MICHIGAN SUPREME COURT

IN RE COH, ERH, JRG, KBH

Supreme Court No.: 147515
Court of Appeals No.: 309161
Trial Court No.: 08-036989-NA

Department of Human Services,
Appellant

v

Lori Scribner,
Appellee

Michigan Children's Institute,
Intervenor

ON APPEAL FROM
MUSKEGON COUNTY CIRCUIT COURT – FAMILY DIVISION
Hon. William C. Marietti, Presiding

BRIEF OF AMICUS CURIAE
CHILDREN'S LAW SECTION
OF THE STATE BAR OF MICHIGAN

Dated: December 2, 2013

Tobin L. Miller (P56601)
Attorney for Children's Law Section
P.O. Box 30026
Lansing, MI 48909
(517) 241-4511
MillerT10@Michigan.gov

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STATEMENT OF FACTS

The following is a brief summary of facts derived from the Court of Appeals opinion. The Department of Human Services (DHS) removed the four children from their mother's custody in February 2008. In October 2008, the four children were placed together in the home of their current foster parents. Appellee, the paternal grandmother of three of the children, has resided in Florida since 2005. Although she had contact and visitation with the children following their placement in foster care, they were not placed in Appellee's home. Nonetheless, Appellee has maintained a "very close and loving" relationship with the children. *In re COH,* unpublished opinion per curiam of the Court of Appeals, issued June 25, 2013 (Docket Nos. 309161 and 312691), p 3. The trial court terminated the parental rights of the children's fathers. In July 2010, DHS petitioned the trial court to terminate the parental rights of the children's mother, and Appellee petitioned the trial court to be appointed juvenile guardian of the children under MCL 712A.19c. The trial court terminated the mother's parental rights and denied Appellee's petition for juvenile guardianship. In denying Appellee's juvenile guardianship petition, the trial court relied on the "best interest" factors in MCL 722.23 of the Child Custody Act and compared Appellee with the children's current foster parents, who had filed a petition to adopt the children. The children were then committed to the Michigan Children's Institute (MCI).

The Court of Appeals reversed the trial court's order denying Appellee's petition for juvenile guardianship and remanded the case for entry of an order appointing Appellee the children's juvenile guardian. DHS appealed to this court, which granted leave to appeal on October 2, 2013.

INTRODUCTION

The Children's Law Section of the State Bar of Michigan (CLS) is governed by the 19 elected members of the Children's Law Section Council. The CLS is comprised of approximately 438 legal professionals practicing in the area of juvenile law. The CLS gratefully accepts the invitation of this Court to file an amicus brief on the law governing the preference for placing children with relatives in child protective proceedings, juvenile guardianship following termination of parental rights, and applying the "best interests of the child" standard to permanency decisions.

Relatives of children removed from their homes for abuse or neglect undoubtedly play a crucial role in child protective proceedings. In September 2013, 13,402 Michigan children resided in foster care. Of these children, 4,521 resided with relatives. By comparison, 6,511 resided with unrelated foster parents. Michigan Department of Human Services Fact Sheet, September 2013, DHS Office of Communications. Placing a child with a relative ameliorates the negative effects of removal, preserves the child's and relative's sense of family identity, and may provide a permanent placement within the existing family structure.

Federal law encourages states to "consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child . . . ." 42 USC 671(a)(19). In Michigan, MCL 722.954a(5) sets forth a preference for placing a child in foster care with an appropriate relative following the child's removal from his or her home. However, when MCL 722.954a(5) is read in the context of related laws, it becomes clear that the preference for placing a child with a relative extends only to 90

days following a child’s removal from parental custody. After this 90-day period, a child’s needs for stability, continuity, and permanence must be considered along with the child’s and relative’s interests in familial integrity when making placement and permanency decisions. Children’s needs are reflected in the “best interests of the child” standard, and a trial court must make difficult factual findings and legal determinations when deciding whether a proposed permanent caregiver, such as a juvenile guardian, will meet a child’s needs. When an appellate court reviews those findings, it should apply a deferential “clear error” standard of review.

When considering a child’s interests in stability, continuity, and permanence, several of the “best interests of the child” factors contained in the Child Custody Act are relevant. The factors contained in MCL 722.23 may be applied to a court’s determination of whether a juvenile guardianship under MCL 712A.19c is in a child’s best interests. These “best interest” factors and substantially similar factors contained in statutes governing guardianship and adoption are relevant when making child-placement and permanency decisions in a variety of contexts, including the decision to grant or deny a juvenile guardianship under MCL 712A.19c. Where the children’s unrelated foster parents have demonstrated their intent to adopt the children (as in this case), a court will necessarily compare the parties’ abilities to meet the children’s needs. Because several of the “best interest” factors in statute and case law permit a court to compare the relative abilities of competing parties to meet a child’s needs, such a comparison is appropriate in cases under MCL 712A.19c.

ARGUMENT

I. THERE IS NO PREFERENCE FOR RELATIVES UNDER MCL 712A.19C(2) WHEN A CIRCUIT COURT DECIDES WHETHER TO CREATE A JUVENILE GUARDIANSHIP AFTER PARENTAL RIGHTS HAVE BEEN TERMINATED.

MCL 712A.19c(2) does not explicitly state that there is a preference for placing a child with a relative when establishing a juvenile guardianship following termination of all parental rights. The statute only directs the court to determine whether a juvenile guardianship is in a child's best interests. A juvenile guardian appointed under MCL 712A.19c may be a relative, unrelated licensed foster parent, or unrelated person with whom the court has placed the child ("fictive kin"). Guardianship assistance payments are available to any of these persons. MCL 722.872(f) and (h); MCL 722.874(1)(a).

In its opinion, the Court of Appeals relied primarily on MCL 722.954a(5) in concluding that "[t]here is a strong preference that children who have been removed from their parent's care be placed with relatives." *COH, supra,* p 2. MCL 722.954a(5) states in relevant part:

> "Before determining placement of a child in its care, a supervising agency shall give special consideration and preference to a child's relative or relatives who are willing to care for the child, are fit to do so, and would meet the child's developmental, emotional, and physical needs."[1]

A "supervising agency" may be "the department if a child is placed in the department's care for foster care, or a child placing agency in whose care a child is placed for foster care." MCL 722.952(l).

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[1] This provision was added by 2010 PA 265, effective December 14, 2010. Thus, the statute became effective after Appellee's petition for juvenile guardianship was filed but before the entry of the trial court's order denying the petition on May 3, 2011.

The Court of Appeals cited DHS foster care policy FOM 722-3, p 3, which requires supervising agency workers to identify relatives throughout a case as potential placements and permanency providers for a child, and FOM 722-3, p 6, which states that "placement with siblings and relatives is usually in the child's best interest." Although not cited by the Court of Appeals, DHS foster care policy also sets forth the general rule that the fewer placement changes a child experiences, the better. "Any placement should be chosen with a view toward preparing the child for the long-range plan." DHS Policy FOM 722-3, p 3.

Although MCL 722.954a(5) establishes a preference for relatives when a child is initially placed in foster care, that preference does not extend throughout the life of a child's foster care case. This is apparent upon reading all of the provisions of MCL 722.954a together, along with other applicable law. These laws support the conclusion that there is no "relative preference" that extends beyond the first 90 days following a child's initial removal from home. When considering the correct interpretation of a statute, the statute must be read as a whole. Moreover, the statute must be read in conjunction with other relevant statutes to ensure that legislative intent is correctly ascertained. *In re MKK,* 286 Mich App 546, 556; 781 NW2d 132 (2009).

MCL 722.954a(2) states:

> "(2) Upon removal, as part of a child's initial case service plan as required by rules promulgated under 1973 PA 116, MCL 722.111 to 722.128, and by section 18f of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.18f, the supervising agency shall, within 30 days, identify, locate, notify, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs."[2]

[2] DHS policy requires children's protective services (at the time of removal) and supervising agency foster care workers to take specified actions to identify, locate, notify, and consult with a child's relatives. See DHS Policy PSM 715-2, pp 8-11 and FOM 722-6, pp 5-7 for the required procedures.

The supervising agency is tasked with identifying relatives who would be appropriate placements for the child within the first 30 days after the child's removal from parental custody. Administrative rules governing child placement agencies promulgated under MCL 722.111 *et seq.* require a supervising agency to create an initial service plan within 30 days of a child's removal from his or her home. Mich Admin Code, R 400.12418(1)(a). Among other things, the initial service plan documents the agency's consideration of possible relative placements.

MCL 722.954a(2) also cites MCL 712A.18f, which addresses case service plans. MCL 712A.18f(2) requires a supervising agency to prepare a case service plan and submit it to the court and parties before the court enters an order of disposition. The case service plan must "provide for placing the child in the most family-like setting available and in as close proximity to the child's parents' home as is consistent with the child's best interests and special needs" and specify "[t]he type of home or institution in which the child is to be placed and the reasons for the selected placement." MCL 712A.18f(3)(a). Although the agency's proposed case service plan documents the agency's proposed placement of the child, the court's order of disposition actually specifies and formalizes the child's placement. MCL 712A.18(1). Typically, the court continues a child's placement in foster care under MCL 712A.18(1)(b) (relative foster care) or MCL 712A.18(1)(c) (licensed unrelated foster care) and incorporates all or part of the case service plan in its order of disposition. MCL 712A.18f(4).

Regarding the time requirements for preparation of the case service plan under MCL 712A.18f, applicable court rules require an order of disposition to be entered no later than 91 days after a child's removal from home, absent delays related to

adjudication. See MCR 3.972(A) (“trial must commence as soon as possible, but not later than 63 days after the child is removed from the home unless the trial is postponed . . .”) and MCR 3.973(C) (“When the child is in placement, the interval [between trial and disposition] may not be more than 28 days, except for good cause”). As explained below, this 91-day period for entry of a dispositional order corresponds to a 90-day deadline in MCL 722.954a(4).

MCL 722.954a(4) requires a supervising agency to make a written placement decision within 90 days of the child’s removal from his or her home and provide that written decision to all relatives who expressed an interest in placement and the involved attorneys.

> “(4) Not more than 90 days after the child’s removal from his or her home, the supervising agency shall do all of the following:
>
> > “(a) Make a placement decision and document in writing the reason for the decision.
> >
> > “(b) Provide written notice of the decision and the reasons for the placement decision to the child’s attorney, guardian, guardian ad litem, mother, and father; the attorneys for the child’s mother and father; each relative who expresses an interest in caring for the child; the child if the child is old enough to be able to express an opinion regarding placement; and the prosecutor.”[3]

A relative denied placement of the child may ask the child’s lawyer-guardian ad litem (LGAL) to review the agency’s placement decision. If the LGAL determines that the denial was not in the child’s best interest, the LGAL may petition the court for review of the agency’s decision. MCL 722.954a(6) states:

> “(6) A person who receives a written decision described in subsection (4) may request in writing, within 5 days, documentation of the reasons for the decision, and if the person does not agree with the placement decision, he or she may request that the child’s attorney review the decision to determine if the decision is

[3] DHS policy FOM 722-3, pp 18-19 requires the supervising agency to document its placement decision in Form DHS-31 and provide it to the persons listed in the statute.

> in the child's best interest. If the child's attorney determines the decision is not in the child's best interest, within 14 days after the date of the written decision the attorney shall petition the court that placed the child out of the child's home for a review hearing. The court shall commence the review hearing not more than 7 days after the date of the attorney's petition and shall hold the hearing on the record."

See also MCR 3.966(B), which mirrors the requirements in MCL 722.954a(6).

In some circumstances, a non-relative foster parent may appeal a foster child's removal from the foster parent's home to the Foster Care Review Board. MCL 712A.13b(1). However, a non-relative foster parent may not appeal a child's replacement if "[t]he change in placement is less than 90 days after the child's initial removal from his or her home, and the new placement is with a relative." MCL 712A.13b(1)(b)(*iii*). Following the 90-day period, a child may only be replaced if there are allegations of maltreatment against the child's foster parent or if the replacement is determined to be in the child's best interests. MCL 712A.13b(1)(b)(*iv*), (4), and (6).

The provisions cited above contain a series of related pre-disposition procedures intended to identify appropriate relative placements for children and finalize decisions regarding those placements within 90 days after a child's removal from parental custody. A child's placement is formalized in the court's order of disposition, entered approximately 91 days following the child's removal from home. Following the 90-day mark, there are no applicable statutory provisions referencing or protecting the preference for placement with a relative; the statutory provisions that apply during the dispositional phase speak to children who *were* placed with relatives following removal. MCL 712A.19(4) (required dispositional review hearings for children in relative placements intended to be permanent), MCL 712A.19(11) (relative with whom a child is placed may

submit information to the court for consideration at a dispositional review hearing), MCL 712A.19a(6)(a) (a child's placement with a relative militates against termination of parental rights), and MCL 712A.19a(12) (relative with whom a child is placed may submit information to the court for consideration at a permanency planning hearing). Moreover, the FCRB and court must review any replacement of a child during the dispositional phase using a "best interest" standard (unless there are allegations of maltreatment against the foster parent). As explained below, the "best interest" standard requires consideration of a child's attachment to his or her current caregiver and the child's need for stability.

MCL 712A.19c governs court review hearings following termination of parental rights. These hearings are conducted following initial disposition hearings. Thus, the "relative preference" contained in MCL 722.954a does not apply to a juvenile guardianship under MCL 712A.19c(2).

The Court of Appeals recently held, in an unpublished opinion, that the statutory preference for relative placement in MCL 722.954a(5) did not apply to a court's review of the MCI superintendent's denial of consent to adopt. *In re AEG,* unpublished opinion per curiam of the Court of Appeals, issued November 7, 2013 (Docket No. 316599), pp 4-5. The Court concluded that the "plain and unambiguous language of MCL 722.954a indicates that the Legislature intended the statute to provide procedural requirements where a child is removed pursuant to a child protective proceeding; there is no indication that the statute was intended to apply to MCI's adoption decisions after termination." *AEG, supra,* p 5. Similarly, there is no indication that the Michigan Legislature intended MCL 722.954a to post-termination juvenile guardianship decisions.

Although we conclude that the "relative preference" contained in MCL 722.954a does not apply to juvenile guardianships under MCL 712A.19c, we do not wish to undermine the importance to children in the child welfare system or their relatives of the procedures contained in MCL 722.954a. The failure to fully comply with this statute and related laws and policies may result in the failure to achieve permanency for children with willing, fit, and loving relatives.

II. ALTHOUGH NO PREFERENCE FOR RELATIVES EXISTS UNDER MCL 712A.19C(2), THE TRIAL COURT APPROPRIATELY CONSIDERED JUVENILE GUARDIANSHIP WITH THE PATERNAL GRANDMOTHER.

As argued above, the preference for placement of a child with an appropriate relative does not extend beyond the first 90 days following the child's removal from parental custody. Because the children's paternal grandmother was not entitled to preferential consideration, the trial court was not required to give juvenile guardianship with the paternal grandmother priority over alternative forms of permanency. The children's current foster parents have petitioned to adopt the children, and the trial court could consider how each proposed permanency goal would best meet the children's needs.[4]

Following termination of parental rights, a fit and willing relative may be considered as a permanent placement for the child. DHS adoption policy[5] requires a child's supervising agency to consider relatives who "have an established relationship with the child and/or provide a familiar environment for the child" for permanent

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[4] This issue is discussed in V., below.

[5] DHS policy sets forth similar considerations for juvenile guardianships. See, for example, DHS Policy GDM 600, pp 5-6.

placement. DHS Policy ADM 610, p 1. The children's paternal grandmother had an established relationship with the children.

If the child was not placed with the relative following the child's removal from home, a replacement of the child into the relative's home must be in the "best interests of the child." MCL 712A.13b(1)(*iv*), (4), and (6). The "best interest" standard also applies to juvenile guardianship following termination of parental rights. MCL 712A.19c(2).

III. APPELLATE COURTS SHOULD APPLY THE DEFERENTIAL "CLEAR ERROR" STANDARD OF REVIEW TO A CIRCUIT COURT'S DETERMINATION OF THE CHILDREN'S BEST INTERESTS PURSUANT TO MCL 712A.19C(2).

Deciding whether juvenile guardianship is in a child's best interests, like all post-termination of parental rights permanency decisions, requires difficult factual and legal determinations concerning the child's history, current condition, and relationships with family members and foster parents. A child's supervising agency gathers detailed information about the child and presents it to the court, and the court may take testimony on the issues. Because a trial court's "best interest" determination under MCL 712A.19c(2) involves careful and individualized fact-finding, appellate courts should apply the deferential "clear error" standard. In this case, the Court of Appeals reviewed the trial court's denial of the petition for juvenile guardianship using a *de novo* standard of review, the standard applicable to interpretation of statutes and court rules.

Generally, an appellate court reviews for clear error a trial court's factual findings in proceedings involving the rights of children. *In re Moiles,* ___ Mich App ___ ; ___ NW2d ___ (2013). "A court's factual findings underlying the application of legal issues are reviewed for clear error." *In re Morris,* 491 Mich 81, 97; 815 NW2d 62 (2012).

"A finding is clearly erroneous if, although there is evidence to support it, [the reviewing court is] left with the definite and firm conviction that a mistake has been made." *In re HRC,* 286 Mich App 444, 459; 781 NW2d 105 (2009). The reviewing court cannot substitute its judgment for that of the trial court. *In re Hall*, 483 Mich 1031; 765 NW2d 613 (2009).

Requiring a "clear error" standard of review of decisions under MCL 712A.19c(2) would be consistent with case law precedents. In an unpublished opinion, the Court of Appeals applied a "clear error" standard to the decision to grant a juvenile guardianship in lieu of termination of parental rights. *In re Jones,* unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket No. 298759), p 2. The Court of Appeals has also held that a trial court's findings of fact regarding the "best interest" factors in the Michigan Adoption Code are reviewed for clear error. *In re BKD,* 246 Mich App 212, 215; 631 NW2d 353 (2001).

IV. A CIRCUIT COURT MAY APPLY THE "BEST INTEREST" FACTORS IN MCL 722.23 OF THE CHILD CUSTODY ACT WHEN DECIDING WHETHER TO GRANT A PETITION FOR JUVENILE GUARDIANSHIP.

Case law permits, but does not require, a court to apply the "best interest" factors in MCL 722.23 when determining whether termination of parental rights is in the best interests of a child. *In re Sherman,* 231 Mich App 92, 102; 585 NW2d 326 (1998). In contrast with child-custody cases, courts in child protective proceedings are not required to make findings on each factor contained in MCL 722.23 when deciding whether termination of parental rights is in a child's best interest. "However, . . . it is entirely

appropriate for a probate court to consider many of the concerns underlying those best interest factors in deciding whether to terminate parental rights." *Sherman, supra.*

Although the determination of a child's best interests in the context of a termination of parental rights may involve different considerations than those involved in a juvenile guardianship, a court's reliance on the "concerns underlying" the "best interest" factors in the Child Custody Act is equally unproblematic when deciding whether to grant a petition for juvenile guardianship. This is because the "best interest" factors in the Child Custody Act set forth considerations applicable to custody decisions in a variety of contexts. The *Sherman* court quoted *In re Barlow,* 404 Mich 216, 236; 273 NW2d 35 (1978) in this regard: "The Legislature has . . . set forth a number of areas of concern in [the Child Custody Act] which it deemed should be evaluated in a large category of inquiries into a child's welfare."

This is borne out by examining the various statutory definitions of the "best interests of the child." The Michigan Legislature has established nearly uniform "best interest" criteria to apply when determining a child's custody, guardianship, or adoption. MCL 722.23 (custody), MCL 700.5101(a) (guardianship), and MCL 710.22(g) (adoption). This strongly suggests that, regardless of the context in which a decision regarding a child's custody or placement is to be made, the factors contained in these statutes are relevant to the decision. The "best interest" factors in these statutes generally reflect children's needs.

