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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-0252-ME

H.H.[1] AND J.H. — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRYAN GATEWOOD, JUDGE
ACTION NO. 20-J-503316-001

T.D.; COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; J.M.; AND M.D., A MINOR CHILD — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: DIXON, GOODWINE, AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellants ("the Custodians") appeal multiple orders entered by the Jefferson Circuit Court holding that they lack standing in the underlying

[1] Pursuant to Court policy, to protect the privacy of minors, we refer to parties in dependency, neglect, and abuse cases by initials only.

dependency, neglect, and abuse ("DNA") action and pertaining to the care and custody of M.D. ("Child"). After careful review of the briefs, record, and applicable law, we affirm in part, reverse in part, and remand for reconsideration of the Custodians' motion to intervene.

BACKGROUND FACTS AND PROCEDURAL HISTORY

On October 30, 2020, the Cabinet for Health and Family Services ("CHFS") filed a petition alleging that Child had tested positive for controlled substances at birth and was abused or neglected. As a result, temporary custody was granted to the Custodians by order entered November 10, 2020. T.D. ("Mother") ultimately stipulated to abuse or neglect and, over the following two years, made efforts toward reunification.

In August 2022, the Custodians filed a petition for permanent custody of Child in Clark County. In response, Mother requested that the court rescind temporary custody, grant her expanded visitation, and assume exclusive jurisdiction over Child. Per the order of October 20, 2022, at the ensuing hearing the Custodians agreed to remand the Clark County action in favor of proceeding in the underlying case, and the court ordered that Mother's visitation be expanded at the discretion of CHFS.

Thereafter, Mother filed a "Motion for Return of Custody" arguing that Child could be safely returned home. The Custodians filed a response

disputing Mother's claim, as well as objections to CHFS's visitation schedule and various motions asking the court to: (1) vacate the October 20, 2022 order, (2) recuse itself, (3) permit them to intervene and grant them permanent custody, (4) remand the issue of Child's return to Mother, and (5) transfer the custody proceedings to Clark County.

By order of January 23, 2023, the court overruled the motions to vacate its prior order and to recuse itself and, deciding to address Mother's motion for return first, passed on the remaining motions. After conducting a hearing, at which the Custodians and their counsel were permitted to attend but not participate, the Court granted Mother's motion and ordered the immediate transfer of custody to her. Thereafter, by order of February 15, 2023, all pending motions were denied as moot, and this appeal timely followed.

STANDARD OF REVIEW

The court's findings of fact shall not be set aside unless clearly erroneous. CR[2] 52.01; *Cabinet for Health & Family Servs. v. R.S.*, 570 S.W.3d 538, 546 (Ky. 2018) (quoting *L.D. v. J.H.*, 350 S.W.3d 828, 829-30 (Ky. App. 2011)). A finding is not clearly erroneous if it is supported by substantial evidence. *R.S.*, 570 S.W.3d at 546. Conclusions of law, however, we review *de novo*. *Id.*

[2] Kentucky Rules of Civil Procedure.

LEGAL ANALYSIS

On appeal, the Custodians aver that the court erroneously denied them standing. Though the Custodians' brief conflates their arguments, at issue are two distinct rulings: (1) the Custodians did not have standing because, absent successful intervention, they were not parties to the DNA action, and (2) the Custodians' motion to intervene was moot. We address each in turn.

Supporting their claim that they were parties to the DNA action, the Custodians cite *F.E. v. E.B.*, 641 S.W.3d 700 (Ky. App. 2022). In *F.E.*, the child's aunt – the temporary custodian throughout the DNA proceedings – was granted visitation when the child was ultimately returned to the mother. *Id.* at 703. Two years later, the court granted the mother's motion to terminate visitation holding that the aunt did not have standing. *Id*. at 703-04. On reconsideration, the court rejected the argument that KRS[3] 403.320(4)[4] conferred standing because the aunt had not filed an original action or sought intervention as required by the statute. *Id*. at 704. On appeal, we questioned the necessity of the aunt's formal

[3] Kentucky Revised Statutes.

