

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002378-ME

STEVEN BOYD AND
GERI BOYD

APPELLANTS

v. APPEAL FROM MEADE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 91-CI-00244

MOHAMED MAHMOUD

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Steven and Geri Boyd appeal from an order of the Meade Circuit Court denying their motion for leave to intervene in a custody dispute between Susan Boyd Mahmoud and Mohamed Mahmoud, natural parents of Sarah Mahmoud. We conclude that the court properly denied the Boyds' motion, and we thus affirm.

Susan and Mohamed met while Mohamed was assigned to Ft. Knox, Kentucky, for training as an Egyptian army officer. They were married in Cairo, Egypt, on June 25, 1983. After

their marriage, Susan and Mohamed returned to the United States. Mohamed renounced his Egyptian citizenship and became a United States citizen in August 1989. After completing graduate work in engineering, Mohamed obtained a job at the Toyota plant in Georgetown, Kentucky.

The couple's only child, Sarah, was born on April 4, 1990. Thereafter, the couple began experiencing marital difficulties, and they separated in November 1991. Susan returned to Meade County, and Mohamed remained in Georgetown (Scott County). In December 1991 Susan filed a petition for dissolution of marriage in the Meade Circuit Court.

In addition to the normal issues raised in a divorce case, Susan expressed grave concerns that Mohamed would take their child and return to Egypt. Because of these concerns, the court ordered that Mohamed's visitation with Sarah be supervised at the home of Susan's parents during the pendency of the case.

On June 3, 1993, the court entered a divorce decree wherein Susan was granted full custody of the child and Mohamed was granted unsupervised visitation. Mohamed exercised unsupervised visitation with Sarah from that time until April 1994. His visitation was modified at that time to supervised visits of one-half hour a week. This change was made because of allegations brought by Susan alleging that Mohamed had sexually abused the child.

It subsequently became known that the allegations made in April 1994 were not the first allegations of that kind to be made by Susan. In December 1993 she took Sarah to see Dr. Jacquelyn Sugarman at Child First in Louisville. Although Susan reported allegations of abuse, Dr. Sugarman was unable to confirm them when she questioned Sarah alone. Further, a full pelvic exam did not reveal any evidence of abuse. Neither Dr. Sugarman nor Susan made any report of these allegations to the authorities in December 1993.

In April 1994 Susan returned to Dr. Sugarman's office again alleging that Mohamed had sexually abused Sarah. As with the previous occasion, a full pelvic exam produced no evidence of abuse. However, on this occasion Sarah told Dr. Sugarman that her daddy had done things to her. Sarah was then referred to a licensed clinical psychologist, Dr. Patricia Abbott. Word of the allegations reached the circuit court, and it entered an order sua sponte referring the case to a domestic relations commissioner (DRC) for proof. The DRC modified Mohamed's visitation to supervised visits of one-half hour a week at the Meade County Office of the Cabinet for Families and Children.

In June 1994 the Cabinet employee responsible for supervising visitation provided an affidavit, which was filed with the court, indicating that supervised visits did not appear to be necessary. Further, the Cabinet worker indicated her

belief that continued restrictions would be detrimental to Sarah. In July 1994 a Georgetown police detective provided an affidavit indicating that the police had investigated the allegations and found no evidence of sexual abuse. The Georgetown police thus closed their investigation into the incident.

On March 29, 1996, the DRC filed his report recommending that Susan's motion to modify custody by restricting Mohamed's visitation be denied. Prior to a hearing by the court on exceptions filed by Susan to the DRC's report, the court sought input from the guardian ad litem (GAL). The GAL filed a brief on behalf of Sarah, noting that Sarah had given conflicting statements at the time the April 1994 allegations first came up. The GAL also raised concerns over the behavior of Susan and her parents. In particular, she found them to be defensive and combative at the hearing before the DRC, and she found that the grandparents acted in ways intended to make the supervised visitation uncomfortable for all involved. The GAL also pointed out that Cabinet employees had found Sarah's behavior toward her father during the supervised visits to be inconsistent with the allegations made against him. As to supervised visitation, the GAL agreed with Cabinet employees that continued supervision of the visitation could be

harmful. Finally, the GAL warned that Susan should be watched, as she appeared fully capable of taking Sarah and running.

