

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

BRIAN CLARK, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-07-049
 :
 - vs - : OPINION
 : 4/18/2011
 :
 NICHOLE MALICOTE, et al., :
 :
 Defendants-Appellants. :

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 09JG16757

Douglas A. Ball, 233 East Main Street, Batavia, Ohio 45103, for plaintiff-appellee, Brian Clark

George P. Montgomery, 45 North Market Street, Batavia, Ohio 45103, for defendant, Nichole Malicote

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HENDRICKSON, J.

{¶1} Intervenor-appellant, Brandon Shaw, appeals a decision of the Clermont County Juvenile Court dismissing his motion to intervene in an action filed by plaintiff-appellee, Brian Clark. For the reasons outlined below, we affirm the decision of the juvenile court.

{¶2} Defendant Nichole Malicote is the biological mother of B.C., born May 21, 2008.¹ Malicote and Clark executed an acknowledgment of paternity on May 23, 2008. The acknowledgment was sent to the Office of Child Support in the Ohio Department of Job and Family Services and entered in the birth registry. The document was also forwarded to the Ohio Department of Health for birth certificate reconciliation and storage. Clark was listed as the father of B.C. on the child's birth certificate.

{¶3} Shaw first became aware of the likelihood that he was the biological father of B.C. approximately ten months after the child's birth. Prior to that time, Malicote advised Shaw that he was not the father. Shortly after becoming aware of the likelihood of his paternity, Shaw paid to undergo a DNA test. The results of the test, returned on April 27, 2009, indicated that there was a 99.69% probability that Shaw was B.C.'s biological father.

{¶4} Ten days later, on May 7, 2009, Clark filed a complaint against Malicote seeking to be declared the father of B.C. Clark also prayed for an order designating him the residential parent and legal custodian of the child or, alternatively, a shared parenting plan. On June 24, 2009, the juvenile court ordered Clark to submit to DNA test. The results of the test indicated that there was a 0.00% probability that Clark was the biological father of B.C. The results were admitted into evidence in Clark's action on July 30, 2009.

{¶5} On October 22, 2009, Shaw moved to intervene in Clark's action for the purpose of establishing parentage rights pursuant to R.C. 3111.07. Shaw further requested that the court terminate any companionship rights between Clark and B.C. Clark moved to dismiss Shaw's motion, arguing that the acknowledgement of paternity signed by Clark and Malicote was final and enforceable under R.C. 3111.25. On June 30, 2010, the juvenile court issued an entry dismissing Shaw's motion. This appeal followed.

1. Malicote is not a party to this appeal.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY DENYING HIS MOTION TO INTERVENE IN DIRECT CONVRAVENTION OF OHIO LAW."

{¶8} Shaw argues that he should be permitted to intervene in Clark's action because R.C. 3111.07(A) requires that any man alleging himself to be the natural father of the child must intervene in an action for parentage.² Shaw further contests the finality of the acknowledgment of paternity signed by Clark and Malicote as it pertains to him. According to Shaw, the statutes creating a conclusive presumption of paternity based upon a signed acknowledgment were designed to bind only the signatories to the document, not third parties. See R.C. 3111.25 to 3111.27.

{¶9} We review the juvenile court's decision dismissing Shaw's motion to intervene for an abuse of discretion. *Kleemeyer v. Hummel* (May 6, 1996), Brown App. No. CA95-10-017, at 12-13. An abuse of discretion connotes that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} Our discussion of the present matter is guided by the legislative enactment commonly referred to as Ohio's Uniform Parentage Act, R.C. 3111.01 et seq. In his complaint, Clark initially prays to be declared the father of B.C. Despite Shaw's arguments to the contrary, this prayer does not make the current matter a paternity action. Rather, Clark's request to be declared the father seems to reflect a lack of understanding of the statutory scheme outlined in R.C. Chapter 3111. A comprehensible explanation of this scheme was offered by the author of the following scholarly article:

2. R.C. 3111.07(A) provides, in pertinent part: "* * * [E]ach man alleged to be the natural father shall be made parties to the action brought pursuant to sections 3111.01 to 3111.18 of the Revised Code or, if not subject to the jurisdiction of the court, shall be given notice of the action pursuant to the Rules of Civil Procedure and shall be given an opportunity to be heard."

{¶11} "The current version of the Ohio Parentage Act supplies three primary mechanisms by which the father-child relationship may be established. First, the relationship may be established by a civil action, as provided in ORC §§ 3111.01 to 3111.18. * * * Second, the father-child relationship may be established by an acknowledgment of paternity, as provided in ORC §§ 3111.20 to 3111.35. * * * Third, the father-child relationship may be established by an administrative determination of paternity, as provided in ORC §§ 3111.38 to 3111.54." Furniss, *The Uncertain Status of Non-Marital Children Under Ohio Inheritance Laws* (2009), 20 Ohio Prob. L.J. 45.

{¶12} As indicated, Clark and Malicote signed an acknowledgement of paternity on May 23, 2008. Under R.C. 3111.25, the acknowledgment became final and enforceable following the passage of certain circumstances, without ratification by a court. The date the acknowledgement became final was July 23, 2008.³ At that point in time, B.C. became Clark's child "as though born to him in lawful wedlock" pursuant to R.C. 3111.26. Notwithstanding Clark's request in his complaint to be declared the father of B.C., the operation of these statutes settled the issue of paternity as to Clark. Therefore, Clark's complaint cannot logically be construed as a paternity action.

{¶13} Shaw's motion to intervene cites R.C. 3111.07 as the basis for allowing him to intervene in Clark's action.⁴ However, because Clark's lawsuit is not a paternity action, Shaw may not properly invoke the statutes governing a civil paternity action, R.C. 3111.01 to

3. Pursuant to R.C. 3111.25 an acknowledgement of paternity becomes final and enforceable without ratification of the court when the acknowledgement has been entered into the birth registry and the 60-day time period for rescission has passed. In this case, the acknowledgement was filed on June 10, 2008 and the 60-day rescission period expired on July 22, 2008.

4. Although Clark's complaint did not cite any statutes, he asserts in his appellate brief that his complaint was filed pursuant to R.C. 3111.25. However, the language of R.C. 3111.25 does not create a cause of action. The statute provides, in its entirety: "An acknowledgment of paternity is final and enforceable without ratification by a court when the acknowledgment has been filed with the office of child support, the information on the acknowledgment has been entered in the birth registry, and the acknowledgment has not been rescinded and is not subject to possible rescission [sic] pursuant to section 3111.27 of the Revised Code."

3111.18, as a means to intervene.

{¶14} Despite the confusion exhibited by the parties, Clark's action is most properly construed as a legal custody action. Although the issue of custody has never been litigated, Malicote currently possesses sole legal custody and residential parent status over B.C. by operation of R.C. 3109.042. The statute provides:

{¶15} "An unmarried female who gives birth to a child is the sole residential parent and legal custodian of the child until a court of competent jurisdiction issues an order designating another person as the residential parent and legal custodian."

{¶16} Clark's complaint requests an order designating him the residential parent and legal custodian of B.C. Therefore, the complaint should be interpreted as a petition for legal custody under R.C. 2151.23(A)(2). Although R.C. 3109.042 granted Malicote legal custody over B.C. by operation of law, Clark's action would still be treated as an initial custody determination. See *Flax v. Wise*, Fayette App. No. CA2007-05-017, 2008-Ohio-3076, ¶10, fn. 1. See, also, *Dunn v. Marcum*, Clark App. No. 08-CA-112, 2009-Ohio-3015, ¶7; *Self v. Turner*, Mercer App. No. 10-06-07, 2006-Ohio-6197, ¶7.

{¶17} R.C. 2151.23(F)(1) requires that the juvenile court exercise its jurisdiction in accordance with, among other sections, R.C. 3109.04. *In re L.G.*, Butler App. No. CA2006-05-116, 2007-Ohio-591, ¶5. Thus, the court will be tasked with considering B.C.'s best interests in fashioning its custody award. See R.C. 3109.04(F)(1). See, also, *Henry v. Stutzman* (Nov. 13, 2001), Madison App. No. CA2001-01-001, at 5.

{¶18} There is no doubt that Shaw, as the biological father of B.C., has an interest in the subject matter of Clark's legal custody proceeding. Civ.R. 24 authorizes interested parties to intervene in an action as a matter of right or permissively under certain circumstances. However, permitting Shaw to intervene under Civ.R. 24 may be troublesome on two fronts. First, Shaw's paternity results are in the record only by virtue of his motion to

intervene, which is a preliminary pleading. Otherwise, his status as B.C.'s biological father has not officially been admitted as evidence in Clark's legal custody action. Second, it is not entirely clear that a legal custody action is the proper procedural posture during which to challenge an acknowledgment of paternity. Cf. *In re Custody of Davis* (1987), 41 Ohio App. 3d 81, paragraph six of the syllabus (considering a former version of the acknowledgment statute and stating, "[o]ne may not attack the validity of an [] acknowledgement of paternity in defending an action for custody and support").

{¶19} The juvenile court was right to deny Shaw's motion to intervene, but its analysis was flawed. The court reasoned that Shaw could not intervene in Clark's action because the acknowledgment of paternity had become final and enforceable. As a result, the court concluded, B.C. was the child of Clark as if born to him in lawful wedlock. In support, the court cited *Jennifer C. v. Tony M.D.*, Clermont App. No. CA2005-01-005, 2005-Ohio-5050.

{¶20} *Jennifer C.* involved an acknowledgement of paternity that had not become final and enforceable because the statutory requirements had not been fulfilled. Here, there is no dispute that the acknowledgement signed by Clark and Malicote satisfied the requirements set forth in R.C. 3111.25 and became final and enforceable. The juvenile court thus erred in relying upon an inapposite case issued by this court to support its decision denying Shaw's motion to intervene. This defect in the juvenile court's decision, however, is not grounds for reversal. *State v. Strunk*, Butler App. No. CA2010-09-085, 2011-Ohio-417, ¶15 (stating, "a proper decision by a lower court that is based upon improper grounds is not cause for reversal * * * [and] a reviewing court is without authority to reverse a correct judgment simply because it was reached for the wrong reason").

