SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4535-15T4

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

K.E.,[1]

Defendant-Respondent,

and

J.A.,

Defendant.

IN THE MATTER OF J.E.,

Minor.

G.A. and R.A.,

Appellants.

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[1] Pursuant to Rule 1:38-3(d), we use initials and fictitious names to protect the confidentiality of the participants in these proceedings.

Submitted July 12, 2017 – Decided October 5, 2017

Before Judges Simonelli and Carroll.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Ocean County, Docket No. FN-15-0005-15.

Jay Turnbach, attorney for appellants.

Christopher S. Porrino, Attorney General, attorney for respondent New Jersey Division of Child Protection and Permanency (Salima E. Burke, Deputy Attorney General, on the brief).

Sheehy & Sheehy, attorneys for respondent K.E. (John E. Sheehy, of counsel and on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Lisa M. Black, Designated Counsel, on the brief).

PER CURIAM

In this Title 9 matter, appellants G.A. and R.A., are the maternal grandparents of J.E. (John), born in July 2010. They appeal from the June 8, 2016 Family Part order, which denied their motion to intervene. For the following reasons, we affirm.

John's biological mother, J.A. (Jane) is deceased. Prior to Jane's death, in June 2014, plaintiff New Jersey Division of Child Protection and Permanency (Division) substantiated allegations of abuse and neglect against her. The Division removed John from Jane's care, obtained care, supervision, and custody of him, and placed him with appellants, with whom the child had lived since birth. Following Jane's death, John continued living with

appellants while also having visitation with his biological father, dispositional defendant K.E. (Ken), who had filed a motion to obtain physical and legal custody of the child.

Appellants did not file a motion to intervene until April 2016, after the court approved the Division's plan to return John to Ken. Appellants argued the court should permit them to intervene and grant them custody because they were John's psychological parents. In the alternative, appellants sought visitation pursuant to the Grandparents and Sibling Visitation Rights Statute, N.J.S.A. 9:2-7.1.

In a June 8, 2016 oral opinion, Judge Madelin F. Einbinder denied the motion as untimely, finding it had been filed almost two years after the Division removed John from Jane's care. Addressing the merits, the judge stated that to establish psychological parentage for custody purposes, appellants had to prove the four elements set forth in V.C. v. M.J.B.:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation [a petitioner's contribution to a child's support need not be monetary]; and

> (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.
>
> [163 N.J. 200, 223 (2000) (citation omitted).]

The judge found appellants failed to establish the first element, as Ken never ceded parental authority or his parental rights to them, and in fact, had been fighting to obtain custody of John. The judge also determined that although appellants had been in John's life since his birth, they did not stand in Ken's position as biological father or share his constitutional rights to custody. The judge also found that even if appellants had established all four elements of the V.C. psychological parent test, they must still show that granting them custody would be in John's best interest, giving weight to the factors set forth in N.J.S.A. 9:2-4. The judge concluded that appellants did not meet the standard to award them legal custody, as they did not establish psychological parentage or overcome Ken's constitutional right to custody.

Judge Einbinder found that although appellants had an interest in the litigation, their interest was not compromised, but was adequately represented to and by the Division, and they could seek custody or visitation under the FD docket. The judge also found that appellants' request for visitation was premature.

The judge noted that John was still residing with appellants and would remain in their physical custody until returned to Ken, and there was no indication appellants would have no contact with the child if Ken regained custody.

Judge Einbinder entered an order on June 8, 2016 order, denying appellants' motion to intervene without prejudice, and requiring the Division to transfer legal and physical custody of John to Ken on June 20, 2016. After the Division returned John to Ken, the judge entered an order on August 23, 2016, terminating the litigation. This appeal followed.

On appeal, appellants contend they met all requirements for intervention as of right. They argue they have an interest in the ligation because they are John's psychological parents, and their interests are being compromised because once the custody issue is decided, they are precluded from being recognized in their role as psychological parents. They also argue that their rights are not protected because the Division, Law Guardian, and John's attorney actively undermined their interests in pursuing custody. Lastly, they argue their application was timely because they filed it when they still had physical custody of John. Appellants do not address Ken's rights as the biological parent or his constitutional rights. They also do not address their right to seek visitation under the FD docket.

Intervention as of right is appropriate where an applicant "claims an interest relating to . . . the subject of the action and is so situated that disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." R. 4:33-1. Intervention as of right requires the movant to show: (1) an interest in the subject matter of the litigation; (2) an inability to protect that interest without intervention: (3) lack of adequate representation of that interest; and (4) timeliness of the application. N.J. Div. of Youth & Family Servs. v. D.P., 422 N.J. Super. 583, 590 (App. Div. 2011).

"The grant or denial of a motion to intervene . . . lies within the sound discretion of the trial court and should not be disturbed on appeal absent a clear showing that the trial court's discretion has been misapplied." ACLU v. County of Hudson, 352 N.J. Super. 44, 65 (App. Div.), certif. denied, 174 N.J. 190 (2002) (citations omitted). The court also has the discretion to determine the timeliness of the intervention application, and may deny the application if deemed untimely. See generally State v. Lanza, 39 N.J. 595 (1963). "[A]n abuse of discretion only arises on demonstration of 'manifest error or injustice[,]'" Hisenaj v. Kuehner, 194 N.J. 6, 20 (2008) (quoting State v. Torres, 183 N.J.

554, 572 (2005)), and occurs when the trial judge's "decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012) (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)).

We have considered appellants' arguments in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons expressed by Judge Einbinder in her cogent oral opinion. We discern no abuse of discretion in the denial of appellants' motion to intervene as untimely and on the merits. We agree that appellants did not satisfy all four elements of the psychological parentage test under V.C. to obtain custody of John, as Ken never ceded the function of psychological parent to them. Certainly appellants have been in John's life since his birth, but they do not stand in Ken's position as the child's biological parent and do not share his constitutional rights. Ken was not found to have abandoned, abused, or neglected John, and was not deemed an unfit parent. Appellants may file an action under the FD docket for grandparent visitation. We express no view as to the merits of such an application.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION