STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

In the Matter of CW, BW, and DW, minors

VALERIU AND KAREN MARTIN,

Petitioners-Appellants,

v.

MICHIGAN DEPARTMENT OF HUMAN SERVICES,

Respondent-Appellee.

Docket No. 140841

Court of Appeals No. 292866

Circuit Court No. 09-016660-AM

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BRIEF OF AMICUS CURIAE, STATE BAR OF MICHIGAN CHILDREN'S LAW SECTION, IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

By: Evelyn K. Calogero (P45512)

CHILDREN'S LAW SECTION
Respectfully submits the following position on:

*

Supreme Court No. 140841
Watkins, Minors

*

The Children's Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Children's Law Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Children's Law Section is 492.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is16. The number who voted in favor to this position was 11. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of section:
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Regarding:
Amicus Brief Supreme Court No. 140841 Waltkins, Minors

Date position was adopted:
May 20, 2010

Process used to take the ideological position:
Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:
16

Number who voted in favor and opposed to the position:
11Voted for position
0 Voted against position
0 Abstained from vote
5 Did not vote

Position:
The Children's Law Section position is that the Michigan Supreme Court should grant leave to review the issues in this case in order to address inconsistent application of MCL 710.45 throughout the state.

Explanation of the position, including any recommended amendments:
Procedures for hearings under MCL 710.45 are applied differently in trial courts throughout the state. Although the appellate courts have addressed the proper standard of review, unpublished opinions from the Court of Appeals illustrate that the standard of review is not always applied consistently. The Children's Law Section proposes that the Michigan Supreme Court undertake review of this case to address the issues of inconsistent application of MCL 710.45 in order to provide clarity to those seeking review of a decision of the MCI.

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QUESTION PRESENTED

Should this Court should grant leave to appeal in this case to provide much-needed guidance to the bench and to the bar on what evidence is relevant to show that the MCI Superintendent's decision to deny consent to adopt was arbitrary and capricious; to provide a workable definition of arbitrary and capricious in the context of a trial court's review of the MCI Superintendent's decision; and to provide a consistent standard by which an appellate court reviews the trial court's decision that the MCI Superintendent's decision was or was not arbitrary and capricious?

Appellant Answers, "Yes."

Appellee Answers, "No."

Amicus Curiae Answers, "Yes."

STATEMENT OF INTEREST OF AMICUS CURIAE

The Children's Law Section is a recognized section of the State Bar of Michigan. The Section has over 400 members who are attorneys and judges working together in Michigan's child welfare system. The attorneys represent children, parents, the Department of Human Services, and the People of the State of Michigan in child abuse and neglect proceedings. Working together, the Section's members make crucial decisions each day that directly and substantially affect the lives of children and families.

The Section's governing council consists of Section members elected by the membership to represent their interests. On May 20, 2010, at the Section's regular meeting, the Section Council voted to authorize the preparation of an amicus brief in *In re CW, DW, and BW,* the case now before this Court.

The section members' expertise is in precisely this narrow area of the law from which this case arises. That expertise is highly relevant to the decision this Court faces. No other group of lawyers or non-lawyers is more appropriately situated to help this court make the decision it must make to ensure a just outcome for Ayden Rood, his family, and the people of this state.

The position taken in this Amicus Brief is the Section's alone. It does not represent a position taken by the State Bar of Michigan. To the best of the Section's knowledge, the State Bar of Michigan has not taken a position in this case.

STATEMENT OF THE FACTS

Amicus accepts the Appellants' Statement of Material Proceedings and Facts as stated in their Application for Leave to Appeal.

ARGUMENT

This Court should grant leave to appeal in this case to provide much-needed guidance to the bench and to the bar on what evidence is relevant to show that the MCI Superintendent's decision to deny consent to adopt was arbitrary and capricious; to provide a workable definition of arbitrary and capricious in the context of a trial court's review of the MCI Superintendent's decision; and to provide a consistent standard by which an appellate court reviews the trial court's decision that the MCI Superintendent's decision was or was not arbitrary and capricious.

This Court should grant the Martins' Application for Leave to Appeal for three reasons: First, the circuit courts do not have a standard by which to determine what evidence is relevant to their reviews of the MCI Superintendent's decision denying a party's consent to adopt an MCI ward. Second, the circuit courts do not have consistent, workable definition of arbitrary and capricious to use in their review of these decisions. And third, the Michigan Court of Appeals is not applying a consistent standard when it reviews circuit court decisions. Because of these discrepancies, an opinion from this Court that describes the procedure to be used in Section 45 hearings, describes a standard by which to determine when a decision is arbitrary and capricious, and states a standard by which to review the circuit court's decision is significant to this state's jurisprudence. But an opinion from this Court would be most significant to the over 6000 Michigan children who are awaiting adoption. See Application for Leave to Appeal at 3 n 1.

When a person seeks to adopt a child who is an MCI ward, that person must get the MCI Superintendent's consent to adopt the child. *See* MCL 710.43(b) ("[C]onsent to [the] adoption of a child shall be executed . . . [b]y the

authorized representative of the department or of a child placing agency to whom the child has been permanently committed by an order of the court."); *In re Keast*, 278 Mich App 415, 419 n 7; 750 NW2d 643 (2008). If the MCI Superintendent denies that person's request to adopt the MCI ward, that person may nevertheless file a petition to adopt the ward, but the person must also file a motion "alleging that the decision to withhold consent was arbitrary and capricious." MCL 710.45(1), (2).

Whenever an adoption petition is filed, the court "shall direct a full investigation by an employee or agent of the court, a child placing agency, or the department." MCL 710.46(1). But although it seems counterintuitive, the court may waive or modify this reporting requirement if the MCI Superintendent denies consent to adopt, and the person files an adoption petition and the motion challenging the Superintendent's decision. MCL 710.45(6). The court must then hold a hearing on the motion – a Section 45 hearing.

The person asking to adopt the MCI ward (now the petitioner) must show by clear and convincing evidence that the MCI Superintendent's decision to deny consent to adopt was arbitrary and capricious. MCL 710.45(7). If the petitioner does not meet that burden, the court must dismiss the adoption petition. *Id.* If, however, the petitioner satisfies that burden, the court may enter an order granting the petition to adopt. MCL 710.45(8).

While the statutes' standards and requirements seem clear, Michigan's family and probate courts (trial courts) do not consistently apply them. And

the Michigan Court of Appeals does not consistently review the trial courts' decisions under the same standard. This Court should, therefore, grant leave to appeal to provide bench and bar with much-needed guidance.

A. The trial courts of this state need a standard by which they can determine what evidence may be used to challenge the MCI Superintendent's adoption decision.

Opinions from the Michigan Court of Appeals show that during Section 45 hearings, trial courts rely heavily on the MCI Superintendent's testimony, while inconstantly admitting other evidence the petitioner has proposed. For example, the Court of Appeals held that a petitioner may bring witnesses to testify that the information that the Superintendent used in making his decision to deny consent to adopt was incomplete thus making his decision arbitrary and capricious. *Greenwood v. Dep't of Human Services*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2008 (Docket No. 277366) Although the trial court refused to allow a psychologist's testimony, the Court of Appeals noted that the Superintendent must articulate his reasons for denying consent and show that these reasons were valid. *Id.* at 3The psychologist would have testified about additional information the Superintendent should have reviewed before making the decision to deny consent to adopt. *Id.* Whether the Superintendent had a "complete evaluation of the circumstances of the children, in advance of his adoption decision, would be relevant in a determination of whether his decision was arbitrary and capricious." *Id.*

In at least one case, the Court of Appeals has noted that while the petitioners challenged the Superintendent's conclusions, they did not challenge his factual findings on which those conclusions were based. *In re G*, unpublished opinion per curiam of the Court of Appeals, issued October 13, 2009 (Docket No. 291343), at 5. Presumably, had the petitioners challenged the factual findings, the petitioners would have been allowed to bring more witnesses. And had the witness who did testify specifically addressed all of the children's circumstances, that testimony would have been entitled to some weight when determining if the Superintendent's decision was arbitrary and capricious. *Id.* at 2.

