

STATE OF MICHIGAN
IN THE COURT OF APPEALS

In the Matter of:
Alyssa and Amber Keast, Minors.

Court of Appeals No. 277354

On Appeal From Newaygo County Circuit Ct
Case No. 05-06388-NA
(The Honorable Terrence R. Thomas)

Liisa R. Speaker (P65728)
Speaker Law Firm, PLLC
Attorneys for Appellee Foster Mother
230 N. Sycamore, Ste. D
Lansing, MI 48933
(517) 482.8933

Shon A. Cook (P51452)
Attorney for Appellee
Maternal Grandparents
120 W. Apple
P.O Box 599
Muskegon, MI 49443-0599
(231) 728.1111

Maribeth Dickerson (P68975)
Assistant Attorney General
Attorneys for MI Department of
Human Services
P.O. Box 30758
Lansing, MI 48906
(517) 373.7700

Scott Sherlund (P54861)
Attorney for Appellee Foster Mother
80 Ottawa N.W., Ste. 301
Grand Rapids, MI 49503-2217
(616) 774.3020

Christine Clancy Frisbie (P46672)
Guardian Ad Litem
1206 E. James St.
P.O. Box 1005
White Cloud, MI 49349
(231) 689.0600

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STATEMENT OF JURISDICTION

Appellee accepts the statement of jurisdiction presented in Appellant's Application for Leave to Appeal.

STATEMENT REGARDING STANDARD OF REVIEW

Appellee accepts the standard of review set forth in Appellant's Application

COUNTER-STATEMENT OF QUESTIONS INVOLVED

- (1) Did the Trial Court err in changing custody of minor children during the course of adoption proceedings and terminating MCI guardianship in its March 5, 2007 order without first conducting a best interests analysis where there was no indication that a change in custody was immediately necessary?

Appellant Attorney General answers: Yes.

Appellee Foster Mother answers: Yes.

Trial Court answers: No.

- (2) Did the Trial Court commit reversible error by failing to comply with the procedural requirements of the Michigan Adoption Code by using post-termination proceedings as a vehicle to change custody of children who were in the process of being adopted by their Foster Mother?

Appellant Attorney General answers: Yes.

Appellee Foster Mother answers: Yes.

Trial Court answers: No.

- (3) Did the Trial Court incorrectly terminate MCI guardianship of the children where the record lacks clear and convincing evidence that the MCI's denial of consent to adopt to the Maternal Grandparents was arbitrary and capricious?

Appellant Attorney General answers: Yes.

Appellee Foster Mother answers: Yes.

Trial Court answers: No.

- (4) Did the Trial Court commit reversible error and deny the Foster Mother her due process rights by hearing the Maternal Grandparents' petition to adopt without providing the Foster Mother notice and opportunity to be heard, as required by the Adoption Code?

Appellant Attorney General answers: Yes.

Appellee Foster Mother answers: Yes.

Trial Court answers: No.

COUNTER-STATEMENT OF FACTS

Appellee Foster Mother accepts Appellant's statement of facts, except that Appellee would draw this Court's attention to the following additional facts:

The minor children whose futures are at stake in this appeal are Alyssa Keast (age 6) and Amber Keast (age 4). They have lived with their foster mother, Nicole Coppess ("Foster Mother") for nearly two years. By the account of every agency who has examined this matter—including the Trial Court—these young girls are closely bonded to their Foster Mother and want to live with her forever. The Foster Mother has been able to provide these girls the security, stability, and nurturing environment that was so conspicuously absent from their lives prior to their placement with their Foster Mother.

Sadly, the girls were removed from the home of their biological mother after the home the biological mother shared with the girls was raided by the police for drug trafficking. The biological mother had a long history of substance abuse that resulted in the Newaygo County Prosecutor's Office conducting an abuse and neglect investigation. The biological mother's substance abuse history began when she was 14 years old and smoke marijuana with her father. In fact, the Trial Court (with the same judge presiding) removed the girls from placement at the Maternal Grandparents' home in July 2005 because it determined that it was not in the children's best interests to remain with their Maternal Grandparents. The Trial Court reached this conclusion after it was disclosed that the maternal grandfather had smoked marijuana as recently as March 2005 and that the Maternal Grandparents had allowed the girls to see biological mother unsupervised and that biological mother had also exposed the girls to her boyfriend, all in contravention of the Maternal Grandparents agreement with Agency.