{¶21} We emphasize that our holding today does not foreclose Shaw from pursuing relief as the biological father of B.C. A finding that the acknowledgment in the case at bar is final as to Clark means that Clark is B.C.'s "legal father" at present. *In re Guardianship of*

Elliott, Putnam App. No. 12-10-02, 2010-Ohio-5405, ¶22. Such a finding does not automatically divest Shaw of his rights as the biological father of B.C., however. In other words, the finality of the acknowledgment does not amount to a permanent deprivation of Shaw's parental rights as would an adoption or an award of permanent custody to a children services agency.

{¶22} One potential avenue for Shaw to pursue is to file his own civil paternity action under R.C. 3111.01 to 3111.18 and, once paternity is established, to seek legal custody of B.C. See *Kleemeyer*, Brown App. No. CA95-10-017 at 13. After all, the right of a natural parent to rear his child has been recognized as a fundamental right protected by the United States Constitution and the Ohio Constitution. See *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S.Ct. 1388 (holding that natural parents possess a fundamental liberty interest in the care, custody, and management of their children, and this interest "does not evaporate simply because they have not been model parents"). See, also, *In re Hockstock*, 98 Ohio St.3d 238, 2002-Ohio-7208, ¶16 (incorporating the *Santosky* holding and designating this fundamental liberty interest the "overriding principle" in custody cases between a parent and a nonparent). Per R.C. 3111.10(C), genetic test results may serve as evidence of Shaw's paternity in an action brought under R.C. 3111.01 to 3111.18.

{¶23} If Shaw pursues his own action and the necessary parties are joined, this would place the issues of Shaw's and Clark's paternity simultaneously before the juvenile court. The court could then decipher what ruling would be in B.C.'s best interests in view of the convoluted facts and circumstances of this particular case. Cf. *Weikle v. Peake*, Union App. No. 14-2000-09, 2000-Ohio-1711. On one hand, the Ohio Supreme Court has lauded finality over perfection in cases involving determinations of parentage, visitation, and child support. *Strack v. Pelton*, 70 Ohio St.3d 172, 175, 1994-Ohio-107. On the other hand, in the words of our own court, it is not necessarily in B.C.'s best interests to "perpetuate the fiction that

[Clark] is his father, when in fact he is not[.]" *Taylor v. Haven* (1993), 91 Ohio App.3d 846, 852. See, also, *Strack* at 176 (stating, "[t]here is no reason for this court to indulge in a legal fiction which forces the parties involved to continue living a lie") (Pfeifer, J., dissenting).

{¶24} Based upon the foregoing analysis, we conclude that the juvenile court did not abuse its discretion in denying Shaw's motion to intervene in Clark's action. *Kleemeyer*, Brown App. No. CA95-10-017 at 12-13. Accordingly, Shaw's first assignment of error is overruled.

{¶25} Assignment of Error No. 2:

{¶26} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN FAILING TO AFFORD APPELLANT AN OPPORTUNITY TO BE HEARD AND TO ACCORD DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS OF OHIO AND THE UNITED STATES."

{¶27} Shaw contends that his fundamental rights as the biological father of B.C. require that he be afforded due process before those rights are terminated.

{¶28} We do not find it appropriate to address Shaw's constitutional argument at this time because the issue is not yet ripe for review. See, e.g., *In re M.D.*, Butler App. No. CA2006-09-223, 2007-Ohio-4646, ¶19. Shaw is a third party to which the acknowledgement signed by Clark and Malicote and the statutes pertaining thereto *have not actually been applied yet*. As Shaw concedes in his intervenor brief, filed with the juvenile court on March 31, 2010, the acknowledgment statutes "specifically apply *only* to Brian Clark and Nichole Malicote." (Emphasis in original.) On the other hand, if Shaw were to file his own paternity action and was foreclosed from maintaining the action due to the finality of the acknowledgment signed by Clark and Malicote, *then* he may acquire standing to attack the constitutionality of the acknowledgment statutes as applied to him.

{¶29} Moreover, Shaw did not directly challenge the constitutionality of any of the statutes contained in Ohio's Uniform Parentage Act before the juvenile court. His intervenor brief argued that he has a fundamental due process right to make decisions regarding the care, custody, and control of B.C. However, Shaw cited this right to support why his wish to terminate B.C.'s visitation with Clark should be upheld. He did not argue that any of the statutes in Ohio's Uniform Parentage Act violated his constitutional right to rear B.C. Therefore, Shaw neglected to properly preserve the argument for appellate review. *Lay v. Chamberlain* (Dec. 11, 2000), Madison App. No. CA99-11-030, at 21.

{¶30} Due to the fact that Shaw's constitutional argument was not properly raised at the juvenile court level, and because the issue is not yet ripe for review, we decline to address his second assignment of error at this time.

{¶31} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.

[Cite as *Clark v. Malicote*, 2011-Ohio-1874.]