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Commonwealth of Kentucky

Court of Appeals

NO. 2020-CA-1593-ME

V.M. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA D. MCDONALD, JUDGE
ACTION NO. 19-J-502648-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; L.C.; AND S.M.,
A MINOR CHILD APPELLEES

OPINION
REVERSING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: COMBS, MAZE, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: V.M. (grandmother) appeals the denial of her motion to intervene and for temporary custody of S.M. (child) in a dependency, neglect, and abuse action (the "J" case).[1] We reverse in part because grandmother

[1] We refer to this specific dependency, neglect, and abuse case as the "J" case rather than by its more familiar moniker of "DNA" case, to avoid confusion because our discussion of paternity

established a significant interest warranting intervention, vacate in part because the denial of custody was premature, and remand for appropriate further proceedings.

In October 2019, child was born to L.C. (mother). Mother gave child the last name of the man she identified as child's father, J.M. (father). Father is the son of grandmother. Father died several months before child's birth.[2]

Child was born premature at thirty-four weeks gestation and exhibited symptoms of drug addiction from exposure in the womb. Mother tested positive for elicit substances, as did child's placenta. Child was placed in the temporary custody of the Cabinet for Health and Family Services (the Cabinet) and went directly from the hospital to foster care on October 31, 2019.

Mother consistently identified father to the Cabinet as child's father. On the petition, the Cabinet named father by name as the "Juvenile's Legal Father." In the pretrial hearing calendar order, father was again named as a party to the action and listed as deceased.

On December 5, 2019, mother waived having separate hearings regarding adjudication and disposition. Mother stipulated to neglect or abuse on

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repeatedly references deoxyribonucleic acid (DNA) testing. When discussing other dependency, neglect, and abuse cases, we use no abbreviation.

[2] Pursuant to Kentucky Revised Statutes (KRS) 213.046(10), mother was able to give child the same surname as father, but as father was deceased and father and mother were not married, mother was unable to name father as child's father on child's birth certificate as father could not fill out an affidavit of paternity.

the basis that her substance abuse placed child at risk. In the order on disposition hearing, child was committed to the Cabinet. Father was again listed in the calendar order as a party by name and listed as deceased.

It is unclear when paternal grandmother learned she had a grandchild and such child was in the custody of the Cabinet. However, grandmother contacted the Cabinet and asked to be considered for placement of child in early 2020, but the Cabinet was not eager to explore her eligibility as a possible placement for child, and there were also various delays following the COVID-19 shutdown.

Ultimately, the Cabinet required that grandmother establish her relationship to child by paying for a DNA test which the Cabinet arranged before grandmother would be given any consideration. Child's DNA was collected in April 2020 and DNA was collected from K.M. (grandfather) and grandmother in June 2020. Grandmother explained the delay in collecting her and grandfather's samples resulted from the lab being unwilling to have her appear for testing earlier due to the COVID-19 shutdown, as the lab was developing new protocols, and she also had to arrange grandfather's cooperation, despite their divorce, in order to prove her genetic connection to child. The DNA test revealed that there was a 99.96% probability that grandmother was child's biological grandparent.

Sometime after receiving the DNA test results, the Cabinet conducted a virtual home study of grandmother's home and investigated whether she had any criminal history or Cabinet history. Although the Cabinet found grandmother to have a suitable home and to be appropriate, Cabinet did not tell grandmother she was approved for possible placement or take any action to let her have visitation with child.

On August 11, 2020, the Commonwealth filed its annual review and dispositional report paperwork (annual report). Child's father was listed as deceased. Notably, the annual report was filed two months early.[3] The annual report was also minimalistic on the details provided on the required elements but did note mother was non-compliant with court orders, which resulted in her only engaging in one supervised visit with child.

The Cabinet noted that as of a June 2020 audit, it had concluded that based on lack of reduction of risk in mother's home child's goal should be changed to adoption and recommended that the family court make that child's permanency

[3] Pursuant to KRS 610.125(1) and (3), and given the timeline of events in child's removal, the Cabinet was required to file notice to inform the family court of the need for the annual permanency hearing at least sixty days prior to the one-year anniversary of mother's stipulation of neglect on December 5, 2019. Oddly enough, no case progress reports appear in the record, even though it is mandatory that one be filed with the court at least once every six months pursuant to KRS 620.240. Perhaps the Cabinet filed the annual report early because it had neglected to timely file a case progress report. Pursuant to statutory requirements, it is inappropriate to conflate a case progress report due after six months with the annual report due at ten months for hearing at a year.

goal. No mention was made of grandmother, even though her availability made a different goal, placement with a permanent custodian, an option pursuant to KRS 610.125(1)(c), and the Cabinet was required to address pursuant to KRS 610.125(4)(e)2. the barriers to "[e]nding the commitment of the child to the . . . cabinet" and provide pursuant to subsection (4)(h) "[r]ecommendations for necessary services required to terminate the commitment of the child to the cabinet . . . or to facilitate another permanent placement[.]" Although the Cabinet had options of which permanency goal to recommend, it certainly could have considered beginning visitation with grandmother with an eye toward transitioning child into her care.

