STATE OF MICHIGAN

COURT OF APPEALS

In re TEM, Minor.

UNPUBLISHED
July 14, 2022
APPROVED FOR PUBLICATION
September 1, 2022
9:00 a.m.

No. 359529
Dickinson Circuit Court
Family Division
LC No. 21-000103-AM

Before: SAWYER, P.J., and LETICA and PATEL, JJ.

PER CURIAM.

Petitioners sought consent to adopt TEM after serving as his foster parents from 2018 to 2019. The Superintendent of the Michigan Children's Institute (MCI) withheld consent to adopt.[1] Petitioners challenged in the trial court the denial of consent to adopt as well as the constitutionality of certain statutes. After conducting a hearing pursuant to MCL 710.45(2) (Section 45 hearing), the trial court found that the MCI Superintendent's decision to deny consent was not arbitrary and capricious and ruled that the Michigan Adoption Code, MCL 710.21 *et seq.*, and statutes governing the MCI Superintendent, MCL 400.201 *et seq*., were not void for vagueness. It is from this decision that petitioners now appeal. We affirm.

[1] The MCI is created by MCL 400.201 and is "under the control and management of the Michigan social welfare commission," which "shall appoint the superintendent, and such other officers and employees as it shall deem necessary, who shall severally hold their offices and positions during the pleasure of the commission." MCL 400.202. "All children committed to the Michigan children's institute shall be considered committed to the department and shall be subject to review by the juvenile division of the trial court under chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712A.32." MCL 400.203(1). The MCI Superintendent "shall represent the state as guardian of each child committed" and "has the power to make decisions on behalf of a child committed to the institute." MCL 400.203(1) and (2).

I. BACKGROUND

Most of the underlying facts are not in dispute. TEM and EM's biological father released his parental rights in 2016, and the parental rights of their biological mother were terminated in 2017. The children thereafter became wards of the MCI. The children resided with their paternal grandmother during the termination proceedings but were subsequently moved to a different foster family out of state. In April 2018, the children were moved to petitioners' care. Petitioners are licensed foster parents with licenses not only in Michigan but also in two other states. The children remained with petitioners until September 2019. At that time, the children were removed from petitioners' care and placed with a different potential adoptive family; however, the children were eventually removed from this family in May 2020 and placed again with the grandmother. In total, the children spent approximately three and a half years with the grandmother, and at the time of the Section 45 hearing, TEM and EM were still residing with their grandmother.

During the time that the children were with petitioners, EM exhibited various behavioral issues. In March 2019, petitioners indicated their intent to adopt both TEM and EM, but, in August 2019, EM's behavior became too much for petitioners to handle. Accordingly, petitioners sought to have EM removed, but both children were subsequently removed from petitioners' care in September 2019. In October 2020, petitioners formally withdrew their petition to adopt EM but retained their intent to adopt TEM. The grandmother was willing to adopt both TEM and EM. The MCI Superintendent denied petitioners' request to adopt TEM, concluding that it was not in the children's best interests to be separated from each other. Petitioners filed a Section 45 motion in the trial court, arguing that the MCI Superintendent's decision was arbitrary and capricious and that the statutory consent-to-adopt process was void for vagueness because it did not provide sufficient standards for the MCI Superintendent to follow.

Petitioners focused their motion largely on the children's removal as well as certain inaccuracies in how petitioners had been portrayed. After holding a Section 45 hearing, the trial court rejected petitioners' challenges and upheld both the MCI Superintendent's decision and the constitutionality of the relevant statutes. The MCI Superintendent's primary reason for denying consent was to keep the children together for adoption rather than separate them. The trial court determined:

> The Superintendent made it clear in her testimony that she considered the letters and documents that were submitted by the [petitioners]. She acknowledged that she did not conduct a further investigation as to the accuracy of reports reviewed or information provided by the [petitioners]. She considered what was reported to her about [TEM]'s preference at the time she was making her decision. The Superintendent's consideration of [TEM]'s position as reported to her is neither arbitrary or capricious despite the fact that his preference at the time of the removal in September 2019, may very well have been to stay with the [petitioners]. [TEM] may have even been influenced by false information in expressing his preference at the time of the Superintendent's decision to remain with his sibling in a relative placement. None of that makes the decision by the Superintendent arbitrary or capricious.

The trial court recognized that its role was not to judge the children's removal or its circumstances but, instead, to focus on the narrow issue before it and limited standard of review. Regarding petitioners' constitutional challenge, the trial court ruled that petitioners' argument failed because they could not show that they had a protected interest. Furthermore, the trial court ruled that, although there were flaws in the current adoption system, this did not make the system unconstitutional.

II. ANALYSIS

A. CONSENT TO ADOPT

1. STANDARD OF REVIEW

"Pursuant to MCL 710.45,[2] a family court's review of the 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." *In re Keast*, 278 Mich App 415, 423; 750 NW2d 643 (2008). This Court reviews for clear legal error whether the trial court properly applied this standard. *Id.* A trial court commits clear legal error when it "incorrectly chooses, interprets, or applies the law . . . ." *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). However, the proper application of the Michigan Adoption Code, MCL 710.21 *et seq.*, presents a question of law that is reviewed de novo. *In re RFF*, 242 Mich App 188, 195; 617 NW2d 745 (2000).

2. DISCUSSION

Petitioners argue that the trial court committed clear legal error when it determined that the MCI Superintendent's decision was not arbitrary and capricious. Moreover, petitioners contend that the trial court applied the wrong legal standard. We disagree.

"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,' " and "[t]he generally accepted meaning of capricious is 'apt to change suddenly; freakish; whimsical; humorsome.' " *In re Keast*, 278 Mich App at 424-425 (quotation marks and citations omitted;

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[2] MCL 710.45 states, in relevant part:

> (2) If an adoption petitioner has been unable to obtain the consent required by section 43(1)(b), (c), or (d) of this chapter, the petitioner may file a motion with the court alleging that the decision to withhold consent was arbitrary and capricious.
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> * * *
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> (7) Unless the petitioner establishes by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court shall deny the motion described in subsection (2) and dismiss the petition to adopt.

first alteration in original). The trial court must not "decide the adoption issue de novo and substitute its judgment for that of the representative of the agency that must consent to the adoption." *In re Cotton*, 208 Mich App 180, 184; 526 NW2d 601 (1994).

This Court long ago emphasized that "the focus is not whether the representative made the 'correct' decision or whether the probate judge would have decided the issue differently than the representative, but whether the representative acted arbitrarily and capriciously in making the decision." *Id*. "[I]f there exist good reasons why consent should be granted and good reasons why consent should be withheld, it cannot be said that the representative acted arbitrarily and capriciously in withholding that consent even though another individual, such as the probate judge, might have decided the matter in favor of the petitioner." *Id*. at 185. In other words, "it is the absence of any good reason to withhold consent, not the presence of good reasons to grant it, that indicates that the representative was acting in an arbitrary and capricious manner." *Id*.

The trial court applied the correct legal standard. It properly noted that the correctness of the children's removal and the circumstances surrounding the removal were not at issue; rather, it was whether the MCI Superintendent's decision was arbitrary and capricious. Contrary to petitioners' assertions, the trial court did not ignore any specific period of time or refuse to review the nature of the MCI Superintendent's decision. Petitioners misunderstand the limited scope of the trial court's review. The trial court could not review the correctness of the denial, whether the MCI Superintendent adequately addressed past circumstances, or whether it would have done things differently. Michigan authority is clear that the court is to determine if there is any good reason to support the MCI Superintendent's decision; if so, the decision must be upheld. See *In re Cotton*, 208 Mich App at 184-185.

