[Cite as *In re A.K.*, 2009-Ohio-5074.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF:	)	
	)	CASE NO. 08-MA-193
A.K., MINOR CHILD.	)	
	)	OPINION
	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas, Juvenile Division of Mahoning County, Ohio Case No. 07JG871
JUDGMENT:	Affirmed
APPEARANCES: For Appellees	Attorney Matthew T. Fekete 725 Boardman-Canfield Rd., Unite L-1 Youngstown, Ohio 44512
For Appellant	Attorney Scott C. Essad Attorney Christopher J. Newman Henderson, Covington, Messenger, Newman & Thomas Co., L.P.A. 6 Federal Plaza Central, Suite 1300 Youngstown, Ohio 44503

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Frank D. Celebrezze, Jr.
Judge of the Eighth District Court of Appeals, Sitting by Assignment

Dated: September 24, 2009

[Cite as *In re A.K.*, 2009-Ohio-5074.]
DONOFRIO, J.

{¶1} Appellant Boardman Local School District Board of Education appeals the decision of the Mahoning County Common Pleas Court, Juvenile Division, denying its motion to intervene in the custody case involving A.K.

{¶2} This case is one of two interrelated cases presently before this court. The two cases paralleled each other below in the general and juvenile divisions of the Mahoning County Common Pleas Court. They each involved the same parties (or those desiring to be parties).

{¶3} A.K. moved from Las Vegas, Nevada to Boardman, Ohio in April 2007 to live with her aunt and uncle, Katherine and Anthony Grosso. On June 26, 2007, the Grossos filed for custody of A.K. in juvenile court in a pleading entitled, "Agreed Complaint for Custody." They alleged that A.K. was dependent, noting her parents did not contest their assumption of custody. The Grossos provided a copy of this complaint to Boardman School District officials with the intention of enrolling A.K. in its schools. The school treasurer informed them, though, that an actual court order of custody was required to enroll her.

{¶4} On August 7, 2007, following a hearing, a juvenile court magistrate adjudicated A.K. dependent pursuant to R.C. 2151.04 and granted custody of her to the Grossos, specifically finding that Las Vegas, Nevada was to bear the cost of her education. The juvenile court adopted the magistrate's decision on August 29, 2007. The order noted: (1) A.K. had become dependent upon the Grossos for her care and support, (2) the Grosso's continued custody of A.K. was in her best interest; and (3) reasonable efforts had been made to prevent the need for A.K.'s placement with the Grossos and make it possible for her to return home. The juvenile court adjudicated A.K. dependent pursuant to R.C. 2151.04 by clear and convincing evidence and granted custody of her to the Grossos. The court noted that it retained continuing jurisdiction over A.K.'s custody pursuant to R.C. 2151.353(E)(1) and ordered "Las Vegas Nevada School District" to bear the cost of her education.

{¶5} Despite this official change in custody, Boardman School District still declined to admit A.K. unless the Grossos paid $800 per month in tuition, an amount

they were unable to afford. As a result, the Grossos filed a petition for a writ of mandamus, motion for temporary restraining order, and petition for a permanent injunction in the Mahoning County Common Pleas Court, General Division, seeking to compel Boardman School District to enroll A.K. without charging them tuition. Taking note of the juvenile court's August 7, 2007 judgment, a magistrate granted a temporary restraining order requiring the district to admit A.K. without charging tuition.

{¶6} Subsequently, the magistrate heard testimony and denied the petition for a permanent injunction in September 2007. The Grossos filed objections and the district responded. The trial court held a hearing on the objections, allowed additional testimony, and took the matter under advisement. Meanwhile, on October 23, 2007, the trial court reinstated the temporary restraining order allowing A.K. to attend Boardman schools tuition-free.

{¶7} On December 19, 2007, the trial court adopted the magistrate's decision denying the preliminary injunction. The court added "no just reason for delay" language and stated that the order is a final appealable order.

