[Cite as *In re D.S.*, 2009-Ohio-4658.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

IN RE: D. S.	C.A. No. 24554
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. DN 07-06-0621

DECISION AND JOURNAL ENTRY

Dated: September 9, 2009

BELFANCE, Judge.

{¶1} Appellant, Darla Hernandez, the maternal grandmother ("Grandmother") of D.S., has appealed from a judgment of the Summit County Court of Common Pleas, Juvenile Division. For the reasons set forth below, we affirm the judgment of the trial court.

FACTS

{¶2} Chandra R. ("Mother") is the mother of D.S., born on May 16, 2007. Paternity of the child was never established. Summit County Children Services Board ("CSB") was alerted to concerns regarding Mother's care of the infant through a referral made the day after her birth. CSB visited Mother and D.S. at the home of the child's maternal great grandmother, where they were staying. At the time, the CSB caseworker believed that although Mother had limited knowledge of infant care, there was a reliable support system within that home. During follow-up visits, however, Mother seemed confused, was unable to answer basic questions regarding the care of the child, and was resistant to receiving services or having any continued CSB

involvement. Through its investigation, the agency learned that Mother had a history of mental health problems and that she had been staying in a homeless shelter in California until relatives recently brought her to Ohio to give birth to D.S. On June 20, 2007, the agency filed a complaint in the juvenile court, alleging dependency of the child and seeking protective supervision. The dispositional request was later amended to temporary custody in CSB. In due course, D.S. was adjudicated to be a dependent child and she was placed in the temporary custody of CSB.

{¶3} On January 4, 2008, Grandmother moved to intervene, and on June 10, 2008, she moved for legal custody of the child. Both motions were denied by a magistrate, who found no evidence that Grandmother had acted in loco parentis. Following the filing of objections by Grandmother, the trial judge found that Grandmother was not entitled to intervene absent a showing that she stood in loco parentis to the child, but granted her leave to present evidence on this issue prior to the start of the permanent custody hearing. The record does not reflect that Grandmother presented any such evidence in the time provided, but the trial judge did not enter judgment on the motion until she also ruled on the custody question before the court. In addition, the trial judge found that Grandmother was entitled to have her motion for legal custody determined on its merits regardless of her party status.

{¶4} Ultimately, CSB moved for permanent custody and Mother moved for legal custody to be awarded to Grandmother. Following a hearing, the trial court granted CSB's motion for permanent custody and denied all other dispositive motions. The trial court found that D.S. could not or should not be placed with a parent within a reasonable time and that permanent custody was in the best interest of the child. Grandmother has appealed from the final judgment and has assigned one error for review. Mother has not appealed.

{¶5} In her sole assignment of error, Grandmother contends that the trial court erred in finding that it was in the best interest of the child to be placed in the permanent custody of the agency.

STANDING

{¶6} CSB has argued that Grandmother lacks standing to appeal the judgment of the trial court because she was not a party to the proceedings below. According to CSB's position, Grandmother was entitled to have her motion for legal custody considered by the trial court, but lacks standing to challenge the denial of her motion in the court of appeals because she was not a party to the trial court proceedings. Grandmother has not responded to this argument.

{¶7} This Court has previously held that where a grandparent files a motion to intervene and a 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. See *In re Voshel* (May 3, 1995), 9th Dist. No. 2913, at *2, and *In re Stanley* (Oct. 11, 2000), 9th Dist. Nos. 20128, 20131, 20132, at *3, citing Whiteside, Ohio Appellate Practice (1996 Edition) 30, Section 1.27.

{¶8} Our research has disclosed that other Ohio courts have reached different conclusions on this question. The second district has held that even where a grandparent lacked party status, the grandparent had standing to challenge a dispositional order by virtue of having filed a motion for legal custody and being permitted to testify in support of that motion. *In re P.P.*, 2nd Dist. No. 19582, 2003-Ohio-1051, at ¶21. The fifth district has similarly held that a grandparent had standing to challenge the denial of a custodial decision by virtue of having filed a motion for legal custody and being permitted to testify in support of that motion. *In re Travis*

Children (1992), 80 Ohio App.3d 620, 625-626. But, see, *In re Bailey* (Mar. 15, 2001), 5th Dist. Nos. 2000AP110071, 2000AP110073, and 2000AP110082, at *7 (holding that a non-party grandparent lacked standing to challenge a custodial decision on appeal). See, also, *In re T.N.W.*, 8th Dist. No 89815, 2008-Ohio-1088, at ¶ 7 (holding that grandmother had standing to appeal the denial of her motion to modify custody in an adoption proceeding because trial court entertained her motions and therefore "implicitly permitted" her to intervene). While we appreciate a degree of merit in these decisions, none of them offers sufficient legal analysis that would compel us to overrule our own precedent.

