STATE OF MICHIGAN

COURT OF APPEALS

	UNPUBLISHED June 25, 2013
In the Matter of COH, ERH, JRG, KBH, Minors.	No. 309161 Muskegon Circuit Court Family Division LC No. 08-036989-NA
In the Matter of COH, ERH, JRG, KBH, Minors.	No. 312691 Muskegon Circuit Court Family Division LC Nos. 2011-007780-AF; 2011-007781-AF; 2011-007782-AF; 2011-007783-AF

Before: TALBOT, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

In Docket No. 309161, appellant appeals by leave granted the trial court's May 3, 2011 order denying her petition for a juvenile guardianship of the four minor children. In Docket No. 312691, appellant appeals as of right the trial court's September 14, 2012 order denying her consent to adopt the minor children. The appeals were consolidated by order of the Court.[1] In Docket No. 309161, we reverse the order denying appellant's petition for guardianship and remand for entry of an order appointing appellant the juvenile guardian of the minor children. The reversal of the trial court's order in Docket No. 309161 renders the appeal in Docket No. 312691 moot.

The four minor children were removed from their mother's care in February 2008 by the Department of Human Services (DHS). In October 2008, the children were placed in the home of their current foster care parents. The placement was supervised by Holy Cross Children's

[1] *In re COH, ERH, JRG, KBH Minors*, unpublished order of the Court of Appeals, entered March 26, 2013 (Docket Nos. 309161, 312691).

Services (Holy Cross). In March 2009, DHS petitioned to terminate all parental rights to the children. Although the four children had the same mother, JRG had a different father from his sisters. The biological father of COH, ERH, and KBH is appellant's son. The trial court terminated the parental rights of the minor children's fathers, but not of the children's mother. It found that although statutory grounds existed for termination of the mother's parental rights, termination was not in the best interests of the children. In July 2010, after DHS again petitioned to terminate the children's mother's parental rights, appellant moved to intervene and to be appointed, under MCL 712.19c and MCR 3.979, the juvenile guardian of the children. An agreement was reached between the children's mother and the prosecutor: the children's mother would plead no-contest to the allegations that she was unable to provide proper care and custody for the children, that it was in the children's best interests that her parental rights be terminated and, if the plea were accepted, the prosecutor would agree that the children not be committed to the Michigan Children's Institute (MCI) until after the trial court ruled on appellant's guardianship petition. The trial court accepted the mother's plea and made the children permanent wards of the court, pending its resolution of the guardianship petition.

Following an evidentiary hearing, the trial court denied appellant's guardianship petition. The trial court, using the best interest factors articulated in the Child Custody Act, MCL 722.21 *et seq.*, determined that in was in the children's best interests to remain with their foster care parents, who had already filed a petition to adopt the minor children. The trial court committed the children to DHS under MCL 400.203 for permanency planning, supervision, and care and placement.

Appellant requested consent from the MCI superintendant to adopt the minor children. The MCI superintendant denied her consent, finding that adoption by the foster care parents was in the children's best interests. Appellant then filed a motion with the trial court, under MCL 710.45(2), and alleged that the MCI superintendant's decision was arbitrary and capricious. The trial court denied the motion.

I. DOCKET NO. 309161

Appellant argues that the trial court erred in denying her petition to be appointed the juvenile guardian of the four minor children. Specifically, appellant claims that the trial court erred in using the best interest factors articulated in the Child Custody Act, and thereby comparing her with the children's foster care parents, to determine the best interests of the children. We review de novo issues involving the interpretation and application of statutes and court rules. *In re DMK*, 289 Mich App 246, 253; 796 NW2d 129 (2010).

At a permanency planning hearing or at a posttermination review hearing, if the court determines that it is in the child's best interests, a trial court may appoint a juvenile guardian for a child. MCL 712A.19a(3); MCL 712A.19c(2); MCR 3.979(A). A juvenile guardianship, which is a judicially created relationship, is intended to be a relationship that is permanent and self-sustaining. MCL 722.875b. The parental rights of protection, education, care and control of the juvenile, custody of the juvenile, and decision making are transferred to the guardian. *Id.*

There is a strong preference that children who have been removed from their parent's care be placed with relatives. For example, under MCL 722.954a(2), when a child is removed

from his or her home, the supervising agency *must* identify, locate, notify, and consult with relatives to determine placement with a fit and appropriate relative who is able to meet the child's developmental, emotional, and physical needs. A supervising agency's placement decision must be made in the child's best interests, and, in making the decision, the supervising agency shall give special consideration and preference to a child's relatives who are willing and fit to care for the child and are able to meet the child's needs. MCL 722.954a(5). The DHS Foster Care Manual (FOM) states that because preference must be given to placement with a fit and willing relative, "it is crucial to identify relatives prior to removal (CPS) and throughout the case (foster care) as potential placements and permanency providers[.]" FOM 722-3, p 3. DHS recognizes that "placement with siblings and relatives is usually in the child's best interest." FOM 722-3, p 6. In addition, a child is to be placed in the most family-like setting available. MCL 712A.18f(3).

Appellant is the paternal grandmother of COH, ERH, and KBH. Regarding JRG, appellant testified that she was at the hospital when he was born and that since that day, he has been her grandson and part of her family.[2] Appellant testified that she has always had a "very close and loving" relationship with the minor children. Appellant moved to Florida from Michigan in 2005. According to appellant, before she moved, she frequently watched the children. After she moved to Florida, appellant talked with the minor children on the telephone approximately once a week and sent them birthday and Christmas presents. She also visited them during the summers. After the children were removed from their mother's care in February 2008, the foster care mother of COH, ERH, and KBH allowed appellant to talk with the three girls on the telephone. Because JRG was in a different foster care home, appellant did not have as much contact with him. Appellant also spoke with the children on the telephone during their visits with their mother. After October 2008, when the minor children were placed with their current foster care parents, appellant was no longer able to speak with the children over the telephone, except during the children's visits with their mother. She was not given the foster care parents' contact information. According to appellant, Holy Cross did not want her to have contact with the children. In May 2010, appellant was granted telephone visits with the children but only after, according to appellant, she made 25 attempts to obtain the visits. In addition, appellant had three visits with the minor children in Michigan during the summer of 2010, and the children visited appellant in Florida for Thanksgiving and Christmas that year.

In determining whether to grant appellant's petition for guardianship, the trial court used the best interest factors of the Child Custody Act, see MCL 722.23, and compared appellant with the foster care parents. We conclude that the trial court erred in making this comparison. Notably, the present case does not present a dispute between parties who have a legal or substantive right to the custody of the minor children.[3] Because a juvenile guardianship is intended to be a permanent and self-sustaining relationship, MCL 722.875b, it is similar to adoption. When a person seeks the adoption of a child, a trial court generally does not compare

[2] JRG has been treated by DHS, Holy Cross, and the trial court as appellant's grandson.

[3] Under the Child Custody Act, a third party may seek custody of a child, see MCL 722.26c, but neither appellant nor the children's foster care parents meet the requirements of the statute.

the prospective adoptive parent with alternate placements for the child. See MCL 710.22(g) (listing the best interest factors under the Adoption Code, MCL 710.21 *et seq.*). Moreover, the trial court failed to give any special consideration or preference to appellant, the grandmother of the minor children. Here, where appellant is the grandmother of the children and where appellant has an established and continuing relationship with the minor children, the trial court should have considered whether appellant was an appropriate juvenile guardian for the children without regard to the foster care parents.

Looking at the undisputed facts set forth on the record, it is patent that appellant is an appropriate juvenile guardian for the minor children; she is willing and able to meet their needs. Appellant is in her early 50s, has no health problems, and enjoys physical activity. Appellant is not married, but she raised five sons, mostly as a single parent. Her sons, like the minor children, are multi-racial. Appellant has family members, including her parents, a sister, and a niece, who live in Florida. Appellant is a registered nurse. After she moved to Florida, appellant worked parttime and lived in an apartment with a roommate. But, when DHS told appellant a "few months" after the children were removed from their mother's care, that she would need "adequate space" if she wanted the children placed with her, appellant requested additional work hours from her employer. Appellant secured fulltime employment in July 2009, and she earned a salary of $87,000 in 2010. Although appellant works 40 hours per week, she has the option to work only 32 or 36 hours per week. Moreover, soon after appellant obtained fulltime employment and in response to DHS's advising her that she would need "adequate space," she purchased a five-bedroom house. The house has approximately 2,600 square feet. Appellant also became a licensed foster care provider; her license specifically allows the minor children to be placed with her. The local school district, which has been "rated A" by the state of Florida for several years, was the "number one" district in the state. Appellant has visited the school the children would attend. In sum, appellant not only quickly fulfilled every DHS requirement, she went significantly above and beyond any legal requirements to ensure she would be well-prepared to care for her grandchildren.

There was no testimony that appellant was unwilling or unable to care for the children or would not be able to provide an appropriate home for them. In fact, neither the prosecutor nor the children's guardian ad litem disputed that appellant would be an appropriate juvenile guardian for the children. The guardian ad litem told that the trial court that appellant deeply loved and cared for the children. The prosecutor told the trial court that appellant was a fit and suitable relative placement: she had a positive relationship with the children; she loved them, and would act in their best interests. Nonetheless, they inexplicably both requested that appellant's guardianship petition be denied because the children had found stability with the foster care parents. The trial court then denied appellant's guardianship petition because it did not want to undermine the stability and comfort that the children experienced with their foster care parents.

Additionally, appellant was never considered by DHS or Holy Cross as a possible permanent placement for the minor children. Although the permanency plan when the children were removed from their mother's care was reunification, this fact did not preclude DHS or Holy Cross from working with appellant to allow her to be a possible permanency provider. See MCL 712A.19(12) ("Reasonable efforts to finalize an alternate permanency plan may be made concurrently with reasonable efforts to reunify the child with the family."); MCL 712A.19(13)

("Reasonable efforts to place a child for adoption or with a legal guardian, including identifying appropriate in-state or out-of-state options, may be made concurrently with reasonable efforts to reunify the child and family."). Again—inexplicably--there is no evidence that DHS or Holy Cross contacted appellant or even considered her as a placement for the children when the permanency plan was changed from reunification to termination in December 2008 or when DHS petitioned a second time to terminate the mother's parental rights in March 2010. The case worker from Holy Cross testified that *appellant* contacted her about becoming the children's guardian in May 2009 and then again in October 2009. The case worker did not volunteer to help appellant obtain a guardianship, nor did she inform DHS of appellant's request. To the case worker's knowledge, no one from DHS ever offered to help appellant become the children's guardian. Appellant testified that after she purchased her five-bedroom house, she contacted DHS and was told that she would need to have the house inspected. After she moved into the house, she again contacted DHS and was then sent back-and-forth between DHS and Holy Cross "for quite some time." Eventually, an "ICPC" contract was sent to Florida. Only then was appellant told—by the state of Florida—that she needed to obtain a foster care license, which she promptly obtained. Although the minor children may have found greater stability with the foster care parents than they had with their mother, this "stability" stems primarily from the failure of DHS and Holy Cross to consider appellant as a possible permanency provider for the children. This type of "bootstrapping" is clearly an inappropriate basis upon which to decide this type of matter, i.e., to justify the "best interests" of the children.

Under the unique circumstances of the case, we conclude that the trial court erred in denying appellant's petition for guardianship. The trial court failed to recognize the preference for children to be placed with relatives. And, we and all the entities involved below have essentially regarded JRG the same as his siblings even though he is their half-brother as there seems to be no suggestion that it is not in his best interest to do so. From the evidence, it is clear that had the trial court recognized this preference and then given appellant the special preference and consideration that she was due as the children's grandmother, the court would have granted the guardianship petition. Appellant has an established and continuing relationship with the children, is a fit placement, and is willing and able to care for the children. Accordingly, we reverse the trial court's order denying appellant's petition for guardianship and remand for entry of an order appointing appellant the juvenile guardian of the children.

We reject the argument, asserted by appellees in their supplemental brief in Docket No. 312691, that any issues concerning appellant's petition for guardianship are moot because the children have been committed to the MCI and, therefore, already have a guardian, i.e., the MCI superintendant. Relying on *In re Keast*, 278 Mich App 415, 422; 750 NW2d 643 (2008), wherein this Court cited *In the Matter of Griffin*, 88 Mich App 184; 277 NW2d 179 (1979), appellees assert that the commitment of a child to the MCI is irrevocable. In *Griffin*, 88 Mich App at 192, this Court held that a trial court's commitment of a child to the Department of Social Services, which included the MCI, was an irrevocable commitment because it divested the trial court of jurisdiction over the child. However, we find nothing in *Griffin* that prevents this Court from revoking the commitment of a child to the MCI when it reverses an erroneously entered order from the trial court that led to the child's commitment.

II. DOCKET NO. 312691

Appellant argues that the trial court erred in denying her consent to adopt the minor children. This Court may decline to review issues that are moot. *Visser v Visser*, 299 Mich App 12, 16; 829 NW2d 242 (2012). "An issue is . . . moot when a judgment, if entered, cannot for any reason have a practical effect on the existing controversy." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). Because in Docket No. 309161 we reverse the trial court's order denying appellant's petition for guardianship, which committed the children to the MCI, and remand for an order appointing appellant the juvenile guardian of the minor children, a judgment from this Court in Docket No. 312691 can have no practical effect on the existing controversy. Indeed, we seriously question how the adoption action was instituted in the lower court when the guardianship matter was already pending before this court and note that the trial court itself ultimately precluded further proceedings until the guardianship case was resolved here. Consequently, since the minor children are no longer wards of the MCI following this court's decision, appellant need not procure the consent of the MCI superintendant to adopt the children. Accordingly, we decline to address the issues raised by appellant in Docket No. 312691. In fact, in her supplemental brief, appellant states that if this Court orders the trial court to grant her guardianship petition and there are no further appeals, she will dismiss the adoption petitions and her appeal in Docket No. 312691.

In Docket No. 309161, we reverse the trial court's May 3, 2011 order and remand for entry of an order appointing appellant the juvenile guardian of the minor children. We do not address the issues raised in Docket No. 312691. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Jane E. Markey
/s/ Michael J. Riordan