

**Commonwealth of Kentucky
Court of Appeals**

NO. 2017-CA-000067-ME

A.S.

APPELLANT

v.

APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE CLINT HARRIS, JUDGE
ACTION NO. 16-AD-00002

A.C.N., A MINOR CHILD,
F.O., JR., AND HIS WIFE, S.C.N.O.,
J.R.N., FATHER, A.L.L., MOTHER
AND CABINET FOR HEALTH
AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, D. LAMBERT AND THOMPSON, JUDGES.

ACREE, JUDGE: In this appeal we are faced with the unfortunate situation of a young child, A.C.N. (Child)¹, at the center of simultaneous custody proceedings

¹ Child's date of birth is January 3, 2012.

initiated in Grayson County, Kentucky, by the biological father's (Justin), former paramour (Angela), and an adoption petition, initiated and granted in favor of Child's paternal uncle and aunt (Floyd and Sarah). The appeal relates to Angela's CR² 59.05 motion to vacate the order of adoption embedded with a motion to intervene based upon her pursuit of *de facto* custodian status in Grayson County. With the hope that Child's best interest is paramount among all parties involved, we reverse and remand for additional proceedings consistent with this opinion.

Floyd and Sarah filed a petition for adoption of Child on February 16, 2016. Ashley and Justin, Child's biological parents, executed voluntary consents terminating their parental rights to Child, and the consents were filed shortly after the adoption petition was filed.³ Additionally, a guardian *ad litem* (GAL) was appointed to Child. The GAL filed a report recommending that the court approve the adoption. On March 7, 2016, the Leslie Circuit Court entered a final order of adoption to Floyd and Sarah of Child.

On March 14, 2016, Angela filed a CR 59.05 motion to vacate the adoption order and further asked the court that she be permitted to intervene in the adoption action based upon her petition initiated on September 8, 2015, in Grayson Circuit Court action 15-CI-00263. Angela stated that she was claiming *de facto* custodian status of Child in that action. In her motion, she stated that the Leslie

² Kentucky Rules of Civil Procedure

³ There was discussion at the intervention hearing as to whether paternity to Child was ever established. Justin's name appears on Child's birth certificate as the biological father, but paternity was never established through D.N.A. testing. However, it appears none of the parties dispute that Justin is Child's father.

Circuit Court was not properly informed of her action, and she was not properly notified of the adoption proceeding. She also attached an affidavit referring to the Grayson Circuit Court action as well as to a copy of her petition filed in that case and a temporary agreed order⁴ concerning custody or visitation with Child. The matter was set for a hearing on June 20, 2016.

At the hearing, additional facts came to the court's attention. Justin and his father, Gary⁵, moved to Grayson County, Kentucky, with Child. Justin met Angela. Angela testified that she was in possession of and cared for Child for nineteen months, since February 2014, prior to filing her custody petition. It seems Justin was present during some of this time, but not in its entirety. Angela's custody petition was filed on September 8, 2015. Justin went to prison in October 2015. He left Child with Angela. Gary apparently tried to intervene in Angela's custody proceeding, but he failed. Also, while Child was with Angela, there was some sort of temporary agreed order of visitation concerning Child.⁶ Sarah testified that she and Floyd met with Gary and Child's biological mother, Ashley, on December 16, 2015, and the decision was made to let Floyd and Sarah take Child. Gary allegedly represented to Floyd and Sarah that the custody proceedings in Grayson County had concluded. However, the custody matter was set for a final

⁴ The temporary agreed order does not appear in the Leslie Circuit Court record.

⁵ Gary is not a party to any court action involving Child, but his involvement with Child and other parties was discussed at length at the intervention hearing.

⁶ Again, this does not appear in the Leslie Circuit Court record, so it is unclear as to what parties were involved and what the arrangement included. The order allegedly pertains to the Grayson Circuit Court custody proceedings.

hearing in February 2016. It was later continued until March 22, 2016.

Meanwhile, the adoption by Floyd and Sarah occurred.

It is clear the circuit court struggled with the decision of whether to vacate the adoption and permit Angela to intervene. When asked to state the basis for her motion to intervene, Angela's counsel stated that she should have been provided notice and should have been included in the adoption proceeding because she believed Floyd and Sarah knew that Angela had previously instituted legal proceedings regarding Child. The circuit court determined that based upon notice, Angela's motion should be overruled because the adoption statute does not require she be provided notice given her relationship status to Child. An order was entered overruling her motion, and this appeal followed.