On November 19, 1996, the court entered an order agreeing with the DRC that Susan's motion to modify custody by restricting Mohamed's visitation should be denied. The court concluded its order by accepting the recommendation of the Cabinet that unsupervised visitation be reinstated in stages. Susan appealed the court's order, and in July 1998 a panel of this court rendered an opinion vacating and remanding the case after determining that certain of Sarah's statements made to Dr. Sugarman and Dr. Abbott should not have been excluded as evidence.

Following the remanding of the case to the circuit court, Susan continued to seek reinstatement of supervised visitation. On December 9, 1998, the court again denied Susan's motion to restrict Mohamed's visitation. In late May 2000, Susan told Mohamed that she would no longer allow unsupervised visitation. When he arrived to pick up Sarah for a weekend visit, she refused to allow him to see her. Further, Susan informed Mohamed that she would not allow his summer visitation.

As a result of Susan's actions, Mohamed filed a motion in the circuit court seeking to hold Susan in contempt. Susan failed to appear with Sarah at the hearing, and she again failed to appear the following day per order of the court. Her

whereabouts and the whereabouts of Sarah would remain unknown to the court from June 2000 until July 2004.

As a result of Susan's actions, the court awarded temporary custody of Sarah to Mohamed. Acting through her attorney, Susan sought a writ of prohibition and emergency relief from this court. Her motions were denied. Furthermore, a Meade County grand jury returned a criminal indictment against Susan for the felony offense of custodial interference. In connection with the grand jury investigation, Susan's father refused to testify and was held in contempt. As a result, he was held in custody from September 2000 until February 2001.

The DRC filed his report on September 28, 2000, after considering the issues on remand. Once again, the DRC recommended that Susan's motion to restrict Mohamed's visitation be denied. In an order entered on November 22, 2000, the court rejected exceptions to the report filed by Susan and adopted the DRC's finding. The court agreed that there was no credible evidence upon which to deny Mohamed unsupervised visitation or custody. Further, the court agreed that there was no credible evidence establishing the allegations of sexual abuse. The court found the issue of custody to be moot in light of the fact that Susan had defied court orders and absconded with Sarah. This court rejected Susan's appeal.

Susan and Sarah were discovered in Paoli, Indiana, in July 2004. Apparently, they had been living in a single motel room during the four-year period. Sarah had not been permitted to attend a regular school, and she had little or no contact with any person other than Susan. Susan was arrested on the felony warrant for custodial interference, and Sarah was placed in the care of the Indiana Office for Families and Children. Both were subsequently returned to the custody and jurisdiction of Kentucky authorities in Meade County. The circuit court was advised that Sarah was developmentally delayed and appeared to be "brainwashed." Further, the court was advised that the child exhibited an intense hatred for her father and possessed the desire to do him harm by stabbing him with a knife.

The court placed the emergency custody of Sarah with the Cabinet "only for the duration necessary to refamiliarize [sic] the child with her father and; thus, enable the return of the child to his care." The Cabinet, which was joined as a party to this case on August 23, 2004, placed Sarah in foster care while it attempted to get her the care necessary to reunite her with her father.

At this point in the divorce and custody battle, Steven and Geri Boyd sought to intervene for the purpose of obtaining temporary and permanent custody of Sarah. Steven is

Susan's brother, and Geri is married to Steven. Thus, they are Sarah's maternal uncle and aunt.

On October 15, 2004, the circuit court entered an order denying the Boyds' motion to intervene on the ground that they lacked standing. The court noted the uncontested facts that the Boyds neither qualified as *de facto* custodians under KRS¹ 403.270, nor had they ever had actual possession of Sarah. The Boyds then filed this appeal.

Arguing that they have a right to intervene in the case pursuant to CR² 24.01, the Boyds contend that the circuit court erred as a matter of law in denying their motion to intervene. The rule provides in applicable part as follows:

Upon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

CR 24.01(1). The Boyds contend that their right to intervene is based on subsection (b) to CR 24.01(1).

¹ Kentucky Revised Statutes.

² Kentucky Rules of Civil Procedure.

As the Boyds noted in their brief, there must be a "present substantial interest in the subject matter of the lawsuit" in order that a party claiming an interest in the matter be allowed to intervene. See Baker v. Webb, 127 S.W.3d 622, 624 (Ky. 2004), quoting Gayner v. Packaging Serv. Corp. of Ky., 636 S.W.2d 658, 659 (Ky.App. 1982). The Boyds argue that "[a]s relatives concerned with the care and custody of Sarah, [they] have a fundamental interest in protecting and nurturing Sarah in a safe and loving environment that will allow Sarah to develop into an intelligent, resourceful, content adult." We disagree with the Boyds that their interest is such that they have a right to intervene under CR 24.01(1).

In Moore v. Asente, 110 S.W.3d 336, 358 (Ky. 2003), the Kentucky Supreme Court stated that "Kentucky's appellate courts have recognized not only that 'parents of a child have a statutorily granted superior right to its care and custody,' but also 'that parents have fundamental, basic and constitutionally protected rights to raise their own children.'" Likewise, in Vinson v. Sorrell, 136 S.W.3d 465, 468 (Ky. 2004), our supreme court recognized that "[p]arents of a child have a fundamental, basic and constitutional right to raise, care for, and control their own children." This right is also recognized in KRS 405.020(1).

In the Vinson case our supreme court, referring to its decision in Moore v. Asente, described how a non-parent may pursue the custody of a child. The court stated:

When a non-parent does not meet the statutory standard of *de facto* custodian, the non-parent pursuing custody must prove either of the following two exceptions to a parent's superior right or entitlement to custody: (1) that the parent is shown by clear and convincing evidence to be an unfit custodian, or (2) that the parent has waived his or her superior right to custody by clear and convincing evidence.

Vinson, 136 S.W.3d at 468. Therefore, since the Boyds were not *de facto* custodians of Sarah and since Mohamed had not waived his superior right to custody, the Boyds were left to show by clear and convincing evidence that Mohamed was an unfit custodian.

The Boyds argue there is ample evidence Mohamed is currently unfit, if not based on his actions raised in the original abuse allegations, then based on Sarah's perception of him. The first part of this argument ignores the court's November 22, 2000, order which found both that there was no credible evidence of abuse and that Mohamed was suitable to care for Sarah without restrictions. As these findings were never appealed, they are now final and are foreclosed from further attack by the Boyds. The second part of the Boyds' argument, that Mohamed is unfit based on Sarah's perception of him, is

also insufficient. In Moore the court noted that a showing of unfitness requires that the parent must have "engaged in conduct similar to activity that could result in the termination of parental rights by the state." 110 S.W.3d at 360. Thus, the Boyds cannot simply point to Sarah's perceptions, nor can they attribute the results of Susan's actions to Mohamed in order to show unfitness. Therefore, we conclude they had no right to intervene pursuant to CR 24.01(1) and challenge Mohamed for custody of Sarah.

The Boyds also claim a right to intervene based on the recent case of Baker, 127 S.W.3d at 622. Therein, the Kentucky Supreme Court held that biological relatives of a child sought to be adopted by foster parents had "a sufficient, cognizable legal interest in the adoption proceeding" so as to grant them a right to intervene in the proceeding pursuant to CR 24.01(1). Id. at 625. In support of its decision, the supreme court referred to KRS 620.090(2), which requires the Cabinet to give preference to available and qualified relatives of a child when placing a child given to its temporary custody. 127 S.W.3d at 625.

We conclude that the holding in the Baker case does not give the Boyds the right to intervene in this case. The Baker case was a dependency, neglect, or abuse case that arose under KRS Chapter 620 of the Unified Juvenile Code. The goal of

the Cabinet, which had received temporary custody when the allegations of abuse arose, became placement for adoption once the father committed suicide and the parental rights of the mother had been terminated. Pursuant to the statute and the Cabinet's administrative regulations, relative placement was to be given preference. Therefore, the court held that the biological relatives had a right to intervene in the adoption proceeding. Id. at 626.

This case is different from the Baker case in that the child has been placed in the temporary custody of the Cabinet "only for the duration necessary to refamiliarize [sic] the child with her father and; thus enable the return of the child to his care." This is not a case where the temporary custody of the child has been given to the Cabinet as a part of a dependency, neglect, or abuse action pursuant to KRS 620.090 or an adoption proceeding. Contrary to their arguments, KRS 620.090 does not provide a basis for the Boyds' standing to request custody of Sarah.

Because the circuit court correctly determined that the Boyds had no right to intervene in the custody dispute between Susan and Mohamed, we affirm the court's order denying the Boyds' motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Eugene L. Mosley
Louisville, Kentucky

BRIEF FOR APPELLEE:

Chris J. Gohman
Radcliff, Kentucky