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In the Michigan Supreme Court
Appeal from the Court of Appeals
(Gadola, P.J., Patel and Young, JJ.)

IN RE BARBER / ESPINOZA MINORS,

Supreme Court No. _____
Court of Appeals Case No. 369359
39th Circuit Court – Lenawee County
Case No. 23-033-NA.
Hon. Anna Marie Anzalone

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LAWYER-GUARDIAN AD LITEM'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

THIS APPEAL INVOLVES THE CUSTODY OF MINOR CHILDREN

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STATEMENT AS TO JURISDICTION

The Michigan Court of Appeals issued its published decision on September 19, 2024. This application for leave to appeal is timely filed within 42 days of the Court of Appeals' decision. MCR 7.305(C)(2)(a). This Court has jurisdiction per MCR 7.303(B)(3), (5)(a) and (b).

STATEMENT OF DECISION APPEALED AND RELIEF SOUGHT

The Michigan Court of Appeals reversed the January 2, 2024, order terminating respondent-mother's parental rights and remanded the case to the trial court for the Michigan Department of Health and Human Services (DHHS) to make "reasonable efforts" to reunify Ms. Espinoza with her children, CB (aged 14) and ME (aged 9). Respondent-mother, Crystal Espinoza, subjected her daughter to sexual predation by adult males on multiple occasions (when CB was between the ages of 2-9), in exchange for drugs for Ms. Espinoza to shoot up in front of her child. The Court of Appeals wrote:

> We acknowledge the extremely serious facts of this case. But while we might personally view a parent sex trafficking their child as particularly egregious conduct, that [sic] is not our role in this case or in our system of jurisprudence. If the Legislature desires such conduct to constitute an aggravating circumstance obviating the need for reunification efforts, it should amend the statutory scheme to so provide. *In re Barber/Espinoza, Minors*, ___ Mich App ___, ___ (2024) (slip op, p *8, n4).

The Court of Appeals ruled that the Child Protection Law requires that a parent commit the criminal sexual conduct in order to fall within the "aggravated circumstances" which will excuse the DHHS from making reasonable efforts to reunify parent with child. *In re Sanborn Minors*, 337 Mich App 252, 259 (2021); *In re Moss*, 301 Mich App 76, 90-91 (2013). The Court did so on the basis of a single unpublished decision, *In re Bergren*, unpublished per curiam opinion of the Court of Appeals, issued June 3, 2021 (Docket No. 354767),[1] and under the gloss of statutory

[1] Cited by the Court of Appeals and analyzed at pp 6-7 slip op of the Court's decision.

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construction. The Court of Appeals has rewritten the Child Protection Law to create an exemption from the Child Protection Law's provisions regarding aggravated circumstances, for parents to essentially sell their children to other adults for sex.

Thus, Appellant LGAL for the children, asks this Court to **peremptorily reverse** the Court of Appeals' September 19, 2024, decision, or to grant leave, on the grounds stated herein.

STATEMENT OF GROUNDS FOR APPEAL AND WHY THIS COURT SHOULD GRANT LEAVE

The grounds presented in this Application involve legal principles of major significance to this state's jurisprudence, MCR 7.305(B)(3), given the vast number of child protective proceedings that are appealed to the Michigan Court of Appeals each month. The Application grounds further merit review by this Court since the decision of the Court of Appeals is clearly erroneous and will cause material injustice, MCR 7.305(B)(5)(b), and the published decision conflicts with another decision of the Court of Appeals, MCR 7.305(B)(5)(b). See, *In re Boyce*, unpublished per curiam opinion of the Court of Appeals, issued January 23, 2020 (Docket No. 348992).[2]

In the myriad termination of parental rights cases issued by the Court of Appeals every month in this State, a parent's unpreserved arguments are not generally accorded the kind of extensive analysis the *Barber/Espinoza* panel expended on Ms. Espinoza's brief. Similarly, when a parent abandons an issue for her failure to adequately brief it **or even provide a single authority in support** – as here – the Court of Appeals generally does not undertake to research and analyze

[2] Cited by the Court of Appeals and analyzed at pp 5-6 slip op of the Court's decision. It is possible that the *Barber/Espinoza* decision may also conflict with a **published** decision of the Court of Appeals, *In re Smith-Taylor Minors*, 339 Mich App 189 (2021). In *Smith-Taylor*, the respondent-mother argued that "aggravated circumstances" did not apply to her and that she was entitled to reasonable efforts, on the basis that it was the father – not the mother – who had abused the children. The Court of Appeals rejected the mother's argument and affirmed termination of both parents' parental rights.

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the party's superficial claims to suss out for the parent what the perceived issue is.

Notably, the Court of Appeals panel confirmed the following relevant details:

- "We find no issue with the trial court's underlying factual finding that ***CB was subjected to the sexual abuse alleged, which respondent either facilitated or knew about without intervening***."
- "Respondent essentially challenges the credibility of CB's allegations, but we defer to the trial court on this matter… ***the trial court explicitly found CB credible***…" *Barber/Espinoza*, ___ Mich App at ___ (slip op, p 8, n5) (emphases added).

In other words, the Court of Appeals **affirmed the trial court's judicial determination** that CB was subjected to sexual abuse which Ms. Espinoza "either facilitated or knew about without intervening." *Barber/Espinoza*, ___ Mich App at ___ (slip op, p 8, n5). Such findings by the trial court unquestionably satisfy the statutory requirement of a "judicial determination" that aggravated circumstances exist in this case. MCL 722.638(1)(a). The fact that Ms. Espinoza herself did not perpetrate the sexual abuse upon her minor daughter does not remove this case from the reach of statutory "aggravated circumstances" excusing reasonable efforts to reunify parent with child, as the Court of Appeals erroneously concluded. Rather, the clear language of the statute requires a showing only that a parent "***has abused***" a child and that the abuse "***included***" one or more of the enumerated offenses. MCL 722.638(1)(a). When Ms. Espinoza made her daughter available to adult men for sex so that Ms. Espinoza could obtain drugs, she unquestionably "abused" her daughter, and that abuse "included" one of the enumerated offenses – criminal sexual conduct. *Id*.

The result of the panel's decision – if it is left undisturbed – is to carve an exception into the Child Protection Law for parents who abuse their children by offering them to other adults for sexual predation. Under the September 19, 2024, published precedent now, those parents who do so will be entitled to reasonable efforts to reunify with the children they have trafficked. The thought of a traumatized child whose parent has so discarded her having to visit with or engage in

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reunification counseling or services stretches the concept of "reasonable efforts" to its breaking point. The Court of Appeals' troubling decision means that parents who prostitute their children will enjoy reasonable efforts to reunify the victimizer with his/her victim, in clear contravention of clear and unambiguous statutory language, as well as of the spirit and intent of State and Federal law governing child welfare cases.

Thus, Appellant LGAL for the children asks this Court to **peremptorily reverse** the Court of Appeals' September 19, 2024, decision, to ensure that the aggravated circumstances presented by a parent proffering her child for sex with adult males continues to fall within the statutory language, intent and meaning of MCL 722.638. Should this Court not peremptorily reverse, the LGAL requests this Court grant leave to appeal in this case to correct the erroneous decision of the Court of Appeals.

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STATEMENT OF QUESTIONS PRESENTED

I. Whether the trial court's decision terminating parental rights should be affirmed where it correctly found that Respondent-Mother's conduct of offering her minor daughter, CB, for sex with adult males constituted "aggravated circumstances" within the Child Protection Law, as Ms. Espinoza "has abused" the child and the abuse "involved" one or more of the enumerated statutory offenses (criminal sexual conduct), and it was not necessary for the parent to perpetrate the sexual abuse contrary to the Court of Appeals' erroneous holding?

The children's LGAL answers: YES.

The DHHS answered: YES.

The trial court answered: YES.

Respondent-mother answers: NO.

The Court of Appeals answers: NO.

II. Whether the trial court's decision terminating parental rights should be affirmed where the DHHS filed an Amended Petition per MCL 722.638(3), an alternative path by which the DHHS may seek termination at initial disposition without providing reasonable efforts, and where Ms. Espinoza did not challenge this basis for termination on appeal?

The children's LGAL answers: YES.

The DHHS answered: YES.

The trial court answered: YES.

Respondent-mother answers: NO.

The Court of Appeals answers: NO.

III. Whether the trial court's decision terminating parental rights should be affirmed where the alleged error regarding advice of rights was not outcome determinative and where Ms. Espinoza not only failed to show plain error but cited an inapplicable court rule as the only "authority" in support?

The children's LGAL answers: YES.

The DHHS answered: YES.

The trial court answered: YES.

Respondent-mother answers: NO.

The Court of Appeals answers: NO.

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STATEMENT OF FACTS

A. *CPS Investigation, Petitions filed by the DHHS, Children's Trauma Assessments, Child Advocacy Clinic Forensic Interview of CB*

The Michigan Department of Health and Human Services (DHHS) filed its initial Petition for Jurisdiction and Termination of Parental Rights in the Lenawee County Circuit Court on February 16, 2023. **Appendix A**, Petition for Jurisdiction and Termination of Parental Rights, 02/16/23. The DHHS's Petition alleged that "The parent or other person legally responsible for the care and maintenance of the child(ren), 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 mental well-being, or he/she has abandoned the child(ren) without proper custody or guardianship." Petition 02/06/23, p 2. Respondent-mother, Crystal Espinoza (Ms. Espinoza), the mother of 14-year old daughter, CB, and of 9-year old son, ME, as the subject of the DHHS's petition following an investigation by Children's Protective Services (CPS).[3]

The Petition further alleged that "[Respondent-Mother]" has failed to protect her children from sexual abuse when able to do so. There is a law enforcement investigation pending due to the sexual abuse and sex trafficking allegation." Appendix A, Petition 02/06/23, p 2. The DHHS, in the Petition, requested the termination of parental rights at the initial dispositional hearing pursuant to MCL 712A.19b(3), (4), and (5). *Id*., p 6, 7.

During the course of the CPS investigation CB was forensically interviewed at a Child Advocacy Center (CAC). TR 12/28/23, p 104. During the February 15, 2023, forensic interview of CB, the child disclosed:

[3] Trial court finding: "On February 2nd of 2023, the initial investigation regarded improper supervision, sexual abuse, sex trafficking and threatened harm." TR 12/28/2023, 104.

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> [S]he made disclosures of sexual abuse by one of the friends of her mother. She disclosed that mother was aware of the sexual abuse and walked in on the abuse and –- but, did not stop it and failed to keep her safe. She disclosed that her mother allowed one man to abuse her, so that, he would give her mother drugs. She, also, disclosed seeing her mother use these drugs. She's stated that she's witnessed her mother using heroin, strapped a band around her arm and used a needle and syringe to inject drugs in her arm." TR 12/28/23, pp 104-105.

A trauma assessment of CB was then conducted on March 13, 2023, which assessment revealed that the child "…has lived in a very neglectful environment, sexually, emotionally, abusively, there are a lot of concerns with [CB]'s mental health in the way that she deals with things because of the trauma and there was a note that she is experiencing complex PTSD (indiscernible)." TR 12/08/23, p 50. CB's younger brother, ME, also underwent a trauma assessment, which detailed a lot of "chronic instability" in this 9-year-old's life, including a "neglectful home environment, emotional abuse, (indiscernible) substances, impaired parenting, such as mental illness, exposure to drug activity, placement outside the home, improvement (indiscernible). It also mentions he had complex trauma. That occurs when children repeatedly experience various harmful mal-treatment under the care (indiscernible) in early life and continue throughout childhood." TR 12/08/23, p 61.

On 02/17/2023, the preliminary hearing on the DHHS's petition was held, during which Brittany Kelly, the CPS investigator who authored the petition testified about CB's disclosures:

> … sexual abuse by two different men that were friends of her mother. She disclosed that her mother was aware of the abuse, that she had walked in on these two different incidents and walked right out. She also disclosed that she believed her mother allowed one of the these acts to happen so that the man would give her drugs. She disclosed that she has seen her mother use the drugs. And she explained that she believes her mother used heroin. She explained that as she strapped the band around her arm and used a needle and syringe to inject the drugs into her arm. TR 2/17/23, p 14.

Ms. Kelly had investigated Ms. Espinoza on a prior occasion and she testified that Ms. Espinoza had been offered services in the past, but did not benefit from the services. TR 2/17/23,

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p 16. Ms. Kelly testified there is substantial risk of harm to the children if they were to be in the care of Ms. Espinoza. TR 2/17/23, p 19. She further noted that the DHHS did not offer reasonable efforts to prevent removal as reasonable efforts are not necessary when aggravating circumstances exist, such as in this case. TR 2/17/23, p 19. The ongoing DHHS caseworker, Chelsee Pelham, also testified at the preliminary hearing and reiterated the DHHS's request for the removal of both children and for termination of Ms. Espinoza's parental rights. TR 2/17/23, p 25.

The trial court found there was "probable cause to substantiate the allegations based on the testimony of the case workers here today and the investigators, based on the CAC interview, as well as the case worker observing the CAC interview, and the statements made on the record today." TR 2/17/23, p 32. The court further found that contact between the children and Ms. Espinoza is not in the best interest of the children and could place the children in danger. TR 2/17/23, p 32. The trial court entered its order authorizing the DHHS's petition. **Appendix B**, Order authorizing petition, 2/17/23. The trial court found probable cause existed to conclude that respondent-mother, Crystal Espinoza, was unfit and that court jurisdiction over her two children, CB (aged 14) and ME (aged 9), was proper. The grounds for the court to exercise jurisdiction over the children were MCL 712A.2(b)(1) and (2). TR 12/28/2023, 84, 106.[4] The trial court's order of removal entered February 17, 2023, acknowledged the children were already in the care and custody of their non-respondent father. Appendix B, Order.[5]

The DHHS filed a First Amended Petition for Jurisdiction and Termination of Parental

[4] The trial court found there was "probable cause to substantiate the allegations based on the testimony of the case workers here today and the investigators, based on the CAC interview, as well as the case worker observing the CAC interview, and the statements made on the record today." TR 2/17/23, p 32.

[5] The children had been in the exclusive care and custody of their father for approximately two years before the DHHS petitioned the court. Appendix C, Amended Petition 6/28/2023, addendum p 4.

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Rights of Respondent Mother at Initial Disposition, on June 28, 2023. **Appendix C**, Amended Petition, 6/28/23. The DHHS now advanced MCL 722.639(3) as a basis to terminate parental rights at initial disposition, with the DHHS having met with the children's Lawyer Guardian Ad Litem (LGAL) and determining that it was appropriate to ask for termination of Ms. Espinoza's parental rights at initial disposition. Appendix C, Amended Petition, 6/28/2023. The Amended Petition alleged that Ms. Espinoza "has failed to protect her children from sexual abuse when able to do so. [Respondent-Mother] has a history of substance abuse [and] of criminality, both impairing her ability to parent safely." *Id*., p 2. As with the prior Petition, the Amended Petition also requested termination of Ms. Espinoza's parental rights. *Id*., p 3.

The Amended Petition detailed CB's disclosures from the CAC interview, including about how she was sexually abused by "men that were friends with her mother," that Ms. Espinoza was aware of the sexual abuse – walking in on the abuse while it happened – but did not intervene, and that CB witnessed her mother use heroin by strapping a band around her arm and using a needle and syringe to inject drugs into her arm. Appendix __, Addendum to First Amended Petition, pp 1-2. CB also disclosed that her maternal grandmother (Ms. Espinoza's mother) coached the child not to make any disclosures, telling CB that she sexually touched her younger brother which was false. Id., p 2.

In various court orders issued during the pendency of the child protective proceeding, the court continually documented its determination that reasonable efforts were not required due to concerns about the children's safety and well-being. "Mother has failed to protect her children from sexual abuse when able to do so, there is a pending law enforcement investigation for sexual abuse and sex trafficking charges, child admissions in CAC interview and observations of caseworker provided enough probable cause that the allegations are substantiated" and

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"Reasonable efforts are not required to prevent or eliminate the children's removal from the home due to their mother subjecting the children to aggravated circumstances of/by allegations of sexual abuse as evidenced by CAC interview;" (boxes 14.b and 16.a checked, Order 2/17/2023 (Appendix B)); "minor child's disclosure during CAC interview regarding allegations of mother's failure to prevent sexual abuse that occurred while the child was in her care" (box 12 checked, order following 7/5/2023, hearing); "allegations of sexual abuse as evidence by CAC interview" (box 13 checked, order following 8/31/2023, hearing). **Appendix D**, 7/5/23 and 8/31/23, court orders.

During the pendency of the case, the children's LGAL met with her clients in person, and reported to the court how the children were safe, cared for, and doing well in the care and custody of their father, Mr. Barber, and their stepmother. TR 2/17/2023, 13-24; TR 8/31/2023, 10; TR 12/8/2023, 6-7; TR 12/28/2023, 83.[6]

B. The DHHS's evidence at the combined Adjudication Trial and Termination of Parental Rights Hearing

At Ms. Espinoza's request, the trial court held a bench trial over the course of two days during which Ms. Espinoza was represented by counsel and was able to present her witnesses, evidence, and arguments. TR 12/08/2023, TR 12/28/2023, *passim*.

The parties first appeared for the combined adjudication trial/termination hearing on July 5, 2023, and when Ms. Espinoza expressed dissatisfaction with her counsel. The trial court adjourned the proceedings for Ms. Espinoza to either continue with her current counsel, retain new counsel or represent herself. TR 07/05/23, pp 4-5. The combined trial/hearing was reset for August 31, 2023, at which point Ms. Espinoza's counsel requested an adjournment. TR 08/31/23, p 4. The

[6] The children had been in the exclusive care and custody of their father for approximately two years before the DHHS petitioned the court. Appendix C, Amended Petition 6/28/2023, addendum p 4.

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trial court granted Ms. Espinoza's adjournment request.

December 8, 2023, was the date and time for a review hearing and for the rescheduled combined bench trial/termination hearing to be held. During the review hearing portion of the proceedings, the children's LGAL agreed with the DHHS that "there are statutory grounds for termination and that it is in the best interests of both children to terminate" the parental rights of Ms. Espinoza. TR 12/08/23 p 6. The lawyer for the children asked the court to consider that CB has consistently spoken about her abuse over time. TR 12/08/23 p 5.

Megan McVay, the ongoing CPS worker, testified that the "children would be at substantial risk if they return to [Respondent-Mother] today." TR 12/08/23, p 10. Ms. McVay also informed the court that since the initiation of the child protective case, Ms. Espinoza had committed additional criminal acts. TR 12/08/23, p 10.

Ms. Espinoza's 14-year old daughter, CB, testified for the DHHS; she is 14 years old and in the ninth grade. TR 12/08/23, p 16. CB testified that her mother abused her: she "let [her] be sexually assaulted and she has used drugs in front of [her]." TR 12/08/23, p 18. CB recounted the abuse by a man named Patrick,[7] a friend of her mother's: "When I was younger, I was about eight-years-old, my mom let me get sexually assaulted by him and he stuck his penis in my butt." TR 12/08/23, p 19. CB testified the sexual abuse was painful, she was bleeding from her "butt," and that she told her mother about it. TR 12/08/23, p 19. Ms. Espinoza minimized the serious physical injury to the child, replying, "[H]e ain't doin' it and [gave her] toilet paper." *Id*. Later in her testimony, CB described how her mother left her in a room with Patrick, that he ripped her clothes off, opened her legs and flipped her on her stomach. TR 12/08/23, pp 39-40. Patrick then stuck his

[7] Patrick (last name not specified) is also referred to as Ms. Espinoza's drug dealer, as well as "Bear." **Appendix E**, CPS Investigation Report excerpt, p 2 (Appendix E not yet e-filed with Application due to confidential nature of document; LGAL will seek direction from the Court).

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penis in her "butt," grabbed her side and sexually abused her. TR 12/08/23, p 40. CB recounted that Patrick then put his penis in her mouth. *Id*. CB told her mother that her butt was bleeding and CB again expressed that her mother knew what had happened. *Id*.

CB testified that she believes she was "payment" from her mother to Patrick, so her mother could get drugs from Patrick/"Bear." TR 12/08/23, pp 43-44. CB also described how she watched her mother shoot a substance into her harm, and smoke what CB believed to be cocaine or meth, saying her mother has "smoked right in front of me. She has shot up, in front of me, she has snorted stuff in front of me but, I don't know what sort of stuff..." TR 12/08/23, p 19.

CB further testified to abuse and neglect to herself and ME by Ms. Espinoza, such as that she and her brother would go for days without eating while in her mother's care. TR 12/08/23, p 38. CB recalled an incident, just a year ago, when CB, her mother, her mother's spouse (Alysia Bowman), and ME were at the Tecumseh Inn. TR 12/08/23, p 20. CB described that her mother had written a suicide note, drew herself a bath, gathered up all her clothes and a pocket knife and tried to go into the hotel bathroom. TR 12/08/23, p 20. Ms. Bowman tried to prevent her from going to the bathroom and an altercation occurred between Ms. Espinoza and Ms. Bowman, with Ms. Espinoza trying to escape the hotel room via the door. CB jumped in front of the door and Ms. Bowman directed the child not to let her mother out of the hotel room. Ms. Espinoza then "started like, pushing and hitting" CB, then pulled out her pocket knife to slit her wrists, but Ms. Bowman blocked her and was cut, causing her to receive six stitches. TR 12/08/23, p 21. CB testified that this event was traumatizing. TR 12/08/23, p 21.

Though CB testified she loves and misses her mother, she made clear that she does not feel safe when she is with her, since Ms. Espinoza allows CB to be sexually assaulted, lets her go without showering, lets her go days without eating, has abused CB, and has overdosed in front of

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CB multiple times. TR 12/08/23, p 22. CB disclosed the abuse recently because she is scared for her younger brother and she does not want ME to go through what she went through. TR 12/08/23, pp 41-42. CB expressed her belief that her mother would not abuse her brother or let him starve at this time, but CB does not believe that Ms. Espinoza is "mentally" sound enough to properly care for ME. TR 12/08/23, p 42.

The ongoing worker, Chelsee Pelham, testified that CB disclosed: "[S]he was sex-trafficked by her mom when her mom was living in, what she - crack house and her mom was using drugs and would sell her to friends to have sex with, so her mom could get drugs." TR 12/08/23, p 49. Ms. Pelham testified that during the CAC interview "[CB] explained that she was anally penetrated by someone that her mom allowed into the home and that her mom received drugs from, in order for her friend to have sex with CB." TR 12/08/23, p 49. CB also disclosed that her maternal grandmother told her to lie about being anally penetrated and to tell physicians that her dad raped her." TR 12/08/23, p 49.

Ms. Pelham also testified about CB's Trauma Assessment which showed that [CB] has "lived in a very neglectful environment, sexually, emotionally, abusively, there are a lot of concerns with [CB's] mental health in the way that she deals with things because of the trauma and there was a note that she is experiencing complex PTSD (indiscernible)." TR 12/08/23, p 50.

Ms. Pelham informed the court that since the initiation of the current case, Ms. Espinoza has been charged with additional crimes: "One is a felony for Uttering and Publishing, I believe, maybe Forgery and then, three other misdemeanors for Retail Fraud and Domestic Violence." TR 12/08/23, p 51. Ms. Pelham expressed her view that it is appropriate to terminate Ms. Espinoza's parental rights as there is substantial risk of harm to the children if were to be returned to their mother. TR 12/08/23, p 51.

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Brittany Kelly, who drafted the petition, also testified for the DHHS. Ms. Kelly had worked with Ms. Espinoza during previous CPS matters. TR 12/08/23, p 59. Ms. Kelly recounted one such prior investigation: "[Respondent-Mother] was in a car accident when [CB] had disclosed that she and her mom went to the hospital towards Ann Arbor where [Respondent-Mother] had bought drugs from a friend in the hospital, took the drugs at the hospital. [Respondent-Mother] drove the children home, on the way home they got into a car accident. They were transported from - by ambulance for medical attention. So, I don't believe the children were seriously injured or anything, but, you know, [CB] did say her Mom took those drugs and then, drove and got into a car accident. She received on-going services from that, for that investigation." TR 12/08/23, pp 62-63. Ms. Kelly stated that Ms. Espinoza was "previously investigated for other allegations about physical neglect, substance abuse, domestic violence." TR 12/08/23, p 63.

Ms. Kelly detailed how Ms. Espinoza had been offered services in the past, including drug screens, Community Mental Health involvement, attempts to get Ms. Espinoza in touch with Hands Across the Water, a wrap-around program, Ms. Espinoza was offered parenting services, but she does not cooperate. *Id*. Ms. Kelly noted Ms. Espinoza had not benefited from any prior services. TR 12/08/23, p 63.

Ms. Kelly is also aware of the CAC forensic interview of CB and how CB disclosed: "[T]hat one of her mom's friends, anally penetrated her and prior to the sexual abuse she saw her mom shoot up drugs, intravenously. She described it, you know, mom had wrapped a rubber band around her arm, they lit the spoon and she shot it up into her arm." TR 12/08/23, pp 59-60.

Ms. Kelly testified about ME's trauma assessment, which indicated: "He had a lot of the chronic instability it talks about. On Experience, neglectful home environment, emotional abuse, (indiscernible) substances, impaired parenting, such as mental illness, exposure to drug activity,

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placement outside the home, improvement (indiscernible). It also talks about he had complex trauma. That occurs when children repeatedly experience various harmful maltreatment under the care (indiscernible) in early life and continue throughout childhood." TR 12/08/23, p 61.

Ms. Kelly believed there was a substantial risk of harm to the children if they were to be returned to their mother. TR 12/08/23, p 64. She did not believe that reunification was in the best interest of the children. TR 12/08/23, p 63.

C. Summary of Ms. Espinoza's witnesses

On December 28, 2023, the parties appeared for the continued trial/hearing. Ms. Espinoza took the stand on her own behalf and she referred to CB as a liar, and derided the child's emotional testimony as "award-winning." TR 12/28/23, p 23, 31. Ms. Espinoza admitted that she was at the Tecumseh Inn with her spouse and the children, and that she intended to commit suicide, but that, "It wasn't in front of [CB]." TR 12/28/23, p 23. She claimed she never did drugs in front of her daughter. TR 12/28/23, p 24. She admitted she did drugs when she had "control of [CB], when [she] had possession of her, when [she] had custody of her." TR 12/28/23, p 24. She also admitted that in the Tecumseh Inn, she had done drugs in the hotel room, but did so in the bathroom. TR 12/28/23, p 23. Later in testimony the Respondent-Mother testified:

Q. Did you try to kill yourself while you had custody of your child?
A. Yes.
Q. Did you use drugs while you had custody of your child?
A. Yes.
Q. And, you feel you are a better option for this child, based on those factors?
A. I didn't say that. TR 12/28/2023, p 32.

Ms. Espinoza testified that she is married to Alysia Bowman, a registered sex offender. TR 12/28/23, p 28, 29, 50. Ms. Espinoza testified they married on December 31, 2019, while Ms. Bowman testified they married on December 30, 2021. TR pp 34, 41. Ms. Bowman acknowledged

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that she is listed on the Sex Offender Registry. TR 12/28/23, pp 29, 50.

Ms. Bowman testified she "never wanted to [be] around [CB] alone because [CB] was the biggest liar [she had] ever seen and [she] was scared that [CB] would try to say something about [her]." TR 12/28/23, p 52. Basically, Ms. Bowman echoed Ms. Espinoza's position that CB was "a liar," blaming the proceedings essentially on teenage rebellion.[8] Ms. Espinoza's mother, Teresa Pate, likewise dismissed CB as a liar. TR 12/28/23, p 63. Yet, Ms. Pate also testified the children were not allowed to be alone with their mother and that Ms. Espinoza was not allowed "to take them [the children.]" *Id*., 63, 67. She admitted she cannot say CB's disclosures are untrue, and notably, she admitted that her daughter was dating Patrick's brother for a period of time. TR 12/28/23, p 69. Ms. Pate further testified that there was "another man" who was permitted to "stay[] like two weeks, in a tent outside [her] home" in 2020. TR 12/28/23, p 70.[9]

Ms. Espinoza also called Nurse Practitioner and Forensic Nurse Rachelle Vanaken who is certified in "adult and adolescent sexual assault exams." TR 12/28/23, pp 74-75. Ms. Vanaken first became familiar with CB and ME when they were brought into the ER for a sexual assault exam. TR 12/28/23, p 75. Ms. Vanaken testified that CB did not want her vaginal area examined and so

[8] The record is unclear but it seems that Ms. Bowman lacked personal knowledge of the sexual assault incidents CB testified to, as it was never established whether Ms. Bowman was in a relationship with Ms. Espinoza during the timeframe CB alleged the sexual abuse. Per Ms. Bowman's testimony, she and Ms. Espinoza were married in 2019; per Ms. Espinoza's telling, they married in 2021. TR 12/28/2023, pp 34, 41.

[9] It is not clear from the record whether the various males who sexually assaulted CB with the mother's knowledge were "household members" of Ms. Espinoza and her children, such that their predation on CB would fall within MCL 722.638(1)(a) ("The department determines that a parent, guardian, or 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, has abused the child…") (emphasis added). The CPS investigation report indicates that at least one of the men – Patrick, aka "Bear," Ms. Espinoza's drug dealer – could well fall within this subsection given he was described as staying in a tent at one of the houses Ms. Espinoza resided in. Appendix E, excerpt CPS investigation report, p 2, para 4 (Appendix E not yet e-filed with Application due to confidential nature of document; LGAL will seek direction from the Court).

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no examination was conducted. TR 12/28/23, p 75. Since there was no examination of CB's vaginal area, Ms. Vanaken found no evidence of sexual abuse at that time. *Id*. She testified that it is not unusual for a child not to want their vaginal area examined, even when those victims have suffered sexual abuse. TR 12/28/23, p 78. Ms. Vanaken also stated that merely because she didn't see physical signs of abuse does not mean that the child did not suffer abuse then or on a prior occasion. TR 12/28/23, p 79. She testified that delayed reporting of child sexual abuse happens quite frequently. TR 12/28/23, p 81.

Mr. Brooks, in his closing argument for Ms. Espinoza, challenged CB's credibility. TR 12/28/23, p 90. He argued that the Havenwyck records did not reflect a report of abuse and so, no abuse must have occurred. TR 12/28/23, p 93. He argued his view that the child had the motive to make false allegations against her mother, contending that CB's involvement in the juvenile court system played a role in her allegations. TR 12/28/23, p 94.

D. The DHHS and the children's LGAL urge the court to take jurisdiction and terminate parental rights at initial disposition

During closing arguments, the DHHS argued that jurisdiction under the juvenile code is established by a preponderance of legally admissible evidence, citing MCL 712A.2(b)(1) and (2). TR 12/28/23, p 84.

The DHHS argued that "although, the aggravating circumstances listed in MCL 722.638(1), do not exist[,] MCL 722.638(3) permits the Department with the concurrence of the LGAL to petition for termination at the initial disposition hearing and that in this case, such relief's appropriate." TR p 84.[10]

[10] As detailed herein, the LGAL disagrees that there were not aggravated circumstances present in this case to justify termination without the DHHS making reasonable efforts. See Argument I and II, below.

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The DHHS argued that the facts adduced at trial/hearing "show there were aggravating circumstances." TR 12/28/23, p 85. The DHHS argued there were two ground for termination of Ms. Espinoza's parental rights, first pursuant to MCL 712.19b(3)(b)(ii), that the child or the sibling of a child was sexually abused and that the parenting who had an opportunity to prevent such abuse, failed to do so that there is a reasonably likelihood that the child will suffer injury or abuse in the foreseeable further if placed with her mother; and secondly pursuant to MCL 712.19b(3)(j), that based on Ms. Espinoza's conduct and capacity the children would be harmed if returned to her. TR 12/28/23, pp 85-86.

The LGAL argued "that the children's best interests are best served by the termination. The parent's ability - we have historic, life-long for these kids, history of exploitation, severe neglect, domestic violence, those three things were checked on the Havenwyck form.[11] We, add, in our testimony, sexual abuse." TR 12/28/23, pp 89-90.

D. The trial court's detailed findings and rulings

At the conclusion of the proofs and the parties' closing statements, the trial court issued its decision from the bench. To being with, the court expressly found CB to be a credible witness: "So, we had testimony from [CB] that was, in my eyes, credible ..." TR 12/28/23, p 99. The trial court found as facts that:

- Ms. Espinoza routinely engaged in domestic violence with and against her spouse, oftentimes in front of the minor children. TR 12/28/2023, 101.
- Ms. Espinoza currently faces criminal felony charges of domestic violence, which carry a possible penalty of life in prison if convicted, as a habitual offender fourth offense notice. TR 12/08/2023, 106.
- Ms. Espinoza once went to a hotel, the Tecumseh Inn, with her spouse, Alysia Bowman, and the two minor children, where Ms. Espinoza threatened to, and attempted to, commit suicide in the children's presence. TR 12/08/2023, 20-21. CB testified in detail about seeing her mother write a suicide note, drawing a bath, picking up a knife, taking pills, and attempting to go into the bathroom, which events were followed by a physical altercation

[11] Respondent's Exhibit 1 at trial.

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with her spouse when Ms. Espinoza tried to slit her wrists, leading to Ms. Bowman getting cut and requiring stitches. *Id*.; TR 12/28/2023, 99, 101.

- Ms. Espinoza has lived essentially a lifetime of criminality, with various misdemeanor and felony charges and convictions spanning some two pages in length. TR 12/28/2023, 100, 105; DHHS's Petition, pp 3-4 of 8; Amended Petition, pp 2-3 of 6.
- The children routinely witnessed domestic violence and drug abuse in the home of Ms. Espinoza. TR 12/28/2023, 101.
- Ms. Espinoza "definitely minimized the domestic violence. So, while, she did not deny the domestic violence occurred, she did make excuses for the domestic violence based on depression and medical issues of Ms. Espinoza." TR 12/28/2023, 103.
- Ms. Espinoza is married to a woman who is a registered sex offender. TR 12/28/2023, 102.
- Ms. Espinoza is an habitual drug-user, including use of heroin, cocaine, meth, TR 12/08/2023, 20-21; TR 12/28/2023, 102, use of suboxone for almost four and a half years at time of trial, with recent drug test positive for amphetamine and suboxone. TR 12/28/2023, 100.
- Ms. Espinoza admitted under oath to using drugs while the minor children were in her custody. TR 12/28/2023, 101.
- Ms. Espinoza has a lengthy prior CPS history with allegations of maltreatment, physical abuse, substance abuse, threatened harm, failure to protect, improper supervision, medical neglect, since at least 2014. TR 12/28/2023, 105; DHHS's Petition, "Crystal Espinoza Past CPS History," p 2 of 8.

The trial court found that taking jurisdiction was proper, TR 12/28/23, p 104, and noted that per MCL 712A.2(b)(1) and (2), there was "neglect, drug use in the home domestic violence in the home, attempted suicide and sex trafficking." *Id*., p 106.

The court ruled it appropriate for the DHHS to petition to terminate at the initial dispositional phase. The court cited "the parent being a suspected perpetrator or suspectful (sic) placing the child at an unreasonable risk and harm due to failure to take reasonable steps to intervene to eliminate that risk." TR 12/28/23, p 108. The court found that the DHHS "has satisfied the requirement that the child or sibling of the child has suffered physical injury or physical or sexual abuse and that based on the testimony heard, that the Court does find credible, that the parent's act caused the physical injury or sexual abuse of the child." *Id*.

The court analyzed the best interest factors and then held that per the "testimony heard and what's been placed on the record, the Court finds there's **clear and convincing evidence that a**

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statutory basis exists for terminating the parental rights of [Respondent-Mother]." TR 12/28/23, p 111. And the court reiterated, "So, the Court does find, as [] previously stated, there is at least, the minimum, one statutory ground for termination proven by clear and convincing evidence." TR 12/28/23, p 112. The court found that **termination is in the best interests of the minor children**." TR 12/28/23, p 112. The statutory grounds for termination the trial court found to have been proven by clear and convincing evidence were MCL 712A.19b(3). The trial court's order terminating the parental rights of Ms. Espinoza entered January 2, 2024. **Appendix F**, Order terminating parental rights, 1/2/2024.

Thus, the record is clear and the Court of Appeals decision affirms that Ms. Espinoza offered her minor daughter multiple times to adult males for sex, when the child was between the ages of 2-9 years old. TR 12/08/2023, 43-44; TR 12/28/2023, 104-105; COA decision, slip op p *8, n5 ("**We find no issue with the trial court's underlying factual finding that CB was subjected to the sexual abuse alleged, which respondent either facilitated or knew about without intervening**.") The Court of Appeals summarizes (and appears to confirm) some of the above litany of "concerns" respecting Ms. Espinoza's parental unfitness in a footnote:

> As a final note, termination may well ultimately be warranted after further proceedings including reunification services. We leave this question for the trial court but **note that the trial court previously considered not only the sexual-abuse allegations, but also respondent's suicide attempt, her neglect of CB's physical and mental health needs, her criminal history, her drug abuse, the trauma respondent caused ME, respondent's refusal to cooperate with Children's Protective Services (CPS), domestic violence between respondent and her spouse, and respondent's lifestyle**. COA decision, p *10, n7 (emphasis added).

D. The Court of Appeals' September 19, 2024, decision

Ms. Espinoza timely appealed from the January 2, 2024, order terminating her parental rights, to the Michigan Court of Appeals, filing her brief on March 18, 2024. In her Brief, Ms.

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Espinoza raised three unpreserved issues, within a Brief whose arguments span just six pages.

The DHHS filed its Brief on May 25, 2024.[12] The Court of Appeals issued its published decision September 19, 2024.

The LGAL for the children timely files this application with the Michigan Supreme Court, within 42 days of the decision of the Court of Appeals. MCR 7.305(C)(2)(a).

STANDARDS OF REVIEW

Unpreserved claims and "adjudication errors raised after the trial court has terminated parental rights are reviewed for plain error." *In re Ferranti*, 504 Mich 1, 29 (2019). See also *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, ___ Mich App ___ (2023) (Docket No. 359090); slip op at 5 fn 3; *In re Beers*, 325 Mich App 653, 677 (2018). Respondent-mother must establish that "(1) error occurred; (2) the error was 'plain,' i.e., clear or obvious; and (3) the plain error affected [her] substantial rights." *In re Ferranti*, 504 Mich at 29. "An error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Beers*, 325 Mich App at 677. "It is the [respondent] rather than the Government who bears the burden of persuasion with respect to prejudice." *In re Pederson*, 331 Mich App 445, 463 (2020).

Questions of statutory interpretation are reviewed de novo. *In re RFF*, 242 Mich App 188, 198 (2000). The Michigan Supreme Court recently reiterated the rules of statutory interpretation in *Iliades v Dieffenbacher North America Inc*, 501 Mich 326, 342-343 (2018):

> When interpreting a statute, this Court's primary goal is to 'ascertain the legislative intent that may reasonably be inferred from the words in [the] statute.' If the statute's language is clear and unambiguous, then the statute must be enforced as written. A necessary corollary of this principle is that a "court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." This Court must give effect to every word, phrase, and clause in a statute, and, in particular, consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory

[12] Both parties waived oral arguments. The LGAL did not file a brief in the Court of Appeals.

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> scheme, to avoid rendering any part of the statute nugatory or surplusage. [Citations omitted.] *Ayotte v Dept of Health & Human Services*, 326 Mich App 483, 493-94 (2018).

"It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other." *Detroit v Mich Bell Tel Co*, 374 Mich 543, 558 (1965), overruled on other grounds by *City of Taylor v Detroit Edison Co*, 475 Mich 109, 119 (2006).

ARGUMENTS

Ms. Espinoza made three cursory arguments in her brief in the Court of Appeals: her first cites an inapplicable court rule as the sole "support" for her unpreserved claim; the second contends that the trial judge was obliged to investigate the attorney-client relationship (an argument the Court of Appeals readily and properly rejected);[13] and the third argument concerning "aggravated circumstances." Because the Court of Appeals spent the bulk of its decision focusing on the aggravated circumstances topic, the LGAL addresses Ms. Espinoza's third argument first.

I. The trial court's decision terminating parental rights should be affirmed where it correctly found that Respondent-Mother's conduct of offering her minor daughter, CB, for sex with adult males constituted "aggravated circumstances" within the Child Protection Law, as Ms. Espinoza "has abused" the child and the abuse "involved" one or more of the enumerated statutory offenses (criminal sexual conduct), and it was not necessary for the parent to perpetrate the sexual abuse contrary to the Court of Appeals' erroneous holding. MCL 722.638(1)(a)(iii).

When a mother offers her minor daughter for sex with multiple adult males, such conduct is encompassed within the "aggravated circumstances" of MCL 722.638(1)(a)(ii) (criminal sexual

[13] Because the correct decision was reached as to Ms. Espinoza's second cursory argument, the LGAL does not address that argument herein.

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conduct). Contrary to the contentions raised in Ms. Espinoza's Argument Three, the Child Protection Law makes clear that when a parent "has abused" the child and when that abuse "include[d]" criminal sexual conduct – as here – then the DHHS is required to submit a petition for authorization to the court under subsection 2(b) of MCL 712A.2. MCL 722.638(1). In the present case, the DHHS complied with this statutory mandate when it filed its initial petition requesting termination of Ms. Espinoza's parental rights at initial disposition on the basis of aggravated circumstances.

1. It is not necessary that a "parent" commit the criminal sexual conduct against the child for there to exist aggravated circumstances.

The Court of Appeals reversed the trial court's decision terminating Ms. Espinoza's parental rights by raising *sua sponte* issues that Ms. Espinoza had never argued, and by deciding issues that Ms. Espinoza had not preserved in the trial court nor presented on appeal. For example, though Ms. Espinoza's brief never asked it, the Court denotes as a "key question": "…whether the criminal sexual conduct against a minor enumerated in MCL 722.638(1)(a)(ii) must be perpetrated by 'a parent, guardian, or custodian, or a person who is 18 years of age or older and resides for any length of time in the child's home' to constitute an aggravated circumstance warranting termination at the initial disposition." *Barber/Espinoza*, slip op pp 4-5.

In answering this unasked question in the affirmative, the Court analyzed two unpublished decisions not mentioned, not raised, and not argued by Ms. Espinoza: "This Court has addressed this precise question under analogous facts in two relatively recent unpublished cases." *Barber/Espinoza*, slip op, p *5 (citing *Boyce* and *Bergren*.)

A primary error in the published *Barber/Espinoza* decision is its adoption of the erroneous holding from *In re Bergren*: "that criminal sexual conduct as an aggravating circumstance must be committed by a parent or other specifically listed person in MCL 722.638(1)(a)." This conclusion

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is incorrect; ***the statute does <u>not</u> require that a parent be the perpetrator***. The plain language of the statute, MCL 722.638(1)(a), requires rather, "that a parent, guardian, or 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, ***has abused the child*** or a sibling of the child ***and the abuse included*** 1 or more of the following: .... (ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate." The plain language of the statute does not require the parent to commit the criminal sexual conduct (CSC); rather, it requires the parent to commit "abuse" of the child, which abuse "***includes***" or involves CSC. So the well-reasoned Boyce decision concluded.

The facts of *Boyce*, in which a mother – as Ms. Espinoza here – allowed her child to be sexually assaulted by adult males could not be more similar to the present case. The *Boyce* panel reasoned:

> "On th[e] record [here], the court could easily determine that [the child] was the victim of "[c]riminal sexual conduct involving penetration" and that [the] respondent "plac[ed] the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk." Accordingly, we discern no error in the circuit court's assessment that reunification efforts were not required in this case. [Id. At 4.] *Boyce*, cited at *Barber/Espinoza* slip op, pp 5-6.

The *Barber/Espinoza* panel states that this Court in *Bergren* more recently "…reached a contrary interpretation of MCL 722.638…" *Barber/Espinoza* slip op, p 6. The Court then concludes that "*Bergren* provides the proper interpretation" of MCL 722.638, and notes *Bergren* "…instructs that criminal sexual conduct as an aggravating circumstance must be committed by a parent…" *Barber/Espinoza* slip op, p 7. Again, this is incorrect.

The statutory language in MCL 722.638(1)(a) was chosen by the Michigan Legislature for a reason, and if the Legislature intended to impose a requirement that the parent be the perpetrator of the CSC, then the statute could easily have so provided. It would instead read:

"**that a parent**, guardian, or custodian, or a person who is 18 years of age or older

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> and who resides for any length of time in the child's home, **has committed 1 or more of the following**: .... (ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate."

Obviously, the Legislature did not so draft the law, however, and canons of statutory construction require that courts must give effect to the intent of the Legislature. *In re England*, 314 Mich App 245, 255 (2016). If the statutory language is clear and unambiguous, courts must enforce it as written. *In re Beers*, 325 Mich App 653, 662 n 4 (2018).

The Court of Appeals' related error on construing MCL 722.638 inheres in its adoption of the faulty reasoning of a single unpublished decision that incorrectly held that a parent must engage in the enumerated acts of MCL 722.638. By so doing, the Court of Appeals essentially convened an un-called/un-requested "conflicts panel," without meeting the requirements of MCR 7.215(J) and announcing that the 2021 *Bergson* decision represents the more on-point reasoning, though it is the in-depth and more factually-on point reasoning of the 2020 *Boyce* decision that actually resolves any conflict between unpublished decisions of the Court of Appeals, if any such conflict exists.[14]

The LGAL's reading of the statute is consistent not only with Michigan law, but also with federal law governing child welfare proceedings. See, *e.g.*, 45 CFR 1356.21(b), which provides in relevant part:

> [t]he title IV-E agency must make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from his/her home, ***as long as the child's safety is assured****; .... In determining reasonable efforts to be made with respect to a child and in making such reasonable efforts,* ***the child's health and safety must be the paramount concern***.[15]

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[14] The LGAL disagrees with the Court's decision that *Bergren* is the more persuasive decision relevant to the facts of this case. Rather, it is *Boyce*, a more factually analogous and better reasoned decision, that should control if the Court had been required to decide any conflict between the two unpublished decisions. MCR 7.215(J).

[15] The federal Child Welfare Policy Manual, § 8.3C.4, similarly provides: "In each individual case, the court and the State must determine the level of effort that is reasonable, *based on safety*

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In fact, in this case, the trial court expressly ruled that due to concerns for the children's health and safety, no reasonable efforts were required to be made. Additionally, the federal regulation quoted above links to the federal statute referencing reasonable efforts in the context of "aggravated circumstances" as present in this case: "…reasonable efforts ... shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that the parent *has* ***subjected the child to*** *aggravated circumstances* (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and ***sexual abuse***) ...." 42 USC 671. See also 45 CFR 1356.21(b)(3). Per this federal statutory language, the parent need only "subject[] the child to" sexual abuse, not be the actual perpetrator of the sexual abuse. And, consistent with federal law, Michigan's statutory language in MCL 722.638 requires only that the parent "abuse" the child in a manner that "includes" sexual assault; the statute does not require that the parent actually commit the sexual assault.[16]

As the DHHS argued below, there was another and alternative basis for affirmance of the trial court's sound decision to terminate parental rights contained in MCL 722.638(3). That provision of the Child Protection Law authorizes the DHHS to petition to terminate "even though the facts of the child's cases do not require departmental action under subsection (1) [the aggravated circumstances provision]. In full, MCL 722.638(3) provides:

> (3) If the department is considering petitioning for termination of parental rights at the initial dispositional hearing as authorized under section 19b of chapter XIIA of

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considerations and the circumstance of the family. Section 478 of the Act clarifies that *the State court continues to have discretion when making judgments about the health and safety of the child*." U.S. Department of Health and Human Services, Administration for Children and Families, Child Welfare Policy Manual, § 8.3C.4, **Appendix G**.

[16] This construction of Michigan's law is further confirmed by the federal Child Welfare Policy Manual § 8.3C.4 which makes clear "that reasonable efforts are not required because the statutory language at section 471(a)(15)(D)(i) of the Social Security Act (the Act) regarding aggravated circumstances ***does not require a criminal conviction***." Appendix G.

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> 1939 PA 288, MCL 712A.19b,[17] even though the facts of the child's case do not require departmental action under subsection (1), the department shall hold a conference among the appropriate agency personnel to agree upon the course of action. The department shall notify the attorney representing the child of the time and place of the conference, and the attorney may attend. If an agreement is not reached at this conference, the department director or the director's designee shall resolve the disagreement after consulting the attorneys representing both the department and the child.[18]

The LGAL's construction of Michigan's law is further confirmed by the federal Child Welfare Policy Manual § 8.3C.4 which makes clear "that reasonable efforts are not required because the statutory language at section 471(a)(15)(D)(i) of the Social Security Act (the Act) regarding aggravated circumstances ***does not require a criminal conviction***." Appendix G.

2. No reasonable efforts were required to be provided due to aggravated circumstances, and Ms. Espinoza never requested a service plan.

Among the arguments *sua sponte* made by the Court on Ms. Espinoza's behalf, the Court incorrectly concluded (on a question never raised by Ms. Espinoza), that the trial court's "finding of aggravated circumstances under MCL 722.638 and associated ruling that petitioner did not have to make reasonable reunification efforts were clearly erroneous," because "a petition was not mandated under subsection (1) of MCL 722.638…" *Barber/Espinoza*, ___ Mich App at ___ (slip op, p 8). There are multiple layers of error within this short assertion. First, as noted above, when a parent "has abused" the child, and when the "abuse" "include[s] 1 of the following…(iii) criminal sexual conduct,…" then the case is one in which there are aggravated circumstances under the statute. Second, such a case is one in which reasonable efforts to reunify parent with child need not be made. *In re Rippy*, 330 Mich App 350 (2019). Third, such a case requires the DHHS to file

[17] The DHHS's initial and amended petitions in this child protective proceeding sought termination of Ms. Espinoza's parental rights at the initial dispositional hearing as authorized by MCL 712A.19b. Appendix A, Petition Addendum, p 4; Appendix C, Amended Petition Addendum, p 3.
[18] The DHHS held the required case conference with the children's LGAL and there was unanimous agreement to seek termination at initial disposition here. TR 12/28/2023, p 83.

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a petition for authorization with the court. MCL 722.638(1).

With regard to the reasonable efforts portion of the Court's erroneous assertion: Challenges to the adequacy of services provided, or whether reasonable efforts at reunification were made, require the respondent to raise the issue in the trial court, otherwise the matter is not preserved and is subject to the plain-error standard of review. See, *e.g., In re Frey*, 297 Mich App 242, 247 (2012), and *In re VanDalen*, 293 Mich App 120, 135 (2011). Ms. Espinoza did not challenge these matters in the trial court; she did not request a service plan in the trial court and she did not challenge the trial court's determinations that reasonable efforts were not necessary in the present case. Therefore, her argument concerning no reasonable efforts is not preserved and is subject to the plain-error standard.

"Generally, the [DHHS] has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights." *In re Sanborn*, 337 Mich App 252, 258 (2021). "In general, when a child is removed from the parents' custody, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan," and "the Department must create a service plan outlining the steps that both it and the parent will take to rectify the issues that led to court involvement and to achieve reunification." *Id*. at 258-259. Although "the [DHHS] has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App at 248.

When the trial court determined following preliminary hearing that aggravated circumstances excusing reasonable efforts existed in this case, it was correct to do so. The court made a judicial determination that "reasonable efforts shall not be made to preserve and reunify the family because it would be detrimental to the children's health and safety." Appendix B, Order

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authorizing petition, 2/17/2023.[19]

The panel's "clearly erroneous" conclusion appears in context of its dealing with the plain error analysis, given that, again, Ms. Espinoza **failed to preserve** any of her (very cursory) issues. *Barber/Espinoza*, ___ Mich App at ___ (slip op, p 8). The panel goes on to take up the remaining factors required to show plain error warranting review of unpreserved error: "Even so, [that is, even where the trial court's finding of aggravated circumstances and no reasonable efforts required] reversal is only warranted if the trial court's error was plain, i.e., clear or obvious, and prejudiced respondent." *Id*.

As for the second prong – whether the error is plain – the Court of Appeals first expressly notes "the dearth of any published authority addressing the facts and question at issue, and indeed the conflicting unpublished authority on the matter." *Id*. But in the next breath, the Court rules that "this" is not an issue subject to reasonable dispute. "This" being, presumably, a reference to this panel's view that a mother proffering her minor child for sex with adult males is not encompassed within the "aggravated circumstances" provision of the Child Protection Law. In support of this somewhat superficial or strained reading of the statute, the panel claims that its interpretation of MCL 722.638 "is clearly provided by the statute's plain language," adds that its view is "supported by a recent case from this Court," and goes on to conclude that "this is not an issue subject to a reasonable dispute."

Here once again, the Court of Appeals does the heavy lifting for Ms. Espinoza, since her brief is virtually devoid of any argument or analysis to satisfy her burden of persuasion on any of

[19] Although the DHHS later filed an amended petition based on MCL 722.638(3), the court correctly found at the preliminary hearing stage that reasonable efforts were not required, and it reached the correct result at each stage of the proceedings moving forward. See Argument II, below.

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her unpreserved claimed errors. *Pederson*, 331 Mich App at 463; *In re MJC*, ___ Mich App ___ (Docket No. 365616) (2023), slip op at 7-8.

At times, the panel acknowledges Ms. Espinoza's deficient argumentation and briefing, see, *e.g.*, *Barber/Espinoza*, ___ Mich App at ___ (slip op, p 8) ("Concerning prejudice, we acknowledge respondent merely contends that there was no factual basis for finding aggravated circumstances …"), but then it takes the lead in developing Ms. Espinoza's abandoned or waived arguments. *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 530 (2007) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, ... nor may he give issues cursory treatment with little or no citation of supporting authority.") Indeed, in many appeals, when a party "merely contends" or in passing expresses only her "belief" – rather than briefs, elaborates and adequately argues – an issue, this Court will routinely rule that the issue was waived or abandoned. See, e.g., *Wilson v Taylor*, 457 Mich 232, 243 (1998) (explaining that "a mere statement without authority is insufficient to bring an issue before this Court").

3. *The DHHS was required to file a Petition*.

On the facts of this case, the DHHS was unquestionably required to petition to protect the minor children from the "abuse" by their mother, and the Court of Appeals footnote implying otherwise is incorrect.[20] MCL 722.638(1).

In her brief, Ms. Espinoza argues that "factually" there were no aggravated circumstances, and that "legally" "sex trafficking" is not contained within MCL 722.638(1). Both her unsupported and cursory claims fail.

Ms. Espinoza's "factually"-based argument is nothing more than a challenge to the trial

[20] Slip op decision, p 8: "only when a petition is required…"

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court's credibility determinations following the combined adjudication trial/termination hearing. The Court of Appeals acknowledged that it must defer to the trial court's express findings that CB was credible. "Respondent essentially challenges the credibility of CB's allegations, but we defer to the trial court on this matter… ***the trial court explicitly found CB credible***…" *Barber/Espinoza*, ___ Mich App at ___ (slip op, p 8, n5) (emphases added).

One fallacy in Ms. Espinoza's cursory "legally" argument is that she too narrowly focused on the phrase "sex trafficking." The CPS in its February 2023 investigation, and the trial court in authorizing the petition, had characterized the abuse of CB by her mother in several ways, including as "sex trafficking," but also as "sexual abuse" and other abusive conduct.[21] Regardless of the label assigned to the acts of Ms. Espinoza when she offered her minor daughter for sex with adult males in exchange for drugs, those acts clearly constitute the "abuse" of a child. Further, those acts by Ms. Espinoza are clearly encompassed within the grounds of MCL 722.638, specifically "criminal sexual conduct," MCL 722.638(1)(a)(ii).

Thus, this Court should PEREMPTORILY REVERSE the Court of Appeals' September 19, 2024, decision, or GRANT LEAVE to the children's LGAL to ensure the important issues are addressed by this Court.

II. The trial court's decision terminating parental rights should be affirmed where the DHHS filed an Amended Petition per MCL 722.638(3), an alternative path by which the DHHS may seek termination at initial disposition without providing reasonable efforts and where Ms. Espinoza did not challenge this basis for termination on appeal.

The DHHS also complied with Michigan law when it filed an amended petition, requesting termination at initial disposition based on the DHHS exercising its discretion and after completing the required case conference with the children's LGAL. MCL 722.638(3).

[21] Trial court finding: "On February 2nd of 2023, the initial investigation regarded improper supervision, sexual abuse, sex trafficking and threatened harm." TR 12/28/2023, 104.

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The DHHS in its brief filed with the Court of Appeals made clear in its Amended Petition filed June 28, 2023, an alternative basis for seeking termination without having to provide reasonable efforts – MCL 722.638(3). Appendix C, Amended Petition, p 5 of 6, ¶¶12.b., c. The Court of Appeals' decision only glancingly refers to this additional or alternative statutory basis for termination presented by the DHHS, in a short footnote, and only to quickly reject the DHHS's theory. Court of Appeals decision, slip op p *7, n3.[22]

As noted above, Ms. Espinoza did not request a service plan in the trial court and she did not challenge the trial court's determinations that reasonable efforts were not necessary due to aggravated circumstances in the present case. She likewise did not challenge the DHHS filing its Amended Petition seeking termination on the alternative basis of MCL 722.638(3), and she made no argument in her brief on appeal concerning this subsection. Therefore, these matters were not preserved and are subject to the plain-error standard.

It seems the DHHS filed the Amended Petition on the mistaken belief that aggravated circumstances did not exist in this case. The LGAL disagrees with the DHHS's statement regarding "no aggravated circumstances," and this Court is not bound to accept such a concession by the DHHS. See, *People v Novak*, 489 Mich 941, 942; 798 NW2d 17 (2011) ("[T]his Court is, of course, not bound to accept such a concession." (quotation marks and citation omitted)).[23]

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[22] In just one of many instances of the panel's advocacy on behalf of Ms. Espinoza, the Court of Appeals here concludes – without any published authority on point and in contravention of the federal statutes cited above – that subsection (3) **requires a criminal conviction of a parent** before the DHHS can utilize the clear statutory authority contained in this subsection. This footnote by the panel is further notable in that it cites to subsections of the statute which do not exist, *e.g.*, "MCL 722.638(3)(i)" and "MCL 722.638(3)(iii)." Court of Appeals decision, slip op p *7, n3.

[23] See also, *People v Reed*, 449 Mich 375, 395 (1995) (Michigan Supreme Court not "bound to accept such a concession" where prosecution on appeal conceded that trial prosecutor "misstated the intent requirement of assault with intent to murder charge."); see also, *In re Devone, Minor*, unpublished COA 10/10/24, Dkt 370946 ("Respondent-father first argues that the referee failed to advise him of his appellate rights pursuant to MCR 3.965(B)(15) at the preliminary hearing, and

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Though the Court of Appeals decision rewrites it, the statutory scheme by which the Michigan Legislature provided for the DHHS to seek termination at the initial disposition via two separate paths was not challenged by Ms. Espinoza. The first path provided for by statute is via the judicial determination of "aggravated circumstances" per MCL 722.638(1) and (2). The second path is via subsection (3) of the statute, when the DHHS determines it will petition for termination at initial disposition and where a case conference with the children's lawyer is conducted. MCL 722.638(3). Notably, subsection (3) makes clear the DHHS's discretion to proceed down this path does not hinge upon any requirement for a petition to be filed: "…even though the facts of the child's case do not require departmental action under subsection (1), …" MCL 722.638(3).

As noted above, generally, reasonable efforts to reunify a family must be made in all cases absent aggravating circumstances. Reasonable efforts to reunify a family are also not required where the initial petition seeks termination of parental rights at initial disposition. This conclusion is supported by MCR 3.977(E). MCL 722.638(3) guides the DHHS when it exercises its discretion to file a petition for termination of parental rights at initial disposition. Thus, if the DHHS files a petition requesting termination of parental rights at initial disposition per MCL 722.638(3), the court may find that reasonable efforts to reunify the family are not required, which is what happened in this case.[24]

The Court of Appeals has now effectively ruled that the DHHS is stripped of the discretion inherent in MCL 722.638(3) to seek termination at the initial disposition after case conference with the children's LGAL. While it does appear that there are no prior published cases on this subsection

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petitioner [DHHS] concedes that the referee failed to comply with MCR 3.965(B)(15)." This Court confirmed it was not bound by the DHHS's concession on this point in *Devone*.)

[24] Again, the trial court originally ruled no reasonable efforts due to the presence of the aggravated circumstances, and then continued this ruling after the DHHS filed its Amended Petition under MCL 722.638(3).

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of the statute, as the LGAL argues above, the clear and unambiguous statutory language authorizes the DHHS to proceed via the two distinct paths to termination at initial disposition.

In its opinion, the Court of Appeals focused its analysis on MCL 722.638(1) and (2), and in a footnote, limited the application of MCL 722.638(3). It held:

> We acknowledge that MCL 722.638(3) alludes to other circumstances where a petitioner may request termination at the initial disposition even if the facts do not support the existence of aggravated circumstances. See MCL 722.638(3) ("If the department is considering petitioning for termination of parental rights at the initial dispositional hearing as authorized under [MCL 712A.19b], even though the facts of the child's case do not require departmental action under subsection (1) . . . ."). Notably, in addition to when a trial court finds aggravated circumstances under MCL 722.638(1) and (2), reasonable efforts also need not be made when a parent has been convicted of various listed offenses. See MCL 712A.19a(2)(b). We conclude that MCL 722.638(3) relates to these other circumstances, none of which are at issue here.

As the Court of Appeals noted, under MCL 712A.19a(2),

> [r]easonable efforts to reunify the child and family must be made in all cases except if any of the following apply:
> (a) There is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in [MCL 722.638(1) and (2)].
> And it also includes subparagraph (b), which includes:
> (b) The parent has been convicted of 1 or more of the following:
> (i) Murder of another child of the parent.
> (ii) Voluntary manslaughter of another child of the parent.
> (iii) Aiding or abetting in the murder of another child of the parent or voluntary manslaughter of another child of the parent, the attempted murder of the child or another child of the parent, or the conspiracy or solicitation to commit the murder of the child or another child of the parent.
> (iv) A felony assault that results in serious bodily injury to the child or another child of the parent.

In its footnote, it also states:

> Further, MCL 722.638(3) shows that the Legislature can and has specifically distinguished when a parent should be held responsible for allowing or facilitating another's conduct. Compare MCL 722.638(3)(i) (parent convicted of murder of another child) with MCL 722.638(3)(iii) (parent convicted of aiding or abetting in the murder of another child).

As a preliminary matter, the citation to MCL 722.638(3)(i) and (iii) is inaccurate; there are

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no subparagraphs to MCL 722.638(3). Assuming this is a clerical error, and the proper cite is MCL 712A.19a(2)(b)(i) and (iii), the panel's footnoted dicta that those statutes "show[] that the Legislature can and has specifically distinguished when a parent should be held responsible for allowing or facilitating another's conduct[,]" is improperly narrow and contrary to the spirit of the Juvenile Code. The (inaccurately) cited statutes specify convictions that the Legislature determined were so egregious that reasonable efforts were not required.

As this Court well knows, the Juvenile Code must be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interest of the state. Preamble, Child Protection Law, Act 238 of 1975. The primary statute at the center of this matter, MCL 722.638, is an excerpt from Michigan's Child Protection law, the overarching purpose of which is to keep children safe. See, e.g., *In re Macomber*, 436 Mich 386 (1990) (Michigan Supreme Court noted the Legislature has given a "broad grant of authority" and great flexibility to probate courts to enter orders for the well-being of a child, *Id*., at 389, and confirming "the paramount purpose of the juvenile code being to provide for the well-being of children.")[25]

The Legislature was clear that the application of the black letter law enacted to balance the rights of parents, children, and the state, must be liberally construed to effectuate the spirit of the Juvenile Code. There are several statutes and court rules, when read together, clearly show that the Legislature intended the Department and trial courts have the authority, autonomy, and discretion to navigate situations such as the case at bar. Relevant to this argument is MCL 722.638(3), part

[25] See also, 42 U.S.C. 678, which provides: "Nothing in this part shall be construed as precluding State courts from exercising their discretion to protect the health and safety of children in individual cases, including cases other than those described in section 471(a)(15)(D) [aggravated circumstances cases]."

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of the Child Protection Act, which specifically grants the DHHS (i.e., petitioner) the discretion to request termination and initial disposition. This is contrary to Court of Appeals dicta that MCL 722.638(3) "alludes to other circumstances where a petitioner may request termination at initial disposition…" MCL 722.638(3) specifically cites to MCL 712A.19b, not MCL 712A.19a.

MCL 712A.19b(1) is subject to MCL 712A.19b(4). MCL 712A.19b(4) states:

> If a petition to terminate the parental rights to a child is filed, the court may enter an order terminating parental rights under subsection (3) at the initial dispositional hearing. If a petition to terminate parental rights to a child is filed, the court may suspend parenting time for a parent who is a subject of the petition.

Thereby, MCL 722.638(3) grants the Department, as permitted by MCL 712A.19b, the discretion to file a petition to terminate parental rights at the initial dispositional hearing. Additionally, MCR 3.977(E) states:

> Termination of Parental Rights at the Initial Disposition. The court shall order termination of the parental rights of a respondent at the initial dispositional hearing held pursuant to MCR 3.973, and shall order that additional efforts for reunification of the child with the respondent shall not be made, if
>
> (1) the original, or amended, petition contains a request for termination;
>
> (2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;
>
> (3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:
>
> (a) are true, and
>
> (b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), or (m);
>
> (4) termination of parental rights is in the child's best interests.

Additionally, it is worth noting that SCAO form JC 11a, Order After Preliminary Hearing (Child Protective Proceedings) includes MCL 722.638 as a relevant statute for the form. It does not specify a specific subsection of the statute as it does for other statutes (for instance, MCL 712.19a(2)) and it includes two separate paragraphs for reasonable efforts. Paragraph 16 is specific

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to aggravating circumstances of MCL 722.638(1) and (2) and MCL 712A.19a(2)(b). Paragraph 17(b) does not cite specific aggravating circumstances and permits the court to make a determination that "Reasonable efforts shall not be made to preserve and reunify the family because it would be detrimental to the child(ren)'s health and safety." This language continues in additional SCAO forms, such as JC 49 (Order of Adjudication) and JC 17 (Order of Disposition).

Ms. Espinoza did not demonstrate plain error affecting her substantial rights arising from the DHHS's decision to seek termination of her parental rights at initial disposition, which led the court to determine reasonable efforts were not required. The Court of Appeals opinion focused mainly on the application of MCL 722.638(1) and (2). In the DHHS's brief below, the agency noted that even if the trial court's analysis was wrong (which the LGAL does not believe), the outcome of this case was correct. This argument of the DHHS would still apply to the extent that the Court of Appeals limited its review to the original petition only (failing to meaningfully address the DHHS's Amended Petition and grounds therefore), and the trial court's subsequent decision on that. De novo review, with proper statutory analysis and application would lead to the conclusion that termination of parental rights was appropriate in this case, whether MCL 722.638(1) and (2), or (3) were used.

Although the Court of Appeals recognized that it must examine "the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme[,]" it clearly failed to do so in its interpretation of and application of MCL 722.638(3). Not only did it fail to respect the statute's plain language, it added language that does not exist, and did not consider its application in context of the entire legislative scheme of the Juvenile Code and Child Protection Law.

"Reasonable efforts must be made in all cases, except those including aggravating

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circumstances." This language is codified in MCL 712A.19a(2)(a) and reiterated in case law. However, whether reasonable efforts must be provided if MCL 722.638(3) is utilized is an issue of first impression. To be clear, the argument is not simply reasonable efforts are not required just because the DHHS is seeking termination, but that when the DHHS believes the facts of the case are so egregious, yet not enumerated in MCL 722.638(1), that it utilizes its discretion to request termination at initial disposition, reasonable efforts are not required.

The exception for aggravating circumstances recognizes that there are situations when the parent's conduct is so egregious, and the harm to the child(ren) is so severe, the only way to safeguard the child is to terminate the parent's parental rights. There are the specifically enumerated aggravating circumstances, and in the same statute, the discretion with the DHHS to file for termination at initial disposition. The language of MCL 722.638(3) outlines a process that would effectively protect funding for purposes of foster care in situations that are beyond those listed in MCL 712A.19a(2), which is delineated in MCL 722.638(1) and the specific convictions of MCL 712A.19a(2)(b). The intent is clear from its language, the court rules, and SCAO court forms discussed above. Simply put: MCL 722.638(3) is a safeguard of sorts, providing the DHHS the discretion to terminate without providing reasonable efforts, a decision with which the LGAL agrees.

Thus, this Court should PEREMPTORILY REVERSE the Court of Appeals' September 19, 2024, decision, or GRANT LEAVE to the children's LGAL to ensure the important issues are addressed by this Court.

III. The trial court's decision terminating parental rights should be affirmed where the alleged error regarding advice of rights was not outcome determinative and where Ms. Espinoza not only failed to show plain error, but cited an inapplicable court rule as the only "authority" in support.

Ms. Espinoza's Argument One – just one single page in length – claimed "the Trial Court's

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failure to advise the Appellant Mother of her appellate rights, pursuant to MCR 3.971(B)(6)-(8), at the Emergency Removal Hearing held on February 17, 2023, violated her fundamental due process rights." **Appendix G**, Ms. Espinoza's Court of Appeals Brief, p 8.

Ms. Espinoza's "argument" relating to the inapplicable court rule is only that she had her "belief" "reinforc[ed]" that the trial court "was not interested in being fair of objective as to her legal position,…" Appellant Mother's brief, p 8. She states in passing that the aggravated circumstances alleged "had no factual basis…" *Id*., 8-9, referencing her Argument Three. But that argument (as detailed above), unsuccessfully sought to contest the trial court's credibility determination as to CB's compelling testimony, and too-narrowly focused on the phrase "sex trafficking" rather than on the clear statutory language of MCL 722.639(1)(a)(iii) (i.e., when a parent "has abused" the child, and the abuse "included" … criminal sexual conduct).

The Court of Appeals handily disposed of this claimed error by noting that the rule cited by Ms. Espinoza does not apply since it applies to cases in which a parent enters a plea, something Ms. Espinoza did not do. COA decision, p *11 ("Because respondent did not offer a plea, MCR 3.971(B) is not applicable. Accordingly, the trial court did not violate MCR 3.971(B)(6)-(8) by failing to advise respondent of her appellate rights at the preliminary hearing.")

In most cases, where an appellant cites an inapplicable rule as a sole basis for relief on an unpreserved issue, the Court of Appeals would generally note the inapplicable rule and leave it at that. Here, the panel raises a separate court rule – one never mentioned, raised or argued by the mother – and concludes that in fact, Ms. Espinoza's rights were violated. *Id*. Beyond *sua sponte* raising this unargued court rule to accord relief to Ms. Espinoza, the panel goes on to further find that her unpreserved (unargued) error also constitutes plain error. In making the plain error analysis, the panel writes: "… had she known she could have appealed the trial court's finding

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regarding the presence of aggravated circumstances, she would have done so and demonstrated that there were no aggravated circumstances." *Id*., p *12.

The conclusion reached by the Court of Appeals here is mere conjecture. As the DHHS argued below, there is no record evidence nor even a suggestion about whether Ms. Espinoza "would have" appealed following the preliminary hearing, nor that she could in any way have "demonstrated that there were no aggravated circumstances." In fact, it would be **an impossibility** for Ms. Espinoza to "demonstrate" that there were no aggravated circumstances where the trial court found – and the Court of Appeals affirmed the findings – that this mother subjected her child to sexual abuse by adult males when the child was between the ages of 2-9, so that the mother could obtain drugs for herself. See, Statement of Facts above. As noted above, when a mother "has abused" her daughter and when the mother's abuse "included" criminal sexual conduct, the provisions of MCL 722.638(1) and (2) clearly apply to Ms. Espinoza, thus making it a legal impossibility for her to "demonstrate" that "there were no aggravated circumstances."

The issue is whether there is reasonable probability that the outcome of these proceedings would have been different if Ms. Espinoza would have received an advice of rights after the preliminary hearing when the original petition alleged aggravating circumstances and the children were released to their non-respondent father. For Ms. Espinoza to prevail on this issue, she must prove there is a reasonable probability there would have been a different outcome had she been provided an advice of rights after the children were removed from her care and custody. Simply asserting she would have appealed the removal is insufficient to demonstrate a reasonable probability the children would not have been removed from her care.

On appeal, Ms. Espinoza asserts she was prejudiced by the trial court because its failure to advise her of her appellate rights reinforced the fact the trial court judge was "not interested in

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being fair or objective as to her legal position[.]" Yet, when asked whether she wanted a jury trial or a bench trial, she specifically told the trial court that she preferred a bench trial because the judge was most familiar with the case. Thus, this argument is unsupported in the record.

In order for the court to remove children from the care and custody of a respondent parent, it must make contrary to welfare findings. During the Emergency Removal Hearing (i.e., Preliminary Hearing), the court found that there was probable cause to authorize the petition based on the case worker's testimony and the forensic interview. The trial court is given great deference as it relates to witness credibility. It determined that there was a substantial risk of harm to the children's wellbeing in the care of Ms. Espinoza, that reasonable efforts were not required as it would be detrimental to the children's wellbeing, and that releasing the children to their non-respondent father was adequate to safeguard the children. Ms. Espinoza fails to argue what facts existed to support a reasonable probability that if she appealed the removal, there would be a different outcome. On the contrary, the evidence at the preliminary hearing was sufficient to support the lower court's decision.

Thus, this Court should PEREMPTORILY REVERSE the Court of Appeals' September 19, 2024, decision, or GRANT LEAVE to the children's LGAL to ensure the important issues are addressed by this Court.

CONCLUSION

Respondent-Mother's brief on appeal to the Michigan Court of Appeals raised in cursory fashion three arguments that span just six pages total, with virtually no case law or other authority in support. Such abandoned or waived arguments are often designated such by the reviewing panels, and relief is not awarded. It is truly the exception to the general rule that the COA panel in this case went to such lengths to not only put flesh on the bones of Ms. Espinoza's unpreserved

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arguments, but to also sua sponte raise, brief and argue various points she never raised or mentioned. Given the many termination cases that issue from the Court of Appeals each week, some of which present facts that are far more compelling and worthy of compassion / sympathy, it is surprising to see the extensive efforts to which this panel went in order to try to preserve Ms. Espinoza's parental rights to two children she has not seen for years (by date of trial), and where the COA itself acknowledges the trial court's sound and evidence-based findings about CB's credibility as well as about the sexual abuse CB endured with her mother's acquiescence. The children's LGAL hopes this Court will peremptorily reverse the COA's decision, so that these traumatized children may begin to heal from the abuse, neglect and trauma inflicted upon them by their mother. As the LGAL stated in the trial court, the children deserve and need permanency which in this case, will come from knowing that they will be able to safely remain in their father's care, with the hopes of adoption by their stepmother to whom they are bonded.

RELIEF

The children's LGAL asks this Court to **peremptorily reverse** the Court of Appeals' September 19, 2024, decision, to ensure that the aggravated circumstances presented by a parent proffering her child for sex with adult males continue to fall within the statutory language, intent and meaning of MCL 722.638. Should this Court not peremptorily reverse, the LGAL requests this Court grant leave to appeal to correct the erroneous decision of the Court of Appeals.

Respectfully submitted,

/s/ Leigh Jameson-Heise

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