STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of LADH, Minor.

CHADDWIC SMITH and TAMERA SMITH,

Appellants,

v

JONATHON CROMWELL and DONNA CROMWELL,

Appellees.

UNPUBLISHED
August 22, 2006

No. 266749
Genesee Circuit Court
Family Division
LC No. 05-015814-AM

In the Matter of PPH, Minor.

CHADDWIC SMITH and TAMERA SMITH,

Appellants,

v

JONATHON CROMWELL and DONNA CROMWELL,

Appellees.

No. 266795
Genesee Circuit Court
Family Division
LC No. 05-015815-AO

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

This case involves two sets of parents competing to adopt two sisters. The competing adoptive parents are Chaddwic and Tamera Smith (the "Smiths"), who are licensed foster parents residing in Clinton County, and Jonathan and Donna Cromwell, a distant cousin of the children's birth mother, (the "Cromwells"), who reside in Oakland County. The birth parent's rights were terminated in Ingham County abuse and neglect proceedings; thereafter, the Cromwells and the Smiths each pursued adoption in the counties of their residence. Ultimately, the Smiths obtained a federal court order on April 4, 2005 declaring that they had been denied their constitutional

right to procedural due process.[1] On June 29, 2005, the State Court Administrator assigned Judge Allen J. Nelson, Genesee Circuit Court Family Division, to serve as judge of the consolidated cases from Clinton and Oakland counties. Judge Nelson presided over a best interests hearing from November 7, 2005 to November 10, 2005. At the conclusion of hearing, the trial court ruled that "it's in the children's best interests to enter an order that keeps the children in their current placement, which will result in a final order of adoption in favor of the Cromwells." The Smiths appeal by right. We affirm.

I

In April 2002, the Ingham County Family Independence Agency (FIA), Child Protective Services (CPS), began an abuse and neglect investigation of the birth parent's home. The initial CPS investigation resulted in an order on April 8, 2002 to take LADH into protective custody. She was placed in the foster home of the Smiths. Allegations then surfaced that the birth parents had perpetrated first-degree criminal sexual conduct against a fourteen-year-old girl. Apparently because of the criminal investigation, the birth parents attempted suicide on April 11, 2002. The birth mother survived, but she was subsequently charged with CSC and after pleading no contest to third-degree criminal sexual conduct, was sentenced to four to fifteen years' imprisonment.

Donna Cromwell expressed her desire that LADH be placed with her and her husband for foster care or adoption. Case workers, however, believed Donna's relationship to the birth mother was too distant to qualify for a "relative placement," and it was in LADH's best interest to stay under the Smiths' foster care because she was doing well.

On May 13, 2002, the Cromwells filed a petition in Oakland Circuit Court Family Division for direct placement adoption of LADH. Donna Cromwell is related to the birth mother by consanguinity of the fifth degree, and therefore, to the children to the sixth degree of consanguinity. Section 22 of Michigan's Adoption Code, MCL 710.22(t), defines "relative" as "an individual who is related to the child within the fifth degree by marriage, blood, or adoption." Section 22(o) defines "direct placement" as "a placement in which a parent or guardian selects an adoptive parent for a child, other than a stepparent or an individual related to the child within the fifth degree by marriage, blood, or adoption, and transfers physical custody of the child to the prospective adoptive parent." MCL 710.22(o). When the Cromwells filed the petition, they had neither physical custody of LADH nor the birth mother's consent to adopt.

PPH was born on August 10, 2002. She was taken into protective custody by order of the Ingham Circuit Court Family Division and added to the abuse and neglect proceedings pending in that court. PPH was placed in the Smith foster care home with her sister. On August 14, 2002, the birth mother signed documents purporting to grant consent to the Cromwells to adopt LADH and also consenting to the Cromwells' adopting her unborn baby (PPH). On the same day, FIA/CPS filed an amended petition in Ingham County Circuit Court Family Division to

[1] *Smith v Oakland Circuit Judge*, unpublished opinion and order of the United States District Court, Eastern District of Michigan issued April 4, 2005 (No. 03-74213).

terminate the parental rights of the birth mother to both children. On August 15, 2002, the Cromwells filed a petition for direct placement adoption of PPH in Oakland Circuit Court.

The amended termination petition came before the Ingham Circuit Court Family Division for a jurisdictional/termination trial on September 6, 2002. An Ingham County assistant prosecutor, the FIA, counsel for the birth mother, counsel for the minors, a guardian ad litem, counsel for the Cromwells, and counsel for the Smiths were present. The birth mother admitted sufficient facts alleged in the amended petition for the court to both take jurisdiction of the children and terminate parental rights. Counsel for the minors and the guardian ad litem agreed with this procedure. Counsel for the Cromwells requested that the court not terminate parental rights so the Cromwells could proceed with their adoption petitions in Oakland Circuit Court on the basis of the birth mother's consent. The trial court ruled that its juvenile protective proceeding took precedence over voluntary proceedings such as guardianships or adoptions. Accordingly, the court ruled it would terminate the birth mother's parental rights because it was not in the children's best interests to not do so. On September 13, 2002, the trial court entered its order terminating the birth mother's parental rights and committing the children to the Michigan Children's Institute (MCI) of the FIA for adoptive planning, supervision, care and placement.

Both the Smiths and the Cromwells sought the MCI's consent to adopt the children. On December 5, 2002, William J. Johnson signed on behalf of the MCI a written consent to adopt both children in favor of the Smiths. On December 11, 2002, the Smiths filed a petition to adopt the children in the family division of Clinton Circuit Court. That court entered orders on December 13, 2002 placing the children with the Smiths for purposes of adoption.

On January 31, 2003, the Cromwells filed a motion in Oakland Circuit Court pursuant to MCL 710.45 to determine whether the decision of the MCI to withhold consent from them was arbitrary and capricious. The petition was timely filed in an appropriate venue, the county of the petitioners' residence.[2] A notice of the pending § 45 motion was filed with the Clinton Circuit Court Family Division on February 10, 2003.

On March 17, 2003, before the § 45 motion was heard in Oakland Circuit Court, the Clinton Circuit Court entered final orders of adoption naming the Smiths as the parents of LADH and PPH. Judge Marvin E. Robertson later explained in a July 30, 2004 affidavit:

> That in entering the Orders of Adoption dated March 17, 2003 . . . I overlooked the fact that our Court had received a notice from the Oakland County Circuit Court that Section 45 Motion proceedings involving these two minors were pending in Oakland County Circuit Court. Had I recalled that our Court had received such notices, or if those notices had been pointed out to me at the time the Orders of Adoption were sought, I would not have entered them, as it would

[2] The statute was subsequently amended to require a moving party file its motion in the court of the county where parental rights were terminated when there is more than one adoption applicant. MCL 710.45(4), as amended by 2004 PA 486, effective December 28, 2004.

have been inappropriate to finalize adoption in favor of the SMITHS while a Section 45 Motion was pending in Oakland County Circuit Court.

On April 4, 2003, Judge Elizabeth Pezzetti held an evidentiary hearing on the Cromwells' § 45 petition. Although Johnson requested that the attorney general represent the MCI and him personally at the hearing, the FIA refused to request that the attorney general do so. Musette Michael, FIA Director of Legal Affairs wrote to the Cromwells' counsel regarding the § 45 motion that "the Family Independence Agency (FIA) does not oppose the relief requested . . . . Moreover, the FIA does not intend to defend the December 5, 2002 'Consent to Adoption Decision' issued by the then-Michigan Children's Institute Superintendent William J. Johnson." Judge Pezzetti issued a 54-page opinion and order on April 15, 2003 finding that Johnson's decision to deny consent to adopt to the Cromwells was "clearly and convincingly arbitrary and capricious." Judge Pezzetti ordered:

> 1. That the final order of adoption of [LADH] and [PPH] to Mr. and Mrs. Smith entered March 13, 2003 be immediately set aside;
>
> 2. That this Court takes permanent custody and assumes jurisdiction over [LADH] and [PPH] effective immediately;
>
> 3. That the involvement of LAS [Lutheran Adoption Services] and LSSM [Lutheran Social Services of Michigan] with this case and with [LADH] and [PPH] is terminated;
>
> 4. That Mr. Johnson's Consent to Adoption Decision is set aside and the jurisdiction of MCI remains terminated;
>
> 5. That this Court's Adoption Services Department shall take immediate steps to arrange for the transition of [LADH] and [PPH] from Mr. and Mrs. Smith to [the Cromwells]; and
>
> 6. That this Court will sign a final order of adoption of [LADH] and [PPH] to [the Cromwells] as soon as one is prepared and presented to this Court by the Adoption Services Department. [Corrected opinion and order of the Oakland Circuit Court Family Division issued April 15, 2003 (Nos. 02-665773-AD & 02-669671-AD), slip op at 54.]

On April 17, 2003, Judge Robinson sua sponte entered an order setting aside the orders of adoption the court had previously entered.

On April 21, 2003, Judge Pezzetti issued orders placing both children with the Cromwells for adoption. The Smiths unsuccessfully moved for relief in both the Clinton and Oakland circuit court cases; their appeals to this Court were dismissed, and our Supreme Court denied leave to appeal. See *In re LH, PH*, 469 Mich 1023; 676 NW2d 212 (2004), and *Smith v Oakland Circuit Judge*, 344 F Supp 2d 1030, 1043-1045 (ED Mich, 2004).

On October 21, 2003, the Smiths sought relief in federal district court. On April 4, 2005 United States District Judge Paul D. Borman entered an order that declared "unconstitutional on

due process grounds the April 15, 2003 Order of Judge Pezzetti, and the April 17, and 18, 2003 Orders of Judge Robertson."[3] *Smith v Oakland Circuit Judge*, unpublished opinion and order of the United States District Court, Eastern District of Michigan, issued April 4, 2005 (No. 03-74213), slip op at 30. The district court did not grant affirmative injunctive relief because it presumed that Michigan courts would comply with its ruling "declaring that the March 17, 2003 adoption orders of Judge Robertson were the last valid state court orders and proceed from that point to adjudicate the merits of the custody of the two minor children in hearings that comport with the Constitutional requirements of due process as to the relevant parties to those proceedings." *Id*.

On April 18, 2005, Judge Borman entered an additional order, certifying its April 4, 2005 opinion as a final judgment for purposes of FRCP 54(b). The April 18, 2005 order repeated that the district court's "focus has been on the constitutional right of procedural due process." *Smith v Oakland Circuit Judge*, unpublished opinion and order of the United States District Court, Eastern District of Michigan, issued April 18, 2005 (No. 03-74213), slip op at 2. Further, the court noted that its decision voiding the state court orders was based on the denial of the Smiths' "constitutional rights to notice and an opportunity to be heard prior to the issuance" of the post March 17, 2003 state court orders. *Id*. The court repeated that its ruling was based on the Smiths' procedural due process rights and "does not address substantive state family law issues, *inter alia*, custody/adoption." *Id*., slip op at 3. The April 18, 2005 order concluded: "Any future hearings relating to the custody and/or adoption of the two minor girls are to be determined in the state courts, in proceedings consistent with the Court's ruling of April 4, 2005, and with federal procedural due process principles." *Id*., slip op at 4.

On April 19, 2005, the Smiths moved the Clinton Circuit Court for an emergency order returning the children to their custody. Judge Lisa Sullivan, successor in office to Judge Robertson, denied the Smiths' ex parte motion for emergency relief. Judge Sullivan entered an order on April 19, 2005, which, in essence, preserved the status quo pending further hearings after notice to all interested parties. Judge Sullivan's temporary order continued the children's placement with the Cromwells but also provided "that this temporary arrangement is not to be construed to establish a custodial environment or in any other way prejudice the rights afforded to the Smiths under Judge Borman's Order of April 18, 2005."

Judge Sullivan subsequently entered an order of disqualification. Successor Judge Jeffrey Martlew heard numerous motions of the parties on June 24, 2005. The court granted the Cromwells' motion to intervene, denied the Cromwells' motion for stay, and took under advisement the Cromwells' motion to set aside the adoption orders in favor of the Smiths. Judge Martlew denied the Smiths' motion for parenting time and took under advisement the Smiths' motion for a pick up order.

On June 28, 2005, the chief judge of the Clinton Circuit Court and the chief judge of the Oakland Circuit Court jointly signed a request to the state court administrator to assign a judge before whom all of the pending matters regarding the minor children could be consolidated for

[3] On April 18, 2003, Judge Robertson entered a corrected version of his April 17 order.

the purpose of the efficient administration of justice. On June 29, 2005, the state court administrator assigned Judge Allen J. Nelson, Genesee Circuit Court Family Division, to serve as judge of the consolidated cases from Clinton and Oakland counties. Also, on June 29, 2005, Clinton Circuit Court Chief Judge Martlew and Oakland Circuit Court Judge Cheryl Matthews both entered orders changing the venue of the matters pending in their respective courts involving the minor children to coincide with the judicial assignment by the SCAO.

On August 11, 2005, Judge Nelson presided over a status conference with all interested parties present. Counsel for the parties and the guardian ad litem (GAL) Judge Nelson had appointed[4] agreed that the court had jurisdiction. All agreed that although the March 17, 2003 adoption orders were the last valid state court orders under the federal court order, that court had not decided issues of custody and adoption, which must be decided in state court. The purpose of the status conference was to determine what motions remained undecided and whether those motions would require an evidentiary hearing. Judge Nelson advised the interested parties that it would schedule the motions for a hearing two weeks from the date of the status conference unless an evidentiary hearing was necessary, then an early hearing date would be impossible. The Cromwells' counsel indicated that the motion to set aside the March 17, 2003 adoption orders might require testimony. The court believed testimony would be unnecessary but would adjourn the hearing if the court were convinced otherwise. The GAL thought the issue was strictly one of law, while the Smiths' counsel stated no position. The court scheduled a motion hearing for August 29, 2005.

On the date scheduled, the parties argued the various motions, and the trial court:

(1) denied the Smiths' motion to dismiss Cromwells' direct placement adoption petitions;

(2) granted the Smiths' motion to dismiss Cromwells' § 45 motion;

(3) denied reconsideration of the order allowing the Cromwells to intervene;

(4) denied reconsideration of the order denying the Smiths parenting time;

(5) denied the Smiths' motion for a pick-up order;

(6) granted the Cromwells' motion to set aside the final orders of adoption entered in Clinton County;

(7) denied the Cromwells' motion for stay;

(8) ordered the Cromwells' to file an amended petition for adoption;

[4] On July 28, 2005, Judge Nelson appointed the Child Advocacy Clinic of the University of Michigan Law School as guardian ad litem for the minor children. Attorney Frank E. Vandervort principally represented the clinic in these proceedings.

(9) ordered that the MCI have no further involvement with these cases;

(10) set aside the Clinton Circuit Court order placing child after consent;

(11) set aside the Oakland Circuit Court order placing child after consent;

(12) made the children permanent wards of the court;

(13) temporarily placed the children with the Cromwells;

(14) consolidated the cases of the two minors for trial; and

(15) ordered that a best interests hearing be held in order to determine which of the competing parties shall adopt the children.

In November 2005, the trial court conducted a best interests hearing. It ruled that it was in the children's best interests to keep them in their current placement and entered a final order of adoption in favor of the Cromwells.

II

The Smiths argue on appeal that the Clinton and Genesee circuit courts denied them due process of law. First, the Smiths contend that Clinton Circuit Court denied them their fundamental liberty interest as parents to the care, custody, and control of their adopted children without a finding of parental unfitness or without a determination regarding the children's best interest. Likewise, the Smiths assert that Genesee Circuit Court denied them due process by setting aside the March 17, 2003 orders of adoption without a finding of parental unfitness. Further, the Smiths argue that the Genesee Circuit Court did not afford them a real opportunity for a hearing or to refute testimony and evidence presented at the prior § 45 hearing in Oakland Circuit Court. Specifically, the Smiths claim that the trial court erred by considering a November 4, 2002 memo authored by William J. Johnson announcing the appointment of Bruce Hoffman as MCI superintendent effective November 11, 2002. The Smiths also argue that the trial court erred not permitting Johnson to testify at the August motion hearing regarding his authority to sign the MCI consent to adopt, despite Hoffman's appointment. We disagree.

This Court reviews de novo constitutional issues. *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 602; 673 NW2d 111 (2003). We also review de novo the interpretation and application of a statute or court rule. *Id*.; *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005).

The major premise of the Smiths' argument - - that they possess the same right to due process that natural parents would enjoy in a parental rights termination case - - fails under the facts and circumstances of this case. Michigan's Adoption Code, MCL 710.21 *et seq*., provides that adoptive parents shall be treated as nearly as possible as the natural parents of the adoptee. *In re Toth*, 227 Mich App 548, 553; 577 NW2d 111 (1998). "After the entry of the order of adoption, . . . persons adopting the adoptee then stand in the place of a parent or parents to the adoptee in law in all respects as though the adopted person had been born to the adopting parents and are liable for all the duties and entitled to all the rights of parents." MCL 210.60(1). The

effect of this statute "is to make the adopted child, as much as possible, a natural child of the adopting parents, and to make the adopting parents, as much as possible, the natural parents of the child." *In re Toth, supra*. Thus, the Smiths argue, the Clinton Circuit Court adoption orders conferred on them the same due process protected liberty interest in the minors that natural parents possess.[5]

The Smiths argue: (A) due process precludes state interference with a natural parent-child relationship without a showing of parental unfitness, (B) the Smiths acquired the same rights as natural parents through the Clinton Circuit Court adoption orders and therefore, (C) it follows that the Smiths' status as parents cannot be terminated without proof of parental unfitness.

The fallacy of the Smiths' syllogism lies in the nature of the proceedings below. The cases on appeal are not protective proceedings under the Juvenile Code seeking termination of parental rights. Such proceedings occurred in Ingham Circuit Court, ending in the termination of the birth mother's parental rights and the commitment of the children to the MCI for the purpose of adoption. The Adoption Code governs the cases initiated in Clinton and Oakland counties and later transferred to Genesee Circuit Court. "The Michigan adoption scheme expresses a policy of severing, at law, the prior, natural family relationship and creating a new and complete substitute relationship after adoption." *In re Toth, supra* at 553. Here, the natural family relationship was destroyed when the birth mother's parental rights were terminated. Thereafter, the best interests of the children govern the process of selecting adoptive parents.

The Legislature has established that the purposes of the Adoption Code are:

> (a) To provide that each adoptee in this state who needs adoption services receives those services.
>
> (b) To provide procedures and services that will *safeguard and promote the best interests of each adoptee* in need of adoption and that will protect the rights of all parties concerned. If conflicts arise between the rights of the adoptee and the rights of another*, the rights of the adoptee shall be paramount*.
>
> (c) To provide prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time. [MCL 710.21a (Emphasis added).]

