

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000672-ME

D.P. AND S.P.

APPELLANTS

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 05-AD-500013

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; S.L.;
J.P.; AND M.D.S.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND JOHNSON, JUDGES.

DYCHE, JUDGE: D.P. and S.P. appeal from an order of the Jefferson Family Court denying their Ky. R. Civ. Pro. (CR) 24 motion to intervene in this Termination of Parental Rights action filed pursuant to KRS 625.¹ Because the appellants failed to comply with the applicable rule pertaining to intervention, we affirm.

¹ D.P. is the paternal grandfather of one of the children, and S.P. is the maternal grandmother of both. Although the trial court incorrectly stated these relationships, the error was, at worst, harmless. CR 61.01.

CR 24.03 requires that the motion to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." The appellants filed no such pleading, even after this deficiency was pointed out in the trial court, and the motion could have been summarily denied. Mulligan v. First National Bank & Trust Co. of Lexington, 351 S.W.2d 59 (Ky. 1961). The family court, however, considered the merits of the motion, even in the absence of this pleading.

We have examined the record carefully, and find that the family court judge did an exceptional job of analyzing the contentions of the parties, stating the salient facts, stating the applicable law, and formulating a cogent order resolving the issues herein. We therefore adopt her opinion, in full, as our own:

This case is before the Court on the motion of the paternal grandparents of one child to Intervene in this Termination of Parental Rights (TPR) action involving two children. The grandparents assert claims for custody and visitation.

This case was previously before this division of Jefferson Family Court in Dependency/Neglect/Abuse Case #'s 00J501925-003 and 00J501924-004. The grandparents were granted standing in that matter at the time of adjudication on a second neglect petition as they had previously had temporary custody of the children following removal pending a first neglect petition. Following a hearing on their motion for temporary custody, this Court denied the motion. They were also present and

testified on their own behalf at a dispositional hearing concerning the children on June 9, 2004. Following the dispositional hearing on the second petition, the Court committed the children to the Cabinet for Health and Family Services (CHFS) (See Finding of Fact, Conclusions of Law and Dispositional Order entered June 14, 2004).

The grandparents claim that two recent Kentucky appellate decisions indicate that grandparents should be permitted to intervene in Termination of Parental Rights cases, *Baker v. Webb*, Ky, 127 S.W.3d 622 (2004) and *E.D. vs. Commonwealth*, Ky.App. 152 S.W.3d 261 (2004). The Cabinet for Health and Family Services and the Guardian Ad Litem have both filed responding memoranda in opposition.

The Kentucky Rules of Civil Procedure provides the following grounds for intervention of right in a civil action:

Upon timely application anyone should be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest related to the property or transaction which is the subject in the action and is so situated that the disposition of the action may, as a practical matter impair or impede the applicant[']s ability to protect the interest, unless that interest is adequately represented by existing parties.
CR 24.01(1)

There is no statutory right of grandparents nor other relatives to intervene in TPR actions in Kentucky. Therefore, we must explore whether any right to intervene exists under CR 24.01 (1)(b).

This is an action to terminate the rights of the mother of two children and the rights of two putative fathers. The movant grandparents are the paternal grandparents of one of the two children involved, M.P. While movants have developed an emotional bond with the younger child, T.L., they have no blood relationship, no parental relationship, no legal custodial or defacto custodial relationship to the child. With respect to the daughter of their son, they similarly have no parental rights to assert; they are neither custodians, defacto custodians or otherwise vested with parental rights. Movants do not have parental rights to assert or protect in this action.

In this case the paternal grandparents' request for temporary custody of these children was carefully considered during D/N/A hearings and rejected. Their claims were never ignored or set aside, as in Baker vs. Webb, Id.. [sic] Indeed they were at one time granted temporary custody of the children.

The [grandparents'] reliance on Baker vs. Webb, Ky. 127 S.W.3d 622 (2004) in support of their motion to intervene is misplaced. In Baker, relatives of the children sought to intervene in an *adoption* proceeding *after* parental rights had been terminated. They never sought to intervene in an action to terminate parental rights. Further, the relatives who sought to intervene had initially been ignored by the Cabinet when they made inquiries to be considered as temporary custodians as the least restrictive placement for the children when Dependency/Neglect/Abuse proceedings were commenced. Accordingly, the Kentucky Supreme Court held that the regulations and policies of the Kentucky Cabinet for Health and Family Services vested the biological relatives of an *adoptive* child with a sufficient cognizable legal interest in the child's adoption proceedings and determined

that their motion to intervene should have been granted.

In any successful motion to intervene, a party's interest relating to the transaction must be a "present substantial interest in the subject matter of the law suit," rather than an expectancy or contingent interest. Gainer vs. Packaging Service Corp. Ky. App., 636 S.W.2d 658, 659 (1982). KRS 625.090 (6) provides that following a trial the Trial Court shall enter a decision either ". . . . (a) Terminating the right of the parent; or (b) Dismissing the petition and stating whether the child shall be returned to the parent or shall remain in the custody of the state." A termination action can, but does not always result in a child's becoming eligible for adoption. In this case, the grandparents have an expectancy or contingent interest.

The [grandparents] also rely on E.D. vs. Commonwealth, Ky.App., 152 S.W.3d 261 (2004), indicating that the decision in that case demonstrates the precariousness of grandparents visitation "rights", in the event that parental rights are terminated. In that case, the Kentucky Court of Appeals held that the existence and extent of grandparents['] right[s] is exclusively the prerogative of the legislature. There are no common law grandparents['] rights nor is there common law termination of parental rights or adoption; all are created by statutes. The Court in E.D. quoted precedent in stating that "this court is not in a position to add words and meaning to a statute that is clear on its face". The Court emphasized that it can only enforce a statute as it is written. The Court construed KRS 405.021 to allow grandparent visitation post termination of parental rights if and only if such visitation was established pursuant to KRS 405.021 in a Circuit Court action. The Court further

held a District Court Order granting visitation during the course of the Dependency/Neglect/Abuse action was insufficient to establish grandparents['] visitation rights post-TPR. The Court further explained that visitation during the parents['] visitation was not a separate order of visitation conferring separate rights upon the parties after termination had occurred.

In this case the [grandparents] were not granted visitation separate from that of the parents nor did they initiate or obtain visitation pursuant to any Circuit Court order under KRS 405.021. In E.D., the Court found that where the grandparents had not been granted visitation rights pursuant to KRS 405.021, there were no rights to enforce. Accordingly, E.D. is of no help to the [grandparents] in this case.

Understandably, movants are concerned that if their son's parental rights are terminated, this legal result could jeopardize (or result in the severing of) the bond between grandparent and child(ren.) If the legislature permitted extended family members, grandparents, aunts, uncles, adult siblings, cousins, and others to intervene in TPR cases, however, the goals and policies of the Adoption and Safe Families Act (AFSA) and Kentucky law, to provide efficient and timely justice for children and their families and to facilitate children's rights to a safe, healthy childhood with a nurturing, permanent family would be severely delayed. Accordingly, for all of the reasons set forth above,

Movants['] request to intervene is hereby overruled.

The order of the Jefferson Family Court is affirmed.

ALL CONCUR.

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