In evaluating the adoption petition of Barb and Tim Atwood ("Maternal Grandparents"), the Trial Court ignored the evidence that the maternal grandfather had a long history of drug abuse, that his own history of drug abuse and smoking marijuana with his daughter starting when she was 14 years old and as recently as 2004, might have had some bearing on the disaster that the biological mother's life had become. Needless to say, the biological mother's inability to control her own life directly led to the abuse and neglect proceedings and the termination of her parental rights of Alyssa and Amber in March 2006. The termination proceedings were concluded after the girls were returned to their biological mother's care for one week in December 2005. During that short opportunity for the biological mother to be with her daughters, the biological mother attempted to suicide in front of her daughters, then aged 3 and 5. Her suicide attempt caused the girls to regress from what progress they had made during the previous 6 months they had lived in their Foster Mother's home.

ARGUMENT

- I. **Leave should be granted because the Trial Court's decision to move the children to their Maternal Grandparents' home was incorrect as the Trial Court failed to conduct a best interest analysis in spite of being presented with evidence that removing the children from the Foster Mother's home was not in the children's best interest, and had the statutory analysis been conducted the majority of the factors would have weighed in the Foster Mother's favor and the children would have properly stayed with the Foster Mother**

The Trial Court committed reversible error by failing to weigh or even consider the best interest of the two minor children when it granted the Maternal Grandparents' Petition to Adopt and denied the Foster Mother's Petition to Adopt the two children.

Whenever a court or government agency examines the custody or placement of a child, the best interest of the child is the paramount concern. The best interest of the child is grafted into virtually every Michigan statute that affects the placement of the child, including the Adoption Code, the Probate Code, and Child Custody Act. The Adoption Code states that its goal is 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." MCL 710.21a(b) (emphasis added). As part of this purpose, the Adoption Code includes the goal of achieving "permanency and stability for adoptees as quickly as possible." MCL 710.21a(e).

The Adoption Code outlines the elements for the court to consider in evaluating the best interests of the child. More precisely, the best interest factors are to be "considered, evaluated and determined by the court to be applied to give the adoptee permanence at the earliest possible date." MCL 710.22(g). The factors enumerated in the Adoption Code are very similar to the factors set forth in the Child Custody Act. *Compare* MCL 710.22(g)

with MCL 722.27. The "sum total" of the factors in the Adoption Code that the trial court is obligated to consider, evaluate, and determine are as follows:

- (i) The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee
- (ii) The capacity and disposition of the adopting individual or individuals . . . to give the adoptee love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.
- (iii) The capacity and disposition of the adopting individual or individuals . . . to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
- (iv) The length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (v) The permanence as a family unit of the proposed adoptive home. . .
- (vi) The moral fitness of the adopting individual or individuals
- (vii) The mental and physical health of the adopting individual or individuals
- (viii) The home, school, and community record of the adoptee.
- (ix) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court considers the adoptee to be of sufficient age to express a preference.
- (x) The ability and willingness of the adopting individual or individuals to adopt the adoptee's siblings.
- (xi) Any other factor considered by the court to be relevant to a particular adoption proceeding. . . .

MCL 710.22(g). These best interests of the children are important at every stage of the proceedings—from termination of parental rights to foster care placement, to permanent

placement in an adoptive home.

Michigan Court Rules point to the best interest of the child in the procedure governing post-termination review hearings. The trial court may enter orders that it considers necessary following the termination of parental rights, but those orders must be in the best interests of the child. MCR 3.978(C). Once a parent's parental rights have been terminated, the trial court can approve the placement of a child, but only if the judge is satisfied that "the best interest of the adoptee will be served by the adoption." MCL 710.51.

The Probate Code also requires the Foster Care Review Board to weigh the best interests of the child when making a change in foster placement. MCL 712A.13b. The foster care review board is required to investigate the foster care placement and if the board determines that the "move is in the child's best interest, the agency may move the child" but if the "move is not in the child's best interest, the agency shall maintain current [foster] placement." MCL 712A.13b(4), (5).