{¶9} In other contexts, the Supreme Court has reached a result which seems to support the prior decisions of this Court. See, e.g., *State ex rel. Sawicki v. Court of Common Pleas of Lucas Cty.*, 121 Ohio St.3d 507, 2009-Ohio-1523, at ¶18 ("As a nonparty, Associated lacks standing to challenge the court of appeals' determination on the merits.") and *State ex rel. Beacon Journal Publishing Co. v. Bond***,** 98 Ohio St.3d 146, 2002-Ohio-7117, at ¶48 ("Because the Beacon Journal was not a party to the criminal action in the court of common pleas, it lacks standing to appeal the trial court's order.").

{¶10} Furthermore, because of the rather unique nature of permanent custody proceedings, we are not inclined to attempt to draw analogies from other areas of law on this point. See, e.g., *In re Guardianship of Santrucek*, 120 Ohio St.3d 67, 2008-Ohio-4915, at ¶14 (holding that one may become a party to a guardianship proceeding either by filing an application to be appointed guardian or by filing a motion to intervene.)

{¶11} We observe that one of the statutes in R.C. Chapter 2151 introduces a distinctive procedure that authorizes a juvenile court to award legal custody of a child who has been adjudicated abused, neglected, or dependent "to either parent or *to any other person* who, prior to

the dispositional hearing, files a motion requesting legal custody of the child * * *. (Emphasis added.) R.C. 2151.353(A)(3). By its very terms, therefore, the statute 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 question of whether the movant becomes a party who may appeal an adverse decision is not answered by the statute and is a matter of some dispute among the appellate districts. Unfortunately, this issue has not been specifically addressed by the Ohio Supreme Court.

{¶12} The issue is brought into stark relief by the facts in the present case. Here, the movant complied fully with the procedural requirements of R.C. 2151.353(A)(3). Grandmother filed a written motion for legal custody prior to the dispositional hearing. In addition, she is a blood relative and was represented by counsel in the trial court. She was present at the child's birth and participated in visitation with D.S. during the trial court proceedings. She filed a written motion to intervene and the motion was denied. Grandmother attended the permanent custody hearing and testified both on direct and cross-examination. Mother supported this relative's request for legal custody. Yet, despite Grandmother's full participation in the proceedings, we cannot find legal justification to bestow party status by implication. Rather, our review of the applicable legal precedent in the context of this case, suggests that a person must successfully intervene in a legal custody matter to attain party status. Notwithstanding, we do recognize that this conclusion ultimately precludes a non-party movant, who has fully participated in the proceedings, from obtaining review of the outcome of a motion for legal custody on the merits.

{¶13} Based on our precedent, and the lack of compelling decisions holding otherwise, we conclude that Grandmother lacks standing to challenge the trial court's award of permanent custody to CSB. In this case, however, because Grandmother's timely notice of appeal indicates that she is, *inter alia*, appealing from the denial of her motion to intervene, we construe her appellate argument as challenging both the denial of her motion for legal custody and the denial of her motion to intervene. As set forth above, while we find that Grandmother has no standing to challenge the denial of her motion for legal custody, she does have standing to challenge the denial of her motion to intervene.

MOTION TO INTERVENE

{¶14} Intervention by a grandparent has been said to be appropriate where the grandparent has a legal right to or a legally protectable interest in custody or visitation with a grandchild, where the grandparent has stood in loco parentis to the grandchild, or where the grandparent has exercised significant parental control over, or assumed parental duties for the benefit of, his or her grandchild. *In re Schmidt* (1986), 25 Ohio St.3d 331, 336-337.

{¶15} Ohio courts have also indicated that a grandparent does not have inherent legal rights based simply on the family relationship. See, e.g., *In re H.W.*, 114 Ohio St.3d 65, 2007-Ohio-2879, at ¶9. "[T]he emphasis placed on family unity by R.C. Chapter 2151 is limited almost exclusively to the nuclear family; and [absent specific circumstances] R.C. Chapter 2151 does not require that extended family members be made parties to custody proceedings." *Schmidt*, 25 Ohio St.3d at 337. Nor does a grandparent have a constitutional right of association with his or her grandchildren. Id. at 336. And according to the juvenile rules, a grandparent is a mandatory party to a custody proceeding only if the child's parent or parents are under the age of majority. See Juv.R. 2(Y).

{¶16} Although Grandmother has expressed concern for D.S. and a desire for her custody, she has no legally protectable interest that was related to D.S.'s care and custody. She never had legal custody of D.S. or stood in loco parentis to her. She never exercised significant parental control or assumed parental duties for her. Except for the first month of her life, D.S. has been in foster care for her entire life, and Grandmother only visited with her a few times and pursuant to court orders. This is not sufficient to support intervention. *In re J.W.*, 10th Dist. Nos. 06AP-864, 06AP-1062, 06AP-875, 2007-Ohio-1419, at ¶28, citing *In re Massengil* (1991), 76 Ohio App.3d 220, 225.

{¶17} Based upon this record, we conclude that the trial court did not err when it denied Grandmother's motion to intervene. Grandmother's assignment of error is overruled.

CONCLUSION

{¶18} Grandmother's assignment of error is overruled. The judgment of the Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

RHONDA KOTNIK, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.