The next day, on August 12, grandmother's counsel filed an entry of appearance. On August 19, 2020, grandmother filed a motion to intervene and for grandmother to be named child's temporary custodian.[4] Grandmother stated that she had been trying to work with the Cabinet for the past six or seven months to establish herself as a qualified relative of child, as paternity of child by her

[4] Although grandmother sought custody pursuant to KRS 620.110, which states that "[a]ny person aggrieved by the issuance of a temporary removal order may file a petition in Circuit Court for immediate entitlement to custody and a hearing shall be expeditiously held according to the Rules of Civil Procedure[,]" this was not in fact the proper mechanism for her to obtain custody. KRS 620.110 allows for an original action to be filed obtain custody before there is a final and appealable order. *See B.D. v. Commonwealth, Cabinet for Health and Family Services*, 426 S.W.3d 621, 622-23 (Ky.App. 2014). However, we are well satisfied that a relative can properly seek custody from the family court in a dependency, neglect, and abuse case because the family court is empowered to make custody decisions for the child.

deceased son had not legally been established. She sought to intervene pursuant to Kentucky Rules of Civil Procedure (CR) 24.01(1)(b) and *Baker v. Webb*, 127 S.W.3d 622 (Ky. 2004), explained that preference was for qualified relatives of child to take custody pursuant to KRS 620.090(1), and attached a copy of the DNA test establishing she was the paternal grandmother of child.

On September 17, 2020, the annual permanency hearing was held virtually. Grandmother did not attend this hearing.[5] The calendar order, rather than listing father by name, simply listed him as deceased. The family court ordered that the permanency plan be adoption and noted that termination of parental rights had been filed.

An initial hearing was held on grandmother's motions on October 29, 2020. Grandmother argued that as soon as she had learned about child she had done everything possible to work with the Cabinet to have child placed with her and had been proactive but that no progress had been made because child had already been placed with foster parents.

Grandmother stated that paternity was established through the DNA test. The family court noted this could be conclusive if everyone agreed and

[5] Although the record indicates grandmother's counsel was served with notice of the hearing, parties to the hearing indicated that perhaps grandmother's counsel had not received notice of it.

invited the parties to respond; no one said anything to contest that grandmother was child's grandparent.

However, there was argument made as to whether paternity needed to be judicially determined. Foster parents objected to grandmother being allowed to intervene and argued it was in child's best interest to remain with them.

It was only at this hearing that grandmother learned from the Cabinet that in June her home study had been completed, her background checks had been completed, and there were no issues with her being a valid placement option. However, the Cabinet refused to take a position as to whether grandmother should be allowed to intervene or be granted temporary custody.

The family court opined that even if grandmother were child's grandparent, that she had no legal right to child until it was given to her by a court. The family court noted that child had never known another family and that the termination of parental rights case was pending but clarified mother had not been served yet and would have to be served through a warning order attorney. The matter was set for another hearing so that the issues could be briefed as argument was made that *Baker* was no longer good law.

Grandmother filed a supplemental memorandum in which she further developed her argument of why intervention was appropriate, distinguishing termination cases which specifically held that relatives may not intervene and

explaining why she believed recent case law supported her position. Grandmother also filed the affidavit of the widow of father, F.M. (stepmother).

Stepmother explained she had a seven-year-old son, J.D.M. (brother), who is child's biological brother. Stepmother stated that her family considered child to be a part of their family, child was loved and acknowledged by her family, and that her family would support grandmother and would help if child were to be placed with grandmother.

On November 19, 2020, the next hearing was held. The Cabinet again stated it did not have a stance on grandmother's motions, despite being repeatedly requested by the family court to take a position on whether grandmother should be allowed to intervene and assume custody of child. Foster parents argued against letting grandmother intervene as an aggrieved party and asked the family court to make a factual finding that child remaining with foster parents would be in her best interest.

The family court stated that it would not accept the DNA report as establishing grandmother was child's grandparent because there was no chain of custody. While grandmother argued that at the previous hearing there were no objections to her claim that the DNA report established her as being child's grandparent, the family court said it was not required to accept that. Grandmother noted that it was the Cabinet who arranged the test and for collection of child's

sample; grandmother simply paid for the test and reported to the lab, and it was the Cabinet who received the DNA results from the lab. The family court stated it would not make a finding that grandmother was the paternal grandmother and stated that grandmother could see if the child support office would start a paternity action and take that DNA report as proof. The family court also ruled from the bench that intervention was inappropriate at this point and advised grandmother to seek grandparent visitation before the termination trial commenced.

That same day, the family court denied the motion to intervene in a docket order. Grandmother, apparently fearing that she would lose her opportunity to appeal if a more formal order was not forthcoming, appealed at the end of the thirty-day period following that order.

On January 12, 2021, a written order was entered denying the motion to intervene and for temporary custody. The family court stated that paternity had not been established and that grandmother could not establish paternity because she was not among those parties authorized to do so under KRS 406.021, and mother and the Cabinet never moved to establish paternity. The family court denied that the DNA test had ever been filed with the court and concluded that even if grandmother had a potential genetic relationship with child, "the fact remains that they are legal strangers" and "it is unclear to this [c]ourt, absent action by the County attorney and/or [the Cabinet], how [grandmother] could legally

establish paternity on behalf of her deceased son." The family court also distinguished *Baker* as it was an adoption case rather than a dependency case, stated that grandparents do not have a right to intervene in termination cases, and concluded that in any event grandmother "is not the legal biological grandparent of the minor child."

The family court found that grandmother is not an aggrieved party pursuant to KRS 620.110 as she was a legal stranger to child, but that even if paternity were appropriately established it would still deny grandmother's motion to intervene as her interests were "expectant in nature" and her motion to intervene was untimely. The family court stated that grandmother sharing a genetic relationship with child would not be sufficient to make her an aggrieved party and chided grandmother for not filing a grandparent visitation action instead.

The family court denied the motion for temporary custody on the basis that a preference for relative placement did not require a relative placement, and once a child is placed with the Cabinet, placement falls within the Cabinet's authority unless the court removes the child from the Cabinet's custody, which it declined to do. The family court relied on the Cabinet's failure to take a position as providing proof that placing child with grandmother would not be in child's best interest, explaining:

> While [the Cabinet], who oddly but tellingly takes no position herein, has apparently known about

> [grandmother] for some time and performed appropriate procedural considerations of her and her home, [the Cabinet has] chosen to leave the child in her current foster home. One can only assume, due to [its] peculiar silence on the issue, that [the Cabinet] did not believe it to be in the child's best interest to remove her from the only family and home she has ever known. Further, it would seem, based upon the comments by [the Cabinet's] counsel and social worker in Court that they appropriately considered this alternative relative placement, but chose not to move the child. Their inaction, even in their refusal to take an official stance before the court, speaks volumes about what they believe to be in the best interest of [child].[6]

The family court found that it was in "[child's] best interest to remain in the custody of the Cabinet and with those who have provided her with the only family she has ever known." The family court included finality language.

As a preliminary matter, we first address the Cabinet's and Commonwealth's arguments that we must dismiss this appeal because grandmother prematurely appealed from the calendar order. We decline to do so, as we are satisfied that it is appropriate to allow her notice of appeal to relate forward to the later written order denying her motions.

Pursuant to *Johnson v. Smith*, 885 S.W.2d 944, 949-50 (Ky. 1994), the filing of a notice of appeal in compliance with CR 73.02 is not a matter of jurisdiction (as losing litigants have a constitutional right of appeal), but a

[6] We do not believe it was appropriate for the family court to attribute this meaning to the Cabinet's failure to take a position.

procedural device which is subject to substantial compliance. Therefore, a prematurely filed notice of appeal can ripen when a final judgment is entered, allowing it to relate forward to such judgment, thus serving as an effective notice of appeal from such final judgment. *Johnson*, 885 S.W.2d at 950. This is appropriate because the premature notice of appeal puts the appellee on notice of the intent to appeal. *Id.* at 949.

In *Milam v. Commonwealth*, 593 S.W.3d 68, 71 (Ky.App. 2020), the Court allowed the appellant, who filed a notice of appeal naming an oral sentence as noted in writing on a docket sheet, to relate forward to a formal written judgment and sentence entered later. The Court explained that while the appellant should have amended his notice of appeal to reflect the later written order, his notice of appeal from the written docket order was still effective, and the appeal could be considered on the merits. *Id. Compare with Oakley v. Oakley*, 391 S.W.3d 377, 378 (Ky.App. 2012) (determining a notice of appeal from a verbal order could not relate forward to a later written order, as the verbal order was no order at all).

Although the calendar order did not contain finality language, this was not necessary for the notice of appeal to be effective to allow grandmother to appeal from the family court's denial of intervention. *See Ashland Public Library Bd. of Trustees v. Scott*, 610 S.W.2d 895, 896 (Ky. 1981). *Compare with Wright v.*

Ecolab, Inc., 461 S.W.3d 753, 760 (Ky. 2015) (explaining that once a notice of appeal was filed from a non-final order, the trial court lost jurisdiction to make it final through a *nunc pro tunc* order; "[c]onsequently, there was never a final order to which Appellant's notice of appeal could relate.").

We are satisfied that the calendar order which denied the motion to intervene is the equivalent of the docket order in *Milam*, the calendar order properly constituted an appropriate final order, and that the premature notice of appeal properly related forward to the more formal written order.

Grandmother argues that the family court erred in denying her motions because: (1) sufficient evidence of record exists to establish paternity and her status as a qualified relative; (2) she was entitled to intervene; (3) termination cases are inapplicable to whether she should have been allowed to intervene in the "J" case; and (4) she was entitled to a meaningful opportunity to be heard on her petition for custody.

The issue regarding paternity needlessly obfuscated the heart of this appeal, which was about whether a fit grandmother has the right to intervene in a dependency, neglect, and abuse action to seek custody of her grandchild. However, as it was the basis on which the family court's analysis largely hinged, we address it first before proceeding to consider whether the family court erred by

failing to grant grandmother's motion to intervene in the "J" case as a matter of right.

While the family court is correct that there was no separate action in which paternity was determined, this is beside the point. A paternity action in district court is brought for the purpose of establishing child support and there is "no statutory authority for a paternity action to be filed after the father's death." *Commonwealth ex rel. Walker v. Estate of Sullivan*, 997 S.W.2d 499, 501 (Ky.App. 1999). Paternity can also be established through an action to gain an intestacy share of an estate of a putative father. *Wood v. Wingfield*, 816 S.W.2d 899, 905 (Ky. 1991). Neither purpose is present here and so neither action would be appropriate. While grandmother states paternity could be established pursuant to a declaratory judgment action as noted in *Wood*, whether that is the correct method to qualify grandmother as a relative for purposes of custody is in doubt.[7] However, we need not resolve that issue as the Cabinet and the Commonwealth are correct that grandmother did not file a declaratory action or preserve such an argument. However, we determine that she did not need to use such a mechanism to establish paternity and her connection to child.

[7] *See Cummins v. Estate of Reed*, No. 2018-CA-001281-MR, 2019 WL 5681194, at *2 (Ky.App. Nov. 1, 2019) (unpublished) (explaining that "[t]he *Wood* case did not address whether paternity may be established in a declaratory judgment action to simply identify the putative father or obtain genetic medical information. Based on the language in that decision, a declaratory judgment action can be used to establish paternity *for inheritance purposes*.").

