

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

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In the Matter of M.S.B., Minor.

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DWAYNE CURTIS SCHANG,

Petitioner-Appellant,

v

EDWARD DENNIS NALL and DEVOTA  
SHERYL NALL,

Respondents-Appellees.

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UNPUBLISHED

April 9, 2002

No. 229691

Livingston Circuit Court

Family Division

LC No. 00-003408-AD

Before: K. F. Kelly, P.J., and Doctoroff and Cavanagh, JJ.

PER CURIAM.

Petitioner appeals as of right the trial court's order reversing the decision of the Family Independence Agency (FIA) granting him permission to adopt the minor child. We reverse the trial court's order and remand for further proceedings. This case is being decided without oral argument pursuant to MCR 7.214(E).

The minor child was born to petitioner's former wife. Petitioner and his former wife were the parents of two children and, initially, petitioner believed himself to be this child's father. However, DNA testing proved that this was not the case. Petitioner received custody of his children and also of his former wife's daughter from a previous marriage.

The FIA sought custody of the child on the ground that she had been sexually abused by her biological father. The child was placed in foster care with respondents. The trial court terminated the parental rights of the child's biological parents and placed the child with the FIA's Michigan Children's Institute (MCI) for adoption.

Petitioner and respondents sought to adopt the child. The MCI gave consent to petitioner to adopt the child. The MCI indicated that both petitioner and respondents could offer the child a stable and satisfactory home, but concluded that the possibility of placing the child in a home with a psychological parent, petitioner, and three half siblings to whom the child was strongly attached constituted extraordinary circumstances sufficient to override the FIA's policy of giving first consideration for adoption to foster parents who had cared for a child for at least one year.

Respondents filed a petition pursuant to MCL 710.45, seeking a determination that consent to their adoption of the child had been withheld arbitrarily and capriciously. The trial court concluded that the decision to give petitioner consent to adopt the child was arbitrary and capricious. The trial court emphasized that the FIA's policy was to give first consideration for adoption to foster parents if the child had been in their care for at least one year. It also found that the FIA acted arbitrarily and capriciously by elevating the fact that petitioner could offer the child a home with her three half siblings to an extraordinary circumstance that would override the FIA's policy. The trial court stated that it did not base its decision on any negative factors associated with the home environment offered by petitioner.

A party who has petitioned to adopt a child may move in the trial court for a determination of whether the withholding of consent was arbitrary and capricious. MCL 710.45(5). 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 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).

We reverse the trial court's order reversing the decision of the FIA granting consent to petitioner to adopt the child, and remand for further proceedings consistent with this opinion. The trial court found that the FIA placed undue emphasis on the fact that petitioner could offer the child a home with a psychological parent and three half siblings. The trial court also found that the FIA erred in considering this an extraordinary circumstance that would override the policy of giving first consideration for adoption to foster parents. The trial court did not take the position that the FIA's policy of giving first consideration to foster parents could not be overridden under any circumstances, and acknowledged that the dispute in this case was based on a disagreement as to what factors should have been considered in the decision regarding the child's adoption. The trial court simply disagreed that the required extraordinary circumstances were presented in this case, and impermissibly substituted its judgment for that of the FIA. Good reasons existed to grant permission to adopt the child to either petitioner or respondents, and good reasons existed to withhold permission from either party. The FIA's decision was not frivolous, and was not without factual support. Under the circumstances, clear and convincing evidence did not exist to show that the FIA acted arbitrarily and capriciously by determining that permission should be granted to petitioner. *Id.*, 185-186.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly  
/s/ Martin M. Doctoroff  
/s/ Mark J. Cavanagh