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STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE BARBER/ESPINOZA MINORS

Supreme Court Case No. 167745

Court of Appeals Case No. 369359

Lenawee County Circuit Court, Juvenile Division Case No. 2023-000033-NA

APPELLEE-MOTHER'S ANSWER TO APPLICATION FOR LEAVE TO APPEAL

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Statement of Material Facts and Proceedings

The principal issue raised in the Application is a question of law. As such, Appellee accepts the statement of facts as articulated by the Court of Appeals in its unanimous opinion, *In re Barber/Espinoza*, unpublished per curiam opinion of the Court of Appeals, issued September 19, 2024 (Docket No. 369359).

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Argument

The Court of Appeals correctly held that the trial court erred in concluding that reasonable efforts were not required before proceeding to terminate the mother's parental rights

Standard of Review

This Court can review unpreserved claims of error under the plain error standard. Under this standard, an appellate court can review an unpreserved error if: (1) an error occurred, (2) the error was plain, meaning clear or obvious, and (3) the plain error affected substantial rights, generally meaning that it affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Plain error may also be established when the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019). Here, the Court of Appeals found that the trial court committed plain error, which impacted both the fairness and the outcome of the proceedings. *In re Barber/Espinoza*, unpub op at 9.

Argument

The Court of Appeals properly applied the canons of statutory interpretation to determine that MCL 722.638(1) was not satisfied in this case. Under Michigan law, statutory interpretation begins with the language of the statute itself, with the primary objective being to ascertain and give effect to the intent of the Legislature. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). Courts must give meaning to every word, phrase, and clause, avoiding interpretations that would render any part of the statute surplusage or nugatory. *Vermilya v Delta College Bd of Trustees*,

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325 Mich App 416, 419; 925 NW2d 897 (2018). Only when an ambiguity exists in the language of the statute may a court go beyond the statutory text to ascertain the intent of the Legislature. *Id.* at 416.

The Court of Appeals, relying on these principles, concluded that MCL 722.638 limits a trial court's discretion regarding when it can dispense with the requirement to make reasonable efforts to reunify based on a finding of "aggravated circumstances." The statutory language clearly specifies the types of individuals whose conduct can qualify as "abuse" under the aggravated circumstances provision. By adhering to these canons, the Court avoided an overly expansive interpretation that would enlarge the statute's scope beyond what the Legislature intended, thereby ensuring that parents are not unjustly deprived of reunification beyond the statutory boundaries. This careful interpretation preserves the legislative balance between protecting children and safeguarding parental rights, emphasizing that bypassing reasonable efforts should only occur under well-defined circumstances explicitly set forth in the law.

A. The Court of Appeals correctly found that the mother did not abuse the child as contemplated under MCL 722.638(1)

The requirement to make "reasonable efforts" to reunify a family originates from both federal and state law, designed to protect parental rights and ensure that families are afforded a genuine opportunity to remain intact before parental rights are terminated. Under federal law, the Adoption Assistance and Child Welfare Act of 1980 (42 USC 671 et seq.) mandates that state agencies make "reasonable efforts"

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to prevent the removal of children from their homes or, if removal is necessary, to reunify children with their parents.

In Michigan, this federal mandate is embedded within the statutory framework of MCL 712A.19a(2), which requires that "reasonable efforts to reunify the child and family must be made in all cases" except those involving "aggravated circumstances" set forth in MCL 722.638 or involving other conditions enumerated in MCL 712A.19a(2)(b), (c), and (d). This statutory requirement reflects a fundamental principle of Michigan's child welfare law: that terminating parental rights should be a last resort, only after reasonable efforts have been made to assist parents in remedying the conditions that led to court intervention.

This Court in *In re Hicks/Brown* underscored that reasonable efforts are an integral part of the statutory scheme with the State bearing an affirmative duty to assist families in staying together whenever possible. 500 Mich 79, 85-86; 893 NW2d 637 (2017). When statutorily required, the failure to make these efforts prevents courts from terminating parental rights. *Id.* at 90.