A separate action is not required to establish paternity of a posthumous illegitimate child where child support, social security benefits, or inheritance is not sought. Instead, grandmother could properly establish that she was child's grandparent in the "J" case itself, as paternity was only relevant to determining who could take custody of the child. Indeed, paternity is routinely established by family courts in both dependency, neglect, and abuse cases and termination cases, and is necessary for the family court to be able to grant custody to an adult relative pursuant to KRS 620.140(1)(c).[8]

A finding of paternity need not be explicit and can also be agreed to by the parties. In *Meinders v. Middleton*, 572 S.W.3d 52, 61 (Ky. 2019), the Kentucky Supreme Court recognized that paternity can be established without the need for a formal order, allowing a biological parent "to gain the legal status as parent" where after a DNA test was presented to the trial court it began identifying

[8] The family court has ongoing jurisdiction over custody of a child in dependency, neglect, and abuse cases. It retains the power to place children in someone else's custody at any point in such cases pursuant to KRS 610.125(1)(c) and (4)(h), KRS 620.140(1)(c), and KRS 620.240(8) and (9). While a dispositional order resolves custody at that juncture in the case, additional dispositional orders may alter custody. *See, e.g., B.S. v. Cabinet for Health & Family Services*, Nos. 2016-CA-000929-ME and 2016-CA-000930-ME, 2017 WL 5953522 (Ky.App. Dec. 1, 2017) (unpublished) (reviewing the appeal of the denial of a motion for relative placement requested after the first disposition was finalized). Such ongoing jurisdiction to make custody decisions is necessary so as to achieve permanency before the child ages out of Cabinet care at age 18 or 21. KRS 620.140(1)(d) and (e). This power is lost only after the dependency, neglect, and abuse case is concluded, either by dismissal or termination of parental rights followed by an adoption.

the man as child's father in open court and in court orders.[9] *See Sevilla v. Lopez*, 150 N.E.3d 683, 687 (Ind. Ct. App. 2020) (recognizing that when no one disputes a man is in fact a child's biological father as conclusively established by a DNA test, a paternity order should be entered).

The family court was incorrect that the DNA results had never been filed with the court. In fact, the DNA report was filed by grandmother in conjunction with her motion for intervention.

The family court's reaction to grandmother's discussion of the DNA results and requirement that she prove a chain of custody for such results is bizarre given that it was uncontested that it was the Cabinet itself that arranged for DNA testing to determine whether grandmother was child's grandparent and thus, the paternity of child's father. Grandmother did not swab child's mouth and deliver samples for testing. Indeed, she could not have done so, having never been granted access to child. Instead, it was the Cabinet who received the report after the samples from child, grandmother, and grandfather were tested and grandparentage was established, and it was the Cabinet who provided the report to grandmother.

[9] Similarly, in *A.S. v. A.C.N.*, No. 2017-CA-000067-ME, 2017 WL 5952866, at *1 n.3 (Ky.App. Dec. 1, 2017) (unpublished), the Court explained that paternity is a non-issue where despite a lack of DNA testing and lack of formal establishment of paternity, none of the parties disputed the putative father was child's father.

More importantly, even before the DNA results, the Cabinet and the family court implicitly acknowledged that father was child's father, hence making grandmother child's grandparent. In previous filings, the Cabinet recounted that mother acknowledged that father was child's father, and child was given father's last name on her birth certificate. In all filings below, the Cabinet failed to suggest that there were any other possible candidates who might be child's father. In all previous orders, father was either listed by name or stated to be deceased. The Cabinet and the family court were willing to repeatedly name a deceased man as child's father so long as this was convenient; this only changed when grandmother sought custody from the Cabinet and then the family court.

While there may have been reasons to doubt whether grandmother was child's grandparent, after the DNA testing established grandmother's status relative to child, the Cabinet was satisfied that she was in fact child's grandparent.[10] It then proceeded to consider grandmother's home and suitability

[10] In their briefs, the Cabinet and the Commonwealth note that mother stated she engaged in prostitution in an apparent attempt to cast aspersions on grandmother's claim to be child's grandparent. However, at no time during the court proceedings did anyone suggest that any investigation needed to be made to determine who child's father was. Mother's past behavior is irrelevant in the face of the DNA results. Of course, DNA proof would be improper if grandmother was father's adoptive mother. However, DNA tests are not required to establish paternity; paternity can be established by testimony alone. *See Fykes v. Clark*, 635 S.W.2d 316, 318 (Ky. 1982). Here, though, grandmother had both a legal and biological connection to father. Additionally, we note that while biological differences between men and women provide a relevant basis for different rules when establishing parental relationship for purposes of conveying legal rights, *see Miller v. Albright*, 523 U.S. 420, 445, 118 S.Ct. 1428, 1442, 140 L.Ed.2d 575 (1998), we cannot let such differences result in invidious discrimination against fathers and paternal relatives. A failure to adequately consider paternal relatives of illegitimate

for placement of child after receiving the DNA results. Foster parents, the guardian *ad litem*, the social worker, and the Cabinet attorney present at both hearings regarding intervention were all satisfied that grandmother was in fact child's grandparent based upon this testing. Under such circumstances, we are satisfied that paternity was conclusively established along with grandmother's legal and biological relationship to child. The family court should have entered such a finding, rather than looked for a way to deny grandmother's connection to child.

However, even if paternity were not conclusively determined through all interested parties' concession, this is beside the point as "a grandparent is not to be deprived of standing to prove that visitation or custody is in the grandchild's best interest merely because the grandchild's paternity remains to be determined." *Posey v. Powell*, 965 S.W.2d 836, 839 (Ky.App. 1998). Instead, paternity can be established after intervention is granted as a precondition for granting custody on the basis of being a qualified relative. *See A.H. v. W.R.L.*, 482 S.W.3d 372, 374 (Ky. 2016) (clarifying that regarding intervention in an adoption proceeding, "standing and intervention are two distinct concepts, and that standing to seek adoption is not a condition for intervening in an adoption proceeding" and the right

children for placement because some time may elapse before they can provide proof of paternity, rather than be presumed to be related as are maternal relatives, harms both children and their paternal relatives.

to intervene did not hinge upon whether the intervenor would ultimately succeed in her custody petition).[11]

Furthermore, pursuant to KRS 405.020(1), while parents are to have joint custody of their minor children, the next sentence of that provision provides: "If either of the parents dies, the survivor, if suited to the trust, shall have the custody, nurture, and education of the children who are under the age of eighteen (18)." In the "J" case, mother stipulated to abuse and neglect, establishing that she was currently unfit to have custody of child. KRS 405.020(1) allows nonparents standing to seek custody on the basis of allegations that the remaining parent is clearly unfit, with custody awarded to a suitable nonparent when it is established that the parent is shown by clear and convincing evidence to be an unfit custodian and the award of custody to the nonparent is in the child's best interest. *See Davis v. Collinsworth*, 771 S.W.2d 329, 330 (Ky. 1989) (explaining standard and determining custody was erroneously awarded to grandmother where there was no evidence that mother was unfit); *Glodo v. Evans*, 474 S.W.3d 550, 553-54 (Ky.App. 2015) (concluding the award of custody to grandparents must be vacated where while father waived his superior right to custody, grandparents failed to

[11] In *McGeorge v. Brown*, No. 2017-CA-000983-MR, 2019 WL 259443, at *3 (Ky.App. Jan. 18, 2019) (unpublished), the Court interpreted *A.H.* as equally applying to custody proceedings where intervention was sought and explained that "standing to seek custody is immaterial to the issue of whether the [grandparents] could intervene as a matter of right under CR 24.01."

prove by clear and convincing evidence that mother was unfit); *McDaniel v. Garrett*, 661 S.W.2d 789, 790 (Ky.App. 1983) (affirming award of custody to maternal grandmother upon a finding of father's unfitness); *Rice v. Hatfield*, 638 S.W.2d 712, 714 (Ky.App. 1982) (vacating and remanding custody award to maternal uncle in custody contest between him and father after mother died, where the trial court failed to make findings establishing the father's unfitness). While these cases are between a parent and a relative in a separate custody action, we believe KRS 405.020(1) still provides an additional basis for grandmother to pursue custody in this "J" case even without a preexisting finding of paternity.

We review the denial of a motion to intervene as a matter of right for clear error while we review the family court's evaluation of the timeliness of the motion to intervene under the abuse of discretion standard. *Hazel Enterprises, LLC v. Community Financial Services Bank*, 382 S.W.3d 65, 67 (Ky.App. 2012). CR 24.01(1)(b) provides in relevant part as follows:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of 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 that interest, unless that interest is adequately represented by existing parties.

If these factors are satisfied, the party seeking intervention must be permitted to intervene as a matter of right. *Carter v. Smith*, 170 S.W.3d 402, 410 (Ky.App. 2004).

We first consider whether grandmother's motion to intervene was timely. In resolving the issue of timeliness, a court may properly consider:

> (1) The 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.

Hazel Enterprises, LLC, 382 S.W.3d at 68 (citations and brackets omitted).

We conclude that the family court abused its discretion in denying the motion to intervene as untimely as these factors support intervention being timely. The uncontroverted evidence is that grandmother acted appropriately and with due diligence when she first learned about child. Grandmother acted reasonably in trying to work with the Cabinet to establish she was child's grandparent and to be administratively considered for placement rather than immediately seeking to intervene in the "J" case.

Grandmother cannot properly be charged with delays which stemmed from the Cabinet's lack of action or which were unavoidable due to the COVID-19 shutdown. Father's death and the COVID-19 outbreak and subsequent shutdown were unusual circumstances delaying grandmother being able to provide proof of paternity. During the hearing, the family court told grandmother that it did not care that COVID-19 had delayed things, observing that COVID-19 ruined lots of people's lives, stating that would not figure into the court's calculus as to whether grandmother had timely intervened. By doing so, the family court was unfairly charging this delay against grandmother.

It was the Cabinet that insisted that grandmother be confirmed as a grandparent through DNA testing she had to pay for before the Cabinet would evaluate her home or conduct background checks on her. It was the Cabinet that failed to inform grandmother that her home study and background checks were approved, but that it had chosen not to begin a transitional process to place child with her, resulting in additional delay before grandmother concluded she needed to pursue custody in court and sought to intervene. It was also the Cabinet who failed to inform the family court that there was an approved relative for placement before pursuing a goal change to adoption and moving up the filing of the yearly review, so that said goal change could be accomplished without placement with grandmother even being considered. The Cabinet can hardly be prejudiced by

grandmother not seeking intervention earlier where it was aware grandmother was actively seeking placement of child.

