

**IN THE COURT OF APPEALS OF IOWA**

No. 2-045 / 11-1819  
Filed February 29, 2012

**IN THE INTEREST OF K.P., C.P., D.N.,  
J.S., and H.S.,  
Minor Children,**

**C.B., Grandmother,  
Appellant.**

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Appeal from the Iowa District Court for Polk County, Rachel E. Seymour,  
District Associate Judge.

Maternal grandmother appeals the juvenile court's denial of her motion to  
intervene in a child-in-need-of-assistance proceeding. **REVERSED AND  
REMANDED.**

Melissa A. Nine of Kaplan, Frese & Nine, L.L.P., Marshalltown, for  
appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Jennifer G. Galloway, Assistant  
County Attorney, for appellee.

Erin M. Carr of Carr & Wright, P.L.C., Des Moines, for mother.

Laura J. Lockwood of Pargulski, Hauser & Clarke, P.L.C., Des Moines, for  
father of H.S. and D.N.

Christopher Kemp, Des Moines, for father of C.P. and K.P.

Thomas G. Crabb, Des Moines, for father of J.S.

Nicole Garbis Nolan, Youth Law Center, Des Moines, attorney and guardian ad litem for minor children.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

**MULLINS, J.**

In this appeal we must determine whether the juvenile court erred when it denied the maternal grandmother's motion to intervene in the children in need of assistance (CINA) proceeding of her five grandchildren. We find the maternal grandmother should have been allowed to intervene. Thus, we reverse the order of the juvenile court and remand for further proceedings. Because there is a pending appeal in the case of *In re K.P.*, No. 2-046 / 11-1869, concerning the juvenile court ruling that immediately followed the denial of the motion to intervene, a separate order will issue in that case.

**I. Background Facts and Proceedings.**

C.B. is the maternal grandmother of five children: H.S. (born February 2002), J.S. (born February 2004), D.N. (born May 2007), C.P. (born November 2009), and K.P. (born July 2010).

The maternal grandmother has provided care and support for her grandchildren throughout much of their lives. She has also participated in this case from the beginning, and has requested placement of the children with her so all the siblings could remain together.

After the children were adjudicated CINA, they were placed with maternal aunts. However, circumstances arose that required the children's placement to be modified. The juvenile court held numerous hearings on modification. During the hearings, the mother requested the children be returned to her care, and alternatively for all of the children to be placed with the maternal grandmother.

The State also requested that the three oldest children (H.S., J.S., and D.N.) be placed with the maternal grandmother.

After the hearings were complete, but two months before the order modifying disposition was filed, the maternal grandmother filed an application to intervene. Following a hearing on the maternal grandmother's application, the juvenile court denied the request determining:

The Court finds the maternal grandmother does have a legal interest in her grandchildren's Child in Need of Assistance case. The Court additionally finds her interests are adequately represented by legal counsel for Mother and the County Attorney. Both of those parties have argued to have the children placed in the grandmother's care, additionally they have presented evidence in effort to support their position, including calling [the maternal grandmother] as a witness.

The maternal grandmother appeals this determination.

## **II. Standard of Review.**

Our review of a motion to intervene is for the correction of errors at law. *In re H.N.B.*, 619 N.W.2d 340, 342 (Iowa 2000). Although our review is on error, we accord some discretion to the district court. *Id.* "This discretion is not the ability to deny intervention where the prerequisites of [rule 1.407] have been met. Rather, this discretion is to be exercised on the question of whether an intervenor is 'interested' in the litigation." *In re A.G.*, 558 N.W.2d 400, 403 (Iowa 1997).

## **III. Error Preservation.**

The State first asserts the maternal grandmother failed to preserve error because her application to intervene was untimely. See Iowa R. Civ. P. 1.407 (requiring an application to be "timely" whether intervention is claimed of right or

as permissive). However, we find the State is the one who has failed to preserve the timeliness issue for our review.

Error preservation exists to ensure that issues not raised in the district court cannot be raised for the first time on appeal. *State v. Mann*, 602 N.W.2d 785, 790 (Iowa 1999). Here, the maternal grandmother filed an application to intervene, the application was ruled upon by the juvenile court, and she filed a timely appeal. Accordingly, the issue is preserved for our review.

To the contrary, the State did not raise timeliness as a ground to deny the application to intervene and the timeliness of the application was not addressed by the juvenile court. Thus, we find the State failed to preserve error on this issue. *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) (“[W]e will not consider a substantive or procedural issue for the first time on appeal, even though such issue might be the only ground available to uphold a district court ruling.”).

