STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
February 12, 2013

In the Matter of NAD, Minor.

No. 311694
Grand Traverse Circuit Court
Family Division
LC No. 11-100023-AM

Before: GLEICHER, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

In this competing party adoption case, petitioners Maureen and Glenn Gordon challenge the decision of William Johnson, Superintendent of the Michigan Children's Institute (MCI), granting the application for adoption filed by Tim and Jala Wharton, NAD's foster parents. Specifically at issue is whether the trial court clearly erred in finding that Johnson had not acted arbitrarily and capriciously by denying the Gordons' request to adopt NAD.

The Gordons focus their appellate arguments on the process that led to NAD's placement with the Whartons. We agree with the Gordons that the process was fundamentally flawed. The evidence supports that Child and Family Services (CFS), the adoption placement agency overseeing NAD's adoption, approached this task in a decidedly non-objective fashion. Despite the Gordons' familial relationship with NAD and their strong qualifications as adoptive parents, CFS personnel displayed unfounded hostility toward Maureen (Mickey) Gordon from the outset. The bias of CFS personnel in favor of the Whartons, who maintained the child's custody throughout the adoption proceedings, prevented the Gordons from developing the same strong bond that the child shared with the Whartons.

Notwithstanding CFS's conduct, the trial court did not clearly err by finding that Johnson's decision was neither arbitrary nor capricious. Johnson is tasked with promoting the best interests of the adoptee rather than critically reviewing the historical events surrounding the child's placement. Given the high barriers insulating his decision from legal challenge and our determination that the trial court correctly applied to his decision the most deferential standard of review, we affirm.

I. UNDERLYING FACTS AND PROCEEDINGS

In June 2009, Child Protective Services (CPS) received information that Julie Dworek, NAD's mother, was selling cocaine from her home. After a preliminary hearing, the Department of Human Services (DHS) placed then four-year-old NAD in the Buist foster home. Megan

Heethuis, a DHS foster care worker, coordinated case service efforts with those concomitantly provided by CFS, a licensed private agency under contract with the DHS. CFS personnel assigned to the proceedings included other foster care workers and therapists.[1]

Shortly after NAD's placement in the Buist foster home, Karen and Jerry Dworek, NAD's grandparents, expressed a desire to take NAD into their care. DHS workers noted that Karen Dworek had provided regular daycare for NAD and the two shared a close bond. By August 9, 2009, NAD was placed with the Dworeks. In October 2009 a DHS worker noted:

> Mr. and Mrs. Dworek are very motivated to provide care for [NAD]. They are willing and able to meet all of her educational, emotional, safety and health needs and want what is best for her. [NAD] has a very strong bond with her grandparents and was very excited to be staying at their home. This placement is in the best interest of [NAD] because it provides [her] with a safe, stable, and secure living environment and because she is placed with family.

Unfortunately, NAD's placement with Karen and Jerry Dworek was short-lived. Jerry Dworek suffered a stroke in January 2010 and died in February. After Jerry's death, Karen Dworek advised the DHS that she needed "respite." NAD was again placed with the Buist family but continued to visit Karen Dworek, spending Thursday through Friday evening in Karen's home. Meanwhile, the proceedings to terminate Julie Dworek's parental rights continued.

In April 2010, the DHS learned that Karen Dworek had permitted Julie to spend the night while NAD was visiting. After being confronted with this transgression, Karen suggested that NAD be placed for adoption. On May 27, 2010, the DHS moved NAD to a "potential adoptive placement" in the home of Timothy and Jala Wharton. On June 18, 2010, the DHS filed a petition seeking termination of Julie Dworek's parental rights.

On July 1, 2010, Mickey Gordon advised the DHS of her interest in adopting NAD. Mickey Gordon is Karen Dworek's sister and NAD's great-aunt. Mickey and her husband, petitioner Glenn Gordon, are experienced foster parents and reside in Oklahoma. The Gordons have four biological adult children and adopted two of their foster children. Mickey Gordon was employed by Family and Children's Services in Oklahoma for a number of years as a family support specialist. Not surprisingly, an "adoptive" home study completed on August 31, 2010, found the Gordons' home appropriate for NAD's placement.[2]

[1] Later, CFS assumed responsibility for placing NAD in an adoptive home and for making a recommendation as to who would adopt her.

[2] A "foster care home study" was completed in October 2010 and also deemed the Gordon home appropriate for placement.

The Gordons' interest in adopting NAD likely came as welcome news to the DHS.[3] DHS policy encourages placement with family members. The DHS Children's Foster Care Manual (also called the "FOM") specifically provides next to the heading, "Preference for Placement with Relatives:"

> When children must be removed from their home and placed in out-of-home care, preference must be given to placement with a fit and willing relative. Therefore, it is crucial to identify relatives prior to removal (CPS) and throughout the case (foster care) as potential placements and permanency providers; see FOM 722-6, Relative Notification. [FOM 722-3, p 3.]

Another section of the FOM states that "placement with . . . relatives is usually in the child's best interest."[4] FOM 722-3, p 6. The record evidence fully substantiates that Mickey Gordon qualified as a "fit and willing relative."

Despite the Gordons' familial relationship with NAD and their extensive experience as foster parents, CFS personnel displayed a decided lack of enthusiasm for NAD's placement with the Gordons. In an August 9, 2010 email, Heethuis summarized: "On [July 1, 2010] a relative (grandmother's sister) from Okalhoma [sic] came forward and stated that she was interested in placement and adoption of [NAD]. This information was shared with CFS and it was pretty clear that they were not in support of a possible placement/adoption with this relative." Heethuis's email continued:

> I had met with Janice Agruda, Echo Dean and Amber Ligon[5] on July 13th to discuss . . . possible placement with the relative. I had requested this meeting due to several emails that were being sent between the parties and my belief that the intention of DHS was being misunderstood. At this meeting I shared with them that we need to make efforts to maintain family connections and that as long as Karen [Dworek] can be appropriate during visits, that the visits needed to occur. . . . I also shared with them that the relative that had come forward will be considered for placement/adoption. They voiced their concerns about the family and that [NAD] does not know this relative. I stated that we needed to investigate and study this relative and if she is approved then a move may happen. I stated that our goal is to place within the family and she had only been with her current foster home for 1 ½ months at that time.

Heethuis later characterized CFS's attitude toward placement with the Gordons as one of "resistance to the policy" favoring placement with family.

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[3] Heethuis subsequently testified that the DHS "always tr[ies] to place first with relatives[.]"

[4] The FOM defines "relative" as including a great-aunt. FOM 721, p 17.

[5] Agruda, Dean and Ligon were employed by CFS.

On August 4, 2010, Julie Dworek relinquished her parental rights, and Mickey Gordon met NAD for the first time.[6] Shortly thereafter Mickey began travelling to Michigan every two weeks for supervised and unsupervised visits with NAD. Karen Dworek also visited with NAD under Mickey's supervision. CFS personnel closely monitored NAD's acceptance of the visits. An October summary of the visits provides:

> [NAD] started having supervised visitation with Mickey Gordon, Karen Dworek's sister[,] in August. Mickey lives in Oklahoma and comes to Traverse City for visitation. Per Adoption worker Laura Field, visitations are going well. Mickey had supervised visits in August and Early [sic] September. [NAD] was shy at first but eventually warmed up to Mickey. Mickey brought appropriate snacks and activities. Mickey is now having unsupervised visitations. During unsupervised time Mickey has taken [NAD] swimming, shopping and out to eat.
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> * * *
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> [NAD] is also currently having supervised visitation with her Grandmother Karen who moved to Oklahoma with her sister in September. Karen has returned to Michigan with Mickey on one occasion since moving. DHS has agreed to allow Mickey to supervise these visits.

Agruda's October 13, 2010 "permanent ward service plan" reported, "It is in the best interest of [NAD] to remain in her current placement pending her adoptive placement. [NAD] has bonded with Tim, Jala and [HW]. . . .[7] [NAD] . . . has become very bonded to the Wharton's [sic] and has stated to this worker and adoption worker Laura Field that Tim and Jala are her 'parents.'" On October 27, 2010, Heethuis sent an email to Agruda observing that her report "is sounding biased in favor of the foster parents and lacking objectivity." The email continued:

> [T]here are several places throughout the report that it appears as though you are going out of your way to point out that [NAD] calls the foster parents mom and dad and refers to them as her parents. Nowhere in the report does it mention anything positive about her visits with Mickey and from what DHS has been told by Laura the visits are going well, they are creating a bond and [NAD] enjoys them. It is fine to list concerns about how she is handling everything and even how she is feeling like she is being pulled in different directions, however it has to be done objectively and the report seems to place blame on the relatives. It is also fine to state that she has bonded with the foster family, but the report comes across as though you are trying to sway the reader in the direction or in the favor of the foster family and again that is not the purpose of these reports.

[6] The parental rights of NAD's father were terminated at the same hearing.

[7] HW is the Whartons' child.

> Please review the report and make the requested corrections. I know you have shared with me in the past that you are having a difficult time with this case and the fact that [NAD] most likely will be moved from the Wharton's [sic], however this cannot be portrayed in the reports.

Notwithstanding this admonition, Echo Dean, a CFS therapist, described in a November 2010 report:

> [NAD] is adamant that she is staying with the Wharton family, and states that, "no one can make me leave." Unfortunately, as the service providers, we know this is not true, but *it will be a travesty and will inflict serious damage to [NAD's] emotional health if she is removed from this family*. [Emphasis added].

In approximately the same time frame, CFS restricted Mickey Gordon and her family to supervised visits with NAD, apparently based on a CFS worker's report that NAD had become emotionally overwrought after a visit with Mickey that Karen Dworek also attended.

In January 2011, Dean authored an "historical narrative" outlining Dean's view of NAD's relationships and best interests. Dean recounted:

> The great aunt has continued to request visits and to adopt [NAD]. It has been made very clear by Karen herself that she has moved to her sister's city of residence and near her home, and that [NAD's] mom Julie, will be moving in with Karen as well. So, in essence [NAD] will be returned to her mother's care, although her mother's parental rights are no longer intact. The issues that brought [NAD] into foster care have not been resolved and therefore [NAD] stands to be at great risk of harm if sent to her great aunt's and subsequently her mother's care.
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> * * *
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> The purpose of providing this historical narrative is to preface what this therapist has seen taking place with [NAD] through all of this. It is unfortunate that [NAD]'s family of origin is dysfunctional, but that is the case. There were many instances where Karen told [NAD] to "keep a secret" which is inappropriate, especially for a 4-year[-]old child. After visiting with her grandmother, [NAD] would get very upset and would cry and tell the foster parents that she was sad; her usually sunny disposition would turn dark and angry but she would be very clingy with the foster mom and seemed to need extra hugs. Perhaps most disturbing was that Karen would tell [NAD] that she should not love her foster parents because only "family" can love her. This has been incredibly difficult for [NAD] because she does love her foster family and she becomes very confused and guilt stricken when her grandmother tells her she shouldn't. When [NAD] refers to her foster mom as "mommy", Karen corrects her and tells her not to call her that.

> At the present time, [NAD]'s mental health is severely compromised. She is confused, hurt and afraid that she will be removed from the foster home where she has been loved and nurtured and cared for in the past 8 months. Instead of helping her granddaughter heal, Karen is hurting her granddaughter and making healing difficult if not impossible in this situation. Her weekly phone calls with [NAD] continue to contain information that is not helpful or appropriate to share with [NAD] such as how [NAD] will soon be coming to live with Aunt Micky and how she will get to see Karen every day. [NAD]'s future placement has not been determined yet and telling her things like this create more stress and anxiety for [NAD].
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> The Wharton's [sic], the current foster family, bring [NAD] in for therapy on a weekly basis and there have been several conjoint sessions with [NAD] and the Wharton's [sic] because [NAD] is so distraught.
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> It is the opinion of this professional that [NAD] should stay in her current foster home where she has bonded and attached and will continue to be cared for and be a part of a young, loving, active family.

Subsequently Dean re-emphasized her preference for the Whartons, expressing in a March 22, 2011 email:

> Just wondering if anyone has actually said to Mickey, "Bringing so many different people is very hard for [NAD]". I know Mickey is a pain in the rear end, but if nothing else, if that was said to her, her answer could be documented. This is, after all, supposed to be about what is in [NAD]'s best interest. If Mickey doesn't seem to care how difficult it is for [NAD] to meet new people all the time, then that speaks volumes about her agenda. Again, I'm not trying to stir up trouble and I know Mickey is difficult to deal with and yet we expect this little girl to deal with it because her great aunt is a bully.[8]

A "Competing Parties Assessment" authored by CFS adoption specialist Laura Field in January 2011 described the Gordons as "financially sound, seasoned parents . . . capable of providing a [sic] adoptive home for [NAD,]" and "excellent in regards to visiting this child." Field's assessment continued,

> The largest concern regarding this family is there [sic] ability to keep good boundaries in place for the maternal grandmother and birth mother. History has shown that these two parties are very enmeshed and that the grandmother has a hard time separating from the birth mother. Maureen [Mickey], in particular, has advocated greatly for her sister and niece. It would be this worker's hope that she could keep clear lines drawn as to whom [NAD]'s primary care givers are to be.

[8] The two "new people" were the Gordons' teenaged children.

> This child is already very confused and anxiety ridden over the uncertainty of her future.

Fields summarized regarding the Whartons as follows:

> This family has provided a stable, and loving home for [NAD]. [NAD] has been able to connect with this family, her community/school and developed some very good friendships since moving in with the Whartons. [NAD] has blossomed since her placement with the Whartons. She has expressed a connection and desire to stay with this family permanently. [NAD] has reported that she likes visiting with the other parties, but wants to live with her "Mom and Dad". Her behaviors have continued to improve, she has less anxiety, and she is able to tell the Wharton's [sic] how she feels. This is a child who is clearly comfortable with her surroundings. This family has connected with this child and has been able to incorporate her into their family just as if she was a biological child. To move [NAD] from this stable environment that she calls home would be detrimental to her emotional growth and healing. She desperately wants to stay where she is at and with her chaotic and confusing life prior, it is understandable.

Fields concluded, "For the sake of continuity of care, her connections and bonds with her family and community this worker is recommending that [NAD] be placed adoptively with the Wharton family."

On February 9, 2011, CFS director Jim Scherrer informed the Gordons of his support for Fields' recommendation "that [NAD] continue in her current placement and be adopted by her foster family." Scherrer advised the Gordons of their right to submit additional information to Johnson, who would make the final adoption decision.

While Johnson reviewed the information provided to him by CFS, Mickey Gordon learned through an internet search that Jala Wharton was pregnant with twins and that the pregnancy was "high-risk," requiring a period of strict bed rest. Mickey further discovered that a foreclosure action had been brought against property owned by the Whartons and that a default judgment had entered against them for a substantial debt owed to American Express. Mickey emailed this information to Johnson, who requested that CFS investigate these issues. Fields subsequently reported to Johnson that Tim Wharton was providing child care during Jala's period of bed-rest and that the Whartons were in the process of a loan "remodification" that had been on-going for approximately six months.

Johnson rendered his decision on June 20, 2011, concluding that NAD would be adopted by the Whartons. Johnson identified five factors he considered in reaching his decision: the length of time NAD had "lived in a stable, satisfactory environment and the desirability of maintaining continuity"; the psychological relationship between NAD and the potential adoptive

families; the ability and willingness of the prospective adoptive parent to adopt siblings;[9] the ability of the prospective parent to meet NAD's physical and emotional needs; and the home, school, and community record of NAD. In discussing these factors, Johnson placed considerable weight on the fact that NAD's home with the Whartons was "stable and nurturing." He found that although the Gordons had established a relationship with NAD, it was "not a strong parent-child relationship" and was "non-existent" before July 2010. He noted that the Gordons had not contacted the agency when NAD was first removed from parental custody, and also found significant that NAD had "established connections with school and community." Although Johnson determined that the Gordons would be suitable for adoptive placement, he concluded NAD's best interests would be served by permanent placement with the Whartons.

In July 2011, the Gordons filed a motion in the circuit court pursuant to MCL 710.45(2), characterizing Johnson's consent decision as arbitrary and capricious and requesting an evidentiary hearing. The § 45 hearing began in October 2011 and concluded in June 2012.[10] During its pendency, the Bureau of Children and Adult Licensing found that CFS had violated DHS policy by failing to attempt to locate or notify NAD's relatives (other than Karen Dworek) before placing her with the Whartons.

During his evidentiary hearing testimony, Johnson summarized the basis for his decision in favor of the Whartons as follows:

> I tried to consider [NAD]'s history, what she had been through in the care of her mother, and her grandmother, and the care that she had finally received from the foster parents who love her and care for her, and who she loves. And to me those were the compelling factors in deciding to support adoption by her foster parents[.]

Johnson admitted that he harbored ill-feelings toward the Gordons based on his perception of their "indifference" to NAD's care until shortly before Julie Dworek relinquished her parental rights. Johnson characterized the Gordons' delay in presenting themselves as possible adoptive parents as "despicable."

In a bench ruling, the circuit court ultimately concluded that the superintendent had good reasons to deny the Gordons' petition and that the Gordons had not clearly and convincingly demonstrated that the superintendent's decision had been rendered arbitrarily and capriciously.

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[9] Johnson subsequently admitted that the Whartons' ability to adopt NAD's siblings lacked relevance in this case because she had no siblings eligible for adoption.

[10] A lengthy adjournment ensued after the Gordons' counsel reported to the Michigan State Police that CFS's management of NAD's adoption had violated Michigan law. The § 45 hearing continued after the state police found no criminal wrongdoing.

II. STANDARD OF REVIEW

"Judicial review of the withholding of consent to an adoption is governed by MCL 710.45[.]" *In re Cotton*, 208 Mich App 180, 183; 526 NW2d 601 (1994).

> Pursuant to MCL 710.45, a family court's review of the superintendent's decision to withhold consent to adopt a state ward is limited to determining whether the adoption petitioner has established clear and convincing evidence that the MCI superintendent's withholding of consent was arbitrary and capricious. Whether the family court properly applied this standard is a question of law reviewed for clear legal error. *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994). [*In re Keast*, 278 Mich App 415, 423; 750 NW2d 643 (2008).][11]

"The generally accepted meaning of 'arbitrary' is determined by whim or caprice, or arrived at through an exercise of will or caprice, without consideration or adjustment with reference to principles, circumstances or significance." *Id*. at 424 (quotation marks and citation omitted). "The generally accepted meaning of 'capricious' is apt to change suddenly; freakish; whimsical; humorsome." *Id*. at 424-425 (quotation marks and citation omitted).

This Court has elaborated as follows the standard controlling a circuit court's review of the MCI superintendent's adoption decision pursuant to MCL 710.45:

> The fact that the Legislature in drafting the statute limited judicial review to a determination whether consent was withheld arbitrarily and capriciously, and further required that such a finding be based upon clear and convincing evidence, clearly indicates that it did not intend to allow the [family] court to decide the adoption issue de novo and substitute its judgment for that of the representative of the agency that must consent to the adoption. Rather, the clear and unambiguous language terms of the statute indicate that the decision of the representative of the agency to withhold consent to an adoption must be upheld unless there is clear and convincing evidence that the representative acted arbitrarily and capriciously.

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[11] The relevant subsections of MCL 710.45 set forth the following:

> (2) If an adoption petitioner has been unable to obtain the consent required by section 43(1)(b), (c), or (d) of this chapter, the petitioner may file a motion with the court alleging that the decision to withhold consent was arbitrary and capricious. . . .
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> * * *
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> (7) Unless the petitioner establishes by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court shall deny the motion described in subsection (2) and dismiss the petition to adopt.

> Thus, the focus is not whether the representative made the "correct" decision or whether the [family court] judge would have decided the issue differently than the representative, but whether the representative acted arbitrarily and capriciously in making the decision. Accordingly, the hearing under § 45 is not, as petitioners seem to suggest, an opportunity for a petitioner to make a case relative to why the consent should have been granted, but rather is an opportunity to show that the representative acted arbitrarily and capriciously in withholding that consent. It is only after the petitioner has sustained the burden of showing by clear and convincing evidence that the representative acted arbitrarily and capriciously that the proceedings may then proceed to convincing the probate court that it should go ahead and enter a final order of adoption.
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> Because the initial focus is whether the representative acted arbitrarily and capriciously, the focus of such a hearing is not what reasons existed to authorize the adoption, but the reasons given by the representative for withholding the consent to the adoption. That is, if there exist good reasons why consent should be granted and good reasons why consent should be withheld, it cannot be said that the representative acted arbitrarily and capriciously in withholding that consent even though another individual, such as the [family court] judge, might have decided the matter in favor of the petitioner. Rather, it is the absence of any good reason to withhold consent, not the presence of good reasons to grant it, that indicates that the representative was acting in an arbitrary and capricious manner. [*In re Cotton*, 208 Mich App at 184-185.]

III. ANALYSIS

The Gordons first assert that the trial court erred by failing "to examine the Superintendent's reasons" for selecting the Whartons "to determine if they were valid in light of the evidence." According to the Gordons, the trial court merely "rubber-stamped" the reasons articulated by Johnson. We do not interpret the trial court's decision as a "rubber stamp." Rather, the trial court permitted extensive examination and cross-examination of the witnesses over the six-day § 45 hearing, carefully reviewed the multitudinous exhibits introduced by the parties, summarized at length the testimony of the witnesses (including Johnson), and highlighted that the court was not permitted to review the facts de novo. The record amply substantiates that the trial court was fully aware of the facts surrounding Johnson's selection of the Whartons, and after thoughtful analysis, detected no evidence that Johnson's decision was arbitrary or capricious.

The Gordons next maintain that "[e]ven if the [trial] [c]ourt correctly analyzed the law," its decision was erroneous "because the Superintendent did not have ***any*** valid reasons to deny consent to the Gordons." (Emphasis in original). Once again, we respectfully disagree. Despite Johnson's personal animosity toward the Gordons, no evidence contravened his determination that NAD thrived in the Whartons' care and that her best interests would be served by remaining in the Whartons' home. Furthermore, Johnson's testimony established that he selected the Whartons over the Gordons based on NAD's circumstances rather than his personal feelings toward the Gordons, whom he characterized as "suitable" for adoptive placement. Johnson's description of the factors motivating his decision corresponded with the paramount principle

governing adoption proceedings: the best interests of the adoptee. Moreover, Johnson's written "consent to adoption decision" provides: "The respective families are strongly encouraged to make efforts to develop a positive and cooperative relationship with each other." Thus, we cannot conclude that Johnson permitted any bias toward the Gordons to direct his ultimate adoption decision.

The Gordons next posit that Johnson's decision was "arbitrary and capricious as a matter of law" because Johnson's bias denied them due process of law. Irrespective of Johnson's personal feelings toward the Gordons, the record reflects that he treated them as fully-qualified competing parties for NAD's adoption. His decision appropriately focused on NAD's best interests and finds some record support. The trial court repeatedly indicated its respect for and admiration of the Gordons, weighed the testimony presented by both sides, and found Johnson's decision neither arbitrary nor capricious. Accordingly, we reject that the trial court clearly erred by discounting that Johnson's negative feelings toward the Gordons equated to arbitrariness or capriciousness.

That said, we find troubling Johnson's hostility toward the Gordons. Although the Gordons did not present themselves for consideration as foster parents until July 2010, at that point NAD had spent approximately only 34 days in the Whartons' home. As articulated by Heethuis, DHS policy suggested that the Gordons would be viewed as a preferred placement due to their status as family. The Gordons' extensive experience as foster parents and their previous adoption of two children lent additional weight to their candidacy. While relevant, the "non-existence" of their relationship with NAD before July 2010 is not easily distinguished from the non-existence of the Whartons' relationship with the child before May 2010.

Furthermore, we cannot characterize the Gordons as "indifferent" to NAD given the time and effort they expended in regularly traveling from Oklahoma to visit her. Nor do we share Johnson's antipathy toward Mickey Gordon's internet research, or her disclosure of pertinent financial information that should have been discovered by CFS. Gordon undertook to independently investigate the stability of the Wharton home. Given CFS's clearly expressed preference for the Whartons, Gordon accurately surmised that CFS had not diligently inquired as to potentially negative information. In the context of a competitive situation such as this, her actions are understandable.[12]

Even less understandable is the approach to the Gordons taken by CFS. CFS personnel made no effort to hide their contempt for Julie and Karen Dworek, referring to them as a "dysfunctional" family and "very enmeshed." Similarly, DHS personnel labeled Mickey "a pain in the rear end" and "a bully." According to the evidence presented in the trial court, CFS spent very little time or effort actually evaluating the parenting abilities of Mickey and Glenn Gordon despite that their Oklahoma home study portrayed them quite favorably. Rather, only four months after the Gordons sought to adopt NAD, Dean threatened that NAD's emotional health

[12] We note that in July 2010, Jala Wharton reported to the Grand Traverse sheriff's office that someone resembling Mickey Gordon had been "stalking" her. The sheriff found no support for this allegation.

would suffer "serious damage" if a "travesty" allowed her to be placed with the Gordons, and later concluded (without any substantiation whatsoever) that the Gordons would allow NAD to be returned to her mother's care. We find this conclusion disconcerting in light of the Gordons' unblemished record as foster care providers and adoptive parents. In essence, CFS attributed to the Gordons the transgressions of the Dworeks. By restricting the Gordons' ability to bond with NAD and declaring that NAD stood "at great risk of harm" if adopted by the Gordons, CFS virtually guaranteed the outcome its personnel had selected for NAD before Mickey Gordon sought placement.

The Gordons next invoke MCL 722.954a(2) for the proposition that "the Gordons had a statutory right to expect that an agency would notify them if one of their relatives had been placed in foster care in Michigan." MCL 722.954a(2) provides:

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

We decline to hold that this statute creates a right to notification, the denial of which would amount to a due process violation. Moreover, CFS's failure to abide by DHS policy did not render Johnson's decision arbitrary or capricious. Similarly, we reject the Gordons' argument that CFS's financial interest in recommending the Whartons over the Gordons rendered *Johnson's* decision invalid.[13]

Finally, the Gordons insist that they did not receive a complete copy of NAD's foster care records, and that the trial court abused its discretion by denying their motion to permit an independent psychological evaluation of NAD.

MCR 2.311(A) provides in relevant part:

> When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician (or other appropriate professional) or to produce for examination the person in the party's custody or legal control. The order may be entered only on motion for good cause with notice to the person to be examined and to all parties.

The trial court correctly found that NAD's mental health did not factor into Johnson's decision other than as it related to the stability of her environment with the Whartons. Thus, it was not in

[13] The record evidence regarding CFS's financial interest in placement with the Whartons, if any, is undeveloped in the record.

controversy. And an evaluation conducted months after that decision would not reflect what Johnson knew at the time he issued it, nor would it accurately reflect NAD's mental state at an earlier point in time. The trial court did not abuse its discretion in refusing to order it.

The trial court also provided sound reasons why discovery of information about the other competing homes would not be allowed, stating that "the only issue before the Court is whether the decision against [petitioners] was arbitrary and capricious, and as such any information about the [other families involved] is not relevant." Accordingly, the court did not improperly deny the Gordons' right to full discovery.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Christopher M. Murray