MICHIGAN SUPREME COURT

IN RE COH, ERH, JRG, KBH

Supreme Court No.: 147515
Court of Appeals No.: 309161
Trial Court No.: 08-036989-NA

Department of Human Services,
Appellant

v

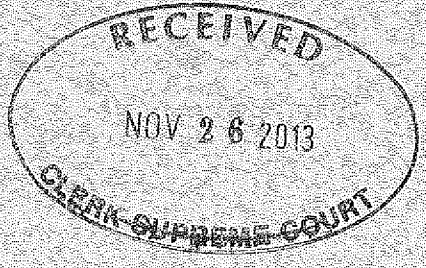
Lori Scribner,
Appellee

Michigan Children's Institute,
Intervenor

ON APPEAL FROM
MUSKEGON COUNTY CIRCUIT COURT – FAMILY DIVISION
Hon. William C. Marietti, Presiding

BRIEF OF AMICUS CURIAE CHILDREN'S LAW SECTION OF THE STATE BAR OF MICHIGAN

Dated: December 2, 2013



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STATEMENT OF FACTS

The following is a brief summary of facts derived from the Court of Appeals opinion. The Department of Human Services (DHS) removed the four children from their mother's custody in February 2008. In October 2008, the four children were placed together in the home of their current foster parents. Appellee, the paternal grandmother of three of the children, has resided in Florida since 2005. Although she had contact and visitation with the children following their placement in foster care, they were not placed in Appellee's home. Nonetheless, Appellee has maintained a "very close and loving" relationship with the children. *In re COH,* unpublished opinion per curiam of the Court of Appeals, issued June 25, 2013 (Docket Nos. 309161 and 312691), p 3. The trial court terminated the parental rights of the children's fathers. In July 2010, DHS petitioned the trial court to terminate the parental rights of the children's mother, and Appellee petitioned the trial court to be appointed juvenile guardian of the children under MCL 712A.19c. The trial court terminated the mother's parental rights and denied Appellee's petition for juvenile guardianship. In denying Appellee's juvenile guardianship petition, the trial court relied on the "best interest" factors in MCL 722.23 of the Child Custody Act and compared Appellee with the children's current foster parents, who had filed a petition to adopt the children. The children were then committed to the Michigan Children's Institute (MCI).

The Court of Appeals reversed the trial court's order denying Appellee's petition for juvenile guardianship and remanded the case for entry of an order appointing Appellee the children's juvenile guardian. DHS appealed to this court, which granted leave to appeal on October 2, 2013.

INTRODUCTION

The Children's Law Section of the State Bar of Michigan (CLS) is governed by the 19 elected members of the Children's Law Section Council. The CLS is comprised of approximately 438 legal professionals practicing in the area of juvenile law. The CLS gratefully accepts the invitation of this Court to file an amicus brief on the law governing the preference for placing children with relatives in child protective proceedings, juvenile guardianship following termination of parental rights, and applying the "best interests of the child" standard to permanency decisions.

Relatives of children removed from their homes for abuse or neglect undoubtedly play a crucial role in child protective proceedings. In September 2013, 13,402 Michigan children resided in foster care. Of these children, 4,521 resided with relatives. By comparison, 6,511 resided with unrelated foster parents. Michigan Department of Human Services Fact Sheet, September 2013, DHS Office of Communications. Placing a child with a relative ameliorates the negative effects of removal, preserves the child's and relative's sense of family identity, and may provide a permanent placement within the existing family structure.

Federal law encourages states to "consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child . . . ." 42 USC 671(a)(19). In Michigan, MCL 722.954a(5) sets forth a preference for placing a child in foster care with an appropriate relative following the child's removal from his or her home. However, when MCL 722.954a(5) is read in the context of related laws, it becomes clear that the preference for placing a child with a relative extends only to 90

days following a child's removal from parental custody. After this 90-day period, a child's needs for stability, continuity, and permanence must be considered along with the child's and relative's interests in familial integrity when making placement and permanency decisions. Children's needs are reflected in the "best interests of the child" standard, and a trial court must make difficult factual findings and legal determinations when deciding whether a proposed permanent caregiver, such as a juvenile guardian, will meet a child's needs. When an appellate court reviews those findings, it should apply a deferential "clear error" standard of review.

When considering a child's interests in stability, continuity, and permanence, several of the "best interests of the child" factors contained in the Child Custody Act are relevant. The factors contained in MCL 722.23 may be applied to a court's determination of whether a juvenile guardianship under MCL 712A.19c is in a child's best interests. These "best interest" factors and substantially similar factors contained in statutes governing guardianship and adoption are relevant when making child-placement and permanency decisions in a variety of contexts, including the decision to grant or deny a juvenile guardianship under MCL 712A.19c. Where the children's unrelated foster parents have demonstrated their intent to adopt the children (as in this case), a court will necessarily compare the parties' abilities to meet the children's needs. Because several of the "best interest" factors in statute and case law permit a court to compare the relative abilities of competing parties to meet a child's needs, such a comparison is appropriate in cases under MCL 712A.19c.

ARGUMENT

I. THERE IS NO PREFERENCE FOR RELATIVES UNDER MCL 712A.19C(2) WHEN A CIRCUIT COURT DECIDES WHETHER TO CREATE A JUVENILE GUARDIANSHIP AFTER PARENTAL RIGHTS HAVE BEEN TERMINATED.

MCL 712A.19c(2) does not explicitly state that there is a preference for placing a child with a relative when establishing a juvenile guardianship following termination of all parental rights. The statute only directs the court to determine whether a juvenile guardianship is in a child's best interests. A juvenile guardian appointed under MCL 712A.19c may be a relative, unrelated licensed foster parent, or unrelated person with whom the court has placed the child ("fictive kin"). Guardianship assistance payments are available to any of these persons. MCL 722.872(f) and (h); MCL 722.874(1)(a).

