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Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-1281-ME

D.B. APPELLANT

v.

APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DOUGLAS BRUCE PETRIE, JUDGE
ACTION NO. 22-AD-00004

T.C.W., A MINOR CHILD; J.D.;
R.W.; T.J.P.; AND T.L.P. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, GOODWINE, AND LAMBERT, JUDGES.

ACREE, JUDGE: Appellant, D.B. (Grandmother), appeals the November 1, 2022, Mercer Circuit Court, Family Division, Order denying her motion to intervene in the adoption action brought by Appellees, T.J.P. and T.L.P. (Foster Parents). We affirm.

BACKGROUND

Grandmother's daughter, J.D. (Mother), gave birth to minor Appellee, T.C.W. (Child), in February of 2019 while incarcerated in the Franklin County Jail. Child's father, R.W. (Father), was also incarcerated there when Child was born. Consequently, the Cabinet for Health and Family Services became involved.

While incarcerated, Mother wanted Child placed with Grandmother who already provided foster care for another of Mother's children. The Cabinet acceded to Mother's wishes and offered to place Child with Grandmother – a decision consistent with the Cabinet's policies and procedures – but Grandmother declined Child's placement with her. The Cabinet then looked elsewhere, and Grandmother suggested placing Child with Foster Parents who attended Grandmother's church. After qualifying them, the Cabinet placed Child with Foster Parents on March 1, 2019, while the Cabinet retained legal custody. On April 4, 2019, in a separate proceeding, Child was committed to the Cabinet.

Grandmother continued to decline Child's placement with her because her husband's health was declining, and she concluded caring for a second child would be too much burden. Grandmother's husband was recovering from hip surgery. He was later diagnosed with Parkinson's disease and died of pneumonia nine months after Child's birth.

The Cabinet's initial goal for Child was his return to the custody of Mother and Father, but that goal changed to adoption. In October 2020, after Child had been with Foster Parents for twenty-one months, and a full year after Grandmother's husband passed, she changed her mind and asked the Cabinet to place Child with her.

The Cabinet investigated whether placement with Grandmother would be in Child's best interest but concluded placement with Foster Parents should continue. The reasons were varied but significant factors were the strong connections Child developed as he approached his second birthday with Foster Parents and members of their family.

To secure her statutory visitation rights, and while the Cabinet still retained legal custody, Grandmother petitioned the Anderson Circuit Court, Family Division, to establish "grandparent timesharing." The court entered an order granting Grandmother visitation on April 4, 2022.

On May 18, 2022, Foster Parents filed a petition in Mercer Circuit Court, Family Division, to adopt Child. Foster Parents served Mother with summons the same day (Record (R.) 1 (Petition)); the next day, the court appointed guardians *ad litem* for Mother, Father, and Child. (R. 31-33). Foster Parents did not serve Grandmother with summons because grandparents are not parties to

adoptions, KRS[1] 199.480; however, they informed Grandmother of the adoption petition on May 27, 2022.

Foster Parents' petition notified the circuit court of Grandmother's visitation rights. On June 17, 2022, they notified Anderson Circuit Court, with notice to Grandmother, that their adoption of Child was proceeding in Mercer Circuit Court and, for that reason, urged transfer of Grandmother's visitation action against the Cabinet from Anderson Circuit to Mercer Circuit Court. On June 30, 2022, that transfer did occur and the separate action is referenced in the adoption action's record. Judge D. Bruce Petrie presides over both the adoption and Grandmother's visitation rights cases. *See D.B. v. Cabinet for Health and Family Servs.*, Case No. 22-CI-00169 (Mercer Circuit Court Jun. 30, 2022). Foster Parents were joined as parties in Grandmother's visitation action on July 26, 2022.

On August 2, 2022, Father consented to Foster Parents' adoption of Child. (R. 10 (Consent to Adoption)). On August 10, 2022, the circuit court entered a Case Management Conference Order and the next day, three months after the adoption action began, Mother filed an answer objecting to the adoption. (R. 78 (Answer)). On August 30, 2022, the circuit court scheduled the adoption for a one-day trial to be conducted on January 27, 2023, each party to be allowed three hours to present their respective cases. (R. 83 (Docket Entry)).

[1] Kentucky Revised Statutes.

On September 24, 2022, more than seven weeks after the court scheduled trial and four months after Grandmother was aware the adoption was proceeding in Mercer Circuit Court, Grandmother moved to intervene in the adoption action. (R. 90 (Motion to Intervene)). She states her sole ground for intervention as follows: "Per *Baker v. Webb*, the child's maternal grandmother may intervene in the adoption proceeding under CR[2] 24.01 as a matter of right. 127 S.W.3d 622 (Ky. 2004)." *Id.*

On November 1, 2022,[3] the circuit court denied Grandmother's motion. Grandmother timely appealed the order.

STANDARD OF REVIEW

"Prior to judgment disposing of the whole case, any denial of intervention of right should be regarded as an appealable final order but the appellate court should affirm unless such intervention of right was erroneously denied." *Ashland Pub. Libr. Bd. of Trs. v. Scott*, 610 S.W.2d 895, 896 (Ky. 1981) (quoting 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1923). Thus, we review denial of a motion to intervene for clear

[2] Kentucky Rules of Civil Procedure.

[3] Based on hand-written docket notes, the circuit court decided to deny intervention on the day the motion to intervene was heard, September 27, 2022. However, it did not enter a written order until November 1, 2022. *Kindred Nursing Centers Ltd. Partnership v. Sloan*, 329 S.W.3d 347, 349 (Ky. App. 2010) ("circuit court . . . speaks only through written orders entered upon the official record"). In the interim, the parties filed about 750 pages of exhibits.

error. *A.H. v. W.R.L.*, 482 S.W.3d 372, 373 (Ky. 2016) (citing *Ashland Pub. Libr.*, 610 S.W.2d at 896).

ANALYSIS

Intervention as a matter of right in an ongoing legal action is governed by CR 24.01. The first requirement of the rule is its "timely application[.]" CR 24.01(1).

Second, it requires that "the applicant claims an interest relating to the property or transaction which is the subject of the action . . . ." CR 24.01(1)(b).[4] Under this requirement, "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." *Baker*, 127 S.W.3d at 624 (quoting *Gayner v. Packaging Serv. Corp. of Ky.*, 636 S.W.2d 658, 659 (1982)).

Furthermore, even if the applicant for intervention has an interest in the lawsuit, intervention will be allowed only if the intervenor "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 . . . ." CR 24.01(1)(b). Although not applicable in this case, one way the intervenor's interest can be protected that

[4] Grandmother did not base her motion to intervene on the existence of a statute conferring an unconditional right to do so. CR 24.01(1)(a). Nevertheless, the circuit court found "there is no statutory right to intervene under CR 24.01[(1)](a)." (R. 886). Grandmother's appeal does not challenge that ruling.

justifies denying intervention is when "that interest is adequately represented by existing parties." *Id.*

Third, there is a mandatory procedural requirement that "[t]he motion . . . shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." CR 24.03. The purpose of this rule is to "place other parties [as well as the trial court] on notice of the claimant's position, the nature and basis of the claim asserted, and the relief sought by the intervenor." *Baker*, 127 S.W.3d at 628 (Keller, J., dissenting) (quoting and supplementing 59 Am. Jur. 2D, *Parties* § 231 (2002)).

In summary, the circuit court found Grandmother's motion to intervene: (1) was not timely; (2) did not identify a present substantial interest in the adoption that as a practical matter could not be adequately protected; and (3) was procedurally flawed because it was not accompanied by the mandatory pleading setting forth her claim.

We address each of these holdings in turn.

The motion to intervene was untimely.

To determine whether an application to intervene is timely, courts look to five factors:

> (1) [T]he point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his

> interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Carter v. Smith, 170 S.W.3d 402, 408 (Ky. App. 2004) (quoting *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989)).

Grandmother argues "these factors favor allowing her to intervene." (Appellant's brief, p. 7.) We do not agree.

The circuit court's disagreement with Grandmother is not a legal opinion; it is a finding of fact. *Ambassador College v. Combs*, 636 S.W.2d 305, 307 (Ky. 1982) ("Timeliness is a question of fact, the determination of which should usually be left to the judge."). This Court, on review, may only reverse that factfinding if we find it clearly erroneous. A finding of fact is clearly erroneous if it is not supported by substantial evidence. *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky. App. 2003). "Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person." *Id.* (citations omitted).

After describing the progress of the adoption, Grandmother's delay in pursuing intervention, the indefiniteness of the relief she sought, her previous refusal to accept Child's placement, her secured right to visitation, and other factors, the circuit court found Grandmother's motion to intervene "was not timely

and to allow her to intervene at this point in the case would unduly delay and prejudice the existing parties. . . ."; furthermore, said the circuit court, "[Grandmother] did not provide any justification for her lack of timeliness." (R. 887-88.)

Substantial evidence bearing on each of the factors in *Carter v. Smith* weighs against intervention. Still, we considered Grandmother's arguments. However, none convinces this Court the finding of fact is clearly erroneous.

As a practical matter, Grandmother's interest is protected.

The circuit court found Grandmother "failed to argue under CR 24.01(b) that she claims an interest or that she is so situated that the disposition of the [adoption] action may as a practical matter impair or impede her ability to protect that interest . . . ." (R. 886-87.) The court read Grandmother's motion as intended "simply [to] allow the intervening party to bolster the Respondent's [Mother's] position." (R. 887.) We read it similarly.

Additionally, the court explained why *Baker v. Webb*, the basis for her claim for intervention as a matter of right, does not support her claim but defeats it. That is, if Grandmother's claimed interest is her preferred status as a relative for placement of Child, the circuit court correctly said the interest no longer exists.

> The Court finds that [Grandmother] has no right to intervene in this action because she failed to "assert her interest" under Baker v. Webb, 127 S.W.3d 622 (Ky. 2004), and Cabinet v. Batie, 645 S.W.3d 452, 468 (Ky.

> App. 2022), prior to this child being available for commitment. By failing to do so, her status as a preferred relative ceased to exist. *A fortiori*, if her status as a relative ceased to have any statutory basis for preference in the DNA action, it follows that her status as a relative confers her no right to intervene in this action. Batie. *Id* at 468 [sic].

(R. 888.) We agree with this explanation as recognizing the limited window in which a relative enjoys preference for purposes of the initial placement of Child. But Grandmother allowed that window of opportunity to close before she tried to assert it.

Unlike the cousins in *Baker v. Webb* whose right to intervene in an adoption was the Supreme Court's cure for the Cabinet's failure to facilitate the cousins' exercise of their status for preferred placement,[5] Grandmother rejected the Cabinet's effort to facilitate that same preference. As this Court explained:

> [T]he rule in *Baker* will find application when courts are faced with such unusual facts as found in that case. Then, the court can turn to *Baker* for the rule that intervention of right in an adoption is required upon proof the intervenor: (1) is known to the Cabinet, KRS 620.090(2); (2) is "a relative who has been denied consideration" for placement, *Baker*, 127 S.W.3d at 625; and (3) asserts the interest while the child is still subject to an order of temporary custody under KRS 620.090(1) – *i.e.*, before the

[5] The Supreme Court said, "[T]he Cabinet completely failed to follow its own policies and procedures by not initiating a home study of [the cousins]" and such failure, in the context of those policies and procedures was enough to "grant a sufficient legal interest under CR 24.01 to *a relative who has been denied consideration for adoptive placement* in complete derogation of the Cabinet's own operating procedures." *Baker*, 127 S.W.3d at 625 (emphasis added).

> "present" interest under KRS 620.090(2) lapses. *Baker*, 127 S.W.3d at 624.

Batie, 645 S.W.3d at 468. Grandmother cannot satisfy the second and third criteria that justified the Supreme Court's decision to allow intervention in that factually unique case.

We also find Grandmother's reliance on *A.H. v. W.R.L.*, 482 S.W.3d 372 (Ky. 2016), unavailing. *A.H.* "involve[d] a matter of first impression" and addressed the rights of individuals in same-sex relationships who were raising a child together as a family, as that relationship is defined in *Mullins v. Picklesimer*, 317 S.W.3d 569, 572 (Ky. 2010), prior to the Supreme Court of the United States decision in *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). "When read in concert and in the context of the issue presented here," said the Supreme Court, "*Baker* and *Mullins* weigh in favor of permitting intervention." *A.H.*, 482 S.W.3d at 375.

The factual distinctions between the circumstances of Grandmother's case and those of the disentitled same-sex partner in *A.H.* are too obvious to comment further. Equally distinguishing are the cases' differing legal and procedural postures upon arrival before the appellate courts.

Unlike this review of a circuit court's denial of intervention, the Kentucky appellate courts[6] in *A.H.* were reviewing the circuit court's *grant* of intervention. In that context, the Supreme Court said:

> By granting Amy's motion to intervene in the adoption proceeding, the judge made a lawful and logical decision that comports with the dictates of CR 24.1 [sic]. We give ample deference to the factual determinations of our trial courts. This is especially true in domestic cases.

Id.

None of this is to say, however, that Grandmother does not have a cognizable legal interest, but her ability to protect this interest will not be impaired because of the adoption proceeding; Foster Parents are not attacking her visitation rights. To the contrary, they informed the circuit court of Grandmother's rights in the petition, and pursuant to KRS 405.021:

> Once a grandparent has been granted visitation rights under this subsection, *those rights shall not be adversely affected by the termination of parental rights belonging to the grandparent's son or daughter*, who is the father or mother of the child visited by the grandparent, unless the Circuit Court determines that it is in the best interest of the child to do so.

KRS 405.021(1)(a) (emphasis added). The prerequisite termination of Mother's parental rights to Child as part of the adoption will have no effect on D.B.'s

[6] *A.H. v. W.R.L.* was a discretionary review of *W.R.L. v. A.H.*, No. 2014-CA-001240-ME, 2015 WL 1746240 (Ky. App. Apr. 17, 2015), which reversed the circuit court's grant of intervention.

visitation rights to Child. According to the statute, that right to visitation will remain in the control of the circuit court.[7]

For Grandmother, KRS 405.021 ensures protection of her interest during the adoption proceedings, but the non-biological mother in *A.H.* had no such protections. We, therefore, cannot find that Grandmother's right to visit Child "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 . . . ." CR 24.01.