We review the circuit court's order relating to intervention for clear error. *Carter v. Smith*, 170 S.W.3d 402, 409 (Ky. App. 2004).

On appeal, Angela relies on the recent Kentucky Supreme Court opinion, *A.H. v. W.R.L.*, 482 S.W.3d 372 (Ky. 2016). In that case, the Supreme Court determined that Amy, mother's former partner, had asserted a cognizable legal interest in her motion to intervene in a stepparent adoption proceeding pursuant to CR 24.01(1)(b). Similar to this case, Amy also had a custody action pending. Amy was ultimately granted a right to intervene despite the plain language of the adoption statute and applicable procedural intervention rules. The Court looked solely to CR 24.01(1)(b).

In order for intervention to be proper as a matter of right under CR 24.01(1)(b), the party petitioning to intervene must have a “present substantial interest in the subject matter of the lawsuit as distinguished from a mere expectancy or contingent interest.” *Gayner v. Packaging Service Corp. of Kentucky*, 636 S.W.2d 658, 659 (Ky. App. 1982). Additionally, CR 24.01(1)(b) requires the petitioner to meet four factors in order to intervene as a matter of right: (1) its motion must be timely; (2) the petitioner must have an interest relating to the subject of the action; (3) the petitioner’s ability to protect its interest may be impaired or impeded, and (4) none of the existing parties could adequately represent the petitioner’s interests. *Carter*, 170 S.W.3d at 407.

The Court identified the present, cognizable legal interest as “maintaining a relational connection with the child, either through custody or visitation.” *A.H.*, 482 S.W.3d at 374. Based on CR 24.01, the Court determined “an order granting [stepparent’s] adoption petition could impair or impede Amy’s proffered custodial interest since, absent her intervention, the adoption proceedings would have concluded before her custody rights were determined.” *Id.* The Court then elaborated regarding what constitutes a sufficient legal interest for purposes of intervening in an adoption proceeding. The Court found it significant that there was documentation evincing an intent to raise the child together as well as facts that established Amy’s involvement with the child in a capacity as the parent. *Id.*

Here, Angela provided an affidavit from Child’s Mother which she had included with her custody petition in Grayson Circuit Court. The affidavit

stated that Mother wanted Angela to have custody and control of Child. There is also allegedly a temporary agreed order within the Grayson Circuit Court proceedings which supports Angela's claim to custody. Additionally, Angela asserted, and it was not disputed at the hearing on the intervention motion, that she had cared for and acted as a parent to Child from February 2014 until December 2015. Child was also left in Angela's possession when Justin went to prison in October 2015.

Floyd and Sarah assert in their appellee brief that Angela's motion was rightfully overruled because it was untimely as it was not filed until after the order of adoption was entered. "Although post-judgment intervention is not strictly forbidden, it is widely within the discretion of the circuit judge." *Polis v. Unknown Heirs of Jessie C. Blair*, 487 S.W.3d 901, 906 (Ky. App. 2016) (citing *Arnold v. Commonwealth*, 62 S.W.3d 366, 369 (Ky. 2001)). Given the circumstances surrounding this action, Angela's motion was filed as timely as it could have been. She testified that she only learned of the adoption order after it had been entered. She, then, immediately acted. Additionally, untimeliness was not the basis for the circuit court's decision to overrule Angela's motion.

In conclusion, we appreciate the Leslie Circuit Court's reluctance to allow Angela to intervene in the adoption, and agree that this is an issue that could be more thoroughly addressed by the legislature with amendments to the adoption statute. However, in accordance with our Supreme Court's decision, *A.H. v. W.R.L.*, 482 S.W.3d 372 (Ky. 2016), we must limit our review to CR 24.01 and

Angela's right to intervene. Accordingly, we must vacate the Leslie Circuit Court's order of adoption as such a determination cannot be made until Angela's legal status to Child has been resolved.

As our courts attempt to accommodate ever-evolving family dynamics which do not fit squarely within the current legal framework, we remind the parties that they are the ones most capable of serving Child's best interest.

Based on the preceding analysis, we vacate the Leslie Circuit Court's order of adoption and remand for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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