[5] "The Fourteenth Amendment's Due Process Clause provides heightened protection against governmental interference with the fundamental liberty interest of parents to make decisions concerning the care, custody, and control of their children." *Ryan v Ryan*, 260 Mich App 315, 333; 338; 677 NW2d 899 (2004). "Parents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process. A due-process violation occurs when a state-required breakup of a natural family is founded solely on a 'best interests' analysis that is not supported by the requisite proof of parental unfitness." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003) (citations omitted).

After the initial proceedings in these cases, the Legislature changed subparagraph b of § 21 non-substantively, and added subparagraphs d and e, which provide:

> (d) To achieve permanency and stability for adoptees as quickly as possible.
>
> (e) To support the permanency of a finalized adoption by allowing all interested parties to participate in proceedings regarding the adoptee. [MCL 710.21a, as amended by 2004 PA 487, effective December 28, 2004.]

In sum, under the Adoption Code the controlling, paramount principle governing adoption proceedings is the best interests of the adoptee. Further, the Adoption Code requires procedures that will not only safeguard the best interests of the adoptee, but also promote a prompt and permanent, and therefore, stable substitute family relationship. See, e.g., *In re RFF,* 242 Mich App 188, 207-208; 617 NW2d 745 (2000) ("the Adoption Code[] aims to promote the best interest of the child in a prompt and final manner"), and *In re Lang*, 236 Mich App 129, 136; 600 NW2d 646 (1999) ("In enacting the Adoption Code, the Legislature sought, inter alia, to establish procedures to safeguard and promote the best interests of the adoptee and to provide for speedy resolution of disputes . . . ."). Thus, where more than one set of prospective parents are competing to adopt the same children, it is not necessary for the prevailing set of parents to establish that other prospective parents are unfit. Rather, the procedure is analogous to a custody dispute between fit parents at which the best interests of the children control.

Because the Smiths cite no legal authority for their claim that due process requires a showing of parental unfitness before judicial review of the legality of an adoption order, they have abandoned that claim. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Moreover, it is clear that the Smiths took a contrary position in federal court, seeking and obtaining an order voiding the adoption order entered in Oakland Circuit Court, not on the basis that the Cromwells were unfit parents, but instead on the basis that the Smiths had been denied due process of law. The federal district court agreed. Thus, the question on appeal becomes whether the Smiths were accorded procedural due process of law in the adoption proceedings after the entry of the April 4, 2005 federal district court order.

The underlying principle of due process is fundamental fairness. *Lassiter v Dep't of Social Services*, 452 US 18, 24; 101 S Ct 2153; 68 L Ed 2d 640 (1981). "'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Mathews v Eldridge*, 424 US 319, 332; 334; 96 S Ct 893; 47 L Ed 2d 18 (1976), quoting *Morrissey v Brewer,* 408 US 471, 481; 92 S Ct 2593; 33 L Ed 2d 484 (1972). In general, procedural due process requires that a party be provided notice of the nature of the proceedings and an opportunity to heard by an impartial decision maker at a meaningful time and in a meaningful manner. *Reed v Reed,* 265 Mich App 131, 159; 693 NW2d 825 (2005); *In re Adams Est,* 257 Mich App 230, 234; 667 NW2d 904 (2003). To determine whether the Due Process Clause is satisfied in a particular case, three factors must be balanced: "[1] the private interests at stake, [2] the government's interest, and [3] the risk that the procedures used will lead to erroneous decisions." *Lassiter, supra* at 27, citing *Mathews, supra* at 335.

In applying the *Mathews* three-element framework, we conclude the Smiths were accorded procedural due process. First, whatever substantive interest the Smiths possessed in adopting the children was counterbalanced by the Cromwells' similar interest in adopting the

children. But both the Smiths' and the Cromwells' interests are subordinate to the right of the children to a determination that is in their best interests. MCL 710.21a(b). After terminating the birth mother's parental rights, the state not only continued to possess an urgent interest in the welfare of the children, but also as parens patriae, a strong interest in providing the children as promptly as possible with a permanent home that furthers their best interests. See *Santosky v Kramer,* 455 US 745, 766, 102 S Ct 1388; 71 L Ed 2d 599 (1982). Finally, all interested parties share a significant interest in procedures that minimize the risk of an erroneous determination, i.e., a determination that is not permanent or in the best interests of the children.

De novo review of the record discloses that the Smiths were provided notice of all hearings, were represented by counsel, and were afforded fundamentally fair opportunities to be heard at meaningful times and in a meaningful manner. Accordingly, the Smiths were accorded procedural due process. *Mathews, supra* at 333; *Reed, supra* at 159. We find the Smiths argument to the contrary regarding the April 19, 2005 Clinton Circuit Court hearing lacks merit. The Smiths initiated that hearing by their ex-parte motion, so they obviously had notice of it. Moreover, the court heard the Smiths through their written motion. "[A]n oral hearing is not necessary to provide a meaningful opportunity to be heard." *English v BCBSM*, 263 Mich App 449, 460; 688 NW2d 523 (2004); see, also, *Leonardi v Sta-Rite Reinforcing, Inc*, 120 Mich App 377, 382-383; 327 NW2d 486 (1982). The trial court did not deny the Smiths due process by preserving the status quo without prejudicing the Smiths' right to a hearing on the merits after notification and opportunity to be heard was afforded all interested parties. MCL 710.21a(e).

We also reject the Smiths' argument that the Genesee Circuit Court denied them due process by considering the November 4, 2002 memo of former MCI superintendent Johnson. Although the Smiths were not permitted to participate in the § 45 proceedings in Oakland Circuit Court, the memo was received in evidence at that hearing. Judge Pezzetti in her April 15, 2003 corrected opinion and order mentions the memo prominently:

> Ms. Kaley[6] testified that on November 12, 2002, a Memo was received by the Ingham County FIA, dated November 4, 2002, addressed to Child and Family Services Managers. The Memo was from Mr. Johnson, with the title "Acting Manager Adoption Services Division," and addressed the appointment of a new MCI Superintendent. See Petitioner's Exhibit 16. The Memo advises that effective November 11, 2002, Bruce Hoffman would be Acting Superintendent of the MCI within the Adoption Services Division. This is an interesting fact considering that Mr. Johnson signed the Consent to Adoption Decision, a decision which pursuant to statute shall be made by the MCI Superintendent, on December 5, 2002. [Opinion and order of the Oakland Circuit Court Family Division issued April 15, 2003 (Nos. 02-665773-AD & 02-669671-AD), slip op at 19.]

Considering that Judge Pezzetti's rulings in these cases were the subject matter of federal litigation the Smiths initiated on October 21, 2003, and that the MCI consent signed by Johnson was the foundation of the Smiths' adoption petitions, we find the Smiths' claim that they were

[6] Janet Kaley was an FIA adoption supervisor.

unaware of the November 4, 2002 memo less than credible. On the basis of the federal litigation, the Smiths' counsel must have been aware of the Cromwells' claim that Johnson no longer held the position of MCI superintendent after November 11, 2002. In his April 4, 2005 opinion, Judge Borman quoted pages 19-20 of Judge Pezzetti's April 15, 2003 opinion: "'Petitioners [Cromwells] contend that Mr. Johnson's [MCI-FIA] decision to grant consent to adoption to Mr. and Mrs. Smith was a final favor to LAS as MCI Superintendent *even though he no longer held that position as of November 11, 2002*." Unpublished opinion of the United States District Court, Eastern District of Michigan, issued April 4, 2005 (No. 03-74213), slip op at 15 (emphasis added). We also note that a copy of Judge Pezzetti's opinion is attached to the Smiths' brief of appeal bearing the FAX number of Smiths' counsel and date of May 6, 2005. So, we find that the Smiths' counsel was on notice of the November 4, 2002 memo well before the hearings in Genesee Circuit Court. Moreover, counsel should have been aware the memo was potential evidence of Johnson's lack of authority to sign the MCI consent to adopt.

We also find without merit the Smiths' contention that the trial court sua sponte raised the issue of Johnson's lack of authority to sign the MCI consent to adopt. On August 23, 2005, the GAL filed its report with the trial court and served all interested parties. The GAL requested that the court set aside the December 13, 2002 orders placing the minors with the Smiths for the purposes of adoption on the ground that Johnson lacked authority to sign consents to adopt on behalf of the MCI on December 5, 2002. The GAL, citing MCL 400.209, asserted that the MCI superintendent must sign a consent to the adoption of a child who is committed to the MCI. The GAL report also referred to Judge Pezzetti's opinion, noting that Johnson was not in fact the superintendent of the MCI when he signed the consent to adopt in favor of the Smiths. The GAL contended this "appearance of impropriety" undermined "the perceived integrity of the judicial process," and therefore, recommended that the court set aside the December 13, 2002 placement orders under the authority of MCR 2.612(C)(1)(f).

The Smiths' contention that they were not afforded a meaningful hearing on this issue has only superficial merit. "The opportunity to be heard does not mean a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence." *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). At the August 29, 2005 motion hearing, the trial court declined to receive Johnson's testimony regarding his claim of authority to sign the MCI consent to adopt on December 5, 2002. But the trial court's ruling must be placed in context. Although the Smiths' counsel must have been aware of the November 4, 2002 memo and its potential evidentiary value to undermine the validity of the MCI consent to adopt at the foundation of the Smiths' adoption petition, counsel failed to indicate at the status conference on August 11, 2005 that testimony might be necessary on the Cromwells' motion to set aside the Clinton County final orders of adoption. Consequently, the Smiths waived the right to present testimony at the August 29, 2005 motion hearing.

Assuming for the purpose of analysis that the trial court erred by not permitting Johnson to testify at the August 29, 2005 motion hearing, the record establishes that the error was harmless beyond a reasonable doubt. Even if preserved, non-structural constitutional error does not merit reversal when the reviewing court determines that the error was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). A structural error is one that affects the constitution of the trial mechanism itself - which includes the total deprivation of the right to trial counsel - trial before a biased judge, the denial of the right to self-

representation, and the denial of the right to a public trial. *People v Anderson (After Remand)*, 446 Mich 392, 405; 521 NW2d 538 (1994) (citations omitted). In contrast, so-called "trial errors" that occur in the course of a trial, such as the erroneous receipt or exclusion of evidence, are non-structural errors because they "'may . . . be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.'" *Anderson, supra* at 405-406, quoting *Arizona v Fulminante*, 499 US 279, 307-308; 111 S Ct 1246; 113 L Ed 2d 302 (1991). Here, the error alleged is the exclusion of evidence, and in the context of due process, is at most non-structural constitutional error.

At the hearing on August 29, 2005, the trial court ruled it would not receive Johnson's testimony based on the parties' having agreed at the status conference that the motions would be decided on the pleadings, briefs, and oral argument. At the conclusion of the hearing, the trial court ruled that an MCI consent to adopt must be signed by its superintendent, and the only evidence before the court was that Hoffman, not Johnson, was the MCI superintendent when the consent to adopt was signed on December 5, 2002. But at the best interests hearing the first witness the Smiths presented was William J. Johnson. Johnson testified that after the 2002 gubernatorial election, some FIA staff took early retirement, resulting in changed job assignments. Johnson assumed the position of his former supervisor, and "Bruce Hoffman . . . assumed the primary duties of the MCI, uh, superintendent at that time." Johnson also testified:

> Within our agency, uh, what - - what was decided was that I would continue, uh, and - - and finalize some of the cases that I had been, uh, been involved with. Um, and this was one of those cases. Um, so our - - within our agency, we - - we determined that I had the authority to continue, uh, acting in that capacity.

During cross-examination, Johnson acknowledged that Hoffman was appointed the MCI superintendent in November 2002. Further, Johnson confirmed that he had sent the November 4, 2002 memo to FIA county offices as well as private agencies to advise the recipients that effective November 11, 2002, Bruce Hoffman was acting superintendent of the MCI. Johnson further testified, "there's one MCI Superintendent, and then there would be, uh, a person that's appointed as - - as acting Superintendent, if that person's unavailable." But Johnson did not know if Hoffman was unavailable to sign the MCI on December 5, 2002. Instead, Johnson relied on "the decision within our agency that I would, uh, continue . . . on some of the cases that I . . . had been involved in and would issue, uh, the decision."

The day after he testified, Johnson faxed to the court two undated memoranda. One memo was from FIA director Nannette Bowler, with the letterhead stating Jennifer M. Granholm was the governor, and one memo was from FIA director Douglas E. Howard, noting John Engler was the governor. Each memorandum confirmed Bruce Hoffman's appointment as MCI superintendent effective November 11, 2002. The memoranda also stated, "In Mr. Hoffman's absence, William Johnson, Acting Director of Adoption Services of the Michigan Family Independence Agency, is designated as Acting Superintendent." These memoranda were admitted at the hearing as Smiths' exhibits 1 and 2. But Mr. Johnson testified he did not act upon this authority, nor did he testify that Hoffman was unavailable. Rather, Johnson testified that he acted on his own belief that he could simply continue working on adoption cases that had started before his tenure as superintendent ended.

We also find the trial court did not clearly err in its legal conclusion that Johnson was not authorized to sign the December 5, 2002 consents to adopt. MCL 710.43(1)(b) provides in part, "consent to adoption of a child shall be executed: . . . (b) By 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 2002, MCL 400.209 provided: "The superintendent of [the Michigan children's] institute is hereby authorized to consent to the adoption, marriage or emancipation of any child who may have been committed to said institute, pursuant to the laws for the adoption, marriage or emancipation of minors." MCR 3.801(B) provides: "A release or consent is valid if executed in accordance with the law at the time of execution."

A state agency has no inherent power to act; its authority comes only from statute. *McIlmurray v Michigan Racing Comm'r*, 130 Mich App 271, 277; 343 NW2d 524 (1983). Similarly, Johnson possessed no inherent authority to decide he could sign an MCI consent to adopt after he no longer was superintendent of the MCI. The plain language of the statutes at issue required the MCI to consent to adoption and that the MCI consent to adopt be signed by its superintendent. Even if the appointment of a standby superintendent is fairly implied by the statutory scheme, see, e.g., *Public Health Dep't v Rivergate Manor*, 452 Mich 495, 503; 550 NW2d 515 (1996), Johnson did not act on that basis. Consequently, if the trial court erred by excluding Johnson's testimony at the August 29, 2005 motion hearing, the error was harmless beyond a reasonable doubt. *Carines, supra* at 774.

Finally, the Smiths raise substantive issues beyond the scope of the constitutional due process question they present on appeal. Because these issues were not included in the statement of issues presented on appeal, they are waived. *Van Buren Charter Twp, supra* at 632.

Moreover, the one-year time period for seeking relief under MCR 2.612(C) must be deemed under the circumstances of this case to have been tolled between the entry of Judge Robertson's April 17-18, 2003 order setting aside the March 17, 2003 orders of adoption and Judge Borman's April 4, 2005 order reviving the adoption orders. Thus, the trial court did not clearly err by finding that the Cromwells timely sought relief, and we conclude further that the court did not clearly err or abuse its discretion by granting relief under MCR 2.612(C)(1)(a) or (f).

III

The Smiths next argue that the trial court showed judicial bias in favor of the Cromwells by manipulating facts, refusing to hear relevant testimony, and ruling to permit a best interests hearing. The Smiths contend that the trial court based its decisions on emotion, not sound legal reasoning. We disagree.

A judge is disqualified when he or she cannot impartially hear a case. MCR 2.003(B); *Van Buren Charter Twp, supra* at 598. A party that challenges a judge "on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality." *Cain v Dep't of Corrections,* 451 Mich 470, 497; 548 NW2d 210 (1996). Moreover, the procedure for seeking the disqualification of a judge set forth in MCR 2.003 is exclusive and must be followed. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 22-23; 436 NW2d 70 (1989). A party waives any claim of disqualification when it fails to comply with the court rule. *Id*. at 23.

Here, the Smiths failed to move to disqualify Judge Nelson. For this reason alone they have waived any claim of judicial bias on appeal. *Id*. Moreover, "MCR 2.003(B)(1) requires a showing of *actual* bias. Absent actual bias or prejudice, a judge will not be disqualified pursuant to this section." *Cain, supra* at 495. Further, the court rule requires showing personal bias on the part of a judge, meaning that the bias or prejudice must be both personal and extrajudicial, i.e., must have "its origin in events or sources of information gleaned outside the judicial proceeding." *Id*. at 495-496. For these reasons, judicial rulings during the course of a trial or hearing "'almost never constitute [a] valid basis for a bias or partiality motion.'" *Id*. at 496, quoting *Liteky v United States*, 510 US 540, 550; 114 S Ct 1147; 127 L Ed 2d 474 (1994). Such rulings "do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id*.

In the present case, the trial court's ruling did not evince "deep-seated favoritism or antagonism" against the Smiths or for the Cromwells. Consequently, even considering the merits of their claim, the Smiths have failed to overcome the strong presumption of judicial impartiality. *Cain, supra* at 497; *Van Buren Charter Twp, supra* at 598.

IV

For their last argument, the Smiths assert that the trial court erred by allowing the Cromwells to amend their 2002 adoption petitions. We disagree.

We review a trial court's grant or denial of a motion for leave to amend pleadings for an abuse of discretion. *Franchino v Franchino*, 263 Mich App 172, 189; 687 NW2d 620 (2004). MCR 2.118 governs amendments to adoption pleadings pursuant to MCR 3.800, which provides: "Except as modified by MCR 3.801-3.806, adoption proceedings are governed by the rules generally applicable to civil proceedings." MCR 2.118(A)(2) provides, "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires."

Ordinarily, a motion to amend pleadings should be granted, unless one of the following particularized reasons exists: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party if the amendment is allowed, or (5) futility. *Sands Appliance Services, Inc v Wilson,* 463 Mich 231, 239-240; 615 NW2d 241 (2000) (citation omitted). Of these reasons, the Smiths assert only that permitting the Cromwells to amend their adoption petition caused the Smiths undue prejudice. But with respect to granting an amendment to a pleading, "[p]rejudice to a party that will justify denial of leave to amend is prejudice that arises when the amendment would prevent the party from having a fair trial. It must stem from the fact that the new allegations are offered late, not that they might cause a party to lose on the merits." *Id*. at 239, n 6, citing *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997).

Here, the amendment did not permit new allegations but rather permitted both putative sets of adoptive parents to have a de novo hearing on the best interests of the children with respect to their long-pending petitions for adoption. Under the facts and circumstances of this case, the petitions for adoption of both sets of prospective parents were built on defective consents to adopt. That the Smiths ultimately lost on the merits when the trial court determined the best interests of the children favored the Cromwells' adopting the children is not a basis for

finding an abuse of discretion by the trial court in allowing amended pleadings. "Prejudice to a [party] that will justify denial of leave to amend is the prejudice that arises when the amendment would prevent the [party] from having a fair trial; the prejudice must stem from the fact that the new allegations are offered late and not from the fact that they might cause the [party] to lose on the merits." The Smiths received a fair hearing on the merits, so they were not subjected to the type of prejudice that would render granting an amendment to the pleadings an abuse of discretion.

We affirm.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Patrick M. Meter