

STATE OF MICHIGAN
COURT OF APPEALS

In RE BRANDON GAVIN HANDORF, Minor.

JOSEPH EBY and MARGO EBY,

Petitioners-Appellants,

FOR PUBLICATION
August 18, 2009
9:10 a.m.

v

MONICA GRACE LABO and ERIC JAMES
LABO,

No. 290101
Livingston Probate Court
LC No. 06-009053-GM

Respondents-Appellees.

Before: Cavanagh, P.J., and Markey and Davis, JJ.

DAVIS, J.

Petitioners Joseph and Margo Eby appeal by leave granted an order denying their motion to allow them to consent – as the guardians of Brandon Gavin Handorf – to their own adoption of Brandon. Respondents Monica Grace Labo and Eric James Labo are Brandon’s biological mother and legal father. We affirm and remand for any further proceedings the trial court deems necessary or appropriate.

Brandon was born while Monica was incarcerated. He was placed with petitioners three days later. Petitioners were initially made temporary guardians over Monica’s objection, and petitioners were eventually appointed as full guardians. The trial court ordered a court-structured plan to reintegrate Brandon with respondents. Monica was required to comply with several conditions, including regular drug testing, obtaining stable housing and employment, and participating in counseling. Eric had no contact with Brandon, and although Monica initially made regular contact, she began missing appointments. Monica generally failed to fulfill the requirements. The court asked the Department of Human Services to investigate termination proceedings, but the Department of Human Services did not do so. Meanwhile, Brandon did well in petitioners’ custody.

Petitioners eventually sought to adopt Brandon. Eric was apparently amenable to this and, indeed, desired no contact with Brandon and wished to be released from any parental obligations. Monica was not amenable. Petitioners moved to be granted the authority, as Brandon’s guardians, to consent to their own adoption of Brandon. The trial court considered the matter and concluded, correctly, that it could only grant petitioners’ request if Brandon’s parents’ parental rights were first terminated. The trial court further concluded that unless

Brandon's parents consented, it lacked the authority under the guardianship code to grant petitioners' motion. The probate court certified this appeal, and this Court granted leave.

We initially note that there is no published authority in Michigan directly on point, and the unpublished opinions from this Court are in conflict.¹ In *In the Matter of Shawna Partello*, unpublished opinion per curiam of the Court of Appeals, released September 15, 1998 (Docket No. 202757), the petitioner, Christina Partello, gave birth to a child at the age of sixteen, consented to having her mother, Sandra Waukazoo, appointed as the child's guardian, and proceeded to generally fail to act as a competent parent. Five years later, Partello petitioned the probate court for an order to terminate the guardianship, and Waukazoo petitioned the probate court for an order granting her the authority to consent to the child's adoption by another couple, the Smiths. The probate court denied the motion to terminate the guardianship. After observing that the order granting authority to consent to the adoption would have the effect of terminating Partello's parental rights, the probate court found that doing so was in the child's best interests and granted Waukazoo's petition. A panel of this Court affirmed, observing that the evidence clearly supported the trial court's finding that termination was appropriate. Conversely, however, in *In the Matter of Jack Robert Blaylock, III*, unpublished memorandum opinion of the Court of Appeals, released December 28, 2001 (Docket No. 234755), another panel of this Court held that guardians did not have the power to consent to adoption of their ward, nor could they carry out that adoption, without the consent of the parents "or tak[ing] the steps necessary to obtain the termination of their parental rights." We agree with and adopt the holding from *Blaylock*.

Petitioners argue that guardians may consent to adoptions of their wards. This assertion is generally correct, subject to authorization by the court and the requirements of MCL 710.44 and MCL 710.51. See MCL 710.43(1)(e), (5). However, "[t]he first step in the adoption process is ensuring the child is freed for adoption." Michigan Judicial Institute Adoption Proceedings Benchbook 2003-2008, § 2.1, p 2-2.² Subject exceptions not at issue here, "a child shall not be placed in a home for the purpose of adoption until an order terminating parental rights has been entered pursuant to [the Michigan Adoption Code] or [the Michigan Juvenile Code] and the court has formally approved placement under [MCL 710.51]." MCL 710.41(1). Unless there is parental consent³ to the adoption, an adoption petition must be accompanied by, among other things, "a copy of each release⁴ or order terminating parental rights over the child having a bearing upon the authority of a person to execute the consent to adoption." MCL 710.26(1)(a).

¹ "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1).

² Available online at <http://courts.michigan.gov/mji/resources/adoption/adoption.htm>

³ "'Consent' means a document in which all parental rights over a specific child are voluntarily relinquished to the court for placement with a specific adoptive parent." MCL 710.22(l)

⁴ "'Release' means a document in which all parental rights over a specific child are voluntarily relinquished to the department or to a child placing agency." MCL 710.22(u).

Therefore, we agree with the trial court's conclusion that the *first* prerequisite for adoption is termination of the child's parents' parental rights (in the absence of the parent's or parents' consent). This is consistent with the purpose of adoption in Michigan, which is "severing, at law, the prior, natural family relationship and creating a new and complete substitute relationship after adoption." *Bikos v Nobliski*, 88 Mich App 157, 162-163; 176 NW2d 541 (1979), superseded on other grounds as discussed in *Jones v Slick*, 242 Mich App 715; 619 NW2d 733 (2000). Until that termination takes place, consent to the *adoption* is irrelevant because the child is not free to be adopted. We do not find any provision in the Adoption Code under which a guardian may simply agree to the termination of parents' parental rights.⁵ As a consequence, any consideration or application of the language in MCL 710.43 and MCL 700.5215(e) permitting guardians to consent to their wards' adoption is premature.

The trial court properly denied petitioners' motion upon its correct finding that Brandon had not been freed for adoption because Brandon's parents' parental rights had not been terminated. We therefore affirm, and we remand the matter to the probate court for any further proceedings that the trial court deems necessary or appropriate. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Jane E. Markey

⁵ A guardian may release a child with the authorization of the court. MCL 710.28(1)(d), (3). But because that release may "be given only to a child placing agency or to the department," MCL 710.28(5), that provision is irrelevant in the instant matter.