

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In re Rocky and Elisa Guerrero, Minors.

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RAYMOND GUERRERO,

Petitioner-Appellant,

v

MICHIGAN CHILDREN'S INSTITUTE,

Respondent-Appellee,

and

FAMILY INDEPENDENCE AGENCY,

Appellee.

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UNPUBLISHED

October 3, 2000

No. 221383

Genesee Circuit Court

Family Division

LC No. 98-014035

Before: McDonald, P.J., and Sawyer and White, JJ.

PER CURIAM.

Petitioner appeals as of right from the family court's order denying his motion for a hearing and dismissing his challenge to the withholding of consent to adopt his siblings Rocky Guerrero (DOB 7-10-84) and Elisa Guerrero (DOB 7-22-89). We affirm.

After the deaths of the natural parents of petitioner and his siblings, other adult siblings were granted guardianship of Rocky and Elisa but failed to provide adequate care. The children were placed in foster homes. Petitioner sought to obtain visitation in the Oakland Circuit Court. He also sought respondent's consent to adopt his siblings; however, respondent denied the request. By letter dated November 19, 1998, petitioner was informed that his request was denied and that he had the right to file a motion, commonly referred to as a "§ 45 motion,"<sup>1</sup> for a hearing to determine whether the withholding of consent was arbitrary and capricious. Unknown to petitioner, the children's foster

<sup>1</sup> MCL 710.45(3)(a); MSA 27.3178(555.45)(3)(a).

parents filed a petition to adopt them. Respondent consented to

the adoption, and pursuant to an order entered on December 1, 1998, the children were formally placed in their foster parents' home in contemplation of their adoption. Section 45 provides that if consent has been given to another petitioner and the child has been placed with the other petitioner by the court, a motion shall not be brought under § 45 after fifty-six days following the entry of the order placing the child.

In January, 1999 petitioner's counsel attempted to file a § 45 motion in Oakland Circuit Court; however, he was informed that the children were located in Genesee county and the matter should be filed in the Genesee Circuit Court. Counsel then called the Genesee court, and sent the motion there for review at a court employee's direction. In April 1999, petitioner filed a § 45 motion in that court. The family court denied petitioner's motion on the ground that it was not accompanied by a consent or a petition to adopt as required by MCL 710.45(1) and (2); MSA 27.3178(555.45)(1) and (2), and that it was untimely.

This case presents a question of law, which we review de novo on appeal. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

Petitioner argues that he was entitled to actual notice of the December 1, 1998 order placing the children with their foster parents in contemplation of their adoption, and that the time for filing his § 45 motion was tolled until he received such notice.

We agree with respondent that petitioner was not entitled to notice as an interested party "petitioner" under the statute, MCL 710.24a(1); MSA 27.3178(555.24a)(1), because he had not petitioned to adopt the children. However, we agree with petitioner that it would have been appropriate to provide him notice under MCL 710.24a(6); MSA 27.3178(555.24a)(6), which provides that "[i]n the interest of justice, the court may require additional parties to be served," given respondent's knowledge of petitioner's sustained interest in the matter.

We nevertheless affirm the court's rejection of petitioner's request to challenge the denial of consent beyond the fifty-six-day period. The court acknowledged that it might have ordered that petitioner receive notice had it been aware of the situation earlier. However, the court declined to conclude that such notice was required retroactively under the circumstances that so much time had passed and that reopening the matter would be disruptive to the children. The court found significant that petitioner never commenced a proper § 45 proceeding because a petition for adoption was never filed, either in the Oakland Circuit Court or the Genesee Circuit Court.

Because petitioner failed to commence a proper § 45 petition at any time, the notice to which petitioner may have been entitled was notice left to the discretion of the court under § 24a(6), and the court thoroughly considered all the circumstances, we conclude that the court

did not abuse its discretion in concluding that the fifty-six day bar should not be excused, notwithstanding petitioners lack of notice of the December 1 order.

Affirmed.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Helene N. White