

Temporal Limitations of the Relative Placement Preference

By Paula A. Aylward



Much has been written praising the virtues of kinship care and relative preference for children removed from their parental homes.¹ A similar body of research exists extolling the importance of placement permanency for children.² Permanency policies at both state and federal levels make time of the essence when making placement decisions for children in foster care, thereby imposing temporal considerations on interim placement determinations. Unfortunately, some decision-makers seem to treat the relative placement preference as a dispositive consideration that prevails at any time before a child's ultimate permanent placement. This article addresses this view and the way it undermines federal and state laws and policies that balance the

competing interests of reunification (or placement) with family (relatives) and placement permanency.

Federal law

With the August 22, 1996, enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, PL 104-193, Congress amended Title IV-E of the Social Security Act to require that states receiving Title IV-E foster care funding "consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant state child protection standards."³ To achieve this end, on October 7, 2008, Congress further amended Title IV-E of the Social

At a Glance:

Some decision-makers seem to treat the relative placement preference as a dispositive consideration that prevails at any time before a child's ultimate permanent placement. This article suggests that the more judicious and equitable course of action would be to accord deference to the plain language of MCL 722.954a and *In re COH* and to strictly confine the relative placement preference within the time frame set forth in MCL 722.954a.

Security Act with enactment of the Fostering Connections to Success and Increasing Adoptions Act of 2008, PL 110-351. This amendment requires states receiving Title IV-E foster care funding to exercise due diligence within 30 days after a child's removal from parental custody to identify all grandparents, all parents having legal custody of a sibling of the child, and other adult relatives of the child (including adult relatives suggested by the parents) and provide notice of the following:

- that the child has been or is being removed from the custody of his or her parents;
- the options the relative has to participate in the care and placement of the child; and
- the requirements to become a foster parent to the child.⁴

State law

The Michigan legislature codified these requirements by amending the Foster Care and Adoption Services Act with the enactment of 2010 PA 265. Section 4a of this act implements requirements of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and the Fostering Connections to Success and Increasing Adoptions Act. Section 4a provides that, upon a child's removal, "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."⁵ The notification must (1) specify that the child has been removed from parental custody, (2) explain the options the relative has to participate in the care and placement of the child, (3) describe the requirements and benefits of becoming a licensed foster family home, and (4) describe how the relative may subsequently enter into an agreement with the department for guardianship assistance.⁶ Not more than 90 days after a child's removal from his or her home, a supervising agency must make a placement decision and document in writing the reason for the decision, and provide written notice of the decision and the reasons for the placement

decision to, among others, each relative who expresses an interest in caring for the child.⁷

However, before determining placement of a child, the agency must 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."⁸ But ultimately, a supervising agency's placement decision will be made in the best interests of the child.⁹ A person who receives a written placement decision may, within five days, request in writing documentation of the reasons for the decision.¹⁰ 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 in the child's best interest.¹¹ 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 must petition the court that placed the child out of the child's home for a review hearing.¹² The court must begin the review hearing not more than seven days after the date of the attorney's petition and must hold the hearing on the record.¹³

In re COH, ERH, JRG & KBH

The Michigan Supreme Court acknowledged the timeline in *In re COH, ERH, JRG & KBH*, considering the interplay between the relative placement preference of MCL 722.954a in the context of a petition to appoint a guardian under MCL 712A.19c.¹⁴ After marshalling the pertinent statutory provisions, the Court held that "MCL 722.954a applies from the moment a child is removed from his or her parents' care, i.e., *before* any placement decision is made, and, consequently, the requirements of MCL 722.954a are intended to guide the DHS's initial placement decision."¹⁵ The Court further held that "[t]he

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preference for placement with relatives is also expressly preserved throughout the review process established in former MCL 722.954a(2) and (3).¹⁶ “However, the review process is limited to a narrow time period: the request for documentation of the reasons for the placement decision must be made within 5 days of receiving the placement decision, the potential petition for a review hearing must be made within 14 days of the written decision, and the review hearing must be held within 7 days after the petition.”¹⁷ Thus, the Court concluded that “there is no indication within the statutory language of MCL 722.954a that the Legislature intended that the preference for placement with relatives exists beyond the time frame identified within MCL 722.954a.”¹⁸

Exalting relative preference over permanence

Notwithstanding the plain language of MCL 722.954a and the clear holding of *In re COH*, some decision-makers apply the relative placement preference well beyond the time frame set forth in MCL 722.954a. Not only does such a practice wholly ignore the plain language of MCL 722.954a and *In re COH*, it impermissibly exalts the relative placement preference over permanency planning goals—including the paramount consideration of best interests of the child. Stated another way, ignoring the plain language of MCL 722.954a and *In re COH* and applying the relative placement preference beyond the time frame set forth in MCL 722.954a allows the rights of relatives to encroach upon the rights of those involved in the child's permanent placement.

This practice would also seem to violate the Separation of Powers Doctrine by judicial encroachment upon and usurpation of the exclusive policymaking powers of the legislature,

a subject not explored in this brief article.¹⁹ The more judicious and equitable course of action would appear to be deference to the plain language of MCL 722.954a and *In re COH* and strictly confining the relative placement preference within the time frame set forth in MCL 722.954a. Beyond that time, forward-looking permanency placement considerations should outweigh backward-looking relative placement considerations, and the former should be given paramount consideration over the latter as being in the child's best interest, as well as in conformity with state and federal law and policy. ■



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ENDNOTES

1. See, e.g., Denby, *Kinship Care: Increasing Child Well-Being Through Practice, Policy, and Research* (New York: Springer Publishing Company, 2016), Pitcher, ed, *Inside Kinship Care: Understanding Family Dynamics and Providing Effective Support* (Philadelphia: Jessica Kingsley Publishers, 2014), and Farmer & Moyers, *Kinship Care: Fostering Effective Family and Friends Placements* (Philadelphia: Jessica Kingsley Publishers, 2008).
2. See, e.g., Fernandez, *Accomplishing Permanency: Reunification Pathways and Outcomes for Foster Children* (New York: Springer, 2013) and Iwaniec, ed, *The Child's Journey Through Care: Placement Stability, Care Planning, and Achieving Permanency* (West Sussex: John Wiley & Sons, 2006), available at <<https://epdf.pub/the-childs-journey-through-care-placement-stability-care-planning-and-achieving-.html>> [<https://perma.cc/J6LK-VAXX>] [site accessed September 24, 2019].
3. 42 USC 671(a)(19).
4. 42 USC 671(a)(29).
5. MCL 722.954a(2).
6. MCL 722.954a(3).
7. MCL 722.954a(4).
8. MCL 722.954a(5).
9. *Id.*
10. MCL 722.954a(9).
11. *Id.*
12. *Id.*
13. *Id.*
14. *In re COH*, 495 Mich 184; 848 NW2d 107 (2014).
15. *Id.* at 195.
16. *Id.*
17. *Id.*
18. *Id.* at 196.
19. For a brief summary of this doctrine, see *Separation of Powers—An Overview*, NCSL <<http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx>> [<https://perma.cc/7LWA-XM6E>] [site accessed September 24, 2019].

