[Cite as *In re R.V.*, 2011-Ohio-1837.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In the Matter of: R.V., K.V.

Court of Appeals Nos. L-10-1278
L-10-1301

Trial Court No. JC 08181874

DECISION AND JUDGMENT

Decided: April 13, 2011

* * * * *

James J. Popil, for appellant K.V., Jr.

K.V., maternal grandmother, pro se.

Dianne L. Keeler, for appellee.

* * * * *

PER CURIAM.

{¶ 1} This is an appeal of a decision terminating parental rights by the Lucas County Court of Common Pleas, Juvenile Division.

{¶ 2} On August 10, 2010, the juvenile court granted appellee Lucas County Children Services' ("LCCS") motion for permanent custody of R.V., born December 2003, and K.V., born January 2008. Appellant, K.V., Jr., the natural father of K.V., appeals this judgment. The maternal grandmother of R.V. and K.V. also appeals.

{¶ 3} This case was originally opened in March 2008, and on April 30, 2008, LCCS was granted two ex parte orders placing R.V. and K.V. into shelter care custody. At that time, these children resided with their mother, D.V., and K.V., Jr., the natural father of K.V. The orders were granted, in part, due to alleged domestic violence between the mother and K.V., Jr., and due to the fact that K.V. was diagnosed with failure to thrive. K.V. was not fed for twelve hours and lost one-half pound over the course of one weekend. There was also very little food in the home and the mother had no means of transportation other than through K.V., Jr. Both parents also have untreated mental health issues.

{¶ 4} This matter also involves two other children born to D.V., their mother, as well as the natural father of each. These children, along with their respective fathers, are not at issue in this appeal.

{¶ 5} On May 1, 2008, LCCS filed a complaint in dependency and neglect for R.V. and K.V. After mediation, held on June 4, 2008, the mother consented to a finding that R.V. and K.V. were dependent and neglected. On June 17, 2008, an adjudication hearing was held. None of the natural parents appeared, but all court appointed attorneys and the guardian ad litem were present. The court determined that R.V. and K.V. were

dependent and neglected children, and temporary custody was awarded to LCCS. Case plans were filed with the goal of reunification with their respective parents.

{¶ 6} LCCS filed a motion for an extension of temporary custody on February 6, 2009, and again on September 24, 2009, in order to give the parents additional time to comply with the case plans. On January 28, 2010, the paternal grandparents of K.V. filed a motion to intervene, which was subsequently granted on June 16, 2010.

{¶ 7} On March 30, 2010, after the children had been in foster care for more than two years, LCCS filed a motion for permanent custody of R.V. and K.V. A dispositional hearing on LCCS' motion for permanent custody of R.V. and K.V. and the paternal grandparents' motion for legal custody of K.V. was held on July 9 and 14, 2010, and August 4 and 10, 2010.

{¶ 8} On the second day of the dispositional hearing, the maternal grandmother appeared as a witness. The attorney for the mother made a motion to allow the maternal grandmother to testify. The maternal grandmother was neither a party to the trial court proceedings nor on the witness list. However, over the state's objection, the court ruled that she could testify, but only in support of the mother's case against permanent custody. Her testimony, contrary to the court's ruling, clearly reflected that she desired legal custody of R.V. She testified that she was also willing to take legal custody of K.V. if his paternal grandparents were not awarded legal custody. The court permitted the grandmother's testimony regarding her own ability to care for R.V. and K.V., but

ultimately found that it was not in the best interest of R.V. or K.V. for the maternal grandmother to be awarded custody.

{¶ 9} The juvenile court's decision granting LCCS' motion for permanent custody and denying the paternal grandparents' motion for legal custody was journalized on August 13, 2010.

{¶ 10} This matter is a consolidated appeal of K.V., Jr., the father of K.V., and of the maternal grandmother from the trial court's final decision. The mother and the paternal grandparents did not appeal.

{¶ 11} K.V., Jr. raises the following two assignments of error:

{¶ 12} "THE TRIAL COURT ERRED IN GRANTING APPELLEE LUCAS COUNTY CHILDREN SERVICES' MOTION FOR PERMANENT CUSTODY AS THE DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 13} "THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PREJUDICIAL ERROR WHEN THE COURT DENIED PATERNAL GRANDPARENT'S [SIC] MOTION FOR LEGAL CUSTODY SINCE A PREPONDERANCE OF THE EVIDENCE SHOWED THAT IT WOULD BE IN THE BEST INTERST OF THE CHILD FOR CUSTODY TO BE AWARDED TO THEM."

