

STATE OF MICHIGAN
IN THE 27TH JUDICIAL CIRCUIT COURT – FAMILY DIVISION
NEWAYGO COUNTY

IN THE MATTER OF:

ALYSSA ANN KEAST and
AMBER MARIE KEAST,

Case No. 06-505-AF and
06-506-AF

Minors.

HON. TERRENCE A. THOMAS

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MEMORANDUM OF LAW

Issue 1: Whether Petitioners in a motion filed pursuant to MCL 710.45, who have no legal rights to the children at issue, have standing to file a response or appearance in abuse and neglect proceedings.

It is improper for the Atwoods, who are the grandparent Petitioners to state wards in a motion brought under MCL 710.45 of the Adoption Code, to file a response in an

abuse and neglect proceeding because they are not interested parties to these proceedings.¹ This is supported by the legal premise that “once the right of . . . biological parents were terminated by the family division, third-party plaintiff’s [the grandmother] rights derivative of the parental relationship were also severed . . .”²

The children at issue, the Keast children, have had the biological parents’ parental rights legally severed by Order of the Newaygo County Circuit Court Family Division. The biological father’s parental rights were terminated on February 22, 2006 and the biological mother’s parental rights terminated on May 10, 2006. The children were subsequently made wards of the Michigan Children’s Institute (MCI) through the MCL 400.203 commitment provisions for purposes of placement and adoption.

Issue 2: Whether a court is empowered to unilaterally terminate a child’s previously ordered commitment to the MCI and issue an order of adoption or placement inconsistent with the MCI Superintendent’s decision.

While the Court is empowered to enter orders regarding minors under its jurisdiction pursuant to the Michigan Probate Code³ and the Michigan Court Rule 3.978(C), jurisdiction is not reserved in the probate court for commitments made to a public institution or agency.⁴ “Since valid consent to adoption can only be given by the duly authorized representative of the Department of Social Services or an agency to whom the child has been permanently committed by an order of the juvenile division of t

¹ *In re Foster I*, 226 Mich App 348 (1997) [Attached].

² *In re Foster II*, 237 Mich App 259, 263 (1999) [Attached].

³ MCL 712A.1, *et. al.*

⁴ *In re Griffin*, 88 Mich App 184 (1979) [Attached].

the probate court, it follows that a commitment made for the purpose of adoption or suitable *placement is permanent*.”⁵ (Emphasis added.)

MCR § 3.978 and the MCL § 712A.19C address post termination review hearings and court monitoring of the progress toward permanent placement of a child; however, these provisions do not confer upon courts the ability to terminate a guardian’s or entity’s legal rights unilaterally in order to mandate placement with another party. If the court was able to do so, the family court could override the statutory authority of the MCI Superintendent to consent to adoptions. In effect, this makes the MCI’s authority a nullity because the court could substitute its judgment for that of the MCI Superintendent and thus negating the arbitrary and capricious standard in the statute.

Furthermore, expedition of the placement process under MCL 712.A19C does not contemplate de-commitment from MCI and ordering placement to a family who was denied adoption consent by MCI and who is pursuing a remedy through a MCL 710.45 action. The statute does not confer that authority and neither does the provision for findings in the MCR 3.978(C) confer that authority.

When read in concert with the *Griffin* analysis that a commitment of a child to an agency for purposes of adoption is permanent unless specified as temporary. The statutes and court rules cited herein limit the scope of a court’s authority to only oversee the placement agency. The court possesses the ability to enter orders to mandate specific steps to be taken and timeframes a placement agency must meet in order to facilitate a

⁵ *In re Griffin*, 88 Mich App 184 (1979) at HN8.

permanent placement in the child's best interests; however, the court does not possess the authority to unilaterally terminate the rights of the MCI and to order the child placed in the custody of persons the court deems "most suitable."

Respectfully submitted,

Michael A. Cox
Attorney General

A handwritten signature in cursive script that reads "Maribeth A. Dickerson".

Maribeth A. Dickerson (P68975)
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Date: February 9, 2007

LEXSEE 226 MICH APP 348

In the Matter of CATHERINE FOSTER, a Minor. FAMILY INDEPENDENCE AGENCY, Petitioner-Appellant, v BEVERLY FOSTER, Intervening-Appellee, and STEVEN L. FOSTER and NANCY M. LONGHWAY, Respondents-Appellees.

No. 199702

COURT OF APPEALS OF MICHIGAN

226 Mich. App. 348; 573 N.W.2d 324; 1997 Mich. App. LEXIS 377

October 8, 1997, Submitted
November 7, 1997, Decided

PRIOR HISTORY: [***1]

Wayne Circuit Court. LC No. 95-530296-AV.

DISPOSITION:

Reversed.

COUNSEL: Frank J. Kelley, Attorney General, Thomas L. Casey, Solicitor General, and Bernard Rosner and Larry W. Lewis, Assistant Attorneys General, for the Family Independence Agency.

JUDGES: Before: Fitzgerald, P.J., and Markey and J. B. Sullivan, * JJ.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

OPINION: [*349]

[**325] PER CURIAM.

Petitioner, Family Independence Agency (FIA), appeals by leave granted the November 22, 1996, Wayne Circuit Court order "Establishing Jurisdiction and Granting Intervention." The circuit court held that it had jurisdiction over this child custody dispute involving Catherine Foster and that Beverly Foster, Catherine's paternal grandmother, had standing [*350] to intervene in the proceedings to terminate the parental rights of respondents Steven L. Foster and Nancy M. Longhway. We reverse.

Catherine was born on August 4, 1984. In the same year, Steven and Nancy sought a divorce in the Wayne Circuit Court. Beverly Foster, Steven's mother, was allowed to intervene in the divorce action as a third-party plaintiff. By ex parte order dated June 14, 1985, Wayne Circuit Judge Marvin [***2] R. Stempien directed Steven to return Catherine to the custodial care of Beverly, with whom Catherine apparently had been residing before June 7, 1985. The circuit court also retained jurisdiction over Catherine until she attained the age of eighteen years or until further order of the court.

On May 3, 1992, Catherine was removed from Beverly's home by the Detroit police because of allegations that Beverly was keeping Nancy locked up in the basement. The FIA filed a petition in the probate court on May 5, 1992, asking that the probate court take temporary custody of Catherine. The petition alleged:

1) The paternal grandmother is the legal guardian of the child. She has retained guardianship and maintained care of the child since 1985.

2) On May 3, 1992, the Detroit Police went to the paternal grandmother's home and removed the mother and the child due to the mother's report that she has been held captive by the paternal grandmother for the past seven years. The grandmother denies any participation in holding the mother against her will. A police investigation is pending. The police placed in [sic] the child in Protective Custody

with the maternal aunt.

3) The mother is currently [***3] hospitalized in Sinia [sic] Hospital. Her release date is unknown. However, upon release, [*351] she plans to move to Florida in order to continue her re-cooperation [sic] under the care of her parents.

4) The child told her maternal grandparents that she knew "a lady" was in the basement, of the paternal grandmother's home. She said that she felt sorry for "the [**326] lady: [sic] and would sometimes throw food down to her."

5) The father is Steven Foster. He has established paternity. He visits sporadically, however, he does not provide support.

6) The mother has requested that her child remain in the care of the maternal relatives until she is capable of resuming her parental role.

The petition also erroneously indicated that Catherine was not subject to the prior continuing jurisdiction of another court. According to the petition, Catherine was placed in the physical custody of a maternal aunt, Connie Oliver, when she was removed from Beverly's home.

On July 2, 1992, pursuant to *MCL 712A.2(b)(2)*; *MSA 27.3178(598.2)(b)(2)*, *MCL 712A.3a*; *MSA 27.3178(598.3a)*, *MCR 3.205*, and *MCR 5.927*, the probate court notified the Wayne Circuit Court that a petition regarding Catherine had been [***4] filed with the probate court.

On September 24, 1992, the probate court entered an order granting visitation rights to Beverly, Steven, and Nancy. On November 18, 1992, a hearing was held in the probate court to determine jurisdiction and temporary custody. The allegations of the May 5, 1992, petition were read into the record, and Beverly, Nancy, and Steven entered no-contest pleas to certain paragraphs in the petition. In light of the no-contest pleas, which were based, in part, upon the statements in a police report, the Attorney General, appearing on behalf of the FIA,

requested that the probate court [*352] take temporary wardship of Catherine. The probate court, finding that it had a factual and legal basis for accepting jurisdiction over the matter, took temporary wardship of Catherine and ordered that Catherine continue in the care of her maternal aunt. A dispositional hearing was scheduled for December 16, 1992.

Following a dispositional hearing on February 8 and 9, 1994, the probate court ordered that Catherine continue to be placed with Connie Oliver, her maternal aunt. On January 26, 1995, the FIA filed a supplemental petition in the probate court seeking termination of Steven's [***5] and Nancy's parental rights. The supplemental petition again erroneously indicated that Catherine was not subject to the prior continuing jurisdiction of another court.

On July 26, 1995, the probate court granted the FIA's oral motion to exclude Beverly as a party in the termination of parental rights proceeding. On October 13, 1995, Beverly filed in the circuit court an appeal of the probate court's finding that she lacked standing to participate in the probate court proceedings to terminate parental rights. Following a hearing, the circuit court sua sponte ruled that the probate court did not have jurisdiction over Catherine's custodial disposition because jurisdiction to determine any subsequent custody issues was vested in the circuit court pursuant to the divorce proceedings. The circuit court also made a finding that the probate court was required, but failed, to file a notice of proceedings in the circuit court and that the probate court failed to notify the circuit court of the entry of any subsequent orders.

[*353] The circuit court also found that the probate court obtained jurisdiction over Catherine as a result of a false complaint of neglect by Catherine's mother and false [***6] statements in the original and supplemental petitions by the FIA. Consequently, the circuit court held that the probate court did not have jurisdiction over the custody of Catherine and that jurisdiction belonged with the Wayne Circuit Court. The circuit court also held that Beverly had standing as Catherine's legal custodian to participate in the proceedings to terminate parental rights.

The FIA first argues that the circuit court erred when it determined sua sponte that the probate court was without jurisdiction to consider the petition to terminate parental rights because of the circuit court's continuing jurisdiction over Catherine as a result of the divorce

proceedings. We agree.

When the probate court has established temporary jurisdiction over a juvenile, an erroneous exercise of that jurisdiction may be challenged at any of the mandatory review hearings. *MCL 712A.19*; *MSA [**327] 27.3178(598.19)*; *In re Hatcher*, 443 Mich. 426, 436; 505 N.W.2d 834 (1993). Exercise of subject-matter jurisdiction can then be challenged only on direct appeal, and it may not be collaterally attacked. *Id.* at 439. Here, respondents did not seek a direct appeal from the probate court order exercising [***7] jurisdiction, and the circuit court erred in raising this jurisdictional question sua sponte.

Nonetheless, jurisdiction in the juvenile division of the probate court is established by statute. *MCL 712A.2(b)(1)*; *MSA 27.3178(598.2)(b)(1)* provides the probate court with jurisdiction over any juvenile under the age of eighteen

[*354] whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship.

The statute also provides that if a petition is filed in any probate court alleging that a juvenile is within the provisions of subdivision 1, and the custody of that juvenile is subject to the prior or continuing order of another court, the manner of notice to the other court to proceed shall be governed by court rule. *MCL 712A.2(b)(5)(B)*; *MSA 27.3178(598.2)(b)(5)(B)*.

MCR 3.205, which governs [***8] prior and subsequent orders and judgments affecting minors in domestic relations actions, provides:

(A) Jurisdiction. If an order or judgment has provided for continuing jurisdiction of a minor and proceedings are commenced in another Michigan court having separate jurisdictional grounds for

an action affecting that minor, a waiver or transfer of jurisdiction is not required for the full and valid exercise of jurisdiction by the subsequent court.