Under the family court's reasoning, grandmother should have immediately filed her motion to intervene with the family court before the Cabinet considered her for placement or she had established her biological connection to child. However, because the adjudication and disposition occurred simultaneously and early in this case, even had grandmother filed to intervene when she first learned about child, this may have been after the disposition order was entered; since that time, nothing of substance had occurred in the "J" case. Clearly, filing before attempting to work with the Cabinet would have been unreasonable and would make any success in seeking relief doubtful, with the family court likely questioning why grandmother was prematurely seeking to intervene without having established an actual interest in child.

While interventions in a dependency, neglect, and abuse case should take place as soon as possible, ideally before the dispositional hearing is conducted, intervention can certainly be reasonable at a later juncture depending upon the individual facts in each case. We will not foreclose intervention as being untimely where grandparent diligently pursued custody with the Cabinet after learning of the child's birth but was delayed by circumstances beyond that grandparent's control. This is not a case where a relative failed to take appropriate

steps when contacted by the Cabinet about possible relative placement, sitting on her rights for years to see whether mother would regain custody or another relative would step forward and seek placement.

We next consider whether grandmother should have been allowed to intervene as a matter of right based upon the interest she claimed. In *Baker*, the Kentucky Supreme Court considered whether second cousins who sought to adopt a child should have been allowed to intervene as a matter of right in an adoption proceeding brought by foster parents. In resolving the case, the Court noted the sister state decisions of *Bechtel v. Rose,* 150 Ariz. 68, 722 P.2d 236 (1986) and *In the Interest of A.G.*, 558 N.W.2d 400 (Iowa 1997), granting grandmothers the right to intervene respectively in dependency and child-in-need-of-assistance cases. *Baker*, 127 S.W.3d at 624.

The *Baker* Court proceeded to hold that intervention should have been granted because "the policies and administrative regulations of the Cabinet . . . give priority to relatives of a child placed for adoption," and because the term "relative" was not defined, second cousins were thereby vested "with a sufficient, cognizable legal interest in the adoption proceeding[s] of this child." *Baker*, 127 S.W.3d at 625.

In making this determination, the Court heavily relied upon KRS 620.090(2) which requires that preference be given to relatives in placing a child

under an order of temporary custody. The cousins had expressed interest in placement of child shortly after temporary custody was granted to the Cabinet, but the Court considered the language expansively 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. It explained that:

> In so holding, we are ensuring that all options for a permanent placement are afforded children in need of a home. Evaluating several possible homes only more thoroughly serves the overriding legislative policy of considering the best interests of the child. By failing to initially evaluate Appellants for placement, the Cabinet has done a disservice to everyone involved, particularly the child who may have been denied the opportunity to be raised in a home more suitable to his needs.
>
> Therefore, we set aside the adoption and order the Cabinet to have [the cousins] evaluated for relative placement, as mandated by its own policies and regulations, so that they may be considered as potential adoptive parents along with the [foster parents]. The Cabinet should then make an informed recommendation to the circuit court as to the best placement option for the child.

Id. at 625-26 (footnote omitted).

In *A.H.*, the Kentucky Supreme Court analyzed whether intervention as of right was appropriate pursuant to CR 24.01(1)(b), where the subject of the step-parent adoption action was a child who was previously being jointly raised by a same-sex couple. It resolved that the nonparent was "claiming a cognizable legal

interest – i.e. maintaining a relational connection with the child, either through custody or visitation." *A.H.*, 482 S.W.3d at 374. The Court explained that regardless of whether the nonparent would succeed in her separate custody petition, she had demonstrated a sufficient interest for purposes of intervening in the adoption proceeding where she had provided evidence of the former couple's intent to co-parent child and her involvement in a parental-type role. *Id.*

Both *Bechtel* and *A.G.*, which were favorably cited in *Baker*, contain persuasive reasoning in resolving whether the family court abused its discretion in refusing to allow grandmother to intervene. *Bechtel* held:

> We are convinced that the best interest of a parentless child is usually served by allowing his grandparents to intervene in a dependency hearing. . . . [G]randparents, who are invested with a natural and abiding love for their grandchildren, should be allowed to intervene in the dependency process unless a specific showing is made that the best interest of the child would not be served thereby. Such intervention . . . would almost certainly shed valuable light on the best placement for the child and the grandparents' own suitability for custody, should they desire it. . . . Indeed, intervention by grandparents willing and able to assume control and custody of the child might obviate the need for a non-familial placement of any duration.

Bechtel, 150 Ariz. at 73, 722 P.2d at 241.

A.G., 558 N.W.2d at 405, reached a similar result, holding that because its relevant statute "allows the juvenile court to consider placing a child in need of assistance in the custody of a 'relative or other suitable person[,]'" this

provided a grandmother "a 'legal interest' in the outcome of the dispositional hearing." The Court explained that the grandmother's interest in obtaining custody would be directly affected by the juvenile court's decision on custody, therefore giving the grandmother a mandatory right to intervene. *Id.*

While not mentioned in *Baker*, we also find persuasive the reasoning of our sister court in *In re Interest of Kayle C.*, 253 Neb. 685, 574 N.W.2d 473 (1998), which involved whether grandparents should be allowed to intervene in dependency proceedings for the purpose of seeking custody of their grandchildren. The Court considered its grandparent visitation statute as demonstrating a public policy of recognizing and fostering grandparent-grandchild relationships[12] and

[12] "Society has long valued the unique and special relationship that exists between a grandparent and a grandchild." *Blackaby v. Barnes*, 614 S.W.3d 897, 902 (Ky. 2021). Never can this potential role be more important than when a child's parents are either incapable or dead. We note that Kentucky's grandparent visitation statute and other statutes as interpreted by our Courts demonstrate the same public policy as Nebraska's statutes and, as a consequence, we believe grandparents are entitled to extra consideration when seeking to intervene in dependency, neglect, and abuse actions to seek custody of their grandchildren, and may very well stand in their deceased child's shoes for purposes of custody consideration where any remaining parent is unfit. *See* 2018 Kentucky Laws Ch. 197 (HB 517) (containing prefatory language explaining the importance of grandparents and how grandchildren benefit from having them in their lives); KRS 405.021 (grandparent visitation statute which in subsection (3) allows grandparents to be granted noncustodial parental visitation rights "if the parent of the child who is the son or daughter of the grandparent is deceased and the grandparent has assumed the financial obligation of child support owed by the deceased parent"); KRS 620.027 (establishing that "[i]n any [dependency, abuse, and neglect] case where the child is actually residing with a grandparent in a stable relationship, the court may recognize the grandparent as having the same standing as a parent for evaluating what custody arrangements are in the best interest of the child."); KRS 199.470 (listing grandparents within the group of relatives exempt from the requirement that they must first obtain consent to adopt from the Cabinet); *Morton v. Tipton*, 569 S.W.3d 388, 398 (Ky. 2019) (noting when grandparent visitation is sought from a nonparent custodian, as the Cabinet is here, "the non-parent custodian and a grandparent are on equal footing under KRS

determined that despite grandparents not having explicit statutory standing to be heard on custody issues during such proceedings, they had implicit standing as grandchildren could be placed with them by the juvenile court if in the grandchildren's best interest. The Court held that intervention was justified under these circumstances because "grandparents have no means of presenting this issue to the juvenile court for determination unless they are permitted to intervene and offer evidence[,]" noting that if the case proceeded to termination the relationship between grandparents and grandchildren would thereby be terminated, "plac[ing] grandparents in a position to realize significant loss by direct operation of judicial determinations made in a dependency proceeding[,]" and thereby giving grandparents "a direct legal interest in the subject matter of a juvenile dependency proceeding which entitle[d] them to intervene as a matter of right[.]" *Id.* at 693, 574 N.W.2d at 477-78.

After considering *Baker*, *A.H.*, *Bechtel*, *A.G.*, and *Kayle C.* it becomes evident that the family court abused its discretion in denying grandmother's motion to intervene for the basis of seeking custody in the "J" case. Grandmother had a right to be considered for custody, and was so situated that the disposition of the action (that child would remain in the custody of the Cabinet and placed with

405.021(1)(a) and the preponderance of the evidence standard for determining whether grandparent visitation is in the child's best interest is fundamentally fair and proper.").

foster parents, with the goal of adoption) may as a practical matter impair or impede grandmother's ability establish and maintain a relational connection to child that all parties concede is her biological grandchild.

While it is true that nothing in the "J" case itself would actually alter whether grandmother would be a candidate for custody later, for it is a judgment terminating parental rights or granting an adoption that actually severs the familial relationship,[13] as a practical matter, gaining custody at the adoption phase is much less likely without an established, ongoing relationship between child and grandmother. *See Baker*, 127 S.W.3d at 626 n.2 (noting allowing intervention for

[13] In the case of grandmother, because father is dead grandmother's relationship with child would not be severed by the termination of mother's parental rights. *See S.B. v. Cabinet for Health and Family Services*, 616 S.W.3d 715, 721 (Ky.App. 2020) (denying maternal grandparents' motion to intervene in a termination case against a father, agreeing with the family court that the termination action against father "did not seek to terminate Grandparents' relationship with Child."). While the grandparent visitation statute, KRS 405.021, now includes a provision preserving preexisting established visitation with a grandchild after parental rights have been legally terminated, KRS 405.021(1)(a), there is no indication that prior to this appeal grandmother sought visitation pursuant to that statute. Therefore, adoption of child will cut off grandmother's legal status *vis-à-vis* child. *See* KRS 199.520(2) (explaining "[u]pon granting an adoption, all legal relationship between the adopted child and the biological parents shall be terminated."); *Palmer v. Burnett*, 384 S.W.3d 204, 206-07 (Ky.App. 2012) (denying grandparent visitation rights to biological grandmother of child, because grandmother's legal rights to the child's mother were terminated and mother's subsequent adoption made grandmother the aunt rather than grandmother of the mother's child); *B.L.M. v. A.M.*, 381 S.W.3d 319, 321 (Ky.App. 2012) (voiding portion of adoption order requiring sibling visitation after adoption was finalized, as "once the judgment of adoptions was entered, no legal ties existed between [the adopted children] and their biological siblings.").

consideration of relatives for adoption after child resided and presumably bonded with the foster parents for nearly two years "may be an exercise in futility").

It is easily established that grandmother's interest would not adequately be represented by any of the other parties. While the family court asserted grandmother has no interest because at best she only has a biological relationship with child, this is specious reasoning. It is evident that grandmother wanted a relationship with this child, but it was the Cabinet who prevented any such relationship. We do not believe that the Cabinet was acting in child's best interest by denying child interactions with a fit paternal grandparent, especially where father was dead and could not be consulted as to his preferences.