#### **IV. Intervention.**

Iowa Rule of Civil Procedure 1.407 provides the requirements for intervention. Under one of the grounds for intervention of right, the applicant, maternal grandmother, must show four elements: (1) her application was timely, (2) she has an interest in the subject matter of the action, (3) she is so situated that her ability to protect that interest may be impaired or impeded by the disposition of the action, and (4) her interest is not adequately represented by the existing parties. Iowa R. Civ. P. 1.407(1)(b).

As found above, the timeliness element is not properly before us. In addition, the parties do not dispute that the maternal grandmother had an interest

in the CINA dispositional proceeding and that her interest may be impaired or impeded by the disposition of the action. See *A.G.*, 558 N.W.2d at 403-04. The only disputed issue in this case is whether the maternal grandmother's interests are "adequately represented" by the children's mother and the State. Iowa Rs. Civ. P. 1.407(1)(b), 1.407(4).

"The requirement of [inadequate representation] is satisfied if the applicant shows that representation of his interests 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10, 92 S. Ct. 630, 636 n.10, 30 L. Ed. 2d 686, 694 n.10 (1972).

The most important factor in determining adequacy of representation is how the interest of the absentee compares with the interests of the present parties. If the interest of the absentee is not represented at all, or if all existing parties are adverse to the absentee, then there is no adequate representation. On the other hand, if the absentee's interest is identical to that of one of the present parties, or if there is a party charged by law with representing the absentee's interest, then a compelling showing should be required to demonstrate why this representation is not adequate. But if the absentee's interest is similar to, but not identical with, that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, although intervention ordinarily should be allowed unless it is clear that the party will provide adequate representation for the absentee.

7C Charles Alan Wright et al., *Federal Practice & Procedure* § 1909, at 393-95 (3d ed. 2007).<sup>1</sup>

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<sup>1</sup> Iowa Rule of Civil Procedure 1.407 was amended in 1997 to be "substantially similar" to Federal Rule of Civil Procedure 24. Iowa R. Civ. P. 1.407, cmt. Because of the similarities between the rules, federal authorities that construe and apply the federal rule are persuasive although not conclusive for similar construction and application of the Iowa rule. See *State v. Paredes*, 775 N.W.2d 554, 561 (Iowa 2009) (interpreting the rule creating an exception to the general prohibition against hearsay statements); *State v.*

Upon our review of the particular circumstances of this case, we find that although the maternal grandmother had interests similar to the mother and the State, her interests are not adequately represented by the two parties.

The ability of a mother to adequately represent a grandparent has already been addressed by our supreme court. In *A.G.*, 558 N.W.2d at 404, the State argued that because a grandmother's rights are derivative of the parents' rights, the parents can adequately represent those rights in the CINA proceeding. However, the supreme court disagreed, finding:

While it may be true that a grandparent's rights to his or her grandchild are derivative of the parent's rights to his or her child, this grandparent/grandchild relationship must be distinguished from the grandparent's rights to the grandchild vis a vis the State. The grandparent's statutory right to be considered for custody of a grandchild upon a CINA disposition exists independently of a parent's relationship to the child.

*A.G.*, 558 N.W.2d 404-05. The mother is only arguing placement of the children with the maternal grandmother as an alternative to placement with her. Although similar, this alternative argument is insufficient to adequately represent the grandmother's independent interest in placement. In addition, given that physical abuse, recognition of abuse and its effects, and the ability to provide for the children's safety are going to be the primary issues for permanency, we believe the maternal grandmother should be able to present her own position and evidence on these concerns in future proceedings, which may differ significantly from the mother's position and evidence.

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*Belieu*, 288 N.W.2d 895, 897 (Iowa 1980) (interpreting rule providing for the severance of a criminal trial from that of codefendants).

We also find the county attorney will not adequately represent the maternal grandmother's interests. The county attorney is charged by statute to represent DHS in CINA proceedings. Iowa Code § 232.90. DHS requested that only the three oldest children be placed with the maternal grandmother. However, the maternal grandmother requested to have all five children placed into her care. Accordingly, their arguments to the juvenile court are divergent. In addition, five days prior to the hearing on the application to intervene, the State filed a petition to terminate all parental rights in this case.

For the foregoing reasons, we find the juvenile court erred in denying the maternal grandmother's motion to intervene based upon the existing parties' ability to adequately represent her independent interests.<sup>2</sup> This case is remanded to the juvenile court for entry of an order granting the motion to intervene.

**REVERSED AND REMANDED.**

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<sup>2</sup> The maternal grandmother also argues the juvenile court failed to provide her notice of the order denying her motion to intervene. However, the maternal grandmother received actual notice through a third-party and made a timely appeal. Moreover, we have found in her favor on the intervention issue. We find this argument to be moot. *In re M.T.*, 625 N.W.2d 702, 704 (Iowa 2001) ("An appeal is moot if it no longer presents a judicable controversy because the contested issue has become academic or nonexistent.").