At least one other panel of the Court of Appeals has held that the Section 45 hearing does

opinion per curiam of the Court of Appeals, issued October 21, 2003 (Docket No. 245206), at 3 ("The trial court properly recognized that the scope of the hearing did not involve the correctness of information in the reports on which [the decision maker] relied when deciding whether to withhold consent, but rather whether [the] decision to withhold consent to adopt Sebastian was made in an arbitrary and capricious fashion.").

Where the petitioners did challenge the Superintendent's factual findings, and where the record did not support those factual findings (indeed the record contradicted them), the Superintendent's decision was arbitrary and capricious. *In re Eckles*, unpublished opinion per curiam of the Court of Appeals, issued September 28, 2004 (Docket Nos. 252709, 252893), at 4-5.

While it appears that the petitioners and the Superintendent testified, it is not clear if others did or not.

In addition, at least two panels of the Court of Appeals have held that the Superintendent may rely on the child-placing agency's reports without conducting an independent investigation into the children's individual facts and circumstances. *See e.g., In re Pendleton,* unpublished opinion per curiam of the Court of Appeals, issued February 14, 2008 (Docket No. 278964) at 3 (citing *In re Cotton,* 208 Mich App 180, 186; 526 NW2d 601 (1994)); *Keast,* supra at 430).

Additionally, while some opinions hold that the Superintendent is generally required to follow DHS polices and common practices of MCI in making decisions to deny or to consent to an adoption, some hold exactly the opposite. Following the DHS adoption service manual can strengthen the findings of the superintendent. *In re Pendleton, supra* at 3. But, under other circumstances, the Superintendent does not have to follow these guidelines. *In re Nall,* unpublished opinion per curiam of the Court of Appeals, issued August 14, 2003 (Docket No. 245509) at 3 (holding that the Superintendent has the discretion to diverge from normal DHS policy and instead favor fit non-blood relatives over fit foster parents). In fact, Michigan trial courts have overturned Superintendent decisions that followed normal policies when the Superintendent failed to consider individual specific circumstances. *In re Carpenter,* unpublished opinion per curiam of the Court of Appeals, issued December 3, 1999 (Docket No. 217634) at 5 (where the Superintendent's

decision was based on the policy of keeping siblings together but failed to consider specific circumstances that showed that the child would actually suffer more harm if she was placed with her siblings, decision to follow policy without considering individual circumstances was arbitrary and capricious). But it is unclear if trial courts are consistently allowing petitioners to bring evidence to show that the facts in a particular case warrant standard DHS polices or if the case should have be treated differently. And in light of this Court's decision in *In re Rood*, 483 Mich 73; 763 NW2d 587 (2009), where this Court emphasized the importance of following DHS policies and procedures, the courts and attorneys of Michigan need guidance regarding how the DHS policies should guide the Superintendent's decision.

Trial courts, and even the Michigan Court of Appeals, do not agree on what types of evidence should be brought before the court during Section 45 hearings and the weight that should be given to this evidence. Evidence from the MCI Superintendent is almost always presented at these trials, and the courts will generally defer to his testimony. As noted in *In re Courturier, supra* at 3, trial courts are given great deference in their ability to judge witness credibility, and it seems that the credibility afforded to the Superintendent is quite high. But, as Judge Shapiro noted in his dissenting opinion in this case, too much deference results in merely rubber-stamping the Superintendent's decision without meaningfully reviewing that decision. *In re CW, BW, and DW,* unpublished opinion per curiam of the Court of Appeals, issued February 16, 2010 (Docket No. 292866), dissenting opinion at 3 (quoting *In re CLH,*

unpublished opinion per curiam of the Court of Appeals, issued June 3, 2003 (Docket No. 244877), at 3.

