STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of KEG and AG, Minors.

DEPARTMENT OF HUMAN SERVICES,

Respondent-Appellee,

v

DAVID S. ULMER and KATHRYN A. ULMER,

Petitioners-Appellants.

UNPUBLISHED
April 10, 2012

No. 306173
Wayne Circuit Court
Family Division
LC Nos. 11-000059-AO;
11-000060-AO

Before: WILDER, P.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

In this competing party adoption case, petitioners David and Kathryn Ulmer filed an application to adopt the minor children, as did the children's foster parents, Ivan and Alicia Provalov. In November 2010, William Johnson, the Superintendent of the Michigan Children's Institute (MCI), an entity within respondent Department of Human Services (DHS), granted the foster parents' application and denied the Ulmers' application. The Ulmers then filed in the circuit court a motion challenging the adoption decision as arbitrary and capricious pursuant to MCL 710.45(2), which the court denied. The Ulmers now appeal as of right. We affirm.

The Ulmers initially contend that Johnson's denial of their adoption application was arbitrary and capricious, because it was made without fully considering the Ulmers as competing parties and without all the facts about the children's individual circumstances. "Judicial review of the withholding of consent to an adoption is governed by MCL 710.45[.]" *In re Cotton*, 208 Mich App 180, 183; 526 NW2d 601 (1994).

> Pursuant to MCL 710.45, 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). [*In re Keast*, 278 Mich App 415, 423; 750 NW2d 643 (2008).]

Although the scope of our review does not entail an assessment of the evidentiary support for Johnson's decision, we will briefly summarize the ample evidence that supported his decision to deny the Ulmers consent to adopt the children, because the evidence is relevant to an evaluation of whether Johnson's decision was arbitrary and capricious. The first factor considered by Johnson involved the "length of time the children have resided in a stable, satisfactory environment and the desirability of maintaining continuity." With respect to Johnson's first finding under this factor, that the "children have both spent the majority of their lives in the Provalov foster home," the record reflects that KEG, who was born in December 2007, moved into the foster home on September 22, 2008, where he stayed for approximately 25 months before Johnson's decision. AG, who was born in December 2008, lived in the same foster home between January 2009 and the time of Johnson's decision. Concerning Johnson's next finding that the foster parents cared well for the children, much evidence established this proposition, including: (1) the testimony of Shelly McClendon about her child adoption assessment recommending the children's adoption by their foster parents, specifically that she visited the foster home and observed affectionate, appropriate, and good interactions between the Provalovs and the children; (2) adoption worker Rebecca Steimel's testimony that the children seemed comfortable in their foster home and with the Provalovs, whom the children referred to "[a]s mom and dad," and that the children were developing, growing appropriately, and always appeared healthy; (3) MCI consultant James Lewis's testimony about his August 2010 visit to the foster home and his characterization of the attachment between the children and both Provalovs as "very strong," almost like that of "a birth family," and his conversation with the children's guardian ad litem, who had visited the foster home "on at least five occasions" and "fully supported the Provalovs adopting both" children; and (4) licensing investigator Derekia Williams's testimony that the licensing investigation encompassed three visits to the foster home in June 2009, October 2009, and November 2009, and that at no point did the licensing department entertain any "concern[] of harm, or threat, or danger . . . to the[] two children[.]" Furthermore, despite the voluminous number of licensing violations that the Ulmers alleged against the Provalovs, the record contains no evidence that the foster parents placed either child's safety in significant or imminent jeopardy. Given the length of time that the children had resided with the foster parents at the time of Johnson's adoption consent decision and the evidence that consistently reflected the children's good care in the foster home, Johnson concluded that the children would experience "emotional[] harm[] . . . if removed from this home at their very young ages."

Concerning the next topic of Johnson's findings, the "close psychological relationship between the children and the respective families," the testimony of Lewis, McClendon, and Steimel supports Johnson's initial finding that the children had "a very close relationship to their current foster family." The evidence also substantiates Johnson's next finding that an approximate 18-month period had elapsed between either child's last contact with the Ulmers and Johnson's adoption consent decision. The apparently undisputed nature of the 18-month duration since the children last had contact with the Ulmers led to Johnson's findings that the children did "not have a close psychological relationship with the Ulmer family at this time," and that the children would experience "emotional[] difficult[y]" should they relocate to the Ulmers' home.

Regarding the next subject of Johnson's findings, the "ability and willingness of the respective adoptive families to meet the ongoing developmental needs of each child," Johnson first noted that both the foster parents and the Ulmers had "the ability and willingness to meet the ongoing needs of the children." However, Johnson deemed this factor to favor the foster parents on the basis that they had "demonstrated this ability through the extended period of time that they have cared for these two children," a reasonable finding in light of the undisputed nature of the evidence that KEG had lived in the foster home since September 2008, more than two years at the time of Johnson's adoption consent decision, and that AG had spent nearly her entire life with the foster parents. And because the children had no contact with the Ulmers during the 18 months preceding Johnson's adoption decision, Johnson concluded that the Ulmers had not shown their "ability and willingness to care for these two children," at least in recent history as the foster parents had.

With respect to Johnson's consideration of the "desirability of maintaining siblings together in adoptive placement," the record concerning AG's minimal contact with the Ulmers and KEG's many interactions with the Ulmers between September 2008 and early May 2009, supports Johnson's initial finding regarding AG's "extremely little contact with the Ulmer family" and the "numerous occasions" that KEG spent in the Ulmer's care. The same evidence supports Johnson's next finding that the Ulmers were "more familiar with [KEG] than with [AG]." Johnson continued that although "[t]his raises the possible option of separating the siblings so that [KEG] could be placed in the Ulmer home while [AG] remains in the Provalov home," the DHS adhered to a "philosophy . . . to make diligent efforts to place siblings together." In light of the length of time the children had resided together with the foster parents and the information documenting the children's sibling bond, especially Lewis's testimony and report, Johnson found that separating these siblings would not serve their best interests.

Concerning Johnson's findings pertaining to the "failure by either family to report the fact that the Ulmers were being used as alternative caregivers without approval by the certifying agency," it does not appear that either the Ulmers or the foster parents dispute Johnson's first finding that "[n]either family took steps to report to the certifying agency that [KEG] was spending numerous occasions in the care of the Ulmer family." Testimony by the Ulmers established their knowledge in the fall of 2008 that KEG was a foster child, and the record reflected that they only became licensed as KEG's alternate caregivers in late February 2009 or early March 2009. Consequently, Johnson found that the Ulmers knew "they were not authorized to care for him or to participate in arranging medical care." Johnson finally found that the Ulmers shared partial responsibility for failing to disclose their unlicensed status as KEG's caregivers, "[a]lthough to a lesser degree" than the foster parents.

The last factor considered by Johnson involved the families' "suitability . . . as a potential adoptive home for the children." As emphasized above, Johnson's testimony, as well as the testimony and documentary evidence supplied by the adoption workers, Lewis and Williams, established that the foster parents had provided the children a safe and stable home for an extended period. Johnson also viewed the Ulmer home as suitable for adoption. Therefore, he found that the children were "fortunate to have two appropriate families who are so strongly interested in providing a permanent house for them."

Johnson concluded his decision by acknowledging "the seriousness of the allegations" regarding the foster care license violations; that MCI representatives met "with agency staff," the families, the children, and "contacted other professionals to obtain input in the matter of adoption of the children"; that this review led to a decision to approve the foster parents' adoption in the children's best interests; and that an adoption by the Ulmers would not serve the children's best interests.[1]

In summary, the circuit court did not commit clear legal error in concluding that the evidence did not clearly and convincingly show that Johnson's withholding of consent was arbitrary and capricious. *In re Keast*, 278 Mich App at 423.

We find unfounded the Ulmers' appellate claims of bias and collusion by the DHS,[2] as well as most of their allegations of DHS policy violations, federal and state law violations, and

[1] The Ulmers' brief on appeal lists 19 "relevant facts" that Johnson purportedly failed to consider. Most of the items in this list either mischaracterize the record or highlight facts irrelevant to Johnson's adoption decision. Regarding item 1, even if the foster parents in the course of their initial 2008 foster home study had expressed a disinclination to adopt African-American children, they plainly had changed their minds during the next year. Contrary to item 6, Johnson ensured that Lewis would inquire into the foster parents' plans for maintaining the children's racial background. The matters listed in items 2, 3, 4, 5, and 11 are irrelevant, because Johnson plainly considered the children's health, safety, and well being in making his decision, and no medical evidence established that either child had medical or special needs. Items 7 and 12 had no bearing on Johnson's decision, according to Johnson's testimony that the DHS did not need to make reasonable efforts to locate a family that would adopt the children without a subsidy when, as here "it has been determined that . . . it is in the best interest of the children to be adopted by a family that requests [a] subsidy." Item 8 is irrelevant to Johnson's decision because the gun storage issue was resolved. Item 9, concerning the foster parents' admission of neglect with respect to KEG, is inaccurate. The portion of the lengthy licensing investigation report documents an apparently isolated comment by Alicia Provalov after AG's placement with the foster parents: "she was very overwhelmed with two babies. [An adoption worker] stated that Mrs. Provalov felt guilty . . . about neglecting [KEG] once [AG] was placed in the home and therefore was glad the [Ulmers] could give him the attention he needed." Regarding items 10 and 13, the record reflects that Johnson did know of the bond that existed between the children and the Ulmers because of the many occasions the Ulmers cared for KEG through May 2009. With respect to item 14, no medical records or other medical information established that KEG was "diagnosed failure to thrive." Concerning items 15 and 18, the Ulmers do not explain how any of their "initial licensing home study" disputes or anything in their updated home study would have affected Johnson's adoption decision. They also fail to explain what information about their home and family demanded an adoption assessment. Lastly, they reiterate in item 17 a groundless licensing violation claim. See *infra* at 8-9.

[2] To the extent that the Ulmers' brief references a July 2010 letter authored by Margaret Warner, a Wayne County DHS employee, we decline to consider the letter because the hearing record

their claims of due process infringement. The Ulmers first contend that Johnson and other agencies within the DHS entertained a strong bias against them and colluded amongst themselves to minimize the Ulmers' chance of adopting the children by not allowing the Ulmers to compete as potential adoptive parents. Irrespective that Johnson may have expressed at some point to other DHS personnel his intent to not consider the Ulmers as prospective adoptive parents, or that DHS personnel in other departments may have attributed to Johnson an intent not to consider the Ulmers, the record reflects that Johnson treated the Ulmers as competing parties for the children's adoption. Most notably, Johnson testified repeatedly that he treated the Ulmers as competing parties for the children's adoption, and the record establishes that Johnson pursued an unusually involved investigation into the children's adoption, took into account all or nearly all of the documentation the Ulmers had presented to him and other DHS agencies, and met with the Ulmers and allowed them the opportunity to highlight their concerns.

The Ulmers additionally allege that Johnson, other DHS employees, and the circuit court disregarded DHS policy directives relating to adoption contained in a DHS Adoption Services Manual (ADM). Although the Ulmers contend that the DHS ignored its obligation to supply the Ulmers with a written document explaining the reasons for the denial of their adoption application (see ADM 560 and ADM 870), the testimony of Judson Center supervisor Sandra Oh and the Ulmers agreed that Oh had verbally advised the Ulmers that their application would be denied because the children's foster parents had expressed interest in adopting both children. Although a technical violation of the written notice requirement occurred, the Ulmers at no point explain with specificity any prejudice they endured arising from the absence of a written denial (e.g., what information they could have presented to contest the denial that they did not otherwise submit). Absent a showing of prejudice, appellate relief is not warranted for this technical violation. See MCR 3.800(A) (adoption proceedings generally "are governed by the rules generally applicable to civil proceedings"); MCR 2.613(A) (an error or defect "in anything done or omitted by the parties is not a ground for . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take action appears . . . inconsistent with substantial justice").

The Ulmers also aver that Johnson, the DHS, and the circuit court disregarded ADM 520, which mandates that "[a] licensing corrective action plan must be satisfactorily completed before recommending the applicants for adoption (unless there is a documented exception)." However, Johnson testified that he took into account the myriad licensing violations that the Ulmers had levied against the foster parents and the serious nature of the licensing violations outlined in a Bureau of Child and Adult Licensing notice of intent to revoke the foster care license, but ultimately concluded that the alleged violations did not signal any immediate or substantial danger to the children's well being, a conclusion buttressed by the testimony of Williams, Lewis, and the adoption workers. The Ulmers further maintain that the DHS and the circuit court ignored the portion of ADM 610 stating that a "supervising agency must consider [as potential adoptive parents] . . . : Unrelated persons who have an established relationship that is significant to the child." Notwithstanding Judson Center's decision not to consider the Ulmers as adoptive parent candidates, the record plainly illustrates that Johnson considered the Ulmers as competing

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included no testimony or documentary evidence from Warner. *In re Rudell Estate*, 286 Mich App 391, 405; 780 NW2d 884 (2009).

parties for the children's adoption. The Ulmers also submit that the DHS violated, and the circuit court ignored, a portion of ADM 860, requiring that assessments of adoptive families and their homes "for all interested families must be submitted with the consent request packet[.]" The record contains an initial assessment of suitability when the Ulmers became licensed as foster parents, and Johnson testified that he considered this report in his adoption consent decision. Moreover, the Ulmers took the initiative to file many documents with various DHS agencies, and they do not explain on appeal what precise information they were precluded from presenting to Johnson concerning the condition of their home or their family situation.

In summary, our review of the record reveals that (1) Johnson treated the Ulmers as competing parties for the children's adoption and considered all the information and evidence that the Ulmers supplied to the DHS before deciding to deny them consent to adopt; (2) Johnson reviewed a wealth of information about the children's circumstances, safety, and well being, and his adoption decision plainly took into account the children's best interests; and (3) because Johnson considered the children's well being and best interests, the Ulmers incorrectly suggest that Johnson and the DHS disregarded federal and state laws and policies promulgated to protect children in foster care.[3] Accordingly, we find no clear legal error in the circuit court's ruling.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

[3] The Ulmers contend that the DHS violated their due process rights. However, these contentions are unfounded. The Ulmers offer no persuasive argument about how the purported violations adversely impacted their opportunity to adopt the children or otherwise diminished their due process rights. Accordingly, these claims do not warrant appellate relief. MCR 2.613(A).