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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MICHELLE J., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, M.R., M.R., R.R., *Appellees*.

No. 1 CA-JV 19-0019
FILED 7-30-2019

Appeal from the Superior Court in Maricopa County
No. JD22224
The Honorable Jo Lynn Gentry, Judge

REVERSED AND REMANDED

COUNSEL

Cantor Law Group PLLC, Phoenix
By John Carbone
Counsel for Appellant

Arizona Attorney General's Office, Tucson
By Autumn Spritzer
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Presiding Judge Paul J. McMurdie delivered the decision of the Court, in which Judge Jennifer M. Perkins and Judge Lawrence F. Winthrop joined.

M c M U R D I E, Judge:

¶1 Michelle J. ("Aunt") appeals the juvenile court's order denying her motion to intervene in a dependency action regarding two of her nieces and her nephew (the "children"). For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL BACKGROUND

¶2 In January 2018, the Department of Child Safety ("DCS") took temporary physical custody of the children and petitioned the juvenile court to find them dependent as to their biological mother and father. The court terminated the biological parents' rights to the children in July 2018.[1] While the termination proceedings were pending, DCS placed the children in a foster home that the two oldest children had previously lived in, and all three children continued to live there at the time of the termination.

¶3 On October 3, 2018, DCS submitted a request for the placement of the children with Aunt through the Interstate Compact on the Placement of Children, which was still pending at the time the court held the hearing in this matter. One day later, Aunt moved to intervene in the dependency action under Arizona Rule of Civil Procedure ("Rule") 24.[2] Aunt explained she was willing and able to care for the children and that she wanted to adopt them. She argued that intervention was in the children's best interests and that: (1) she had a common question of law and fact with the underlying dependency action; (2) the other parties were not adequately representing her interests as a family member; (3) intervention would allow the court to be informed of all options for the children; and

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[1] The children's biological parents are not parties to this appeal. Our decision in this appeal has no effect on the termination of their rights.

[2] Aunt also filed a notice of right to participate in the proceedings under Rule 58.

(4) intervention would not unduly delay or prolong the litigation. Aunt requested a hearing "to address the status of the case and physical custody of the minor children." DCS objected to Aunt's motion, arguing that intervention would not be in the children's best interests.

¶4 Aunt amended her motion to intervene and DCS again objected. The juvenile court considered Aunt's motions as both a motion to intervene and a request for change of placement and scheduled a joint hearing. The portion of the hearing relating to the motion to intervene was brief. Aunt argued she should be allowed to intervene because she "would be able to present information and evidence to [the] Court, and [the] Court has wide discretion in order to allow her to intervene in order to present her information and evidence." DCS responded that the court had the discretion to "settle the placement issue without the necessity [of having Aunt] intervene" and Aunt did not "need[] intervenor status in order to pursue whether she is the best placement for these children." The children's guardian *ad litem* also objected to Aunt's intervention. The court then denied Aunt's motion to intervene.

¶5 The court proceeded with an evidentiary hearing on the placement of the children. Aunt and the children's foster placement both testified to their relationship with the children, and the court also heard testimony from the children's other aunt, their behavioral health case manager, and their assigned adoption worker. The juvenile court took the matter under advisement and subsequently issued an order denying Aunt's motions. In the court's *nunc pro tunc*[3] order, the court explained:

> This matter came before the court on paternal aunt's motion to intervene filed October 4, 2018 and amended on October 18, 2018. After considering the pleadings and oral argument,
>
> IT IS ORDERED denying the motion.

¶6 The court then went on to discuss the children's placement. The court found that "[t]here is nothing to suggest that [Aunt] could not or would not provide a safe and stable home." But it also found the "foster parents are committed to these children and have demonstrated their intent

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[3] The court amended its under advisement ruling to include notice of the parties' appeal rights and a signature. The court's *nunc pro tunc* order is otherwise identical to its initial order resolving Aunt's motion.

to provide for all the needs of the children" and that "[t]o remove the children from this environment and risk a set-back that could have lasting and negative consequences would be a disservice to the children and is not in their best interests." "For these reasons," the court reiterated its denial of Aunt's motion to intervene. Aunt timely appealed.

DISCUSSION

A. This Court Has Jurisdiction Over Aunt's Appeal.

¶7 As an initial matter, DCS argues this court should dismiss Aunt's appeal for lack of jurisdiction. DCS asserts Aunt's motions were mainly requests for placement and that an order denying such a claim is not a final, appealable order. *See Jewel C. v. DCS*, 244 Ariz. 347, 351, ¶ 9 (App. 2018). Although Aunt's motions included statements that she wanted to adopt the children, and thus ultimately be their permanent placement, we disagree that the motions were not substantively motions to intervene.

¶8 Often a party seeking to intervene in a dependency action is ultimately trying to present evidence or to advocate for a particular placement of the dependent children. *See, e.g.*, *Bechtel v. Rose*, 150 Ariz. 68, 71 (1986); *Allen v. Chon-Lopez*, 214 Ariz. 361, 364–65, ¶¶ 6–7 (App. 2007); *William Z. v. ADES*, 192 Ariz. 385, 386, ¶¶ 4–5 (App. 1998). But Aunt asserted she met the requirements of Rule 24 because she had a common question of law or fact with the dependency action and argued why intervention should be granted. Our supreme court has held that the denial of a motion to intervene is a final, appealable order, *Bechtel*, 150 Ariz. at 71, and we have jurisdiction under Arizona Revised Statutes ("A.R.S.") section 8-235(A) and Arizona Rule of Procedure for the Juvenile Court 103(A).

B. The Superior Court Erred in How It Denied Aunt's Motion to Intervene.

¶9 Aunt argues the juvenile court abused its discretion by denying her motion to intervene without considering Rule 24 and the factors identified in *Bechtel*. 150 Ariz. at 72. She also argues the court erred by considering the eventual placement of the children as a basis for denying her motion.

¶10 A juvenile court "may permit anyone to intervene who: (A) has a conditional right to intervene under a statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." Ariz. R. Civ. P. 24(b)(1); *see also* Ariz. R.P. Juv. Ct. 37(A) (a reference to a "party" to a dependency action includes "any person . . . who has been

permitted to intervene pursuant to" Rule 24). The "court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Ariz. R. Civ. P. 24(b)(3). We review a ruling on a motion to intervene for an abuse of discretion. *Roberto F. v. ADES*, 232 Ariz. 45, 49, ¶ 17 (App. 2013). "An abuse of discretion exists when the trial court commits an error of law in the process of exercising its discretion." *Fuentes v. Fuentes*, 209 Ariz. 51, 56, ¶ 23 (App. 2004). A summary denial of a motion to intervene is an abuse of discretion. *William Z*, 192 Ariz. at 389, ¶¶ 21–22.

¶11 If a person meets a condition for intervention under Rule 24(b)[4] in a juvenile proceeding, "then the juvenile court must determine whether the party opposing intervention has made a sufficient showing that intervention is not in the child's best interest." *Allen*, 214 Ariz. at 365, ¶ 12 (citing *Bechtel*, 150 Ariz. at 73). To determine whether the intervention would not be in the child's best interests, the court must consider the factors identified in *Bechtel*. 150 Ariz. at 74. Those factors are:

> (1) The nature and extent of the intervenors' interest in the dependency case, (2) the intervenors' standing to raise relevant issues in the dependency case, (3) the legal position the [intervenors] seek to advance, and its probable relation to the merits of the case, (4) whether the [intervenors'] interests are adequately represented by other parties already present in the litigation, (5) whether intervention will prolong or unduly delay the litigation, and (6) whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

Roberto F., 232 Ariz. at 52, ¶ 33 (quotation omitted) (quoting *Bechtel*, 150 Ariz. at 72). A dependent child's aunt may be permitted to intervene in dependency proceedings under Rule 24. *Allen*, 214 Ariz. at 364–65, ¶ 11.

¶12 In this case, the juvenile court did not address Rule 24 or *Bechtel* in its order denying Aunt's motion to intervene or in the hearing on the motion. Instead, the court heard brief arguments on the motion, denied

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[4] DCS concedes the juvenile court implicitly found Aunt's motion was timely and intervention was permissible under Rule 24 based on the court's consideration of the children's best interests. *See William Z.*, 192 Ariz. at 387, ¶ 9.

it without comment, and turned to the issue of placement. But intervention does not "confer any right to custody upon" the person seeking intervention, *Bechtel*, 150 Ariz. at 73, n.3, and a "proper inquiry under *Bechtel* focuses not on the eventual outcome of the proceeding but rather on the effect intervention may have on the proceeding," *Allen*, 214 Ariz. at 365, ¶ 13.

¶13 In *Allen*, this court held the juvenile court abused its discretion by denying a dependent child's aunt's motion to intervene where the "bulk of the [court's] comments . . . refer[red] not to the *Bechtel* factors related to intervention, but instead to whether [the child] should be placed with [the aunt] once . . . parental rights are terminated." *Allen*, 214 Ariz. at 365, ¶ 13. We recognized that the aunt "likely face[d] an uphill battle to demonstrate that she is a suitable adoptive placement for [the child]," but concluded any delay in the aunt seeking custody would not "necessarily . . . be undue" and directed the juvenile court to reconsider its ruling in light of the *Bechtel* factors. *Allen*, 214 Ariz. at 366, ¶¶ 15–16.

¶14 In this case, the court explained:

> During the course of the dependency, [Aunt] contacted DCS and expressed her interest in being placement for the children. For reasons unknown, her attempts to maintain contact with DCS were largely ignored. Meanwhile, the children have been placed in their current foster home, Madison since February 2016 and Macy in September 2016 until they were returned to father and then all three kids have been in the current home since January, 2018 when they were removed from parents for the second time. In the period of time they have been in care, the children have blossomed. When they were placed in January, the children had some issues to overcome and with the services and love and nurturing they have received while in their current placement, the children are reportedly thriving. There is nothing to suggest that [Aunt] could not or would not provide a safe and stable home. The only issue is what another disruption could do to these children. In their birth home, they were exposed to drug use, instability, domestic violence and filth. They were neglected and all three children tested positive for methamphetamine when they were removed and taken into DCS custody. This treatment caused the children to have issues that the foster parents have worked to overcome. The foster parents are committed to these children

> and have demonstrated their intent to provide for all the needs of the children. This type of love and stability is needed by the children to overcome the abuse and neglect inflicted by their birth parents. To remove the children from this environment and risk a set-back that could have lasting and negative consequences would be a disservice to the children and is not in their best interests.
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> For these reasons, the Motion to Intervene is denied.

¶15 We do not discount the court's findings as to the foster parents' "love and stability" for the children. The testimony offered at the hearing demonstrated that both the foster placement and Aunt cared for the children and could provide a loving, stable home for them. But the placement of children is not the proper inquiry when ruling on a motion to intervene, and there is nothing in the record to suggest the court considered the *Bechtel* factors or how intervention by Aunt would impact the dependency action going forward.

¶16 DCS argues that this court must presume the juvenile court considered the relevant factors and that "[r]egardless of the juvenile court's failure to include verbatim references to the *Bechtel* factors," its findings address the relevant factors. But, as discussed above, the court only heard brief arguments on Aunt's motion to intervene, did not address the *Bechtel* factors, and then denied the motion and proceeded with the hearing on the change of placement without further discussion of intervention. DCS even argued that the juvenile court had "discretion to settle the placement issue without the necessity [of having Aunt] intervene." The court's specific findings are only related to the children's placement with their foster parents, and we cannot glean from those findings or the record that the court considered all the necessary factors and made an individualized determination.

¶17 We recognize that Aunt had the opportunity at the hearing to present evidence and call witnesses. But the children will remain dependent until an adoption decree is entered. *See* A.R.S. § 8-201(15)(a)(i) (a dependent child is one who is adjudicated to be in "need of proper and effective parental care and control and who has no parent or guardian"); A.R.S. § 8-117 (an adoption decree establishes a parent-child relationship between a child and the adoptive parent and "completely sever[s]" the relationship between the adopted child and the child's prior parents). While the children remain dependent, the court must continue to hold periodic review hearings at least every six months. A.R.S. § 8-847(A). Before each

hearing, DCS must prepare a report addressing the placement of the children, Ariz. R.P. Juv. Ct. 58(C)(1), and after each hearing, the court must "[e]nter appropriate orders concerning placement and custody" of the children, Ariz. R.P. Juv. Ct. 58(F)(3). Thus, the children's placement will continue to be at issue while they are dependent, and Aunt's ability to present evidence at this one hearing does not moot Aunt's request for intervention in the *ongoing* dependency action.[5]

¶18 The juvenile court erred by considering placement as a basis for denying Aunt's motion to intervene. *See Allen*, 214 Ariz. at 365, ¶ 13. Because there is nothing in the record to suggest the court made an "individualized determination" based on the *Bechtel* factors, we remand for a reconsideration of Aunt's motion to intervene. *Bechtel*, 150 Ariz. at 74 ("Because there is no evidence that the juvenile court made an individualized determination of the petitioner's motion to intervene, based upon the rule enunciated today, we must conclude that the juvenile court abused its discretion by summarily denying intervention."); *William Z.*, 192 Ariz. at 389, ¶ 22 (based on *Bechtel*, the lack of an "individualized determination explaining the juvenile court's denial of [a] motion to intervene" was an abuse of discretion).

CONCLUSION

¶19 For the foregoing reasons, we reverse and remand for proceedings consistent with this decision.

AMY M. WOOD • Clerk of the Court
FILED: AA

[5] An individual permitted to intervene is afforded "party" status for the proceedings. *See* Ariz. R.P. Juv. Ct. 37(A). They thus are also afforded various rights that are not necessarily given to others, including "participants" in juvenile proceedings. *See Roberto F.*, 232 Ariz. at 50, ¶ 19, n.5; *see also* Ariz. R.P. Juv. Ct. 37(A) (defining "parties" and "participants" differently).