{¶8} The Grossos appealed, asking this court to stay the trial court's order denying the preliminary injunction and the order dissolving the temporary restraining order. *State ex rel. Grosso v. Boardman Twp. Local School Dist.*, 7th Dist. No. 08-MA-3. After considering oral arguments at the stay hearing, the trial court record, and the pertinent law, this court granted the Grosso's stay request and issued an injunction pending the appeal that allowed A.K. to remain in Boardman public schools "without charging tuition to any private individual." 01/25/08 J.E. This court also partially remanded the matter to the trial court to complete the case on its merits and held the appeal in abeyance pending the outcome of the trial court's decision.

{¶9} Meanwhile, in the juvenile court case and over five months after its custody determination, Boardman School District filed a motion on February 4, 2008, entitled, "Motion of Boardman Local District Board of Education to Intervene and to Vacate or Amend the August 29, 2007 Order of this Court." In that motion, the ruling

upon which is the subject of this appeal, the district claimed standing to intervene pursuant to R.C. 2151.362 and R.C. 3313.64. The thrust of its argument was that the juvenile court lacked the statutory authority to order an out-of-state school district to bear the costs of A.K.'s education. It argued that the statutes relied upon by the juvenile court in ordering Las Vegas, Nevada to bear the cost of A.K.'s education apply only to intra-, not inter-state, shifts in custody. In essence, the district claimed that it was or would be unable to collect reimbursement for A.K.'s education from the Las Vegas, Nevada school district. Even if the juvenile court had jurisdiction over a school district from outside Ohio, Boardman School District argued that "Las Vegas Nevada School District" was a non-entity and that the court failed to include language in the order that the "determination of which school district is responsible to bear the cost of educating the child is subject to re-determination by the department" as required by R.C. 2151.362(A). Lastly, the district also took issue with the juvenile court's finding of dependency.

{¶10} Back in the mandamus action (upon remand from this court), Boardman School District filed an answer and the trial court set the case for a non-oral hearing. On May 9, 2008, the trial court reversed its previous position (as reflected in its December 19, 2007 denial of the preliminary injunction) and granted the petition for writ of mandamus. The trial court found that R.C. 3313.64 was applicable to the situation where a child's parents reside out of state, but the child is in the legal custody of a nonparent in Ohio. Further, the trial court found that A.K. resides in the Boardman School District since she lives with her legal custodians, the Grossos, whose residence is in that school district. Thus, it concluded that the district, pursuant to R.C. 3313.64(B)(2) was required to admit her to its schools. In regard to tuition and whether it was required to be paid by a private individual, the court held that the juvenile court had already ruled that Las Vegas Nevada School District was to bear the costs of A.K.'s education and thus, res judicata applied. The district appealed the court's decision to this court. *State ex rel. Grosso v. Boardman Twp. Local School Dist.*, 7th Dist. No. 08-MA-105.

{¶11} Subsequently, in the juvenile court action, the court held a hearing on the district's motion on July 9, 2008. On August 27, 2008, the court issued two judgment entries. In the first, the court inexplicably amended the magistrate's August 7, 2007 decision to remove the finding of dependency. Concerning who would bear the cost of educating A.K., the court changed it from "Las Vegas Nevada School District" to "Clark County School District of the State of Nevada." In the second judgment entry, the court denied the district's motion on several grounds: (1) the district should have filed an objection to the magistrate's August 7, 2007 decision; (2) the district is not a proper party in interest; (3) a motion to vacate cannot be substituted for a timely notice of appeal; and (4) a custody complaint cannot be amended once it has been adjudicated. The district appealed the second entry, which is the subject of the present appeal. *In re A.K. Kitchel*, 7th Dist. No. 08-MA-193.

{¶12} The district raises one assignment of error which states:

{¶13} "The trial court erred when it denied the Boardman Local School District Board of Education's motion to intervene."

{¶14} Boardman School District's February 4, 2008 motion was entitled, "Motion of Boardman Local District Board of Education to Intervene and to Vacate or Amend the August 29, 2007 Order of this Court." Logic dictates that a non-party cannot file a motion to vacate or amend in a case to which they have not yet been made a party. Therefore, the threshold issue that presents itself is whether the district could intervene in this custody action. In its motion and on appeal, the district claims (without explanation) that it is entitled to intervention as of right pursuant to R.C. 2151.362 and R.C. 3313.64.

{¶15} Whether the district could intervene in this custody action initially implicates two rules of procedure – Juv.R. 2 and Civ.R. 24. The definitional section of the Juvenile Rules of Procedure defines a party to include "a child who is the subject of a juvenile court proceeding, the child's spouse, if any, the child's parent or parents, or if the parent of a child is a child, the parent of that parent, in appropriate cases, the

child's custodian, guardian, or guardian ad litem, the state, and any other person specifically designated by the court." Juv.R. 2(Y). Under this provision, a school district plainly does not fall within the definition of a party. However, a juvenile court can use Civ.R. 24 as a guide to join parties under Juv.R. 2(Y). *In re Beyerly* (Sept. 30, 1998), 11th Dist. Nos. 97-P-0096 & 97-P-0097.

{¶16} Civ.R. 24 governs intervention as of right and permissive intervention. Boardman School District only claims intervention as of right. It makes no argument that it should have been allowed permissive intervention. Civ.R. 24(A) states:

{¶17} "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 that is the subject of the action and the applicant 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 the applicant's interest is adequately represented by existing parties."

{¶18} Whether Boardman School District could intervene as of right in this custody action is essentially a question of standing. "The question of standing is whether a litigant is entitled to have a court determine the merits of the issues presented." *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, 643 N.E.2d 1088. "Whether established facts confer standing to assert a claim is a matter of law." *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, at ¶90. Appellate courts review questions of law under a de novo standard of review. *Skirvin v. Kidd*, 174 Ohio App.3d 273, 2007-Ohio-7179, 881 N.E.2d 914, at ¶14.

{¶19} As already indicated, the district claims intervention as of right pursuant to R.C. 2151.362 and R.C. 3313.64. Chapter 3313 applies to boards of education and the administration of schools. R.C. 3313.64 controls the school district in which a child must be admitted and determines whether tuition is owed and who must pay it. Chapter 2151 governs juvenile courts. R.C. 2151.362 instructs the juvenile court to insert the cost determination dictated by R.C. 3313.64 into its custody order.

Boardman School District has failed to point to or quote any provision from either section that bestows on it an intervention of right in A.K.'s custody case. A thorough review of those sections reveals no such right. Since a statute of this state does not confer upon the district an unconditional right to intervene, Civ.R. 24(A)(1) does not permit intervention. The question then becomes whether the district can demonstrate an interest in the custody proceedings as required by Civ.R. 24(A)(2).

{¶20} The Grossos cite to *In re Goff*, 11th Dist. No. 2003-P-0068, 2003-Ohio-6087. In that case, grandparents sought to intervene in dependency proceedings brought by the county department of job and family services. Their grandchild was born as the result of a rape committed by their son against his stepdaughter. The juvenile court denied their motion to intervene and the Eleventh District affirmed on appeal. The court noted that grandparents have no constitutional right of association with their grandchildren.

{¶21} *Goff* illustrates the point that a juvenile court is "required to join only those parties with colorable rights to custody or visitation." Id. at ¶16, citing *In re Hoffman*, 5th Dist. Nos. 2002-CA-0419 and 2002-CA-0422, 2003-Ohio-1241, at ¶22. In *Goff*, the court noted that the grandparents had "never obtained, prior to their motion to intervene, through statute, court order, or other means, any legal right to custody or visitation with their grandson." Id. See, also, *In re Wood* (June 28, 1999), 7th Dist. No. 240. Nor was it in the best interests of the child to allow them to intervene. Id. at ¶17.

{¶22} In this case, Boardman School District has no legal right to custody or visitation with A.K. Nor is it concerned with A.K.'s best interests. Indeed, its only stated interest in A.K. is a pecuniary one. And it is not even A.K.'s pecuniary interest the district is concerned with; it is the district's own pecuniary interest. Consequently, it cannot be said the trial court erred in denying the Boardman School District's motion to intervene as of right.

{¶23} Even if the district had been entitled to intervention as of right, the Grossos posit that the district's motion was fatally untimely. Civ.R. 24 requires a party

seeking intervention to make "timely application." "The timeliness of a motion to intervene pursuant to Civ.R. 24(A) is a matter within the sound discretion of the trial judge, and the trial court's decision will be reversed only upon a showing of an abuse of that discretion." *Univ. Hosps. of Cleveland, Inc. v. Lynch*, 96 Ohio St.3d 118, 2002-Ohio-3748, 772 N.E.2d 105, at ¶47.

{¶24} "In determining the timeliness of a motion to intervene pursuant to Civ.R. 24, a court should consider the following factors: (1) the point to which the suit has progressed, (2) the purpose for which intervention is sought, (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case, (4) the prejudice to the original parties due to the proposed intervenor's failure after he or she knew or reasonably should have known of his or her interest in the case to apply promptly for intervention, and (5) the existence of unusual circumstances militating against or in favor of intervention." Id. at ¶48.

{¶25} Applying those factors to this case, Boardman School District's motion to intervene was untimely for the following reasons. First, the custody action had already proceeded to final judgment when Boardman School District sought intervention. In this type of situation, the Ohio Supreme Court has held that "[i]ntervention after final judgment has been entered is unusual and ordinarily will not be granted." *State ex rel. First New Shiloh Baptist Church v. Meagher* (1998), 82 Ohio St.3d 501, 503-504, 696 N.E.2d 1058.

{¶26} Second, there was no allowable purpose for which Boardman School District sought intervention as of right. The action in which the district sought to intervene only concerned A.K.'s custody and what was in her best interests. The district sought only to protect its own financial interest. The juvenile court's designation of who is to bear the costs of educating A.K. is dictated solely by statute. The district's own input or opinion on that issue is irrelevant. The district's avenue of redress on this matter lies with the General Assembly, not the courts.

{¶27} Third and lastly, Boardman School District knew or reasonably should have known of its interest in the case well before it filed its motion to intervene. When the Grossos met with school officials on June 29, 2007 to enroll A.K., they provided a copy of the dependency complaint to them. (Docket 15, Affidavit of the Grossos in support of Brief Contra Boardman School District's Motion to Intervene, ¶4.) The school treasurer informed them an actual order of legal custody would be needed before they could enroll A.K. Id. At the latest, the district had to have known about the custody order on September 7, 2007, when the Grossos filed their petition for writ of mandamus, motion for temporary restraining order, and petition for preliminary injunction seeking to compel the district to enroll without charging them tuition. The district did not file its motion to intervene until February 4, 2008 – over seven months after initially meeting with the Grossos and almost five months after the Grossos filed suit against the district.

{¶28} In conclusion, based on the facts and circumstances of this case, Boardman School District has failed to demonstrate that it was entitled to intervention as of right under case law and the applicable statutory scheme as it is presently constructed. There is the other avenue of intervention available under Civ.R. 24 – permissive intervention. Civ.R. 24(B) allows anyone to seek permissive intervention "(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." But, the district never requested permissive intervention. And, even if it had, Civ.R. 24(B) requires that a motion for permissive intervention be timely and, for the reasons already detailed, the district's motion was not.

{¶29} Accordingly, Boardman School District's sole assignment of error is without merit.

{¶30} The judgment of the trial court is hereby affirmed.

Vukovich, P.J., concurs.

Celebrezze, J., concurs.
Judge of the Eighth District Court of Appeals
Sitting by Assignment