STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
June 17, 2010

In the Matter of D.L.W., Minor.

No. 295705
Monroe Circuit Court
Family Division
LC No. 08-004173-AF

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Petitioners appeal as of right from a circuit court order denying their motion to compel consent to their adoption of the minor child pursuant to MCL 710.45. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The minor child was born in April 2007, became the subject of child protective proceedings at birth, and was placed with petitioners. After the parental rights of the natural parents were terminated in 2008, petitioners sought to adopt the child. After information about a prior domestic violence incident came to light, other concerns were raised about the stability of petitioners' marriage. The child was allowed to remain in petitioners' home provided they complete various services. Although petitioners engaged in services, they continued to engage in criminal activity and either did not disclose their arrests immediately or did not disclose all the relevant facts surrounding their arrests. The superintendent of the Michigan Children's Institute ("MCI") subsequently declined to grant consent to adopt. He gave the following reasons for withholding consent:

> Repeatedly since first becoming directly involved in this matter following the Foster Care Review Board Appeal Investigation held on August 18, 2008, it has been decided to delay a decision while you addressed problems brought by your decisions and behaviors. This has included domestic violence and jostling. Issues regarding marital discord, substance abuse, physical discipline and financial management have also been addressed. Efforts to assist you in correcting these problems were made by making arrangements for psychological assessments, drug screens and counseling. However, in just over one year it has not been possible for you to maintain stability within you [sic] home for a period of time long enough to complete the adoption process. On June 23, 2009, Mr. Martin was found guilty of stalking, disorderly person, disturbing the peace and careless driving. On August 14, 2009, Mr. Martin was sentenced to one year probation and additional requirements and conditions.

Pursuant to MCL 710.45, a trial court's review of a superintendent's decision to withhold consent to adopt a state ward is limited to determining whether the petitioner has established by 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). Whether the trial court properly applied this standard is a question of law that is reviewed for clear legal error. *Id*.

If an adoption petitioner is unable to obtain consent to adopt from the MCI, the petitioner may challenge the decision to withhold consent on the ground that it "was arbitrary and capricious." MCL 710.45(2). "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 . . . and dismiss the petition to adopt." MCL 710.45(7). A trial court is not permitted to decide the adoption issue de novo or substitute its judgment for that of the MCI superintendent. *In re Cotton*, 208 Mich App 180, 184; 526 NW2d 601 (1994). Rather, "the decision of the representative of the agency to withhold consent to an adoption must be upheld unless there is clear and convincing evidence that the representative acted arbitrarily and capriciously." *Id*.

"The clear and convincing evidence standard presents a heavy burden that far exceeds the preponderance of the evidence standard that is sufficient for most civil litigation." *Heindlmeyer v Ottawa Co Concealed Weapons Licensing Bd*, 268 Mich App 202, 224; 707 NW2d 353 (2005). "The words 'arbitrary' and 'capricious' have generally accepted meanings." *Bundo v City of Walled Lake*, 395 Mich 679, 703 n 17; 238 NW2d 154 (1976). A decision is arbitrary if it is unreasoned, i.e., it is the result of an exercise of will or caprice rather than reference to principles, circumstances, or significance. A decision is capricious if it is whimsical, freakish, or subject to sudden change. *Id*. "[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 representative was acting in an arbitrary and capricious manner." *In re Cotton*, 208 Mich App at 185.

The trial court did not err in determining that petitioners failed to prove by clear and convincing evidence that the MCI superintendent's decision was arbitrary and capricious. The evidence showed that the facts underlying the 2007 domestic violence incident came to light in 2008 and created concern about the stability of petitioners' marriage and thus whether the child should remain in petitioners' home. Petitioners were sent for psychological evaluations and then to counseling. In December 2008, respondent obtained a report regarding the "jostling" incident, which revealed that petitioner C. Martin was not simply involved in an altercation with another person, but rather that she had physically assaulted petitioner R. Martin and then jumped out of the car and ran away when the police stopped his car because she did not want respondent to know about her drinking. This was an indication that the 2007 domestic violence incident was not an isolated event. In January 2009, R. Martin was involved in a separate incident in Montmorency County that ultimately resulted in criminal convictions. When petitioners finally disclosed the arrest a month after the fact, respondent obtained the police report regarding the incident. It revealed that R. Martin had been involved in a relationship with another woman for most of the previous year and then assaulted her by trying to run her off the road. R. Martin claimed that he was simply trying to collect a debt. This was an indication that petitioners' marriage was still troubled and that R. Martin was unwilling to acknowledge the problem.

The evidence gave the MCI superintendent good reason to believe that petitioners' marriage was in serious jeopardy despite their participation in counseling and that they would not be able to provide a stable home for the child. Accordingly, the circuit court did not err in finding that the superintendent did not arbitrarily and capriciously withhold consent.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald