STATE OF MICHIGAN
IN THE 27TH JUDICIAL CIRCUIT COURT – FAMILY DIVISION
NEWAYGO COUNTY

IN THE MATTER OF:

ALYSSA ANN KEAST and AMBER MARIE KEAST,	Case No. 05-06388-NA; 06-505-AF and 06-506-AF
Minors.	HON. TERRENCE A. THOMAS

Shon A. Cook (P51452)
Williams, Hughes & Cook, PLLC
Attorney for Petitioners Timothy and
Barbara Atwood
120 W. Apple Ave – PO Box 599
Muskegon, MI 49443-0599
(231) 728-1111

H. Daniel Beaton, Jr. (P43336)
Maribeth A. Dickerson (P68975)
Michigan Department of Attorney General
Education & Social Services Division
Attorney for Respondent Michigan
Department of Human Services
PO Box 30758
Lansing, MI 48909
(517) 373-7700

RESPONDENT'S MCL § 710.45 CLOSING BRIEF

NOW COMES the Department of Human Services Michigan Children's Institute ("MCI"), through its legal counsel, the Michigan Attorney General's Office, and provides as requested by the Court its written closing brief.

Issue

Whether the MCI Superintendent, William Johnson, acted arbitrarily and capriciously when he denied Petitioners' request for consent to adopt.

Standard of Review and the Burden Of Proof

A. If a hearing is held pursuant to MCL 710.45, there is a very high burden of finding by clear and convincing evidence that he MCI Superintendent acted arbitrarily and capriciously in order to obtain a reversal of the MCI Superintendent's denial of consent. The Petitioners have not met that high burden.

MCL 710.45 provides for a hearing to be held to determine whether the denial of the consent to adoption was arbitrary and capricious. The burden rests with the petitioners, which in this case are the individuals denied consent.[1] The burden is very high. The court must find by "clear and convincing evidence" that the denial was "arbitrary and capricious."

The clear and convincing evidence standard is the most demanding evidentiary standard in a civil case.[2] Evidence is clear and convincing when it:

> "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.". . . Evidence may be uncontroverted, and yet not be "clear and convincing." . . . Conversely, evidence may be "clear and convincing" despite the fact that it has been contradicted.[3]

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[1] A petitioner cannot meet the burden without presenting relevant and material evidence through testimony or documentary evidence.

[2] *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995).

[3] *In re Martin*, 450 Mich at 227, quoting *In re Jobes*, 108 NJ 394, 407-408; 529 A2d 434 (1987).

In *Bundo v Walled Lake*, the Michigan Supreme Court adopted definitions of "arbitrary" and "capricious" used by the United States Supreme Court[4]:

> Arbitrary is: "[W]ithout adequate determining principle. . . . Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . .decisive but unreasoned."
>
> Capricious is: "[A]pt to change suddenly; freakish; whimsical; humorsome."[5]

In the case at bar, the denial of consent specifies the reasons for the denial.[6] The reasons expressed in the denial of consent can be generally described as: (1) the prospective adoptive parents failed to ensure the children were not exposed to further emotional/physical harm through allowing unapproved, unsupervised visits with the biological mother; (2) intergenerational substance abuse in the prospective adoptive parents home consisting of admitted drug use with petitioner's daughter, who lost her parental rights to the children at issue due to drug use; and (3) lack of insight into the children's mental health issues and underlying behavioral problems as well as the significant progress the children have made while residing in their long term foster care home that provides a validating and supportive environment. These reasons will be substantiated by testimony later in the brief.

These are all good reasons for denial of consent. To wit, the Petitioners have not demonstrated the MCI Superintendent acted arbitrarily and capriciously by clear and convincing evidence because there were good reasons to deny consent.

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[4] *Bundo v Walled Lake*, 395 Mich 679; 238 NW2d 154 (1976).
[5] *Bundo*, 395 Mich at 703, fn 17, quoting *United States v Carmack*, 329 US 230, 243; 67 S Ct 252; 91 L Ed 209 (1946).
[6] Attachment A.

B. Case law establishes a very narrow review of the denial of consent pursuant to MCL 710.45, which is not *de novo*, nor a custody dispute, nor an opportunity to demonstrate why consent should have been granted.

The benchmark case interpreting hearings under MCL 710.45 is the Michigan Court of Appeals case in *In re Cotton*.[7] *Cotton* is very important for several of its conclusions. First, the panel in *Cotton* recognized that a hearing under MCL 710.45 is not *de novo* allowing the court to substitute its judgment for that of the MCI Superintendent. Second, the focus of the hearing is whether the decision was arbitrary and capricious and not whether it was the "correct" decision. Third, the hearing is not for the petitioners to present a case for why they should have been granted consent. It is for the petitioners to demonstrate the denial of consent was arbitrary and capricious. Fourth, if a good reason exists for the denial of consent, it cannot be said that the denial was arbitrary and capricious. The Michigan Court of Appeals has stated that **"it is the absence of any good reason to withhold consent, not the presence of good reasons to grant it that indicates that the representative was acting in an arbitrary and capricious manner."**[8] (Emphasis added.)

A hearing under MCL 710.45 is very limited. A petitioner cannot prevail if all that can be proffered are reasons for why consent could have been granted or an alternate theory, even if plausible, that preponderates against the denial of consent. A petitioner cannot prevail by disparaging the individual who might have been granted consent in an attempt to make the matter a custody battle. In this case, the MCI Superintendent had

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[7] *In re Cotton*, 208 Mich App 180; 526 NW2d 601 (1994) (Attachment B).
[8] *Id* at 185.

more than one good reason to deny consent. He testified about his inquiry, reasoning, and information utilized to proffer those good reasons.

Application of Law to Facts of this Case

A. Testimony from the decision maker, the MCI Superintendent William Johnson, established his decision was not made in an arbitrary and capricious manner but was based on a thoughtful analysis of the information presented to him from multiple sources including the Petitioners themselves and fact finding by the MCI Superintendent.

The MCI Superintendent, William Johnson ("Mr. Johnson"), provided testimony about the information, analysis, and decision making processes he engaged in while evaluating the Petitioners, the Atwood's, request to adopt Alyssa and Amber Keast. Specifically, at the February 7, 2007, hearing, Mr. Johnson testified that:

- Mr. Johnson received written documents that contained information compiled from numerous sources [Tr, pp 55, 61, 62, 72].
- Mr. Johnson also received and reviewed the Atwood's written rebuttal information and letters of reference on their behalf. [Tr, p 55]. Mr. Johnson testified that it was his review of this information that was partially what caused him to further check into the recommended denial of consent [Tr, p 79].
- Mr. Johnson did not rely solely on the initial information presented and followed up when he was skeptical of that information [Tr, pp 64, 71]. Even though the head of a state agency has a reasonable expectation to rely on information from state contracted licensed agencies, Mr. Johnson testified he checked further into the accuracy of the information initially presented to him.[Tr, pp 64, 71].
- Mr. Johnson convened a phone conference with the regional adoption worker, Newaygo and Lake County DHS, and Bethany Christian Services staff to further

inquire into the Atwood's Adoptive Family Assessment information. He did this upon receiving the information from DHS and Bethany Christian Services that recommended denial of adoption consent to the Atwoods [Tr, pp 60-61, 73].

- Mr. Johnson testified he wanted to give the grandparents "a second look" in order to refute or confirm what was in the agency information presented to him regarding the agencies' recommendations to deny adoption to the grandparents [Tr, p 74]. Mr. Johnson testified this informal interagency conference allowed him to obtain more information beyond what he was initially presented with [Tr, p 73].
- Mr. Johnson testified that the informal interagency conference allowed him to speak with the workers who had been involved with the girls and their biological family over the past two years [Tr, p 74]. Thereby allowing Mr. Johnson the opportunity to speak with professionals that were familiar with the girls and their family history prior to the termination of parental rights and commitment to MCI [Tr, p 74].
- A separate case conference with Bethany, DHS and the Petitioners was held in order to allow the Petitioners the opportunity to discuss and contest information in the Adoptive Family Assessment after the Petitioners received the initial recommendation by Bethany Christian Services and DHS to deny them consent to adopt. Petitioners were also allowed the opportunity to supplement the record with any additional information they thought would be useful for DHS to consider in making its recommendation on adoption [Tr, p 78].

- Mr. Johnson testified that as the MCI Superintendent, he can decide a request to adopt differently than what the agencies recommend [Tr, p 74]. He is not bound by the recommendations he receives and he engages in further information gathering when warranted.
- Mr. Johnson testified that a partial basis of his concern about the Petitioners adopting the girls was due to the multi-generational substance abuse in Petitioners' family [Tr, p 77].
- Mr. Johnson exercised his professional judgment when he determined that information and direct discussion about this case with Newaygo County DHS, Lake County DHS, and Bethany Christian Services to get a better understanding of the history that led to the children being removed was adequate and that he did not need to read a verbatim written substance abuse or psychological report. Also of note, these evaluating practitioners functioned in an assessment role, not the role of an ongoing provider who maintained a long term relationship with Petitioners.

Mr. Johnson's testimony establishes that he engaged in an inquisitive and thoughtful decision making process. Under the *Cotton* standard and subsequent case law, Mr. Johnson's consideration of information from multiple sources and further investigation into that information cannot reasonably be construed as him making a decision in an "arbitrary and capricious" manner.

B. Testimony from Petitioner, Mr. Atwood, reinforced the legitimacy of the basis for the adoption consent denial.

Although the transcripts were not yet transcribed at the time this brief was due for submission, the substance of Mr. Atwood's testimony reinforced the legitimacy of the basis for the adoption consent denial.

- Mr. Atwood testified there is "social" use of illegal drugs, seemingly oblivious to the undisputed fact that possession and use of any degree is illegal. This is his professed view point despite the fact that illegal drug use is what precipitated his own daughter being unable to provide safe parenting to the Keast minors. Mr. Atwood's stance on drug use is that, even though a drug is illegal, there is "social use" of a drug. This type of statement demonstrates an attitude of acceptance toward drug use. Given the history of drug use in the family, the children would be at risk to become users and to continue the intergenerational pattern if the children were to reside in this type of environment.
- Mr. Atwood confirmed he had smoked marijuana with his daughter, the mother of the children who had her parental rights terminated for drug use.
- Mr. Atwood confirmed that the children's biological mother was allowed to take the children unsupervised other than for purposes of going to church.

C. Testimony of the Petitioners' Expert Established Petitioner, Mr. Atwood, was not forthcoming with all the necessary information the expert needed upon which to base an accurate opinion.

- Petitioner submitted testimony from psychologist Dr. Griffieon regarding his parenting ability and psychological status. However, when directly

questioned he stated that Mr. Atwood "did not specifically say anything about marijuana use with his daughter" [Tr, p 38].

- When further questioned about the effect of knowing about Mr. Atwood's use of marijuana with his daughter and how it would have influenced his opinion of Mr. Atwood's ability to be a good parent, Dr. Griffieon stated, "In reference to how it would influence his overall parenting, you know, that would – I would say that it would probably have had some influence. **It would have to have some influence, if it were a proven fact in this case**" [Tr, p 40, Emphasis added]. Mr. Atwood's own admission makes the event in question a proven fact in this case.

Brief Response to Opposing Counsel's Findings of Fact and Law Submitted on the Date of the May 23, 2007 Hearing Continuance

At the May 23, 2007 hearing continuance, counsel for Petitioners presented the Court and opposing counsel with "Proposed Findings of Fact and Law." This document was not requested by the Court nor previously noticed to opposing counsel. In addition to objecting to the submission of this document, Respondent notes there are omissions and inaccuracies throughout the document. However, the following statements require to be addressed specifically in the event this unsolicited document is accepted as part of the record.

- At page 5, Petitioners assert that Respondents have submitted to the Court that "any reason is sufficient for the Michigan Judicial [*sic*] Institute to deny consent. However, that is simply not true." Petitioner is correct in that this is not true. Respondent has briefed the issue for this Court and opposing counsel and cited

published court opinion that states an absence of any **good** reason would render a decision arbitrary and capricious.[9]

- At page 6, Petitioner notes that "[s]imply not liking a candidate for adoption or having a bias against the candidate does not suffice as a basis for denial." Respondent has set forth valid concerns based in fact for the denial of consent to Petitioners. "Not liking" or "having a bias" against the Petitioners are <u>not</u> a component of these reasons.
- At page 6, Petitioner asserts that the MCI Superintendent's decision was arbitrary and capricious because he did not review the verbatim psychological reports and drug and alcohol assessments of Tim Atwood even though the Superintendent was provided with summaries of this information. Despite having the reasonable expectation that a licensed agency that is contracted with the state would provide reliable information, Petitioners' line of argument is negated by a 2003 unpublished opinion of the Michigan Court of Appeals[10] where the court states that no legal error was committed by the trial court in its review of a decision to withhold consent when the court did not allow "irrelevant questioning offered by petitioners to refute the accuracy of information in reports considered by Judge Carpenter. . . . **The trial court properly recognized that the scope of the hearing did not involve the correctness of information in the reports on which Judge Carpenter relied when deciding whether to withhold consent . .**

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[9] *In re Cotton*, 208 Mich App 180; 526 NW2d 601 (1994) (Attachment B).
[10] *In re Couturier and Hernandez*, 2003 Mich App LEXIS 2612 (2003) (Emphasis added) (Attachment C).

."[11] Petitioners have not asserted that the summarized information presented to the MCI Superintendent was incorrect, just that he was arbitrary and capricious in not requesting and reviewing the actual reports.

- Beginning at page 6, the Petitioners other proposed "expected" findings of this Court are addressed within other sections of this closing brief.
- At page 3, Petitioners' Application for Leave to Appeal referenced in the document has been denied.[12]

Closing

The case at bar is solely about the decision making process engaged in by the MCI Superintendent and whether his denial of consent to adopt was reached in a reasoned, logical manner, or in an arbitrary and capricious manner. The reasons the Superintendent denied consent were based on information submitted from multiple sources, including information from the Petitioners. After reviewing the information, the Superintendent initiated further information gathering. The information he relied upon would be the type of information that would reasonably be considered to be reliable. Furthermore, Petitioner, Mr. Atwood's, testimony substantiated the very concerns that were the basis of the denial of consent: intergenerational substance abuse, failing to properly protect the children from the biological mother, and a lack of insight.

Petitioners try to assert that the MCI Superintendent not directly reviewing the psychological and substance abuse reports of Mr. Atwood was somehow arbitrary and capricious. The MCI Superintendent received a summary of these reports. He not only

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[11] *Id* at 2.
[12] Attachment D.

considered that information, but also obtained further oral historical information from both Bethany Christian Services and DHS workers who had been involved with these children for the entire period of the parental reunification efforts and ultimate parental rights termination. Furthermore, Mr. Atwood's own psychological expert testified he was not told by Mr. Atwood about information that would have directly impacted his evaluation of parenting ability. Informing one's psychologist of important information is a client responsibility, not the responsibility of a third party agency.

Petitioners assert they were not informed about the safety issues involved when allowing their daughter to take the children unsupervised outside of the narrow scope of her attending church with the girls. The extent of information that Petitioners were provided about DHS concerns for unsupervised parenting time remains a fact in dispute. Petitioners asserted knowing less, and DHS staff asserted full information sharing. What is not in dispute is the importance of exercising common sense when functioning as a parent. Any reasonable person would know that a drug raid on a home with children present means that those children were exposed to illegal and dangerous activities centered around the drug culture. A reasonable person would be able to determine that unstructured, unsupervised time with a parent involved in that drug culture and who is not yet involved in rehabilitation-treatment efforts could again expose the children to that unsavory environment. The approved unsupervised time for the mother to take the children to church was the result of a dispositional court hearing. The amount of time involved to take children to church and back is easily determinable and regularly occurs on a specific day - Sunday. A responsible person in a parenting role would be able to determine for himself or herself what is or is not a safe practice for the children.

However, Petitioners, despite claiming the ability to exercise good judgment then assert they had to be specifically "told" what to do. This is an inherent contradiction and should call into question the reliability of the Petitioners' testimony. This lack of judgment adds further support to the basis of the denial to consent to adopt. Furthermore, what happens if they are given custody, eventually adoption rights, and no agencies are then involved? Nobody will be there to "tell them" what to do.

This case involves a clear pattern of refusal to accept self-responsibility for choices made and actions either taken or not taken by the Petitioners. Events that resulted in negative outcomes have been attributed to their daughter Erika's fault, DHS' fault, society's fault or even the fault of one but not the other spouse.[13]

In this case, the MCI Superintendent had good reasons to deny consent. Therefore, the Petitioners cannot demonstrate by clear and convincing evidence that the MCI Superintendent acted arbitrarily and capriciously as required by MCL 710.45. Moreover, the case law is clear that this Court should not substitute its judgment for that of the MCI Superintendent.

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[13] Transcripts from May 23, 2007 and May 24, 2007 were not yet available at the time this closing brief was prepared. However, testimony by Mrs. Atwood deflected responsibility for poor judgment from her husband to herself. Mr. Atwood testified there is "social" use of illegal drugs, seemingly oblivious to the undisputed fact that possession and use of any degree is illegal. This is his professed view point despite the fact that illegal drug use is what precipitated his own daughter being unable to provide safe parenting to the Keast minors. Both Petitioners blame DHS for not adopting the girls out to biological family, allegedly not telling them certain information, trying to have a previously noticed case conference meeting without them, etc.

WHEREFORE, DHS and MCI based upon the foregoing, and the information and testimony submitted at the hearing, respectfully requests this Honorable Court to uphold the decision of the MCI Superintendent and deny Petitioner's Section 45 motion and dismiss the Atwood's petition for adoption.

Respectfully submitted,

Michael A. Cox
Attorney General

Maribeth A. Dickerson

Maribeth A. Dickerson (P68975)
Assistant Attorney General
Education and Social Services Division
P.O. Box 30758
Lansing, MI 48909
Telephone: (517) 373-7700

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