In its opinion, the Court of Appeals relied primarily on MCL 722.954a(5) in concluding that "[t]here is a strong preference that children who have been removed from their parent's care be placed with relatives." *COH, supra,* p 2. MCL 722.954a(5) states in relevant part:

> "Before determining placement of a child in its care, a supervising agency shall give special consideration and preference to a child's relative or relatives who are willing to care for the child, are fit to do so, and would meet the child's developmental, emotional, and physical needs."[1]

A "supervising agency" may be "the department if a child is placed in the department's care for foster care, or a child placing agency in whose care a child is placed for foster care." MCL 722.952(l).

[1] This provision was added by 2010 PA 265, effective December 14, 2010. Thus, the statute became effective after Appellee's petition for juvenile guardianship was filed but before the entry of the trial court's order denying the petition on May 3, 2011.

The Court of Appeals cited DHS foster care policy FOM 722-3, p 3, which requires supervising agency workers to identify relatives throughout a case as potential placements and permanency providers for a child, and FOM 722-3, p 6, which states that "placement with siblings and relatives is usually in the child's best interest." Although not cited by the Court of Appeals, DHS foster care policy also sets forth the general rule that the fewer placement changes a child experiences, the better. "Any placement should be chosen with a view toward preparing the child for the long-range plan." DHS Policy FOM 722-3, p 3.

Although MCL 722.954a(5) establishes a preference for relatives when a child is initially placed in foster care, that preference does not extend throughout the life of a child's foster care case. This is apparent upon reading all of the provisions of MCL 722.954a together, along with other applicable law. These laws support the conclusion that there is no "relative preference" that extends beyond the first 90 days following a child's initial removal from home. When considering the correct interpretation of a statute, the statute must be read as a whole. Moreover, the statute must be read in conjunction with other relevant statutes to ensure that legislative intent is correctly ascertained. *In re MKK,* 286 Mich App 546, 556; 781 NW2d 132 (2009).

MCL 722.954a(2) states:

> "(2) Upon removal, as part of a child's initial case service plan as required by rules promulgated under 1973 PA 116, MCL 722.111 to 722.128, and by section 18f of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.18f, the supervising agency shall, within 30 days, identify, locate, notify, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs."[2]

[2] DHS policy requires children's protective services (at the time of removal) and supervising agency foster care workers to take specified actions to identify, locate, notify, and consult with a child's relatives. See DHS Policy PSM 715-2, pp 8-11 and FOM 722-6, pp 5-7 for the required procedures.

The supervising agency is tasked with identifying relatives who would be appropriate placements for the child within the first 30 days after the child's removal from parental custody. Administrative rules governing child placement agencies promulgated under MCL 722.111 *et seq.* require a supervising agency to create an initial service plan within 30 days of a child's removal from his or her home. Mich Admin Code, R 400.12418(1)(a). Among other things, the initial service plan documents the agency's consideration of possible relative placements.

MCL 722.954a(2) also cites MCL 712A.18f, which addresses case service plans. MCL 712A.18f(2) requires a supervising agency to prepare a case service plan and submit it to the court and parties before the court enters an order of disposition. The case service plan must "provide for placing the child in the most family-like setting available and in as close proximity to the child's parents' home as is consistent with the child's best interests and special needs" and specify "[t]he type of home or institution in which the child is to be placed and the reasons for the selected placement." MCL 712A.18f(3)(a). Although the agency's proposed case service plan documents the agency's proposed placement of the child, the court's order of disposition actually specifies and formalizes the child's placement. MCL 712A.18(1). Typically, the court continues a child's placement in foster care under MCL 712A.18(1)(b) (relative foster care) or MCL 712A.18(1)(c) (licensed unrelated foster care) and incorporates all or part of the case service plan in its order of disposition. MCL 712A.18f(4).

Regarding the time requirements for preparation of the case service plan under MCL 712A.18f, applicable court rules require an order of disposition to be entered no later than 91 days after a child's removal from home, absent delays related to

adjudication. See MCR 3.972(A) ("trial must commence as soon as possible, but not later than 63 days after the child is removed from the home unless the trial is postponed . . .") and MCR 3.973(C) ("When the child is in placement, the interval [between trial and disposition] may not be more than 28 days, except for good cause"). As explained below, this 91-day period for entry of a dispositional order corresponds to a 90-day deadline in MCL 722.954a(4).

MCL 722.954a(4) requires a supervising agency to make a written placement decision within 90 days of the child's removal from his or her home and provide that written decision to all relatives who expressed an interest in placement and the involved attorneys.

> "(4) Not more than 90 days after the child's removal from his or her home, the supervising agency shall do all of the following:
>
> "(a) Make a placement decision and document in writing the reason for the decision.
>
> "(b) Provide written notice of the decision and the reasons for the placement decision to the child's attorney, guardian, guardian ad litem, mother, and father; the attorneys for the child's mother and father; each relative who expresses an interest in caring for the child; the child if the child is old enough to be able to express an opinion regarding placement; and the prosecutor."[3]

A relative denied placement of the child may ask the child's lawyer-guardian ad litem (LGAL) to review the agency's placement decision. If the LGAL determines that the denial was not in the child's best interest, the LGAL may petition the court for review of the agency's decision. MCL 722.954a(6) states:

> "(6) A person who receives a written decision described in subsection (4) may request in writing, within 5 days, documentation of the reasons for the decision, and if the person does not agree with the placement decision, he or she may request that the child's attorney review the decision to determine if the decision is

[3] DHS policy FOM 722-3, pp 18-19 requires the supervising agency to document its placement decision in Form DHS-31 and provide it to the persons listed in the statute.

> in the child's best interest. If the child's attorney determines the decision is not in the child's best interest, within 14 days after the date of the written decision the attorney shall petition the court that placed the child out of the child's home for a review hearing. The court shall commence the review hearing not more than 7 days after the date of the attorney's petition and shall hold the hearing on the record."

See also MCR 3.966(B), which mirrors the requirements in MCL 722.954a(6).

In some circumstances, a non-relative foster parent may appeal a foster child's removal from the foster parent's home to the Foster Care Review Board. MCL 712A.13b(1). However, a non-relative foster parent may not appeal a child's replacement if "[t]he change in placement is less than 90 days after the child's initial removal from his or her home, and the new placement is with a relative." MCL 712A.13b(1)(b)(*iii*). Following the 90-day period, a child may only be replaced if there are allegations of maltreatment against the child's foster parent or if the replacement is determined to be in the child's best interests. MCL 712A.13b(1)(b)(*iv*), (4), and (6).

The provisions cited above contain a series of related pre-disposition procedures intended to identify appropriate relative placements for children and finalize decisions regarding those placements within 90 days after a child's removal from parental custody. A child's placement is formalized in the court's order of disposition, entered approximately 91 days following the child's removal from home. Following the 90-day mark, there are no applicable statutory provisions referencing or protecting the preference for placement with a relative; the statutory provisions that apply during the dispositional phase speak to children who *were* placed with relatives following removal. MCL 712A.19(4) (required dispositional review hearings for children in relative placements intended to be permanent), MCL 712A.19(11) (relative with whom a child is placed may

submit information to the court for consideration at a dispositional review hearing), MCL 712A.19a(6)(a) (a child's placement with a relative militates against termination of parental rights), and MCL 712A.19a(12) (relative with whom a child is placed may submit information to the court for consideration at a permanency planning hearing). Moreover, the FCRB and court must review any replacement of a child during the dispositional phase using a "best interest" standard (unless there are allegations of maltreatment against the foster parent). As explained below, the "best interest" standard requires consideration of a child's attachment to his or her current caregiver and the child's need for stability.

MCL 712A.19c governs court review hearings following termination of parental rights. These hearings are conducted following initial disposition hearings. Thus, the "relative preference" contained in MCL 722.954a does not apply to a juvenile guardianship under MCL 712A.19c(2).

The Court of Appeals recently held, in an unpublished opinion, that the statutory preference for relative placement in MCL 722.954a(5) did not apply to a court's review of the MCI superintendent's denial of consent to adopt. *In re AEG,* unpublished opinion per curiam of the Court of Appeals, issued November 7, 2013 (Docket No. 316599), pp 4-5. The Court concluded that the "plain and unambiguous language of MCL 722.954a indicates that the Legislature intended the statute to provide procedural requirements where a child is removed pursuant to a child protective proceeding; there is no indication that the statute was intended to apply to MCI's adoption decisions after termination." *AEG, supra,* p 5. Similarly, there is no indication that the Michigan Legislature intended MCL 722.954a to post-termination juvenile guardianship decisions.

Although we conclude that the "relative preference" contained in MCL 722.954a does not apply to juvenile guardianships under MCL 712A.19c, we do not wish to undermine the importance to children in the child welfare system or their relatives of the procedures contained in MCL 722.954a. The failure to fully comply with this statute and related laws and policies may result in the failure to achieve permanency for children with willing, fit, and loving relatives.

II. ALTHOUGH NO PREFERENCE FOR RELATIVES EXISTS UNDER MCL 712A.19C(2), THE TRIAL COURT APPROPRIATELY CONSIDERED JUVENILE GUARDIANSHIP WITH THE PATERNAL GRANDMOTHER.

As argued above, the preference for placement of a child with an appropriate relative does not extend beyond the first 90 days following the child's removal from parental custody. Because the children's paternal grandmother was not entitled to preferential consideration, the trial court was not required to give juvenile guardianship with the paternal grandmother priority over alternative forms of permanency. The children's current foster parents have petitioned to adopt the children, and the trial court could consider how each proposed permanency goal would best meet the children's needs.[4]

Following termination of parental rights, a fit and willing relative may be considered as a permanent placement for the child. DHS adoption policy[5] requires a child's supervising agency to consider relatives who "have an established relationship with the child and/or provide a familiar environment for the child" for permanent

[4] This issue is discussed in V., below.

[5] DHS policy sets forth similar considerations for juvenile guardianships. See, for example, DHS Policy GDM 600, pp 5-6.

placement. DHS Policy ADM 610, p 1. The children's paternal grandmother had an established relationship with the children.

If the child was not placed with the relative following the child's removal from home, a replacement of the child into the relative's home must be in the "best interests of the child." MCL 712A.13b(1)(*iv*), (4), and (6). The "best interest" standard also applies to juvenile guardianship following termination of parental rights. MCL 712A.19c(2).

III. APPELLATE COURTS SHOULD APPLY THE DEFERENTIAL "CLEAR ERROR" STANDARD OF REVIEW TO A CIRCUIT COURT'S DETERMINATION OF THE CHILDREN'S BEST INTERESTS PURSUANT TO MCL 712A.19C(2).

Deciding whether juvenile guardianship is in a child's best interests, like all post-termination of parental rights permanency decisions, requires difficult factual and legal determinations concerning the child's history, current condition, and relationships with family members and foster parents. A child's supervising agency gathers detailed information about the child and presents it to the court, and the court may take testimony on the issues. Because a trial court's "best interest" determination under MCL 712A.19c(2) involves careful and individualized fact-finding, appellate courts should apply the deferential "clear error" standard. In this case, the Court of Appeals reviewed the trial court's denial of the petition for juvenile guardianship using a *de novo* standard of review, the standard applicable to interpretation of statutes and court rules.

Generally, an appellate court reviews for clear error a trial court's factual findings in proceedings involving the rights of children. *In re Moiles,* ___ Mich App ___ ; ___ NW2d ___ (2013). "A court's factual findings underlying the application of legal issues are reviewed for clear error." *In re Morris,* 491 Mich 81, 97; 815 NW2d 62 (2012).

