

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Supervised
Estate of Jerome Wilderness, Jr.,
(Deceased),

Marisa Wilderness,
Appellant-Non-Party,

and

Jerome Wilderness, Sr.,
Appellant-Intervenor,

v.

April 30, 2021

Court of Appeals Case No.
20A-ES-1464

Appeal from the Lake Circuit Court
The Honorable Marissa McDermott,
Judge

The Honorable Jewell Harris, Jr.,
Probate Commissioner

Trial Court Cause No.
45C01-1804-ES-29

The Estate of Jerome
Wilderness, Jr. and Syd
Wilderness as Personal
Representative of the Estate,
Appellees-Respondents.

Friedlander, Senior Judge.

[1] Appellants Marisa Wilderness¹ and Jerome Wilderness, Sr., sister and father of the deceased Jerome Wilderness, Jr., appeal the trial court's order denying Jerome Sr.'s motion to intervene and Marisa's motion to join in Jerome Sr.'s motion to correct error. Finding no error, we affirm.

[2] Appellants present two issues for our review, which we restate as:

1. Whether the trial court erred by denying Jerome Sr.'s motion to intervene.
2. Whether the trial court erred by denying Marisa's motion to join.

[3] This appeal arises from several contentious relationships. In December 2017, Jerome Jr. filed for divorce from his wife, Syd. In February 2018, Jerome Sr.

¹ The typewritten filings and documents in this case contain two different spellings of Marisa's name. We adopt this version based on her signature on her Petition to Remove Personal Representative. *See* Appellants' App. Vol. II, p. 120.

shot and killed Jerome Jr. *See Wilderness v. State*, No. 20A-CR-88, 2020 WL 4931561 (Ind. Ct. App. August 24, 2020), *trans. denied*.

- [4] On April 3, 2018, Syd petitioned to open an estate for Jerome Jr. The court granted the petition, and Syd was appointed personal representative of the estate.
- [5] Commencing in June 2019, there were numerous filings in the estate by both Syd and Jerome Jr.'s relatives. Initially, Syd petitioned the court to order Marisa and Patricia Wilderness, Jerome Jr.'s mother, to turn over certain assets and to cease intermeddling in the administration of the estate. On January 6, 2020, Marisa petitioned the court to remove Syd as personal representative of Jerome Jr.'s estate. Following a hearing, the court denied Marisa's petition on April 28, 2020.
- [6] In the meantime, in February 2020 Syd, individually and as the personal representative of the estate, filed a wrongful death action against Jerome Sr. in cause number 45D04-2002-CT-183. Jerome Sr. filed a motion to dismiss the lawsuit on the ground that Syd was ineligible to be appointed personal representative of the estate. In her response to Jerome Sr.'s motion, Syd included the probate court's order denying Marisa's petition to remove Syd as personal representative. On May 27, 2020, the court denied Jerome Sr.'s motion, stating that it would not relitigate an issue already decided by another court and that any error by the probate court in appointing Syd as personal representative should be addressed in the action in the probate court.

[7] The same day, Jerome Sr. moved to intervene in the probate action for the purpose of moving to correct error, arguing that his intervention was necessary to address the court's error in appointing Syd as personal representative and subsequently failing to remove her by denying Marisa's petition to remove. Marisa moved to join in Jerome Sr.'s motion to correct error regarding the court's denial of her motion to remove Syd as personal representative. Syd filed responses to both motions. On July 9, the court struck from the record and denied Jerome Sr.'s motion to intervene as well as denied Marisa's motion to join Jerome Sr.'s motion to correct error. Appellants now appeal.

1. Motion to Intervene

[8] Jerome Sr. argues the probate court erred in denying his motion to intervene as of right or, in the alternative, as a matter of permissive intervention.² The grant or denial of a petition to intervene is within the discretion of the trial court and is reviewed for an abuse of that discretion. *Granite State Ins. Co. v. Lodholtz*, 981 N.E.2d 563 (Ind. Ct. App. 2012), *trans. denied* (2013). An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable and probable inferences to be drawn therefrom. *Id.* The facts alleged in a motion to intervene are taken as true. *In re Paternity of E.M.*, 654 N.E.2d 890 (Ind. Ct. App. 1995).

