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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. 167745
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 REPLY BRIEF

THIS APPEAL INVOLVES THE CUSTODY OF MINOR CHILDREN

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Introduction (Summary Reply)

Appellee-Mother's (Ms. Espinoza's) Brief relies upon mischaracterizing governing law and the LGAL's arguments, engages in faulty "statutory construction," and fails largely to respond to, let alone refute, the arguments and grounds for relief in the LGAL's Application.

Ms. Espinoza's cursory Brief echoes the Court of Appeals' outlier decision which held, contrary to clear statutory language, that a "parent" must commit the sexual abuse against the child in order for the sex crimes to fall within "aggravated circumstances." MCL 722.638(1). Ms. Espinoza takes a "nothing to see here" approach with no hint in her Brief about the disturbing facts of this case involving aggravated circumstances against a child, going so far as to argue that her conduct constitutes not the egregious child abuse that it was, but mere "neglect." She omits mention of the Court of Appeals' findings, which confirm the findings made by the trial court:

> 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***. *Barber/Espinoza*, slip op, p 8, n5.

She ignores the Court of Appeals' detailed summary confirming the lengthy record about Ms. Espinoza's parental unfitness. *Barber/Espinoza*, slip op, p 10, n7. She fails to acknowledge that CB was found to be credible by the trial court. *Id*, p 8, n5.

In its erroneous decision, the Court of Appeals designated as a "key question" (which Ms. Espinoza had never asked): whether a parent must commit the aggravated circumstances abuse (*i.e.*, perpetrate the criminal sexual conduct herself)? As the LGAL Application makes clear, the statute does not so require. Rather, the LGAL suggests the more appropriate "key question" is: When a mother sells her child to drug dealers for sex so that the mother can obtain her "fix," has that mother "abused" the child? And, the related "key question" would be: when the child is sexually assaulted by the men who mother gave free rein to, does the mother's "abuse include[] 1

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of the following…criminal sexual conduct." MCL 722.638(1)(a)(ii). The answer to these more appropriate "key questions" is a resounding "Yes." Accordingly, the Court of Appeals' decision should be peremptorily reversed, or leave should be granted to the LGAL.

LGAL Reply to Mother's Arguments.

I. Ms. Espinoza bore the burden to show plain error and prejudice, but she failed to do so, and none of her unpreserved and cursory arguments merited the relief she requested.

Ms. Espinoza failed to preserve the issues raised in her perfunctory Brief filed in the Court of Appeals. Though she failed to carry her burden to establish outcome determinative error,[1] the Court of Appeals took up Ms. Espinoza's standard and briefed and argued her case for her. Thus, Ms. Espinoza cites the Court of Appeals' finding that the trial court committed plain error, "which impacted both the fairness and the outcome of the proceedings." Appellee Brief, p 6. She quotes the Court of Appeals' overly-generous decision which "established" the requisite showing of prejudice, *Barber/Espinoza*, slip op p 9, which Ms. Espinoza failed herself to show. *In re Pederson*, 331 Mich App 445, 463 (2020).

In concluding its speculation-laced analysis about plain error and unestablished prejudice, the Court of Appeals notes how: "… respondent was improperly denied any opportunity to rectify her situation and demonstrate a willingness and ability to parent notwithstanding her earlier concerning conduct." *Barber/Espinoza*, slip op at 10. But, Ms. Espinoza did not herself even attempt to "rectify her situation" nor even try to demonstrate a willingness/ability to parent. Thus, during the pendency of the case, she did not ever ask for reasonable efforts not contest the court's finding about aggravated circumstances being presented by the facts of this case. Nor did she ever: (a) stop using illegal drugs; (b) seek drug treatment; (c) submit clean drug screens; (d) stop

[1] Unpreserved claims are reviewed for plain error. *In re Ferranti*, 504 Mich 1, 29 (2019).

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committing crimes; (e) enroll in counseling to understand the trauma she had inflicted upon her children; (f) stop the frequent domestic violence in her home; (g) take responsibility for her actions, rather than repeatedly call her daughter "a liar," to cite but some examples.

Simply put: Ms. Espinoza did not establish plain error, she did not explain or brief how the outcome of this case would have been any different but for the claimed errors. The lenient but unsupported conjectures by the Court of Appeals with regard to plain error and prejudice are untenable and Ms. Espinoza's Brief does nothing to show them otherwise. Accordingly, the Court of Appeals' decision should be peremptorily reversed, or leave should be granted to the LGAL.

