Circuit Court for Baltimore County
Case No. 03-I-19-000007

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 624

September Term, 2020

IN RE: B.F.

Berger,
Arthur,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: March 8, 2021

B.F., the child of K.S. ("Mother"), was determined to be a child in need of assistance ("CINA"). At the time, B.F.'s father was thought to be Mother's husband, Mr. S.

At a review hearing seven months after the CINA adjudication, Mr. K. appeared in court and claimed to be B.F.'s father. The court ultimately ordered Mr. K. to submit to a paternity test to confirm his status as B.F.'s father.

On the day after the court ordered him to submit to a paternity test, Mr. K. filed a motion to intervene as of right as B.F.'s father. The court denied Mr. K.'s motion without prejudice to his ability to reassert the motion after he took the paternity test. The court also denied a motion to alter or amend.

In this appeal, Mr. K. raises three questions, which we have rephrased and condensed into two:

1. Did the circuit court err or abuse its discretion in denying Mr. K.'s motion to intervene?

2. Did the circuit court err or abuse its discretion ordering Mr. K. to submit to genetic testing?[1]

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[1] Mr. K. formulated his questions as follows:

I. Whether the court legally erred in denying Appellant's Motion to Intervene in the CINA proceeding.

II. Whether the court erred, as a matter of legal procedure, by ordering Appellant to submit to a paternity test as condition to participating in any future proceedings

III. Whether the appeal of the Order denying Appellant's Motion is authorized pursuant to § 12-303 of the Courts and Judicial Proceedings

(footnote continued . . .)

For reasons to follow, we hold that the circuit court did not err in denying the motion. We affirm the court's judgment.

BACKGROUND

B.F. was born in October of 2015. No father was named on B.F.'s original birth certificate.

In the years that followed, Mother identified two men, Mr. J. and Mr. B., as B.F.'s father. A paternity test excluded Mr. J. as the father. Mr. B. had died by the time he was identified as a potential father, so no paternity test was ever performed to confirm or deny his status as B.F.'s father.

In December of 2018, when B.F. was three years old, Mother married Mr. S. Shortly thereafter, on January 9, 2019, the Baltimore County Department of Social Services (the "Department") filed a CINA petition with a request to place B.F. and her younger sister in shelter care. The petition alleged that the identity of B.F.'s father was unknown and that Mother "did not want to provide his identity."

On January 10, 2019, the Circuit Court for Baltimore County granted the petition for shelter care and placed B.F. and her sister in the custody of their maternal grandmother ("Grandmother"). The court directed Mother to inform the Department of the identity of B.F.'s potential fathers.

Article of the Maryland Code.

We shall address the final question when we address B.F.'s motion to dismiss the appeal.

On approximately February 6, 2019, Mother named her husband, Mr. S., as B.F.'s father. On February 14, 2019, the Department filed an amended petition that named Mr. S. as B.F.'s father.

On May 30, 2019, the circuit court held an adjudication and disposition hearing on the Department's CINA petition. Mr. S. was represented by counsel at the hearing.

In an order dated May 30, 2019, the court determined B.F. to be a CINA. In reaching its decision, the court found that B.F. had been in the custody of Mother and Mr. S., to whom the court referred as B.F.'s "father." In addition, the court found that B.F.'s "[p]arents," including Mr. S. as her father, had "substance abuse, mental health, and domestic violence issues which prevent them from providing appropriate care." The court ordered that B.F. be placed in the custody of her maternal grandmother ("Grandmother").

The court conducted a review hearing on November 12, 2019. At that hearing, Mr. S., in his capacity as B.F.'s father, was again represented by counsel. As a result of the hearing, the court adopted a permanency plan of reunification with the parents, presumably including Mr. S. In addition, the court ordered that Mr. S., as the child's "father," should have liberal, supervised visitation.

On February 7, 2020, a few days before the next scheduled review hearing, Mother showed the Department a new birth certificate. That document, issued three days earlier, on February 4, 2020, named Mr. K. as B.F.'s father.

At a CINA review hearing on February 11, 2019, Mr. K. appeared and claimed to be B.F.'s father. The court reset the matter for April 2020, so that Mr. K. could obtain counsel. Because of the COVID-19 emergency, however, the rescheduled hearing did not take place.

On May 18, 2020, Mr. K. filed a petition for a protective order on B.F.'s behalf in the District Court of Maryland for Baltimore County. Mr. K.'s petition alleged that Grandmother was abusing B.F. The district court, apparently unaware of the CINA proceedings in circuit court, granted the petition and awarded temporary custody of B.F. to Mr. K.

When the Department learned that Mr. K. had secured a district court order to remove B.F. from Grandmother's custody, it filed a request for emergency review in the circuit court. In that document, the Department asked the court to rescind the order granted by the district court.

On May 27, 2020, the day before the scheduled hearing on the Department's request for emergency review, Mother's husband, Mr. S., filed what he called an "Unopposed Request for Excusal from Party Status." In brief, Mr. S. asked the court to issue an order "removing him as" B.F.'s "named father." Mr. S. claimed that he "no longer believe[d] himself to be [B.F.'s] father" given the assertions by Mother and Mr. K. that Mr. K. was B.F.'s father.

On June 2, 2020, the court granted Mr. S.'s request and ordered that his name be stricken as B.F.'s father and that he be excused from the case. The order noted that the new birth certificate named Mr. K. as the child's father.

Meanwhile, at the hearing on the Department's emergency petition on May 28, 2020, Mr. K. appeared with counsel and again asserted that he was B.F.'s father. He claimed to have "believed that he is the father for years." He also claimed to have executed an "affidavit of parentage," which, he said, constituted "a legal finding of parentage." Mr. K., however, does not appear to have presented an affidavit of parentage to the court before or during the hearing.

Mother, who was also present at the hearing, agreed with Mr. K. that he should be recognized as B.F.'s father. Mother claimed, incorrectly, that she had never presented anyone other than Mr. K. as the father. She expressed concerns regarding the allegations of abuse against Grandmother, as did Mr. K.

Both the Department and counsel for B.F. objected to Mr. K.'s claim that he should be considered the father. Arguing that Mother had named three other men as B.F.'s father, they requested that Mr. K. be required to submit to a paternity test. They indicated that they had no concerns about Grandmother's care of B.F.

The circuit court found that a more comprehensive evidentiary hearing was appropriate to address the allegations of abuse involving Grandmother. The court also found, however, that B.F. was to remain in Grandmother's custody and that there was no likelihood that abuse or neglect would occur with that custody arrangement.

On the issue of Mr. K.'s status, the court ruled that he must submit to a paternity test. The court said: "At that time, assuming that he is the father, then he will be admitted as a party in this case and [counsel's] appearance will be accepted."

After Mr. K. objected and declared that he would likely file a motion to intervene, the court stated:

> Do whatever you need to do, but at this juncture considering this is the fourth person who has been considered as the father[,] I think a DNA test would be appropriate. It is not like there has been contact with [Mr. K.] throughout even the majority of this case. He has only appeared in 2020.
>
> I appreciate that there has been a change in the birth certificate and I appreciate that he is willing to step up for paternity . . . , but at this juncture I think we need to have a test.

The court expressed its willingness to conduct a full hearing at some point in the future, but it noted that the child was four years old, that the case was over a year old, and that Mr. K. had only just appeared in the case. The court embodied its decision in a written order that was dated May 28, 2020, and docketed on May 29, 2020.

On May 29, 2020, the day after the hearing at which the court announced its intention to require him to submit to a paternity test, Mr. K. moved to intervene under Md. Rule 11-122(a). As an exhibit to the motion, Mr. K. attached B.F.'s recent birth certificate (the document dated February 4, 2020, more than four years after her birth). In addition, Mr. K. referred to, but did not attach, an affidavit of parentage. Mr. K. asserted that an affidavit of parentage "constitutes a legal finding of parentage" under Maryland Code (1984, 2019 Repl. Vol.), § 5-1028 of the Family Law Article ("FL"). In

contravention of Md. Rule 11-122(c), Mr. K.'s motion was not "accompanied by an affidavit showing that [he] is a parent of the" child.

In an order dated June 23, 2020, and docketed on June 24, 2020, the circuit court denied the motion to intervene, without prejudice. The court observed that it had ordered Mr. K. to submit to a paternity test. The court allowed Mr. K. to refile his motion to intervene if the test showed that he was the child's father.

Within 10 days of the order denying his motion to intervene, on July 5, 2020, Mr. K. moved to modify or vacate it. As an exhibit, his motion included a largely illegible copy of an affidavit of parentage. In the motion, Mr. K. argued, among other things, that under FL § 5-1028 he was, "by operation of law," the child's father because he had signed an affidavit of parentage.

On July 21, 2020, before the court had ruled on his motion to vacate or modify, Mr. K. noted an appeal. On August 11, 2020, the court denied the motion to vacate or modify.[2]

[2] Mr. K.'s brief contains an array of additional factual assertions that are completely unsupported by any citation to the record. For example, Mr. K. asserts that he "and Mother were involved in an intimate relationship at the time the child, B.F., was conceived," which would presumably have been in early 2015. "At that time," he asserts, he "was enlisted in the United States Army." He says that he was to be deployed to Georgia "from September of 2016," when the child was 11 months old, until "late 2019." He "proffer[s]" that Mother refused to designate him as B.F.'s father because she was upset that he was leaving after her birth (though he says he was not deployed to Georgia until 11 months after she was born). He claims to have contributed financially to B.F.'s support since her birth. He goes on at length about his concerns about B.F.'s safety while she is in Grandmother's care. Suffice it to say that it is inappropriate for Mr. K. to advance these unsupported allegations as though they were the "facts" before the circuit court.

MOTION TO DISMISS

B.F., the child, has moved to dismiss Mr. K.'s appeal. B.F. argues that the circuit court's order denying Mr. K.'s motion to intervene is not a final judgment and, hence, is not appealable.

Mr. K. did not respond to the motion, but he addressed it preemptively in his brief. There, he argued that the denial of his motion to intervene is an appealable interlocutory order under Maryland Code (1974, 2013 Repl. Vol.), § 12-303(3)(x) of the Courts and Judicial Proceedings Article ("CJP"), because it deprives him, as a parent, of the care and custody of a child.

Mr. K.'s argument is a bit circular because it assumes that he is a parent, even though that is a contested issue in this case. But notwithstanding Mr. K.'s circular argument, we are convinced that B.F.'s motion to dismiss has no merit. "[A] circuit court's denial of a motion to intervene is an appealable final order." *HIYAB, Inc. v. Ocean Petroleum, LLC*, 183 Md. App. 1, 9 (2008) (citing *Montgomery County v. Bradford*, 345 Md. 175, 185 n.1 (1997); *Maryland Life & Health Ins. Gty. Ass'n v. Perrott*, 301 Md. 78, 87 (1984); *Benning v. Allstate Ins. Co.*, 90 Md. App. 592, 596 (1992)).[3]

[3] Although no party raises the issue, we note that under *Edsall v. Anne Arundel Cty.*, 332 Md. 502, 508 (1993), Mr. K. was not required to note a second appeal after the denial of his post-judgment motion:

> [A] notice of appeal filed prior to the withdrawal or disposition of a timely filed motion under Rule 2-532, 2-533, or 2-534, is effective. Processing of that appeal is delayed until the withdrawal or disposition of the motion.

(footnote continued . . .)

DISCUSSION

Standard of Review

Appellate review of a child-custody decision involves three interrelated standards. First, we review any factual findings for clear error. *In re Yve S.*, 373 Md. 551, 586 (2003). Second, we review any legal conclusions without deference. *Id.* Finally, we do not disturb the ultimate conclusion unless the court abused its discretion. *In re Adoption of Ta'Niya C.*, 417 Md. 90, 100 (2010). A court abuses its discretion if its decision "does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective." *In re Adoption/Guardianship of Jayden G.*, 433 Md. 50, 87 (2013) (citation omitted).

