

STATE OF MICHIGAN
COURT OF APPEALS

In re C.V., Minor.

DEAN CUNNINGHAM and RITA
CUNNINGHAM,

Petitioners-Appellants,

v

DEPARTMENT OF HUMAN SERVICES,

Respondent-Appellee.

UNPUBLISHED
September 15, 2009

No. 290439
Shiawassee Circuit Court
Family Division
LC No. 08-003565-AO

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

PER CURIAM.

Petitioners appeal as of right from a circuit court order dismissing their petition to adopt the minor child following a hearing conducted pursuant to § 45 of the Adoption Code, MCL 710.45 (“§ 45 hearing”) at which petitioners challenged the decision of the Michigan Children’s Institute (MCI)’s superintendent to withhold consent to the adoption petition. We affirm.

A circuit court’s review of the MCI superintendent’s decision to withhold consent at a § 45 hearing is limited to a determination whether the petitioners established by clear and convincing evidence that the superintendent acted arbitrarily and capriciously. MCL 710.45(7); *In re Keast*, 278 Mich App 415, 423; 750 NW2d 643 (2008). The superintendent’s consent to the adoption petition is required because he serves as the guardian of children who are state wards. *Id.*, see also MCL 400.203; MCL 400.209. The initial focus of the § 45 hearing is on the superintendent’s reasons for withholding consent. *Keast, supra* at 425. “[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 . . . might have decided the matter in favor of the petitioner.” *In re Cotton*, 208 Mich App 180, 185; 526 NW2d 601 (1994).

On appeal, we review whether the circuit court properly applied the statutory standard for clear legal error, as a question of law. *In re Keast, supra* at 423. The circuit court’s finding regarding whether the superintendent’s decision was arbitrary and capricious is reviewed for clear error. *Id.* at 434. “[A] finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake was made.” *Boyd v Civil Service Comm*, 220 Mich App 226, 235; 559 NW2d 342 (1996). Deference is given to the

circuit court's special opportunity to judge the credibility of witnesses. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Here, we have limited our review to the evidence presented at the § 45 hearing. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). Because the information regarding alleged statements by the superintendent after the § 45 hearing concluded was presented only in affidavits filed in support of a motion for reconsideration, and petitioners have not challenged or addressed the circuit court's decision denying reconsideration, we do not consider the affidavits submitted with that motion. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Petitioners have failed to show any clear error in the circuit court's assessment of the superintendent's investigation of their adoption application, or his decision to withhold consent. Although the case conference provided for in respondent's Adoption Services Manual (CFA 732-32) was not conducted after the adoption worker completed her assessment, un rebutted evidence was presented at the § 45 hearing that petitioners had an opportunity to personally meet with the superintendent to discuss the assessment and present new information. Further, the superintendent testified that he conducted an investigation in which he consulted a number of individuals and agencies, including therapists and various adoption, foster care, and protective services workers. He personally met with the foster parent to observe her interaction with the minor child before concluding that it would be emotionally harmful to remove him from the foster parent's home. He also indicated that he was aware of the circumstances surrounding various changes in the foster parent's personal life while the child was in her care, including a divorce, a protective services investigation that resulted in the child being temporarily removed from her home, and the foster parent's moves to new residences, before reaching his conclusion that the home provided a stable and satisfactory environment for the child.

Although the superintendent did not detail all of his findings in his written decision and admitted that it contained some inaccurate historic information regarding the underlying failed attempt to establish legal paternity, the manual admitted at the § 45 hearing only required a brief description of the factors considered, as well as petitioners' opportunity to question the superintendent regarding his decision. Therefore, we fail to find any deficiency in the written decision that provides a basis for holding that the superintendent arbitrarily and capriciously concluded that it was not in the child's best interests to be adopted by petitioners. Giving appropriate deference to the circuit court's superior ability to hear the testimony at the ¶ 45 hearing and evaluate credibility issues, we find no clear err in the court's finding that petitioners did not meet their burden of establishing clear and convincing evidence that the superintendent acted arbitrary and capriciously.

With respect to petitioners' claim that they were entitled to a "relative" preference under the Adoption Code, petitioners have failed to establish any provision of the Adoption Code that provides a specific preference to relatives. In any event, the only matter before the circuit court was whether the superintendent arbitrarily and capriciously withheld his consent, and the superintendent's testimony indicates that he considered petitioners to have a preference as a possible relative to the child, notwithstanding the inability of petitioner Rita Cunningham's son to establish his legal paternity. The superintendent also considered the foster parent's circumstances and interest in adoption and, as previously indicated, we find no clear error in the

circuit court's assessment of his decision based on the evidence presented at the § 45 hearing. Cf. *In re Keast, supra* at 434 (adoptive placement with existing foster family can override potential policy considerations in superintendent's decision).

We also reject petitioners' argument to the extent that they suggest that the circuit court was required to evaluate the child's best interests utilizing the factors set forth in MCL 710.22(g). That definition has no application to this case because the circuit court did not decide the child's best interests and had no duty to do so because a preliminary finding that the superintendent's decision was arbitrary and capricious is necessary for it to terminate MCI's right to withhold consent to the adoption petition. See MCL 710.45(8); see also *In re Keast, supra* at 435.

Whether the superintendent was required to evaluate the child's best interests in reaching his decision to withhold consent is a separate matter that is not governed by MCL 710.22(g), because that definition only applies when a "court" is ruling on an adoption petition. Further, as previously indicated, there is evidence that the superintendent considered the child's best interests, although he testified that he was not required to prepare a written decision that contained an analysis of each best interest factor. The superintendent also testified that his written decision summarized the three factors that he considered most important in this case. Considering the evidence as a whole, and the limited purpose of a § 45 hearing, we are not persuaded that petitioners have shown anything about the superintendent's best interests evaluation that affords a basis for disturbing the circuit court's decision to dismiss the adoption petition. Petitioners' reliance on *In re Clausen*, 442 Mich 648; 502 NW2d 649 (1993), is misplaced because that case did not involve a § 45 hearing.

Petitioners have also failed to shown any clear legal error in the circuit court's refusal to reopen the prior child protection proceeding that caused the child to become a state ward, subject to the superintendent's guardianship under MCL 400.203, or to conduct a paternity hearing pursuant to *In re KH*, 469 Mich 621; 677 NW2d 800 (2004). Petitioners' claim fails as a matter of law because they have not shown a right to collaterally attack the decision reached in the child protection proceeding regarding the child's legal father, let alone that they have standing to step into the shoes of petitioner Rita Cunningham's son to pursue related paternity issues. "There is a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which case the action of the trial court is not void although it may be subject to direct attack on appeal." *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544; 260 NW 908 (1935). In general, an alleged error in a court's exercise of jurisdiction is not subject to collateral attack. *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992). Further, "[t]he general rule is that a litigant cannot vindicate the rights of a third party." *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 375; 716 NW2d 561 (2006) (opinion of Young, J.).

Finally, petitioners have not shown that they properly preserved their claim under the Fourteenth Amendment that the child's right to be with his biological family was violated. In general, under Michigan's "raise or waive" rule, a litigant's failure to raise an issue in the trial court precludes appellate review, absent a miscarriage of justice. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). Further, an appellant may not leave it to this Court to search for factual support for a claim. MCR 7.212(C)(7); *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004). In any event, considering that petitioners have not

shown any standing to litigate the child's rights, we decline to further address this issue. *Michigan Chiropractic Council, supra* at 375; see also *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005) ("constitutional rights are personal, and a person generally cannot assert the constitutional rights of others").

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Elizabeth L. Gleicher