² Jerome Sr. also asserts error with the trial court's striking of his motion to intervene, but because the court's denial of his motion is dispositive we need not address the striking of such.

a. Intervention as of Right

[9] Indiana Trial Rule 24(A) governs intervention as of right and provides in part that, upon timely motion, anyone shall be permitted to intervene in an action when the applicant claims an interest relating to a property, fund or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest in the property, fund or transaction, unless it is adequately represented by existing parties. Ind. Trial Rule 24(A)(2). To satisfy the requirements of Trial Rule 24(A)(2), our courts have traditionally adopted a three-part test, requiring intervenors to show: (1) an interest in the subject of the action; (2) disposition of the action may as a practical matter impede the protection of that interest; and (3) representation of the interest by existing parties is inadequate. *Moran Elec. Serv., Inc. v. Comm’r, Ind. Dep’t of Env’tl. Mgmt.*, 8 N.E.3d 698 (Ind. Ct. App. 2014), *aff’d on reh’g, trans. denied*. The intervenor must establish each element under Trial Rule 24(A)(2). See *Cincinnati Ins. Co. v. Young*, 852 N.E.2d 8 (Ind. Ct. App. 2006) (determining that trial court erred by allowing party to intervene under Trial Rule 24(A)(2) where first element of three-part test for intervention as of right was not fulfilled), *trans. denied* (2007). The determination of what precise facts or circumstances are sufficient to satisfy the requirements of the test for intervention as a matter of right is committed to the discretion of the trial court. *Moran*, 8 N.E.3d 698.

[10] With regard to the first factor, Indiana has adopted a narrow interpretation of the interest requirement, demanding more of an interest to merit intervention as

of right than the language of the rule itself might suggest. *Developmental Disabilities Residential Facilities Council v. Metro. Dev. Comm’n of Marion Cty., Ind.*, 455 N.E.2d 960 (Ind. Ct. App. 1983). The applicant seeking intervention must have an immediate, direct, substantial, and legally protectable interest in the proceeding. *In re Paternity of E.M.*, 654 N.E.2d 890. Stated another way, “an intervenor of right must have an interest recognized by law that relates to the subject of the action in which intervention is sought.” *State ex rel. Prosser v. Indiana Waste Sys., Inc.*, 603 N.E.2d 181, 187 (Ind. Ct. App. 1992).

- [11] Here, although Jerome Sr. claims an interest in the estate proceeding, it cannot be said to be an interest relating to a property, fund or transaction, or an interest recognized by law that relates to the subject of the action. The subject of the action is the administration of Jerome Jr.’s estate—in other words, distribution of property and payment of any claims. Jerome Sr. asserts no claim against the estate, and, because he took his son’s life, he is not permitted to receive any property from the estate to which he may have been entitled. *See* Ind. Code § 29-1-2-12.1 (2005) (person found guilty of murdering decedent is constructive trustee of any property he is otherwise entitled to receive as result of decedent’s death and entitlement to such property will be determined as if person had died immediately before decedent). Rather, Jerome Sr.’s interest lies in thwarting the estate’s effort to establish his liability for the wrongful death of Jerome Jr. in order to protect his own assets. As he stated in his brief, his interest lies in “the

estate not obtaining [] property from him.”³ Appellants’ Br. p. 21.

Accordingly, Jerome Sr.’s interest in this proceeding is merely indirect and derivative, which is inadequate to support an intervention. Thus, Jerome Sr. does not have the level of interest that Trial Rule 24(A)(2) requires for intervention as of right.

b. Permissive Intervention

[12] Indiana Trial Rule 24(B) governs permissive intervention and provides in part that, upon timely filing of a motion, anyone may be permitted to intervene in an action when an applicant’s claim or defense and the main action have a question of law or fact in common, and 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. Ind. Trial Rule 24(B)(2). The court is given broad discretion to grant or deny a permissive intervention. *Developmental Disabilities*, 455 N.E.2d 960.

