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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

REGINALD WELLS, Intervenor/Appellant, v. JIMMY HENDERSON, Petitioner/Appellee, and LOUNMALA N. CHANTHARAJ, Respondent/Appellee.	2 CA-CV 2010-0153 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. SP20080135

Honorable Nanette M. Warner, Judge

AFFIRMED

Solyn & Lieberman, PLLC
By Scott Lieberman and Melissa Solyn — Tucson
Attorneys for Intervenor/Appellant

Jimmy Henderson — Tucson
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Reginald Wells appeals from the trial court's order denying his motion to intervene in custody proceedings between Jimmy Henderson and Lounmala Chantharaj. On appeal, Wells contends the court erred in determining his motion was untimely and in denying the motion on the merits. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's ruling. *See Assoc'd Aviation Underwriters v. Wood*, 209 Ariz. 137, ¶ 5, 98 P.3d 572, 578 (App. 2004). In late 2004 and early 2005, Wells and Chantharaj were involved in an intimate relationship. In late February or early March 2005, Chantharaj told Wells and Henderson that she was pregnant and that either of them might be the father. A few weeks later, she told Wells that he could not be the father, based on the dates during which they had been intimate. Chantharaj gave birth to a daughter, S., in October 2005.

¶3 In January 2008, Henderson filed a "Complaint for Paternity, Child Custody, Parenting Time and Child Support" in the Pima County Superior Court. One year later, Chantharaj and Henderson reached a settlement, which included their acknowledgement that Henderson was the child's natural father. They also agreed S. would spend alternate weekends with Henderson and that he would provide daycare whenever Chantharaj was at work. Following a settlement conference attended by both parties, the trial court found "by clear and convincing evidence [that] Henderson [wa]s the natural father of [S.]" and entered an order adjudicating Henderson the father.

¶4 In October 2009, Chantharaj contacted Wells, informing him he might be S.'s father.[1] Wells took two paternity tests, one in December 2009 and the other in January 2010. The results from both tests indicated a 99.99 percent probability that he was S.'s father. Wells then filed a motion to intervene in the custody proceedings on April 22, 2010, which the trial court denied without a hearing. This appeal followed.

Discussion

¶5 Wells first contends the trial court erred in finding his motion to intervene was untimely. He argues that neither Rule 33(D), Ariz. R. Fam. Law P., which provides that "[u]pon timely application, the court may allow a third party to intervene in an action if necessary for the exercise of the court's authority," nor *Andrew R. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 453, 224 P.3d 950 (App. 2010), supports the trial court's ruling.

¶6 In the absence of case law interpreting the timeliness requirement of Rule 33(D), we turn to case law addressing timeliness of motions to intervene filed pursuant to Rule 24, Ariz. R. Civ. P. *See* Ariz. R. Fam. Law P. 1 cmt. (wherever language in family law rules substantially the same as language in other statewide rules, case law interpreting language will apply to these rules); *Kline v. Kline*, 221 Ariz. 564, ¶ 13, 212 P.3d 902, 906-07 (App. 2009) (same).

¶7 "The requirement of timeliness is a flexible one and normally ascertaining its existence is to be left to the sound discretion of the trial court." *Winner Enters., Ltd. v. Superior Court*, 159 Ariz. 106, 109, 765 P.2d 116, 119 (App. 1988). "We will not set

[1]Although Wells's affidavit filed in the trial court states that Chantharaj contacted him in August 2009, his opening brief states that the date was October 2009, the date Chantharaj gives in her affidavit.

aside the court's ruling on the timeliness of a motion to intervene absent a clear abuse of discretion." *State ex rel. Napolitano v. Brown & Williamson Tobacco Corp.*, 196 Ariz. 382, ¶ 5, 998 P.2d 1055, 1057 (2000). The burden is on the prospective intervenor to demonstrate his right to intervene. *See Morris v. Sw. Sav. & Loan Ass'n*, 9 Ariz. App. 65, 68, 449 P.2d 301, 304 (1969).

¶8 In its ruling, citing *Andrew R.*, the trial court found that "Wells'[s] assertions that he is the father of [S. were] too late." Although *Andrew R.* addressed the timeliness of a motion filed pursuant to Rule 60(c), Ariz. R. Civ. P., challenging an earlier acknowledgement of paternity, we find it instructive as to the policy considerations surrounding the timeliness of paternity challenges in general. We noted in *Andrew R.* that

> there exists a strong public intent to advance a child's best interest by providing that child with permanency. . . . At some point in time, a child's need for permanency must outweigh the ability of a party who has acknowledged paternity to challenge that acknowledgement. The limitation provided by [the rules governing challenges to paternity] addresses this need.

223 Ariz. 453, ¶ 24, 224 P.3d at 957. With that policy consideration in mind, we address the timeliness of Wells's motion to intervene.

¶9 "In determining whether a motion [to intervene] is timely, the trial court must consider several factors, including the stage to which the lawsuit has progressed when intervention is sought and whether the applicant could have attempted to intervene earlier." *Napolitano*, 196 Ariz. 382, ¶ 5, 998 P.2d at 1057. "The most important

consideration, however, is whether the delay in moving for intervention will prejudice the existing parties in the case." *Id.*

¶10 In this case, Wells knew when Chantharaj first became pregnant that the child might be his. However, he did not raise the issue of his paternity by filing his motion to intervene until the child was four years old—more than two years after the custody proceedings commenced, and more than one year after Henderson had been adjudicated S.'s father.[2] In contrast, Henderson had been involved in protracted litigation seeking to establish his paternity and custody of S. and had been actively involved in S.'s life as her natural father, actions he may not have taken had he known from the beginning that he was not the natural father. We cannot conclude the trial court abused its discretion in finding that the motion was untimely under these circumstances.

¶11 Wells nevertheless argues he "was justified in not bringing his Motion sooner, as he was unaware of his possible paternity until October of 2009." Although not directly on point, we find instructive our supreme court's reasoning in *In re Maricopa County Juv. Action No. JS-8490*, 179 Ariz. 102, 108, 876 P.2d 1137, 1143 (1994). In that

[2]On appeal, Wells cites several cases for the proposition that "the 'timely application' requirement [of Rule 33] does not preclude a post-judgment Motion to Intervene." While he is generally correct in this assertion, there is no evidence in the record that the trial court found the motion untimely based solely on the fact that it was filed after a settlement between the original parties had been reached. Furthermore, "post-judgment motions to intervene are 'ordinarily looked upon with a jaundiced eye,'" *In re One Cessna 206 Aircraft, FAA Registry No. N-72308*, 118 Ariz. 399, 401, 577 P.2d 250, 252 (1978), *quoting McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1072 (5th Cir. 1970), and generally will be granted "'only upon a strong showing of entitlement and of justification for failure to request intervention sooner.'" *Id.* at 402, 577 P.2d at 253, *quoting United States v. Assoc'd Milk Producers, Inc.*, 534 F.2d 113, 116 (8th Cir. 1976). As we discuss below, Wells lacked any such justification for his delay in filing.

case, the father ended his relationship with the mother when he learned she had been having sexual relations with another man. *Id.* at 104, 876 P.2d at 1139. The mother was pregnant when the father ended their relationship, although the father claimed he was unaware of the pregnancy. *Id.* In 1987, the father was told that the mother had given birth earlier that year and that the baby looked like him. *Id.* at 106, 876 P.2d at 1141. In 1988, Arizona Department of Economic Security initiated dependency proceedings and removed the child from the mother's custody. During a chance encounter in 1989, the mother told the father that the child was his. And in 1990 he was told the child had been placed for adoption. After a hearing, the trial court terminated the father's parental rights, finding he had abandoned the child. *Id.* Division One of this court reversed the trial court's decision because "there was not clear and convincing evidence of intent to abandon because [the father] did not have sufficient reason to believe that he had a child, and when he did discover that fact, he 'expressed concern for the child.'" *Id.* at 105, 876 P.2d at 1140.

¶12 In vacating the court of appeals' decision and affirming the trial court's order terminating the father's paternal rights, our supreme court stated that "if a man has reasonable grounds to know that he might have fathered a child, he must protect his parental rights by investigating the possibility and acting appropriately on the information he uncovers. No other rule will satisfy the need for prompt and final resolution of the child's status." *Id.* at 106-07, 876 P.2d at 1141-42. And, regarding the father's failure to take action until he learned of the impending adoption, the court said, "[t]his is not action,

merely reaction. The law does not permit one in [the father]'s position to sit back and wait until receipt of formal notice of fatherhood."[3] *Id.* at 107, 876 P.2d at 1142.

¶13 Finally, our supreme court noted that A.R.S. § 8-106.01, "which drastically changes Arizona's adoption and termination statutes, provides that lack of notice of the pregnancy and birth is not an acceptable reason for failing to assert parental rights." *Id.* at 106, n.6, 876 P.2d at 1141 n.6. Here, the trial court cited this statute as support for its ruling. Section 8-106.01(A) requires any putative father wishing to receive notice of adoption proceedings to file a notice of a claim of paternity with the State Registrar of Vital Statistics in the Department of Health Services. The notice must be filed within thirty days of the child's birth, and failure to file according to the statute's requirements constitutes waiver of the right to notification of the adoption. § 8-106.01(B), (E). Furthermore, and of particular significance to Wells, "[l]ack of knowledge of the pregnancy is not an acceptable reason for failure to file. The fact that the putative father had sexual intercourse with the mother is deemed to be notice to the putative father of the pregnancy." § 8-106.01(F).

[3]We recognize *Maricopa County* is factually distinguishable, in that the father waited a full year after learning the child was his before raising the issue of his paternity. We nevertheless find the case instructive. In reaching its conclusion, the court focused not on this one-year delay but on the fact that the father had reason to know the child was his—albeit without certainty—three years before he took any action to assert his paternal rights. 179 Ariz. 102, 106, 876 P.2d 1137, 1141 (1994) ("even taking [the father]'s testimony [that he did not know the mother was pregnant] at face value, *he nonetheless learned sometime in 1987 that [she] had given birth to a child*," yet did not assert rights until 1990) (emphasis added). Thus, the court concluded the father's obligation to act arose long before he knew definitively that the child was his.

¶14 Section 8-106.01 appears to reflect the same policy considerations we noted in *Andrew R.* and that our supreme court discussed in *Maricopa County*—permanency and stability for the child. Given these important considerations, the trial court did not err in finding Wells lacked sufficient justification for his delay in filing the motion to intervene. He was aware Chantharaj was pregnant and that the child might be his. The court likewise did not err in concluding that the justification Wells had given for the delay was outweighed by the importance of the "child's need for permanency." *Andrew R.*, 223 Ariz. 453, ¶ 24, 224 P.3d at 957.

¶15 Last, Wells claims Henderson would not be prejudiced by his delay in moving to intervene because he "would still have the ability to assert *in loco parentis* custody and parenting time rights based on his historical relationship with [S.] pursuant to A.R.S. § 25-415." We disagree. Henderson already has established his paternity, custody rights, and parenting time in these proceedings. It is unreasonable to conclude he would not be prejudiced by having to relitigate a claim for custody and parenting time. *See Napolitano*, 196 Ariz. 382, ¶ 5, 998 P.2d at 1057 (most important consideration is whether delay in moving for intervention will prejudice existing parties). The trial court did not abuse its discretion in denying Wells's motion to intervene as untimely. Thus, we need not reach the underlying merits of Wells's motion to intervene. *See Weaver v. Synthes, Ltd.*, 162 Ariz. 442, 447, 784 P.2d 268, 273 (App. 1989) (motion to intervene properly denied if untimely).[4]

[4]Wells also argues "the [trial] court should have been bound by its February 8, 2010 ruling indicating that it would hold a hearing, should an alleged father come

Disposition

¶16 For the reasons stated, we affirm the trial court's ruling.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

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forward." But neither the trial court nor this court is bound by the trial judge's ruminations. *See State v. Dixon*, 216 Ariz. 18, ¶ 14, 162 P.3d 657, 661 (App. 2007) ("'[a]ppeals lie from findings of fact, conclusions of law, and judgments, not from ruminations of the trial judge'"), *quoting United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 308, 681 P.2d 390, 460 (App. 1983).