[Cite as *State ex rel. A.D. v. Giesler*, 2011-Ohio-4045.]

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

In the matter of: A.W.:

State of Ohio ex rel. A.D.
and R.Y.

Relators

v.

Honorable Kathleen Giesler

Respondent

Court of Appeals No. OT-11-011

DECISION AND JUDGMENT

Decided: August 3, 2011

* * * * *

Loretta Riddle, for relators.

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Joseph H. Gerber, Assistant Prosecuting Attorney, for respondent.

* * * * *

YARBROUGH, J.

{¶ 1} This matter is before the court on relators' petition for a writ of prohibition. After issuing an alternate writ, and receiving respondent's motion to dismiss, we now

dismiss relators' petition pursuant to Civ. R. 12(B)(6), for failing to state a claim upon which relief can be granted.

{¶ 2} In March 2009, A.W. was removed from the home of his mother, W.W., and stepfather and placed in the emergency temporary custody of his maternal grandparents. J.V. is A.W.'s biological father, and is also a party to the trial court proceedings. In April 2009, based upon admissions of W.W. and J.V., A.W. was found dependent and remained in the temporary custody of his maternal grandparents, J.D and S.D. In September 2009, while A.W.'s parents were working toward reunification, the agency was granted temporary custody of A.W. due to domestic violence between the maternal grandparents. Temporary custody was again extended for six months in March 2010, while the biological parents worked on their case plan services.

{¶ 3} In June 2010, relators, A.D. and R.Y., filed a "petition for legal custody" of A.W. in case No. 20930033. A.D. is the maternal aunt of A.W., and R.Y. is A.D.'s live-in boyfriend. The record does not reflect that relators filed a motion to intervene, pursuant to Civ.R. 24. Nonetheless, the parties do not dispute that relators are parties to the proceedings below.

{¶ 4} In September 2010, the juvenile court, upon an oral motion by the agency, granted a subsequent extension of temporary custody and A.W. was placed with his paternal grandmother, G.V. On January 12, 2011, the agency filed a motion for legal custody recommending that G.V. be awarded legal custody of A.W. The certificate of service on that motion did not include relators.

{¶ 5} On March 9, 2011, at the hearing on the agency's motion, relators' counsel appeared and argued that relators should be awarded legal custody of A.W. based upon their "petition for legal custody." J.V.'s attorney thereafter petitioned the court to appoint an attorney to G.V. On April 8, 2011, that motion was granted, and G.V. was appointed an attorney to represent her interests in the dispositional hearing. On April 25, 2011, relators filed the instant petition to prohibit G.V., a non-party, from being represented by a court-appointed attorney. The parties stipulate that G.V. never filed a motion for legal custody on her own behalf, or to intervene as a party in the proceedings.

{¶ 6} On May 10, 2011, this court issued an alternative writ, and respondent filed a motion to dismiss the complaint, pursuant to Civ.R. 12(B)(6), on May 20, 2011. Relators thereafter did not file a responsive pleading.

{¶ 7} In order to obtain a writ of prohibition, relators must establish (1) that the court or officer against whom the writ is sought is about to exercise judicial or quasi-judicial power, (2) that the exercise of that power is unauthorized by law, and (3) that denying a writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *Goldstein v. Christiansen* (1994), 70 Ohio St.3d 232, 234-235, citing *State ex rel. Koren v. Grogan* (1994), 68 Ohio St.3d 590.

{¶ 8} Relators and respondent agree that Judge Giesler is about to exercise judicial power by permitting G.V. to continue in the hearing represented by a court appointed attorney. The issues then are whether her actions are unauthorized, and whether the denial of the writ will result in injury without an adequate legal remedy for relators.

{¶ 9} Relators argue that G.V. is not a party to the underlying proceedings, and has not been found indigent. Therefore, relators argue that the court did not have the authority to appoint counsel to G.V., or allow G.V. to continue to be represented by a court-appointed attorney.

{¶ 10} Hearings for legal custody of a child are governed by the Rules of Juvenile Procedure. Juv.R. 1(A). Juv.R. 4(A) states: "Every party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel *if indigent.* These rights shall arise when a person becomes a party to a juvenile court proceeding. * * *. This rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute." (Emphasis added.) The term party, as used throughout the juvenile rules "* * * 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 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*." Juv.R. 2(Y). (Emphasis added.)

{¶ 11} The record does not reflect that G.V. was made a party to the proceedings below. There are two ways to become a party in the proceedings below: by making a motion to intervene, pursuant to Civ.R. 24, or by being a person defined in Juv.R. 2(Y). The proper procedure to intervene is set forth in Civ.R. 24(C), which requires a motion to

be served on the parties, and a pleading setting forth a claim for which intervention is sought.

{¶ 12} Nonetheless, it is well-established 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, quoting *In re Parsons* (May 29, 1997), 9th Dist. No. 95CA006217; *In re Franklin* (1993), 88 Ohio App.3d 277, 623 N.E. 2d 720. This is to "protect and adjudicate all legitimate claims, protect all interests appearing, avoid multiple litigation and conserve judicial time in the orderly administration of justice." *Franklin* at 280. Further, the trial court's determination whether to include a person as a party will not be reversed absent a showing of an abuse of discretion. *Parsons,* supra. An 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, 450 N.E.2d 1140.

{¶ 13} Respondent argues that G.V. automatically became a party to the proceedings because she is acting in loco parentis to A.W., as defined by Juv.R. 2(Y). However, the record does not reflect that she acted in loco parentis prior to the agency's award of temporary custody in March 2009. Instead, A.W. was placed in G.V.'s home in September 2010, while A.W. was in the temporary custody of the agency. However, one must act in loco parentis prior to agency intervention in order to become a party under that circumstance. See *In re I.S.*, 9th Dist. No. 23215, 2007-Ohio-47, ¶ 18. A.W.'s

placement with G.V. *after* agency intervention, did not automatically entitle her to party status under Juv.R. 2(Y).

{¶ 14} Even if G.V. were a party to the proceedings, the record does not reflect that she has been found indigent as required by Juv.R. 4(A). Therefore, Judge Giesler's appointment of counsel to G.V. was unauthorized.

{¶ 15} As a side note, we remind the parties that a person need not be a party to be awarded legal custody in a dispositional hearing. Because G.V. was identified in a pleading prior to the dispositional hearing, she can still obtain legal custody without becoming a party to the proceedings, as long as she complies with the statutory mandates. Here, the record does not reflect that G.V. has fully complied with R.C. 2151.353(A)(3), which provides the proper procedure the court must follow when awarding legal custody:

{¶ 16} "(3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings. A person identified in a complaint or motion filed by a party to the proceedings as a proposed legal custodian shall be awarded legal custody of the child only if the person identified signs a statement of understanding for legal custody that contains at least the following provisions:

{¶ 17} "(a) That it is the intent of the person to become the legal custodian of the child and the person is able to assume legal responsibility for the care and supervision of the child;

{¶ 18} "(b) That the person understands that legal custody of the child in question is intended to be permanent in nature and that the person will be responsible as the custodian for the child until the child reaches the age of majority. Responsibility as custodian for the child shall continue beyond the age of majority if, at the time the child reaches the age of majority, the child is pursuing a diploma granted by the board of education or other governing authority, successful completion of the curriculum of any high school, successful completion of an individualized education program developed for the student by any high school, or an age and schooling certificate. Responsibility beyond the age of majority shall terminate when the child ceases to continuously pursue such an education, completes such an education, or is excused from such an education under standards adopted by the state board of education, whichever occurs first;

{¶ 19} "(c) That the parents of the child have residual parental rights, privileges, and responsibilities, including, but not limited to, the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support;

{¶ 20} "(d) That the person understands that the person must be present in court for the dispositional hearing in order to affirm the person's intention to become legal custodian, to affirm that the person understands the effect of the custodianship before the court, and to answer any questions that the court or any parties to the case may have."

{¶ 21} A review of the record reveals that G.V. was "identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to

the proceedings" when the agency so identified her in its January 2011 motion. However, the record does not reflect that G.V. has signed a petition as mandated by R.C. 2151.353(A)(3)(a)-(d). Signing the petition need not be performed prior to the dispositional hearing, so long as she was identified in a filing prior to the hearing. Further, R.C. 2151.53(A)(3)(d), requires G.V.'s presence at the dispositional hearing only to affirm her intentions, show her understanding of the effect of the custodianship and to answer the questions of the parties.

{¶ 22} We next turn to the third requirement for a writ of prohibition, whether Judge Giesler's unauthorized act will result in injury to relators for which they have no other remedy in the ordinary course of the law. Relators claim that they were denied counsel by the "Juvenile Clerk of Courts" and that "[relators] have no adequate remedy at law to curtail the infusion of another party into the proceedings and further delay their motion for legal custody."

{¶ 23} As to their first claim, there is no evidence in the record before us that a petition by relators for court appointed counsel was ever filed, much less denied. Relators presently have retained counsel to represent their interests. As a party, if indigent, appointed counsel is a right. Thus, relators, as parties, can petition the trial court for court appointed counsel. Even if the motion for counsel by relators was denied, we fail to see how appointment of counsel to G.V. results in injury to relators.

{¶ 24} A.D. also claims that she "is prejudiced because she is the only party that has filed a motion seeking custody of [A.D.]. * * *. Now the court appoints a 'non-party'

an attorney to defeat her in her attempt to gain custody of her nephew [A.W.]." Pursuant to Juv.R. 2(Y), the state is also defined as a party and it filed a motion for legal custody in which it recommended that G.V. be awarded custody. It is up to the trial court, at the dispositional hearing, to ultimately determine who will receive legal custody of A.W. Currently, relators have counsel to represent their interests, and can petition the court for appointment of counsel pursuant to Juv.R. 4.

{¶ 25} Relators also briefly mention that they did not receive notice of the hearing on the agency's motion for legal custody. The record is clear that relators were not included on the certificate of service of the agency's motion for legal custody. Despite the lack of notice, A.D. appeared with counsel at the hearing on March 9, 2011. Thereafter, relators, through counsel were notified of the proceedings held on April 25, 2011. While relators, as parties, could potentially have a procedural due process claim for lack of notice, that issue is not relevant to an injury caused by G.V. being appointed an attorney.

{¶ 26} We find that the appointment of counsel to a non-party, while unauthorized, does not create an injury for which no other adequate remedy exists in the ordinary course of the law. As parties, relators maintain their right to a direct appeal. Therefore, we dismiss relators' petition for a writ of prohibition against Judge Giesler, pursuant to Civ. R. 12(B)(6), for failing to state a claim upon which relief can be granted. Relators are ordered to pay the costs, pursuant to App.R. 24.

{¶ 27} To the Clerk of Court:

{¶ 28} The clerk is directed to serve upon all parties, within three days, a copy of this decision in a manner prescribed by Civ.R. 5(B).

WRIT DENIED.

Peter M. Handwork, J. _____
JUDGE

Thomas J. Osowik, P.J.

_____
JUDGE

Stephen A. Yarbrough, J.
CONCUR.

_____
JUDGE