STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of C.L.H., Minor.

LYNNE IVEY and KIPP IVEY,

Petitioners-Appellants,

v

MICHIGAN CHILDREN'S INSTITUTE and GLORIA ALEXANDER,

Respondents-Appellees.

UNPUBLISHED
June 3, 2003

No. 244877
Marquette Circuit Court
Family Division
LC No. 02-004172-AM

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Petitioners appeal as of right the trial court's decision denying their motion for review of respondent Michigan Children's Institute's (MCI) decision denying them consent to adopt the minor child pursuant to MCL 710.45. We reverse and remand.

The trial court's review of respondent MCI's decision to withhold consent was limited to a determination of whether that consent was withheld arbitrarily and capriciously. *In re Cotton*, 208 Mich App 180, 184; 526 NW2d 601 (1994). We review the trial court's decision to determine whether the court applied correct legal principles and whether its ultimate determination with regard to arbitrariness and capriciousness was clearly erroneous. *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). A decision is clearly erroneous when, after review of the entire record, this Court is left with the definite and firm conviction that a mistake has been made. *Id*.

Under the Michigan Adoption Code, a person seeking to adopt a child who has been made a state ward must obtain the consent of the authorized representative of the department to whom the child has been permanently committed. MCL 710.43(1)(b); MCL 710.45(1). Regarding an adoption petitioner's challenge to an agency's denial of consent, section 45 of the Adoption Code provides as follows:

> (2) If an adoption petitioner has been unable to obtain the consent required by section 43(1)(b), (c), or (d) of this chapter, the petitioner may file a motion with the court alleging that the decision to withhold consent was arbitrary

and capricious. A motion under this subsection shall contain information regarding both of the following:

(a) The specific steps taken by the petitioner to obtain the consent required and the results, if any.

(b) The specific reasons why the petitioner believes the decision to withhold consent was arbitrary and capricious.

* * *

(5) 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.

(6) 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 may enter further orders in accordance with this chapter or section 18 of chapter XIIA as the court considers appropriate. . . . [MCL 710.45.]

In *Cotton, supra,* this Court considered the appropriate scope of judicial review when a party claims that an agency's decision to withhold consent was arbitrary and capricious. The Court stated:

> The fact that the Legislature in drafting the statute limited judicial review to a determination whether consent was withheld arbitrarily and capriciously, and further required that such a finding be based upon clear and convincing evidence, clearly indicates that it did not intend to allow the probate court to decide the adoption issue de novo and substitute its judgment for that of the representative of the agency that must consent to the adoption. Rather, the clear and unambiguous language terms of the statute indicate that 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. Thus, 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. Accordingly, the hearing under § 45 is not, as petitioners seem to suggest, an opportunity for a petitioner to make a case relative to why the consent should have been granted, but rather is an opportunity to show that the representative acted arbitrarily and capriciously in withholding that consent. It is only after the petitioner has sustained the burden of showing by clear and convincing evidence that the representative acted arbitrarily and capriciously that the proceedings may then proceed to convincing the probate court that it should go ahead and enter a final order of adoption. [*Id.* at 184.]

The Court further explained:

> Because the initial focus is whether the representative acted arbitrarily and capriciously, the focus of such a hearing is not what reasons existed to authorize the adoption, but *the reasons given by the representative for withholding the consent to the adoption*. That is, 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.* at 185; emphasis added.]

In *Goolsby v Detroit*, 419 Mich 651, 678; 358 NW2d 856 (1984), our Supreme Court noted that 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." The generally accepted meaning of "capricious" is "apt to change suddenly; freakish; whimsical; humorsome." *Id.* (citations and internal quotes omitted). Thus, the pertinent question is whether petitioners established by clear and convincing evidence that MCI Superintendent William Johnson acted arbitrarily and capriciously, i.e., in the absence of a good reason to withhold consent to their adoption of the child.

Here, respondent MCI's representative Johnson's purported good reason for denying petitioners consent was the availability of adoptive placement with respondent Gloria Alexander, the child's maternal grandmother who had earlier adopted the child's half-siblings. In Johnson's interpretation of FIA policy, a blood relative always takes precedence over a foster family, absent "extraordinary circumstances." According to Johnson, the benefits of being raised by a relative among siblings are so great that they justified the disruption of continuity that would result from moving the child from petitioners' home. Johnson also downplayed the effect of the disruption by recommending facilitation of a smooth transition, and by stating that the child already had a "familiar relationship" with Alexander. Although the trial court clearly disagreed with this reasoning, it nonetheless denied petitioners' motion, explaining, "[G]iven the state of this record, there is not clear and convincing evidence that the Superintendent's decision was either arbitrary or capricious."

We are mindful that MCL 710.45 precludes focusing on whether Johnson made the "correct" decision, and instead narrows the question to whether Johnson acted arbitrarily and capriciously. *Cotton, supra* at 184. We also are mindful that the proper inquiry is whether there is an absence of good reason to withhold consent from petitioners, and not whether the evidence favoring petitioners outweighs the evidence favoring Alexander. *Id.* at 185. However, in order to determine the questions of arbitrariness and capriciousness, and the absence of a good reason, it is necessary to consider whether Johnson's articulated reason was made without consideration of the child's individual circumstances, or made whimsically. *Goolsby, supra* at 678. 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 the instant case, we must conclude that Johnson's decision was not arguably valid in light of the undisputed evidence. Johnson conceded that the child had no emotional connection to her siblings; thus, there is no sibling relationship or shared family history to weigh against the benefit of maintaining continuity of her placement with petitioners. Similarly, there was clear and convincing evidence that the child never formed an emotional connection to Alexander. Indeed, the evidence does not even support Johnson's restrained findings that the child had a "familiar relationship" with Alexander, or that Alexander "is not a stranger" to the child. It appears Johnson emphasized the importance of blood relationships to the exclusion of consideration of the child's individual circumstances and, therefore, was not a valid reason for denying petitioners consent.

Johnson apparently believed that the absence of an emotional bond between the child and Alexander and the siblings was attributable to the fact that Alexander's housing situation prevented her from accepting placement of the child when she was born, and that this situation was corrected by Alexander's purchase of a larger house, which notably occurred only a few days after the child was born. If this were a simple matter of a blood relative belatedly coming forward to seek adoption of a child based on changed circumstances that resolved earlier impediments to accepting placement, we would defer to Johnson's assessment of the relative's sincerity and motives. However, in this case, Johnson's acceptance of Alexander's explanation for her changed position regarding adoption of the child failed to take into account several undisputed factors.

First, there was clear and convincing evidence that Alexander failed to avail herself of opportunities to start building a bond with the child, despite the child's placement with petitioners. Alexander attended several supervised visits between the child and the biological parents, but the Child and Family Services worker who supervised the visits reported that she seldom interacted with the child. The worker also testified that Alexander rebuffed petitioners' attempts to arrange visits between the child and Alexander's adopted children, and Alexander initiated no such overtures. Alexander herself testified that she did not believe she could work with petitioners to arrange visits because she disagreed with petitioners' religious affiliation. Thus, Alexander's failure to form a bond with the child cannot be entirely attributable to her professed inability to accept placement of the child at the time of her birth.

Additionally, Alexander admitted that she decided to seek adoption of the child only after the family who she initially wanted to adopt the child could not obtain a Michigan foster care license. Alexander stated that she did not expect to have the sort of relationship with the child that she wanted if petitioners adopted her, apparently assuming that their different religious stances would be an insurmountable impediment. Alexander based this belief solely on her perception that petitioners were overly involved in their church, their religion was "patriarchal" and "very born again," and that she was not religious. Johnson never indicated that he gave any consideration to Alexander's mixed motives, although Alexander herself testified that she told him about her objections to petitioners' religious practices and decision to home-school their children. Johnson never addressed, in either his written decision or his testimony, how Alexander's decision to adopt the child was conditional on the rejection of her preferred adoptive family. Instead, he accepted at face value her self-serving statements that improved living arrangements completely alleviated the stress that prevented her from taking the child earlier. Johnson thus failed to consider the existing actual circumstances when he concluded that the

absence of a bond between the child and Alexander was only due to extraneous conditions that Alexander had corrected.

Finally, Johnson did not take into account Alexander's intent to allow the child to have contact with her biological father, a decision which Alexander's preferred adoptive family supported, despite the fact that the biological father has a history of sexually predatory behavior. Although Alexander stated that she would not allow the father to have unsupervised contact, the father's history showed that he had been aggressive with a social worker during a supervised visit, and could pose a risk to the child even if his visits were supervised.

Considering the totality of circumstances in this case—Alexander's professed mixed motives, her failure to avail herself of what opportunities she had to interact with the child, and her intent to allow the biological father contact with the child—we conclude that petitioners satisfied the high standard of proof under MCL 710.45(5). Johnson's sole proffered reason for denying petitioners consent, the existence of a biological tie to Alexander, is so contrary to the overwhelming undisputed evidence supporting the opposite conclusion that it truly constitutes an absence of a reason. *Cotton*, *supra*. We therefore reverse the trial court's order and remand this case to the trial court for further proceedings under MCL 710.45(6).

Reversed and remanded. We do not retain jurisdiction. This order and opinion is to take immediate effect.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell