

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

IN RE: B.O., : **O P I N I O N**
ALLEGED DEPENDENT CHILD : **CASE NO. 2011-L-055**

Civil Appeal from the Lake County Court of Common Pleas, Juvenile Division, Case No. 2007 DP 1002.

Judgment: Affirmed.

Gregory J. Zitkiewicz, Gregory J. Zitkiewicz, Attorney At Law, L.L.C., 30432 Euclid Avenue, Suite 101, Wickliffe, OH 44092 (For Appellant-Deborah Kerby).

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P. O. Box 490, Painesville, OH 44077 (For Appellee-Lake County Department of Job and Family Services).

Edward A. Wadding, 3537 North Ridge Road, Perry, OH 44081 (Guardian ad litem).

MARY JANE TRAPP, J.

{¶1} Appellant, Deborah Kerby, appeals from the decision of the Lake County Court of Common Pleas, Juvenile Division, denying her motion to intervene in a permanent custody case regarding her minor granddaughters, D.D.O. and B.O. The motion hearing was held before a magistrate, whose findings were adopted by the trial court. It is from the trial court's acceptance of the magistrate's findings that Ms. Kerby

appeals. For the following reasons, we find that the trial court did not err in adopting the magistrate's decision and denying Ms. Kerby's motion to intervene.

{¶2} Substantive Facts and Procedural History

{¶3} In 1995, Ms. Kerby had custody of her daughter, Linda Owens', eldest three children ("Rice children"). Sometime in 1995, the Rice children were taken into temporary custody by the Lake County Department of Job and Family Services ("DJFS"), because Ms. Kerby had abandoned them at an emergency room. Two years later, in 1997, the Rice children were still in temporary custody when DJFS sought permanent custody of all three. After what appears to have been a two-year absence, Ms. Kerby filed a motion for and was granted visitation. A home study of Ms. Kerby was done to determine the suitability of placement with her.

{¶4} The social worker at the time, Ms. Guarnieri, conducted the home study and was reluctant to recommend placement of the Rice children with Ms. Kerby. Ms. Guarnieri had serious concerns about Ms. Kerby based upon information provided to her by mental health professionals, and her own personal interactions with Ms. Kerby. Ms. Kerby was "very difficult to work with, very accusatory, would be yelling at [Ms. Guarnieri] one minute and very pleasant to [Ms. Guarnieri] the next ***." Furthermore, the "report from the [mental health] services providers was very concerning."

{¶5} Despite DJFS's concerns, Ms. Kerby was granted temporary custody of the Rice children in February of 1998, by agreement. This custody agreement, however, was executed with reservations, and the trial court ordered protective supervision. Once the children were transferred to Ms. Kerby's custody, DJFS visited the Kerby home monthly to monitor the well-being of the children, and ensure Ms. Kerby

was complying with the case plan. Within two months of placement with Ms. Kerby, the Rice children expressed to Ms. Guarnieri that Ms. Kerby was physically abusing them. As a result, DJFS filed an abuse complaint against Ms. Kerby in October of 1998.

{¶6} A second abuse complaint was filed in April of 1999, and DJFS was granted emergency temporary custody of the Rice children. The parties stipulated to a finding of abuse, and the children remained in the custody of DJFS with Ms. Kerby being granted visitation.

{¶7} Eventually, even DJFS supervised visitation caused concern for the children's safety and well-being. DJFS social workers observed Ms. Kerby berating the children, speaking excessively harshly to them, punishing them for no real reason, and leaving early on two occasions after having become enraged. The children's therapist became "concerned and recommended that visitation not continue with the grandmother due to her deteriorating mental health ***, it was extremely stressful to them and they were becoming very emotionally distraught over it and were having a very hard time functioning because of it ***." Visitation was terminated in July of 1999 until further court order, and, in 2001, permanent custody of the Rice children was granted to DJFS.

{¶8} In May of 2007, DJFS filed two complaints, alleging that Ms. Kerby's youngest granddaughters, D.D.O and B.O. ("Owens girls"), were abused and dependent children. At the time, both children resided with their biological parents, Linda and Brad Owens. In July of 2007, the parties to the abuse and dependency case reached an agreement as to the facts alleged, and DJFS instituted protective supervision of the Owens girls. A case plan was adopted.

{¶9} Between July 2007 and September 2008, semi-annual reviews were conducted and adopted, and protective supervision was continued upon completion of each review. In September 2008, upon motion by DJFS, the trial court found that it was not in the children's best interest to remain in their parents' home. Temporary custody was granted to DJFS, and the Owens girls were removed to a certified foster home.