We agree with the trial court's determination that there was good reason to support the MCI Superintendent's decision. The MCI Superintendent thoroughly evaluated four factors, and she determined that, apart from one factor, petitioners and the grandmother were equal. The only factor in which there was a difference was a factor that the MCI Superintendent and Michigan policy place a great deal of emphasis on: keeping siblings together. The grandmother, in contrast to petitioners, desired to adopt both children. Given that petitioners did not desire to adopt EM, the MCI Superintendent determined that the factors weighed against consent. The record shows that the MCI Superintendent considered petitioners' outstanding record as foster parents and did not rely on inaccurate information. Furthermore, at the time of the MCI Superintendent's decision, TEM had expressed a desire to be adopted by the grandmother along with EM. Many other personnel, including the children's therapist, physician, and guardian ad litem, supported keeping the children together. This was not an arbitrary and capricious determination but one supported by thoughtful analysis and adequate investigation.

B. CONSTITUTIONAL CHALLENGES

1. STANDARD OF REVIEW

This Court reviews de novo constitutional issues, *Dorman v Clinton Twp*, 269 Mich App 638, 644; 714 NW2d 350 (2006), whether a statute is unconstitutionally vague, *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 538-539; 669 NW2d 594 (2003), and questions of statutory

interpretation, construction, and application, *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010).

2. DISCUSSION

Petitioners argue that portions of the Adoption Code, MCL 710.21 *et seq.*, and statutes governing the MCI Superintendent, MCL 400.201 *et seq*., are unconstitutional because they are void for vagueness. Specifically, petitioners contend that they do not give the MCI Superintendent adequate guidance or standards when making a consent-to-adopt decision, thereby leaving her with unlimited discretion. We disagree.

"When interpreting a statute, [this Court] must ascertain the Legislature's intent," which is accomplished "by giving the words selected by the Legislature their plain and ordinary meanings, and by enforcing the statute as written." *Griffin v Griffin*, 323 Mich App 110, 120; 916 NW2d 292 (2018) (quotation marks and citation omitted). If a statute is unambiguous, it must be applied as plainly written. *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 971 NW2d 584 (2018). This Court may not read something into the statute "that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Id*. (quotation marks and citation omitted).

Statutes are presumed to be constitutional, and the burden is on petitioners to prove otherwise. *STC, Inc*, 257 Mich App at 539. "The 'void for vagueness' doctrine is a derivative of the constitutional guarantee that a state may not deprive a person of life, liberty, or property without due process of law." *Id*. at 538. "A challenge to the validity of an ordinance predicated on vagueness invokes constitutional principles of due process." *Turunen v Dir of Dep't of Natural Resources*, 336 Mich App 468, 482; 971 NW2d 20 (2021). To show that a statute is void for vagueness, petitioners must show: "(1) it is overbroad and infringes First Amendment freedoms, (2) it does not provide fair notice of the conduct it regulates, or (3) it gives the trier of fact unstructured and unlimited discretion in concluding whether the statute has been violated." *STC, Inc*, 257 Mich App at 539.

"[T]he entire text of the statute is examined and the words of the statute are given their ordinary meanings." *Id*. Given that the present case does "not involve a challenge to First Amendment freedoms," it will be "examined in light of the facts of the particular case." *Id*. "[T]he constitutionality of the statute in question must be examined in light of the particular facts at hand without concern for the hypothetical rights of others." *Turunen*, 336 Mich App at 482 (quotation marks and citation omitted). Therefore, "[t]he proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in this case." *Id*. (quotation marks and citation omitted).

Petitioners have failed to demonstrate that they hold a protected interest for purposes of due process. Petitioners acknowledge that the United States Supreme Court has never proclaimed a protected interest for foster parents or prospective adoptive parents. They claim, however, that Michigan law does. This argument fails. MCL 710.24a(1)(a) does not create a protected interest; it merely provides that petitioners are "[i]nterested parties in a petition for adoption." Similarly, MCL 722.958a(2)(a) does not create a protected interest:

> (2) To ensure that each foster parent is treated with dignity, respect, trust, and consideration, the supervising agency shall ensure that each foster parent has access to or receives the following:
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> (a) Explanation and clarification regarding the supervising agency's role and expectations, information concerning the supervising agency's policies and procedures, and changes to those policies or procedures relative to the role as a foster parent or the children in the foster parent's care within 30 days after those changes are made.

MCL 722.953(g) provides that prospective adoptive parents have access to the same resources within MCL 722.958a. Accordingly, these provisions merely provide for foster parents and prospective adoptive parents to be treated in a particular way and to have access to various resources. Petitioners provide no other authority to support their position.

Furthermore, petitioners have failed to overcome their burden of proving vagueness. Under the Adoption Code, "the best interests of the adoptee are the overriding concern." *In re ASF*, 311 Mich App 420, 435; 876 NW2d 253 (2015). The Adoption Code identifies the factors that must be considered by "the court" "[u]pon the filing of an adoption petition" and in the subsequent investigation of the adoption, which includes the best interests of the adoptee and the prospective adoptive family's background. MCL 710.46(1)(a). These best interests are contained in MCL 710.22(g). The MCI is created by MCL 400.201 and is "under the control and management of the Michigan social welfare commission," which "shall appoint the superintendent, and such other officers and employees as it shall deem necessary, who shall severally hold their offices and positions during the pleasure of the commission." MCL 400.202.

"All children committed to the Michigan children's institute shall be considered committed to the department and shall be subject to review by the juvenile division of the trial court under chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712A.32." MCL 400.203(1). The MCI Superintendent "shall represent the state as guardian of each child committed" and "has the power to make decisions on behalf of a child committed to the institute." MCL 400.203(1) and (2). The MCI Superintendent's ability to consent to adoption is governed by MCL 400.209, which provides in relevant part:

> (1) The superintendent of the institute or his or her designee is authorized to consent to the adoption, marriage, guardianship, or emancipation of any child who may have been committed to the institute, *according to the laws for the adoption*, marriage, guardianship as provided in section 19c of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.19c, or emancipation of minors. . . . [Emphasis added.]

Furthermore, "[t]he MCI superintendent or his or her designee *shall consult with the child's lawyer guardian ad litem* when considering whether to grant written consent." MCL 712A.19c (emphasis added).

MCL 400.209(1) explicitly provides that the MCI Superintendent was "authorized to consent to the adoption . . . of any child who may have been committed to the institute, *according*

to the laws for the adoption . . . of minors." The laws of adoption are contained within the Adoption Code and provide for various standards to guide adoptions, such as the best-interest factors, MCL 710.22(g), investigations into the background of the prospective family, MCL 710.46(1)(a), and consultations with the guardian ad litem, MCL 712A.19c. Moreover, the MCI Superintendent is overseen by the Michigan Social Welfare Commission, MCL 400.202, as well as Michigan courts, MCL 710.46. The MCI Superintendent is also bound by the fact that "the best interests of the adoptee are the overriding concern," *In re ASF*, 311 Mich App at 435, and she must work to "safeguard and promote the best interests of each adoptee in need of adoption and that will protect the rights of all parties concerned;" she must also work to "provide prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time," "[t]o achieve permanency and stability for adoptees as quickly as possible," and "[t]o support the permanency of a finalized adoption by allowing all interested parties to participate in proceedings regarding the adoptee," MCL 710.21a. The MCI Superintendent was not without standards or guidance.

Petitioners read MCL 400.209 in a vacuum. As our Supreme Court has stated, "statutes must be read together, and no one section should be taken in isolation." *Apsey v Mem Hosp*, 477 Mich 120, 133 n 8; 730 NW2d 695 (2007). By reading the Adoption Code in tandem with those statutes that govern the MCI Superintendent's actions, they are easily harmonized and dispense with petitioners' arguments. See *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477, 508; 274 NW2d 373 (1979) (quotation marks and citation omitted) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be voided.").

Affirmed.

/s/ David H. Sawyer
/s/ Anica Letica
/s/ Sima G. Patel