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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2023-2024

CL-2023-0223

M.S. and D.S.

v.

Calhoun County Department of Human Resources

Appeal from Calhoun Juvenile Court
(JU-23-67.01)

MOORE, Judge.

M.S. and D.S. ("the maternal grandparents"), who are the maternal grandmother and the maternal step-grandfather of S.R.M. ("the child"), appeal from an order entered by the Calhoun Juvenile Court ("the juvenile court") denying their motion to intervene in a dependency action involving the child.

Procedural History and Facts

The child was born on March 20, 2018. Following the birth of the child, the Blount County Department of Human Resources ("the Blount County DHR") received a report that the child and her twin sibling, J.M. ("the child's twin sibling"), had been diagnosed with "failure to thrive." The Blount County DHR removed the child, the child's twin sibling, and the child's older sibling, E.M. ("the child's older sibling"), from the custody of S.M. ("the mother") and placed them in the temporary custody of the maternal grandparents in October 2018. On June 17, 2019, the mother regained custody of all three children.

In September 2019, the child's older sibling died due to injuries allegedly inflicted upon him by the mother's boyfriend; the mother was arrested and charged with the murder of the older sibling. The Blount County DHR removed the child and the child's twin sibling from the mother's custody and placed them in foster care temporarily. In September 2020, the Blount County DHR placed the child and the child's twin sibling with their father, J.D.C. ("the father"), who lived in Calhoun County. In January 2021, the maternal grandparents began informally

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visiting with the child and the child's twin sibling. In July 2021, they began keeping the children over the weekends until approximately December 10, 2022, when the father abruptly halted the visits without explanation.

On January 18, 2023, the father allegedly murdered the child's twin sibling. On January 19, 2023, the Calhoun County Department of Human Resources ("the Calhoun County DHR") filed a dependency action regarding the child. On January 27, 2023, the maternal grandparents filed a motion to intervene in the dependency action, along with a motion for emergency custody of the child.

On March 6, 2023, the juvenile court conducted a hearing to address, among other things, the maternal grandparents' motion to intervene. At the hearing, the maternal grandmother testified that she did not believe that the mother had murdered the child's older sibling. The maternal grandmother also testified that, during the visits with the child and the child's twin sibling, she did not notice any unusual bruising or injuries on the children that would have raised concerns that the father had been physically abusing them. According to the maternal

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grandmother, after the father stopped the visits with the child and the child's twin sibling, she had requested that they resume but, she said, the father had consistently responded to her requests via text messages stating that he had other plans with the children. The maternal grandmother testified that she had not found the father's responses to her requests for visitation concerning, because, she said, he had responded similarly to some past requests to visit, so she had not contacted the police or the Calhoun County DHR to check on the safety and welfare of the children.

Two representatives of the Calhoun County DHR testified that, when the child had been taken into custody following the death of the twin sibling, the child had had noticeable bruising and swelling on her face and body. The first representative testified that the Calhoun County DHR had concerns regarding the protective capacities of the maternal grandparents, who, she said, had failed to detect any danger to the three children despite their involvement with the children throughout their lives. The second representative testified that she had inspected the one-bedroom apartment where the maternal grandparents were residing and

had determined that it was inadequate for the child.

On March 8, 2023, the juvenile court entered an order finding the child to be dependent and awarding her custody to the Calhoun County DHR. On March 15, 2023, the juvenile court entered an order that, among other things, denied the motion to intervene filed by the maternal grandparents. Regarding the maternal grandparents' motion to intervene, the order states, in pertinent part:

"4. [The maternal grandmother] was a part of the Blount County action and had temporary custody of th[e] child and [the child's twin sibling] for a period of time prior to the mother's arrest. After custody was given to the father, at some time the father allowed the [maternal grandparents] to have both children for visitation. Starting in July 2021, the [maternal grandparents] would have the children 'almost every weekend.' [The maternal grandmother] stated she last saw the children the 2nd week of December, 2022, when the father ceased contact. She reported she never saw bruising on either child. She made no report when the father abruptly ceased contact and she could no longer see the children, even during Christmas. Neither of the [maternal grandparents] have/had any custodial/visitation rights to this child or [the child's twin sibling].

"[The maternal grandmother] had made [F]acebook posts regarding [the mother's] innocence in [the child's older sibling's] murder and appeared to be of that same belief during this action. While the Court sympathizes with [the maternal grandmother's] dilemma, she appeared to have no

concept of complicity in criminal actions.

"5. The [Calhoun County] DHR worker testified that [the child's twin sibling] was bruised 'from head to toe.' Considering [the child's older sibling's] death prior, this Court is dumbfounded that neither [of the maternal grandparents] saw any reason for concern given the father's actions prior to [the child's twin sibling's] death.

"6. Relating to intervention of right, no party has any statutory unconditional right to intervene in this action. While the [maternal] grandparents may have an interest relating to the child, nothing in an Order denying their motion to intervene in any way impedes the Calhoun County [DHR] (who ha[s] discretion in planning and placement) from considering [the maternal grandparents] regarding placement or custody of th[e] child.

"7. Regarding permissive intervention, [the maternal grandparents have no] statutory conditional right to intervene. While the [maternal grandparents] do have claim (for custody) in common, again, nothing impedes the Calhoun County [DHR] from considering [them] regarding placement or custody of this child."

On March 23, 2023, the maternal grandparents filed a postjudgment motion to alter, amend, or vacate the order denying their motion to intervene; they alleged, among other things, that, on January 27, 2023, they had attempted to file a dependency petition relating to the child but that the juvenile-court intake officer had refused to receive and

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file the petition on the ground that the dependency petition filed by the Calhoun County DHR was already pending before the juvenile court. The maternal grandparents also argued that the juvenile court had erred in denying their motion to intervene. The juvenile court allowed the postjudgment motion to be denied by operation of law. See Rule 1(B), Ala. R. Juv. P. On April 6, 2023, the maternal grandparents filed a notice of appeal to this court. They subsequently filed in this court a motion to stay the dependency action, which this court denied.

Issues

The maternal grandparents raise three issues on appeal: (1) whether the juvenile court erred by denying their motion to intervene to the extent that it sought intervention as of right, (2) whether the juvenile court erred in denying their motion to intervene to the extent that it sought permissive intervention, and (3) whether the juvenile court erred by refusing to allow them to file an independent dependency action regarding the child.

Discussion

Intervention of Right

Rule 1(A), Ala. R. Juv. P., provides that "[i]f no procedure is specifically provided in [the Alabama Rules of Juvenile Procedure] or by statute, the Alabama Rules of Civil Procedure shall be applicable to those matters that are considered civil in nature" Because no rule of juvenile procedure specifically controls intervention, pursuant to Rule 1(A), the procedure for intervention in a dependency proceeding is governed by Rule 24, Ala. R. Civ. P. See F.W. v. T.M., 140 So. 3d 950, 958 (Ala. Civ. App. 2013).

Rule 24(a), Ala. R. Civ. P., provides, in pertinent part:

"Upon timely application, anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant 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 applicant's interest is adequately represented by existing parties."

On appeal, the maternal grandparents argue that they have a right to intervene in the dependency proceeding pursuant to Rule 24(a)(2), Ala.

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R. Civ. P. However, the maternal grandparents did not raise this precise issue to the juvenile court. In their postjudgment motion, the maternal grandparents cited Rule 24(a)(2) and a case construing that rule, City of Dora v. Beavers, 692 So. 2d 808 (Ala. 1997), but they did not argue to the juvenile court that it was required to allow them to intervene under Rule 24(a)(2). Instead, the maternal grandparents relied on Rule 24(a)(1) by arguing that they had an unconditional statutory right to intervene pursuant to Ala. Code 1975, § 30-3-4.2, the grandparent-visitation statute. See D.S. v. Cullman Cnty. Dep't of Hum. Res., 42 So. 3d 1284 (Ala. Civ. App. 2010) (holding that a grandparent seeking visitation with a child who is the subject of ongoing dependency proceedings has an unconditional statutory right to intervene in the dependency proceeding to prosecute that claim pursuant to Rule 24(a)(1)). This court cannot consider an issue raised for the first time on appeal. Randolph Cnty. Dep't of Hum. Res. v. A.H., 224 So. 3d 667, 669 (Ala. Civ. App. 2016). Thus, we do not address the question of whether the maternal grandparents have a right to intervene pursuant to Rule 24(a)(2), an issue not properly preserved for appellate review.

Refusal to Receive Dependency Petition

We also cannot consider the third issue argued by the maternal grandparents in this appeal. The maternal grandparents did not support their postjudgment motion with affidavits or any evidence to support their allegations that they had presented a dependency petition regarding the child to the juvenile-court intake officer and that the officer had refused to receive and file the petition. This court cannot consider facts asserted in a brief that are not supported by evidence in the record. See Martin v. Martin, 623 So. 2d 1167, 1170 (Ala. Civ. App. 1993). Moreover, the proper avenue to challenge the alleged refusal of a juvenile-court intake officer to accept a dependency petition is the filing of a petition for the writ of mandamus with this court within 14 days. See Ex parte G.L., 30 So. 3d 434 (Ala. Civ. App. 2009); Ex parte M.D., 332 So. 3d 438 (Ala. Civ. App. 2021). The maternal grandparents did not file a petition for the writ of mandamus, and we decline to treat this appeal as a petition for the writ of mandamus because the notice of appeal was filed more than 14 days after January 27, 2023, the date of the alleged refusal to accept the petition. See State Dep't of Hum. Res. ex rel. Bowen v.

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Bowen, 958 So. 2d 901, 904 (Ala. Civ. App. 2006) (refusing to exercise discretion of court to treat appeal as a petition for the writ of mandamus because it was untimely).

Permissive Intervention

Rule 24(b), Ala. R. Civ. P., provides, in pertinent part:

"Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) 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."

The maternal grandparents argue that they should have been permitted to intervene pursuant to Rule 24(b)(2) and that the juvenile court erred in denying their motion to intervene to the extent that it sought permissive intervention. On appeal, we must determine whether the juvenile court clearly abused its discretion in denying the motion to the extent that it sought permissive intervention. See Universal Underwriters Ins. Co. v. Anglen, 630 So. 2d 441, 443 (Ala. 1993).

The maternal grandparents sought to intervene in the underlying dependency proceedings for the purpose of asserting a claim for custody

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of the child. The record indicates that, before ruling on the motion to intervene, the juvenile court had adjudicated the child to be dependent. See Kennedy v. State Dep't of Hum. Res., 535 So. 2d 168, 170 (Ala. Civ. App. 1988) (indicating that relatives should be allowed to intervene in dependency proceeding filed by state agency only after child has been determined to be dependent). After adjudicating a child to be dependent, a juvenile court must conduct a dispositional hearing, see Ala. Code 1975, § 12-15-311, and dispose of the custody of the child. See Ala. Code 1975, § 12-15-314. The maternal grandparents asserted in their motion to intervene that they intended to seek custody of the child through the dependency proceedings. In their proposed pleading, the maternal grandparents alleged that it would be in the best interests of the child for them to obtain her custody. Their claim unquestionably involves questions of law and fact in common with the main action within the meaning of Rule 24(b)(2).

The maternal grandparents filed their motion to intervene and their claim for custody only eight days after the dependency petition was filed and before any dispositional hearing had even been scheduled. The

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dependency proceeding would not have been unduly delayed by allowing them to intervene. We also cannot discern how their intervention would prejudice the adjudication of the rights of the Calhoun County DHR or of the mother and the father. The discretionary factors expressly set forth in the language of Rule 24(b)(2) do not militate against allowing the maternal grandparents to intervene.

In its brief, the Calhoun County DHR argues that the juvenile court could have determined that it was not in the best interests of the child to allow the intervention. In other states, the courts have recognized that the paramount consideration in determining whether to allow intervention by a relative into a juvenile proceeding is the best interests of the child. See, e.g., In Interest of W.A., 909 N.W.2d 229 (Iowa Ct. App. 2017) (table); In re Dependency of M.R., 78 Wash. App. 799, 803-04, 899 P.2d 1286, 1289 (Wash. Ct. App. 1995) (implying that a child's best interest is a pertinent consideration by suggesting that, once a permissive intervenor has satisfied whether they share a question of law or fact in common with the parties in a dependency proceeding, "[a]s in all child welfare proceedings, the trial court's discretion should be

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exercised to promote the best interests of the child"); Bechtel v. Rose, 150 Ariz. 68, 722 P.2d 236 (Ariz. 1986) (holding that grandparent should be allowed to intervene in juvenile proceeding unless clearly proven to be contrary to best interests of child). In granting courts discretion to allow intervention, Rule 24(b)(2) does not limit the factors that a court may consider, so it seems it would be proper for a juvenile court to consider the best interests of a child in ruling on a motion to intervene. We need not decide that precise issue in this case, however, because the record contains no evidence indicating that it would be contrary to the best interests of the child to allow the intervention.

The Calhoun County DHR contends that "the juvenile court could have reasonably believed it is not in [the child's] best interest to permit entry by [the maternal grandparents] who presented concerns of protective capacity through evidence and their own testimony." The Calhoun County DHR's brief, p.16. The juvenile court did express serious concerns regarding the suitability of the maternal grandparents to act as custodians for the child. However, in ruling on a motion to intervene, a court should refrain from considering the ultimate merits of the claim to

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be heard following intervention. See Brennan v. New York City Bd. of Educ., 260 F.3d 123, 129 (2d Cir. 2001); see also QBE Ins. Corp. v. Austin Co., 23 So. 3d 1127 (Ala. 2009) (recognizing federal cases construing identical Rule 24, Fed. R. Civ. P., as persuasive authority).

In Allen v. Chon-Lopez, 214 Ariz. 361, 153 P.3d 382 (Ariz. Ct. App. 2007), an Arizona trial court denied a motion to intervene filed by the aunt of a dependent child who had formerly served as a custodian of the child. In the order denying the motion, the trial court reasoned that it would not be in the best interests of the child to allow the aunt to intervene because her mental and emotional problems rendered her unsuitable for custody. In reversing the order, the Arizona Court of Appeals determined that, in ruling on a motion to intervene, a court should not focus on the eventual outcome of the litigation but, rather, on the effect of the intervention on the proceeding. The appellate court recognized that the aunt would have difficulty proving her suitability for custody, but it determined that it was improper to deny a motion to intervene based on the merits of the custody claim. Like in Allen, the order denying the maternal grandparents' motion to intervene refers to

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facts indicating that they are likely unsuitable to become custodians of the child. It appears that the juvenile court was improperly influenced by that factor when ruling on the motion.

The Calhoun County DHR points out that the juvenile court provided in the order denying the motion to intervene that the maternal grandparents could still be considered as a placement for the child. See D.S. v. Pike Cnty. Dep't of Hum. Res., [Ms. CL-2022-1192, June 9, 2023] ___ So. 3d ___ (Ala. Civ. App. 2023) (recognizing that a relative need not be a party to a dependency proceeding to receive custody of a dependent child). Based on that provision, the Calhoun County DHR asserts that the juvenile court's denial of the motion to intervene will not prejudice the maternal grandparents in their goal of being considered for custody of the child. We disagree. Although the juvenile court properly recognized that the maternal grandparents could still gain custody of the child without being made parties, it is evident that the Calhoun County DHR actively opposes their claim for custody and will not present evidence favorable to the maternal grandparents. The mother and the father, both of whom have been accused of murdering their own children,

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cannot adequately represent the interests of the maternal grandparents. The maternal grandparents can make their case for custody in the dependency proceeding only by being accorded the status of parties with a right to present evidence on their own behalf.

Moreover, allowing the maternal grandparents to intervene as parties when the juvenile court has clearly expressed that it will consider them as potential custodians for the child will not unduly complicate or lengthen the dependency proceeding; it will only allow the juvenile court to fairly decide the custodial disposition for the child with more developed facts than otherwise. Like in Jim Parker Bldg. Co. v. G & S Glass & Supply Co., 69 So. 3d 124, 129-31 (Ala. 2011), we conclude that "[w]ith little strain on the court's time and no prejudice to the litigants, the controversy can be stilled and justice completely done" if the appellants are granted permission to intervene." 69 So. 3d at 133 (quoting Stallworth v. Monsanto Co., 558 F.2d 257, 270 (5th Cir. 1977), quoting in turn McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1074 (5th Cir. 1970)). Thus, we conclude that the juvenile court exceeded its discretion in denying the maternal grandparents' motion to the extent that it sought

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permissive intervention. Accordingly, the juvenile court's March 6, 2023, order denying the maternal grandparents' motion to intervene is reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Edwards, Hanson, and Fridy, JJ., concur.

Thompson, P.J., concurs in the result, without opinion.