

STATE OF MICHIGAN
COURT OF APPEALS

In re G, Minors.

AMG and LLG,

Appellees,

and

LEO GREENWOOD and CYNTHIA
GREENWOOD,

Petitioners-Appellants,

v

DEPARTMENT OF HUMAN SERVICES, JOHN
NOWICKE and WENDY NOWICKE,

Respondents-Appellees.

UNPUBLISHED
October 13, 2009

No. 291343
Ingham Juvenile Division
LC No. 06-000214-AO

Before: Talbot, P.J., and Wilder and M. J. Kelly, JJ.

PER CURIAM.

This matter was previously before this Court.¹ Following remand, the trial court conducted additional hearings and determined that the decision of the MCI superintendent to deny consent to petitioners to adopt the minors was not arbitrary or capricious. Petitioners appeal as of right the order dismissing their petition to adopt the two minor children. We affirm.

Petitioners contend that the trial court erred in excluding evidence that arose subsequent to the MCI superintendent's decision. A lower court's decision to admit or exclude evidence is

¹ *In re Greenwood Minors*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2008 (Docket No. 277366) (*Greenwood Minors I*).

reviewed for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005).

At issue was the decision of the MCI superintendent. The family court is not permitted to decide the adoption issue de novo, but rather must determine whether there is clear and convincing evidence that the decision maker acted arbitrarily and capriciously. *In re Cotton*, 208 Mich App 180, 184; 526 NW2d 601 (1994). “[I]t is the absence of any good reason to withhold consent, not the presence of good reasons to grant it, that indicates that the [decision maker] was acting in an arbitrary and capricious manner.” *Id.* Because the trial court properly focused on the reasons for withholding consent, events that occurred after consent was denied were irrelevant.

Petitioners further contend that the trial court erred in not permitting testimony from petitioners about the respondents’ willingness to continue to work together to facilitate a sibling relationship. Petitioners fail to cite to the alleged error in the record, but imply that the testimony would have concerned events that occurred after consent was denied.² Considerable testimony was elicited regarding past sibling visits from several witnesses. However, testimony pertaining to events that occurred after the consent decision was irrelevant and, therefore, its exclusion was not an abuse of discretion.

Petitioners also assert that the trial court erred in precluding information concerning circumstances of the parties and minor children that the MCI superintendent did not rely upon in making his decision. A complete evaluation of the child’s circumstances is relevant in determining whether the superintendent’s decision was “arbitrary” or “capricious,” as those terms are defined. See *Goolsby v Detroit*, 419 Mich 651, 678; 358 NW2d 856 (1984). On remand, this Court specifically instructed the trial court to conduct “an examination of the superintendent’s articulated reasons for granting consent to respondents, and whether those reasons were valid in light of the specific circumstances of the children.” *In re Greenwood Minors*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2008 (Docket No. 277366), slip op at 4. This Court instructed the trial court that “whether the superintendent had before him a complete evaluation of the circumstances of the children,” and “additional factors [a treating psychologist] believed should have been evaluated” were relevant. *Id.*

Petitioners allege that the trial court erred in not admitting the statement of Christina Johnson, the children’s therapist, who previously opined that moving the older Greenwood children to petitioners’ home from their foster home would traumatize them. Petitioners contend that a similar statement from Johnson about the younger children being traumatized by such a move should be evaluated in light of the older children having adjusted well to their change in placement. However, the referenced statement does not address the younger children or their unique circumstances. Thus, Johnson’s statement was properly deemed to be irrelevant.

² Petitioner referenced the *continued* willingness to facilitate visits and an incident that occurred in February 2009 (emphasis added).

Petitioners also contend, without reference to the record, that they were precluded from making any inquiry into the stability of respondents' family. Because the MCI superintendent specifically referenced the stable and satisfactory environment of respondents as a reason for his decision, such information was potentially relevant. The exchange relied on to support this contention, referenced questioning of Mr. Nowicke regarding difficulties experienced by the Nowickes in managing behavioral concerns exhibited by the minor children. The trial judge limited this testimony to what the MCI superintendent knew in making his decision. It is not clear that evidence of the children's behavior related to the stability of respondents' home environment, or any of the other factors that the MCI superintendent listed as reasons for his consent decision. Additionally, there was information in the record about the behavioral difficulties of the children, and that the MCI superintendent was aware of these concerns when making his decision. The information that was excluded was an expanded description of the information that the MCI superintendent considered, but did not base his decision on. The purpose of the hearing was not to investigate who should have custody of the minors, whether the MCI superintendent made the "correct" decision, or why consent should have been given to petitioners. See *In re Cotton, supra* at 184-186. In limiting the testimony concerning the behavioral problems, the trial court properly kept the focus of the hearing on the MCI superintendent's decision and the information that was relevant to this decision. The trial court did not abuse its discretion in so ruling. *Elezovic, supra* at 419.

Next, petitioners argue that the trial court erred in limiting discovery only to documents that the MCI superintendent relied on in making his decision. Decisions regarding discovery are reviewed for an abuse of discretion. *Hamed v Wayne Co*, 271 Mich App 106, 109; 719 NW2d 612 (2006). "The purpose of discovery is to simplify and clarify the contested issues." *Id.* "[T]he court rules also ensure that discovery requests are fair and legitimate by providing that discovery may be circumscribed to prevent excessive, abusive, irrelevant, or unduly burdensome requests." MCR 2.302(C); *Hamed, supra* at 110. This Court remanded to the trial court and vacated its order denying petitioners' discovery requests because the trial court failed to delineate its reasons for denying discovery. *Greenwood Minors I, supra*, slip op at 5. On remand, the trial court said it "will order that DHS provide petitioner with the information or documentation that the superintendent relied on in making his decision to deny the consent to the [petitioners]. Specifically excluded is anything on the [respondents] and why they were granted consent." The trial court clarified that while production was limited to these documents, petitioners could depose individuals regarding the information in the documents.

Petitioners claim they were not provided with reports that contained information about the behavioral difficulties of the minors and respondents' setting of appropriate boundaries in their home. Petitioners also state that they were not provided with the Permanent Ward Service Plan produced by the Department of Human Services (DHS) and that they were denied DHS documents containing information about the psychological treatment of the minors and respondents. As part of their discovery request, petitioners sought production of the entire DHS file pertaining to the minors. In ruling on the discovery request, the court did not abuse its discretion and recognized its limited role of determining whether the decision of the MCI superintendent was arbitrary and capricious. *In re Cotton, supra* at 184.

Next, petitioners contend that the trial court erred in not ordering a psychological evaluation of all four Greenwood minors as a sibling group. Petitioners argue that MCL 710.45

and MCL 710.46 provided the trial court with the authority to order this evaluation. MCL 710.45(6) authorizes an investigation pursuant to MCL 710.46 to be modified or waived. MCL 710.46 authorizes a court to use the assessment provided in MCL 710.23(f) and to order additional investigation. MCL 710.23f(1) provides, “In a direct placement, an individual seeking to adopt may request, at any time, that a preplacement assessment be prepared by a child placing agency.” MCL 710.23f clearly provides for an assessment of the individual seeking to adopt a child and does not address assessments of the potential adoptees. Therefore, the trial court correctly stated, “there is no legal authority that requires the court to direct that the superintendent have the children evaluated as a sibling set in order to demonstrate that his decision was not arbitrary or capricious.”

Petitioners alternatively argue that the assessment was necessary because their expert, Michael Katz, testified that an evaluation of the sibling bond would provide crucial information relevant to the determination of whether the children would be more harmed by separation from their older siblings or by terminating their relationship with respondents. However, a review of the record shows that the MCI superintendent weighed these competing interests by having considered the testimony of three treating professionals who had assessed the children. These assessments included a psychological evaluation of all four children who were observed together with the prospective parents. All of the assessments concluded that consent should be granted to respondents due to the potential for psychological harm to the minor children should they be taken from their current home. Contrary to the position of petitioners, the trial court’s role was to ascertain if the denial of their consent petition by the MCI superintendent was arbitrary and capricious and not to conduct further investigation regarding the existence of an alternative or “correct” decision. *In re Cotton, supra* at 184-186.

Petitioners also argue that the trial court erred in not finding that the MCI superintendent’s denial of consent was arbitrary and capricious. A person who has filed a petition to adopt a state ward, and has not received consent from the MCI, may file a motion in family court to challenge the MCI superintendent’s denial of consent. MCL 710.45(2). If the court finds by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court may terminate the rights of the appropriate court, child placing agency, or department and proceed with the adoption by petitioner. MCL 710.45(8); *In re Cotton, supra* at 184. The accepted meaning of the term “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.” *In re Keast*, 278 Mich App 415, 424-425; 750 NW2d 643 (2008), quoting *Goolsby, supra* at 678. The generally accepted meaning of the term “capricious” is “apt to change suddenly; freakish; whimsical; humorsome.” *Id.* We review whether the trial court applied the correct legal principles and the arbitrary and capricious determination for clear error. *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996); *Keast, supra* at 423.

The family court is not permitted to decide the adoption issue de novo, but rather must determine whether there is clear and convincing evidence that the decision maker acted arbitrarily and capriciously. *In re Cotton, supra* at 184. “[I]t is the absence of any good reason to withhold consent, not the presence of good reasons to grant it, that indicates the [decision maker] was acting in an arbitrary and capricious manner.” *Id.* at 185. The focus of the trial court is on the reasons given by the MCI superintendent for withholding consent to the adoption. *Id.*

The reasons that the MCI superintendent gave for denying consent are:

The length of time the children have resided in a stable satisfactory environment and the desirability of maintaining continuity.

The strong emotional and psychological relationship that the children have developed with their current parental caregivers.

The extent of emotional harm that they would experience if they were to be removed from this environment. This factor is more important due to the very young ages of the children.

The willingness of both respective families to continue working together so that all of the children will continue to have a relationship with each other as siblings even though they will not be growing up together in the same home. Both families have supported the continuity of the sibling relationship through visits and other contact. The [respondents] indicate that they may be relocating from the Lansing area in the near future to a location closer to Mr. Nowicke's employment. This would result in a decrease in the geographic distance between the two families.

Although the conclusions of the MCI superintendent are challenged, his factual findings were not. The MCI superintendent noted that the minors were four and five years old at the time of the consent decision, and lived with respondents for three years and eight months, constituting a substantial portion of their lives. As such, it was reasonable to not disrupt the continuity of their living environment. Petitioners argue that respondents' home environment was not satisfactory because of concerns that they struggled with setting limits to address the behavioral difficulties exhibited by the children. This concern was noted and taken into consideration by the MCI superintendent. The superintendent was involved in a December 2005 meeting that resulted in a referral of respondents to a therapist for assistance in dealing with oppositional behavior, and the superintendent also received a memo from DHS indicating that the concerns were ongoing. However, this was the only information in the record that suggested disruption in respondents' home. There was also testimony that the children struggled with behavioral and emotional problems before placement with respondents and that such problems are not unusual among abused children.

Central to the MCI superintendent's decision was the existence of an emotional bond between the children and respondents and the harm the children would experience if removed from respondents' care. In reaching this conclusion, the MCI superintendent relied on the opinions of three professionals that provided services to the children and family. In addition, as the MCI superintendent noted, the minors were very young, which necessitated an even greater examination of the harm they would experience from separation. Due to differences in age and experience by the two sets of siblings, it was reasonable to not place significance or rely on the information related exclusively to the older siblings.

Petitioners further contend that the MCI superintendent's failure to consider information that would have been gained from evaluating the siblings, as a group was a critical omission. Katz recommended an evaluation of the sibling bond by evaluating the four of them as a group,

without any adults. However, Katz acknowledged that this type of evaluation was only his preference, and did not offer criticism of the evaluations actually performed. In fact, Katz endorsed the MCI superintendent's decision by stating "he had some valid reasons to make the recommendations that he made."

Katz indicated that his recommendation would provide more complete information in order to make the "right" decision. However, the three professionals that the MCI superintendent relied on all assessed the issues of the sibling bonds, and the familial bonds with the petitioners and respondents, and incorporated these assessments into their recommendations. Moreover, one professional did evaluate the siblings as a group, but in the presence of each of the prospective adoptive parents. The MCI superintendent acknowledged that he supports efforts to place children with suitable relatives and to place siblings together unless there are valid reasons to do otherwise. It is unclear why an attempted reunification of the siblings did not occur earlier in the process, or why DHS did not attempt to place the younger children with the petitioners when they announced their availability in 2004. Regardless, considering the totality of the evidence, there was no demonstration of error by the superintendent in concluding that the children were bonded with respondents and that removing them would produce harm.

Petitioners also contend that the superintendent's finding that the families were willing to work together to maintain a relationship among the siblings, and a relationship between the minors and their great uncle and aunt was inaccurate. At the hearing, there was conflicting testimony about who was responsible for arranging the visits and whether any party was reluctant to arrange visits. However, at the time of the superintendent's decision, the information available indicated that the visits were regularly occurring.

In this instance, there was vehement debate about what would constitute the "correct" decision for placement between two desirable alternatives. However, judicial review of the MCI superintendent's decision does not entail determining the "correct" decision. *Cotton, supra* at 186. If a trial court finds that the superintendent had a good reason to withhold consent, it cannot be said that the decision was arbitrary and capricious. *Id.* at 185. As acknowledged by petitioners' own expert, the evidence supports the trial court's conclusion that the MCI superintendent had valid reasons for his decision. Therefore, petitioners failed to demonstrate that the MCI superintendent made an arbitrary and capricious decision. *In re Keast, supra* at 424-425.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Kelly