However, if a minor is known to be subject to the prior continuing jurisdiction of a Michigan court, the plaintiff or initiating party must mail written notice of proceedings in a subsequent court to the attention of the clerk or register of the prior court and the appropriate official of the prior court. *MCR 3.205(B)(2)*.

In *Krajewski v Krajewski*, 420 Mich. 729, 732; 362 N.W.2d 230 (1984), the Supreme Court addressed the extent "of power that may be exercised by the juvenile division of probate court in dealing with abused [*355] or neglected minors who are wards of a circuit court by virtue of a custody award rendered as part of a divorce decree." The Supreme Court considered the substantially similar predecessors of *MCL 712A.2(b)*; [***9] *MSA 27.3178(598.2)(b)* and *MCR 3.205* (GCR 1963, 724.1[5]) when it held that the probate court is not required to obtain a waiver of jurisdiction by the circuit court in order to exercise its own jurisdiction, because probate jurisdiction is conferred by statute. *Krajewski*, *supra* at 734.

Following *Krajewski*, this Court considered the effect of the notice provisions on the probate court's jurisdiction in *In re DaBaja*; 191 Mich. App. 281; 477 N.W.2d 148 (1991). In *DaBaja*, the respondent contended that the probate court improperly terminated his parental rights. The respondent argued that because the circuit court had continuing jurisdiction over the minor child as a result of the divorce proceedings between the parents, the probate court could not take jurisdiction over the child without giving proper notice of the adoption proceedings to the circuit court. *Id.* at 288.

Relying primarily upon the Supreme Court's holding in *Krajewski*, this Court stated:

As respondent correctly contends, the Wayne Circuit Court retained jurisdiction to alter the custody order pertaining to the minor child after it issued the judgment of divorce and custody order in his parents' [***10] divorce action. [Citation omitted.] Nevertheless, the Wexford County Probate Court also had jurisdiction over the minor child pursuant to § 24 of

the Adoption Code [citation omitted] . . . and pursuant to *MCL 712A.2(b)*; MSA 27.3178(598.2)(b), the jurisdictional provision [**328] of the Juvenile Code, as a child under the age of eighteen whose parent or person legally responsible for the child had failed or refused to provide [*356] proper support. In such cases of concurrent jurisdiction, the probate court is not required to obtain a waiver of jurisdiction by the circuit court in order to exercise its own jurisdiction, because probate jurisdiction is conferred by statute. *Krajewski v Krajewski*, 420 Mich. 729, 734; 362 N.W.2d 230 (1984).

In this situation of concurrent jurisdiction over the minor child, the manner of notice to the circuit court and the authority of the probate court was governed by *MCR 3.205*. See *MCL 712A.2(b)*; MSA 27.3178(598.2)(b). *MCR 3.205* required the probate court to mail timely, written notice of the probate proceedings to the clerk or register, the friend of the court and the prosecuting attorney of Wayne County. . . .

. . . However, the court failed to notify [***11] the Wayne County Clerk or Prosecutor regarding commencement of the adoption proceedings.

Nevertheless, as the court rule expressly states, waiver or transfer of jurisdiction was not required for the full and valid exercise of the probate court's jurisdiction. Furthermore, the required notice was not jurisdictional and did not prevent the probate court from entering interim orders. [*DaBaja, supra* at 288-289.]

Contrary to the circuit court's findings, the probate court's failure to give the circuit court proper notice or the circuit court's failure to waive jurisdiction did not preclude the probate court from exercising jurisdiction of the proceedings involving Catherine. *Id.*; *Krajewski, supra* at 734, n1

n1 Additionally, it appears as if the circuit court erred in determining that no notice was given to the circuit court by the probate court. Attached as Appendix V to the Agency's Brief on Appeal is a Notice of Prior Court of Proceedings Affecting Minor(s) dated July 2, 1992. By this notice, the probate court informed the Wayne Circuit Court that a petition was filed with the court affecting a minor subject to the continuing jurisdiction of the Wayne Circuit Court.

[***12]

[*357] The circuit court also found that although it and the probate court can have concurrent jurisdiction, the probate court may not issue orders contradicting circuit court orders. In support of this proposition, the circuit court cited the Supreme Court's opinion in *Krajewski*. However, the circuit court apparently misinterpreted the Court's holding in *Krajewski*. In *Krajewski*, the Court reproduced the language of GCR 1963, 724.1, the predecessor of *MCR 3.205*:

The subsequent court shall give due consideration to prior continuing orders of other courts of record and refrain from entering orders contrary or inconsistent with such prior orders unless appropriate to the welfare of the child and in the best interests of justice. [*Krajewski, supra* at 734.]

After doing so, the Court stated:

The observation in GCR 1963, 724.1(5) that "no waiver or transfer of jurisdiction is required for the full and valid exercise of jurisdiction of the subsequent court" evinces our conviction that the children intended to be protected by the constitution and the Juvenile Code can best be served by a procedure which, having provided for appropriate notice and opportunity for [***13] the prior court to exercise its responsibility under its jurisdiction to further the child's best interests, *nonetheless gives unrestricted freedom to the juvenile court to carry out its mandate.* [*Id.* (Emphasis added.)]

Hence, we conclude that the probate court properly exercised jurisdiction over Catherine.

The FIA also contends that the circuit court erred in finding that Beverly possessed standing to participate in the proceedings to terminate Steven's and Nancy's parental rights. We agree.

[*358] In order to have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected. *Solomon v Lewis*, 184 Mich. App. 819, 822; 459 N.W.2d 505 (1990). In *Bowie v Arder* 441 Mich. 23, 42-43; 490 N.W.2d 568 (1992), the [*329] Supreme Court, quoting 59 Am Jur 2d, Parties, § 30, p 414, noted that

"one cannot rightfully invoke the jurisdiction of the court to enforce private rights, or maintain a civil action for the enforcement of such rights, unless one has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. [***14] This interest is generally spoken of as 'standing.'"

