

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JESSE and LACEY SHAW, Minors.

JAMES PFAFF AND LILLIAN PFAFF,

Petitioners-Appellants,

v

FAMILY INDEPENDENCE AGENCY,

Respondent-Appellee.

UNPUBLISHED

June 12, 1998

Nos. 204870; 206056

Washtenaw Probate Court

LC Nos. 96-007430-AD;

96-007431-AD

Before: Hood, P.J., and Markman and Talbot, JJ.

PER CURIAM.

Petitioners appeal as of right from two orders, which denied them the ability to adopt Jesse and Lacey Shaw. The first order upheld the denial of consent by the Michigan Children's Institute (hereinafter MCI) and dismissed petitioners' petition to adopt Jesse Shaw (d.o.b. 9/8/89). The second order denied the petition to adopt Lacey Shaw (d.o.b. 7/19/96). Petitioners' two appeals were consolidated by order of this Court. We affirm in part, reverse in part, and remand.

In 1995, Jesse Shaw and his half-sister, Stacey Shaw¹, were removed from the home of Gary and Linda Shaw, their parents, due to abuse and neglect. Petitioners, Linda Shaw's parents, requested that Jesse, Linda's biological child, be placed with them during the time period that he was to be in foster care. This placement did not occur because petitioners lived in Ann Arbor and such a placement would not have allowed Linda and Gary easy access for visitation from their Traverse City home. Jesse and Stacey were therefore placed into the home of Mickey and Linda Sparks.

On July 19, 1996, Linda and Gary Shaw had a daughter, Lacey Shaw. Lacey tested positive for cocaine at the time of her birth. Five days later, she was placed into foster care. Approximately four months later, Lacey was united with Jesse and Stacey in the Sparks home².

On September 4, 1996, the parental rights of Linda and Gary Shaw to Jesse and Lacey were voluntarily terminated. On the same day, Gary Shaw released his rights to Stacey. Stacey's biological

mother subsequently released her rights to Stacey as well. On November 12, 1996, petitioners petitioned for the adoption of Jesse Shaw and Lacey Shaw only. MCI's superintendent withheld his consent to petitioners' adoption of Jesse and Lacey. In January 1997, petitioners filed a motion for the probate court to determine whether the superintendent's consent had been withheld arbitrarily and capriciously. An evidentiary hearing was then held pursuant to § 45 of the Adoption Code, MCL 710.45; MSA 27.3178(555.45). The probate court affirmed the superintendent's withholding of consent as to Jesse but reversed as to Lacey. It then ordered a full investigation of the circumstances relative to petitioners' petition for the adoption of Lacey. After the filing of investigation report, the probate court denied petitioners' petition to allow the adoption of Lacey.

In docket number 204870, petitioners argue that the probate court erred in upholding the superintendent's denial of consent as to Jesse. We disagree. Judicial review of a superintendent's decision to withhold consent is limited. *In re Cotton*, 208 Mich App 180, 184; 526 NW2d 601 (1994). The scope of judicial review is not to determine whether the superintendent reached the correct decision but rather whether he or she acted arbitrarily and capriciously in reaching his or her decision. *Id.* The probate court is bound to uphold the decision unless there is clear and convincing evidence that the representative acted arbitrarily or capriciously. *Id.* “[I]f 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 . . . [the probate court] might have decided the matter in favor of the petitioner.” *Cotton, supra* at 185. The superintendent based his decision on the best interests of Jesse by taking into account the length of time Jesse had lived with the Sparks in a stable and satisfactory environment (and the desirability of maintaining continuity), and by considering the strong and important sibling bond between Jesse and Stacey. (The petitioners did not wish to adopt Stacey.) Based on the record, the superintendent presented good reasons supporting his decision to deny petitioners' request for consent to adoption. Therefore, his decision was not arbitrary or capricious, and the probate did not err in upholding the denial of consent.

Petitioners also presents several other arguments relating to their failed bid to adopt Jesse. We find that these arguments are without merit. First, petitioners argue that the Jesse should have been originally placed with them as foster parents instead of with the Sparks. This issue is not appropriate for our review because this appeal is taken from the probate court's affirmance of the superintendent's denial of consent to allow petitioners to adopt. It is not taken from any order relating to the placement of Jesse into a foster care home other than that of petitioners. Moreover, petitioners concede that they do not have standing to even challenge the foster care placement. Finally, we find that this argument fails because petitioners were considered but rejected as foster parents because of the enormous distance between petitioners' home and the home of Gary and Linda Shaw. The distance would not have properly facilitated visitation between the children and the Shaws, who had not yet given up their parental rights.

Second, petitioners argue that they should have been give priority consideration to adopt Jesse and Lacey because they are biological relatives. The Family Independence Agency (FIA) Services Manual does not require that relatives be allowed to adopt simply because they show an interest. It

merely requires that they should be given consideration ahead of non-relative families. In this case, petitioners were considered to adopt Jesse and Lacey, but there were articulated reasons why they were not allowed to do so. Petitioners fail to demonstrate that they were not given proper consideration as is required by the FIA Services Manual. Simply because they were rejected for adoption does not mean that they were not given due consideration.

Third, petitioners argue that too much emphasis was placed on sibling attachment. Our review of the record leads us to disagree. Petitioners concede that sibling attachment is properly considered when determining adoptive placements. However, they argue that sibling attachment should not be given overriding concern and that because they would have facilitated visitation between Stacey and the younger two siblings if they were allowed to adopt them, sibling attachment should not have barred consent to the adoption. They rely on a portion of the Services Manual that states:

If separation of siblings is necessary but contrary to the placement criteria for the child, the adoptive family shall be encouraged to facilitate continued contact between siblings through correspondence, telephone calls and personal visits.

In this case, there was no showing that it was *necessary* to separate the siblings. In fact, the Sparks were willing to adopt all of them as a family unit. Sibling attachment was properly considered by the superintendent and where the Sparks were willing to adopt all of the siblings, we find that the superintendent's reliance on sibling attachment when determining to withhold consent was not arbitrary or capricious. Moreover, our review of the record does not indicate that too much emphasis was placed on keeping the siblings together. Other factors, including the length of time the children had been with the Sparks, were considered.

Fourth, petitioners argue that the FIA should have allowed them to adopt instead of the Sparks because they were willing to adopt without a subsidy. The willingness to adopt without a subsidy is not reason alone to grant an adoption and petitioners cite no authority for the proposition that it is. Petitioners' argument that the FIA had to make a reasonable effort to identify a family willing to adopt without a subsidy, and did not, ignores two important aspects. First, petitioners were identified as a family willing to adopt without a subsidy and were rejected for reasons that were neither arbitrary or capricious. Second, the rules and laws cited to by petitioners are inapplicable. They relate only to the definitions and criteria that social service agencies should use when determining whether an adoptee is eligible for a support subsidy³. They have no bearing on the granting or denial of consent for adoption and, in fact, are irrelevant to it. There was testimony that in deciding whether to withhold or grant consent, the issue of an adoption subsidy is not a determining factor. Even if the superintendent failed to follow proper procedure when determining that the Shaw children were eligible for an adoption subsidy if adopted by the Sparks, this error had no bearing on the petitioners bid to adopt Jesse and Lacey. There is no authority that they should have been granted consent simply because they were willing to adopt without a subsidy.

In light of our finding that the probate court properly affirmed the decision of the superintendent to deny petitioners the right to adopt Jesse, petitioners' second issue on appeal is moot⁴.

In Docket No. 206056, petitioners argue that the probate court erred in denying their petition to adopt Lacey because it based its decision in part on the recommendation of an independent investigator without allowing petitioners the opportunity to cross-examine that investigator. We agree based on a reading of the Adoption Code. Statutory interpretation is a question of law which is reviewed de novo on appeal. *In re Hill*, 221 Mich App 683, 689; 562 NW2d 254 (1997). In interpreting a statute, the primary goal is to ascertain and give effect to the intent of the Legislature. *Id.* "Because the Adoption Code is in derogation of the common law, its provisions must be strictly construed." *Id.*

MCL 710.45(6); MSA 27.3178(555.45)(6) allows the probate court, upon finding by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, to terminate the rights of the appropriate department and enter further orders in accordance with the Adoption Code. In this case, the probate court agreed with petitioners that the superintendent's withholding of consent to the adoption of Lacey was arbitrary and capricious. It therefore terminated the superintendent's rights over Lacey and ordered a full investigation, including the filing of an investigation report, pursuant to MCL 710.46; MSA 27.3178 (555.46).

Section 26 of the Adoption Code, MCL 710.26; MSA 27.3178(555.26), requires that a hearing on an adoption petition be held. MCL 710.26(f); MSA 27.3178(555.26)(f) contemplates that the hearing on the petition will be held after the probate court receives the investigation report prepared pursuant to MCL 710.46; MSA 27.3178(555.46). The probate court erred in denying petitioners' petition for adoption based upon the investigation report and recommendation where it did not hold the necessary hearing after the completion of the investigation. Petitioners should have been allowed to, at least, cross-examine the author of the report at a hearing. There is, however, no prohibition against the probate court's considering the evidence already adduced at the §45 hearing. Therefore, even though the probate court erred, we are limiting petitioners' relief.

