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NOT DESIGNATED FOR PUBLICATION

No. 97,524

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

GENE E. ABERNATHY,
Appellee,

and

JALON J. ABERNATHY,
Appellee,

(GORDON and KAREN ABERNATHY)
Intervenors/Appellants.

MEMORANDUM OPINION

Appeal from Douglas District Court; JANETTE SHELDON and JEAN F. SHEPHERD, judges. Opinion filed August 10, 2007. Affirmed.

James E. Rumsey, of Lawrence, for intervenors/appellants.

John J. Immel and *Katherine L. O'Connor-Gonzales*, of Petefish, Immel, & Heeb, L.L.P., of Lawrence, for appellee Jalon J. Abernathy.

Before MALONE, P.J., BUSER, J. and LARSON, S.J.

Per Curiam: Gordon and Karen Abernathy (Grandparents), paternal grandparents of the minor children of Gene E. Abernathy (Father) and Jalon J. Abernathy (Mother), appeal the district court's denial of their motion to intervene in this divorce case. We affirm.

Factual and Procedural Background

Mother and Father were divorced on August 10, 2005. Child custody and support issues were reserved for further hearing. Mother and Father then submitted an agreed order on these issues, which Judge Jean F. Shepherd signed and entered on February 21, 2006.

The agreed order recited certain events since the divorce, including the preparation of a parental assessment by Kathie S. Nichols, Ph.D. and Father's federal criminal conviction and sentence to 37 months' incarceration. The agreed order conferred sole custody on Mother and set up monthly visitation with Father at the Leavenworth Penitentiary. Grandparents or Father's sister were to transport the children to see Father.

The agreed order was to "remain in place until [Father's] release, at which time it may be reviewed upon proper motion."

Grandparents filed a motion to intervene about 3 months later, on May 25, 2006. Grandparents asserted they had an "unconditional right to intervene" for the purposes of grandparent visitation. Grandparents did not allege a violation of their own visitation. Rather, they maintained Mother was not complying with orders regarding Father's contact with the children, such as telephone calls from the prison. Grandparents also alleged Mother was engaging in "disruptive behavior towards the children" including "unilaterally decid[ing] to remove them from [a parochial school] even though [Father] made arrangements for them to continue to attend before he was incarcerated."

Grandparents argued the alleged violations of the court order and "disruptive behavior" should be "counterbalanced by regular contact with the [G]randparents." They asserted it was "in the best interests of the children that . . . [G]randparents have regular visitation" 1 evening every other week, 1 weekend each month, an 8-hour visitation over Thanksgiving, Winter, and Spring school breaks, and 1 week each summer.

On May 26, 2006, Judge Shepherd appointed a case manager to deal with the Mother's alleged interference with Father's contact with the children. The case manager's order did not address Grandparents' concerns regarding schooling.

On August 1, 2006, the administrative assistant to the Chief Judge of the Seventh Judicial District, Robert W. Fairchild, filed a notice stating the case had been reassigned to Judge Fairchild. A similar notice was filed on August 22, 2006, this time reassigning the case to Judge Shepherd.

On the same day as the reassignment, and without further explanation in the record, Grandparents' motion to intervene was heard by Senior Judge Janette Sheldon. After both parties presented argument, Judge Sheldon denied the Grandparents' motion, ruling that counsel for Grandparents "has shown no interest to the Court nor has he impressed the Court with any reason why there should be an intervening party." Grandparents appeal.

Jurisdiction

At the outset, Grandparents raise the issue "whether the Temporary Judge who heard [Grandparents'] Motion had the jurisdiction to decide the matter." This issue

focuses on the status of Judge Sheldon, whom Grandparents call "a Temporary [District] Judge" and Mother describes as "an Assigned Senior Judge." An objection to jurisdiction may be raised at any time, and it presents a question of law subject to unlimited review. *Foster v. Kansas Dept. of Revenue*, 281 Kan. 368, 369, 130 P.3d 560 (2006). *Mid-Continent Specialists, Inc. v. Capital Homes*, 279 Kan. 178, 185, 106 P.3d 483 (2005).

Grandparents contend Judge Sheldon heard their motion under K.S.A. 2006 Supp. 20-310b(a), which states:

> "Upon stipulation of the parties to an action, the court may order the action to be heard and determined by a temporary judge who is a retired justice of the supreme court, retired judge of the court of appeals or retired judge of the district court. Such temporary judge shall be sworn and empowered to act as judge in the action until its final determination."

Nothing in the record indicates that Judge Sheldon heard Grandparents' motion pursuant to this statute. Specifically, there is no record of a related district court order, stipulation by the parties, or swearing of Judge Sheldon. Nevertheless, Mother does not dispute Grandparents' reliance on K.S.A. 2006 Supp. 20-310b, but simply argues that Grandparents waived any objection by appearing before the judge without complaint.

The parties do not cite K.S.A. 20-2616(a), which provides that a "retired district judge . . . may be designated and assigned to perform such judicial service and duties as such retired . . . judge is willing to undertake." In contrast to an assignment under K.S.A. 2006 Supp. 20-310b(a), which requires a district court order and stipulation of the parties, under K.S.A. 20-2616(a) "[d]esignation and assignment of a retired . . . judge . . . shall be made by the chief justice of the supreme court."

The records on file in the Office of Judicial Administration show that Chief Justice Kay McFarland designated Judge Sheldon, "[i]n accordance with the provisions of K.S.A. 20-2616," as an "assigned Judge of the District Court in the Seventh Judicial District . . . to hear and determine any cases assigned to you by the Chief Judge of said district." The designation and assignment was effective "August 3, 2006, through Calendar Year 2006."

Chief Justice McFarland's designation was evidently the basis of Judge Sheldon's authority, not K.S.A. 2006 Supp. 20-310b. Grandparents have failed to establish that Judge Sheldon was without authority or jurisdiction to rule on this motion. See *Fletcher v. Nelson*, 253 Kan. 389, 392, 855 P.2d 940 (1993) (appellant has burden to designate record establishing claimed error).

Due Process

Turning to Grandparents' substantive contentions, they claim "[t]he denial of [their] motion to intervene by the Temporary Judge is a denial of [their] rights to due process and must be reversed." "The question of what process is due in a given case is a question of law over which an appellate court has unlimited review. [Citation omitted.]" *State v. Moody*, 282 Kan. 181, 188, 144 P.3d 612 (2006).

"The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Moody*, 282 Kan. at 188. Grandparents do not specify a lack of notice or hearing. They complain in a conclusory fashion that "[t]heir day in court was denied."

The record shows Grandparents filed a 6-page verified motion to intervene on May 25, 2006. Following Mother's request for oral arguments on the motion, Grandparents' counsel filed a notice setting the matter for hearing. Counsel for Mother and Grandparents filed a joint motion to continue the hearing which was ultimately held on August 22, 2006. During the hearing both counsel presented their arguments and Judge Sheldon indicated she had read the submissions of all parties. Grandparents clearly

had notice, an opportunity to be heard, and they fully argued their motion before the district court.

Grandparents also cite K.S.A. 60-224 and K.S.A. 60-1616(b). The former statute controls intervention by nonparties, and the latter controls grandparent visitation in divorce cases. *Cf. Skov v. Wicker*, 272 Kan. 240, 247-48, 32 P.3d 1122 (2001) (reading the limitations on grandparent visitation found at K.S.A. 38-129[a] into K.S.A. 60-1616[b]). Other than cite the statutes, Grandparents do not identify any provision violated here. They only complain they "should have been allowed to intervene."

After Grandparents moved to intervene, their motion was denied after notice and a hearing. We find no error in the due process afforded Grandparents. Finally, although Grandparents frame this issue as a due process challenge, their complaint is actually with the result of the hearing, not the process.

Denial of Intervention

Grandparents finally contend the district court applied a wrong standard to their intervention motion. In particular, Grandparents claim the district judge adopted the Mother's argument at the hearing that "before [Grandparents] could assert their position in

Court regarding grandparent visitation they had to show a change in circumstances from the present custody/parenting order." See K.S.A. 60-1610(a)(2)(A). Grandparents argue, however, that the proper standard is whether visitation would be in the "best interests of the child." See K.S.A. 60-1616(c).

K.S.A. 60-224(a) governs intervention of right, and K.S.A. 60-224(b) controls permissive intervention. Both are matters of judicial discretion. See *Montoy v. State*, 278 Kan. 765, 766, 102 P.3d 1158 (2005); *Smith v. Russell*, 274 Kan. 1076, 1083, 58 P.3d 698 (2002); *Jones v. Bordman*, 243 Kan. 444, 448, 759 P.2d 953 (1988). To the extent this court "must construe the rules pertaining to intervention," review is de novo. *Farmers Group, Inc. v. Lee*, 29 Kan. App. 2d 382, 385, 28 P.3d 413 (2001).

The district court did not identify the standard it applied in denying intervention, only stating that counsel for Grandparents "has shown no interest to the Court." The journal entry does not resolve this ambiguity, stating only that "the Motion . . . to intervene . . . should be and is hereby denied." Whether the district judge was referring to K.S.A. 60-224(a)(2), which supports intervention of right when "the applicant claims an interest relating to the property or transaction which is the subject of the action," or was ruling on the merits that Grandparents had failed to show that

additional visitation would be in the "best interests of the child," or was applying some other standard is a matter of speculation.

In this regard, Grandparents' framing of their intervention motion was confusing. Their motion to intervene concluded "the Intervenors pray their request to intervene be granted, and that their request for grandparent visitation be granted as well." At the hearing, however, Grandparents' counsel urged the district court to rule on intervention separately from the merits: "We're not here to argue the merits of this motion in terms of how much or whether or not there should be a modification . . . only whether or not we should be allowed to intervene in the case."

On appeal, Grandparents fail to detail how K.S.A. 60-224 permitted intervention in their case. They do not effectively argue that they merited intervention of right or permissive intervention. Instead, Grandparent presume the district court ruled on a basis other than K.S.A. 60-224, an assertion neither proven nor disproven by the record. Given the state of the record and the context Grandparents presented this issue we are unable to discern that the district judge used an incorrect standard in ruling on Grandparents' motion.

Grandparents bore the burden of designating a record showing reversible error. *Fletcher*, 253 Kan. at 392.

> "'[A] litigant must object to inadequate findings of fact and conclusions of law in order to give the trial court an opportunity to correct them. In the absence of an objection, omissions in findings will not be considered on appeal. Where there has been no such objection, the trial court is presumed to have found all facts necessary to support the judgment.'" *Gilkey v. State*, 31 Kan. App. 2d 77, 77-78, 60 P.3d 351, *rev. denied* 275 Kan. 963 (2003) (quoting *Hill v. Farm Bur. Mut. Ins. Co.*, 263 Kan. 703, 706, 952 P.2d 1286 [1998]).

Grandparents' failure to designate a sufficient record precludes our finding reversible error on this issue.

Affirmed.