The law permits bypassing reasonable efforts only in limited and explicitly defined circumstances. Under MCL 712A.19a(2), reasonable efforts are not required if there is a judicial determination that the parent has subjected the child to "aggravated circumstances" as defined under MCL 722.638(1) and (2), or if the parent has been convicted of an enumerated criminal offense, had rights to a child previously terminated and failed to rectify the conditions that led to the termination, or is a registered sex offender. Aggravated circumstances include

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severe abuse, such as criminal sexual conduct, where the abuse was perpetrated by a parent, guardian, or another qualifying adult residing in the home. MCL 722.638(1)(a). Both this Court and the Court of Appeals have clarified that bypassing reasonable efforts is permissible only under these specific circumstances, ensuring that parents are given every opportunity to reunify unless clear statutory grounds for bypass are met. *In re Simonetta,* 507 Mich 943 (2021); *In re Simonetta*, 340 Mich App 700, 707; 987 NW2d 919 (2022).

The L-GAL contends that the trial court correctly found aggravated circumstances because Ms. Espinoza failed to protect CB from abuse by others. Application at 17. However, the Court of Appeals correctly determined that these facts do not meet the statutory requirements of MCL 722.638(1). The statutory language explicitly requires that the perpetrator of the sexual abuse must be either a "parent, guardian, custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home." In this case, the alleged abusers did not fall into any of these categories.

Even though the abuse was not perpetrated by a "parent, guardian, custodian," or a person residing in the home, the L-GAL argues that reunification efforts were not legally required for two reasons. First, it contends that Ms. Espinoza herself "abused" her child, as contemplated by the statute, by failing to protect CB from others' abuse. Application at 19-20. The plain language of the statute, however, does not support this broad definition of abuse; rather, Ms. Espinoza's conduct more accurately aligns with neglect. Under Michigan law, "child

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abuse" is defined as "harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment." MCL 722.622(g). In contrast, the law defines "child neglect" as "harm or threatened harm to a child's health or welfare" by "[p]lacing a child at an unreasonable risk of harm to the child's health or welfare by failure of the parent . . . to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of that risk." MCL 722.622(k).

Here, Ms. Espinoza did not directly harm her child; her failure to intervene constitutes neglect, which does not fulfill the statutory definition of aggravated circumstances required to bypass reasonable efforts. While neglect is indeed serious, it, in and of itself, is not enough to strip a parent of their right to reunification services under the law. The Court of Appeals properly applied the plain language of the statute to determine that aggravated circumstances based on "abuse" were not satisfied here.

B. The Court of Appeals correctly found that MCL 722.638(3) did not apply

Next, the L-GAL asserts that MCL 722.638(3) provides an alternative path for termination without reasonable efforts. Specifically, it argues that because the DHHS filed an amended petition, it could seek termination at the initial disposition regardless of whether aggravated circumstances were present. Application at 26. The Court of Appeals, however, correctly found that the trial court misapplied this provision.

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MCL 722.638(3) suggests that DHHS may still request termination at initial disposition, and dispense with reunification efforts, even if the conditions in MCL 722.638(1) are not met. But, as the Court of Appeals noted, the provision still requires the need to satisfy the additional statutory grounds for bypassing reasonable efforts set forth in MCL 712A.19a(2). *In re Barber/Espinoza*, unpub op at 7, n 3. As noted above, this may involve situations where a parent has been convicted of specific crimes like aiding and abetting a serious offense or being a registered sex offender. None of these conditions applied in this case.

The L-GAL's argument that DHHS can proceed to termination in any case by merely filing an amended petition under MCL 722.638(3) without providing any reunification efforts is incorrect. Accepting this argument would render the statutory requirements in MCL 722.638(1) meaningless. Under such an interpretation, DHHS could request termination of parental rights at the initial disposition and withhold reasonable efforts in any case simply by amending the petition and holding a meeting. Such a practice would undermine the statutory intent behind the reasonable efforts requirement, reducing it to a mere formality that DHHS could circumvent at its discretion, thus depriving parents of a meaningful opportunity to reunify with their children in any case.

As highlighted by the Court of Appeals, the statutory framework is clear: termination at initial disposition is only permissible when strict statutory conditions are met, ensuring that children and parents are not unfairly denied the opportunity for reunification.

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Conclusion

The Court of Appeals correctly determined that the trial court erred in terminating Ms. Espinoza's parental rights without ensuring compliance with the statutory requirement to make reasonable efforts towards reunification. The statutory framework under MCL 722.638 and MCL 712A.19a are clear, and the Court of Appeals correctly interpreted the plain language of the statute. Thus, this Court should deny the Application for Leave to Appeal.

Respectfully submitted,

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Statement of Countable Words

This document contains 1,645 countable words. MCR 7.212(B)