

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of MYAH SUE NALL, f/k/a MYAH
SUE BENNETT, Adoptee.

DWAYNE CURTIS SCHANG,

Petitioner-Appellant,

UNPUBLISHED
August 14, 2003

v

No. 245509
Livingston Circuit Court
Juvenile Division
LC No. 00-003408-AD

EDWARD DENNIS NALL and DEVOTA
SHERYL NALL,

Respondents-Appellees.

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

The primary duty of judges of this state is to apply the law as set forth by the Legislature or our appellate courts to the facts of a particular case. Indeed, each of us swear under oath to uphold the laws of this great state and of our United States before we take on the responsibility of judging the action of others. When called upon to perform such tasks on a daily basis, we are at times confronted with a decision which is legally correct, and therefore compelled, but which has an obvious and significant detrimental impact on one or both of the parties involved. In such cases, and despite our natural human desire to make what we may feel is equitably the “right” decision, we must adhere to our oath and apply the law governing the case. In this particular case, we are therefore required, albeit quite reluctantly so, to vacate the trial court’s order of adoption because the trial court once again committed reversible error in failing to set aside the adoption order on the prior remand. We do so despite the obvious turmoil which this decision may cause to befall the innocent minor child involved in this case.

I. Facts and Procedural History

The facts underlying this case were set forth in this Court's earlier opinion:¹

The minor child was born to petitioner's former wife. Petitioner and his former wife were the parents of two children and, initially, petitioner believed himself to be this child's father. However, DNA testing proved that this was not the case. Petitioner received custody of his children and also of his former wife's daughter from a previous marriage.

The FIA sought custody of the child on the ground that she had been sexually abused by her biological father. The child was placed in foster care with respondents. The trial court terminated the parental rights of the child's biological parents and placed the child with the FIA's Michigan Children's Institute (MCI) for adoption.

Petitioner and respondents sought to adopt the child. The MCI gave consent to petitioner to adopt the child. The MCI indicated that both petitioner and respondents could offer the child a stable and satisfactory home, but concluded that the possibility of placing the child in a home with a psychological parent, petitioner, and three half siblings to whom the child was strongly attached constituted extraordinary circumstances sufficient to override the FIA's policy of giving first consideration for adoption to foster parents who had cared for a child for at least one year.

Respondents filed a petition pursuant to MCL 710.45, seeking a determination that consent to their adoption of the child had been withheld arbitrarily and capriciously. The trial court concluded that the decision to give petitioner consent to adopt the child was arbitrary and capricious. The trial court emphasized that the FIA's policy was to give first consideration for adoption to foster parents if the child had been in their care for at least one year. It also found that the FIA acted arbitrarily and capriciously by elevating the fact that petitioner could offer the child a home with her three half siblings to an extraordinary circumstance that would override the FIA's policy. The trial court stated that it did not base its decision on any negative factors associated with the home environment offered by petitioner. [*In re MSB, supra*, slip op at 1-2.]

The order appealed in that case was the August 21, 2000 order wherein the trial court declared as "arbitrary and capricious" the MCI superintendent's decision consenting to petitioner's adoption of the child. That same order terminated the rights of the MCI to the child. On the same day, the trial court also issued orders making the child a ward of the court, approving placement of the child in the home of respondents, for purposes of adoption, and declaring petitioner's petition for adoption moot. While the appeal was pending, the trial court signed an October 23, 2000, order allowing the adoption of the child by respondents.

¹ *In re MSB*, unpublished opinion of the Court of Appeals, issued April 9, 2002 (Docket No. 229691).

This Court ultimately reversed the trial court's order setting aside the decision of the MCI and, without retaining jurisdiction, remanded the case to the trial court "for proceedings consistent with this opinion." *Id.*, slip op at 2.

