STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ANDREA LYNN CARPENTER, Adoptee.

BRYANT PHILLIPS and SANDRA PHILLIPS,

Petitioners-Appellees,

v

FAMILY INDEPENDENCE AGENCY,

Respondent-Appellant.

UNPUBLISHED
December 3, 1999

No. 217634
Oakland Circuit Court
Family Division
LC No. 98-615557 AD

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

This case stems from the circuit court's determination that the Superintendent of the Michigan Children's Institute (MCI), a division of respondent, Family Independence Agency (FIA), arbitrarily and capriciously withheld consent to the adoption of Andrea, a minor (born March 17, 1996), by petitioners, Bryant Phillips and Sandra Phillips. In the same order, the trial court denied a motion to disqualify itself, established a twenty-day period during which amicus curiae Roy Williams and Sylvia Williams and FIA could request blood tests on Andrea, and directed the adoption of Andrea, by petitioners, to proceed. In an accompanying written opinion and order, the trial court explained the basis for its determination that the Superintendent's actions were arbitrary and capricious, terminated the commitment of Andrea to the MCI, and referred Andrea to the Oakland County Adoption Department for adoption proceedings. The chief judge of the Oakland Circuit Court subsequently issued a written opinion and order denying FIA's motion to disqualify the trial court judge. FIA now appeals as of right. We affirm.

Andrea was nineteen months old in October 1997, when her mother abandoned her and her older brother and sister.[1] After a brief period at Children's Village, Andrea was placed, separately from her siblings, in the foster care of Frances Johnson and Charles Johnson. In March 1998, Andrea was placed in the foster care of petitioners.[2] On June 8, 1998, the trial court terminated the parental

rights, with regard to all three children, of their mother, a John Doe putative father, and a named putative father. The trial court then committed all three children to the MCI for adoptive planning, supervision, care and placement.

Petitioners indicated a desire to adopt Andrea and were offered the opportunity to adopt all three children as a "sibship." Petitioners declined, however, because of perceived behavioral problems, and need for treatment, associated with Andrea's siblings. Petitioners made a formal adoption request with regard to Andrea on August 16, 1998. Consent was ultimately denied, ostensibly because the MCI Superintendent wanted to place the three children together, and because Roy Williams (brother to the named putative father) and his wife, Sylvia Williams, had expressed an interest in adopting the children. In response, petitioners initiated the instant case by petitioning, pursuant to MCL 710.45; MSA 27.3178(555.45), for a determination that consent to their adoption of Andrea had been withheld arbitrarily and capriciously. Petitioners also moved for, and were granted, an order preventing Andrea's removal from their home until further order of the court.

A hearing was held pursuant to MCL 710.45; MSA 27.3178(555.45) (a "§ 45 hearing"). In a § 45 hearing, the petitioners have the burden of demonstrating the absence of any good reason for withholding consent to their adoption. *In re Cotton*, 208 Mich App 180, 185; 526 NW2d 601 (1994). Petitioners presented evidence that when Andrea was placed with them, she had very limited verbal skills (she communicated by pointing and grunting) and was diagnosed with Reactive Attachment Disorder. Petitioner Sandra began working with Andrea on her verbal skills and Andrea made remarkable progress in her capacity to control her emotions and her verbal abilities. By the time she was examined in December 1998, Andrea showed no signs of Reactive Attachment Disorder and no longer needed communication services. Andrea had formed a strong psychological bond with petitioner Sandra in particular and petitioner Bryant in general, and, in one expert's opinion, her removal from petitioners' home would create profound adjustment problems for her. By contrast, after returning from overnight visits with her siblings and the Williamses, Andrea's behavior would regress in that she would refrain from playing with other children, she exhibited anxiety that her "mommie" (petitioner Sandra) would leave her, and she was unable to urinate for prolonged periods after the visits.

Evidence was introduced, through foster care workers familiar with Andrea's siblings, that Andrea's six-year-old sister and five-year-old brother exhibited signs of sexual abuse and that the brother had severe behavioral problems. The siblings were purposely placed in a foster home where the caretaker was familiar with caring for children who had been abused. Andrea's sister was afflicted with venereal warts, which were discovered when she was treated for a vaginal tear. Andrea's sister reported that her brother had inserted a toy into her vaginal area. During play therapy, Andrea's brother pretended to cut off penises with a pair of scissors and stated that penises were bad, and it was strongly suspected that he had either witnessed sexual abuse or, like his sister, had been the victim of it. Andrea's brother displayed a pattern of aggressive behavior toward other children with whom he was placed (including punching, pushing, and pulling hair), with particular aggression toward his older sister and another little girl who was Andrea's age. He intentionally destroyed property, threw temper tantrums, tried to feed sharp objects to a kitten in order to hurt it, cut up his own hands, and reacted to

structure with anger and defiance. In supervised visits with her siblings, Andrea avoided interacting with them and, as noted, after overnight periods in their company, Andrea exhibited emotional distress.

After hearing the above evidence, but before petitioners' case was completed, the trial court, on its own initiative, noted that it was evident that Andrea was white, as were petitioners, and that her siblings were admittedly bi-racial. The Williamses, with whom the MCI Superintendent was trying to place all three children, were African American. From this, the trial court concluded that Andrea had a different father than her siblings and that she was not biologically related to the Williamses. The trial court then indicated that it had heard enough evidence to justify granting petitioners their requested relief and inquired of FIA's counsel as to whether he felt that continuation of the § 45 hearing was necessary. After a recess, FIA's counsel moved the trial court to disqualify itself on the basis of racial bias and declined to continue the hearing or present any proofs. The trial court denied the motion to recuse itself, ruled that the MCI Superintendent had withheld his consent to Andrea's adoption by petitioners arbitrarily and capriciously, terminated Andrea's commitment to the MCI, and directed Andrea's adoption by petitioners to proceed.

After a subsequent hearing on FIA's written motion for disqualification, pursuant to MCR 2.003, the trial court again declined to recuse itself and explained that its determination was not based on a personal racial bias. The trial court allowed FIA a twenty-day period during which it could subject Andrea to blood testing if it disputed the trial court's conclusion that Andrea was not related to the Williamses. In its subsequent written opinion and order, the trial court detailed the reasons for its determination. FIA then renewed its motion for disqualification before the chief judge of the circuit court, who found that FIA was raising a challenge to the legal bases on which the trial court's ruling rested, but had not demonstrated that the trial court's ruling was a result of actual, personal bias or prejudice.

On appeal, FIA first challenges the denial of its motion to disqualify the trial court pursuant to MCR 2.003. This Court reviews the chief judge's determination for an abuse of discretion. *Cain v Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996).

A judge is subject to disqualification under MCR 2.003 if the judge is personally biased for or against a party or attorney or if the judge has one of certain enumerated relationships to the case or the parties. MCR 2.003(B). Establishing judicial bias requires demonstrating actual bias or prejudice, or demonstrating circumstances where experience teaches that the probability of actual bias is too high to be constitutionally tolerable. *Cain, supra* at 498, 514. There is a heavy presumption of judicial impartiality that is not usually overcome unless prejudice is both personal and extrajudicial. *Id.* At 495-497.

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make a fair judgment impossible. *Id.* at 496, quoting *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994).

Race may not be the sole factor in determining the best interests of the child. *Palmore v Sidoti*, 466 US 429; 104 S Ct 1879; 80 L Ed 2d 421 (1984); *JHH v O'Hara*, 878 F2d 240, 245 (CA 8, 1989).[3] However, under the Michigan Adoption Code, one factor to be considered in determining the best interests of an adoptee is the ability of the adopting individuals "to create a milieu that fosters the religion, racial identity, and culture of the adoptee." MCL 710.22(b)(ii); MSA 27.3178(555.22)(b)(ii).

In this case, the races of the respective parties were relevant to more than just whether petitioners or the Williamses would be able to create a milieu that would foster Andrea's racial identity. The MCI Superintendent was attempting to place the three siblings together with a relative of their biological father. Consequently, to the extent that race demonstrated that Andrea was not related to the family selected by the MCI Superintendent, it eliminated a potential justification for his withholding consent.

Nor was the trial court's decision based solely on race. When the trial court concluded that "Andrea is going to be . . . completely out of place in that family," it is fair to say that it was aware from the evidence that: (1) the Williamses were virtual strangers to Andrea; (2) Andrea would be separated, at a critical stage in her development, from the psychological parents to whom she had become bonded; (3) Andrea would be at risk of being abused by her emotionally disturbed brother to whom she would present a target for his aggression and sexual acting out; (4) the fostering of Andrea's racial identity would be impeded; and (5) Andrea was not biologically related to the Williamses. There is no indication here that the trial court was personally biased against African Americans or that, during the proceeding, the trial court developed a deep-seated antagonism toward FIA, the Williamses, or African Americans in general.[4] Accordingly, there is nothing to overcome the strong presumption of judicial impartiality. *Cain, supra* at 497.

Next, FIA claims that the trial court erred by making its determination at the § 45 hearing without first allowing FIA an opportunity to explain and support the MCI Superintendent's reasons for withholding consent. However, our examination of the record indicates that FIA expressly elected not to put on its proofs at the § 45 hearing, despite the fact that the trial court stated several times that it was willing to continue hearing evidence. A party may not take a position in the trial court and subsequently seek redress in an appellate court on the basis of a position contrary to that taken in the trial court. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Moreover, after the issue of disqualification was adjudicated before the trial court and the chief judge, FIA never moved to continue the § 45 hearing. FIA's protestations notwithstanding, we find that FIA waived appellate review of this claim. *Dedes v Asch*, 233 Mich App 329, 333-335; 590 NW2d 605 (1998). Whatever complaints that FIA may have with the trial court's resolution of this case, it is disingenuous to include among them the complaint that FIA was denied the opportunity to be heard.

Finally, FIA contends that the trial court erred when it determined that the MCI Superintendent wrongfully withheld his consent for petitioners to adopt Andrea and that the trial court's findings were not supported by the record. The trial court's review of the MCI Superintendent's decision to withhold consent was limited to a determination of whether that consent was withheld arbitrarily and capriciously. *In re Cotton, supra* at 184. On appeal, this Court must determine whether the lower court applied correct legal principles and whether its ultimate determination with regard to arbitrariness and

capriciousness was clearly erroneous. *Boyd v Civil Service Comm'n*, 220 Mich App 226, 234; 559 NW2d 342 (1996).

The decision of the representative agency to withhold consent to an adoption must be upheld unless there is clear and convincing evidence that the representative acted arbitrarily and capriciously. *In re Cotton*, *supra* at 184. Once a petitioner has met its burden, the petitioner may proceed to convince the court that it should enter a final order of adoption. If there are 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. *Id.* at 184-185. Consequently, it is the absence of any good reason to withhold consent, rather than the presence of good reasons to grant it, that indicates that the representative was acting in an arbitrary and capricious manner. *Id.*

In this case, it was FIA's articulated theory that the MCI Superintendent withheld his consent to Andrea's adoption by petitioners because, in the Superintendent's view, it would be in the best interest of Andrea if she and her siblings were adopted as a group and raised together. The trial court's written opinion and order indicates that it found the Superintendent's action arbitrary and capricious because: (1) there was no blood relationship between Andrea and the Williamses; (2) the bond between Andrea and petitioners superseded any bond between Andrea and her siblings; (3) Andrea was not bonded to her siblings and her behavior regressed after sibling visits; and (4) Andrea would be subject to potential harm from the aggressive and sexually inappropriate behavior of her brother if placed in the same household with him.

We find that there was convincing evidence presented that placing Andrea with her siblings would not be in Andrea's best interests. It appears that the MCI Superintendent was adhering to a general policy of placing siblings together, even though the policy was not in keeping with the best interests of this specific child. The failure to consider the individual circumstances makes the Superintendent's action arbitrary and capricious. Petitioners not only demonstrated that the MCI Superintendent did not have a good reason to withhold consent, they clearly and convincingly demonstrated that he was relying on a bad reason to do so. We find no indication that the trial court applied the law incorrectly or that its determination that the MCI Superintendent had acted arbitrarily and capriciously was clearly erroneous.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Henry William Saad

[1] According to testimony at the § 45 hearing, there are actually five siblings in foster care. Andrea's relationship with the other two siblings is not at issue here.

[2] We find it ironic, in light of the issues on appeal, that petitioners were not licensed to care for children who are "cross racially assessed." For foster care placement, Andrea was designated by respondent as white and was placed in white foster homes. Her siblings were designated biracial.

[3] See also *McLaughlin v Pernsley*, 693 F Supp 318, 324 (ED Pa, 1988), aff'd 876 F2d 308 (CA 3, 1989) (consideration of foster child's racial and cultural needs when considering the best interests of the child, is indisputably a compelling governmental interest for the purposes of the Equal Protection Clause, but the use of race alone in making long-term foster care placements is neither necessary nor appropriate to accomplish those objectives); *In re Adoption/Guardianship No. 2633*, 101 Md App 274, 298-299; 646 A2d 1036 (1994) ("While race may be considered as one factor in making the ultimate placement decision, . . . courts that have addressed the issue agree that race may not be used in an automatic fashion to prescribe the appropriate adoptive placement"); *In re Moorehead*, 75 Ohio App 3d 711, 723; 600 NE2d 778 (1991) ("The difficulties in interracial adoption justify consideration of race as a relevant factor in adoption, but do not justify race as being the determinative factor").

[4] FIA appears to also argue that the very fact that the trial court presumed that it could distinguish a Caucasian child from biracial children of the same mother, by itself establishes that the court was racially biased. This argument has no logic and is particularly specious in light of FIA's foster care designation of Andrea as white and of her siblings as biracial. Likewise, there is no logic to the argument on appeal made by the Williamses, as amicus curiae, that the court's decision to permit blood tests indicated that the court could only tolerate placing Andrea with a black family if she was, in fact, black. A court is permitted to take judicial notice of adjudicative facts that are "not subject to reasonable dispute" and are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MRE 201. Obviously, the court felt that the racial make-up of the children was not subject to reasonable dispute, and its decision to permit blood tests was clearly in response to FIA's counsel, who claimed to be unable to determine whether Andrea was bi-racial because there "has been no blood testing, DNA typing, or anything."