[4] KRS 403.320(4) instructs that:

> where the court finds, by clear and convincing evidence, it is in the best interest of the child, any relative, by blood or affinity, that was previously granted temporary custody pursuant to the provisions of KRS 620.090 may be granted reasonable noncustodial parental visitation rights by a Circuit Court or Family Court as an intervenor or by original action.

intervention in the DNA action when she was the petitioner, had received notice of all proceedings, and had custody of the child. *Id.* at 705-06. We did not resolve this matter, however, since we concluded any objection to the aunt's statutory standing had been waived and she had the necessary constitutional standing. *Id.* at 706.

Here, the Custodians admit the issue was not waived and, thus, *F.E.* is not dispositive. Nevertheless, the Custodians argue that *F.E.* supports their contention that formal intervention is unnecessary given that, like the aunt, they were temporary custodians actively involved in the DNA case and also satisfy the requirements for constitutional standing. The Custodians, in fact, insist that their claim to standing is even stronger than that in *F.E.* since they, unlike the aunt, filed an original action for permanent custody. We are unconvinced.

Even as dicta, *F.E.* is factually distinguishable since the Custodians were not the petitioner below and did not have custody prior to the commencement of the DNA action. Furthermore, undermining the proposition that temporary custody and participation in the action are determinative of standing, KRS 620.100(5) states that, though relatives providing care for a child have the right to be noticed of, and heard in, any proceeding respecting the child, this alone "shall not be construed to require that [they] be made a party to a proceeding[.]" Additionally, having concluded that their arguments stem from a misunderstanding

of the discussion in *F.E.*, we reject the contention that either constitutional standing or the filing of a separate original action have any relevancy to whether the Custodians are parties in this case.

Next, the Custodians alternatively assert their standing under statutory law as "persons acting as a parent" pursuant to the Kentucky Supreme Court's interpretation of KRS 403.822 in *Mullins v. Picklesimer,* 317 S.W.3d 569 (Ky. 2010), and as *de facto* custodians per KRS 403.270. Again, the Custodians misconstrue the issue. Regardless of whether these statutes would permit them to file a new action regarding Child, neither provision mandates that they are automatically granted party status in an already existing action. To be clear, the underlying petition was filed prior to the physical or legal custody of Child by the Custodians.

Having determined that the Custodians' arguments are without merit, the court did not err in concluding that they were not parties to the DNA action. Accordingly, the Custodians' claims – they were denied a hearing, the court failed to consider Child's best interest, and the court improperly delegated its authority to CHFS – are not properly before this Court. *See Interactive Media Ent. & Gaming Ass'n, Inc. v. Wingate*, 320 S.W.3d 692, 694 (Ky. 2010).

The Custodians' allegation that they were denied an opportunity to be heard, however, is not similarly foreclosed since, irrespective of their party status,

KRS 620.100(5) instructs that "relatives providing care for the child . . . shall have a right to be heard[.]" CHFS disputes the applicability of the statute given that the Custodians "were merely fictive kin" but states that, regardless, they received due process. Assuming *arguendo* the statute applies, the Custodians' rights were satisfied by their various filings apprising the court of their concerns, and this claim fails.

Finally, turning to the matter of intervention, to the extent that the Custodians assert the court erred in summarily denying the motion, we agree. The intervention of parties is permitted in accordance with CR 24. In *Bailey v. Bertram*, the Supreme Court of Kentucky explained:

> [t]he purpose of allowing intervention in an action is to prevent an issue from being tried to finality without all parties with a common interest in the issue or factual scenario being present. The rule is intended, at least in part, to reduce the chances of a single set of facts being litigated multiple times.

471 S.W.3d 687, 691 (Ky. 2015).

Here, notwithstanding the extensive briefing devoted to the topic, the Custodians' motion was not denied on the basis of standing or for cause. Rather, the court declined to rule on intervention until after it had heard the merits in the underlying case, only to then conclude the matter was thereby moot. Though

courts have great discretion in managing their dockets,[5] because the delay in addressing the motion defeats the very purpose of intervention, we have no difficulty in concluding that the court erred. Consequently, the matter must be reversed.

CONCLUSION

Therefore, and for the foregoing reasons, the orders of the Jefferson Circuit Court are AFFIRMED IN PART, REVERSED IN PART, and REMANDED for further proceedings consistent with this Opinion.

ALL CONCUR.

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[5] *See A.H. v. W.R.L.*, 482 S.W.3d 372, 375 (Ky. 2016).