On remand, petitioner brought a motion requesting the trial court to vacate its orders authorizing the adoption by respondents and declaring petitioner's petition for adoption moot, and to reinstate petitioner's original petition to adopt the child or to grant leave to file a new petition. Petitioner further asked the court to grant his own request for adoption of the child.

On November 20, 2002, the trial court issued an opinion and order seeking to address the issues on remand. In that opinion, the trial court "accept[ed]" our ruling that it erred in finding the MCI superintendent's decision arbitrary and capricious. However, the court referred to its three orders of August 21, 2000, recited that the court "proceeded with the adoption of Myah Sue, because there was a proper petition for adoption filed," and, because this Court had not ordered a stay of proceedings, declared that the adoption would not be disturbed because "the child, Myah Sue, is no longer available for adoption pursuant to [petitioner's] petition."

Petitioner then filed a complaint for superintending control with this Court, which was denied. Petitioner appealed that denial to the Supreme Court, and also filed his claim of appeal with this Court. The Supreme Court issued an order denying leave in the matter, but ordering this Court to expedite the appeal, which we have done.

II. Analysis

We believe that this case is resolved by a straightforward application of our prior ruling to the clear and unambiguous language of MCL 710.45, and in particular MCL 710.45(5). As we noted in our prior opinion, respondents sought the adoption under MCL 710.45, by filing a petition seeking to overturn the MCI superintendent's consent for petitioner to adopt the minor child. Pursuant to MCL 710.45(6), *if* the court finds by clear and convincing evidence that the consent to adopt was arbitrary and capricious, *then* the court may terminate the rights of the agency and make further appropriate orders. However, if the court concludes that there is not clear and convincing evidence of an arbitrary and capricious decision, then under subsection 5 the court "shall" deny the motion and dismiss the petition to adopt:

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*. [MCL 710.45(5) (emphasis added).]

Thus, once this Court held that respondents had not established that MCI's consent to adopt was arbitrary and capricious,² on remand, the circuit court was compelled by statute to deny respondent's motion and to "dismiss the petition to adopt." *Id.*

² Our prior opinion in this case was the law of the case, which the trial court was required to
(continued...)

The trial court incorrectly concluded that, because a stay was never ordered after the first appeal, it need not alter or amend the orders entered subsequent to the initial order setting aside the superintendent's consent on remand. To the contrary, under the statute, those subsequent orders,³ including the October 23, 2000, adoption order, were without legal footing since all of those orders were premised solely on the existence of the initial August 21, 2000, order setting aside the superintendent's consent. As noted, MCL 710.45(6) makes it clear that a court may terminate an agency's rights to a child and make other appropriate orders only "if" it finds by clear and convincing evidence that the agency's consent was arbitrary and capricious. Absent such a finding, the petition challenging the decision must be dismissed. MCL 710.45(5).

Therefore, pursuant to our prior decision and these statutory provisions, on remand, the trial court should have (1) set aside its order vacating the MCI superintendent's consent, (2) entered an order denying respondent's motion to set aside the consent, and (3) entered an order dismissing respondents' petition. The trial court is instructed to do so on remand, as well as to reinstate petitioner's petition and to decide that petition within thirty-five days from the date of this opinion. We shall retain jurisdiction over this case to address any matters raised by the parties after the trial court's decision on petitioner's petition.⁴

Reversed and remanded. Jurisdiction is retained.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray

(...continued)

follow. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

³ There were three separate orders entered on August 21, 2000. The first order set aside the MCI superintendent's consent to adopt, the second order placed the child in respondents' home for purposes of adoption, and the third order declared petitioner's adoption petition moot.

⁴ We noted in the commencement of this opinion that the legal ruling and appeals in this matter have caused unnecessary delays in finalizing the family life of this child. The Supreme Court has recently addressed the seriousness of these situations, see *In re JK*, 468 Mich 202, 217-219; 661 NW2d 216 (2003) and because of that, we think it prudent to retain jurisdiction so that the appellate process will be more quickly available to provide finality for the child and the parties.