"A finding is clearly erroneous if, although there is evidence to support it, [the reviewing court is] left with the definite and firm conviction that a mistake has been made." *In re HRC,* 286 Mich App 444, 459; 781 NW2d 105 (2009). The reviewing court cannot substitute its judgment for that of the trial court. *In re Hall*, 483 Mich 1031; 765 NW2d 613 (2009).

Requiring a "clear error" standard of review of decisions under MCL 712A.19c(2) would be consistent with case law precedents. In an unpublished opinion, the Court of Appeals applied a "clear error" standard to the decision to grant a juvenile guardianship in lieu of termination of parental rights. *In re Jones,* unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket No. 298759), p 2. The Court of Appeals has also held that a trial court's findings of fact regarding the "best interest" factors in the Michigan Adoption Code are reviewed for clear error. *In re BKD,* 246 Mich App 212, 215; 631 NW2d 353 (2001).

IV. A CIRCUIT COURT MAY APPLY THE "BEST INTEREST" FACTORS IN MCL 722.23 OF THE CHILD CUSTODY ACT WHEN DECIDING WHETHER TO GRANT A PETITION FOR JUVENILE GUARDIANSHIP.

Case law permits, but does not require, a court to apply the "best interest" factors in MCL 722.23 when determining whether termination of parental rights is in the best interests of a child. *In re Sherman,* 231 Mich App 92, 102; 585 NW2d 326 (1998). In contrast with child-custody cases, courts in child protective proceedings are not required to make findings on each factor contained in MCL 722.23 when deciding whether termination of parental rights is in a child's best interest. "However, . . . it is entirely

appropriate for a probate court to consider many of the concerns underlying those best interest factors in deciding whether to terminate parental rights." *Sherman, supra.*

Although the determination of a child's best interests in the context of a termination of parental rights may involve different considerations than those involved in a juvenile guardianship, a court's reliance on the "concerns underlying" the "best interest" factors in the Child Custody Act is equally unproblematic when deciding whether to grant a petition for juvenile guardianship. This is because the "best interest" factors in the Child Custody Act set forth considerations applicable to custody decisions in a variety of contexts. The *Sherman* court quoted *In re Barlow,* 404 Mich 216, 236; 273 NW2d 35 (1978) in this regard: "The Legislature has . . . set forth a number of areas of concern in [the Child Custody Act] which it deemed should be evaluated in a large category of inquiries into a child's welfare."

This is borne out by examining the various statutory definitions of the "best interests of the child." The Michigan Legislature has established nearly uniform "best interest" criteria to apply when determining a child's custody, guardianship, or adoption. MCL 722.23 (custody), MCL 700.5101(a) (guardianship), and MCL 710.22(g) (adoption). This strongly suggests that, regardless of the context in which a decision regarding a child's custody or placement is to be made, the factors contained in these statutes are relevant to the decision. The "best interest" factors in these statutes generally reflect children's needs.

The "concerns underlying" some of the "best interest" factors contained in the Child Custody Act are very relevant to a decision to grant or deny a petition for juvenile guardianship. When making decisions regarding replacement and juvenile guardianship

following termination of parental rights, a supervising agency and MCI superintendent or the court may be required to weigh a child's needs for continuity of care, maintaining established relationships with caregivers, and family integrity. Those considerations are contained in MCL 722.23(a) and (d), which require a court to consider:

> "(a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> * * *
>
> "(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity."

It should also be noted that the "best interest" factors contained in MCL 700.5101 of the Estates and Protected Individuals Code (EPIC) may also be very relevant to a court's decision regarding juvenile guardianship. Although "[a] juvenile guardianship is distinct from a guardianship authorized under the Estates and Protected Individuals Code," MCR 3.903(A)(13), the two are quite similar. A juvenile guardian appointed pursuant to MCL 712A.19c has the powers and duties that minor guardians have under EPIC. MCL 712A.19c(7) and MCL 700.5215. MCL 700.5101(a)(*i*) and (*iv*) contain the same language as do MCL 722.23(a) and (d). See also MCL 710.22(g)(*i*) and (*iv*) (the same factors must be applied in a case under the Michigan Adoption Code).

Similarly, case law allows a court in a child protective proceeding to consider a child's emotional ties and need for permanence, stability, and finality when determining whether termination of parental rights is in the child's best interests. *In re BZ,* 264 Mich App 286, 301; 690 NW2d 505 (2004) and *In re McIntyre,* 192 Mich App 47, 52-53; 480 NW2d 293 (1992).

Thus, it is appropriate for a court to apply the "best interest" factors contained in the Child Custody Act—or the substantially similar factors contained in EPIC and the

Michigan Adoption Code—to its decision to grant or deny a juvenile guardianship under MCL 712A.19c.

V. A CIRCUIT COURT MAY PROPERLY COMPARE CHILDREN'S FOSTER PARENTS WITH A PROPOSED JUVENILE GUARDIAN WHEN DECIDING WHETHER A JUVENILE GUARDIANSHIP IS IN THE BEST INTERESTS OF THE CHILDREN.

In concluding that the trial court erred in comparing the children's paternal grandmother with the children's foster parents, the Court of Appeals stated:

> "Notably, the present case does not present a dispute between parties who have a legal or substantive right to the custody of the minor children. Because a juvenile guardianship is intended to be a permanent and self-sustaining relationship, MCL 722.875b, it is similar to adoption. When a person seeks adoption of a child, a trial court generally does not compare the prospective adoptive parent with alternate placements for the child. See MCL 710.22(g) (listing the best interest factors under the Adoption Code, MCL 710.21 *et seq.* . . . Here, where appellant is the grandmother of the children and where appellant has an established and continuing relationship with the minor children, the trial court should have considered whether appellant was an appropriate juvenile guardian for the children without regard to the foster care parents." *COH, supra,* pp 3-4.