This case is a perfect example of the confusion that has resulted from the Court of Appeals' mixed messages. Here, the trial court was not familiar with how a Section 45 hearing should proceed. After the MCI Superintendent testified, the court asked the Assistant Attorney General, who represented the Michigan Children's Institute) if Section 45 hearings usually go beyond the Superintendent's testimony, stating, "I've only had a couple [of these hearings]. Do they ever go beyond this?" Transcript of Section 45 Hearing, May 21, 2009, at 85. The Assistant Attorney General replied, "I mean, they're [sic there] might be other witnesses they call . . . ." *Id.*

Should trial courts be required to allow petitioners to bring evidence to show that the Superintendent used information based on falsehoods in denying consent to adopt? Conflicting unpublished opinions of the Court of Appeals have resulted in confusion regarding whether the trial courts should allow petitioners to bring their own witnesses to testify on their behalf to challenge the correctness of the underlying facts on which the Superintendent has based his decision. Compare *In re Couturier, supra,* with *In re Eckles, supra.*

Likewise, should evidence be allowed to show that the superintendent's reliance on agency reports resulted in misguided judgment? These same conflicting unpublished opinions of the Court of Appeals have resulted in confusion regarding whether the Superintendent may rely on agency reports, or whether the petitioners may bring evidence to show that those reports were

based on false information. That raises the question – should the MCI Superintendent be required to conduct an independent investigation when two families request to adopt the same child?

Should trial courts always determine if the Superintendent followed standard DHS and MCI policy in denying consent to adopt, and should they be allowed to determine if these standard policies were appropriate in the particular case? In some situations, the courts will hear evidence regarding whether the Superintendent followed standard DHS and MCI procedure, and in other situations, it will examine whether the circumstances in that particular case warrant divergence from those procedures. Compare *In re Pendleton, supra,* with *In re Nall, supra* and with *In re Carpenter, supra.*

Because the Superintendent must articulate his reasons for refusing to consent to an adoption, and because he must also show that these reasons are valid, *Greenwood,* supra at 3, a trial court should allow evidence that would show that the Superintendent based his decision on incomplete or invalid information. A trial court that does not allow that evidence has abused its discretion.

Accordingly, because neither this Court nor Court of Appeals have definitively taught bench and bar how to apply the arbitrary and capricious standard, the trial courts have inconsistently admitted and precluded evidence that would show why the Superintendent's decision to deny consent to adopt was arbitrary and capricious. Until this Court speaks, trial courts will continue to inconsistently control the admission of evidence to Section 45

hearings. This Court should grant the Martins' Application for Leave to Appeal because this issue is significant to the state's jurisprudence.

B. The trial courts need a consistent, workable definition of arbitrary and capricious to use in their review of the Superintendent's consent-to-adopt decisions.

The Michigan Court of Appeals has articulated several different definitions of arbitrary and capricious, and this Court has not yet chosen to review any of them. This has allowed trial courts to apply the standard in different ways, with different results. This Court should grant leave to appeal to define arbitrary and capricious in the context of Section 45 hearings and to show bench and bar how to apply that standard.

Beginning with *In re Cotton, supra*, and ending with *In re Keast, supra*, Michigan's trial courts have received mixed messages from the Court of Appeals regarding what arbitrary and capricious means and how to determine if the Superintendent's decision was arbitrary and capricious. Amicus agrees that the focus must remain on the reasons given for withholding consent. *Cotton, supra* at 185. And Amicus agrees that

> if 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. Rather, 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.*]

But the Court of Appeals has effectively limited a trial court's focus, which results in precluding any evidence that shows that the decision was

based on false information, by stating 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.* at 184. It is difficult to fathom, however, how a decision based on falsehoods can be anything but arbitrary and capricious.

Yet a close reading of the *Cotton* decision shows that the Court of Appeals did look at the truth of the facts that the Superintendent relied on. For example, one of the reasons the Superintendent gave for denying the petitioners' request for consent to adopt was that the petitioners had their foster care license revoked because of allegations of abuse and neglect and because they would not cooperate with DHS authorities by participating in certain educational classes. *Id.* at 182. When the petitioners argued that this adverse action would not allow the probate court to conclude that abuse or neglect had occured when they were foster parents, the Court of Appeals stated, "[T]he record amply supports any conclusion by the trial court that the reason the licensing authorities moved to revoke the foster care license was in fact true." *Id.* at 186. By saying that the trial court cannot focus on whether the decision was "correct" but in the same opinion saying that the evidence supports that the facts relied on to make that decision were true, the Court of Appeals did what it said the trial court could not do. *See also, id.* (the Superintendent's decision was not arbitrary or capricious where "the

allegations [the Superintendent relied on] are not frivolous or fanciful or ***without factual support***" (emphasis added)).

Fourteen years later, the Court of Appeals issued another published opinion that addressed the arbitrary and capricious standard. *In re Keast, supra.* Here, the Court of Appeals reversed the trial court's decision that the Superintendent's decision to deny consent to adopt was arbitrary and capricious. *Id.* at 423. The court in *Keast* reaffirmed *Cotton's* basic principles, including the definition of arbitrary and capricious:

> 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.' " *Goolsby v Detroit,* 419 Mich 651, 678; 358 NW2d 856 (1984) (internal quotation marks and citations omitted). The generally accepted meaning of "capricious" is "apt to change suddenly; freakish; whimsical; humorsome." *Id.* (internal quotation marks and citations omitted). [*Keast, supra* at 424-25.]

Even this definition of "arbitrary" leaves room for considering the factual underpinnings of the Superintendent's decision. If arbitrary means "arrived at . . . without consideration or adjustment with reference to . . . circumstances," then a court must look at all of the facts to determine if the facts given to support the Superintendent's conclusion to deny consent to adopt are consistent with reality. That is not deciding the issue anew; that is ensuring that the Superintendent's decision wasn't based on false or incomplete information. *See e.g., Greenwood, supra* at 3.

The accepted definition of "capricious," results in consistency and predictability in the Superintendent's decisions. A decision that is "apt to

change suddenly" is one that is erratic or unpredictable. A decision to deny consent to adopt should, at the very least, be predictable.

And in *Keast,* the court did consider the factual underpinnings of the Superintendent's conclusion to deny consent to adopt. *Id.* at 429-436. For example, the adoption petitioners alleged, and the trial court found, that the Superintendent's decision was arbitrary and capricious because he had relied on summaries of reports and not the full original reports. *Id.* at 429. The Court of Appeals noted that the record did not support this conclusion because the summaries of the reports quoted from the originals and because the reports' authors' testimony at the Section 45 hearing was consistent with the reports. *Id.* at 429. Moreover, the facts that supported the Superintendent's decision were "clear from the record." *Id.* at 430.

The Court of Appeals in *Keast* looked at every finding of fact that the trial court made regarding the facts that the Superintendent's decision was based on, and in every instance it found that the record did not support the trial court's findings. As a result, no clear and convincing evidence existed that proved that the Superintendent's decision was arbitrary or capricious. *Id.* at 435.

Trial courts have applied the *Cotton* and *Keast* standards in several different ways. For example, in *In re NMW,* unpublished opinion per curiam of the Court of Appeals, issued October 13, 2009 (Docket No. 292356), the trial court determined that financial instability was not "a good reason" to deny consent to adopt, but that "the presence of a half-sibling in the adoptive home

and the lack of a bond between a prospective adoptive parent and the child are good reasons to withhold consent to adopt." *Id.* at 3. Because at least two good reasons existed, the Superintendent's decision was not arbitrary or capricious. *Id.*

A trial court may become confused by statements like these: "[I]t is necessary to consider whether [the Superintendent's] articulated reason was made without consideration of the child's individual circumstances, or made whimsically. ***This entails examination of whether Johnson's reason was invalid in light of the evidence.*** Otherwise, review of an agency representative's decision under MCL 710.45(5) would ***amount to nothing more than a rubber stamp of whatever reason the representative articulated, and the statutory review procedure would be illusory.***" *In re CLH*, unpublished opinion per curiam of the Court of Appeals, issued June 3, 2003 (No 244877), at 2 (emphasis added).

Amicus submits that this is the correct view of how a trial court should review the Superintendent's decision – look at the reason given for denying consent to adopt and determine if it is based on the individual circumstances of the case and based in reality. In other words, the trial court should determine if the reason given is, in fact, a valid reason. The court in *In re CLH, supra,* looked at the reasons that the Superintendent gave and noted that one reason was invalid because it excluded consideration of the child's actual circumstances. *Id.* at 3. Another reason was invalid because the "evidence overwhelmingly supported the opposite conclusion." *Id.* at 4. Accordingly, at

least according to the court in *In Re CLH*, the trial court may look at the Superintendent's reason for denying consent to adopt and compare it to the evidence supporting the reasons to grant consent to adopt to the petitioners. *Id.* When the evidence supporting granting consent to adopt overwhelmingly contradicts the reasons given for denying consent to adopt, the Superintendent has acted arbitrarily and capriciously. *Id.*

The reasoning and the Court of Appeals' conclusion in *In re CLH* stand in stark contrast to those in *In re Couturier*, , where the Court of Appeals noted, "The trial court properly recognized that the scope of the hearing ***did not involve the correctness of information*** in the reports on which Judge Carpenter relied when deciding whether to withhold consent, but rather whether Judge Carpenter's decision to withhold consent to adopt Sebastian was made in an arbitrary and capricious fashion." *Id.* at 2 (emphasis added).

Even when based solely on these cases, although there are other examples, this Court can see that bench and bar need the guidance that only this Court can provide regarding how to apply the arbitrary and capricious standard. As noted earlier, a decision that is based on incorrect information must be considered to be one that is arbitrary and capricious, but not all of the trial courts are adopting this standard. That's understandable because the Court of Appeals has adopted various standards. And in the two cases most-often cited for the proposition that the trial court cannot review the decision de novo, *Cotton, supra* and *Keast, supra*, the trial courts did go beyond merely accepting the Superintendent's reasons and they examined the validity of the

reasons in light of the child's individual circumstances. This Court should grant the Martins' Application for Leave to Appeal because consistency in applying the arbitrary and capricious standard is significant to this State's jurisprudence.

C. This Court should grant leave to appeal because the Court of Appeals has stated various standards by which it reviews a trial court's decision in a Section 45 hearing.

In addition to the different standards trial courts have used regarding what evidence is relevant to proving that a decision was arbitrary and capricious, and in addition to the various ways courts have applied the definitions of arbitrary and capricious, the Court of Appeals has not applied just one standard to use when reviewing a trial court's Section 45 decision. The Court of Appeals has applied a standard for reviewing legal questions, a standard for reviewing mixed questions of fact and law, an administrative law review standard, and a clear error standard where it does not state whether it is reviewing a question of law or a question of fact for clear error. This Court should grant leave to appeal to state a standard of appellate review.

The appellate standard of review that the Court of Appeals stated in *Keast, supra,* is the standard that appellate courts should apply. This standard considers the proper application of the arbitrary and capricious standard to be a question of law that it reviews for clear legal error:

> [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. Whether the family court properly applied this standard is a question of law reviewed for

clear legal error. *Fletcher v Fletcher,* 447 Mich 871, 877; 526 NW2d 889 (1994). [*Keast, supra* at 423; *see also In re NMW, supra* at 1; *In re MLB,* unpublished opinion per curiam of the Court of Appeals, issued October 13, 2009 (Docket No. 292110), at 1 ("In this context, whether the trial court properly applied the [clear and convincing evidence that the decision is arbitrary and capricious] standard is a question of law reviewed for clear legal error."); *In re Kuntzman,* unpublished opinion per curiam of the Court of Appeals, issued February 10, 2009 (Docket No. 286434), at 2 ("A trial court's application of a standard of law is reviewed for clear error.").]

Other panels of the Court of Appeals have applied the administrative law standard articulated in Const 1963, art 6, § 28, without ever deciding if that constitutional provision applies to decisions the MCI Superintendent made. *In re Couturier, supra* at 3, n1.

Const 1963, art 6, § 28 provides in relevant part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are *authorized by law*; and, in cases in which a hearing is required, whether the same are *supported by competent, material and substantial evidence on the whole record.*

The courts that have relied on this standard, have actually applied the standard for administrative agency and reviewing judicial tribunal that the Court of Appeals announced in *Boyd v Civil Service Comm,* 220 Mich App 226, 234-35; 559 NW2d 342 (1996). As the court in *Boyd* described the standard:

> when reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This latter standard is indistinguishable from the clearly erroneous

> standard of review that has been widely adopted in Michigan jurisprudence. As defined in numerous other contexts, 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 has been made.

Stated otherwise, the trial court's decision is reviewed to determine if it applied the correct legal principles, and the trial court's factual conclusions are reviewed for clear error. Stated this way, the standard of appellate review is much like any other appellate review of questions of law and fact. As the court in *In re Couturier, supra* at 3, recognized, appellate courts review findings of fact for clear error, conclusions of law de novo, and application of law to facts de novo. *Id.* (citing MCR 2.613(C) (review of factual findings), *Cardinal Mooney High School v Michigan High School Athletic Ass'n,* 437 Mich 75, 80; 467 NW2d 21 (1991) (questions of law reviewed de novo), and *Centennial Healthcare Mgmt Corp v Dep't of Consumer & Industrial Svcs,* 254 Mich App 275, 285; 657 NW2d 746 (2002) (application of law to facts reviewed de novo)).

But various panels of the Court of Appeals have not distinguished between legal questions and factual findings. Instead, these panels have stated only that the trial court's decision is reviewed for clear error. *See e.g., In re Baas,* unpublished opinion per curiam of the Court of Appeals, issued October 28, 2008 (Docket No. 285670), at 1 ("This Court reviews for clear error a trial court's determination that no clear and convincing evidence was presented that a decision by the MCI Superintendent to withhold consent to adoption was 'arbitrary and capricious.'"), *In re Clark,* unpublished opinion per curiam of the

Court of Appeals, issued April 23, 2002 (Docket Nos. 231011, 231012), at 1 ("This Court reviews the family court's determination for clear error.")

In this appeal, the Court of Appeals stated the standard of appellate review as follows:

> This Court reviews 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, 234-235; 559 NW2d 342 (1996). '[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 has been made.' *Id.* at 235" [*In re CW, DW, and BW, supra* at 7.]

In other words, the Court of Appeals reviewed the trial court's legal determinations, its facutal findings, and its application of law to fact for clear error. It did not follow the maxim that legal conclusions and application of law to fact are reviewed de novo and that only the trial court's factual findings are reviewed for clear error.

This Court should grant leave to appeal to set the standards under which the appellate courts review the different portions of a trial court's Section 45 hearing conclusions regarding the law, the facts, and the law applied to the facts. A consistent standard of appellate review is important to the parties in these Section 45 hearings and to the State's jurisprudence as a whole.

CONCLUSION

The overarching question in Section 45 hearings is whether the Superintendent's decision was arbitrary and capricious. That necessarily involves determining what evidence is relevant to show that the Superintendent's decision was without adequate determining principle (the

trial court should look to DHS policies to answer that question), without consideration of the circumstances (the trial court should allow evidence of the truth or falsity of the facts relied on to make the decision), or apt to change suddenly (this Court should announce standards so that the decisions made with regard to different families are consistently based on the same principles). Otherwise, as the Court of Appeals warned, the trial courts risk becoming rubber stamps to the Superintendent, and families do not receive a meaningful review of the Superintendent's decision. As the Martins noted in their Application for Leave to Appeal at 2, "Courts serve as the only check to ensure that the MCI [Superintendent] is not overreaching in [his] decisions regarding the state's most vulnerable children." Amicus adds that our courts are the only check on unbridled discretion, possible bias, and "bad" reasons.

REQUEST FOR RELIEF

Amicus curiae, the State Bar of Michigan's Children's Law Section, respectfully asks this Court to grant leave to appeal and on leave to appeal to set the standards for reviewing the MCI Superintendent's decision in the trial court, set the standards for Court of Appeals review of the trial court's decision, reverse the decision of the Court of Appeals in this case, and remand to the trial court to apply the standards this Court develops to the decision in this case.

Respectfully submitted,

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