

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/31/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

R.W.,)
)
) No. 1 CA-SA 12-0219
Petitioner,) 1 CA-SA 12-0221
)
)
v.)
)
)
THE HONORABLE BRADLEY ASTROWSKY,) Maricopa County
Judge of the SUPERIOR COURT OF) Superior Court
THE STATE OF ARIZONA, in and for)
the County of MARICOPA,)
)
) No. JD509283
Respondent Judge,) JS507131
) (Consolidated)
)
ARIZONA DEPARTMENT OF ECONOMIC)
SECURITY; J.J.,)
) DEPARTMENT C
Real Parties in Interest.)

DECISION ORDER

K.I.,)
)
)
Petitioner,)
)
)
v.)
)
)
THE HONORABLE BRADLEY ASTROWSKY,)
Judge of the SUPERIOR COURT OF)
THE STATE OF ARIZONA, in and for)
the County of MARICOPA,)
)
)
Respondent Judge,)
)
)
ARIZONA DEPARTMENT OF ECONOMIC)
SECURITY; J.J.,)
)
)
Real Parties in Interest.)

These special actions came on regularly for conference on October 30, 2012 before Presiding Judge Philip Hall, Judge Peter B. Swann and Judge Samuel A. Thumma.

These two petitions for special action arise out of a single dependency proceeding currently pending in Maricopa County Superior Court. The dependent child's Paternal Grandmother (R.W.) and Foster Mother (K.I.) (collectively Petitioners) seek relief from orders denying their separate motions to intervene as parties in the dependency. As relevant to these special actions, the facts are undisputed.

The child J.J., born August 2010, has been adjudicated dependent as to both parents. J.J. has been placed with Foster Mother continuously since September 2011. Prior to that time, J.J. had not lived with Foster Mother and has never lived with Paternal Grandmother. Mother has not participated in the case and Father is in prison, apparently with a release date sometime in 2013. In January 2012, ADES filed a motion to sever the parental rights of Mother and Father (who, at that time, was alleged to be the biological father of J.J., pending paternity testing). Around that same time, Paternal Grandmother learned that J.J. might be her grandchild and began to participate in the proceedings, seeking authorization to have visits with and

develop a relationship with J.J.¹ There is nothing to indicate that Father and Paternal Grandmother have taken inconsistent positions in this matter or are antagonistic in any manner relevant here. Indeed, on the record before this court, Father and Paternal Grandmother appear to be working together and taking unified positions.

In May 2012, Father's paternity was established and Mother's parental rights were severed when Mother waived her rights by failing to appear. The trial on the motion to sever Father's parental rights apparently is set to start November 2, 2012.

By June 2012, Paternal Grandmother had retained counsel who filed a motion to intervene pursuant to Arizona Rule of Civil Procedure 24, applicable pursuant to Arizona Rule of Procedure for the Juvenile Court 37(A). Paternal Grandmother's stated purposes for seeking intervention were (1) "so that she can have input regarding her grandchild," (2) "so that information regarding the best interests of this child [including family medical history and placement information] may become known and ultimately realized," and (3) "so that she can show the Court

¹ According to Paternal Grandmother, Father also requested visits between Paternal Grandmother and J.J. and the first such visit occurred in October 2012.

why [placement with Paternal Grandmother] would be in the child's best interests."

Within days, Foster Mother had retained counsel who filed a motion to intervene. Foster Mother's stated purposes for seeking intervention were (1) to advance her legal position seeking to keep J.J. in her home and (2) to inform the court about her suitability as a placement, including J.J.'s current status and relationships.

ADES filed a single response offering no objection to intervention and stating a belief that J.J.'s best interests would be served by granting Petitioners' motions to intervene. The record reflects no other response to Petitioners' motions.

The court ruled on the motions to intervene without oral argument,² finding that both motions were timely and that Petitioners' interests in the proceeding satisfied the requirements of Arizona Rule of Civil Procedure 24(b) for permissive intervention. The court further found that Petitioners' interests were adequately represented by other parties to the proceeding "at this stage in the litigation" and, on that basis, denied both motions to intervene without

² The court's orders recite that no party requested oral argument on the motions. Paternal Grandmother's motion, however, had requested "the Court set a hearing, if the Court does not summarily grant this Motion." Paternal Grandmother does not challenge the lack of a hearing in her special action petition.

prejudice to reassertion "if changes have occurred in this litigation that warrant a reexamination of intervention."

In denying the motions to intervene without prejudice, however, the court expressed interest in the "thoughts and comments" of Petitioners and stated the court "would not want to make a final order concerning the placement of the child without a consideration of [their] position[s]." To that end, the court's orders granted Petitioners substantial rights to be involved in the proceedings, in substance granting Petitioners "Participant" status with significant rights under Rule 37(B) of the Arizona Rules of Procedure for the Juvenile Court, despite failing to use that term. The orders, in pertinent part:

- (1) require ADES to provide Petitioners Court Reports before all Report and Review Hearings;
- (2) require ADES to invite Petitioners to meetings "in which issues concerning the placement of the child will be addressed;"
- (3) allow Petitioners to attend all court proceedings, even those closed to the public;
- (4) allow Petitioners "to address the Court, either directly or through counsel, at any scheduled court hearing pertaining to the issue of placement and services of and for the child" and
- (5) allow Petitioners to "present to the Court letters and/or other documents they wish the Court to consider prior to making any orders concerning the placement and services of and for the child."

The orders also allow Petitioners to file any future motion to intervene without leave of court and allow Petitioners to file other future motions with leave of court.

Petitioners filed these petitions for special action seeking relief from the court's orders denying their motions to intervene. Because Petitioners have no equally plain, speedy and adequate remedy by appeal, this court accepts jurisdiction of these special actions. Ariz. R.P. Spec. Act. 1(a); *Bechtel v. Rose*, 150 Ariz. 68, 71, 722 P.2d 236, 239 (1986) (noting "[a]n appeal might involve unconscionable delay" in the context of intervention in a dependency proceeding); *Allen v. Chon-Lopez*, 214 Ariz. 361, 362-63, ¶ 1, 153 P.3d 382, 383-84 (App. 2007) (accepting special action jurisdiction in similar circumstances). However, relief is denied because neither Paternal Grandmother nor Foster Mother has demonstrated that the superior court abused its discretion given the substantial rights the court granted to Petitioners.

This court reviews the denial of a motion to intervene for an abuse of discretion. *Allen*, 214 Ariz. at 364, ¶ 9, 153 P.3d at 385. The possibility of intervention in dependency and termination proceedings is expressly authorized by Arizona Rule of Procedure for the Juvenile Court 37(a). Petitioners requested permissive intervention, which is governed first by the terms of Arizona Rule of Civil Procedure 24(b). *Bechtel*, 150 Ariz. at 72,

722 P.2d at 240. If the moving party satisfies the conditions of Rule 24(b), the superior court may, in its discretion, grant intervention. *Id.* The touchstone for the court's exercise of discretion in these circumstances is the best interests of the child. *Bechtel*, 150 Ariz. at 72-73, 722 P.2d at 240-41; *William Z. v. Ariz. Dep't of Econ. Sec.*, 192 Ariz. 385, 388, ¶ 13, 965 P.2d 1224, 1227 (App. 1998). To this end, the court must make an "individualized determination," considering the factors enumerated in *Bechtel*. *Bechtel*, 150 Ariz. at 74, 722 P.2d at 242; *William Z.*, 192 Ariz. at 389, ¶¶ 21-22, 965 P.2d at 1228.

Unlike civil cases, Rule 37 of the Arizona Rules of Procedure for the Juvenile Court -- added in 2001, after *Bechtel* and *William Z.* were decided -- provides for "Participants" (including foster parents) as well as "Parties" (including intervenors) in dependency and termination proceedings. Ariz. R.P. Juv. Ct. 37(A)-(B). By rule, foster parents are automatically designated Participants entitled to notice of "all applicable proceedings;" the court also may designate "any other person" a Participant. Ariz. R.P. Juv. Ct. 37(B).

Broadly speaking, Participants are allowed to "participate in the proceedings," although the rule leaves open the scope of that participation and other rights. *Id.* At a minimum, a Participant is entitled to notice of and participation in dependency and review hearings. Ariz. R.P. Juv. Ct. 37(B); see

A.R.S. § 8-847(B)(2), (6). This flexible concept entitles a Participant to notice as a baseline but also to further rights and privileges as ordered or allowed by the court. *Cf.* Thomas A. Jacobs, *Arizona Juvenile Law and Practice* § 5:20 (2012) (describing rights and roles of Participant foster parents in dependency proceedings, including notice and right to attend hearings, and generally to address the court).

Although the distinction is not pristine, a Party appears to be entitled to certain rights not necessarily provided to a Participant. These include (generally) a right to counsel, A.R.S. § 8-841(D)(4), a right to file motions, see Ariz. R.P. Juv. Ct. 46(A), a right and obligation of discovery and disclosure and attendant responsibilities, see Ariz. R.P. Juv. Ct. 44, and a right to present a case (as by calling and examining witnesses), *cf.* A.R.S. § 8-843 (B)(2)-(4).³ Nothing in the rules restricts a court's authority to grant these same rights to a Participant, even without designation as a Party.

Here, although the court denied intervention as a Party, the orders effectively designated both Petitioners status as Participants and granted all of the rights (although not the title) sought in the motions to intervene. Paternal Grandmother,

³ A Participant's presence at hearings may also, if appropriate, be restricted in a way not applicable to parties. See, e.g., Ariz. R.P. Juv. Ct. 41(C).

through counsel, sought to "have input regarding her grandchild," and the superior court's order explicitly solicits her thoughts, comments and position regarding J.J. Paternal Grandmother also sought to provide information regarding J.J.'s best interests, including family medical history and her suitability as a placement, and the order allows her to provide this information by addressing the court and presenting documents for the court's consideration. Finally, Paternal Grandmother sought to intervene so she could "show the Court why [placement with Paternal Grandmother] would be in the child's best interests," and the order allows her access to ADES's information and the ability to present to the court information and argument regarding placement.

Foster Mother's motion sought to advance her position seeking to keep J.J. in her home, which the superior court's order allows by providing a right to address the court regarding placement. Foster Mother also sought to advance her position by informing the court about her suitability as a placement, including J.J.'s current status and relationships, and the order allows Foster Mother to both address the court and present documents for the court's consideration.

Although a Party would be entitled to some additional rights beyond those granted by the court's order, neither Paternal Grandmother nor Foster Mother specifically requested

any of those rights either in their motions to intervene or in their petitions for special action. Nor have Petitioners shown how the court's orders restrict any manner in which they currently wish to participate in the case. Both Petitioners are already represented by counsel. Neither raises any motion she wishes to file but cannot due to the orders (and, in any event, the order allows filing with leave of court). The orders mandate that Petitioners receive from ADES information weighing on J.J.'s best interests (including, specifically, services and placement) and contemplate Petitioners' presence and participation at all relevant hearings. The orders actively solicit Petitioners' input and participation, seek their "thoughts and comments" and contemplate decisions regarding J.J. only after consideration of their positions. In the circumstances as they currently exist, Petitioners have not shown any harm suffered due to the court's orders granting them substantial rights but denying intervention.

Finally, and significantly, the superior court expressly stated that Petitioners could re-urge their motions to intervene "if changes have occurred in this litigation that warrant a reexamination of intervention." Should the superior court grant the motion to sever Father's parental rights (an issue set for trial, not yet resolved and certainly not before this court), such severance would constitute a change warranting

reexamination of intervention. As indicated by the cases Petitioners cite, a court's discretion in addressing a post-termination motion to intervene (frequently filed by grandparents) is severely limited. The parties have cited and this court has located no published decision affirming the denial of a motion to intervene filed by a relative after severance of the applicable parent's rights. This is particularly true where, as here, there is no hint that any reason for the motion to sever was caused by or as a result of conduct by a grandparent. It would be an extraordinarily unique case where *Bechtel* and its progeny would permit the denial of a grandparent's motion to intervene after severance of the applicable parent's rights. Accordingly,

IT IS ORDERED accepting jurisdiction of Petitioners' special action petitions.

IT IS FURTHER ORDERED denying Petitioners' requests for relief.

IT IS FURTHER ORDERED amending the captions to refer to J.J. and to Petitioners solely by their initials.

/s/
SAMUEL A. THUMMA, Judge