These numerous statutory provisions demonstrate the legislature's objective of ensuring that any placement of a child is in that child's best interests. Contrary to the statutory obligations, the trial court in this case failed to conduct any best interests analysis. Instead, in deciding to grant the Maternal Grandparents' petition to adopt, the trial court simply asked the grandfather one question about his prior drug use:

THE COURT: Is there—do you understand this business about, apparently this drug use, that's got to be a thing of the past, do you understand that?

MR. ATWOOD: Yes, and I did, your Honor.

THE COURT: The Court will grant your petition and consent to the

adoption by the maternal grandparents.

(Exhibit H, Transcript hearing 1/3/07, at p 5)¹ The Trial Court conducted this cursory examination in spite of the fact that the Trial Court had removed these children from the Maternal Grandparents home in July 2005 because the grandfather had recently engaged in drug use with the children's biological mother). (Exhibit B attached to Exhibit O at p 1; Exhibit R; Exhibit S)

The following month when the Foster Mother's petition to adopt came before the trial court, the trial court refused to hear the attorney representing the Foster Mother. (Transcript 4/3/07; Affidavit of Scott Sherlund) Instead, the Trial Court reiterated its previous ruling which granted the Maternal Grandparents' petition to adopt. (Transcript, 4/3/07; Affidavit of Scott Sherlund) In the previous hearings regarding the Maternal Grandparents' petition and in the hearing on the Foster Mother's petition to adopt, there is a complete lack of any analysis regarding the best interests of the child. In fact, the Trial Court's refusal to follow the statutory scheme that is designed to protect the best interests of the children starkly contrasts the Trial Court's own recognition that the children were closely bonded with their foster mother and that the children were doing well with their placement in the foster home that now wanted to adopt them. (Order, 3/5/07)

The followings facts are part of the record that the trial court had available to it to determine what placement was in the best interests of the children:

¹ All the exhibits referenced in this answer refer to the exhibits attached to the Attorney General's Application for Leave to Appeal.

Evidence Demonstrating that Adoption by the Foster Mother is in Best Interests of Children

1. An Adoption Progress Report of Bethany Christian Services dated February 6, 2007 stated that "Alyssa and Amber continue to do very well in their current foster home placement. They remain closely bonded to their foster mother, who has indicated a desire to adopt both girls. Alyssa and Amber have likewise indicated their desire to stay with their foster mother." (Exhibit A attached to Exhibit O)
2. According to the Bethany Christian Services Report, Alyssa has made a "tremendous amount of change" over the prior six months while she was in foster care. Although Alyssa has significant behavioral problems arising from her life before foster care, the Foster Mother uses time outs and takes away privileges to discipline Alyssa. The Foster Mother has also started a behavior incentive program with both girls that has proven successful with Alyssa. (Exhibit B attached to Exhibit O, at p 6)
3. Alyssa is being exposed to cultural beliefs/identity and practices and traditions within her foster family. (Exhibit B attached to Exhibit O, at p 6)
4. Although Amber has been diagnosed with Attention-Deficit/Hyperactivity Disorder, Oppositional Defiant Disorder, and Post-traumatic stress disorder, her Foster Mother participates directly with Amber's counselor. The Foster Mother disciplines Amber with time outs and takes away privileges. (Exhibit B attached to Exhibit O, at p 8-9)
5. Bethany Christian Services noted that the girls are "very close to their current foster mother and her parents." The Foster Mother "loves both girls" and her friends and

their children are also an emotional support for both the foster mom and the girls.
(Exhibit B attached to Exhibit O, at p 9)

6. Before Bethany Christian Services evaluated the Foster Mother as an adoptive family, it noted that "It is anticipated that it will be very difficult for both girls to face the reality of moving into an adoptive home. It is believed that the foster mother will be extremely helpful in the transition to a new home if she feels that home can meet the girls' mental and emotional needs. Her support will be vital to the success of the placement, as the girls place a great deal of trust in her." (Exhibit B attached to Exhibit O, at p 9)
7. In examining the girls' special physical, emotional and educational needs, Bethany Christian Services noted that "Amber and Alyssa have experienced a great deal of trauma in their young lives. They are doing very well in their current placement [with their Foster Mother], which offers consistency, stability, security, and love." (Exhibit B attached to Exhibit O, at p 10)
8. Bethany Christian Services reported that "[g]iven their choice, it is believed that both girls would say they want to stay with their foster mother forever. They love her and are bonded to her. It will be hard for them to face moving." (Exhibit B attached to Exhibit O, at p 11)
9. Bethany Christian Services conducted written interviews of 5 references as part of their review of Foster Mother's application to adopt. These references highly recommended Foster Mother as an adoptive parent and detailed the loving and secure environment that the Foster Mother had created for these girls. (Exhibits B-1 through B-5 attached to Exhibit O)

10. Bethany Christian Services performed an Adoptive Family Assessment of Foster Mother. The assessment concluded that "Nicole Coppess appears physically, emotionally, and financially stable to pursue adoption." She has proven as the Foster Mother that she can "provide for their physical, mental, and emotional needs. She has provided a secure, stable, nurturing home that provides a validating home environment where drugs are not used. She has demonstrated her love for the girls in countless ways." (Exhibit B-7 attached to Exhibit O)
11. The foster care worker, Lacey Gonzalez-Borstler, testified that the children were doing well in foster care and the children have indicated that they would like to stay with their foster mother. (Exhibit X, Transcript, 2/7/07 at 3-4)
12. In the trial court's Order After Post Termination Review, 2/7/07, the trial court found that Alyssa is closely bonded with her foster mother and that Amber is a loving child closely bonded to her foster mother. (Exhibit A at p 2)

Evidence Demonstrating that Adoption by Maternal Grandparents is not in Best Interests of Children

1. The Michigan Children's Institute Superintendent reviewed the Maternal Grandparents request to adopt, but in a notification dated 01/17/07 the MCI decided that adoptive placement of the girls in their Maternal Grandparents' home would not be in the girls' best interest. (Exhibit G)
2. Bethany Christian Services noted that after the girls were removed from their biological mother's care, they were placed with their Maternal Grandparents. However, the "girls were removed from their grandparent's care following the

grandfather's admitted recent use of marijuana with the girls's mother and the fact that they had allowed the mother to take the children to the boyfriend's home, clearly breaking the parent-agency agreement." (Exhibit B attached to Exhibit O, at p 1)

3. In a psychological intake of the biological mother, she stated that she thought that her father might have sexually abused the girls when the girls had been left in their grandfather's care. The girls' mother also stated in court in November 2005 that she and her father used to roll joints together and smoked them starting when the biological mother was 14. (Exhibit B attached to Exhibit O, at p 2, 4-5)
4. Bethany Christian Services commented that neither girl has a current relationship with any of their relatives. Although the Maternal Grandparents had indicated a desire to adopt the girls, they have not seen the girls since the girls were removed from the Maternal Grandparents home in July 2005. (Exhibit B attached to Exhibit O, at p 10) When Alyssa was asked if she remembered her Maternal Grandparents, she "dropped her head and hesitantly related a story of walking into the house and into their bedroom and seeing their bare butts." (Exhibit B attached to Exhibit O, at p 10)
5. In a CHM assessment of Alyssa dated August 31, 2006, the therapist stated that the biological mother was suffering from bipolar disorder, depression, and borderline personality disorder. Research has shown that borderline personality disorder is caused from an "invalidating home environment." The CHM therapist noted that "this would be a huge concern if Alyssa or sister were placed in an environment that is invalidating because biological mother struggled in her parents' home and she

continues to struggle as an adult. Due to the drug history, possible sexual abuse, and invalidating environment Alyssa should not be placed back into her maternal grandparents home.” (Exhibit B attached to Exhibit O, at p 11)

6. Bethany Christian Services performed a family assessment of Maternal Grandparents and conducted a case conference with them. The Maternal Grandparents were not recommended for placement. (Exhibit B-6 attached to Exhibit O, Adoption Progress Report, dated 12/19/06)
7. The Foster Care Review Board’s review of the Maternal Grandparents’ appeal when the girls were removed from their home in July 2005 provides insight into the problems that the Board saw with the Maternal Grandparents’ home. The Board concluded that the “Agency demonstrated that Amber and Alyssa were at risk of harm [in their Maternal Grandparents’ home]; their needs were not being met under [Maternal Grandparents’] care and moving Alyssa and Amber were in their best interest.” (Exhibit R)
8. The Adoptive Family Assessment of the Maternal Grandparents noted that the grandfather can “be pushed into doing things that he later regrets” like “ ‘giving in’ to his daughter and smoking marijuana with her outside while Amber and Alyssa were inside the home.” He knew at that time that drugs played a key role in the problems his daughter was having, yet he lacked the strength to resist her pleading. (Exhibit S, at p 9) His behavior showed “poor self-control, lack of judgment, and failure to put the girls welfare first.” (Exhibit S, at p 16) There was also an unsubstantiated report of abused that the grandmother had pushed Amber into a wall. (Exhibit S, at p 6)

9. The Foster Care Review Board made findings, conclusion, and recommendations on 03/20/07 regarding the girls' placement. The Board agreed with the Agency's recommendation not to return the children to the Maternal Grandparents. DHS also advised that they believed it not be to be in the children's best interest to be removed from their Foster Mother's care. (Exhibit E, at p 2) The Board concluded that their "current placement was in their best interests and moving the children would have an adverse or traumatic impact on them and on their safety and well being." (Exhibit E, at p 4)

Contrary to the evidence in the record that demonstrated that adoption by the Foster Mother would be in the children's best interest, the trial court denied the Foster Mother an opportunity to be heard and granted the Maternal Grandparents adoption petition. (Transcript, 1/3/07; Transcript, 4/4/07) The trial court failed to consider, evaluate, and determine what was in the children's best interest. His decision must be reversed.

II. The Trial Court committed many significant procedural errors that the Foster Mother can raise on cross appeal because it disregarded the statutory requirements for post termination proceedings that caused it to render a factually unsupported order changing the children's custody, without providing the children's Foster Mother or the Michigan Children's Institute any notice or opportunity to be heard

The Adoption Code outlines the proper procedures for placement of children in cases such as this, where parental rights are terminated. As part of the procedural scheme, the Michigan Children's Institute ("MCI") has guardianship and statutory authority to consent to petitions to adopt children under its care. MCL 400.203. In this instance, the

trial court completely ignored the MCI authority when it entered its January 3, 2007 order granting the Maternal Grandparents' petition to adopt. At that point, Bethany Christian Services had recommended that the children should not be placed with the Maternal Grandparents, but the MCI Superintendent had not made a final determination.

A. The January 3, 2007 Order Was Premature and Unsupported

The January 3, 2007 hearing that ended in an order granting the grandparent's petition to adopt was held prematurely because the MCI Superintendent had not officially denied consent to adopt at that time. Additionally, not all interested parties received notice of the premature hearing. In fact, only the Maternal Grandparents and their counsel were present. (Exhibit H, Transcript Hearing, 1/3/07 at p 1) As a result, the Trial Court based its decision to grant the adoption petition on the representations of the Maternal Grandparents' counsel. During the short proceeding, the Trial Court was led to believe that the only reason for the anticipated denial of consent by the Superintendent was the concern about the maternal grandfather's marijuana use. (Exhibit H, Transcript Hearing, 1/3/07 at 3)

However, the MCI's consent to adopt was also withheld because of the Maternal Grandparents' repeated violations of the no-contact order. (Exhibit N, Adoption Assessment at 5) Pursuant to the order, the children were not to have any contact whatsoever with their biological mother. Nonetheless, the Maternal Grandparents facilitated unsupervised visits with the girls' biological mother and the mother's boyfriend. In addition, Bethany Christian Services noted that the children's biological mother feared that the children had been sexually abused by their maternal grandfather. (Exhibit N, Adoption Assessment, at p 8) That assessment report also referred to the Maternal

Grandparents' home as an "invalidating environment." (Exhibit N, Adoption Assessment, at p 11)

The biological mother's mental conditions and criminal involvement with drugs caused her rights to be terminated. On an attempted reunification visit with the children, she attempted suicide in front of the girls (ages 3 and 5). (Order, 5/3/06) The gravity of exposing the children to their biological mother is immense. Both children already display behavioral and emotional problems which are likely to worsen if they lack a stable home life. (Exhibit N, Adoption Assessment, at p 5) The Maternal Grandparents' willingness to "give in" to their daughter is evidence that they will expose the children to her in the future.

Although this is a serious risk with the possibility of grave consequences for the children, the Trial Court did not consider it before granting the Maternal Grandparents' adoption petition. Actually, the Trial Court specifically referred to the grandfather's drug use as the only reason for denial of consent, to which counsel for the Maternal Grandparents agreed. (Exhibit H, Transcript Hearing, 1/3/07 at p 3)

Moreover, without all the interested parties present at the hearing, the Trial Court was led to believe that nobody else was interested in adopting the children and that the placement process was virtually stagnant. (Exhibit H, at p 4) The Foster Mother expressed an interest in adopting the two girls in November 2006 and had begun the adoption process by the time of the January 2007 hearing. (Exhibit O at p 5) However, the Trial Court was led to believe that she did not wish to adopt simply because she had not filed her petition at that time. (Exhibit H, Transcript Hearing 1/3/07, at p 4, Ex H) Contrary to what counsel for the Maternal Grandparents advised the Trial Court at that hearing, significant progress had been made towards the Foster Mother's adoption of these two

girls. (Exhibit O, at p 5)

B. The Trial Court Erred in Terminating MCI Guardianship over the Children

The Trial Court made an inexcusable error when it terminated the MCI Superintendent's authority over the children for lack of progress. MCL 400.201 First and foremost, as counsel for the Department of Health and Human Services explained in its Application, there is no statutory authority permitting the Trial Court to dismiss MCI's authority in termination review proceeding. Instead the Trial Court was attempting to finalize his erroneous conclusion from the January 3, 2007 hearing by using MCL 712A.19c.

Secondly, MCR 3.978(C) provides that a court can enter such orders as it considers necessary in the best interest of the child, but this language does not provide the Trial Court with a license to freely make custody dispositions where the MCI has statutory authority and has already denied consent to adopt to an interested party. *Petition of Wehr*, 88 Mich App 187; 277 NW2d 179 (1979).

Further, even if the Trial Court's action was procedurally permissible, its basis for relieving MCI of guardianship was inaccurate. (Order, 2/7/07) The Trial Court dismissed MCI for lack of progress toward permanency. However, the Adoption Assessment prepared by Bethany Christian Services in October of 2006 explained that other placement was being explored. (Exhibit N, Adoption Assessment, at p 11) Additionally, the Foster Mother expressed interest in adopting the children as early as November 2006. (Exhibit O, Motion for Reconsideration, at p 5) That interest was confirmed in writing on December

19, 2006 in an Adoption Progress Report. (Exhibit B, Adoption Report, at p 1) Therefore, the Trial Court's decision was clearly erroneous and should be reversed.

If this Court permits actions that are in complete derogation of statutory purpose, the goals of the Adoption Code will be hampered, and the interests of the children will not be preserved. For example, if a court is able to disengage the guardianship rights of the MCI to escape the procedural requirement of a proper section 45 hearing in this case; it is likely that the same court will continue to circumvent statutory purpose and the rights of interested parties in the future by using this tactic.

C. *The Court Erred When it Denied Foster Mother's Motion for A Section 45 Hearing*

Unlike the Maternal Grandparents, the Foster Mother was denied a section 45 hearing when the Trial Court withheld its consent for her to adopt the children. At a hearing held in response to the Trial Court's decision to change custody of the children, Mr. Sherlund, trial counsel for the Foster Mother was not permitted to speak. (Exhibit C, Sherlund Affidavit, at p 1) When he tried to object to the lack of notice sent prior to the post-termination hearing held February 7, 2007, the Trial Court told him that he would not be heard. (Exhibit C, Sherlund Affidavit, at p 2) Mr. Sherlund proceeded to make an oral motion for consent to adopt on behalf of the Foster Mother which was denied on the spot. Following the denial of that motion, counsel made a motion for a section 45 hearing for review of the denial of consent, which was also denied. (Exhibit C, Sherlund Affidavit, at p 2)

Pursuant to MCL 710.45, the Trial Court did not have authority to deny the Foster

Mother's motion for a statutory hearing. By denying the Foster Mother review under the arbitrary and capricious standard listed in section 45, the Trial Court was virtually creating its own rule, resulting in an essentially unreviewable decision to deny consent. Neither the Foster Mother, nor her counsel, had an opportunity to present clear and convincing evidence showing that the denial of consent was arbitrary and capricious.

III. The Trial Court committed reversible error by granting the Maternal Grandparents' adoption petition without any evidence that MCI's denial of consent to adopt was arbitrary or capricious

The Maternal Grandparents filed their motion for a section 45 hearing before the Superintendent made his decision denying consent. The same judge who had previously taken the children out of the Maternal Grandparents' home in 2005 due to concerns of drug use and violation of a no-contact order, began that section 45 hearing and approved the Maternal Grandparent's adoption petitions without providing notice to the interested parties. (Hearing, 1/3/07)

The procedure for appealing a denial of consent by the MCI is clearly outlined in MCL 710.45. This section permits a party who is denied consent to adopt the opportunity for a hearing. In the course of the hearing, the movant must show by clear and convincing evidence that the Superintendent's decision to deny consent was arbitrary and capricious. In the case at bar, the record indicates no such showing by the Maternal Grandparents. In fact, "clear and convincing" has been defined in this context to mean evidence that:

[P]roduces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations ought to be established, evidence so clear, direct and

weighty and convincing as to enable the fact-finder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

In re Martin, 450 Mich 204, 227; 538 NW2d 399 (1995) (quoting *In re Jobes*, 529 A2d 434 (NJ 1987)).

On the other hand, the Superintendent's position was backed by a DHS review and a review by Bethany Christian Services. Both of these qualified agencies conducted extensive investigations each culminating with a recommendation that the grandparent's should not have custody of the children. (Exhibits N and S) Such overwhelming support shows that the Superintendent's recommendation could not have been either arbitrary or capricious.

Moreover, the Trial Court's abrupt, spontaneous, and feebly supported order granting the Maternal Grandparents' adoption petition before all of the statutory requirements were met was clearly erroneous. (Exhibit H, Transcript Hearing, 1/3/07 at 8) A Trial Court may properly consider relatives when making determinations on care and custody of a child, but the simple fact that a petitioning party is a relative is not dispositive. *In re Futch*, 144 Mich App 163, 170 (1984). At the January 3, 2007 hearing, the Trial Court expressed his preference for sending the children to live with family and not with "strangers." (1/3/2007 Hearing at 6) The Trial Court ignored the fact that the child had lived with the foster mother for two years and apparently did not appreciate that she had, in essence, become the girls' only family.

Further, at the hearing, the only mention of "arbitrary and capricious" was in the very last sentence where the Trial Court made its finding that the denial of consent (although it had not occurred) was arbitrary and capricious without citing any particular reason.

(Exhibit H, at p 8) The decision of the child's representative must be upheld unless clear and convincing evidence exists to show that the representative acted arbitrarily and capriciously. The Trial Court may not substitute its own judgment for that of the representative. If good reasons existed to both grant and withhold consent, the representative cannot be said to have acted arbitrarily and capriciously. *In re Cotton*, 208 Mich App 180, 185; 526 NW2d 601 (1994). *Cotton* illustrates that even if the Trial Court was legally permitted to review what was only an anticipated denial of consent to the Maternal Grandparents, it was not possible for it to conclude correctly that the denial was arbitrarily made.

CONCLUSION AND REQUEST FOR RELIEF

Appellee requests this Court Grant Appellant's Emergency Application for Leave to Appeal and Reverse the Trial Court's March 5, 2007 Order so that the Foster Mother's Adoption Proceedings can go forward pursuant to Michigan Statute.

April 16, 2007

Respectfully Submitted:



Liisa R. Speaker (P65728)
Speaker Law Firm, PLLC
230 N. Sycamore St., Suite D
Lansing, MI 48933
(517) 482-8933