The "concerns underlying" some of the "best interest" factors contained in the Child Custody Act are very relevant to a decision to grant or deny a petition for juvenile guardianship. When making decisions regarding replacement and juvenile guardianship

following termination of parental rights, a supervising agency and MCI superintendent or the court may be required to weigh a child's needs for continuity of care, maintaining established relationships with caregivers, and family integrity. Those considerations are contained in MCL 722.23(a) and (d), which require a court to consider:

> "(a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> * * *
>
> "(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity."

It should also be noted that the "best interest" factors contained in MCL 700.5101 of the Estates and Protected Individuals Code (EPIC) may also be very relevant to a court's decision regarding juvenile guardianship. Although "[a] juvenile guardianship is distinct from a guardianship authorized under the Estates and Protected Individuals Code," MCR 3.903(A)(13), the two are quite similar. A juvenile guardian appointed pursuant to MCL 712A.19c has the powers and duties that minor guardians have under EPIC. MCL 712A.19c(7) and MCL 700.5215. MCL 700.5101(a)(*i*) and (*iv*) contain the same language as do MCL 722.23(a) and (d). See also MCL 710.22(g)(*i*) and (*iv*) (the same factors must be applied in a case under the Michigan Adoption Code).

Similarly, case law allows a court in a child protective proceeding to consider a child's emotional ties and need for permanence, stability, and finality when determining whether termination of parental rights is in the child's best interests. *In re BZ,* 264 Mich App 286, 301; 690 NW2d 505 (2004) and *In re McIntyre,* 192 Mich App 47, 52-53; 480 NW2d 293 (1992).

Thus, it is appropriate for a court to apply the "best interest" factors contained in the Child Custody Act—or the substantially similar factors contained in EPIC and the

Michigan Adoption Code—to its decision to grant or deny a juvenile guardianship under MCL 712A.19c.

V. A CIRCUIT COURT MAY PROPERLY COMPARE CHILDREN'S FOSTER PARENTS WITH A PROPOSED JUVENILE GUARDIAN WHEN DECIDING WHETHER A JUVENILE GUARDIANSHIP IS IN THE BEST INTERESTS OF THE CHILDREN.

In concluding that the trial court erred in comparing the children's paternal grandmother with the children's foster parents, the Court of Appeals stated:

> "Notably, the present case does not present a dispute between parties who have a legal or substantive right to the custody of the minor children. Because a juvenile guardianship is intended to be a permanent and self-sustaining relationship, MCL 722.875b, it is similar to adoption. When a person seeks adoption of a child, a trial court generally does not compare the prospective adoptive parent with alternate placements for the child. See MCL 710.22(g) (listing the best interest factors under the Adoption Code, MCL 710.21 *et seq.* . . . Here, where appellant is the grandmother of the children and where appellant has an established and continuing relationship with the minor children, the trial court should have considered whether appellant was an appropriate juvenile guardian for the children without regard to the foster care parents." *COH, supra,* pp 3-4.

It is true that neither the children's paternal grandmother nor their foster parents had a right to custody of the children, that juvenile guardianship is similar to adoption, and that when one party seeks to adopt a child, the court does not compare the prospective adoptive parent to alternate caregivers. However, in this case, the paternal grandmother petitioned to obtain a juvenile guardianship, and the foster parents have filed a petition to adopt the children. The children and their paternal grandmother have an established relationship, but the children have resided with the foster parents since October 2008. The supervising agency and the court were required to consider how each

of the proposed caregivers and each of the possible permanency goals could best meet the children's needs.