It is true that neither the children's paternal grandmother nor their foster parents had a right to custody of the children, that juvenile guardianship is similar to adoption, and that when one party seeks to adopt a child, the court does not compare the prospective adoptive parent to alternate caregivers. However, in this case, the paternal grandmother petitioned to obtain a juvenile guardianship, and the foster parents have filed a petition to adopt the children. The children and their paternal grandmother have an established relationship, but the children have resided with the foster parents since October 2008. The supervising agency and the court were required to consider how each

of the proposed caregivers and each of the possible permanency goals could best meet the children's needs.

It should be noted that adoption is the preferred permanency goal for children after the possibility of reunification with a parent has been foreclosed by termination of parental rights, and a supervising agency is required to "rule out" adoption as a permanency goal before recommending juvenile guardianship. MCL 722.875a(a) and DHS Policy GDM 600, pp 1-2.[6]

It is improper to consider the advantages of a child's foster home when deciding whether a statutory basis for termination of parental rights exists. *In re Foster,* 285 Mich App 630, 635; 776 NW2d 415 (2009). However, after a statutory basis for termination of parental rights has been established, a court may consider the advantages of a child's foster home when deciding whether termination of parental rights is in a child's best interests. *Foster, supra.* This is because following establishment of a statutory basis for termination of parental rights, a parent's constitutionally protected interest in the parent-child relationship no longer exists. *In re Trejo,* 462 Mich 341, 355-56; 612 NW2d 407 (2000). A court is then free to compare the relative abilities of the parent and current foster caregiver to meet the needs of the child. Because neither a petitioner for juvenile guardianship under MCL 712A.19c(2) nor a child's foster parents have a right or protected interest in their relationship with the child, they are in the same position as a parent following establishment of a statutory basis for termination of parental rights. A court considering a child's best interests under MCL 712A.19c(2) should likewise be able to compare the abilities of two proposed permanency providers to meet the child's needs.

[6] The children's paternal grandmother also applied to adopt the children, but the MCI superintendent denied her request for consent to adopt. The trial court upheld the MCI superintendent's decision following a "section 45 hearing" in 2012.

As argued above, the trial court appropriately considered the "best interest" factors in the Child Custody Act when determining whether to appoint a juvenile guardian. The "best interest" factors in the Child Custody Act (and the substantially similar factors in EPIC and the Michigan Adoption Code) permit comparison of the relative abilities of competing parties to meet some of those needs. Under MCL 722.23(b) and (c), for example, a court may evaluate "the capacity and disposition of the parties involved" to give the child "love, affection, and guidance" and provide the child with "food, clothing, [and] medical care." MCL 710.22(g)(*ii*) and (*iii*) contain substantially similar language, applicable to adoptions.

Finally, although a child's supervising or adoption agency may consider relatives who "have an established relationship with the child and/or provide a familiar environment for the child" for permanent placement, DHS Policy ADM 610, p 1, an agency must weigh the child's existing relationships with relatives along with the child's psychological attachment to his or her current caregivers and other factors:

> "If a child resides with licensed foster parent(s), the psychological attachment of a child to the foster parents must always be considered before replacing the child to a different adoptive home. The child's age, developmental stage and frequency and number of replacements must all be considered in relationship to the length of time the child has resided in the foster home." DHS Policy ADM 610, p 2.

It is an "undisputed fact that the emotional ties between foster parent and foster child are in many cases quite close, and undoubtedly in some as close as those existing in biological families." *Smith v Org of Foster Families for Equality & Reform,* 431 US 816, 844 n52; 97 S Ct 2094; 53 L Ed 2d (1977). When deciding whether juvenile guardianship with a relative or adoption by foster parents is in children's best interests, a trial court should consider the children's emotional attachment to their foster parents and assign it

appropriate weight in light of the children's history and current conditions. In this case, the trial court concluded that the children had found "stability and comfort" with their foster parents during the five years that they have been placed in the foster parents' home.

REMEDY

The CLS urges this Court to review the Muskegon Circuit Court Family Division's decision under MCL 712A.19c(2) using a "clear error" standard of review. If this Court concludes that the trial court's decision was not clearly erroneous, CLS urges this Court to reverse the Court of Appeals' decision and reinstate the children's commitment to the MCI. The CLS also requests that this Court hold that the "relative preference" contained in MCL 722.954a(5) does not apply to petitions for juvenile guardianship under MCL 712A.19c(2), that a court may rely upon the "best interest" factors in the Child Custody Act (or the substantially similar factors contained in EPIC and the Michigan Adoption Code) when deciding whether juvenile guardianship is in a child's best interests under MCL 712A.19c(2), and that a court may compare a petitioner for juvenile guardianship and a child's current foster parents when determining the child's best interests under MCL 712A.19c(2).

Dated: 11/26/13

Tobin L. Miller (P56601)
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Children's Law Section

STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
December 21, 2010

In the Matter of J. R. JONES, Minor.

No. 298759
Ingham Circuit Court
Family Division
LC No. 09-002359-NA

Before: MARKEY, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Respondent father appeals as of right from the May 20, 2010, trial court order appointing a juvenile guardian to the minor child under MCL 712A.19a(7). We reverse and remand for further proceedings.

A trial court's decision regarding the best interests of the child is reviewed for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). Whether there were reasonable efforts to reunify the family is reviewed under the same standard. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). A finding is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made. *Id.* Regard is given to the special ability of the trial court to judge the credibility of the witnesses who appeared before it. *Id.*

On appeal, both petitioner and respondent have framed their arguments in terms of the Child Custody Act ("CCA"), specifically MCL 722.25(1). Respondent argues that the trial court failed to make specific findings with regard to the best interest factors of MCL 722.23 in order to overcome the statutory presumption in favor of parental custody found in MCL 722.25(1). Petitioner argues that there was clear and convincing evidence that the best interest factors under MCL 722.23 weighed in favor of the minor child being placed in her grandparents' care, not respondent's.

Although a family division court has the authority to consider numerous matters concerning the same family that fall within its jurisdiction, the court's exercise of jurisdiction must be consistent with the statutory scheme it is applying and the relevant court rules. *In re AP*, 283 Mich App 574, 593; 770 NW2d 403 (2009). In this case, respondent and petitioner have mischaracterized the trial court's decision to place the child under a guardianship as a determination made under the CCA. At the adjudication on March 22, 2010, the trial court

stated that it was proceeding with this case as an abuse and neglect file, and as such, respondent's parental rights could be terminated if he failed to participate in, and benefit from, services. At no time until after the appointment of the guardian did the trial court dismiss its jurisdiction over the child or indicate that it was considering a change of custody motion based on the CCA. Nor did the trial court address the parental presumption of MCL 722.25(1) or the best interests factors enumerated in MCL 722.23. Rather, the trial court's decision to appoint a guardian was based on MCL 712A.19(13), MCL 712A.19a(6) and (7) and MCR 3.976.

Although respondent mistakenly framed his argument in terms of the statutory scheme of the CCA, he did argue that there were no allegations of abuse or neglect against him and that petitioner failed to present evidence that respondent was unable to provide proper care and custody for the child. Based on respondent's psychological evaluation, petitioner did not believe that there were any services it could offer the child's mother that would help her to ever provide the child with proper care and custody. However, respondent's evaluation did not suggest that he would not be able to parent the child or that she would be harmed if placed in his care.

MCL 712A.19(13) does allow reasonable efforts to place a child with a legal guardian to be made concurrently with reasonable efforts to reunify the child with her family. Such "reasonable efforts to reunify the child and family must be made in *all* cases" except those involving aggravated circumstances not present in this case. MCL 712A.19a(2); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010); *Rood*, 483 Mich at 99-100. In the present case, petitioner failed to make reasonable efforts to reunify the child with respondent.

At the adjudication on March 22, 2010, the foster care worker told the trial court that she was waiting for the results of respondent's psychological evaluation and that she wanted to offer him services to determine whether reunification between him and the child could be achieved. At the dispositional hearing, the worker had received the evaluation, and decided to pursue termination of parental rights. In the psychological evaluation, the evaluator stated that respondent expressed a desire to obtain custody of his child. The evaluator opined that respondent's bipolar disorder would create significant difficulties handling the demands of a young child. However, the evaluator recommended parenting classes, individual therapy to help translate the skills learned in the parenting classes to everyday life and any other available programs related to parental support to overcome these difficulties. The evaluator noted that it was important for respondent to establish a consistent pattern of behavior over a long period of time.

None of these services were ever offered to respondent. The worker did refer him to parenting classes after he asked for them, but they were not scheduled to start until the week of the April 21 hearing. She had not referred respondent to individual therapy or any other parenting programs. Respondent had been offered visitation and the visits reportedly went very well. Accordingly, the trial court clearly erred in concluding that reasonable efforts had been made to reunify respondent with the child.

In addition, the trial court clearly erred in determining that it was in the best interests of the child to be placed in a guardianship with the maternal grandmother at this time. There was scant information concerning the relationship between respondent father and his daughter and its potential harm or benefit to his daughter. The court had an insufficient basis upon which to determine that custody with respondent was not in the child's best interests. While the trial

court's findings are entitled to great deference, they must be based upon record evidence. Therefore, the trial court clearly erred in placing the child in a guardianship at this time. As a result, we reverse the trial court's order granting a juvenile guardianship and remand to the family court for further evaluation and services.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens

STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of AEG and LEG, Minors.

UNPUBLISHED
November 7, 2013

No. 316599
Jackson Circuit Court
Family Division
LC No. 12-005262-AM

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Petitioners appeal as of right from the order of the trial court dismissing their petitions to adopt the minor children. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Petitioners are the maternal grandparents of four siblings: AC, JC, LG, and AG. Child protective proceedings were initiated against the siblings' biological parents, and in November of 2009, the three older siblings (AC, JC, and LG) were removed from their biological mother and placed with petitioners. AG was subsequently born in February of 2010 and was placed in a licensed foster home, because petitioners did not believe they were able to care for her at that time. In the summer of 2010, the four siblings were returned to their biological mother pursuant to a reunification plan. Reunification was unsuccessful, however, and the four siblings were removed from their biological mother on September 24, 2010. At that time, only the two oldest siblings, AC and JC, were placed with petitioners, as petitioners did not believe they were able to care for all four siblings. LG and AG were placed together in a licensed foster home. On October 6, 2010, petitioners requested that AC and JC be removed from their home, at least in part because petitioners did not believe they could provide the requisite care at that time. AC and JC were placed with a family friend and later with a maternal aunt. On May 23, 2011, at the maternal aunt's request, AC and JC were removed and were placed back with petitioners.

On May 31, 2011, the trial court terminated the parental rights of the siblings' biological parents and they were committed to respondent Department of Human Services (DHS) and its adoption unit, the Michigan Children's Institute (MCI). AC and JC continued their placement with petitioners, while LG and AG continued their foster placement. In July of 2011, petitioners began working toward adopting all four siblings. On July 12, 2012, MCI denied consent to petitioners' request to adopt LG and AG; however, MCI did not deny consent to petitioners'

request to adopt AC and JC. On August 31, 2012, petitioners filed a motion under MCL 710.45(2), contending that MCI's denial of consent as to LG and AG was arbitrary and capricious. LG and AG moved into a new foster home, which the record indicates was a potential adoptive placement for LG and AG. MCI subsequently consented to petitioners' adoption of AC and JC; and the trial court finalized this adoption in February of 2013. Thereafter, in April of 2013, the trial court held a Section 45[1] hearing on petitioners' motion to reverse MCI's denial of consent to adopt LG and AG. The trial court denied petitioners' motion, finding that the MCI superintendent's decision was not arbitrary or capricious; and the court granted respondent's motion to dismiss petitioners' petitions to adopt LG and AG.