Analysis

I. Denial of Motion to Intervene as of Right

Mr. K. moved to intervene under the authority of Md. Rule 11-122(a). Rule 11-122(a) concerns intervention as "[o]f right" in juvenile proceedings. It states: "Upon timely application, any parent not served with original process shall be permitted to intervene for any purpose." In other words, the rule requires a court to allow a person to intervene in a juvenile proceeding if the person is a parent who has not been served with original process.

In this case, there is no dispute that Mr. K. was not served with original process. The dispute concerns whether he is a "parent."

The trial court retains jurisdiction to decide the motion notwithstanding the filing of the notice of appeal.

In support of the contention that the court erred in denying his motion to intervene, Mr. K. claims that he was, "by operation of law," B.F.'s father. He relies on the barely-legible affidavit of parentage that he claims to have executed and on FL § 5-1028. He asserts that in view of § 5-1028 the court was required to accept him as B.F.'s father even if he refused to undergo a paternity test.

FL § 5-1028 typically comes into play when the Department attempts to enforce a child-support obligation against the child's putative father. *See, e.g.*, *Faison v. MCOCS ex rel. Murray*, 235 Md. App. 76 (2017); *Boone v. Youngbar*, 234 Md. App. 288 (2017). Section 5-1028 states, in relevant part, as follows:

> (d)(1) An executed affidavit of parentage constitutes a legal finding of parentage, subject to the right of any signatory to rescind the affidavit:
>
> (i) in writing within 60 days after execution of the affidavit; or
>
> (ii) in a judicial proceeding relating to the child:
>
> 1. in which the signatory is a party; and
>
> 2. that occurs before the expiration of the 60-day period.
>
> (2)(i) After the expiration of the 60-day period, an executed affidavit of parentage may be challenged in court only on the basis of fraud, duress, or material mistake of fact.

In this case, it is debatable whether the circuit court was required to accept Mr. K.'s unsworn assertion that the barely-legible affidavit of parentage is what he says it is: an affidavit of parentage by which he affirmed that he is B.F.'s father. But there is a more fundamental problem with Mr. K.'s argument: when he filed his motion to

intervene, he did not attach the affidavit of parentage, or any other affidavit showing that he is a parent of B.F. For that reason, the motion was legally defective.

Maryland Rule 11-122(c) governs the procedure for moving to intervene in a juvenile case. The rule states, in pertinent part, that if a person "claims a right of intervention under section a of this Rule," as Mr. K. did when he attempted to intervene as of right, "the motion shall be accompanied by an affidavit showing that the applicant is a parent of the respondent child."

Mr. K.'s brief motion did not comply with this requirement. The motion attached the child's new birth certificate, and it asserted that "an executed affidavit of parentage constitutes a legal finding of parentage." But it did not attach an affidavit of parentage (not even an illegible one). Nor did it attach any other form of affidavit in which Mr. K. swore or affirmed that he was the child's father.

In these circumstances, the motion failed to satisfy a technical, procedural requirement of a valid motion to intervene as of right under Rule 11-122. The circuit court did not err in denying this procedurally defective motion.[4]

[4] Mr. K. attached the putative affidavit of parentage to his post-judgment motion to "amend or modify" the denial of his motion to intervene, but he does not argue that the court abused its broad discretion in denying that post-judgment motion. *See Steinhoff v. Sommerfelt*, 144 Md. App. 463, 484 (2002) (stating that "[t]he trial judge has boundless discretion not to indulge this all-too-natural desire to raise issues after the fact that could have been raised earlier but were not"). Consequently, we do not consider that issue.

II. Order Requiring Paternity Test

Mr. K. asserts that the court had no authority to require him to submit to a paternity test as a condition of appearing as a party. He complains that because he is not a party, he has no ability to challenge the order (even though he is challenging it in this appeal). Citing a civil case involving a man who claimed to be the biological father and the man who was presumed to be the biological father (the mother's husband),[5] he argues that the court can order a paternity test only through an order compelling a party to submit to a physical examination. Thus, he concludes that the court could not compel him, a non-party, to submit to a paternity test. Finally, he argues that the circuit court was required to consider the child's best interests before ordering him to submit to a paternity test.[6]

We agree that, in a CINA case, the court must consider the child's best interests before it orders a putative father to submit to a paternity test. We disagree, however, that a court cannot compel a non-party to submit to a paternity test when he interjects himself into the proceedings and claims to be the child's father, as Mr. K. did.

[5] *Turner v. Whisted*, 327 Md. 106 (1992).

[6] It is debatable whether Mr. K. has the right to take an immediate appeal of the interlocutory order requiring him to submit to a paternity test. *Cf. St. Joseph Med. Center, Inc. v. Cardiac Surgery Assocs., P.A.*, 392 Md. 75, 90-91 (2006) (permitting a non-party to take an immediate appeal of an order requiring it to produce documents). Typically, he would have the right to appeal if he refused to comply and was held in contempt. CJP § 12-304(a). We address the issue because it is intertwined with the denial of his motion to intervene, which is immediately appealable.

Under CJP § 3-803(b)(1)(i), a juvenile court has "concurrent jurisdiction over . . . [the] paternity of a child whom the court finds to be a CINA." In other words, a juvenile court has the power to ascertain the paternity of a CINA. *See In re B.C.*, 234 Md. App. 698, 718 (2018) (stating that "CINA courts have the power to determine paternity in order to identify the proper parties to the CINA proceeding").

Under CJP § 3-821(a)(3), a juvenile court, "on its own motion . . . may issue an appropriate order directing, restraining, or otherwise controlling the conduct of a person who is properly before the court, if the court finds that the conduct . . . [w]ill assist in the rehabilitation of or is necessary for the welfare of the child." Under CJP § 3-821(b), the court may issue such an order against a person who, like Mr. K., is not a party to the CINA petition "if the person is given: (1) [n]otice of the proposed order controlling the person's conduct; and (2) [t]he opportunity to contest the entry of the proposed order." The order is enforceable under the rules governing contempt of court. CJP § 3-821(c). Consequently, a person may obtain appellate review of the order by refusing to comply, being held in contempt, and noting an appeal. CJP § 12-304(a).

An order requiring a putative father to submit to a paternity test is obviously one that will assist in the rehabilitation of the child or is necessary for the child's welfare: it is important for a child, the mother, the Department, and others to know whether a person who claims to be the father really is the father. It is, therefore, not difficult to see that CJP § 3-821 permits a court to order a person who claims to be the child's father to

submit to a paternity test, provided that the person is "properly before the court," had notice of the proposed order, and had the opportunity to contest the entry of the order.

In this case, these conditions were met. Mr. K. was before the court because he had interjected himself into the proceedings three months earlier, when he first claimed to be B.F.'s father. Furthermore, because he and his attorney attended the proceedings at which the court ordered him to submit to a paternity test and addressed the court at those proceedings, he had notice of the proceedings and an opportunity to contest the entry of the order. The court, therefore, had the power to compel him to submit to a paternity test. Contrary to his assertion that he has no way to challenge the order, he may obtain appellate review by refusing to comply, being held in contempt, and noting an appeal. CJP § 12-304(a).[7]

Finally, we have no question that the court considered the child's best interests in its decision to require Mr. K. to submit to a paternity test. Mr. K. was the fourth man who had been identified as B.F.'s father. He did not surface until B.F. was more than four years old, and the CINA case was more than a year old. He somehow obtained the district court order under which B.F. was removed from Grandmother's care notwithstanding the order in the CINA case that gave custody to Grandmother. Finally, the court was told that B.F. and Mr. K. had never met and that B.F. "had no idea who her father is." Based on that information, the court reached the sound conclusion that B.F.

[7] Typically, a court will and should stay the operation of its order pending appeal. If the circuit court does not stay the operation of its order, the appellate court may. Md. Rule 8-425(a).

was "entitled to know who her father is" and, consequently, that a paternity test was appropriate. If Mr. K. takes the test and is found to be B.F.'s father, he may intervene in her CINA case.

MOTION TO DISMISS DENIED. JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.