Court of Appeals, State of Michigan

ORDER

IN RE A. K. DIXON, MINOR

Docket No. 363388

LC No. 21-137495-NA

Elizabeth L. Gleicher
Presiding Judge

Colleen A. O'Brien

Allie Greenleaf Maldonado

Judges

Respondent's motion for reconsideration is GRANTED in part and DENIED in part, and this Court's opinion issued on April 20, is hereby VACATED. A new opinion is attached to this order.

Respondent contends that this Court should "revers[e] the trial court's order authorizing the petition," asserting that the trial court identified an inapplicable ground for taking jurisdiction. Respondent did not appeal the trial court's acquisition of jurisdiction, however. The order from which respondent appealed addressed only the "removal" of the child. Respondent did not claim an appeal from the initial order of disposition following the adjudication. See MCR 3.993(A).

Because respondent did not claim an appeal or otherwise challenge the adjudication or the initial dispositional order, the majority erred by addressing the propriety of the adjudicatory decision in its initial opinion. The new opinion attached to this order eliminates the Court's references to the adjudication. To the extent that respondent seeks reconsideration based on this Court's holding or findings regarding the adjudication, respondent's motion for reconsideration is GRANTED.

Respondent also seeks reconsideration based on the trial court's alleged failure to consider "actual evidence" provided by the DHHS regarding the fitness of respondent's proposed placement. As a majority of this Court previously determined, the evidence submitted by the DHHS included a home study which revealed serious concerns regarding the fitness of the proposed placement. This evidence sufficed to prevent placement of the child in the home respondent proposed. Similarly, respondent's additional arguments in support of reconsideration do not demonstrate "a palpable error by which the court and the parties have been misled," or that "a different disposition of the motion must result[.]" MCR 7.215(I)(1); MCR 2.119(F)(3). Accordingly, other than regarding the Court's references to the adjudicatory decision, respondent's motion for reconsideration is DENIED.

The motion of the Children's Law Section of the State Bar of Michigan for leave to join as amicus curiae in support of respondent-father's motion for reconsideration is GRANTED.

Presiding Judge

Maldonado, J., would GRANT the motion in whole.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

June 15, 2023
Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

In re A. K. DIXON, Minor.

FOR PUBLICATION
June 15, 2023
9:10 a.m.

No. 363388
Genesee Circuit Court
Family Division
LC No. 21-137495-NA

Before: GLEICHER, C.J., and O'BRIEN and MALDONADO, JJ.

GLEICHER, C.J.

ON RECONSIDERATION

Within days after AKD's birth, the Department of Health and Human Services (DHHS) petitioned for his removal from his mother and for the termination of her parental rights. The DHHS knew that the current respondent was the child's likely father. Father expeditiously established his paternity. Yet the DHHS neglected to file a petition naming him as a respondent for 15 months after his child was placed in foster care. During the interim, father urged the court to place his son with PM, fictive kin. The court rejected this option, and father now appeals the court's "removal" order.

The DHHS's delays are deeply troubling. But because the court reasonably determined that the fictive kin suggested by father was an inappropriate placement, we must affirm.

I. BACKGROUND

On June 7, 2021, mother gave birth to AKD. Father was incarcerated at the time of AKD's birth and was not present to immediately sign an acknowledgment of parentage (AOP). This prevented mother from placing father's name on the birth certificate. MCL 333.2824(2). Mother named the child after father, and before the preliminary hearing on June 16, the DHHS identified father as the putative father. Father remained incarcerated but appeared at the virtual hearing and was represented by counsel. The referee advised father that he had "been named as the putative father" and that the court could "work on getting [a DNA test] set up for him." The referee further advised father that he had 14 days "to start working with us to establish paternity if this is something you would like to do." Father requested a DNA test and asked for an adjournment until

the DHHS served the petition on him. The referee indicated that the court would keep father "informed of everything" but the DHHS could not include him as a respondent or grant him the rights of a legal parent until paternity was officially determined. The court further noted that although father was incarcerated and could not take physical custody of the child, once paternity was legally determined, "he may have family . . . that would be appropriate to care for the child." At the close of the hearing, the court approved the DHHS plan to place AKD in the licensed foster home where his two older half-siblings had been placed.

By September 29, 2021, DNA testing established father as AKD's biological parent. Counsel for the DHHS stated, "I also think that [father] did sign an [AOP] and that we are just waiting to file it with the Court or waiting to get it from the jail." Father's counsel agreed with the DHHS's assessment, noting that father was "kind of in limbo right now because he's signed the AOP and I'm told it's been sent to Lansing, so he's not officially a father yet." DHHS's counsel expressed the department's intent to file an amended petition naming father as a respondent, but only for purposes of jurisdiction and removal, not termination. Father's counsel requested an adjournment "so that we can make sure everything is done correctly." The court proceeded to take evidence regarding mother's case and terminated her parental rights to AKD. At that termination hearing, a DHHS caseworker testified that the foster family was willing to plan for AKD permanently and to adopt him.

By the next hearing on November 23, 2021, the DHHS had received the AOP, submitted it to Vital Records, and was awaiting return of "the official copy." The DHHS still had not filed an amended petition naming father as a respondent. By this time, AKD was 5½ months old.

The next hearing was not conducted until February 22, 2022—8½ months after AKD's birth and five months after biological paternity had been established. Inexplicably, the DHHS still had not named father as a respondent or filed an amended petition seeking jurisdiction as to father. MCR 3.965(B)(8) required the court to "advise" father of his "right to seek placement of his . . . child[] in his . . . home." However, father remained incarcerated with an earliest release date of October 2023, unable to take physical custody of his child. His counsel argued:

> Well, your Honor, since – since he's now the legal father and there are no allegations in any petition against him, he can place the child where he wants. So, um, I think that they need to ask him where he wants the child to go, and the child needs to go there.

The DHHS caseworker recommended keeping AKD in his current placement as he was "doing very well," had been in the care of the foster home "since he was a very little baby," and was placed with his two older brothers. Moreover, the caseworker had "reached out to [father's] family, and no one was interested in placement of the people that [father] gave me to get in contact with." Father's counsel inquired if father could identify other potential placements. Counsel argued that as no allegations had been levied against father, if he identified a willing placement, "they don't have to go through any background checks" and the DHHS "doesn't get to refuse to put the child there . . . . He can place wherever he wants."

The court placed father under oath. The court advised father that it would prefer that only family members be recommended for placement but would consider "if there were other

individuals that you believe would be appropriate." However, the court rejected counsel's position that placement would be automatic, indicating that the DHHS would evaluate any recommended placement. Father asked the court and DHHS to consider placement with his "significant other," PM. The DHHS acknowledged that father had identified PM as a potential placement and father stated that PM had expressed willingness to take custody of AKD. The court ordered the DHHS to evaluate PM for potential placement and to investigate initiating virtual visits for father and his son.

On May 10, 2022, the DHHS presented its recommendation about placement of AKD with PM. The caseworker reported:

> [W]e did conduct a home study at the home. Um, and honestly we do have some concerns relating to placement of [AKD] in this home. Although [PM's] intentions are very – are very good, um, the history that comes with this I do not believe will put [AKD] in a safe environment. [PM] has known [father] for approximately five years. They have been in an on-and-off relationship. They were engaged at one point prior to this most current incarceration and split up due to [father] cheating on [PM] with [AKD's mother]. Um, they did reconcile while he – and then now he is in prison again for I believe approximately two more years.
>
> [PM] has nine instances of CPS history over a fourteen year span, um, approximately 2004 to as – as close as 2018. These investigations did not all directly involve her, but she was named in all of these investigations due to affiliation with the people or regarding herself. These were allegations that included substance abuse and physical neglect.
>
> Um, there's also question that [PM] has communication with the birth mother's mother, which is a little confusing to explain, but we have gotten numerous reports that they talk on a regular basis; and there is concern that, if [AKD] was placed in this home, that he could have unauthorized and possibly unsafe connections with his birth family, birth mom. Birth mom currently knows that this is possibly going to take place and has made threats already to [PM]. And, when I visited with [PM] at her home, when we did some – brought [AKD] to meet her, um, she did state that she believed that, within a couple of weeks, CPS would already be called to her house due to how many people are so apparently against this placement.
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> . . . [S]o honestly, she hasn't – [PM] hasn't had any CPS history investigations recently, but she also hasn't had any children in her home so it – she does say that she is sober for ten years, but there was a substance abuse issue at the time.

The DHHS requested that AKD be kept in place and sought another adjournment as it still had not filed a petition to name father as a respondent despite that the child was then 11 months old.

The child's LGAL concurred with the DHHS recommendation. She cited further concerns with placing AKD with PM:

> Financial concerns – my understanding is that [PM] does not own or rent her own home; she lives with her mother. It's a two-bedroom home. She received Social Security Disability of about eight or nine hundred dollars a month. She does have a car payment and insurance, so I mean that – she had to pay for her own necessities, so I'm very concerned financially. She would not be receiving, you know, financial support for [AKD].
>
> Um, I'm also very concerned about the CPS history that was reported. My biggest concern is that there is no relationship between [AKD] and [PM], none; and he is absolutely thriving in his current placement where he lives with his two siblings. They are in the process – I don't know if they have already been adopted by the foster parents or not, but that process is ongoing. This is an extremely stable environment and my concern is is [sic] that it's so important with little ones – the first two years of a child's life it's just critical to form those safe attachments, those bonds. I mean, that really sets the foundation for a child's emotional stability and well-being. So I'm absolutely terrified of this, you know, moving him at this point. If it's not to place back with parent, I don't – I – I worry about that.
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> I'm also very concerned about the safety of – of [AKD] being placed with [PM] as referred. My understanding is that mother has made threats during all the drama that went on between she and father. Um, I mean this gentleman has been in prison; and the relationship between [PM] and the dad five – either five years on and off, I don't know what the intention and motivation of [PM] is to have this one-year old in her home; that's a lot.
>
> So there are just so many red flags; and I – I don't believe that dad has, um, made a decision for a placement that is either appropriate or safe; and, while a parent does have the right to direct place, that placement does have to be an appropriate one. And I don't believe, you know, that keeping [AKD] with – in this placement where he is now, dad can still, you know, maintain that relationship with [AKD] and the – you know, the communication or whatever. We can – we can still work on that. So it wouldn't be denying dad a relationship . . . .

Father's counsel objected that as a nonrespondent, father had "the right to make the direct placement" and he had selected PM. Counsel asserted that although PM had been "involved" in CPS investigations, those cases did not "have anything to do with her." PM understood her duty to keep AKD safe, even from his biological mother. Father's counsel then asserted:

> It's also my understanding that the foster homes [sic] – in talking with the caseworker, had either entered a [30]-day notice for removal of this child or were seriously considering putting in a [30] day notice to remove this child. I think it was that they had put in the [30] day notice.

Counsel continued:

> I mean they're already talking about we want to make him a respondent because we don't like the placements that he has directed. I mean, that is no reason to make

> a father a respondent. And next what they'll do is they'll say well he's in prison and he's been in prison so long he doesn't have a relationship with the child so we want to terminate his rights. So the only way [father] is going to be able to have a relationship with his child is if the Court grants this placement; you know, higher courts have said he has the right to make that direct placement. So I ask your Honor to go ahead, and make this direct placement so that [father] can have a relationship with his child.

The attorney for the DHHS retorted that "the foster parents did not put in a notice for [30] days . . . ." Indeed, no notice appears in the lower court record and it was never mentioned again. In fact, the final court report provided to this Court, prepared in December 2022, indicates that the foster parents were still willing to adopt AKD if reunification efforts were not successful. The trial court rejected father's request and retained AKD in his foster placement, citing its duty to ensure the safety of the child and his home.

Two weeks later, the court conducted another review hearing, and still the DHHS had not filed an amended petition alleging father's unfitness. The court notified father that he could present additional names for the DHHS to consider for placement of his child. The court continued AKD's placement with his foster family.

Finally, on May 25, 2022, the DHHS authored a supplemental petition naming father as a respondent in these child protective proceedings. As grounds for jurisdiction under MCL 712A.2(b), the DHHS asserted that:

> The parent . . . when able to do so, neglected or refused to provide proper or necessary support, education, medical, surgical, or other care necessary for the child(ren)'s health or morals, or he/she has subjected the child(ren) to a substantial risk of harm to his or her material well-being, or he/she has abandoned the child(ren) without proper custody or guardianship.
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> The home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of the parent, guardian, nonparent adult, or other custodian, is an unfit place for the child(ren) to live.

The DHHS asserted that it was "contrary to the welfare of" AKD to be placed in father's home because father was "unable to provide proper care and/or custody" during his incarceration and "[a]ssessments have been completed on the individuals provided by [father] for direct placement and the placement was denied by this court." The DHHS noted that father's earliest release date is October 19, 2023, but his maximum release date is not until 2028. The petition detailed father's criminal history, which included home invasion, assault by strangulation, possession of cocaine, and illegal possession of weapons, spanning from 2008 through 2021. Regarding his attempts to directly place AKD, the DHHS noted that father identified two relatives who were unwilling to take custody of the child as well as PM, who was assessed and deemed an inappropriate placement. The DHHS therefore requested an order removing AKD from father's care and taking jurisdiction of the child as to father.

The petition seeking jurisdiction of father was authored on May 25, but was not mentioned at the court's July 19 review hearing. Rather, the DHHS detailed its attempts to arrange Zoom parenting time and the prison's resistance until father's name was added to the child's birth certificate. The court ordered the DHHS to continue these efforts. Before father was designated a respondent, the caseworker had given father "some worksheets related to children and trauma." No other services had been provided.

The DHHS still had not served the petition on father before the court's next hearing on August 30, 2022, requiring an additional adjournment.

It was not until September 20, 2022, a full year after father had been identified as AKD's biological parent, that father was finally made a respondent to these proceedings. One year after DNA testing proved respondent-father's biological connection to his child, the court finally considered his parental fitness and again took jurisdiction over the child. Fifteen months after the child's birth and placement in foster care, the court officially "removed" him from respondent-father's care and custody. The DHHS conceded at this hearing that virtual parenting time still had not been arranged because the caseworker did not know how to have respondent-father's name added to the birth certificate. Respondent-father's attorney incredulously directed the caseworker to the instructions printed on the AOP form and argued that this should be a non-issue: "There's definitely no question that mom believes him to be the father, since they have the same name."

Respondent-father wasted no time and filed this claim of appeal from the court's removal order on October 11, 2022. The latest court report in the lower court record provided to this Court was authored on December 20, 2022. It notes that father had yet to be provided virtual parenting-time sessions, although the caseworker had sent recent pictures and updates regarding AKD. Respondent-father advised that he had "completed an advanced substance abuse program" while incarcerated and was willing to complete any other services required of him. The report listed the services father would be obligated to complete as including "Mental Health Counseling, Parenting Education, Substance Abuse Treatment, Psychological Evaluation, Housing, and Employment." However, none of these services or alternatives had been made available to father in the prison. At that point, the foster parents were "supportive of the goal of reunification," but were still "willing to provide long term permanency . . . if reunification does not occur."

II. ANALYSIS

"It is well established that parents have a significant interest in the companionship, care, custody, and management of their children. This interest has been characterized as an element of 'liberty' to be protected by due process." *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993). See also *In re VanDalen*, 293 Mich App 120, 132; 809 NW2d 412 (2011) (quotation marks and citation omitted) ("[P]arents have a due process liberty interest in caring for their children."). "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . ." *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1981).

The state may not infringe a parent's "right to direct the care, custody, and control of his children . . . without *some* type of fitness hearing." *In re Sanders*, 495 Mich 394, 414-415; 852 NW2d 524 (2014). Here, the court and the DHHS bypassed father's right to direct the placement

of his child by delaying his legal ability to assert that right. Mother was sure of paternity at birth as she named AKD after his father. AKD was only three months old when DNA analysis established father's parentage. Father then immediately signed an AOP, but an "official copy" required to name father as a legal parent was delayed through no fault of his own. AKD was in care for almost 15 months before the DHHS served a petition naming father as a respondent. Even when the DHHS finally authored a petition against father shortly before AKD's first birthday, it waited three months to serve it. There is no legitimate excuse for the DHHS's failure to timely declare father a respondent. Such delays run counter to the purpose of the Juvenile Code, which is the protection of children. *In re Jagers*, 224 Mich App 359, 362; 568 NW2d 837 (1997). And these delays impinged on father's constitutional rights.

Father contends that before he was officially named as a respondent in the child protective proceedings, he possessed an unfettered right to place his child with anyone of his choosing. MCR 3.965(B)(8) confers a right to unchecked direct placement only in the nonrespondent parent's "*home*." (Emphasis added.) But it has long been the law that a parent may "entrust the care of their children for extended periods of time to others" "without court interference by the state *as long as the child is adequately cared for*." *In re Weldon*, 397 Mich 225, 296; 244 NW2d 827 (1976) (opinion by Levin, J.) (quotation marks and citation omitted), overruled in part on other grounds as stated in *Bowie v Arder*, 441 Mich 23; 490 NW2d 568 (1992) (emphasis added).

The earliest possible date that father could have planned for AKD was September 2021, when DNA testing established his paternity and he signed an AOP. But father was not immediately available to ensure that his selected custodian could adequately care for AKD. AKD was already in foster care by that time, as ordered by the court when the child was removed from his mother's care. And although father quickly designated PM as his son's custodian, evidence submitted to the court by both the DHHS and the GAL supported that AKD would not be "adequately cared for" in PM's home.

Our dissenting colleague argues that once father directed that AKD be placed with PM, the circuit court had no legal authority to leave AKD in foster care. Although we respectfully disagree, we readily admit that the law regarding this issue is difficult to parse and that no clear guidelines exist to assist courts confronted with similar situations. We frame the question presented as: what procedural protections must be afforded to protect the constitutional right of a late-identified parent to select a relative or fictive kin placement when the child is already in the care and custody of the state? Because the accuracy and legitimacy of a decision to deprive a parent of the right to control his child's custody is fundamental, we submit that the proper inquiry weighs the interests at stake under the due process framework established in *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976), which assists courts in making similar assessments.

We begin by reviewing the statutes and court rules governing the removal of children from their parents' custody. MCL 712A.2(b) provides for jurisdiction over a minor, in relevant part, as follows:

> Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:

> (1) Whose parent . . . 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. As used in this sub-subdivision:
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> * * *
>
> (B) "Neglect" means that term as defined in . . . MCL 722.602.[1]
>
> (C) "Without proper custody or guardianship" does not mean a parent has placed the juvenile with another person who is legally responsible for the care and maintenance of the juvenile *and who is able to and does provide the juvenile with proper care and maintenance.*
>
> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in. As used in this sub-subdivision, "neglect" means that term as defined in . . . MCL 722.602. [Emphasis added.]

MCL 712A.13a(2) governs the authorization of a petition for jurisdiction:

> If a juvenile is alleged to be within [MCL 712A.2(b)], the court may authorize a petition to be filed at the conclusion of the preliminary hearing or inquiry. The court may authorize the petition upon a showing of probable cause that 1 or more of the allegations in the petition are true and fall within [MCL 712A.2(b)]. . . .

AKD was without proper care and custody at his birth due to his mother's substance abuse and neglect and his putative father's incarceration. When removal first became necessary, neither parent placed AKD into a guardianship or with a responsible adult under a power of attorney. The court properly approved AKD's removal from his mother and placed him in foster care.

[1] MCL 722.602(1)(d) defines "neglect" as

> harm to a child's health or welfare by a person responsible for the child's health or welfare that occurs through negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care, though financially able to do so, or the failure to seek financial or other reasonable means to provide adequate food, clothing, shelter, or medical care.

