

## ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA09-695

JOHN SCHUBERT and CINDY  
SCHUBERT,

APPELLANTS

V.

ARKANSAS DEP'T OF HUMAN  
SERVICES,

APPELLEE

**Opinion Delivered** FEBRUARY 3, 2010

APPEAL FROM THE CRAWFORD  
COUNTY CIRCUIT COURT  
[NO. JV-08-18]

HONORABLE MICHAEL MEDLOCK,  
JUDGE

REVERSED AND REMANDED

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**KAREN R. BAKER, Judge**

This case involves the rights of foster parents to intervene in a dependency-neglect proceeding in order to adopt a child who was in their care for the first fourteen months of her life, and whom, they claimed, DHS led them to believe they could adopt, before it placed her with another family. The circuit court deferred to DHS's decision, held that the foster parents had no standing to adopt, and denied the motion to intervene. For the reasons expressed below, we reverse and remand.

K.G. was born on January 16, 2008, to a mother with serious mental problems. When she was five days old, DHS placed her with appellants John and Cindy Schubert, who were approved foster parents. John Schubert was 68 years old, and Cindy Schubert, a housewife, was 46 years old at the time of the hearing. The Schuberts have three grown children and

have adopted four young, special-needs children. In August 2008, K.G.'s mother and her legal father consented to termination of their parental rights. In November 2008, the court terminated their parental rights, along with those of the putative father.

On the recommendation of the attorney ad litem, K.G. remained with the Schuberts for several more months. She thrived in their care and was, by all accounts, happy and well-adjusted. According to the Schuberts, DHS led them to believe that they would be able to adopt K.G. Nevertheless, only a couple of weeks before a scheduled adoption hearing, DHS informed the Schuberts that they would no longer be considered as preadoptive parents for the child because of their ages and the composition of their household. On March 20, 2009, when K.G. was fourteen months old, the court entered an ex parte order approving her removal from the Schuberts' home. DHS then placed her with a couple in their thirties. On March 26, 2009, the Schuberts filed a motion to intervene in this proceeding, along with a petition to adopt K.G.

The court held a hearing on the motion on April 9, 2009. The Schuberts presented the testimony of Gregory Roberts, a psychologist, who testified that K.G. had probably formed a strong bond with the Schuberts and that she could be mentally and emotionally damaged from being taken from her primary caregivers at this age. Kathryn Weible, who was K.G.'s caseworker until February 2009, testified that K.G. had become fully integrated into the Schuberts' family and that, given the length of time she was with them, and her strong bond with them, especially Cindy, it would be in her best interest that the Schuberts adopt

her. The Schuberts' grown daughter, Nancy Pruitt, testified that K.G. would be devastated if she were not returned to her parents. Cindy Schubert testified at length about the close bonds K.G. shared with the family. She said that, after the attorney ad litem requested that K.G. stay in their home, they had believed that they would be able to adopt her, and began preparing the entire family for that goal. She feared that K.G. would feel as if they had abandoned her.

At the conclusion of the hearing, the Schuberts' counsel argued that they had a right to intervene in this proceeding because they had been led to believe that they could adopt the child. The trial court responded that DHS, not the court, would decide where to place K.G. It made the following findings in its order denying the Schuberts' motion to intervene:

[T]he Court finds that the Juvenile division has exclusive jurisdiction regarding the adoption of the Juvenile Code and that the Juvenile Code provides that the State of Arkansas as the legal custodian of the child, has the right and interest to dictate where the child will reside. The Court further finds that *Patterson v. Robbins*, 295 Ark. 511 (1988) is not controlling in this matter and is superceded by the passage of the Juvenile Code. The Court further finds that the proposed Intervenors do not have a legal right to petition for the adoption of the juvenile herein, specifically finding that the foster parents must have had a legal interest at the institution of the proceedings regarding the Juvenile and that they cannot obtain a legal interest to adopt based solely upon the status as foster caregivers for a period of fourteen months. Since the proposed intervenors do not have a cognizable right to petition, nor a right conferred by statute, they do not meet the requirements of A.R.C.P. Rule 24(a) allowing for intervention by right. The Court also finds that permissive intervention pursuant to A.R.C.P. should not be granted because they have no right conferred by statute, and that while the claim does have common questions of law or fact, intervention should not be granted based upon the reasoning set out herein.

On appeal, the Schuberts argue that the circuit court abused its discretion in denying their motion to intervene. They make the following arguments: (1) the trial court erred in

ruling that, as foster parents, they had no standing to petition to adopt the child; (2) the trial court erred in ruling that the enactment of the juvenile code in 1989 superceded *Patterson v. Robbins*, 295 Ark. 511, 749 S.W.2d 330 (1988), in which the supreme court recognized the standing of foster parents to adopt; (3) the juvenile division of circuit court has subject matter jurisdiction to hear some adoption proceedings; and (4) the trial court erred in ruling that they did not have a right to intervene in the dependency–neglect proceeding.

The Schuberts contend that, as married foster parents eligible to adopt according to Arkansas Code Annotated section 9–9–204 (Repl. 2008) and *Patterson v. Robbins, supra*, they have standing to file for adoption. In *Patterson*, the supreme court held that section 9–9–204, which confers standing to adopt, did not exclude persons who had served as foster parents of the minor to be adopted. The supreme court denied a petition for a writ of prohibition and held that the probate court had authority to decide whether DHS had unreasonably withheld its consent to adopt. The Schuberts urge us to hold that the circuit court erred in ruling that the enactment of the juvenile code superceded *Patterson v. Robbins*.

*Patterson* remains good law. We so hold in part based upon a section of the juvenile code, Arkansas Code Annotated section 9–27–325(l) (Supp. 2009), which deals with hearings in dependency–neglect cases:

(1) The Department of Human Services shall provide to foster parents and preadoptive parents of a child in department custody notice of any proceeding to be held with respect to the child.

.....

(3)(A) The court shall allow foster parents, preadoptive parents, and relative caregivers an opportunity to be heard in any proceeding held with respect to a child in their care.

(B) Foster parents, adoptive parents, and relative caregivers shall not be made parties to the proceeding solely on the basis that the persons are entitled to notice and the opportunity to be heard.

(C) Foster parents, preadoptive parents, and relative caregivers shall have the right to be heard in any proceeding.

Subsection (l)(B), therefore, contemplates situations in which the foster parents, including those seeking to adopt the child, might become parties to the dependency-neglect proceeding. We therefore hold that the juvenile code did not supercede *Patterson*, and that appellants did establish standing.

We also agree with the Schuberts that the circuit court's juvenile division's exclusive jurisdiction of the child under Arkansas Code Annotated section 9-27-306 (Supp. 2009), and the probate division's jurisdiction over adoption proceedings, did not prevent the juvenile division from hearing their petition to adopt. Since amendment 80 of the Arkansas Constitution was adopted, the circuit court has had subject matter jurisdiction over both types of actions. See *Ferguson v. Ferguson*, 2009 Ark. App. 549.

The Schuberts also argue that they had a right to intervene in this action under Arkansas Rule of Civil Procedure 24, which states that a nonparty may intervene in a lawsuit as a matter of right or by permission. Subsection (a) provides for intervention of right:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject

of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(b) deals with permissive intervention:

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Although intervention of right cannot be denied, the trial court has discretion whether to grant permissive intervention, and its decision will be reversed only if it abused its discretion. *Burt v. Arkansas Dep't of Health & Human Servs.*, 99 Ark. App. 402, 261 S.W.3d 468 (2007); *see also Lowell v. Lowell*, 55 Ark. App. 211, 934 S.W.2d 540 (1996).

Although the testimony of Cindy Schubert, Gregory Roberts, and Kathryn Weible was compelling,<sup>1</sup> we do not decide whether the Schuberts should have been permitted to intervene as a matter of right or by permission. We cannot say whether the trial court abused its discretion because it refrained from exercising *any* discretion. In its order, the circuit court

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<sup>1</sup> The child was reared by the Schuberts from the time she left the hospital as a newborn until she was fourteen months old. The evidence was clear that she had formed strong bonds with her foster parents and siblings; that the Schuberts had, for several months, considered her as more than a foster child after being led by DHS to believe that they could adopt her; and that, at this age, the rupture of the child's bonds with the only parents she had ever known could harm her. *See State v. Anderson*, 749 P.2d 542 (Okla. 1988); *I.B. v. Dep't of Children & Families*, 876 So. 2d 581 (Fla. Dist. Ct. App. 2004).

correctly noted that the State of Arkansas is this child’s legal custodian and has the interest and right to decide where she will reside. The court’s remarks from the bench, however, revealed that it viewed DHS as the only arm of the state empowered to make the final decision on that issue, which was error as a matter of law. Our juvenile code places that power, indeed, that duty, in the juvenile divisions of the circuit courts. In simply acceding to DHS’s recommendations, the circuit court abdicated its duty to consider the merits of the Schuberts’ petition to adopt and their motion to intervene. Accordingly, we reverse and remand this case for the circuit court to fulfill its responsibility to consider the Schuberts’ petition to adopt on the merits. If, after the court adjudicated the adoption petition on the merits, the Schuberts decide to proceed with intervention—seeking to be parties to all issues remaining in this case—then the court should consider their motion to intervene in a manner consistent with this opinion. *See Gullahorn v. Gullahorn*, 99 Ark. App. 397, 260 S.W.3d 744 (2007).

Reversed and remanded with instructions.

GLADWIN and MARSHALL, JJ., agree.