

[Cite as *In re A.S.*, 2015-Ohio-4386.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102697

IN RE: A.S.

[Appeal by Grandmother D.B.]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD14905656

BEFORE: McCormack, P.J., E.T. Gallagher, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: October 22, 2015

ATTORNEY FOR APPELLANT

Becky S. Blair
The Law Offices of Becky Blair, L.L.C.
The Brownhoist Building
4403 St. Clair Ave.
Cleveland, OH 44103

ATTORNEYS FOR APPELLEE C.C.D.C.F.S.

Timothy J. McGinty
Cuyahoga County Prosecutor

By: Cheryl Rice
Feisul M. Khan
Assistant County Prosecutors
C.C.D.C.F.S.
3955 Euclid Ave.
Cleveland, OH 44115

Also listed:

GUARDIAN AD LITEM

Richard D. Summers
McDonald Hopkins Co., L.P.A.
600 Superior Ave., E.
Suite 2100
Cleveland, OH 44114

ATTORNEYS FOR A.S.

Robert L. Tobik
Cuyahoga County Public Defender

By: Patricia L. Bunce
Assistant Public Defender
9300 Quincy Ave.
Cleveland, OH 44106

ATTORNEY FOR K.S.

Christopher R. Lenahan
2035 Crocker Road
Suite 104
Westlake, OH 44145

TIM McCORMACK, P.J.:

{¶1} Appellant, D.B., paternal grandmother of A.S., a minor child, filed for legal custody of A.S. after the juvenile court found the child neglected and dependent and awarded the child's temporary custody to the Cuyahoga County Division of Children and Family Services ("CCDCFS"). The trial court denied the grandmother's request on the ground that she was not a party to the instant juvenile court proceeding and therefore lacked standing to request custody. For the following reasons, we affirm.

Procedural Background

{¶2} On May 2, 2014, CCDCFS filed a complaint for temporary custody of A.S., who was born in 2012. The complaint alleged that, on April 23, 2014, A.S.'s mother was under the influence of drugs and alcohol while caring for A.S. The complaint alleged that mother had substance abuse and mental health problems. Mother has had three other children in the legal custody of relatives.

{¶3} On May 14, 2014, the trial court removed A.S. from mother's custody and placed her into the emergency custody of CCDCFS. The child's guardian ad litem ("GAL") subsequently filed a report recommending a grant of temporary custody to the agency.

{¶4} A month later, on June 18, 2014, a magistrate held a hearing on the agency's complaint. Present at the hearing were the child's mother, father, their respective counsel, and the child's GAL. The parents stipulated to the agency's

complaint as amended and the magistrate found A.S. to be neglected and dependent. The parents agreed to a grant of temporary custody of the child to CCDCFS.

{¶5} On July 3, 2014, the trial court adopted the magistrate's decision granting A.S.'s temporary custody to the agency. The court found that the child cannot be placed with relatives because no relatives were willing and able to provide care. The court also noted that the plan for the child was reunification.¹

{¶6} On September 8, 2014, A.S.'s father filed a motion requesting legal custody. That motion was subsequently dismissed, however, for a failure to prosecute.

{¶7} Four months later, on January 6, 2015, appellant D.B., A.S.'s paternal grandmother, filed a complaint for legal custody and visitation. She asked the court to award the child's legal custody to her and, if the request was not granted, to allow her to have unsupervised visitation with A.S.

{¶8} On January 7, 2015, a magistrate denied appellant grandmother's complaint on the ground that she was not a party to the custody proceeding and lacked standing to file for custody. Appellant filed a motion to set aside the magistrate's order. The trial court, construing appellant's motion as objections to the magistrate's order, overruled the motion and adopted the magistrate's order. Appellant grandmother now appeals from that decision.² She raises two related assignments of error for our review. They state:

¹The trial court noted additionally that there was a question of whether proper medical care was provided by the child's foster family and that the agency was investigating a placement with an aunt of the child.

²As an initial matter, we note that the trial court's judgment is a final appealable order. *See,*

1. The trial court abused its discretion by improperly interpreting Rules of Juvenile Procedure 10(A) when it denied appellant's complaint for legal custody based on non-party status and lack of standing.
2. The trial court's decision violates the due process rights of the paternal grandmother as Juvenile Rule 10(A) specifically states that any person has standing to file a complaint to determine legal custody.

{¶9} The central question presented in this appeal is: whether appellant grandmother was a party with standing to request legal custody of the child.³

Law and Analysis

{¶10} At common law, grandparents have no legal right of access to their grandchildren. *In re Whitaker*, 36 Ohio St.3d 213, 214, 522 N.E.2d 563 (1988). "The law does not provide grandparents with inherent legal rights based simply on the family relationship." *In re T.N.W.*, 8th Dist. Cuyahoga No. 89815, 2008-Ohio-1088, ¶ 17, citing *Whitaker* at 215. Although a parent has a fundamental right to raise his or her child and this interest is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by Section 16, Article I, of the Ohio Constitution,

e.g., *In re C.G.*, 12th Dist. Preble No. CA2007-03-005, 2007-Ohio-4361; *In re Goff*, 11th Dist. Portage No. 2001-P-0144, 2003-Ohio-6768, ¶ 10.

³Although appellant's complaint requested legal custody and unsupervised visitation, the trial court's judgment only mentioned her lack of standing to file for custody. Moreover, appellant's assignments of error only relate to her request for legal custody. Accordingly, we limit our analysis to the issue of custody.

grandparents, by contrast, have no constitutional right of association with their grandchildren. *In re B.K.*, 8th Dist. Cuyahoga No. 98730, 2013-Ohio-1190, ¶ 17.

{¶11} Here, the trial court found A.S. to be neglected and dependent and granted temporary custody to CCDCFS after a hearing, where both her parents as well as her GAL were present. The trial court found no relatives were willing and able to provide care for the child. The trial court further approved of reunification as a permanency plan for the child. All parties, including the parents, agreed with a grant of the temporary custody to the agency. Six months later, appellant filed a complaint for legal custody.

{¶12} The juvenile statutes governing custody matters require an individual to be a “party” in order to participate in the proceedings. 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.

{¶13} Because A.S.’s parents are not minors themselves, appellant must be specifically designated by the court in order to be a party in this custody matter. The juvenile court has discretion under Civ.R. 24(B) to permit intervention in custody proceedings. *In re J.W.*, 10th Dist. Franklin Nos. 06AP-864, 06AP-1062, and 06AP-875, 2007-Ohio-1419, ¶ 26.

{¶14} Appellant, however, never filed a motion to intervene under Civ.R. 24. Instead of filing a motion to intervene pursuant Civ.R. 24 to qualify as a party for participation in the present proceeding, she filed for legal custody under the same case number. Although a grandmother's interest in being involved in her grandchild's life is commendable and often life-saving, pursuant to Juv.R. 2(Y), she was not a party in this juvenile proceeding initiated by CCDCFS. The trial court did not err procedurally in denying her request for legal custody due to her lack of standing.

{¶15} On appeal, appellant relies exclusively on Juv.R. 10(A) for her claim of eligibility to seek custody of A.S. Juv.R. 10(A) governs the filing of a complaint regarding a child in the juvenile court. It states, in pertinent part: "Any person may file a complaint to have determined the custody of a child * * *." Appellant asserts that the rule refers to any "person," rather than "party," therefore, she does not have to be a party to file for custody of the child.