[13] An intervenor is treated as if it were an original party and has equal standing with the parties. *In re Guardianship of A.L.C.*, 902 N.E.2d 343 (Ind. Ct. App. 2009). But the intervenor takes the case as he finds it. *Becker v. State*, 992 N.E.2d 697 (Ind. 2013). Accordingly, an intervenor is not permitted to

³ In his motion to intervene, Jerome Sr. also stated that he had an interest in “whether the estate exists” and “whether Syd Wilderness has been properly appointed as personal representative of the estate.” Appellants’ App. Vol. III, p. 4. The removal of Syd as personal representative would not necessarily mean the wrongful death action against him could no longer be maintained. *See* Ind. Code § 29-1-10-6(c) (2009) (removal of a personal representative after letters are duly issued does not invalidate official acts performed prior to removal).

relitigate matters already determined in the case. *In re Guardianship of A.L.C.*, 902 N.E.2d 343. And thus an intervenor is bound by all orders and judgments made in the case prior to the time of intervention. *Becker*, 992 N.E.2d 697.

[14] Here, on January 6, 2020, Marisa petitioned to remove Syd as personal representative and to be appointed as successor personal representative. The petition stated that, because Jerome Jr. died intestate with a dissolution action pending in his marriage to Syd, Syd should not have been appointed personal representative of his estate and should be removed as such. The following day the court held a hearing on Marisa's petition, after which Syd filed a supplemental response. On April 28, the court denied Marisa's petition. Marisa filed no motion to correct error or other motion with respect to the court's denial of her petition to remove Syd as personal representative.

[15] On May 27, Jerome Sr. filed his motion to intervene and to correct error. His motion to intervene was brought pursuant to Trial Rule 24(A) and noted that Marisa had filed the petition to remove personal representative, set forth the same facts as those in Marisa's petition, and presented exactly the same argument as that presented in Marisa's petition. The motion also acknowledged that the court had already denied Marisa's petition. Permissive intervention, under Trial Rule 24(B), was not addressed until Jerome Sr.'s reply to Syd's response to his initial motion to intervene. There he alleged that the common question of law was whether Syd could serve as personal representative.

[16] In its order denying Jerome Sr.’s motion to intervene, the court stated that the motion “seek[s] to rehash arguments already presented to, and denied, by this Court. This Court previously addressed these issues and held that the request to remove Syd should be denied.” Appealed Order, p. 8. Thus, having just determined, when presented with the same basis for removal, that removal of Syd as personal representative was not warranted, the court was well within its broad discretion to deny Jerome Sr.’s motion to intervene in order to avoid relitigating a matter already determined.

2. Motion to Join

[17] Although Appellants frame their second issue as whether the trial court erred in denying the motion to correct error, the issue, if any, is whether the court erred by denying Marisa’s motion to join. This is so because the court’s consideration of Jerome Sr.’s motion to correct error was dependent upon him first being granted leave to intervene in the case; until such time, he was a non-party and not permitted to participate in the proceedings. *See Kelley v. Kelley*, 158 N.E.3d 396 (Ind. Ct. App. 2020) (holding individual lacked standing to challenge trial court’s denial of his motion to quash subpoena duces tecum filed by party to case where individual was neither a named party nor an intervenor in action); *see also Hepp v. Hammer*, 445 N.E.2d 579, 582 (Ind. Ct. App. 1983) (holding that nonparty, who had filed appearance and motions on behalf of defendant, had “no standing in the case whatsoever” where nonparty had not moved to intervene or to join as amicus curiae). Accordingly, the court’s denial of Jerome Sr.’s motion to intervene not only precluded consideration of his

motion to correct error but also prevented consideration of Marisa's motion to join in the motion to correct error. Quite simply, there was no motion under consideration by the court in which Marisa could join. Thus, we find no error with the court's denial of Marisa's motion to join.

[18] Based on the foregoing, we conclude the court did not err by denying Jerome Sr.'s motion to intervene and by denying Marisa's motion to join.

[19] Judgment affirmed.

Robb, J., and Weissmann, J., concur.