III. STANDARD OF REVIEW

Judicial review of the withholding of consent to an adoption is governed by MCL 710.45." *In re Cotton*, 208 Mich App 180, 183; 526 NW2d 601 (1994).

> Pursuant to MCL 710.45, a family court's review of the [MCI] superintendent's decision to withhold consent to adopt a state ward is limited to determining whether the adoption petitioner has established clear and convincing evidence that the MCI superintendent's withholding of consent was arbitrary and capricious. Whether the family court properly applied this standard is a question of law reviewed for clear legal error. [*In re Keast*, 278 Mich App 415, 423; 750 NW2d 643 (2008).]

"The generally accepted meaning of 'arbitrary' is 'determined by whim or caprice,' or 'arrived at through an exercise of will or caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned.'" *Id.* at 424 (internal quotation marks and citations omitted). "The generally accepted meaning of 'capricious' is 'apt to change suddenly; freakish; whimsical; humorsome.'" *Id.* at 424-425 (internal quotation marks and citations omitted).

We review "de novo questions of law, such as statutory interpretation." *Thomas v New Baltimore*, 254 Mich App 196, 201; 657 NW2d 530 (2002).

With respect to unpreserved issues, this Court's review "is limited to plain error affecting substantial rights." *In re Utrera*, 281 Mich App at 9, citing *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999). Under the plain error rule, a respondent must show that an obvious error occurred and "that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763.

[1] MCL 710.45.

III. THE TRIAL COURT'S REVIEW OF MCI'S ADOPTION DECISION

On appeal, petitioners argue that the trial court erred by considering MCI's July 12, 2012 consent decision as evidence, by misapplying the arbitrary and capricious standard, and by determining that MCI's denial of consent was not arbitrary and capricious. We disagree.

In this case, MCI's July 12, 2012 denial of adoption consent stated that "[a]fter careful review of all the information provided, it does not appear to be in the best interests of" LG and AG to be adopted by petitioners. MCI's July 12, 2012 decision further stated that its denial of adoption consent was based on multiple factors, including petitioners' past statements of ambivalence or reluctance to parent the children, petitioners' failure to "understand the risk to the physical and emotional wellbeing of the children that would result from contact with the birth mother[,]" and the fact that petitioners had not provided for LG's care since June 30, 2010 and had never provided for AG's care. According to MCI's denial of consent, the private adoption agency working with petitioners and the children's lawyer guardian ad litem (LGAL) believed that petitioners did not understand the risk of harm associated with contact between LG and AG and their birth mother, and the agency and LGAL were concerned that petitioners would allow such contact to occur.

Petitioners attached MCI's July 12, 2012 decision to their August 31, 2012 motion to reverse MCI's denial of adoption consent, and respondent attached MCI's decision to its Section 45 hearing brief. At the Section 45 hearing, the trial court stated: "My focus, as I evaluate whether the decision was arbitrary and capricious, is the decision itself." The trial court noted, however, that although the July 12, 2012 decision was attached to prehearing filings, neither party actually introduced it as an exhibit at the Section 45 hearing.

On appeal, petitioners argue for the first time that the trial court improperly considered MCI's July 12, 2012 consent decision as evidence, although it was not admitted as an exhibit at the Section 45 hearing. Petitioners had an opportunity and did not object below to the trial court's consideration of MCI's July 12, 2012 decision, and our review of petitioners' challenge on appeal is "limited to plain error affecting substantial rights." *In re Utrera*, 281 Mich App at 9.

Both parties provided the trial court with MCI's July 12, 2012 decision before the Section 45 hearing, and the trial court treated it as admitted evidence after noting the parties' failure to introduce it as an exhibit at the actual hearing. MCR 3.800 provides that adoption proceedings are governed by the Michigan Court Rules except as modified by MCR 3.801-3.8067. MCR 2.613 provides that an error in the admission of evidence is not grounds for setting aside an order, "unless refusal to take this action appears to the court to be inconsistent with substantial justice." Where petitioners presented the evidence to the trial court and failed to object to the trial court's consideration of it as evidence at the Section 45 hearing, they should not now be allowed relief on the basis that the trial court's action in considering the decision as evidence was inconsistent with substantial justice. Moreover, at the Section 45 hearing, petitioners implicitly relied on MCI's July 12, 2012 written decision to establish MCI's basis for denial; petitioners did not call the MCI superintendent as a witness or introduce any affidavit or other document (apart from the decision itself) establishing MCI's basis for denial. Therefore, if MCI's written decision was not properly before the trial court, petitioners would have had no basis by which to

meet their burden of establishing by clear and convincing evidence that MCI's consent decision was arbitrary and capricious. MCL 710.45(7). In sum, petitioners have not demonstrated that the trial court's consideration of MCI's July 12, 2012 decision constituted plain error affecting their substantial rights. *In re Utrera*, 281 Mich App at 9.

Petitioners also contend that the trial court clearly erred by misapplying the "arbitrary and capricious" standard and not finding that MCI's denial of adoption consent as to LG and AG was arbitrary and capricious. As discussed above, MCI's July 12, 2012 decision stated that the denial of adoption consent was based on multiple factors, including petitioners' failure to understand the risk of harm to the children that would result from contact with their biological mother and the fact that petitioners had not provided for LG's care since June 30, 2010 and had never provided for AG's care. However, in petitioners' motion under MCL 710.45(2), and in their Section 45 hearing brief, petitioners incorrectly characterized MCI's basis for denial as relying solely on petitioners' alleged statements of inability or unwillingness to parent the children. At the Section 45 hearing, petitioners focused entirely on their alleged statements that they were unable or unwilling to parent the children, and they did not address MCI's other reasons for denial of adoption consent. At the hearing, petitioners acknowledged that AG had never been under their care and that LG had not been under their care since approximately June 30, 2010. The maternal grandmother testified that when the children were at petitioners' house in the past, the birth mother "could come pretty much whenever she wanted to come." This supports MCI's conclusion that petitioners did not understand the risk of harm with respect to contact between LG and AG and their birth mother.

The trial court found that the evidence of petitioners' past ambivalence or reluctance to parent the children—if it were the sole basis for MCI's denial of adoption consent—would constitute an arbitrary or capricious reason to deny petitioners consent to adopt LG and AG. However, the trial court then found that petitioners had not established by clear and convincing evidence that MCI's alternate bases for denial of adoption consent were arbitrary and capricious. Reversal is improper where MCI articulates any legitimate reason for denial. *In re Keast*, 278 Mich App at 425 (emphasis added) ("It is the absence of *any* good reason to withhold consent, rather than the presence of good reasons to grant it, that indicates that the decision maker has acted arbitrarily and capriciously."). On the record before us, the trial court did not misapply the relevant standard or clearly err in finding that petitioners failed to establish by clear and convincing evidence that MCI lacked any basis for denial that was not arbitrary or capricious. *Id.* at 424-425; *In re Cotton*, 208 Mich App at 184.

IV. STATUTORY PREFERENCE FOR RELATIVE PLACEMENT

Petitioners next argue that the trial court erred by not applying the statutory preference for relative placement under MCL 722.954a(5) to MCI's adoption decision. We disagree.

We review de novo questions of statutory interpretation. *Thomas*, 254 Mich App at 201.

> The goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and a court must enforce the statute as written. Words and phrases in a statute shall be construed

> and understood according to the common and approved usage of the language. [*In re Conservatorship of Townsend*, 293 Mich App 182, 187; 809 NW2d 424 (2011) (citations omitted).]

MCL 722.954a(5) provides, in relevant part:

> Before determining placement of a child in its care, a supervising agency shall give special consideration and preference to a child's relative or relatives who are willing to care for the child, are fit to do so, and would meet the child's developmental, emotional, and physical needs. The supervising agency's placement decision shall be made in the best interests of the child.

A review of the plain and unambiguous language of MCL 722.954a indicates that the Legislature intended the statute to provide procedural requirements where a child is removed pursuant to a child protective proceeding; there is no indication that the statute was intended to apply to MCI's adoption decisions after termination. See MCL 722.954a(2); MCL 722.954a(3)(a); MCL 722.954a(4)(a). See also *In re Conservatorship of Townsend*, 293 Mich App at 187 ("If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and a court must enforce the statute as written."). Moreover, petitioners do not cite to any case applying MCL 722.954a in the context of an adoption proceeding or a Section 45 hearing. There is no basis for this Court to conclude that MCL 722.954a(5) applies to MCI's adoption decision.[2]

Moreover, even if this Court were to find that MCL 722.954a(5) applies to MCI's decisions regarding whether to grant consent to adopt, we would not find that MCI or the trial court is required to consent to relative adoption under MCL 722.954a(5). In the context of child protective proceedings, this Court has held that the trial court is not required to place a child with relatives. See *In re IEM*, 233 Mich App 438, 453; 592 NW2d 751 (1999), rev'd on other grounds by *In re Morris*, 491 Mich 81; 815 NW2d 62 (2012); *In re McIntyre*, 192 Mich App 47, 52; 480 NW2d 293 (1991).

In the instant case, the trial court held that MCL 722.954a(5) articulates a preference for relative placement, not a mandate. The trial court correctly ruled that its review of respondent's denial of adoption consent was limited to whether that denial was arbitrary and capricious and made its ruling on the basis of its finding that the decision was not arbitrary or capricious. Petitioners are not entitled to relief on the basis of MCL 722.954a(5).

V. PARTICIPATION OF THE LGAL

Finally, petitioners argue that the LGAL's participation in the Section 45 hearing constituted error requiring reversal. We disagree.

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[2] Michigan courts routinely consider placement with relatives in the context of child protective proceedings under MCL 712A.19b. See *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010); *In re Olive/Metts*, 297 Mich App 35, 43; 823 NW2d 144 (2012).

At the Section 45 hearing, petitioners contended that the LGAL "has no role in this proceeding." In response, the trial court ruled:

> There is an extensive list of powers and duties of an LGAL that makes it clear first of all that the LGAL's appointment continues until jurisdiction over the children is terminated.
>
> * * *
>
> So even if there weren't specific statutory authority for the LGAL's participation in this hearing today, I'm going to order it. I want the LGAL to participate. . . . I want the LGAL to have input because of her involvement throughout the time that the court has had jurisdiction over these children.

"In Michigan, adoption proceedings are governed entirely by statute. Section 24a(1) of the Adoption Code, MCL 710.24a(1), specifically enumerates who is considered an interested party in adoption proceedings." *In re Toth*, 227 Mich App 548, 554; 577 NW2d 111 (1998). In this case, the LGAL was not an interested party under MCL 710.24a(1). However, other statutes make clear the Legislature's intent that the LGAL should be involved in the adoption proceedings regardless of whether the LGAL is an interested party under MCL 710.24a(1). For instance, MCL 710.45(5) provides that "[t]he court shall provide notice of a motion brought under this section to all interested parties as described [MCL 710.24a(1)], *the guardian ad litem of the prospective adoptee if one has been appointed during a child protection proceeding*, and the applicant who received consent to adopt." (Emphasis added.) MCL 400.204(2) provides:

> During the time a child is committed to the superintendent of the Michigan children's institute, the superintendent and the child's attorney may communicate with each other regarding issues of commitment, placement, and permanency planning; and if the child's attorney has an objection or concern regarding such an issue, the superintendent and the child's attorney shall consult with each other regarding that issue.

Moreover, MCL 712A.17d(1)(b) provides that the LGAL's "powers and duties include . . . [t]o serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child." In light of the foregoing statutory provisions, as well as our review of the lower record, petitioners are not entitled to relief on the basis of the LGAL's participation in this case.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra