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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: NOVEMBER 1, 2018
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2017-SC-000360-DGE DATE 11/26/18 Kim Redmon, DC

P.B. AND T.B. APPELLANTS

V.

ON REVIEW FROM COURT OF APPEALS
CASE NOS. 2017-CA-000476-MR & 2017-CA-00538-MR
CLARK CIRCUIT COURT NOS. 16-AD-00042 & 16-AD-00043

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

P.B.[1] seeks discretionary review of a Court of Appeals' order dismissing the appeal from the Clark Circuit Court. We granted the motion for discretionary review to consider if the courts below erred and whether P.B. has standing to contest the underlying termination of parental rights action. After review of the record, we affirm.

[1] Due to the confidential nature of the underlying proceedings, we refer to the parties by their initials.

I. BACKGROUND.

Appellants, P.B. and T.B.[2], are the maternal grandparents of R.G. and A.G. In 2011, the Cabinet for Health and Family Services (Cabinet) brought a Dependency, Neglect, or Abuse (DNA) petition against the biological Mother[3] for educational neglect due to R.G.'s excessive absences from and tardiness to school. Mother stipulated to educational neglect. R.G. and A.G. were in Father's custody after this finding of Mother's neglect and Mother was allowed supervised visitation with the children.

During a brief period in 2012, R.G. and A.G. resided with P.B. A July 16, 2012 Cabinet report indicated that the children were to remain placed with the maternal grandparents, P.B. The children and their parents lived with P.B. from 2013 through 2014. In 2015, Mother had another child who tested positive for marijuana at birth. The Cabinet became involved again with one of the additional areas of concern being biological Mother's actions in allowing her children to have contact with her paramour, a registered sex offender. A temporary removal order was entered on July 23, 2015, placing R.G. in the custody of the Cabinet.[4] On August 20, 2015, dispositional orders were entered, keeping the children in the custody of the Cabinet. P.B. filed a private Petition for Custody in the Clark Circuit Court Family Division on April 28,

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[2] Appellants will be collectively referred to as "P.B."

[3] Mother's initials are also T.B. and Father's initials are A.G. We will identify these individuals by "Mother" and "Father" to avoid any confusion.

[4] It appears from the record that all of the children were placed in the same foster home. We refer to the children collectively as R.G. for the remainder of the opinion.

2016. It appears from the record, and from the parties' arguments, that the Family Court declined to rule on private custody until the neglect case was resolved.

The neglect case was reviewed periodically and P.B. filed a Motion for Joinder or for Custody of Minor Children in the neglect action on May 24, 2016. -The motion was heard on June 30, 2016, and the court's docket sheet indicates that the motion was sustained only as to the consideration of custody. At a hearing on August 4, 2016, the Cabinet changed its recommendation from reunification to adoption. The court accepted the Cabinet's recommendation. On August 8, 2016, P.B. filed a Motion to Intervene and to be Joined as a Real Party in Interest for Purposes of Notice and Participation in Further Proceedings and for Custody of Minor Child. P.B. indicated that no notice had been provided to them regarding the review proceedings held subsequent to the court's June 30, 2016 grant of intervention as to custody. P.B. indicated that there was no opportunity for P.B. to respond to the Cabinet's change in recommendation in the permanency plan. P.B. renewed the May 24, 2016 motion for custody and asked the court to take notice of their private petition for custody filed in the circuit court, family division on April 28, 2016.

The court ruled on the motion on September 1, 2016, with a docket sheet notation stating the motion was "addressed on 6/30/16 and that ruling adopted today."

The Cabinet filed a petition to terminate parental rights (TPR) on October 3, 2016. A hearing was held on February 14, 2017, where Mother voluntarily terminated her parental rights, the Cabinet presented evidence regarding Father,[5] and the Cabinet presented evidence regarding the child's placement and progress in a foster-to-adopt home. The trial court entered its Findings of Fact and Conclusions of Law on February 21, 2017, finding the child to be abandoned by Father and noting the Mother's voluntary relinquishment of her parental rights. The order terminating the parents' rights was entered on the same day.

One month later, on March 21, 2017, P.B. filed a notice of appeal from the termination proceedings. The Court of Appeals issued a show cause order on April 17, 2017, ordering P.B. to show cause why the case should not be dismissed for failure to appeal from a case in which the grandparents were parties. P.B. responded to the show cause order, arguing that they had to rely on court staff to get the TPR case numbers to appeal, they filed a notice of appeal in the DNA cases as well and wanted to consolidate the appeals, and reiterated that the child had lived with the grandparents for a period of time and the grandparents were interested parties in the underlying DNA actions. The Court of Appeals entered an order dismissing the appeal for failure to appeal from actions to which the appellants were parties.

[5] Father was neither present nor participated in any of the proceedings but was represented by appointed counsel.

P.B. moved for discretionary review with this Court, which we granted. After a thorough review of the record, we affirm the actions of the Clark Circuit Court.

II. STANDARD OF REVIEW.

A grant or denial of intervention is reviewed under a clearly erroneous standard. *Carter v. Smith*, 170 S.W.3d 402, 409 (Ky. App. 2004). "The 'clearly erroneous' standard is sufficiently broad to permit the reviewing court to adopt a method of review which best fits the questions involved and the particular facts in a specific case. The appellate court should review each case according to what is most appropriate under the specific circumstances." *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). "The reviewing court should not substitute findings of fact for those of the trial court where they were not clearly erroneous." *Id.* (citing *Bennett v. Horton*, 592 S.W.2d 460 (Ky. 1979)).

> "[T]he dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, *i.e.*, whether or not those findings are supported by substantial evidence. 'Substantial evidence' is '[e]vidence that a reasonable mind would accept as adequate to support a conclusion' and evidence that, when 'taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men.'"

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (internal citations omitted).

Issues of law are reviewed *de novo*, giving no deference to the lower courts. *Commonwealth v. Love*, 334 S.W.3d 92, 93 (Ky. 2011).

III. ANALYSIS.

A. Grandparents have no right to intervene in a termination of parental rights proceeding.

The rights of a party to intervene are governed by Kentucky Rule of Civil Procedure (CR) 24.01 and 24.02. CR 24.01, titled Intervention of right, states as follows:

> (1) Upon timely application anyone shall 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 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.
>
> (2) Anyone possessing a statutory right of intervention under (1)(a) above, may move the court to intervene in a pending action and, on failure of a party to file an objection within ten (10) days to the intervention and a notice of hearing on the objection, have an order allowing the intervention without appearing in court for a hearing.

This Court has repeatedly applied CR 24.01 to family law cases to determine whether or not a party should have been allowed to intervene in an action. The most recent of those cases was *A.H. v. W.R.L.*, 482 S.W.3d 372, 374 (Ky. 2016), in which this Court held that biological mother's former same-sex partner had a cognizable interest, pursuant to subsection (b), in maintaining a relational connection with the child. Such cognizable interest granted the entitlement to intervene as a matter of right in the step-parent adoption proceeding brought by the biological mother's new spouse. *Id.* at 373-74. In *Baker v. Webb*, this Court held that a child's second cousins had a

sufficient, cognizable legal interest in the adoption proceeding initiated by the child's foster parents. 127 S.W.3d 622, 625 (Ky. 2004).

In the interim between this Court's decisions in *Baker* and *A.H.*, we addressed grandparents' right to intervene in a termination of parental rights proceeding in *Com., Cabinet for Health and Family Services v. L.J.P.*, 316 S.W.3d 871 (Ky. 2010). In that case, the biological parents lost custody of the child in a dependency, neglect, and abuse action and the child was placed in foster care. *Id.* at 872. The Cabinet filed a petition for involuntary termination of parental rights, followed by the biological parents filing of a petition to voluntarily terminate their parental rights conditioned upon the child being placed for adoption with the grandparents. *Id.* Grandparents moved to intervene in the termination of parental rights proceeding, which was denied by the family court. *Id.* The Court of Appeals reversed, holding that the grandparents had a right to intervene pursuant to CR 24.01. This Court reversed the Court of Appeals.

In analyzing the right of grandparents to intervene in the action, the Court first noted that intervention is not mentioned anywhere in the termination statutes. *Id.* at 876. The parties to an involuntary termination proceeding are enumerated by statute and include "the child, the petitioner, the Cabinet (if not the petitioner), the birth parents, and qualifying putative fathers." Kentucky Revised Statute (KRS) 625.060. For voluntary terminations, parties are the parent seeking termination and a guardian ad litem to represent the best interest of the child. KRS 625.041. "[K[RS 625.060

does not require non-parental relatives or potential custodians to be given notice of involuntary termination proceedings." *L.J.P.*, 316 S.W.3d at 876. "A termination proceeding concerns the relationship between parent and child, and not any other party. The Appellees, as grandparents, simply have no cognizable rights to protect or enforce in a termination proceeding." *Id.*

These cases provide ample guidance for resolving, or rather clarifying, the issue at hand. *A.H.* and *Baker* addressed intervention in adoption cases, specifically, adoption cases in which the termination of a parent's rights was not necessary or had already been completed. On the other hand, in *L.J.P.*, the Court addressed intervention in the underlying termination proceeding and concluded that no such right of intervention by the grandparents existed. The case before us is similar to *L.J.P.* The Cabinet's permanency goals from the underlying neglect cases had changed from reunification to adoption. The precursor to the Cabinet being able to place the child for adoption is, necessarily, the initiation of a termination proceeding. Therefore, *A.H.* and *Baker* are not applicable. We reiterate the holding of *L.J.P.* and hold that P.B. was not entitled to intervene in this termination proceeding.

While *L.J.P.* is controlling precedent on this issue, this Court has concern with its holding and the future implications it may have on grandparents' care and custody of grandchildren. The seminal case on grandparents' rights is *Troxel v. Granville*, 530 U.S. 57 (2000). In *Troxel*, the United States Supreme Court held that a fit parent is presumed to act in the best interest of the child regarding the child's visitation with grandparents. 530 U.S. 57, 68-69. Absent

a showing of the parent's unfitness, the Court will not interfere with the parent-child relationship. *See id* at 68-69 ("Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.") (internal citations omitted).

Further, our General Assembly has provided statutory visitation rights for grandparents in KRS 405.021. The Circuit Court may grant reasonable visitation rights to the paternal or maternal grandparents and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so; "[o]nce a grandparent has been granted visitation rights under this subsection, those rights shall not be adversely affected by the termination of parental rights belonging to the grandparent's son or daughter, who is the father or mother of the child visited by the grandparent, unless the Circuit Court determines that it is in the best interest of the child to do so." KRS 405.021(1)(a).

It is true that any rights grandparents have are a natural corollary to, and flow through, the rights of the biological parents. Termination of parental right proceedings are only concerned with the parental relationship; however, grandparents' rights are no doubt impacted by such proceedings. In a climate where so many parents are plagued by outside forces impacting their ability to care and provide for their children, such as the current opioid epidemic, communities and courts alike are calling on grandparents to take over where

the natural parents cannot. We give pause, then, in examining *L.J.P.*, as to the wisdom of preventing grandparents from intervening, when appropriate, in TPR proceedings. However, this remains a decision for another day, because as discussed below, P.B.'s failure to attempt intervention in the TPR proceedings is fatal to this appeal and the continued wisdom of *L.J.P.* has not been questioned in the case at bar.

P.B. maintains that this right of intervention existed because P.B. had initiated a proceeding in the circuit court, family division and had previously attempted to intervene in the neglect cases. We are unpersuaded.

We first point to the failure to file a motion to intervene in the termination proceeding. It appears P.B. argues that this failure relates to the confidential nature of such proceedings and because of P.B.'s lack of notice of the proceedings. It is true that termination of parental rights proceedings are confidential and P.B. would not have received notice of such proceedings. However, the underlying neglect cases were confidential as well. Yet, counsel filed a motion to intervene in those matters. While confidentiality provides more difficulty to the intervenor, it remains possible to move the court to intervene.

We further point to the fact that the child's biological Mother, P.B.'s daughter, voluntarily terminated her parental rights. Additionally, the biological father never participated in any proceeding below before his rights were involuntarily terminated. This is not a case where both parents were making an effort to maintain a fundamental relationship with their children.

While we cannot speculate as to why the biological Mother did not inform P.B. of the proceeding, the fact remains that P.B. did not attempt intervention in the termination proceeding. Despite our case law holding grandparents have no right to intervene in TPR cases, the complete failure of P.B. to file a motion to intervene in such cases indicates there is no error for this Court to review.

B. Future guidance.

The only issue before this Court is whether or not grandparents have a right to intervene in a termination of parental rights proceeding. P.B. further argues that this right of intervention exists because the grandparents had a pending civil action and had made attempts to intervene in the underlying juvenile actions. While we have addressed the only issue before us above, we further dispel P.B.'s argument that a right of intervention stems from the other court filings, and we take this opportunity to remind courts and litigants of proper procedure going forward.

1. Private custody petition.

P.B. filed a private custody action pursuant to KRS 620.110. This statute states:

> Any 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. During the pendency of the petition for immediate entitlement the orders of the District Court shall remain in effect.

We know that the children had resided with P.B. for a brief period in 2012 and from 2013 through 2014. There is also a Cabinet report in the

record indicating that the children were residing with P.B. for a brief period during the pendency of the neglect proceeding. Pursuant to a temporary removal hearing, the children were placed with a foster family after the Cabinet indicated P.B. had violated a court order.[6] Pursuant to KRS 620.110, P.B. was aggrieved by the temporary order, and as such was entitled to file a private custody petition in Clark Circuit Court, Family Division. P.B. did file such a petition and was entitled to an expeditiously held hearing according to the Civil Rules. It appears from the record that P.B. never received that hearing due to the trial court's desire to complete the neglect cases first.

Such reasoning by the trial court was in error. However, such error is indeed harmless because both the trial court and P.B. fail to recognize the implications of an action for immediate entitlement under the statute. KRS 620.110 provides for an original action "in the nature of habeas corpus." *B.D. v. Com., Cabinet for Health and Family Services*, 426 S.W.3d 621, 622-23 (Ky. App. 2014) (citing *Moore v. Dawson*, 531 S.W.2d 259, 262 (Ky. 1976)). The circuit court, family division shall hear the action despite ongoing proceedings in district (DNA) court.

> KRS 610.010 states that the entry of a circuit court order cancels all *prior* orders of the District Court in conflict with the Circuit Court order, but it does not speak to the impact of district court orders entered *after* the circuit court order. The circuit court does not lose jurisdiction over a custody case when the district court enters the subsequent order, but a litigant may need a new circuit court order to override the district court order.

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[6] It appears that P.B. allowed Mother's third child, not A.G. or R.G., to have unsupervised contact with Mother.

Louise Everett Graham & James E. Keller, 15 Ky. Prac. Domestic Relations L. § 6:4 (citing KRS 610.010).[7] The Clark Circuit Court, Family Division should have heard P.B.'s petition for immediate entitlement, even if the result would have been a back and forth of competing, controlling orders from the family docket and DNA docket. Here, Clark County has an established family court. As such, the family court judge hears matters pertaining to custody and those pertaining to DNA actions. In counties without family courts, a circuit court judge hears custody matters and a district court judge hears DNA cases. Competing and controlling orders are far from ideal. But the possibility of such is present due to family court (custody) and district court (DNA) matters being separate and distinct. Even when the cases deal with the same family and the same parties, custody and DNA matters can present two different cases within two different tribunal tracts, even when heard by the same judge, as was the case here.

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[7] KRS 610.010(7). Nothing in this chapter shall deprive other courts of the jurisdiction to determine the custody or guardianship of children upon writs of habeas corpus or to determine the custody or guardianship of children when such custody or guardianship is incidental to the determination of other causes pending in such other courts; nor shall anything in this chapter affect the jurisdiction of Circuit Courts over adoptions and proceedings for termination of parental rights.