Here, the purpose of the probate court proceeding was solely to terminate Steven's and Nancy's parental rights. Presumably, Beverly sought to intervene in the proceeding in an effort to be awarded custody of Catherine. However, as noted by this Court in *Tallman v Milton*, 192 Mich. App. 606, 615; 482 N.W.2d 187 (1992), quoting *Fritts v Krugh*, 354 Mich. 97, 115; 92 N.W.2d 604 (1958),

"it is totally inappropriate to weigh the advantages of a foster home against the home of the natural and legal parents. Their fitness as parents and the question of neglect of their children must be measured by statutory standards without reference to any particular alternative home which may be offered the children."

Although *Tallman* involved an attempt by a foster parent to intervene in proceedings to terminate parental rights, we believe that the same analysis applies with respect to a legal custodian of a child whose parents are the subject of a petition to terminate [*359] parental rights. Hence, in the absence of any statute, court rule, or case law granting standing to a legal custodian to participate in a probate court [***15] proceeding to terminate parental rights, we conclude that the circuit court erred in concluding that Beverly had standing to participate in such proceedings.
n2

n2 We wish to emphasize that this issue involves only the proceedings to terminate parental rights and does not concern any proceedings with respect to custody of the juvenile.

Reversed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Joseph B. Sullivan

LEXSEE 237 MICH. APP. 259

**NANCY M. FOSTER, Plaintiff, v STEVEN L. FOSTER, Defendant, and BEVERLY
C. FOSTER, Third-Party Plaintiff-Appellant, and FAMILY INDEPENDENCE
AGENCY, Third-Party Defendant-Appellee,**

No. 213389

COURT OF APPEALS OF MICHIGAN

237 Mich. App. 259; 602 N.W.2d 610; 1999 Mich. App. LEXIS 230

April 6, 1999, Submitted
August 20, 1999, Decided

PRIOR HISTORY: [***1] LC No. 84-433087 DM.
Wayne Circuit Court.

DISPOSITION: Affirmed.

COUNSEL: Steinberg, O'Connor & Burns, P.L.L.C. (by
Janice L. Burns), for Beverly C. Foster. Detroit.

Jennifer M. Granholm, Attorney General, Thomas L.
Casey, Solicitor General, and Judy A. Hartsfield and
Larry W. Lewis, Assistant Attorneys General, for Family
Independence Agency.

JUDGES: Before: Hood, P.J., and Holbrook, Jr., and
Whitbeck, JJ.

OPINION: [*260] [**611] PER CURIAM.

Third-party plaintiff Beverly C. Foster appeals as of
right from an order denying her motion for return of
custody of her granddaughter, Catherine Foster. We
affirm.

This case is before us for a second time. Nancy M.
and Steven L. Foster are Catherine's natural parents. The
facts that preceded the first appeal are set forth in *In re
Foster*, 226 Mich. App. 348; 573 N.W.2d 324 (1997)
(hereinafter *Foster I*). Pertinent portions of those facts are
reproduced below:

Catherine was born on August 4, 1984. In the same
year, Steven and Nancy sought a divorce in the Wayne
Circuit Court. Beverly Foster, Steven's mother, was

allowed [***2] to intervene in the divorce action as a
third-party plaintiff. By ex parte order dated June 14,
1985, [the circuit court] directed Steven to return
Catherine to the custodial care of [*261] Beverly, with
whom Catherine apparently had been residing before
June 7, 1985. The circuit court also retained jurisdiction
over Catherine until she attained the age of eighteen years
or until further order of the court.

On May 3, 1992, Catherine was removed from
Beverly's home by the Detroit police because of
allegations that Beverly was keeping Nancy locked up in
the basement. The [Family Independence Agency (FIA)]
filed a petition in the probate court on May 5, 1992,
asking that the probate court take temporary custody of
Catherine. . . . The petition . . . erroneously indicated that
Catherine was not subject to the prior continuing
jurisdiction of another court. According to the petition,
Catherine was placed in the physical custody of a
maternal aunt, Connie Oliver, when she was removed
from Beverly's home.

* * *

. . . On November 18, 1992, a hearing was held in the
probate court to determine jurisdiction and temporary
custody. . . . Beverly, Nancy, and Steven entered
no-contest pleas [***3] to certain paragraphs in the
petition. In light of the no-contest pleas, . . . the Attorney
General . . . requested that the probate court take
temporary wardship of Catherine. The probate court,
finding that it had a factual and legal basis for accepting
jurisdiction over the matter, took temporary wardship of
Catherine and ordered that Catherine continue in the care

of her maternal aunt. . . .

Following a dispositional hearing on February 8 and 9, 1994, the probate court ordered that Catherine continue to be placed with Connie Oliver On January 26, 1995, the FIA filed a supplemental petition in the probate court seeking termination of Steven's and Nancy's parental rights. . . .

On July 26, 1995, the probate court granted the FIA's oral motion to exclude Beverly as a party in the termination of parental rights proceeding. . . . Beverly filed in the circuit court an appeal of the probate court's finding that she lacked standing to participate in the probate court proceedings Following a hearing, the circuit court sua sponte ruled that the probate court did not have jurisdiction over Catherine's custodial disposition because jurisdiction to [*262] determine any subsequent [***4] custody issues was vested in the circuit court pursuant to the divorce proceedings. . . .

The circuit court also found that the probate court obtained jurisdiction over Catherine as a result of a false complaint of neglect by Catherine's mother and false statements in the original and supplemental petitions by the FIA. Consequently, [*612] the circuit court held that the probate court did not have jurisdiction over the custody of Catherine and that jurisdiction belonged with the Wayne Circuit Court. The circuit court also held that Beverly had standing as Catherine's legal custodian to participate in the proceedings to terminate parental rights. [226 Mich. App. at 350-353.]

The *Foster I* Court held that third-party plaintiff lacked standing to participate in the termination proceedings initiated by the FIA. 226 Mich. App. at 359. Thereafter, on January 26, 1998, the FIA renewed the termination proceedings by filing a petition in the family division of the circuit court seeking termination of parental rights. Subsequently, third-party plaintiff filed in the circuit court a motion for return of custody of Catherine. On June, 2, 1998, three days before the hearing on third-party [***5] plaintiff's motion, the family division entered an order terminating Steven and

Beverly Foster's parental rights. Catherine was "committed to the Michigan Children's Institute [MCI] of the [FIA] for adoptive planning, supervision, care, and placement." On June 5, 1998, the circuit court ruled from the bench that it no longer had jurisdiction over the custody matter once the parental rights were terminated and the child was made a permanent ward of the state.

Third-party plaintiff argues that irrespective of the action taken by the family division, the circuit court retained jurisdiction over matters relating to custody of Catherine pursuant to the June 1985 ex parte [*263] order. We disagree. First, we note that under *MCL 600.1021*; *MSA 27A.1021*, the family division of the circuit court has sole and exclusive jurisdiction over matters relating to both termination of parental rights and custody of juveniles. Therefore, we are not presented with the situation where we must evaluate and reconcile orders rendered by different courts with different statutory grants of authority. See, e.g., *In re Toth*, 227 Mich. App. 548; 577 N.W.2d 111 (1998). [***6] Both the termination order and the order denying third-party plaintiff's motion for return of custody came out of the family division of the Wayne Circuit Court. Once the parental rights were terminated and Catherine was committed to the care of MCI, the June 1985 ex parte order was effectively superseded. *MCR 3.205(C)*. Legal and physical custody of Catherine now rests with the state. See *In re Griffin*, 88 Mich. App. 184, 193-194; 277 N.W.2d 179 (1979). Additionally, once the rights of Catherine's biological parents were terminated by the family division, third-party plaintiff's rights derivative of the parental relationship were also severed. The matter is no longer one of custody, but of adoption.

Affirmed.

/s/ Harold Hood

/s/ Donald E. Holbrook, Jr.

/s/ William C. Whitbeck

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LEXSEE 88 MICH. APP. 184

IN THE MATTER OF LINDA LOU GRIFFIN

Docket Nos. 78-2035, 78-2072, 78-2073, 78-2965, 78-2966

Court of Appeals of Michigan

88 Mich. App. 184; 277 N.W.2d 179; 1979 Mich. App. LEXIS 1960

November 2, 1978, Submitted

January 17, 1979, Decided

DISPOSITION: [***1]

The Alpena County Probate Court is reversed and the case remanded to that court for consideration of the Wehrs' petition. Custody is to remain with the Wehrs pending issuance of an adoption order.

HEADNOTES:

1. Courts -- Probate Courts -- Jurisdiction -- Infants.

Probate court jurisdiction over children is not inherent but is based upon constitutional and statutory provisions.

2. Infants -- Courts -- Probate Courts -- Jurisdiction -- Commitment of Minor -- Private Agency -- Public Agency -- Statutes.

A probate court's commitment of a child to a private or incorporated institution or agency does not divest the court of jurisdiction over the child; however, commitment of the child to the Department of Social Services, a public agency, is irrevocable and the jurisdiction of the probate court becomes divested (*MCL 712A.5, 712A.18[d], 712A.18[e]; MSA 27.3178[598.5], 27.3178[598.18][d], 27.3178[598.18][e]*).

3. Infants -- Courts -- Probate Courts -- Commitment of Minor -- Conditional Commitment -- Statutes.

A probate court may commit a minor to the Department of Social Services conditionally only as provided by statute; a commitment for the purpose of purchasing services from [***2] a private agency is not a valid condition under the statute, and where the condition

is not a valid one, the commitment is not a conditional commitment (*MCL 400.203; MSA 25.383*).

4. Courts -- Probate Courts -- Jurisdiction -- Statutes.

A statute which provides that where a case is originally within the jurisdiction of the probate courts of two or more counties the court in which proceedings are first commenced shall retain jurisdiction does not apply to a case in which one probate court had jurisdiction which was properly exercised and divested before a proceeding was commenced in a second probate court (*MCL 701.22; MSA 27.3178[22]*).

SYLLABUS:

The parental rights concerning Linda Lou Griffin were terminated by the Grand Traverse County Probate Court. Subsequently, the court committed Linda Lou to the Department of Social Services "for purchase of service to" a private agency for the purpose of adoption or other placement. The child was placed by the DSS, through the Michigan Children's Institute, a public agency, in the foster home of David E. and Coraline C. Lardie in Traverse City. Gregory and Susan Wehr of Alpena petitioned for adoption of Linda Lou in the Alpena County Probate [***3] Court, and a consent to the adoption was filed by the director of the Children's Institute. The Grand Traverse County Probate Court then issued an order purporting to vacate its earlier commitment order to the Department of Social Services and committing the child to a private agency. It ordered custody to remain with the Lardies until the agency completed adoption proceedings. The Wehrs, having been licensed as a foster home, subsequently visited Linda Lou, and arranged to have her transported to their

home in Alpena. They filed a complaint in Alpena Circuit Court seeking a restraining order to prevent the child from being removed from their home. The restraining order was granted, Joseph P. Swallow, J., and the Wehrs were instructed to pursue the adoption proceeding in probate court in order to determine probate court jurisdiction. The Alpena County Probate Court, Richard E. Meden, J., ordered that jurisdiction over the child was in the Grand Traverse County Probate Court. This order was appealed by the DSS, by the Wehrs, and by the appointed counsel for the child. The Lardies filed a petition for adoption in the Grand Traverse County Probate Court, and their adoption was [***4] immediately ordered, Kenneth G. Mackness, J. At a further hearing the Alpena Circuit Court ordered temporary custody to remain with the Wehrs until final adjudication of the jurisdiction controversy. This order was appealed from by the Grand Traverse County Probate Judge, who was a party in the Alpena Circuit Court proceedings, and by the Lardies. The Court of Appeals consolidated the appeals for hearing and decision. *Held*:

The order of the Grand Traverse County Probate Court committing the child to the Department of Social Services was irrevocable and divested that court of jurisdiction. That court's later order committing the child to the private agency, and the order of adoption, were, therefore, without effect. Jurisdiction was thereafter properly assumed by the Alpena County Probate Court when the Wehrs' petition for adoption was filed therein. Jurisdiction remains in the Alpena County Probate Court.

COUNSEL:

Frank J. Kelley, Attorney General, *Robert A. Derengoski*, Solicitor General, and *Janis Meija* and *Robert N. Rosenberg*, Assistants Attorney General, for the Department of Social Services.

Jason, Kowalski, Pugh & Poch, for Gregory and Susan Wehr. [***5]

Raven & Sterling, P.C., guardian ad litem for Linda Lou Griffin (Grand Traverse Probate Court) and for David E. and Coraline C. Lardie.

Williams, Coulter, Cunningham, Davison & Reed, for the Grand Traverse County Probate Judge.

Douglas K. Wenzel, guardian ad litem for Linda Lou

Griffin (Alpena Circuit Court).

JUDGES:

Beasley, P.J., and D. E. Holbrook and G. R. Cook, * JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

OPINION BY:

COOK

OPINION:

[*186] [**181] The essential question presented for resolution in this case is whether the Grand Traverse County Probate Court or the Alpena County Probate Court has proper jurisdiction over Linda Lou Griffin, born February 21, 1975, and thus constitutes the proper forum to adjudicate adoption proceedings involving the child. Cases 78-2035, 78-2072 and 78-2073 concern appeals from the May 22, 1978, decision and order of the Alpena County Probate Court that only the Grand Traverse [*187] County Probate Court possessed adoptive jurisdiction over Linda Lou Griffin. By order of this Court on August 25, 1978, the appeals in these three cases were consolidated with appeals in Cases 78-2965 and 78-2966, both [***6] of [**182] which arise from a July 25, 1978, Alpena County Circuit Court order awarding temporary custody of Linda to Gregory and Susan Wehr, prospective adoptive parents of Linda, who reside in Alpena county.

The complex litigational history of these cases requires a detailed examination of their underlying facts. During the proceedings in Alpena County Probate Court to determine whether it or the Grand Traverse County Probate Court had jurisdiction over Linda, the parties stipulated as follows:

"1. That the parental rights concerning Linda Lou Griffin were terminated in Grand Traverse County by Order of the Probate Court on February 14, 1977, pursuant to * * * [MCL 712A.2(b); MSA 27.3178(598.2)(b)].

"2. That a Petition for Re-Hearing was filed in the Probate Court on April 5, 1977.

"3. That the matter was re-heard in the Probate Court on May 5, 1977.

"4. That a decision reaffirming its subsequent Order for Termination of Parental Rights was issued on September 6, 1977.

"5. That an Application for Delayed Leave to Appeal was filed on October 13, 1977.

"6. That said Application for Delayed Leave to Appeal was denied by the Circuit Court for the County of Grand Traverse [***7] on March 8, 1978.

"7. That the Probate Court for the County of Grand Traverse issued an Order committing Linda Lou Griffin to Child and Family Services on September 30, 1977.

"That said Order states in pertinent parts the following:

""[THEREFORE IT IS ORDERED,] that [LINDA [*188] LOU GRIFFIN] is hereby committed to Child [&] Family Services of Michigan for the purpose of adoption or suitable placement, and said agency may make immediate plans for placement, there being no re-hearing or appeal time remaining.'

"8. That the Probate Court for the County of Grand Traverse issued an Order committing Linda Lou Griffin to The Department of Social Services for a purchase of service to Child and Family Services of Michigan on October 4, 1977. Said Order states in pertinent parts the following:

""[THEREFORE IT IS ORDERED,] that [LINDA LOU GRIFFIN] is hereby committed to [the] Department of Social Services for purchase of service to Child [&] Family Services of Michigan for the purpose of adoption or suitable placement.

""[IT IS FURTHER ORDERED], that in all other respects the Order of September 30, 1977 is hereby reaffirmed and remains in full force and effect.' [***8]

"9. That the contract between The Department of Social Services and Child and Family Services of Michigan expired on February 23, 1978.

"10. That the Grand Traverse County Probate Court issued an Order vacating and setting aside its October 4, 1977 Order and further ordering that Linda Lou Griffin

be committed to Child and Family Services of Michigan on April 3, 1978. Said Order states in pertinent parts the following:

""[THEREFORE IT IS ORDERED,] that the Order of October 4, 1977 committing the captioned child to [the] Department of Social Services is hereby vacated and set aside.

""[IT IS FURTHER ORDERED], that the prior Order of September 30, 1977[,] committing said juvenile to Child [&] Family Services of Michigan for adoption or suitable placement is hereby reinstated and said agency shall henceforth have full responsibility for the custody and placement of said child.

""[IT IS FURTHER ORDERED], that said child shall remain in her present temporary foster home placement until the agency completes adoption arrangements or otherwise approves a move.'

[*189] "11. That The Department of Social Services -- Alpena County arranged a pre-adoption visit for Gregory [***9] and Susan Wehr of Alpena County which was held on April 13th and 14th of 1978.

[**183] "12. That Gregory and Susan Wehr and Miss LaCrosse of the Alpena Department of Social Services caused Linda Lou Griffin to be transported from Grand Traverse County to Alpena County where she presently remains, on April 16, 1978.

"13. That Gregory and Susan Wehr were licensed as a foster home on the 1st day of April, 1978 by the Bureau of Regulatory Services, Department of Social Services.

"14. That a Petition for Adoption on behalf of Gregory and Susan Wehr was filed in the Probate Court for the County of Alpena on March 22, 1978 requesting the adoption of Linda Lou Griffin and sponsored by The Department of Social Services.

"15. Consent to adoption by Other Than Parents was signed by The Department of Social Services and filed March 29, 1978 by Richard Higley, Superintendent of Michigan Children's Institute, State of Michigan, Department of Social Services."

The Alpena County Circuit Court on April 28, 1978, issued a temporary restraining order forbidding removal of Linda from the Wehr's residence. After noting that the probate courts of both Alpena and Grand Traverse

counties had active [***10] files on the child, the Alpena County Circuit Court instructed the Wehrs to petition Alpena County Probate Court for immediate consideration of their adoption petition so that the question of probate court jurisdiction over Linda could be decided.

Pursuant to this directive, the parties appeared in Alpena County Probate Court on May 17, 1978. That court on May 22, 1978, entered its decision and order that the Grand Traverse County Probate Court had sole jurisdiction over Linda, stating in pertinent part:

[*190] "The three orders issued by the Grand Traverse Probate Court clearly indicate to this Court that the Court did not intend to release Linda Lou to any agency for adoption or [to] permanently *** release the child from its jurisdiction until at such time as each agency had fully complied with the terms of the commitment orders.

"The purpose of the commitment in the present case was 'for purchase of service to Child and Family Services of Michigan for the purpose of adoption or suitable placement'. The commitment, therefore, was a qualified and restricted commitment to the Michigan Department of Social Services. ***.

"In the present case, because the Order [***11] of commitment to the Michigan Department of Social Services was qualified and restricted to the purpose of purchasing services from the Child and Family Services of Michigan, it cannot be said that the qualified commitment to the Michigan Department of Social Services divests the Grand Traverse County Probate Court of its continuing jurisdiction to oversee the fulfillment of the conditions of the commitment."

On June 1, 1978, the Grand Traverse County Probate Court issued an order confirming the adoption of Linda Lou Griffin by David E. and Coraline C. Lardie, residents of Grand Traverse county. However, the Alpena County Circuit Court on July 24, 1978, ordered temporary custody of Linda to remain with the Wehrs. The effect of this order was to stabilize Linda's custodial environment pending this Court's adjudication of the adoptive jurisdiction controversy.

Determination of which forum possesses adoptive

jurisdiction over Linda Lou Griffin depends upon the proper interpretation of the three orders issued by the Grand Traverse County Probate Court on September 30, 1977, October 4, 1977, and April 3, 1978. The Alpena County Probate Court's [*191] May 22, 1978, decision held [***12] that these orders resulted in a valid *conditional* commitment of Linda to the Michigan Department of Social Services (DSS), with continuing jurisdiction in the Grand Traverse probate court to revoke this commitment if the DSS did not fulfill the conditions of commitment to the probate court's satisfaction. The opposing view, held by the DSS, is that the Grand [**184] Traverse probate court's October 4, 1977, commitment of Linda to the DSS was *irrevocable* and divested the Grand Traverse probate court of any further jurisdiction in the matter. According to this view, subsequent DSS efforts to place Linda for adoption in Alpena county validly vested adoptive jurisdiction in the Alpena County Probate Court, and the latter erred reversibly by ruling otherwise.

We note initially that probate court jurisdiction over children is not inherent but is based upon constitutional and statutory provisions. Const 1963, art 6, § 15; *Fritts v Krugh*, 354 Mich 97, 112; 92 NW2d 604, 612 (1958). Particularly relevant to the instant dispute are the juvenile code, *MCL 712A.1 et seq.*; MSA 27.3178(598.1) *et seq.* and the act establishing the Michigan Children's Institute, *MCL 400.201 [***13] et seq.*; MSA 25.381 *et seq.*

The Grand Traverse County Probate Court obtained jurisdiction over Linda when she was removed from her natural parents pursuant to *MCL 712A.2(b)(1)*; MSA 27.3178(598.2)(b)(1). This jurisdiction would continue until she reached the maximum age of jurisdiction "unless released sooner by order of the court". *MCL 712A.2a(1)*; MSA 27.3178(598.2a)(1). Consequently, that court's September 30, 1977, order committing Linda "to Child & Family Services of Michigan for the purpose of adoption or suitable placement" was valid. *MCL [*192] 712A.18(d)*; MSA 27.3178(598.18)(d). It is important to note that this commitment did not divest the Grand Traverse probate court of jurisdiction over Linda, since MCL 712A.5; MSA 27.3178(598.5) provides that "[commitments] to a private or incorporated institution or agency shall not divest the juvenile division of the probate court of jurisdiction unless the child is adopted in a manner provided by law".

Because the Grand Traverse probate court retained

jurisdiction over Linda subsequent to its September 30, 1977, order, that court, by its order of October 4, 1977, was able to modify the September 30 order and [***14] commit Linda "to the Department of Social Services for purchase of service to Child & Family Services of Michigan for the purpose of adoption or suitable placement". This commitment was authorized by *MCL 712A.18(e)*; *MSA 27.3178(598.18)(e)*. ~~However, we~~ hold that the order of October 4, 1977 -- unlike the order of September 30, 1977 -- constituted an irrevocable commitment of Linda to the DSS and divested the Grand Traverse probate court of any further jurisdiction over her. That court's order of April 3, 1978, was therefore invalid.

Several considerations support our conclusion that the order of October 4, 1977, was irrevocable. First, as noted previously, *MCL 712A.5*; *MSA 27.3178(598.5)* specifically states that the probate court is not divested of jurisdiction when a child is committed "to a private or incorporated institution or agency * * *". By contrast, there exists no similar statutory provision reserving jurisdiction in the probate court for commitments made to a public institution or agency.

Secondly, we note the difference in language between *MCL 712A.18(d)*; *MSA 27.3178(598.18)(d)* [*193] and *MCL 712A.18(e)*; *MSA 27.3178(598.18)(e)*. The former allows the probate court [***15] to "[place] the child in or commit the child to a private institution or agency * * *". (Emphasis supplied.) The latter authorizes the probate court only to "[commit] the child to a public institution * * *". (Emphasis supplied.) Since the word "place" does not carry the connotations of finality and severance of authority inherent in the term "commit", we conclude that the Legislature used these terms advisedly and intended a commitment under subsection (e) to be final and irrevocable. This argument receives support from the fact that the distinction between "place" and "commit" is maintained not only within subsection (e), but also throughout the other subsections of *MCL 712A.18*; *MSA 27.3178(598.18)*.

[**185] The third argument suggesting irrevocability of the October 4th order derives from the fact that when the Grand Traverse probate court committed Linda to the DSS she was thereby placed in the Michigan Children's Institute (MCI) pursuant to *MCL 400.203(a)*; *MSA 25.383(a)*. Although *MCL 400.203(b)*; *MSA 25.383(b)* allows admission of a child to the MCI

by "temporary commitment" for observation, the Legislature did not use the adjective "temporary" to limit commitment [***16] under subsection (a). Commitment under subsection (a) is therefore logically permanent in nature.

Finally, our analysis of this issue would not be complete without a brief discussion of two relevant opinions of the Michigan Attorney General. OAG, 1945-1946, No 3552, p 336 (May 23, 1945), presented the following question:

"When a child is committed to a public institution such as M.C.I. [Michigan Children's Institute] under (e) of *Section 18 of Act 54 P.A. 1944* by the Juvenile Court [*194] and such institution accepts the child, does the Court retain any further jurisdiction?"

In answering this question, the above-cited opinion referred to OAG, 1945-1946, No 3091, p 221 (February 7, 1945), which states at 222:

"A careful reading of section 5 of Act No. 220, Public Acts of 1935, and sections 7 and 9 of the act as amended by Act No. 8, Public Acts of 1944 Extra Session, will, in our opinion, clearly show that (1) children placed in the Michigan Children's Institute become the wards of the State; (2) are under the supervision and control of the Michigan Juvenile Institute Commission; (3) which has the power and duty of maintenance, health, instruction and training of the children, [***17] and placing and supervising them in homes, without further order from the court committing the child.

"It is therefore our opinion that a child committed by the probate court to the Michigan Children's Institute is received by said institute subject to the provisions of Act No. 220, Public Acts of 1935 (as amended by Act No. 8, Public Acts of 1944 Extra Session), and is subject to the provisions of said act in each individual case, depending upon the purpose for which the child was committed."

Although the opinion does not specifically state that the probate court loses jurisdiction upon commitment of a child to a public institution pursuant to *MCL 712A.18(e)*; *MSA 27.3178(598.18)(e)*, it does note that the MCI may place the committed child in a home without a further court order. Furthermore, *MCL 400.209*; *MSA 25.389* authorizes the superintendent of the MCI "to consent to the adoption * * * of any child who may have been

committed to said institute, pursuant to the laws for the adoption * * * of minors". Since valid consent to adoption can only be given "[by] the [*195] duly authorized representative of the department or of a child placing agency to whom the child has been [***18] permanently committed by an order of the juvenile division of the probate court", *MCL 710.43(1)(b)*; MSA 27.3178(555.43)(1)(b), it follows that commitment of a child pursuant to *MCL 712A.18(e)*; MSA 27.3178(598.18)(e), and reception of that child into the MCI by virtue of this commitment compels the conclusion that the child's commitment must be permanent. Otherwise the MCI, through the DSS, would be unable validly to consent to subsequent adoption of the child as provided by statute. Therefore, the October 4, 1977, order of the Grand Traverse County Probate Court was of necessity a permanent commitment.

We do not agree that the final clause of the above-quoted opinion, "depending upon the purpose for which the child was committed", envisions power in a probate court to make a conditional commitment to the DSS. This clause is more properly interpreted as referring to the different types of commitment found in *MCL 400.203*; MSA 25.383. Because Linda Lou Griffin was admitted to the MCI pursuant to subsection (a)(1) of the statute, other subsections of the same statute dealing [**186] with conditional commitment to the MCI are inapplicable to her case. Furthermore, because a probate [***19] court may condition a commitment to the DSS only as provided by *MCL 400.203*; MSA 25.383, and since the condition ostensibly imposed by the Grand Traverse probate court's October 4, 1977, order is not recognized as a valid condition under this statute, the condition which the probate court attempted to impose is void.

Certain of the parties cite *MCL 701.22*; MSA 27.3178(22) as dispositive of the issue presented. That statute provides as follows:

[*196] "When a case shall be originally within the jurisdiction of the probate court of 2 or more counties, the court which shall first take cognizance thereof by the commencement of proceedings, shall retain the same

throughout."

This statute is inapplicable for two reasons. First, only the Grand Traverse probate court originally had jurisdiction over Linda. It properly exercised this jurisdiction in the neglect proceedings. The Alpena County Probate Court had no jurisdiction at that time.

Secondly, at the time the Wehrs filed an adoption petition with the Alpena probate court, the Grand Traverse probate court no longer had jurisdiction over the child because it had divested itself of jurisdiction by virtue of its October 4, 1977, [***20] order. There was therefore no statutory impediment to the Wehr's filing of an adoption petition in Alpena county.

Our disposition of the first issue on appeal obviates the need for any extended discussion of the Alpena County Circuit Court's June 22, 1978, order awarding temporary custody of Linda to Gregory and Susan Wehr. The Alpena Circuit court should not be criticized for attempting to stabilize the custodial environment of Linda Lou Griffin pending resolution of the complex jurisdictional dispute on appeal. We need not decide whether the circuit court's actions were technically imperfect.

We reverse the May 22, 1978, order of the Alpena County Probate Court and remand this case to that court for its consideration of the Wehrs' petition for adoption of Linda Lou Griffin. This remand is without prejudice to the right of David E. and Coraline C. Lardie to file in that court a petition for the adoption of Linda. The Alpena probate court shall expeditiously consider [*197] the petition or petitions filed and shall decide them based upon the best interests of Linda Lou Griffin. Pursuant to our power under GCR 1963, 820.1(7), we order that temporary custody of Linda Lou [***21] Griffin be continued with the Wehrs until the Alpena County Probate Court has issued an order confirming Linda Lou's adoption.

Reversed and remanded for further proceedings not inconsistent with this opinion.

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