

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Court of Appeals No. 279845

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

Jodi M. Latuszek (P70547)
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

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

**APPELLANT'S RESPONSE TO APPELLEES' MOTION
TO SET ASIDE STAY OF GRANDPARENT VISITATION**

I. This Court properly exercised its authority to enter a stay of proceedings pursuant to 710.65(2).

Contrary to the Atwood's assertion, the Adoption Code is applicable to the order that was stayed by the trial court in this instance. The Adoption Code permits this Court to enter a stay pending appeal when there is "good cause" and "on such terms that are deemed just." MCL 710.65(2). The Trial Court's Order awarding grandparent visitation expressly invoked jurisdiction pursuant to MCL 710.45(8), which is part of the Adoption Code. The Trial Court's actions, thus, render other provisions of the Adoption Code applicable. Also, the proceedings were in the context of a consent hearing under MCL 710.45 and thus, the Adoption Code is applicable. This case defines good cause to enter a stay pending appeal where the trial court awarded extensive grandparent visitation to maternal grandparents of their biological grandchildren even though the parental rights of the children's biological parents had been terminated two years ago.

Even if the provision regarding motions for stay contained within the Adoption Code is not applicable to this instance, it is common practice for this Court to waive the requirements of MCR 7.209 where a motion in the trial court would be futile. IOP MCR 7.209(A)(3) provides:

If the moving party believes that a prior motion in the trial court would be futile or if the moving party cannot provide the trial court transcript and/or order denying stay or bond, a motion to waive those requirements must be filed with the motion for stay or bond in the Court of Appeals. A separate motion fee is required for the motion to waive the requirements of MCR 7.209(A)(2) or (3).

In the case at bar, a motion for stay in the trial court would have been futile and time was of the essence because the order for grandparent visitation was scheduled to take

effect just days after the emergency appeal was filed. The order was to take effect Friday, August 10, 2007 and would have allowed the grandparents to take the children for the entire weekend. In addition, this Court was closed on Friday, August 10, 2007, which left the Appellant with no time to go through the Trial Court first.

Appellant did not originally file a motion to waive the requirements of MCR 7.209 along with the motion for stay because the authority for the motion for stay pursuant to MCL 710.65 was amply supported by the facts of this case. Just a small sample of testimony from the hearing illustrates that the stay was imperative for the girls' well-being. For instance, the children's therapists testified that the girls' displayed regressive behavior during and shortly after visits with their grandparents. (TT, 8/2/07 at 160-161). The children's foster mother also testified that the girls' behavior worsened due to visits with the grandparents and that she believed the visits to be harmful to the children. (TT, 8/2/07 at 137).

In addition, these children had originally been removed from their grandparents' home for violating the termination order and allowing the girls to have contact with their biological mother. (Parental Investigation, 8/13/05). The order terminating parental rights indicates that the girls are to have no contact with their mother. (Parental Investigation, 8/13/05).

Grandparent visitation is not only inappropriate given the facts of this case, it is also unsupported by law. Grandparent visitation rights are usually derivative in nature and dependent on the biological parent's rights being in tact. In this case, there is no right to visitation by the biological grandparents. Such extensive visitation will only confuse the

girls and disrupt any stability that has been achieved in their troubled lives.¹ Progress has been made toward the adoption of these girls and visitation only disrupts this prospect given the girls' fragile emotional state.

Further, the Trial Court's order requires the foster mother to take the children to their grandparent's home any time the children are not with her. This is unacceptably burdensome and unreasonable. The foster mother should not need to be fearful of contempt charges if she chooses to find a babysitter for the children or leave them with her own parents with whom she has a very close relationship.

However, allowing the children to have any visitation, let alone extensive visitation, with the grandparents could impact them emotionally and create confusion. Given the testimony regarding the girls' regression and problems with behavioral issues when the grandparents are permitted to visit, the risk of further regression that could possibly be caused by further visitation is far too great.

The testimony included drug use in the grandparents' home while the children were in other rooms and outside. Additionally, given the grandparents' prior lapse in judgment allowing contact with their drug-addicted daughter, visitation with the grandparents pending appeal potentially places them in grave danger.

If this Court determines that a motion to waive the requirements was necessary to effectuate a stay of the trial court's grandparent visitation order, Appellant will immediately furnish the required motion and fee.

¹The girls have been living with their foster mother for over two years and refer to her as "mommy." They are on a stable path toward permanency with the foster mother, whose adoption petition is awaiting the resolution of this case on consolidated appeal..

II. This Court has not addressed whether the grandparent visitation statute applies to situations like the one presented by this emergency appeal, and therefore, the applicability of the statute is an improper ground for lifting the stay of the grandparent visitation order.

Appellee argues that the grandparent visitation statute specifically provides that the grandparents have standing to pursue visitation in situations like this one, and therefore the stay of grandparent visitation should be lifted. This dramatic conclusion is largely based on this Court's recently published opinion in *Brinkely v Brinkley*, ___ Mich App ___; ___ NW2d ___ (Decided October 16, 2007, Docket No. 269725). However, in *Brinkley*, this Court did not hold that the grandparent visitation statute always applies to situations where both natural parent's rights have been terminated and the grandparents have been denied consent to adopt. In fact, *Brinkley* addressed the presumption against visitation that is automatically created when two natural parents sign an affidavit opposing grandparent visitation. *Brinkley* addressed a scenario involving two fit parents and a set of natural grandparents, that is hardly the factual scenario presented in this instance.

Further, the *Brinkley* panel's brief discussion of when the grandparent visitation statute applies is strictly dicta and hardly provides the black letter law on the proper statutory construction of MCL 722.27b as is required by the issues presented in the instant appeal. Consequently, the *Brinkley* decision is not a proper basis to reverse a stay of the grandparent visitation order. Notably, Appellant only requested that this Court stay the grandparent visitation order, yet the Court sua sponte stayed all of the lower court proceedings in this case. In order for this Court to undo the stay of grandparent visitation order, it would be required to undo the stay of all proceedings. This conclusion hardly seems logical considering that nearly three months have passed since the stay was

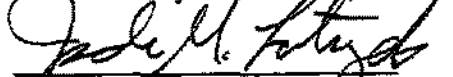
entered. If this Court lifts the stay of grandparent visitation, the girls will be forced to have immediate visitation with their grandparents, which the record reflects could be emotionally detrimental given their extreme sensitivity and attachment issues.

CONCLUSION AND REQUEST FOR RELIEF

Appellant respectfully requests that this Court maintain the Stay pursuant to MCL 710.65(2) as good cause has been shown that the August 6, 2007 allowing grandparent visitation could endanger the girls emotionally. Progress toward permanent placement has been made and the further visitation with the grandparents will only disrupt any sense of stability that has been achieved in the two years that the girls have been with their foster mother. Additionally, if this Court finds that MCL 710.65(2) did not provide authority for the Stay, Appellant requests that this Court continue the Stay, waiving the requirements of MCR 7.209, and require Appellant to pay the required motion fee.

Date: November 6, 2007

Respectfully Submitted,



Jodi Latuszek (P70547)

Speaker Law Firm, PLLC

Attorneys for Appellant

230 N. Sycamore St., Ste. D

Lansing, MI 48933