The motion to intervene failed to comply with CR 24.03.

As the circuit court said, "If [Grandmother] wanted to be considered for adoption, . . . her motion should have been accompanied by a pleading setting forth the claim or defense for which intervention is sought." (R. 886-889 (Order)). That takes us to the Mercer Circuit Court's next reason for denying Grandmother's intervention motion.

[7] We know the Supreme Court held parts of KRS 405.021(1) unconstitutional in *Pinto v. Robison*, 607 S.W.3d 669 (Ky. 2020). However, the Court said: "This opinion should not be read to hold that *all* grandparent visitation statutes are unconstitutional. In fact, we are leaving intact KRS 405.021(1)(a) . . . ." *Id.* at 677. We know of nothing in statute or caselaw that requires supersession of an order granting grandparent visitation upon adoption. We are also mindful that adoptive parents have the same constitutional rights as biological parents, and this could set up the same kind of constitutional challenge addressed in *Pinto*. That is a matter of speculation and we do not find it is an unprotected present interest sufficient to justify reversing the circuit court's denial of intervention. Grandmother did not challenge the circuit court's holding that she could not intervene as a matter of right based on any statute, which would have included KRS 405.021(1)(a). To paraphrase *Pinto*, Grandmother "did not argue to the Court of Appeals . . . that the trial court erred in failing to analyze [her] motion under paragraph (a). Therefore, with an eye towards finality and stability for the children and rest of the family, we will not address whether the trial court should have done so or remand for it to do so." *Id.* at 677-78.

The circuit court found Grandmother's motion procedurally deficient because "[a]n application to intervene *must* be accompanied by a pleading setting forth the claim or defense for which the intervention is sought." CR 24.03 (emphasis added). To challenge that rule, Grandmother directs this Court to Justice James Keller's dissent in *Baker*, 127 S.W.3d at 627-28 (Keller, J., dissenting). This is an odd citation upon which to rely.

First, Justice Keller said exactly the opposite of what Grandmother argues. He would have disallowed intervention for a reason the majority in *Baker v. Webb* never addressed, one way or the other – that the motion "shall be accompanied by a pleading . . . ." *Id*. (quoting CR 24.03). That is, Justice Keller agrees entirely with Mercer Circuit Judge Petrie.

Second, Justice Keller believes:

> intervention at the adoption stage is very different from a relative's claim to initial placement when a child is removed from its parents. Kinship care provides a beneficial service to many children. Those benefits do not have to be denied to see the difference between the prospect of an initial move to the home of any caring relative and the prospect of the removal of a child from an otherwise stable placement to the home of a person virtually unknown to them simply because of a blood relationship.

LOUISE EVERETT GRAHAM AND JAMES E. KELLER, 16 KY. PRAC. DOMESTIC RELATIONS L. § 26:2 (2020) (discussing Justice Keller's dissent in *Baker v. Webb*). Grandmother denied Child the prospect and benefit of kinship care of an initial

placement in her home. As Justice Keller points out, that is quite different from removing Child from a stable placement simply because of a blood relationship. That blood relationship, contrary to Grandmother's argument, does not establish the right to intervene in the adoption.

Third, to the extent Grandmother suggests we draw an inference that Justice Keller's dissent means the majority allowed the intervention despite the intervenors' failure to comply with CR 24.03, we are not persuaded. As the parties and others have noted, *Baker v. Webb* "created confusion and criticism." *D.T. v. G.W.*, No. 2020-CA-0178-ME, 2021 WL 1431613, at *4 (Ky. App. Apr. 16, 2021), *review denied* (Sep. 22, 2021).[8] It is true that "[t]he majority in *Baker* does not mention whether the motion to intervene was accompanied by a tendered pleading." *Id.* Then again, "[t]he facts of [*Baker* were] somewhat disputed and very little is in the record." *Baker*, 127 S.W.3d at 623.

If the record was not ambiguous and if, in fact, there was no accompanying pleading, then the majority elected not to allow that deficiency to defeat the case's outcome. That was and is the Supreme Court's prerogative. Grandmother's reliance on Justice Keller's dissent does not support her argument

[8] Unpublished opinions are not binding precedent. We do not cite this case for authority, but only to show this is not the first time we noted *Baker v. Webb* has not held up well in our jurisprudence.

so much as it reveals one of the bases upon which *Baker v. Webb* receives criticism and explains why it is rightly limited to its unique facts.

CONCLUSION

For the aforementioned reasons, we affirm.

GOODWINE, JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS AND DOES NOT FILE SEPARATE OPINION.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEES:
Michael L. Goodwin Louisville, Kentucky	Jenny E. Scott Lexington, Kentucky