{¶10} In November 2008, a semi-annual review was conducted and adopted, and no changes were made to the case plan. DJFS's temporary custody was continued. In May of 2009, another semi-annual review was conducted and adopted. Again, no changes were made to the case plan; however, DJFS indicated it intended to seek permanent custody of both girls, unless Mrs. Owens made significant progress on her case plan. Temporary custody was again extended in August of 2009.

{¶11} In November 2009, a semi-annual review was conducted and adopted, in which no changes were made to the case plan, and DJFS's temporary custody was continued. In February 2010, Mr. Owens was removed from the case plan and visitation plan, and DJFS's temporary custody was again continued. In March 2010, DJFS filed a motion to extend temporary custody, and all pending motions were set for trial.

{¶12} On April 29, 2010, Ms. Kerby filed a pro se motion requesting to be made a party in the matter and for visitation. In early May 2010, another semi-annual review was conducted and adopted, with DJFS's temporary custody again being continued. In late May, Ms. Kerby's request to intervene was denied for failure to properly effect service. In August 2010, Ms. Kerby, through counsel, re-filed her motion to intervene, and on October 12, 2010, DJFS filed a motion for permanent custody.

{¶13} A hearing on the motion to intervene was set for January 7, 2011, and trial was scheduled for January 24 and 25, 2011. After the motion hearing on January 7, the magistrate denied Ms. Kerby's motion to intervene. Ms. Kerby retained new counsel, who filed an objection to the magistrate's decision on her behalf. Upon review of the magistrate's decision, the trial court adopted the magistrate's decision and denied Ms. Kerby's motion to intervene. The case proceeded on DJFS's motion for permanent custody, to which Mrs. Owen's ultimately agreed.

{¶14} Ms. Kerby filed a timely notice of appeal and now brings the following assignments of error:

{¶15} "[1.] The trial court erred to the prejudice of the movant-appellant when it conducted a hearing on her motion that was fundamentally unfair.

{¶16} "[2.] The trial court erred to the prejudice of the movant-appellant when it denied her motion to intervene."

{¶17} Standard of Review

{¶18} The standard of review of a trial court's denial of a motion to intervene is abuse of discretion. *In re Estate of Piunno* (Sept. 10, 1999), 11th Dist. No. 98-G-2153, 1999 Ohio App. LEXIS 4202, *3, citing *Jamestown Village Condominium Owners Assn. v. Market Media Research, Inc.* (1994), 96 Ohio App.3d 678, 694. Furthermore, "[o]n appeal, a trial court's adoption of a magistrate's decision will not be overruled unless the trial court abused its discretion in adopting the decision." *Brown v. Gabram*, 11th Dist. No. 2004-G-2605, 2005-Ohio-6416, ¶11, citing *Lovas v. Mullet* (July 29, 2001), 11th Dist. No. 2000-G-2289, 2001 Ohio App. LEXIS 2951, *5-6.

{¶19} “This court has recently stated that the term ‘abuse of discretion’ is one of art, connoting judgment exercised by a court, which does not comport with reason or the record.” *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. The Second Appellate District recently adopted this definition of the abuse-of-discretion standard in *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, citing Black’s Law Dictionary (8 Ed.Rev.2004) 11.

{¶20} Fairness of the Motion Hearing

{¶21} In her first assignment of error, Ms. Kerby alleges that the trial court conducted a fundamentally unfair hearing when it did not allow her to present rebuttal evidence at the conclusion of DJFS’s case. Nothing in the record, however, suggests that the motion hearing was unfair.

{¶22} Ms. Kerby argues that the magistrate did not allow her to present rebuttal evidence after DJFS’s submission of evidence related to her mental health status and a previous abuse adjudication. She relies on *Katz vs. Enzer* (1985), 29 Ohio App.3d 118, to support the position that she was entitled to present rebuttal evidence. This reliance is misplaced, however, because in *Katz* the court denied outright the appellant’s express request to present rebuttal evidence. A review of the record reveals that Ms. Kerby never requested the opportunity to present rebuttal evidence, nor did the court expressly or even indirectly deny Ms. Kerby the opportunity to present such evidence.

{¶23} At the end of the hearing we note the following colloquy:

{¶24} THE COURT: They’ve been in custody for how long?

{¶25} THE WITNESS: Over two years.

{¶26} THE COURT: Any other questions?

{¶27} MR. SOMOGYI [attorney for Linda Owens]: No, Your Honor.

{¶28} MR. WADDING [guardian ad litem] : No, Your Honor.

{¶29} MS. PHILLIS [attorney for DJFS]: No, Your Honor.

{¶30} THE COURT: Just so I have this straight, with regard to these other three children, there was a finding of abuse and Ms. Kerby is abuser?

{¶31} THE WITNESS: (No verbal response.)

{¶32} THE COURT: Okay. Any questions as a result of my questions?

{¶33} MS. PHILLIS: No, Your Honor.

{¶34} THE COURT: Okay. That ends our hearing. Thank you. We are adjourned. Motion to intervene is denied.

{¶35} Furthermore, the trial court judge who reviewed the magistrate's findings, expressly stated that "[t]he Court finds that the maternal grandmother had the opportunity at the hearing to call any rebuttal witnesses that she desired. She failed to do so."

{¶36} We find no request for rebuttal in the trial court record, and no proffer of rebuttal evidence; thus we find no error in the conduct of the motion hearing. Ms. Kerby's first assignment of error is without merit.

{¶37} Denial of the Motion to Intervene

{¶38} In her second assignment of error, Ms. Kerby argues that the trial court erred to her prejudice when it overruled her objections and accepted the magistrate's findings denying her motion to intervene. Ms. Kerby claims that she stood *in loco parentis* and, thus, was entitled to intervene under *In re: Schmidt* (1986), 25 Ohio St.3d

331. She quotes *In re Schmidt* and suggests that it stands for the proposition that “[i]ntervention by grandparents in a permanent custody proceeding is appropriate where the grandparents have a legal right to or a legally protectible interest in custody or visitation with their grandchild, where the grandparents have stood *in loco parentis* to their grandchild, or where the grandparents have exercised significant parental control over, or assumed parental duties for the benefit of, their grandchild. Where any of these circumstances are present, it is my view that a denial of the grandparents’ motion to intervene would constitute an abuse of the juvenile court’s discretion.” *Id.* at 338 (C.J. Celebrezze concurring). This court finds such a suggestion disingenuous, however, as Ms. Kerby cites to a concurring opinion and not the majority’s holding; the statement constitutes mere dicta. To suggest that this was the court’s holding misleads the reader and fails to properly articulate the true holding of the *Schmidt* court. This court has recognized that *Schmidt*, in fact, stands for the proposition that “in general, grandparents have no constitutionally protected right or legal interest to custody or visitation of their grandchildren.” *In re Jones-Dentigance*, 11th Dist. No. 2005-P-0058, 2005-Ohio-5960, ¶13. Therefore, Ms. Kerby’s reliance on *Schmidt* is misplaced.

{¶39} Civ.R. 24 governs intervention in civil and juvenile court cases, and provides for two types of intervention: as of right and permissive. An individual is entitled to intervention as of right “(1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant 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 the applicant’s interest is adequately represented by existing parties.” Civ.R. 24(A). Permissive intervention may occur “(1) when a statute of this state

confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Civ.R. 24(B).

{¶40} The trial court found that intervention was permissive in Ms. Kerby's case and stated that "[t]he Court must look to whether the intervention is in the best interest of the children. The Court finds that the magistrate did exactly as is required." We find no abuse of discretion in holding that intervention was permissive and not as of right.

{¶41} A review of the trial court record demonstrates that the magistrate did not abuse his discretion in denying Ms. Kerby's motion to intervene, nor did the trial court judge err in overruling her objections and accepting the magistrate's findings that intervention was not in the best interest of the children. Specifically, the magistrate found Ms. Kerby had been "adjudicated the abuser of Ms. Owens' other children, did not comply with the case plan in that matter, and has failed to show sufficient evidence rehabilitating her status as a potential placement for any children ***." Furthermore, the magistrate expressly found Ms. Kerby not to be credible, because "[s]he did not recall the prior abuse case, her recollection that the other children lived with her for 5 to 7 years was a fabrication, and the statement that she had no mental health issues is not believable."

{¶42} The trial court record fully supports the magistrate's findings, and thus the trial court did not abuse its discretion in accepting the magistrate's findings and denying Ms.

Kerby's motion for intervention. No evidence exists to suggest that the trial court erred in determining that "it is not in the best interest of [the girls] that Ms. Kerby's Motion to Intervene be granted."

{¶43} Because we find no abuse of discretion on the part of the trial court in accepting the magistrate's findings and denying the motion to intervene, Ms. Kerby's second assignment of error is without merit.

{¶44} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, Juvenile Division, is affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.