{¶ 14} In the father's second assignment of error, he contends that the trial court erred by granting the motion for permanent custody because it should have placed K.V. in the legal custody of the paternal grandparents. We must initially determine whether the father has standing to raise this challenge on appeal.

{¶ 15} "[A] parent has standing to challenge the trial court's failure to grant a motion for legal custody filed by a non-parent because the court's denial of that motion led to a grant of permanent custody to the children services agency, which impacted the residual rights of the parent. * * * The parent has standing to challenge only how the court's decision impacted the parent's rights, however, not the rights of the third party." *In re J.J.*, 9th Dist. No. 21226, 2002-Ohio-7330, ¶ 36, citing *In re Evans* (Feb. 2, 2000), 9th Dist. No. 19489.

{¶ 16} K.V., Jr.'s standing is therefore limited to whether the trial court improperly terminated his parental rights. Consequently, his second assignment of error is found not well-taken.

{¶ 17} Turning to K.V., Jr.'s first assignment of error, a juvenile court can terminate parental rights and award permanent custody to a proper moving agency if it finds clear and convincing evidence of both prongs of the permanent custody test: (1) that the child is abandoned, orphaned, has been in the temporary custody of the agency for at least 12 of the prior 22 months, or cannot be placed with either parent within a reasonable time or should not be placed with either parent, based on the analysis under R.C. 2151.414(E); and (2) that the grant of permanent custody to the agency is in the best interest of the child, based on an analysis under R.C. 2151.414(D). See R.C. 2151.414(B)(1) and 2151.414(B)(2).

{¶ 18} The father concedes that the first prong of the test was satisfied. The trial court found that K.V. was in the custody of LCCS for more than two years at the time of

the trial. That finding is clearly supported by the record, as K.V. has been in the temporary custody of LCCS since May 1, 2008.

{¶ 19} Next, we turn to the best-interest prong of the permanent custody test. The juvenile court must consider the following when determining whether a grant of permanent custody is in the child's best interest:

{¶ 20} "(a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

{¶ 21} "(b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

{¶ 22} "(c) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

{¶ 23} "(d) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency; [and]

{¶ 24} "(e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child." 2151.414(D)(1)(a) - (e)."

{¶ 25} The failure of the trial court to consider each of these factors in reaching a determination concerning a child's best interest is prejudicial error. *In re Wright*, 10th Dist. No. 04AP-435, 2004-Ohio-4045, ¶ 8.

{¶ 26} We note that the trial court considered R.C. 2151.414(E), and found that (E)(1), (E)(2), (E)(4), and (E)(16) applied to K.V., Jr. Therefore, R.C. 2151.414(D)(1)(e) is not relevant to our analysis.

{¶ 27} The father contends that the court's findings were not supported by clear and convincing evidence as required by R.C. 2151.414(B). However, the crux of the father's argument is that "his parents' ability to care for their grandson, in view of the evidence presented at trial, would certainly be the more appropriate alternative to awarding permanent custody." As discussed above, however, our analysis is limited to the court's termination of the father's parental rights and responsibilities because the father does not have standing to appeal the court's decision not to award legal custody to the paternal grandparents. The paternal grandparents did not appeal the trial court's final decision.

{¶ 28} After thoroughly reviewing the court's record, we find the trial court's decision awarding permanent custody of K.V. to LCCS is supported by clear and convincing evidence.

{¶ 29} The caseworker testified that the father visited K.V. regularly and consistently once a week and that those visitations were appropriate. However, the caseworker testified that the father, at the time of the dispositional hearing, was not "going for [his] children," meaning that he no longer sought custody of K.V. The guardian ad litem also testified that she has "seen [K.V., Jr.] explode on a number of people at Children's Services. He slams out of rooms, yells at people and it's -- it seems sort of hair trigger."

{¶ 30} K.V., Jr. received intensive outpatient counseling as part of his substance abuse case plan services. However, the caseworker testified that K.V., Jr. routinely tested positive for marijuana throughout the case. He has also failed to leave a urine screen since January 2010, even though he was asked to leave screens monthly through April 2010. Testimony also reflects that K.V., Jr. did not consistently take his medication required to treat his anxiety.

