

STATE OF MICHIGAN
COURT OF APPEALS

In re KYLE KUNTZMAN, Minor.

KYLE KUNTZMAN, Minor,

Appellee,

and

TERESA ORVIS,

Petitioner-Appellant,

v

DEPARTMENT OF HUMAN SERVICES,

Respondent-Appellee.

UNPUBLISHED
February 10, 2009

No. 286434
Tuscola Circuit Court
Family Division
LC No. 08-002719-AO

Before: Servitto, P.J., and Owens and K. F. Kelly, JJ.

PER CURIAM.

Petitioner appeals as of right the trial court's denial of her petition to adopt her grandchild. Because application of MCL 710.45 to the facts of this case did not deprive petitioner of her due process rights, and the decision withholding consent to adopt the minor child was not arbitrary and capricious, we affirm.

MCL 710.45 states in part as follows:

(1) A court shall not allow the filing of a petition to adopt a child if the consent of a representative or court is required pursuant to section 43(1)(b), (c), or (d) of this chapter unless the petition is accompanied by the required consent or a motion as provided in subsection (2).

(2) If an adoption petitioner has been unable to obtain the consent required by subsection 43(1)(b), (c), or (d) of this chapter, the petitioner may file a motion

with the court alleging that the decision to withhold consent was arbitrary and capricious. . . .

* * *

(7) 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.

Here, petitioner, the maternal grandmother of the minor child, sought consent from the Superintendent of the Michigan Children's Institute to adopt the minor child after the child's parents' rights were terminated. The Superintendent withheld consent and petitioner, in accordance with the above, moved for a hearing before the trial court. At the conclusion of the hearing, the trial court concluded that petitioner had not established by clear and convincing evidence that the Superintendent's decision was arbitrary and capricious. The trial court thus denied petitioner's motion and dismissed her petition for adoption.

On appeal, petitioner first argues that the denial of her petition to adopt the minor child deprived her of her constitutional right to procedural and substantive due process. Specifically, petitioner argues that MCL 710.45(7), as applied, deprived her of her fundamental right to adopt her grandchild. We disagree.

This Court reviews preserved constitutional issues de novo. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005). Unpreserved constitutional issues are reviewed for plain error affecting substantial rights. *People v Carnes*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantive rights." *Id.* at 763.

"A procedural due process analysis requires a dual inquiry: (1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient." *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004) (internal quotation marks and citation omitted). A party claiming a violation of a constitutionally protected interest has the burden of establishing that they had a constitutional right that was interfered with. *Michael H v Gerald D*, 491 US 110, 125; 109 S Ct 2333; 105 L Ed 2d 91 (1989).

Petitioner has failed to cite to any authority, either binding or persuasive, that establishes that, as a grandparent, she has a fundamental right to adopt her grandchild. In the context of a question involving grandparenting time, this Court has stated that "grandparents do not have a fundamental right to maintain a family relationship with their grandchildren." *Brinkley v Brinkley*, 277 Mich App 23, 35; 742 NW2d 629 (2007). It follows that if grandparents do not have a fundamental right to maintain an ongoing relationship through regular visitation with their

grandchildren, they do not have a fundamental right to transform the nature of their relationship with their grandchildren through adoption.¹

Petitioner also argues that the clear and convincing standard of proof required by § 45(7) violates her substantive due process rights. Again, we disagree.

“The underlying purpose of substantive due process is to secure the individual from the arbitrary exercise of governmental power.” *Id.* at 29-30. Whether legislation violates substantive due process depends on the nature of the right affected. *Id.* If the challenged government action violates a fundamental right, the strict scrutiny test applies. *Id.* at 30. However, if a fundamental right is not involved, the rational basis test applies. *Id.*

As indicated above, grandparents do not have a fundamental right to adopt their grandchildren. Thus, the rational basis test is applicable. Petitioner acknowledges that protecting the health, safety, and welfare of children is a paramount governmental interest. We are satisfied that placing the burden on a party challenging government action in furtherance of protecting its paramount interest in protecting children is rationally related to that legitimate governmental purpose. See *id.*

Petitioner further argues that because there is a risk that MCL 710.45(7) could lead to erroneous decisions, this Court should review the constitutionality of the statute. Because this unpreserved argument is not outcome determinative, *In re App of Consumers Energy Co*, 278 Mich App 547, 568; 753 NW2d 287 (2008), we will not entertain it.

Finally, petitioner contends that the trial court erred in upholding the arbitrary and capricious ruling of the agency. We disagree.

“[A] family court’s review of the superintendent’s decision to withhold consent to adopt a state ward is limited to determining whether the adoption petitioner has established clear and convincing evidence that the MCI superintendent’s withholding of consent was arbitrary and capricious.” *In re Keast*, 278 Mich App 415, 423; 750 NW2d 643 (2008). A trial court’s application of a standard of law is reviewed for clear error. *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994).

A trial court reviewing a decision to withhold consent is limited to a review of the reasons cited in support of such decision. *In re Cotton*, 208 Mich App 180, 185; 526 NW2d 601 (1994). If the trial court finds that the superintendent had a good reason to withhold consent, it cannot be said that the decision was arbitrary and capricious. *Id.*

¹ In addition, this Court has held that grandparents do not have a protected interest to intervene in adoption proceedings. *In re Toth*, 227 Mich App 548, 554-555; 577 NW2d 111 (1998). Moreover, the United States Supreme Court has held that even a father’s genetic link to his child does not give rise to a fundamental right to custody of his child. See *Lehr v Robertson*, 463 US 248, 256-65; 103 S Ct 2985; 77 L Ed 2d 614 (1983).

In this case, the superintendent cited the following reasons as the basis for its denial of consent:

- **The ability and willingness to protect the children from harm and to meet the ongoing physical and emotional needs of the children.** Kyle was placed with Ms. Orvis due to problems the parents were experiencing which led to court intervention. The parents are young and do not have the ability or resources to provide suitable care for a child. Ms. Orvis returned Kyle to the custody of the parents without court approval thereby placing him at further risk of harm.
- **The length of time that the children have resided in stable, satisfactory environments and the desirability of maintaining continuity.** The children have resided in their respective home environments for a significant period of time in comparison to their young ages. Kyle has been in foster care since 10-19-2004 and has lived in his present home since 5-12-2006. [Two of Kyle's siblings] have resided in their present foster home since birth. . . . They have formed strong psychological attachments with their respective caregivers. It would be emotionally harmful to the children to be removed from their home environments.
- **The impact of deprivation and neglect that the children experienced, especially Kyle, and the risk of future harm.** As an infant while he was living in the custody of his birth parents, Kyle experienced conditions of deprivation and neglect which were made worse by the lack of adequate parenting ability of his young, inexperienced parents. He also has certain medical and physical needs which require an extraordinary level of care from a parent. He is making development and emotional progress while in his current placement. It is vitally important that he not experience any further disruptions in care or breakdown in suitable parental caregiving.
- **The importance of preserving sibling relationships.** Ideally it is desirable for siblings to be placed together in foster and adoptive homes. At the present time, Kyle is placed in one home with his younger sister who is still a temporary ward of the court. [Two other siblings] are placed in another foster home which was formerly Kyle's foster home. The families have worked together to maintain ongoing relationship[s] among the children. However, it appears that the extent of the needs of the children is such that it is in their best interests to be placed in separate home[s].
- **Possible placement with relatives.** It is consistent with DHS policy and philosophy to make efforts to place children with suitable relatives if doing so is consistent with the best interests of the child. In this case, efforts were made to place with Ms. Orvis but those were not successful.

Because of the reasons listed above, it is in the best interests of these children not to be adopted by Ms. Orvis.

At the § 45 hearing, the superintendent explained that in addition to the above-cited reasons, he based his decision to withhold consent, in part, on a psychological evaluation performed on petitioner. He testified that the psychological evaluation raised doubt as to petitioner's ability to recognize and put Kyle's needs over the needs of others. Further, he explained that petitioner's positive drug test for marijuana raised considerable doubt as to whether it would be in Kyle's best interest for petitioner to adopt him.

In concluding that the superintendent's decision to withhold consent to adopt from petitioner was not arbitrary and capricious, the trial court stated:

In this case, the denial of consent set forth a number of reasons, some of which have greater strength than others. But I observe for the record that the Department, among other things, set forth the ability and willingness to protect the children from harm. To meet the ongoing and physical and emotional needs of the children.

Although the report of [the psychological evaluation] is not before the Court, there are allusions to the contents of that report which entered the record without objection. The essence of which are that [the evaluator] believed that Ms. Orvis would not necessarily know how to place the children's needs ahead of her own.

It's also noted for the record that she did violate a court order, which was intended to protect the children from their parents. And she took it upon herself to return the children to the parents without the authority of the Court. Those are significant. Perhaps in and of itself not persuasive, but taken in light of all other things, significant.

Most importantly to me and certainly a very legitimate reason for the Department to deny Ms. Orvis' adoption petition is the length of time that the child has resided in a stable, satisfactory environment and desirability of maintaining continuity of that environment. . . .

* * *

The Department acted appropriately in denying Ms. Orvis'[s] petition to adopt for the reason that disruption would be, after a year and a half in a suitable environment which is willing to take him as an adoptive child, would be contrary to the best interests of the child.

There is a good reason. There are more reasons than one, but there is one reason overwhelming in my mind in addition to the others that I have mentioned. That overwhelming reason is continuity of custody. . . .

Petitioner does not deny that providing a stable environment for a child who has been in foster care for over a year was not a good reason to deny consent. Instead, petitioner focuses on the following observations made by the court: “The fact remains that Ms. Orvis did indeed disregard the court’s order as found by the DHS and that she did use drugs. Those are factors which can legitimately be considered by the agency in making its decision which petition for adoption to approve.” Petitioner argues that these observations show that the trial court erroneously concluded that she was a “drug abuser.” Moreover, petitioner argues that it is “patently arbitrary and capricious” to allow this one failed test to disqualify her from consideration as a proper adoptive parent.

Contrary to petitioner’s assertion, the court did not find that she was a “drug abuser.” The court concluded that she had used drugs; this is conceded by petitioner. Further, it is clear that the court did not focus solely on this circumstance when denying the appeal. Whether petitioner’s drug use was a one-time occurrence or habitual did not diminish the superintendent’s obligation to consider all factors before him when deciding what was in the best interest of Kyle.

Lastly, petitioner argues that the court erroneously relied on an unsubstantiated report that she had violated the court’s order after the preliminary hearing. It is clear from the record, as the court found, that petitioner violated its directives when she admittedly permitted Kyle to spend the night with his parents. Assuming that petitioner is arguing (as she did below) that she did not see the order or understand that she was not to have the child spend the night with his parents, petitioner’s argument is one of credibility, which is best left to the circuit court for resolution. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Affirmed.

/s/ Deborah A. Servitto
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly