

STATE OF MICHIGAN
COURT OF APPEALS

In re ALICIANA GREENWOOD and LEON L.
GREENWOOD, Minors.

ALICIANA GREENWOOD and LEON L.
GREENWOOD,

UNPUBLISHED
August 26, 2008

Appellees,

and

LEO GREENWOOD and CYNTHIA
GREENWOOD,

Petitioners-Appellants,

v

DEPARTMENT OF HUMAN SERVICES, JOHN
NOWICKE, and WENDY NOWICKE,

No. 277366
Ingham Circuit Court,
Juvenile Division
LC Nos. 06-000214-AO,
06-000215-AO

Respondents-Appellees.

Before: Wilder, P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Petitioners appeal as of right the decision of the circuit court to dismiss their motion under MCL 710.45 for failing to show by clear and convincing evidence that respondent Department of Human Services' (DHS) decision granting respondents consent to adopt was arbitrary and capricious. We reverse and remand.

Petitioners are the paternal great uncle and great aunt of the four siblings, born in 1998, 1999, 2001, and 2002. The children born in 2001 and 2002 are the subjects of the current dispute (and will be referred-to herein as "the younger children"). Petitioners reside in Illinois. Respondents reside in Michigan.

In February 2003, all four siblings were removed from parental custody. On February 10, 2003, the siblings were placed into the respondents' foster home, and in April 2004, were

briefly (for three weeks) returned to parental custody. In 2004, the two older siblings were placed in foster care with a family not involved here. In June 2004, the parental rights of both parents to the four children were terminated.

In early 2005, petitioners learned that the siblings were in foster care. On April 24, 2005, a home study of petitioners' home was completed by the state of Illinois. In December 2005, the two older siblings were placed with petitioners as foster parents. Subsequently, an order was entered in which petitioners formally adopted the two older siblings. Later, both respondents and petitioners sought to adopt the younger children.

On October 26, 2006, Michigan Children's Institute superintendent William J. Johnson granted consent to respondents to adopt the younger children. The superintendent stated that the decision was based on his determination of the younger children's best interests. Petitioners filed a motion in circuit court under MCL 710.45, protesting the decision as arbitrary and capricious.

At the hearing on petitioners' motion, petitioners presented the testimony of Dr. Michael Katz, a psychologist. Dr. Katz testified in part that, in his opinion, there was an insufficient evaluation of the impact that separating the siblings (having two siblings adopted by one family and the other two siblings adopted by another) would have on the younger children, and that the information available to the superintendent was incomplete when he rendered his decision. The trial court precluded testimony from Dr. Katz as to his opinion on what additional evaluation should have been conducted. On cross-examination, Dr. Katz acknowledged that the factors the superintendent did rely upon in his placement decision were important and valid factors. He stopped short, however, of agreeing that there were "good reasons" for the superintendent's placement determination. Petitioners also offered the testimony of Harold Shinley Gazan, whom petitioners sought to qualify as an expert in social work. Petitioners intended Dr. Gazan to testify concerning administrative issues as they pertain to foster care and adoption placement, more specifically, that the superintendent failed to follow DHS protocol or Foster Care Review Board recommendations in reaching his decision. The circuit court declined to hear this testimony on the basis that any testimony Mr. Gazan could offer in these subject areas would be irrelevant. The circuit court then heard the testimony offered by Daphne Shane, an adoption specialist for the state of Michigan. However, before Shane completed her testimony the trial court adjourned the proceedings.

When the proceedings resumed and before petitioners could present the balance of Shane's testimony, respondents moved to dismiss the case under MCR 2.504(B)(2). Respondents asserted that given Dr. Katz' testimony that the superintendent had considered valid reasons in making his placement decision, and further, since Dr. Katz' testimony was the only expert testimony on the record that would be considered by the circuit court, as a matter of law, petitioners were unable to show that the superintendent's decision was arbitrary or capricious. Petitioners opposed respondent's motion, and after argument, the trial court granted the motion to dismiss. In so ruling, the trial court concluded that petitioners had presented evidence seeking to show that the consent granted to respondents was arbitrary and capricious, and that this evidence failed to show that the denial of consent to petitioners was arbitrary and capricious. In a subsequent written opinion, the circuit court reiterated that it was "not the presence of good reasons to grant [consent to adopt to petitioners] that indicates that the superintendent was acting" arbitrarily, but rather the absence of any good reason to withhold consent from

respondents, that governed whether DHS had acted in an arbitrary and capricious manner. The circuit court further stated:

Based on the Petitioner's [sic] own expert witness, there is clear and convincing evidence that the decision of the superintendent was not arbitrary and capricious. The Petitioner [sic] did not have additional expert witnesses subpoenaed to rebut his own expert; therefore, the Petitioner [sic] cannot meet his burden of proof by clear and convincing evidence that the superintendent acted arbitrarily or capriciously.

This Court granted petitioners' application for leave to appeal.

Petitioners first argue that the circuit court erred by granting respondents' motion to dismiss before petitioners' had concluded presenting all of their evidence. We agree.

In a challenge to the denial of an adoption petition pursuant to MCL 710.45, "the petitioner may file a motion with the court alleging that the decision to withhold consent was arbitrary and capricious." MCL 710.45(2). "Unless the petitioner establishes by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court shall deny the motion described in subsection (2) and dismiss the petition to adopt." MCL 710.45(7).

MCR 2.504(B)(2) states:

In an action tried without a jury, *after* the presentation of the plaintiff's evidence the defendant, without waiving the right to offer evidence if the motion is not granted, may move for dismissal on the ground that on the facts and the law the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517. [Emphasis added.]

A lower court's decision to admit or exclude evidence is discretionary and is reviewed on appeal for an abuse of that discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). An abuse of discretion is a ruling that is not within the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

In *In re Cotton*, 208 Mich App 180, 185; 526 NW2d 601 (1994), this Court stated that in a hearing to determine whether the denial of the consent to adopt was an arbitrary and capricious decision,

the focus of such a hearing is not what reasons existed to authorize the adoption, but the reasons given by the representative for withholding the consent to the adoption. That is, if there exist good reasons why consent should be granted and good reasons why consent should be withheld, it cannot be said that the representative acted arbitrarily and capriciously in withholding that consent even though another individual . . . might have decided the matter in favor of the

petitioner. Rather, 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.

As noted by our Supreme Court:

The words “arbitrary” and “capricious” have generally accepted meanings[:]

* * *

Arbitrary is: “[Without] adequate determining principle[:] [f]ixed 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: “[Apt] to change suddenly; freakish; whimsical; humorsome.” [*Goolsby v Detroit*, 419 Mich 651, 678; 358 NW2d 856 (1984) (citation and quotation marks omitted).]

Thus, in the instant case, any determination of whether the superintendent’s decision to deny consent to adopt to the petitioner was arbitrary and capricious, necessarily entails an examination of the superintendent’s articulated reasons for granting consent to respondents, and whether those reasons were valid in light of the specific circumstances of the children. Thus, whether the superintendent had before him a complete evaluation of the circumstances of the children, in advance of his adoption decision, would be relevant in a determination of whether his decision was arbitrary and capricious. *Goolsby, supra* at 678.

In this regard, we conclude that the circuit court abused its discretion in precluding Dr. Katz from testifying as to the additional factors he believed should have been evaluated, before the superintendent made his adoption determination, in precluding Mr. Gazan from testifying, and in dismissing this matter before Shane and petitioners’ other witnesses could testify on relevant matters concerning the circumstances of the children. We therefore reverse and remand for petitioners to have an opportunity to present relevant evidence in support of their case.

Petitioners next argue that the circuit court erred in disallowing discovery in preparation for the hearing under MCL 710.45, and in granting respondents’ request for a protective order. Regarding petitioners’ motion for production of documents, the circuit court stated only that the motion was “premature, but may be renewed,” and that the petitioners’ “[m]otion for supplemental evaluation of children [is] denied.”

Discovery rulings are reviewed for an abuse of discretion. *Muci v State Farm Mut Automobile Ins Co*, 478 Mich 178, 200; 732 NW2d 88 (2007). Similarly, a trial court’s decision whether to grant a protective order limiting discovery is reviewed for an abuse of discretion. *PT Today, Inc v Comm’r of Office of Financial & Ins Services*, 270 Mich App 110, 151; 715 NW2d 398 (2006), citing MCR 2.302(C)(1).

The scope of discovery is broad:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things It is not ground for objection that the information sought will be inadmissible at trial if *the information sought appears reasonably calculated to lead to the discovery of admissible evidence*. [MCR 2.302(B)(1) (emphasis added).]

Here, the trial court did not explain why it denied petitioners' request for an evaluation of the children, nor why their motion for release of DHS documents was premature. Although the court permitted petitioners to renew the motion, the court later denied the renewed motion, without explanation. Since we are unable to review the basis of the circuit court's decision, we vacate the order denying discovery, and permit petitioners to renew the request on remand. Should the circuit court exercise its discretion to deny or limit discovery, it should give an adequate explanation of the basis for its ruling.

We reverse and remand for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ William C. Whitbeck