Just as intervention by relatives in adoption proceedings should be freely granted so as to consider all available options for child, *Baker*, *supra*, intervention should be freely granted in dependency, neglect, and abuse proceedings where custody is sought, as it is appropriate to consider all available options for a permanent placement.[14] We agree with the sentiment expressed in *B.S.*, 2017 WL 5953522, at *5, regarding consideration of relatives for custody in a

[14] This includes not just relatives, but also current and former foster parents. *See, e.g.*, *Hammond v. Foellger*, No. 2005-SC-000966-MR, 2007 WL 858810, at *2-3 (Ky. Mar. 22, 2007) (unpublished); *K.P. v. Cabinet for Health and Family Services*, No. 2008-CA-001092-ME, 2009 WL 637381, at *4 (Ky.App. Mar. 13, 2009) (unpublished).

dependency, neglect, and abuse case, that "case law indicates a trial court must consider the 'preference' for relative placement by allowing the relatives to intervene and be evaluated . . . for potential placement."

We believe that to protect intervenors' substantive interests in custody or visitation, as a matter of course when intervention is granted in a dependency, neglect, and abuse case, the family court should enter an order requiring that such intervenors be given notice of any adoption action, so that their established interest cannot be circumvented. Much grief to relatives could be avoided if they received such notice, which would also obviate against relatives seeking to void adoptions that they had no previous notice of, and would have wished to intervene in had they had notice.[15] Having previously been granted the right to intervene in a dependency, neglect, and abuse case, even when it does not result in custody being given to the intervenor, demonstrates that such intervenor has significant enough interest that intervention should likewise be granted to such intervenor in child's adoption proceeding if requested. But because these are separate cases, which may take place in separate counties, thereby involving separate judges, and intervenors

[15] *Compare Cabinet for Health & Family Services v. Kroeker*, No. 2018-CA-001149-ME, 2019 WL 2246602, at *2 (Ky.App. May 24, 2019) (unpublished) (noting the order of intervention in dependency, neglect, and abuse case directed the Cabinet to notify the intervening party of the adoption proceedings, and expressing that if this was a final and appealable order, it would not hesitate to affirm it) *with D.T. v. G.W.*, Nos. 2020-CA-000178-ME and 2020-CA-000179-ME, 2021 WL 1431613, at *6 (Ky.App. Apr. 16, 2021) (unpublished) (noting the frustration of relatives who were granted intervention in the dependency, neglect, and abuse case only learning about the adoption after it occurred).

have no statutory right to notice of any subsequent adoption case, as a practical matter such intervenors cannot easily and timely intervene in such subsequent proceedings. Therefore, as a matter of fundamental fairness, all intervenors whose intervention has been granted in a dependency, neglect, and abuse case for the purpose of seeking custody, should be given notice and an opportunity to be heard in any subsequent adoption case so that all options for placement may be considered.

We further note that while the Cabinet, in contrast to *Baker*, did consider grandmother as a potential placement rather than wholly abrogating its responsibility, effectively grandmother was not fully considered for placement where although she was approved as a fit person to have custody of child, the Cabinet refused to take a position and make a recommendation as to whether child should be placed with grandmother. While *Baker* concerned adoption, we believe its reasoning that the Cabinet must evaluate interested relatives for placement and "should then make an informed recommendation to the circuit court as to the best placement option for child[,]" 127 S.W.3d at 626, equally applies to dependency, neglect, and abuse cases. Then the family court should apply the preference for relative placement by considering those relatives qualified for placement.[16] Therefore, on remand, the Cabinet must take a position and make a

[16] Our reasoning is consistent with *B.S.*, 2017 WL 5953522, at *5.

recommendation once the family court proceeds to consider grandmother's motion for custody.

While termination and adoption may have taken place in the interim, grandmother is not thereby fully foreclosed from seeking relief. As established in KRS 199.540, the validity of an adoption is subject to attack for one year from the date of the entry of the judgment of adoption and a pending custody matter can justify vacating such adoption.[17]

We do not consider whether the family court was correct in its denial of grandmother's motion for temporary custody of child based on its assessment that continued placement of child with foster family was in her best interest. This determination was patently premature when grandmother was not allowed to intervene and offer evidence during a dispositional hearing about what would be in child's best interest and the Cabinet failed to make any recommendation, in derogation of its duty, as to what was in child's best interest.

Accordingly, we reverse and remand the family court's denial of grandmother's motion to intervene and vacate its denial of custody. On remand, a finding of paternity must be entered and intervention must be granted as a matter

[17] *See A.S. v. A.C.N.*, No. 2017-CA-000067-ME, 2017 WL 5952866, at *3 (Ky.App. Dec. 1, 2017) (unpublished) (relying on *A.H.* in requiring voluntary adoption to be vacated so that father's former paramour, who had a pending custody action claiming she was child's *de facto* custodian, could intervene and establish her custody claim).

of right. We recognize that given the fact that termination and adoption proceedings, being separate proceedings, are not stayed by this appeal, that whether the family court can proceed to consider grandmother's request for custody will depend upon whether the "J" case has concluded with child having been adopted or child continues to be under the custody of the Cabinet. We direct the family court to inform grandmother of child's present status and any adoption action involving child.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John P. Swain
Louisville, Kentucky

BRIEF FOR APPELLEE COMMONWEALTH OF KENTUCKY:

Daniel Cameron
Attorney General of Kentucky

Michael J. O'Connell
Jefferson County Attorney

David A. Sexton
Special Assistant Attorney General
Louisville, Kentucky

BRIEF FOR APPELLEE CABINET FOR HEALTH AND FAMILY SERVICES:

Adam Sanders
Louisville, Kentucky