{¶16} While appellant is correct that, under Juv.R. 10(A), any "person" may file a complaint to determine the custody of a child, the present case, however, had been initiated by a complaint filed by CCDCFS. Proceeding under the agency's complaint, the juvenile court adjudicated A.S. as neglected and dependent and, with the agreement of her parents and her GAL, placed her in the temporary custody of CCDCFS. Appellant's filing under the same case number, although styled as a "complaint" to determine legal custody, was actually a motion under Juv.R. 35(A) ("[t]he continuing jurisdiction of the court shall be invoked by motion filed in the original proceeding"). A motion to modify

or terminate any order of disposition is permitted under R.C. 2151.353(F)(2). However, such a motion must be filed by a “party.”⁴

{¶17} The Supreme Court of Ohio, in *In re McBride*, 110 Ohio St.3d 19, 2006-Ohio-3454, 850 N.E.2d 43, affirmed the principle that Juv.R. 10(A) may not override the express statutory language to confer standing on a nonparty. *Id.* at ¶ 13. In *McBride*, a biological mother who had lost custody to a children services agency, filed for custody, similarly claiming Juv.R. 10(A) permitted any *person* to file for custody. The Supreme Court of Ohio rejected the claim for two reasons. First, the court reasoned that after the biological mother’s parental rights were terminated, she ceased to be a party under R.C. 2151.414(F). Second, the court explained that R.C. 2151.353(F)(2) specifically conferred standing on certain children services agencies and “any party, other than any parent whose parental rights with respect to the child have been terminated” to seek modification of a dispositional order; the biological mother, having lost permanent custody, did not have standing because she did not fit into the category of eligible individuals. The court concluded that Juv.R. 10(A) may not confer standing on an

⁴R.C. 2151.353(F)(2) states:

(2) Any public children services agency, any private child placing agency, the department of job and family services, or any *party*, other than any parent whose parental rights with respect to the child have been terminated pursuant to an order issued under division (A)(4) of this section, by filing a motion with the court, may at any time request the court to modify or terminate any order of disposition issued pursuant to division (A) of this section or section 2151.414 or 2151.415 of the Revised Code. The court shall hold a hearing upon the motion as if the hearing were the original dispositional hearing and shall give all parties to the action and the guardian ad litem notice of the hearing pursuant to the Juvenile Rules. If applicable, the court shall comply with section 2151.42 of the Revised Code. (Emphasis added.)

individual who did not have standing under the statutes. *Id.* at ¶ 13. Accordingly, appellant's reliance on Juv.R. 10 is misplaced.

{¶18} We observe that “[I]ntervention by grandparents in a permanent custody proceeding is appropriate 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.” *J.W.*, 10th Dist. Franklin Nos. 06AP-864, 06AP-1062, and 06AP-875, 2007-Ohio-1419, at ¶ 27, citing *In re Schmidt*, 25 Ohio St.3d 331, 338, 496 N.E.2d 952 (1986) (Celebrezze, C.J., concurring). *See also In re R.W.*, 2015-Ohio-1031, 30 N.E.3d 254, ¶ 18 (8th Dist.). Furthermore, the trial court's denial of a grandparent's motion to intervene will be reviewed for an abuse of discretion. *Goff*, 11th Dist. Portage No. 2001-P-0144, 2003-Ohio-6768, at ¶ 11. In the instant case, however, we do not have such a judgment with an adequate record for our review. The first and second assignments of error are without merit.⁵

{¶19} Finally, CCDCFS filed a motion to dismiss this appeal, invoking the general principle that a person must be a party or have attempted to intervene in order to gain the right to appeal the trial court's decision, *State ex rel. Lipson v. Hunter*, 2 Ohio St.2d 225, 208 N.E.2d 133 (1965). The trial court here denied appellant's request for legal custody because of her lack of party status. CCDCFS asks this court to preclude a review of that

⁵It came to this court's attention during the oral argument that the agency is now conducting a home study regarding appellant grandmother; however, we also learned that grandmother and her counsel were excluded by the trial court from a pretrial proceeding regarding the child held recently.

decision on the ground she was not a party. Appellant's claim on appeal is that even though she was not a party, she was nonetheless eligible for file for custody under Juv.R.

10. Because of the uniqueness of custody proceedings, appellant grandmother is entitled to have her contention reviewed by this court.

{¶20} For the foregoing reasons, we deny CCDCFS's motion to dismiss, but affirm the judgment of the trial court.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the juvenile court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIM McCORMACK, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
SEAN C. GALLAGHER, J., CONCUR