It should be noted that adoption is the preferred permanency goal for children after the possibility of reunification with a parent has been foreclosed by termination of parental rights, and a supervising agency is required to "rule out" adoption as a permanency goal before recommending juvenile guardianship. MCL 722.875a(a) and DHS Policy GDM 600, pp 1-2.[6]

It is improper to consider the advantages of a child's foster home when deciding whether a statutory basis for termination of parental rights exists. *In re Foster,* 285 Mich App 630, 635; 776 NW2d 415 (2009). However, after a statutory basis for termination of parental rights has been established, a court may consider the advantages of a child's foster home when deciding whether termination of parental rights is in a child's best interests. *Foster, supra.* This is because following establishment of a statutory basis for termination of parental rights, a parent's constitutionally protected interest in the parent-child relationship no longer exists. *In re Trejo,* 462 Mich 341, 355-56; 612 NW2d 407 (2000). A court is then free to compare the relative abilities of the parent and current foster caregiver to meet the needs of the child. Because neither a petitioner for juvenile guardianship under MCL 712A.19c(2) nor a child's foster parents have a right or protected interest in their relationship with the child, they are in the same position as a parent following establishment of a statutory basis for termination of parental rights. A court considering a child's best interests under MCL 712A.19c(2) should likewise be able to compare the abilities of two proposed permanency providers to meet the child's needs.

[6] The children's paternal grandmother also applied to adopt the children, but the MCI superintendent denied her request for consent to adopt. The trial court upheld the MCI superintendent's decision following a "section 45 hearing" in 2012.

As argued above, the trial court appropriately considered the “best interest” factors in the Child Custody Act when determining whether to appoint a juvenile guardian. The “best interest” factors in the Child Custody Act (and the substantially similar factors in EPIC and the Michigan Adoption Code) permit comparison of the relative abilities of competing parties to meet some of those needs. Under MCL 722.23(b) and (c), for example, a court may evaluate “the capacity and disposition of the parties involved” to give the child “love, affection, and guidance” and provide the child with “food, clothing, [and] medical care.” MCL 710.22(g)(*ii*) and (*iii*) contain substantially similar language, applicable to adoptions.

Finally, although a child’s supervising or adoption agency may consider relatives who “have an established relationship with the child and/or provide a familiar environment for the child” for permanent placement, DHS Policy ADM 610, p 1, an agency must weigh the child’s existing relationships with relatives along with the child’s psychological attachment to his or her current caregivers and other factors:

> “If a child resides with licensed foster parent(s), the psychological attachment of a child to the foster parents must always be considered before replacing the child to a different adoptive home. The child’s age, developmental stage and frequency and number of replacements must all be considered in relationship to the length of time the child has resided in the foster home.” DHS Policy ADM 610, p 2.

It is an “undisputed fact that the emotional ties between foster parent and foster child are in many cases quite close, and undoubtedly in some as close as those existing in biological families.” *Smith v Org of Foster Families for Equality & Reform,* 431 US 816, 844 n52; 97 S Ct 2094; 53 L Ed 2d (1977). When deciding whether juvenile guardianship with a relative or adoption by foster parents is in children’s best interests, a trial court should consider the children’s emotional attachment to their foster parents and assign it

appropriate weight in light of the children’s history and current conditions. In this case, the trial court concluded that the children had found “stability and comfort” with their foster parents during the five years that they have been placed in the foster parents’ home.

REMEDY

The CLS urges this Court to review the Muskegon Circuit Court Family Division's decision under MCL 712A.19c(2) using a "clear error" standard of review. If this Court concludes that the trial court's decision was not clearly erroneous, CLS urges this Court to reverse the Court of Appeals' decision and reinstate the children's commitment to the MCI. The CLS also requests that this Court hold that the "relative preference" contained in MCL 722.954a(5) does not apply to petitions for juvenile guardianship under MCL 712A.19c(2), that a court may rely upon the "best interest" factors in the Child Custody Act (or the substantially similar factors contained in EPIC and the Michigan Adoption Code) when deciding whether juvenile guardianship is in a child's best interests under MCL 712A.19c(2), and that a court may compare a petitioner for juvenile guardianship and a child's current foster parents when determining the child's best interests under MCL 712A.19c(2).

Dated: ______________________ ______________________________

Tobin L. Miller (P56601)
Attorney for Amicus
Children's Law Section