The probate court, in denying petitioners' petition as to Lacey, indicated that it had reconsidered the evidence adduced at the § 45 hearing under a full scope hearing (i.e., not limited to determining whether the superintendent's withholding of consent was arbitrary and capricious). At the hearing, petitioners called William Johnson, the superintendent of the Michigan Children's Institute, and Patricia Sparks⁵, the primary foster care worker assigned to the case as witnesses. In addition, both petitioners testified. Lillian testified that she could give Jesse emotional, mental, physical, financial, and educational support as well as her time. She testified that she could give him a future. When asked about Lacey, she testified that she had bonded with Lacey and had taken classes to understand fetal alcohol syndrome. James testified that he was willing to take care of Jesse and Lacey "like any new father would." He further testified that if allowed to adopt them, they would become part of his extended family. Both Lillian and James testified that they would facilitate visits between Stacey and her other siblings. The court also heard testimony from Leah Dittmer, Stacey and Jesse's therapist, who was called as a witness by the State. She testified that separating Jesse and Stacey would be devastating to Jesse and that separating Stacey and Lacey would be devastating to Stacey. She further testified that the children should not be separated from the Sparks, who had provided them with consistency, stability and structures and have community and religious support. With regard to Lacey, she testified that Lacey would not have thrived without the Sparks' care and intervention and that Lacey

had bonded with the Sparks. Because the court heard relevant testimony from numerous witnesses regarding petitioners bid for adoption, it is unnecessary to hold a new hearing as to that evidence. We remand only for a limited evidentiary hearing on the investigation and resulting report, including allowing petitioners to cross-examine the report's author. At that time, the court can make its determination based on all of the evidence in the record, including its disposition of the case in docket number 204870.

In docket number 206056, petitioners also argue that the superintendent's withholding of consent to the adoption of Lacey was arbitrary and capricious, and violative of statutory law and administrative policy. Their arguments in this regard are irrelevant where the probate court agreed with petitioners that the superintendent acted arbitrarily and capriciously with respect to Lacey and where the probate court terminated the superintendent's rights over Lacey. The probate court provided petitioners with relief from the superintendent's decision by granting their motion brought pursuant to MCL 710.45; MSA 27.3178(555.45) and ordering a full investigation. We can offer no further relief to petitioners from the superintendent's denial of consent. Therefore, we will not address their arguments that the superintendent acted arbitrarily and capriciously. Moreover, we note that these arguments closely mirror petitioners' arguments as presented in docket number 204870 with regard to the superintendent's denial of consent to petitioners' adoption of Jesse.

Finally, petitioners argue that the probate court actually affirmed the superintendent's decision while stating that it was arbitrary and capricious. The record does not support this contention. As was previously noted, after the probate court determined that the superintendent acted arbitrarily and capriciously, it ordered a full investigation. Only after this full investigation did the probate court deny petitioners' petition to adopt Lacey. Although the probate court's ultimate decision to deny the petition had the same effect as the superintendent's decision to withhold consent, the probate court denied petitioners' petition on grounds independent from the superintendent's denial of consent. Based on the record, we disagree that the probate court "reinstated the jurisdiction of MCI over Lacey and effectively affirmed the MCI January 1997 denial of consent to the [petitioners] to adopt Lacey." In fact, petitioners contention in this regard grossly misrepresents the actual record of events. The probate court made an independent determination that petitioners' petition should be denied.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Harold Hood

/s/ Stephen J. Markman

/s/ Michael J. Talbot

¹ Stacey Shaw was born to Patricia Holder and Gary Shaw on March, 1983. Linda Shaw is her step-mother.

² It appears that Lacey was not originally placed with the Sparks because of her exposure to cocaine and the early need for intensive care while placed with a foster family. When her health improved, she was placed with the Sparks.

³ 42 USC 673 discusses adoption assistance agreements for children with special needs. MCL 400.115f(h); MSA 16.490(25f)(h) defines the term "certification" within the social welfare act. FIA Service Manual § 738 discusses the criteria necessary before a subsidy will be given.

⁴ Petitioners second issue was that if this Court reversed the probate court's affirmance of the superintendent's denial of consent, it should enter an order permitting them to adopt Jesse.

⁵ Patricia Sparks is not related to Linda and Michael Sparks, the foster parents in this case.