Had AKD been placed with a relative instead of in foster care, the DHHS would still have been obligated to assess the safety of that placement.[2] MCL 712A.2(b)(1)(C) recognizes that placement with a relative, standing alone, does not automatically establish that a parent has provided proper care. Rather, a parent is obligated to place her child with a person who is "legally responsible for the care and maintenance of the juvenile and who is able to and does provide the juvenile with proper care and maintenance." Once a child has been placed, a court "must review the placement order" "[o]n motion of a party," and may modify it if doing so "is in the best interest of the child." MCR 3.966(A)(1).

Phrased somewhat unartfully, this Court has observed that "if a parent places a child in the care of a relative whose home is not unfit, then the 'without proper custody or guardianship' language is not satisfied." *In re Baham*, 331 Mich App 737, 748; 954 NW2d 529 (2020) (emphasis omitted). The converse is equally true. If a parent places a child in the care of a relative whose home *is* unfit, the parent has not provided proper care and custody. This is why MCR 3.965(C)(5) mandates that even when a child is placed with a relative, the court must order the completion of a home study within 30 days and may order the completion of a criminal record and central registry check within a week.

We wholeheartedly concur with our dissenting colleague's position that a fit parent has a constitutional right to place his child with anyone he deems appropriate. And father was not even preliminarily determined to be unfit until his child was more than a year old. But AKD was under the DHHS's care and supervision by the time father had the legal ability to place the child. Father's incarceration and his absence at the child's birth put him in the unenviable position of being unable to directly place his child without DHHS input. When he was able to direct AKD's placement, the child was 5½ months old and living in a stable foster family placement.[3]

The dissent contends that *Sanders*, 495 Mich at 421, compels the conclusion that before being adjudicated unfit, father had the constitutional right to direct the DHHS to immediately remove AKD from his foster care placement and to place the child with PM, and that the DHHS was not entitled to curtail or delay that placement. In our view, *Sanders* does not stretch quite that far.

In *Sanders*, the Michigan Supreme Court held that a parent must be adjudicated as unfit before the state may infringe his constitutionally protected relationship with his child. *Id*. at 415-416. A dispositional hearing conducted within the proceedings involving an already adjudicated

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[2] MCL 712A.13a(1)(j) was amended by 2022 PA 200, effective October 7, 2022, to include within the definition of "relative" individuals who are "[n]ot related to a child within the fifth degree by blood, marriage, or adoption but who has a strong positive emotional tie or role in . . . the child's parent's life if the child is an infant, as determined by the [DHHS]." This new definition might encompass PM. But at the time AKD required placement, such "fictive kin" did not fall within the definition of relative.

[3] We assume without deciding that father was legally entitled to make placement decisions by November 21, 2021, when the DHHS received the signed AOP and submitted it to Vital Records.

parent does not adequately protect the unadjudicated parent's right to custody, the Court held. In analyzing the substantive and procedural constitutional interests at play, the Court applied the three-part balancing test described in *Eldridge*, 424 US 319.

In *Eldridge*, 424 US at 323-324, the United States Supreme Court considered whether a state agency may terminate a recipient's social security disability benefits without affording an opportunity for an evidentiary hearing. The Court painstakingly described the "elaborate" web of procedures preceding a final decision terminating disability benefits. *Id*. at 337-339. The Court also analyzed the constitutional adequacy of those procedures under a three-factor balancing framework:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Id*. at 335.]

The Supreme Court concluded that the Due Process Clause did not mandate a hearing before the initial termination of a claimant's benefits. *Id*. at 349. In large measure, the Court rested its decision on "the fairness and reliability of the existing predetermination procedures," which entailed a low risk of error. *Id*. at 343-345.

In *Sanders*, the Michigan Supreme Court applied the *Eldridge* factors in assessing the process due an unadjudicated parent in maintaining full custody and control of a child subject to an adjudication order involving the other parent. As to the first factor, the Court readily recognized "the importance of the private interest at stake . . .—a parent's fundamental right to direct the care, custody, and control of his or her child free from governmental interference." *Sanders*, 495 Mich at 415. The Court specifically acknowledged that "[w]ith respect to the second and third *Eldridge* factors, it is undisputed that the state has a legitimate and important interest in protecting the health and safety of minors and, in some circumstances, that the interest will require temporarily placing a child with a nonparent." *Id*. The nonrespondent father in that case had "requested that the children be placed with his mother, the children's paternal grandmother." *Id*. at 421. That request should have been honored, the Court held, because "[a]s long as the children are provided adequate care, state interference with such decisions is not warranted. *Id*.[4]

As in *Sanders*, father here enjoyed a constitutional right to direct the care and custody of AKD before he was adjudicated. But in *Sanders*, as here, the legal analysis does not stop with that observation. When a child has been placed into care by an unchallenged order of the court, the state has a legitimate and important interest in protecting the child's health and safety. When

[4] We note that a court's consideration of the fitness of a proposed placement is also consistent with *In re Weldon*, 397 Mich 225, 296-297; 244 NW2d 827 (1976) ("There is no evidence that [the child's] grandmother . . . did not adequately care for [the child] during the periods [the parent] was away from home.").

vindication of an unadjudicated parent's custodial right will necessarily involve a court-ordered custodial change and the elimination of state custody, the state's interest permits the maintenance of continued, temporary placement while an investigation is conducted to ensure the appropriateness of the new placement.

We have no difficulty concluding that an abrupt removal of AKD from his foster care placement would have triggered a substantial risk of emotional harm to the child, even if the proposed placement were ultimately determined to be fit. AKD was only 5½ months of age when father became eligible to direct his care and custody. The court and the DHHS had an interest in protecting him from an unsafe and emotionally damaging custodial transfer, which meant conducting some investigation into the appropriateness of father's proposed placement. See also the *Children's Foster Care Manual*, FOM 722-03B, p 3 (providing that "[s]afety assessments, safety planning (when appropriate), and background checks must occur for all unlicensed homes prior to placement"). We note that after placement, even relatives must proceed through the foster care licensing process. *Id*. Before a child is placed with a relative, the DHHS must review the individual's "[p]rior CPS history" and conduct a "Central Registry check." *Id*. at 7-8.

We sympathize with father's position but under the circumstances presented here, father's right to control the custody and care of his child must yield, at least temporarily, to the state's interest in preventing upheaval for AKD, a vulnerable child who has been in care with the same foster family for nearly two years. Balancing the interests as *Eldridge* supports that we do, we conclude that in this case, the court did not err by *initially* refusing to transfer AKD's custody. But as discussed below, the evidentiary basis for this refusal was not well fleshed out, and on remand we direct that the DHHS conduct a second and more detailed home study of PM forthwith.

Going forward, the court and the DHHS must tread carefully to avoid repeating their mistakes.

First, the DHHS must reevaluate PM as a placement for AKD and place more details of its investigation into the record. Prior CPS investigations do not automatically preclude consideration of a relative caregiver, and PM likely now falls within that category. The DHHS stated that PM had "nine instances of CPS history" between 2004 and 2018. But the DHHS did not differentiate between "investigations due to affiliation with" other subjects and those "regarding herself." The DHHS did not indicate whether those reports were substantiated. It did not describe whether services were provided and if so of what type, and whether PM benefitted. See *Children's Foster Care Manual*, FOM 722-03B, pp 7-8. Moreover, the DHHS failed to consider PM's years of sobriety since these investigations. While the DHHS expressed concern that AKD's biological mother could pose a safety threat in this placement, it failed to recognize that a safety plan could be formulated to protect the child. *Id*. at 3.

Second, the lack of parent-child contact in this case violates the Juvenile Code. MCL 712A.13a(13) and MCL 712A.18f(3)(c) require the court to permit "regular and frequent parenting time" when a child is removed from a parent's care. The court recognized this duty and ordered the DHHS to arrange video visits for the incarcerated father and his young son. As of December 2022, those visits still were not occurring, contrary to court order. If these visits still have not been scheduled, that must be rectified immediately. This may require a court order directly to the prison.

Third, it appears from the record that little has been done to secure services for father even after he was named as a respondent. Father reported that he had completed a substance abuse program and a caseworker vaguely described material she had provided about children and trauma. At the very least, the caseworker must provide available workbooks for father to complete, as has been done in many other cases involving incarcerated parents. MCL 712A.19a(2) excuses the DHHS from making reasonable efforts toward reunification only under very limited aggravated circumstances. The mere fact of imprisonment is not one of them. And the DHHS's efforts have been grossly inadequate thus far. Accordingly, although we are affirming the court's removal of AKD from his home, we do not condone the court's and DHHS's treatment of father or the violation of his constitutional rights.

We reluctantly affirm.

/s/ Elizabeth L. Gleicher
/s/ Colleen A. O'Brien

STATE OF MICHIGAN

COURT OF APPEALS

In re A. K. DIXON, Minor.

FOR PUBLICATION
June 15, 2023

No. 363388
Genesee Circuit Court
Family Division
LC No. 21-137495-NA

Before: GLEICHER, C.J., and O'BRIEN and MALDONADO, JJ.

MALDONADO, J. (*dissenting*).

ON RECONSIDERATION

In this child protective case, respondent appeals by right from the trial court's order removing AKD from his care. I agree wholeheartedly with my colleagues' recitation of the tragic facts of this case, and I share their frustration with the conduct of the Department of Health and Human Services. Moreover, in light of the outcome ultimately reached by the majority, I concur with their instructions regarding the Department's role moving forward. However, my interpretation of the law governing these facts leads me to different conclusions. I would conditionally reverse the trial court's removal of AKD because DHHS failed to take reasonable efforts to prevent removal. I would order DHHS to promptly make reasonable efforts to prevent AKD's removal, and the trial court's removal would be reinstated only if AKD remains without proper care after such efforts are made. Because the majority has chosen instead to affirm, I respectfully dissent.

In this opinion I begin by narrowing the scope of this analysis and explaining why my focus is on the rules governing the court's authority to remove children from the care of their parents. Then, I provide background on the "one parent doctrine" in order to explain my position that the trial court had no right to leave AKD in foster care after respondent was declared the legal father but before a petition had been brought against him. Next, I explain my contention that the trial court's finding that reasonable efforts were made to prevent removal was clearly erroneous. Finally, while acknowledging the gaps in the law governing this field, I explain why I believe the proper remedy in a case such as this is conditional reversal of the removal order.

I. BASIS FOR APPEAL

At the outset, I believe that the proper focal point of the analysis in this case is the trial court's order removing AKD from respondent's care because this is the order which provides the basis for this Court's jurisdiction.

Appellate jurisdiction in child protective proceedings is laid out by MCR 3.993, which provides in relevant part:

> (A) The following orders are appealable to the Court of Appeals by right:
>
> (1) any order removing a child from a parent's care and custody,
>
> (2) an initial order of disposition following adjudication in a child protective proceeding,
>
> * * *
>
> (7) any final order.
>
> * * *
>
> (B) All orders not listed in subrule (A) are appealable to the Court of Appeals by leave.

For context, I will briefly discuss the process in a child protective proceeding, then identify where respondent was in this process when this appeal was commenced. Child protective proceedings are initiated when DHHS files a petition containing "a request for court action to protect a child . . ." MCR 3.961(A). The proceedings were initiated against respondent when DHHS filed a petition on May 25, 2022. When DHHS petitions the court to take jurisdiction in a child protection matter, "the trial court must hold a preliminary hearing and may authorize the filing of the petition upon a finding of probable cause that one or more of the allegations are true and could support the trial court's exercise of jurisdiction under MCL 712A.2(b)." *In re Ferranti*, 504 Mich 1, 15; 934 NW2d 610 (2019). "The preliminary hearing must commence no later than 24 hours after the child has been taken into protective custody . . . unless adjourned for good cause shown, or the child must be released." MCR 3.965(A)(1). This rule was flouted by the trial court as the preliminary hearing did not commence until September 20, 2022. At the preliminary hearing, the trial court decided to authorize the petition. If a petition is authorized, the court may order that the child be placed in foster care pending trial if it finds that the requirements of MCR 3.965(C)(2) are met. In this case, the trial court so found, and that is where the proceedings were at the time of the appeal. I believe it is important to clarify that respondent is appealing the removal of AKD and the authorization of the petition; the trial court had not yet exercised jurisdiction at the time of the order from which respondent appeals.

Respondent appeals from the September 29, 2022 order after following the preliminary hearing in which the court authorized the petition and ordered AKD's removal. Moreover, in his claim of appeal, respondent asserted that the order being appealed was an "order removing a child from a parent's care and custody." However, in his brief on appeal, respondent erroneously cites MCR 3.993(A)(2), which confers us with jurisdiction to hear appeals from an initial disposition following adjudication; respondent appealed prior not only to the initial disposition, but prior to

the court's assumption of jurisdiction. Therefore, I would treat this as an appeal by right pursuant to MCR 3.993(A)(1), which applies to appeals from any order removing a child. Moreover, while the focal point respondent's analysis was the court's decision to authorize the petition, AKD's removal was raised in his statement of the questions presented.

Because the trial court's order removing AKD formed the basis for our jurisdiction in this matter, I believe it necessary to address the validity of this order.

II. *IN RE SANDERS* AND THE ONE PARENT DOCTRINE

In light of our Supreme Court's holding in *In re Sanders*, 495 Mich 394, 422; 852 NW2d 524 (2014) and its abolition of the one parent doctrine, I do not believe that the circuit court had any legal authority upon which to base its decision to leave AKD in foster care during the interim period between respondent-father being established as the legal father and the court ordering AKD's removal.

It is well established that parents have a fundamental constitutional right "to make decisions concerning the care, custody, and control of their children." *Troxel v Granville*, 530 US 57, 66; 120 S Ct 2054; 147 L Ed2d 49 (2000). Because of this right, "there is a presumption that fit parents act in the best interests of their children." *Id*. at 68. To respect this right and honor this presumption, our Supreme Court has held "that due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship." *Sanders*, 495 Mich at 422. "[D]ue process requires that *every* parent receive an adjudication hearing before the state can interfere with his or her parental rights." *Id*. at 415.[1]

On February 22, 2022, respondent-father appeared in court for the first time as AKD's undisputed legal father.[2] Respondent-father did not waste this opportunity to direct placement of AKD with PM. However, the circuit court responded to this directive as follows:

> The concern is, Mr. Dixon, that I have is that mother's rights were terminated; *by mother's rights having been terminated, I still have the authority to direct placement of the child by that case.* The Department may or may not be filing a petition with respect to you; so for you to just randomly say I want the child here, I would disagree with your lawyer that I just have to say okay, because I have authority over the case, but we're not gonna get into that.

[1] The Supreme Court acknowledged that "extending the right to an adjudication to all parents before depriving them of the right to direct the care, custody, and control of their children will impose additional burdens on the DHS," but it concluded that "those burdens do not outweigh the risks associated with depriving a parent of that right without any determination that he or she is unfit . . . ." *Sanders*, 495 Mich at 418-419.

[2] I emphasize again that respondent-father had been definitively established as AKD's biological father as of the September 29, 2021 hearing, and both parents had signed an affidavit of parentage as of the November 23, 2021 hearing.

The circuit court's assertion that it had the authority to deprive respondent-father of his right to direct the care and custody of his child by virtue of its jurisdiction over respondent-mother is a clear application of the "one-parent doctrine" that our Supreme Court squarely rejected in *Sanders*. Contrary to the circuit court's beliefs, every parent, including respondent-father, has the right to "receive an adjudication hearing before the state can interfere with his or her parental rights." *Id*. at 415. Because respondent-father had not had an adjudication hearing, the court did not have the authority to interfere with respondent-father's parental rights, see *Id*., and respondent-father's parental rights include the constitutional right to direct the care and custody of his child, see *Troxel*, 530 US at 66. Therefore, the circuit court did not have the authority to interfere with respondent-father's right to entrust PM with AKD's care. Moreover, because there had been no judicial finding regarding respondent-father's fitness, the court was duty-bound to presume that respondent-father's decision to place AKD with PM was in AKD's best interests. *Id*. at 68. As was aptly noted by the majority, "it has long been the law that a parent may 'entrust the care of their children for extended periods of time to others' 'without court interference by the state as long as the child is adequately cared for.' *In re Weldon*, 397 Mich 225, 296; 244 NW2d 827 (1976) (opinion by Levin, J.) (quotation marks and citation omitted), overruled in part on other grounds as stated in *Bowie v Arder*, 441 Mich 23; 490 NW2d 568 (1992)." Because respondent-father directed placement of AKD with PM, the circuit court did not have a basis upon which to order AKD's removal.

The majority stated that "[f]ather's incarceration and absence at the child's birth put him in the unenviable position of being unable to directly place his child without DHHS input," and DHHS "determined that PM was not an appropriate placement for AKD." However, I disagree with the premise that DHHS had the right to determine whether PM was an appropriate placement for AKD absent a judicial determination regarding respondent-father's fitness. See *Troxel*, 530 US at 68; *Sanders*, 495 Mich at 422. The majority's first source of authority in support of this premise is MCR 3.965, which sets out the rules governing preliminary hearings. MCR 3.965(B) sets out the procedure that a court must follow when conducting a preliminary hearing, and Subrule (B)(8) provides that "[t]he court must advise a nonrespondent parent of his or her right to seek placement of his or her children in his or her home." I would not interpret this rule as being broader than listing one of the rights of which a nonrespondent parent must be advised during the preliminary hearing for a respondent parent. Specifically, I do not view this rule as restricting the right of a nonrespondent parent—which respondent-father was as of February 22, 2022—to place the child with somebody else whom the nonrespondent parent deems fit, particularly when the rule is read against the backdrop of the Supreme Court's pronouncements *In re Sanders*.

MCR 3.965(C) governs pretrial placement of the children of a respondent parent, and Subrule (C)(5) provides:

> If the child has been placed in a *relative's* home,
>
> (a) the court may order the Family Independence Agency to report the results of a criminal record check and central registry clearance of the residents of the home to the court before, or within 7 days after, the placement, and

(b) the court must order the Family Independence Agency to perform a home study with a copy to be submitted to the court not more than 30 days after the placement. [Emphasis added.]

In my view, Subrule (C)(5) is inapplicable because *respondent-father is a parent, not a relative*. Rule 3.965 sets out rules and procedure aimed at the implementation of MCL 712A.2, and MCL 712A.13a sets out definitions for terms that are used in MCL 712A.2. See MCL 712A.13a(1). "Relative" is defined by MCL 712A.13a(j), and the version of the statute that was in effect during the lower court proceedings provided:[3]

"Relative" means an individual who is at least 18 years of age and related to the child by blood, marriage, or adoption, as grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew or niece, first cousin or first cousin once removed, and the spouse of any of the above, even after the marriage has ended by death or divorce.

"Thus, a child's biological parent is not that child's 'relative' for purposes of the statute." *In re Mota*, 334 Mich App 300, 322; 964 NW2d 881 (2020). Given the close relationship between MCL 712A.2 and MCR 3.965, I would apply the definition of "relative" set forth in MCL 712A.13a to the court rule as well. Such an interpretation would be consistent with cases such as *Sanders*,

[3] MCL 712A.13a was amended effective October 7, 2022 by 2022 PA 200.

"Relative" means an individual who is at least 18 years of age and is either of the following:

(*i*) Related to the child within the fifth degree by blood, marriage, or adoption, including the spouse of an individual related to the child within the fifth degree, even after the marriage has ended by death or divorce, the parent who shares custody of a half-sibling, and the parent of a man whom the court has found probable cause to believe is the putative father if there is no man with legally established rights to the child.

(*ii*) Not related to a child within the fifth degree by blood, marriage, or adoption but who has a strong positive emotional tie or role in the child's life or the child's parent's life if the child is an infant, as determined by the department or, if the child is an Indian child, as determined solely by the Indian child's tribe. As used in this section, "Indian child" and "Indian child's tribe" mean those terms as defined in section 3 of chapter *XIIB*.

There does not currently appear to be caselaw discussing whether biological parents remain excluded from the statutory definition of "relative." However, because the prior version was in effect at all relevant times in this case, resolution of that question is immaterial for the purposes of this appeal.

Troxel, and *Weldon* that recognize the special right of parents to direct the care and custody of their children.

Finally, the majority cites *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed2d 18 (1976). Through its detailed application of what has come to be known as the "*Eldridge* factors," the majority persuasively argued that the trial court had a strong interest in protecting AKD from the "substantial risk of emotional harm" that would accompany "an abrupt removal of AKD from his foster care placement" that would exist "even if the proposed placement were ultimately determined to be fit." However, having a strong interest in taking an action is not the same as having the authority to take such action. Moreover, I worry that recognizing in trial courts what would essentially be an equitable power to block unadjudicated, legal parents from placing their children in order to prevent the emotional trauma of upheaval could prevent respondent from ever taking custody of AKD. The goal in this case remains reunification, and as more time elapses with AKD in foster care, the trauma he would endure from being returned to his father will likely increase. I do not want trial courts to believe that a child's bond with his foster family and his interest in permanence empowers the court to bar reunification with a parent who has removed all other barriers to reunification.

For these reasons, I would conclude that the trial court lacked the authority to leave AKD in foster care over the objections of his unadjudicated, legal father.

III. REASONABLE EFFORTS

Because a court cannot order the removal of a child from the child's parent absent a finding that reasonable efforts to prevent removal were made and because I believe the trial court clearly erred by finding that such efforts were made in this case, I would reverse the trial court's decision to remove AKD from respondent-father's care.

MCR 3.965(C)(2) provides:[4]

> The court may order placement of the child into foster care if the court finds all of the following:
>
> (a) Custody of the child with the parent presents a substantial risk of harm to the child's life, physical health, or mental well-being.
>
> (b) No provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from the risk as described in subrule (a).
>
> (c) Continuing the child's residence in the home is contrary to the child's welfare.

[4] While the revised majority opinion issued on reconsideration clarifies that the removal order forms the basis of this appeal, it nonetheless does not contain any references to MCR 3.965(C)(2) nor does it engage in any discussion of reasonable efforts.

(d) Consistent with the circumstances, *reasonable efforts were made to prevent or eliminate the need for removal of the child*.

(e) Conditions of child custody away from the parent are adequate to safeguard the child's health and welfare. [Emphasis added.]

See also MCL 712A.13a(9).

In this case, the lead opinion does an excellent job detailing the departments failures with respect to its duties to respondent-father:

> Prior CPS investigations do not automatically preclude consideration of a relative caregiver, and PM likely now falls within that category. The DHHS stated that PM had "nine instances of CPS history" between 2004 and 2018. The DHHS did not differentiate between "investigations due to affiliation with" other subjects and those "regarding herself." The DHHS did not indicate whether those reports were substantiated. It did not describe whether services were provided and if so, of what type and whether PM benefitted. Moreover, the DHHS failed to consider PM's years of sobriety since these investigations. While the DHHS expressed concern that AKD's biological mother could pose a safety threat in this placement, it failed to recognize that a safety plan could be formulated to protect the child.
>
> Second, the lack of parent-child contact in this case violates the Juvenile Code. MCL 712A.13a(13) and MCL 712A.18f(3)(c) require the court to permit "regular and frequent parenting time" when a child is removed from a parent's care. The court recognized this duty and ordered the DHHS to arrange video visits for the incarcerated father and his young son. As of December 2022, those visits still were not occurring, contrary to court order. . . .
>
> Third, it appears from the record that little has been [done] to secure services for father even after he was named as a respondent. Father reported that he had completed a substance abuse program and a caseworker vaguely described material she had provided about children and trauma. At the very least, the caseworker must provide available workbooks for father to complete, as has been done in many other cases involving incarcerated parents. MCL 712A.19a(2) excuses the DHHS from making reasonable efforts toward reunification only under very limited aggravated circumstances. The mere fact of imprisonment is not one of them. And the *DHHS's efforts have been grossly inadequate thus far*. . . . [Emphasis added; citations omitted.]

In my opinion, it was a clear error for the circuit court to find under these facts that reasonable efforts to prevent removal were made.

The violations of *In re Sanders* that were outlined above bolster my conclusion that reasonable efforts were not made. The rule requires a finding that "reasonable efforts *were made*," so it is not specified who must make the reasonable efforts. This is where the above discussion of the one parent doctrine becomes critical; the court's failure to allow respondent to place AKD ran afoul of the mandate that reasonable efforts be made to prevent removal. Indeed, it is highly likely

that the court's violation of respondent's right to direct the care and custody of his child is the reason why it later decided that removal was necessary. The trial court's unauthorized refusal to allow AKD to place his child likewise informs my conclusion that reasonable efforts to prevent removal were not made. In other words, reasonable efforts were made neither by DHHS nor the court.

For these reasons, I would conclude that the trial court clearly erred by finding that reasonable efforts were made to prevent removal.

IV. REMEDY

I believe that the proper remedy for the trial court's erroneous removal of AKD is a conditional reversal.

Having established that the trial court erred by ordering AKD's removal, the next issue is the proper remedy for this error. The majority accurately notes "that the law regarding this issue is difficult to parse and that no clear guidelines exist to assist courts confronted with similar situations." This situation is particularly nuanced; in general, if a child does not have a safe home because reasonable efforts to prevent removal were not made, this does not change the fact that the child does not have a safe home. Did the Legislature intend for a child in this situation to simply be returned to an unsafe environment? To frame the issue in a manner particularized to the case before us, the courts have been left to determine what to do when a child has been wrongly left in foster care for an extended period of time in violation of the constitutional rights of a parent—a parent who has likewise been wrongfully deprived of a meaningful opportunity to form a bond with the child. Until we have further guidance from the Supreme Court or the legislature, I have found counsel from our Supreme Court's opinion in *In re Morris*, 491 Mich 81; 815 NE2d 62 (2012).

In *Morris*, our Supreme Court examined the notice provisions of the federal Indian Child Welfare Act (ICWA), 25 USC 1901 through 1963. *Id*. at 88. ICWA requires "that notice of certain involuntary child custody proceedings be sent to the appropriate Indian tribe or to the Secretary of the Interior where the court knows or has reason to know that an Indian child is involved." *Id*. (quotation marks and citation omitted). After determining that the ICWA notice provisions had been violated, the Court had to determine the proper remedy because no such remedy was provided by the statute. *Id*. at 114-115.[5] The Court contemplated three possible remedies: automatic reversal, conditional reversal, and conditional affirmance. *Id*. at 115. In cases such as the one currently before us, we are faced with an analogous conundrum: there were serious and unacceptable violations of the law perpetrated early in the case, but the relevant law provides no remedy for situations in which it is violated.

In *Morris*, the Court noted that argument in favor of the first remedy—automatic reversal—was that the finding of a notice violation would divest the court of its "jurisdiction to enter any

[5] "Having determined that the notice requirement of 25 U.S.C.A. § 1912(a) was triggered in both cases before us and that the trial courts did not fully comply with that statute, we are left to consider the proper remedy for ICWA-notice violations." *Morris*, 491 Mich at 114.

foster care or termination of parental rights orders pending resolution of the tribal-notice issue." *Id*. at 116. In this case, the automatic-reversal argument mirrors that made in *Morris*: the trial court had no legal authority to bar respondent from placing the child, so that and all subsequent actions should be nullified. In *Morris*, based in part on an analysis of other provisions of ICWA, the Court determined that violation of the notice provision would not require the "immediate return of the children to the home from which they were removed." *Id*. at 117.

However, importantly for our purposes, this conclusion was not based entirely on its interpretation of ICWA's other provisions:

> We also do not believe that automatic reversal would be in the best interests of the children. In the majority of cases involving ICWA-notice violations that were conditionally affirmed by the Michigan Court of Appeals, it was eventually determined that the children were not Indian children and thus that ICWA did not apply. An automatic-reversal rule would require new termination proceedings in even the cases not involving Indian children, and this would disrupt or delay the permanent placement of the child. It would be counterproductive and nonsensical to disrupt the permanent placement of a child before it is determined whether the child is an Indian child. Additionally, an automatic-reversal rule would not conserve judicial resources because it would require the invalidation of all orders entered when there was an ICWA-notice violation, even if it is later determined that the child is not an Indian child. [*Id*. at 119-120.]

Furthermore, the Court noted that "the automatic-reversal remedy would be inconsistent with our longstanding disfavor of automatic reversals." *Id*. at 120.

In this case and those like it, the above rationales against automatic reversal are equally applicable. It cannot be argued in good faith that automatic reversal would be in the best interests of AKD. This remedy would "disrupt or delay the permanent placement of" of AKD, and "[i]t would be counterproductive and nonsensical" to remove AKD from the foster family with whom he has established a home and a strong bond in order to place him with a stranger despite being aware of the possibility that AKD could ultimately be returned to foster care. *Id*. at 119-120. Moreover, it is equally true in this case that automatic-reversal "would be inconsistent with our longstanding disfavor of automatic reversals." *Id*. at 120 (citing *In re Osborne*, 459 Mich 360, 369; 589 NW2d 763 (1999) ("Rules of automatic reversal are disfavored . . .").).

In *Morris*, after establishing that automatic-reversal was not an appropriate remedy, the Court determined that conditional-reversal was favorable to conditional-affirmance. *Id*. at 120-121. While recognizing that there were little practical differences between the two, the Court emphasized the difference in the message conveyed:

> [B]etween the two remedies, conditional reversal is more deferential to tribal interests, as expressed by ICWA, and is more likely to ensure these interests are protected by the trial courts. The term "conditional reversal" sends a clearer signal to the lower courts and the DHS that they must pay closer attention when ICWA is implicated. In sum, we think that the conditional-reversal remedy is more

> emphatic, more consistent with the text and purposes animating ICWA, and more likely to encourage compliance with ICWA. [*Id*. at 121.]

This is not an ICWA case, but similar interests are at play. In this case, respondent has immeasurable interests in the protection of his relationship with his son, and a conditional reversal is both "more deferential to" these interests "and is more likely to ensure these interests are protected by the trial courts." *Id*. Moreover, as was thoroughly detailed by the majority, DHHS spent more than a year flouting respondent's constitutional rights. A conditional reversal would send an emphatic message to the Department and the trial court that such conduct will not be tolerated while also protecting the best interests of AKD.

The majority says that it does "not condone the court's and DHHS's treatment of father or the violation of his constitutional rights." I have the utmost respect for my colleagues and do not doubt the truth of this statement nor their disappointment in the conduct of DHHS. However, as a practical matter, I worry that the majority's decision to affirm, reluctant as it may be, sends a different message. I believe it is neither the intent of the Legislature nor in the best interests of the affected children to implicitly send a message to DHHS that it can violate the constitutional rights of a parent without any practical consequences. I believe that a conditional reversal would send the appropriate message.

Finally, in *Morris*, the Supreme Court outlined what the trial court was required to do in response to the conditional reversal:

> On remand, the trial courts shall first ensure that notice is properly made to the appropriate entities. If the trial courts conclusively determine that ICWA does not apply to the involuntary child custody proceedings—because the children are not Indian children or because the properly noticed tribes do not respond within the allotted time—the trial courts' respective orders terminating parental rights are reinstated. If, however, the trial courts conclude that ICWA does apply to the child custody proceedings, the trial courts' orders terminating parental rights must be vacated and all proceedings must begin anew in accord with the procedural and substantive requirements of ICWA.

A similar approach should be taken in this case. I would remand this case to the trial court with orders to make reasonable efforts to prevent the continuation of AKD's stay in foster care. In this regard, there is some overlap with the majority's decision. I would order that DHHS conduct a new home study with PM and that DHHS must presume that PM is a fit placement unless articulable reasons to the contrary are established. General allegations that PM has had proximity to CPS investigations will not suffice. If concerns are raised with PM, these should not prevent placement with her unless the concerns rise to such a level that removal would be warranted had AKD been placed with her upon respondent's first request. Under this approach, the removal order would not be reinstated unless DHHS provides the court with both detailed allegations against PM as well as specific reasons why there is no assistance DHHS can offer PM to overcome these barriers.

For these reasons, I would remedy this case with a conditional reversal of the order removing AKD.

CONCLUSION

In conclusion, for the reasons detailed in this opinion, I would conditionally reverse. Finally, I would like to note that I cannot vouch for respondent-father's ability to succeed as a parent in the same way that I cannot prospectively vouch for the ability of any parent to succeed. However, future uncertainty does not justify the state in preemptively violating the constitutional right of parents to raise their children and, more importantly, the constitutional right of children to be raised by their parents. The possibility of failure does not justify the deprivation of the opportunity for success. As former Chief Justice Bridget McCormack aptly put when dissenting in a termination case, "[i]f incarceration alone is insufficient to justify" state interference with the parent-child relationship, "it isn't clear to me there is much more this respondent could have done to provide proper care and custody for [the child] under the circumstances." *In re Whisman*, 506 Mich 931; 949 NW2d 153 (2020) (MCCORMACK, C.J., dissenting).

Respectfully, I dissent.

/s/ Allie Greenleaf Maldonado