{¶ 31} The record also clearly reflects that K.V. Jr. was abusive towards D.V., and towards the paternal grandmother. The paternal grandmother testified that K.V., Jr. pushed D.V. to the ground when she was pregnant with K.V. The paternal grandmother further testified that K.V., Jr. "beat [the paternal grandmother] up" and then he disappeared for 32 days. The guardian ad litem testified about a police report, also admitted into evidence, describing an act of domestic violence committed by K.V., Jr. against D.V. on October 9, 2009. The guardian ad litem described his behavior as "out of control and somewhat vicious." At the time of this incident, K.V., Jr. was in counseling

as part of his case plan services. K.V., Jr. did complete a batterer's intervention program as required by the case plan services. However, the caseworker testified that placing K.V. with his father would create a safety risk due to K.V., Jr.'s continuing turbulent relationships with the mother and the [paternal grandparents]." Thus, testimony sufficiently evinces that K.V., Jr. failed to resolve the issues those services were designed to address.

{¶ 32} The guardian ad litem testified on behalf of K.V. because he was only two and one-half years old at the time of the hearing. She testified that permanent custody to LCCS was in the best interest of K.V. She specifically stated that R.V. and K.V. "need each other," and since their current foster family had an interest in adopting both boys, she felt that remaining together was in their best interest.

{¶ 33} The custodial history of K.V. included virtually no time living with his parents. K.V. was taken into custody when he was only four months old. He has spent the remaining time in foster care with his brother, R.V. The guardian ad litem stated that K.V. has never been in "conscious placement with his parents."

{¶ 34} There is also evidence that K.V. needs a legally secure permanent placement. The trial court found that "* * * [K.V., Jr.] has conceded that he cannot care for his son." At the time of the dispositional hearing, K.V., Jr. was unemployed and did not have a residence. In fact, LCCS posted notice regarding the dispositional hearing for K.V., Jr. because he could not be located for service. The father also had no means of transportation other than a bicycle. On the other hand, R.V. and K.V. have lived with

their current foster family for one year and testimony indicates that the family is interested in adopting the brothers.

{¶ 35} The father asserts that his parents were suitable and that K.V. should have been placed in their custody. LCCS did consider the paternal grandparents for placement, but found them to be unsuitable. As a result, their home study was not approved. The paternal grandmother had a history of using marijuana, and testimony from both the caseworker and the guardian ad litem showed the paternal grandmother made inconsistent statements regarding her use of marijuana. The paternal grandmother reported that she used marijuana daily, and then later reported only using marijuana during her menstrual cycle. Further, the paternal grandfather, who testified that he did not like marijuana because it "reminds [him] of horse manure," tested positive for marijuana after the second day of the hearing. He then gave contradictory statements to explain his use of marijuana. The trial court specifically found that their testimony was not credible. The trial court also considered the history of domestic violence between K.V., Jr. and the paternal grandmother, as well as between D.V. and the paternal grandmother, when it determined that granting legal custody to the paternal grandparents was not appropriate.

{¶ 36} There was ample evidence before the trial court from which it could conclude that granting permanent custody of K.V. to LCCS was in his best interest. Consequently, the trial court did not err in terminating the father's parental rights.

{¶ 37} Accordingly, K.V., Jr.'s first assignment of error is found not well-taken.

{¶ 38} The maternal grandmother of R.V. and K.V., now raises the following assignment of error:

{¶ 39} "I am [the maternal grandmother] am [sic] requesting a lawyer for the appeal that Im [sic] filing for the custody of my grandsons[.] [T]he Judge did not give me a chance to show as well [sic] provide information on the case that would help her decisions."

{¶ 40} We note that the maternal grandmother failed to submit a brief or any other argument in support of her assignment of error. Nonetheless, we afford the maternal grandmother reasonable leeway in liberally construing her motion as one to decide this issue on the merits. See *Sherlock v. Myers*, 9th Dist. No. 22071, 2004-Ohio-5178, ¶ 3.

{¶ 41} We have interpreted the maternal grandmother's appeal as raising three distinct arguments. First, the trial court failed to allow her to intervene in the proceedings sub judice. Second, the trial court failed to provide her with a separate hearing on her oral motion for legal custody. And finally, she is appealing "for the custody of [her] grandsons," which goes to the merits of the trial court's final decision. The state contends that the maternal grandmother was not a "party" to the proceedings below, and therefore has no standing to appeal.

{¶ 42} Turning to the maternal grandmother's first argument, we have thoroughly reviewed the record and find the maternal grandmother did not file a written motion to intervene or motion for legal custody prior to the dispositional hearing. Instead, the maternal grandmother appeared on the second day of the dispositional hearing and was

permitted to testify, over the state's objection, in support of the mother's case opposing the state's motion for permanent custody. The majority of her testimony, however, addressed her desire for custody of R.V. and her ability to care for R.V. She further testified that she would be willing to take custody of K.V., if his paternal grandparents were not awarded legal custody. The caseworker was subsequently called to rebut the maternal grandmother's testimony regarding her home's appropriateness for R.V.

{¶ 43} Hearings for custody of a child are governed by the Rules of Juvenile Procedure. Juv.R. 1(A). Pursuant to Juv.R. 2(Y), the term party means "a child who is the subject of a juvenile court proceeding, the child's spouse, if any, the child's parent or parents, or if the parent of a child is a child, the parent of that parent, in appropriate cases, the child's custodian, guardian, or guardian ad litem, the state, and any other person specifically designated by the court."

{¶ 44} This court has held in custody matters that the trial court is permitted to "include individuals not specifically otherwise designated a party but whose presence is necessary to fully litigate an issue presented in the action." *Christopher A.L. v. Heather D.R.*, 6th Dist. No. H-03-040, 2004-Ohio-4271, ¶ 11, citing *In re Parsons* (May 29, 1996), 9th Dist. No. 95CA006217. The rationale is for the court to "protect and adjudicate all legitimate claims, protect all interests appearing, avoid multiple litigation and conserve judicial time in the orderly administration of justice. Id. citing *In re Franklin* (1993), 88 Ohio App.3d 277, 280. A trial court's determination of whether to include a person as a party will not be reversed absent a showing of an abuse of

discretion. *Parsons*, supra. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 45} A grandparent may file a motion to intervene in a permanent custody action. *In re Titionna K.*, 6th Dist. No. L-06-1232, ¶ 4, citing *In re Schmidt* (1986), 25 Ohio St.3d 331. If the grandparent's motion is denied, an abuse of discretion will be found if the grandparent had a "legal right to or a legally protectable 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 control over, or assumed parental duties for the benefit of, their grandchild." *Schmidt*, 25 Ohio St.3d at 338.

{¶ 46} At best, the maternal grandmother's testimony could be construed as an informal motion for intervention. See *In re Wood* (June 28, 1999), 7th Dist. No. 240. Further, while the trial court did not specifically deny the maternal grandmother's motion to intervene, it effectively did so in its final decision by stating that "she is not a party to this matter." We must determine whether the trial court's denial of the maternal grandmother's motion to intervene was an abuse of discretion.

{¶ 47} After thoroughly reviewing the record, we cannot find any evidence that the maternal grandmother ever stood in loco parentis, exercised significant control over, or assumed parental duties for the benefit of, either R.V. or K.V.

{¶ 48} The maternal grandmother never expressed an interest in obtaining legal custody of K.V. until the father's attorney, on cross-examination, asked whether she would be willing to take legal custody of K.V. if the paternal grandparents were not awarded legal custody. Besides indicating her willingness to accept custody under those circumstances, the maternal grandmother offered no other testimony or evidence regarding her relationship with K.V. Regarding R.V., the maternal grandmother testified that "[she] was there the day [R.V.] was born," and "[R.V.] has known [the maternal grandmother] all his life." She also visited R.V. ten to fifteen times in the two years he was in LCCS' custody.

{¶ 49} The maternal grandmother's home was evaluated by LCCS for possible placement of R.V. and K.V. However, the home study was not approved because of substantiated claims of neglect regarding a different grandchild that lives with the maternal grandmother. That grandchild was removed from the maternal grandmother's home for several months due to the maternal grandmother's failure to properly supervise the grandchild. Further, the maternal grandfather, who also resides in the home, has a history of "assaultive behavior," including domestic violence towards the maternal grandmother, and a history of substance abuse. Therefore, we cannot find the trial court abused its discretion when it effectively disallowed the maternal grandmother from intervening.

{¶ 50} Finding that the maternal grandmother was not a party to the proceedings sub judice, we must determine whether she has standing to raise her second and third

arguments. We agree with the ninth district, in *In re D.S.*, 9th Dist. No. 24554, 2009-Ohio-4658, ¶ 7, when it held that "where a grandparent files a motion to intervene and motion for legal custody, and where the motion to intervene is denied and permanent custody is granted to the agency, the grandparent has standing to contest the denial of the motion to intervene, but does not have standing to challenge the permanent custody decision on appeal." However, other district courts have not reached this same conclusion.

{¶ 51} The second district has held that even where a grandparent lacked party status, the grandparent had standing to challenge a dispositional order by filing a motion for legal custody and being permitted to testify in support of that motion. *In re P.P.*, 2d Dist. No. 19582, 2003-Ohio-1051, ¶ 21. The fifth district has concluded that a grandparent had standing to challenge the denial of a custodial decision by filing a motion for legal custody and testifying in support of that motion. *In re Travis Children* (1992), 80 Ohio App. 3d 620, 625-626. The eighth district has held that a grandmother had standing to appeal the denial of her motion to modify custody in an adoption proceeding because the trial court entertained her motions and therefore "implicitly permitted" her to intervene in the action after judgment. *In re T.N.W.*, 8th Dist. No. 89815, 2008-Ohio-1088, ¶ 17.

{¶ 52} We do not find the facts of those cases sufficiently similar to the facts in this case. Here, the grandmother was denied the ability to intervene, but she made an oral motion for legal custody on the second day of the dispositional hearing. Testimony from

the record reveals a dispute as to whether the maternal grandmother filed a pro se complaint for custody of R.V., or a pro se motion for custody of R.V., on June 24, 2010. Regardless, that alleged filing is not a part of the record, and will not be considered on appeal. The record does not contain any written motion for legal custody from the maternal grandmother. She argues that she was denied the opportunity to present evidence to the trial court. We therefore limit the maternal grandmother's second argument to whether the trial court erred by not providing the maternal grandmother with a separate evidentiary hearing on her oral motion for legal custody.

{¶ 53} R.C. 2151.353(A)(3) permits the trial court to award legal custody of a child to any person, so long as that person files a written motion for legal custody prior to the dispositional hearing. Pursuant to this statute, this individual need not be a party to the action in order to file a motion for legal custody. The maternal grandmother did not file a written motion for legal custody prior to the dispositional hearing. The trial court was therefore not permitted to grant legal custody of R.V. or K.V. to the maternal grandmother by virtue of the statutory language. The trial court gratuitously entertained the maternal grandmother's oral request for legal custody, but did not err by failing to provide her with a separate evidentiary hearing.

{¶ 54} Finally, we address the maternal grandmother's "appeal for the custody of her grandsons." We conclude, as set forth above, that the maternal grandmother was not a party to the proceedings. Therefore, she lacks standing to appeal the merits of the final termination order. *In re D.S.*, supra at ¶ 7, 13.

{¶ 55} For the foregoing reasons, we hold that the trial court did not abuse its discretion by not permitting the maternal grandmother to intervene or by not providing her with a separate evidentiary hearing on her oral motion for legal custody. The grandmother's assigned error is found not well-taken.

{¶ 56} Accordingly, the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App. R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Thomas J. Osowik, P.J.
CONCUR. _____
JUDGE

Stephen A. Yarbrough, J.,
CONCURS AND WRITES
SEPARATELY. _____
JUDGE

YARBROUGH, J.

{¶ 57} I concur but write separately to address the use of the much-parroted statement that "[a] termination of parental rights is the family law equivalent of the death

penalty in a criminal case." This dramatic characterization originated with this court nearly 20 years ago as a way to impress upon juvenile courts the seriousness of a termination proceeding and to ensure that parents "[are] afforded every procedural and substantive protection the law allows." See *In re Smith* (1991), 77 Ohio App.3d 1, 16. This statement has since been widely quoted in parental rights cases both by our sister appellate districts and the Ohio Supreme Court, and indeed was quoted in appellant's brief. See, respectively, e.g., *In re Sadiku* (2000), 139 Ohio App.3d 263, 268 and *In re Hayes* (1997), 79 Ohio St.3d 46, 48.

{¶ 58} It is time to put this analogy to rest. The "death penalty" language—often repeated verbatim by judges in their courtrooms, and echoed by attorneys to their clients—has had the unfortunate, although certainly unintended, consequence of causing parents and children to believe that after the final order of termination, they must abandon forever any hope of a future relationship. This is simply untrue. While the judicial termination order is unquestionably the end of their legal rights as natural parents, no order of the court can permanently sever the relationship between a parent and child. Unfortunately, in almost all of these termination cases, parents have failed to live their lives in a way that would allow them to develop positive and beneficial relationships with their children. However, unlike death, a judicial termination order does not foreclose the possibility that parents can change their ways, and at some point become capable of developing healthy relationships with their adult children.

{¶ 59} In addition, the use of the "death penalty" language is unnecessary to achieve the purposes for which it was invoked. The juvenile courts are very aware of the gravity of termination proceedings, and judges and attorneys are more than able to convey this seriousness to the parents without using the shortcut of this "death penalty" analogy. This language accomplishes no useful purpose, and instead has the deleterious effect of exacerbating what is already an emotionally devastating situation, and, in some cases, operating as an excuse for parents not to care about their children. Therefore, all parties should discontinue the use of the "death penalty" analogy.