KRS 610.010(9). [H]owever, if the case involves allegations of dependency, neglect, or abuse, no emergency removal or temporary custody orders shall be effective unless the provisions of KRS Chapter 620 are followed. Such orders shall be entirely without prejudice to the proceedings for the permanent custody of the child and shall remain in effect until modified or set aside by the court. Upon the entry of a temporary or final judgment in the Circuit Court awarding custody of such child, all prior orders of the juvenile session of the District Court in conflict therewith shall be deemed canceled. This section shall not work to deprive the Circuit Court of jurisdiction over cases filed in Circuit Court.

However, we are not convinced that the outcome would have been different had the circuit court, family division heard the private custody petition. The DNA court could have still entered findings of neglect against the biological parents despite any custody award in the private action. Such findings against the parents would not be contrary to any custody award for P.B.; thus, the orders could coexist. The Cabinet could have still proceeded with a TPR proceeding in the circuit court, family division. Despite P.B. having prior physical possession of the child, pursuant to *L.J.P.* above, P.B. would not have the right to intervene in the termination proceeding. We are therefore constrained from conjuring a different outcome. These are complex problems, often occurring in highly charged custodial atmospheres. We hope to provide some clarity to our courts in the management of what historically were strictly civil court (custody) and district court (DNA) matters.

2. Intervention in DNA cases.

P.B. filed a motion to intervene in the underlying neglect action and such motion was sustained only as to consideration of custody. According to P.B., no notice of proceedings was provided and P.B. was not allowed to participate in the DNA proceedings.

At the outset, it could be confusing why the trial court would grant the motion as to consideration of custody but not allow P.B. to be present in subsequent hearings. However, a closer look at the specific facts, procedural timeline, and relevant statutes reveals that the trial court's actions were not an abuse of discretion. The temporary removal order was entered by the trial

court on July 23, 2015, and the children were committed to the custody of the Cabinet. P.B. filed the first motion for joinder on May 24, 2016. This ten-month delay is important.

KRS 620.100(5) states:

> Foster parents, preadoptive parents, or relatives providing care for the child shall receive notice of, and shall have a right to be heard in, any proceeding held with respect to the child. This subsection shall not be construed to require that a foster parent, preadoptive parent, or relative caring for the child be made a party to a proceeding solely on the basis of the notice and right to be heard.

While P.B. provided care for the child previously, P.B. was not providing care for the child when the motions for joinder and intervention were filed. The trial court could still consider P.B. as a possibility for placement of the children, along with the Cabinet's recommendation as to placement, but the trial court was not bound to make P.B. a party or provide notice. Therefore, we can legally find no error in the trial court's actions.

However, as stated in *Wallace v. Wallace*, 224 S.W.3d 587, 591 (Ky. App. 2007):

> [K]entucky has created the family court system. The "one judge, one family" approach is a remedy to the fractionalization of family jurisdiction. In 1988 the Legislative Research Committee appointed a Task Force to examine the need for and feasibility of establishing a family court system. In its report, the Task Force found that fractionalization leads to a "waste of time and delays, that it increases the time and expense involved in these cases, and creates an inordinate delay between intake and final resolution." Hence, our current family court system was created. In those circuits where the Supreme Court has designated a family court

division, matters set forth in KRS 23A.100, including child custody and visitation, are now exclusively vested in the family court.[8]

Better practice would have been to provide P.B. with notice and the ability to participate in the proceedings, as custody was to be determined. The trial court was not bound to award custody to P.B., or any other party for that matter, as the best interest of the child is paramount. Continuity and consistency in practice and procedures in our family courts is always the goal, and ultimately best serves families in the Commonwealth.

IV. CONCLUSION.

For the foregoing reasons, we affirm the dismissal by the Court of Appeals and, consequently, affirm the actions of the Clark Circuit Court.

All Sitting. All concur.

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[8] KRS 23A.100 gives the family court division of Circuit Court jurisdiction in child custody, visitation, adoption, termination of parental rights, and dependency, neglect and abuse proceedings, among others.