II. Ms. Espinoza's "statutory construction" argument, like the Court of Appeals' analysis, is faulty and yields an impermissible absurd result.

Ms. Espinoza baldly asserts that the Court of Appeals "properly applied the canons of statutory construction…" Appellee Brief, p 6. She posits that the Court of Appeals "relying on these principles, concluded that MCL 722.638 limits a trial court's discretion regarding when it can dispense with the requirement to make reasonable efforts to reunify based on a finding of 'aggravated circumstances.'" *Id*., p 7. But Ms. Espinoza improperly overlays the statutory language with a "requirement" which does not exist: that is, the "requirement" that the parent herself must have herself have sexually assaulted the child. This "requirement" was incorrectly created in the Court of Appeals' outlier decision,[2] when it raised a "key question" not asked by anyone: "…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

[2] "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.'" *Iliades v Dieffenbacher North America Inc*, 501 Mich 326, 342-343 (2018).

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aggravated circumstance warranting termination at the initial disposition." *Barber/Espinoza*, slip op p 5.

As noted in the LGAL's Application, the statute requires only that the parent **"has abused" the child** and that the "abuse include[s] 1 or more of the following: … (iii) criminal sexual conduct." MCL 722.638(1)(a)(ii). Here, the Department correctly determined that Ms. Espinoza "abused" the child and that the "abuse included" criminal sexual conduct, when Ms. Espinoza sold the child to adult men for sex. The trial court, in turn, correctly ruled that no reasonable efforts were required. See LGAL Application, Statement of Facts, 4-5, and Orders at Appendix B, D.

The Court of Appeals did not, as Ms. Espinoza contends, "avoid[] an overly expansive interpretation that would enlarge the statute's scope beyond what the Legislature intended, …" Appellee Brief, p 7. Instead, that Court overly **restricted** the scope of the statute – to carve an exception for parents who choose to proffer their children to others for sexual predation – a result so absurd it could not have been intended by the Legislature. See, *Rogers v Wcisel*, 312 Mich App 79, 87 (2015); *Kalin v Fleming*, 322 Mich App 97 (2017) (Statutory language should be construed reasonably, keeping in mind the purpose of the act, and to avoid absurd results). According to the Court of Appeals' and Appellee's tortured construction of the statute, where a mother pimps out her minor daughter for sex with adult men, that mother is entitled to reunification efforts, but a mother who "abandons" or physically abuses her child (under other sections of the statute), will not be so entitled.

The Court of Appeals seems to have arrived at this untenable conclusion by picking up Ms. Espinoza's bare contention that "sex trafficking" is not among the aggravated circumstances listed in the statute. *Barber/Espinoza*, slip op, p 8, n4. But, again, "criminal sexual conduct" **is** contained within the statute, and what is clearly prohibited by the Legislature is sexual predation on minor

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children – whatever the terminology employed. The LGAL's arguments concerning statutory construction are bolstered by governing federal law, LGAL Application, pp 21-22, as well as by the construction and reasoning from multiple panels of the Michigan Court of Appeals. See, *e.g.*, *In re Horton/Lee, Minors*, unpublished decision of the Court of Appeals, Dkt No 370031, issued November 20, 2024, p *4 ("Although respondent-mother did not commit sexual abuse against CCH, respondent-mother did subject CCH to abuse by continuing to allow Lee into her life, knowing that he sexually assaulted CCH on multiple occasions. Given this conduct by respondent-mother, it is reasonable to infer that she placed all of her children at an unreasonable risk of harm."); and see, *In re Boyce, Minors*, unpublished decision of the Court of Appeals, Dkt No 348992, issued January 23, 2020, p *4 ("On this record, the court could easily determine that BMB was the victim of "[c]riminal sexual conduct involving penetration" and that 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.") [3]

Ms. Espinoza selectively notes how the "reasonable efforts" requirements which arise under federal law are "…designed to protect parental rights…," Brief, p 7, but she tellingly omits any mention of the paramount concern for the safety and well-being of the child which is expressly contained in federal law. See, *e.g.*, 42 USC 671(a)(15).[4] Similarly, Ms. Espinoza asserts reasonable

[3] These unpublished decisions are cited as constituting recent examples of the Court of Appeals finding no reasonable efforts required when aggravated circumstances exist and where the mother herself did not commit the sexual predation on the minors. MCR 7.215(C).

[4] 42 USC 671**(a) Requisite features of State plan**. In order for a State to be eligible for [Title IV-E] payments under this part, it shall have a plan approved by the Secretary which — … **(15)** provides that — **(A)** in determining reasonable efforts to be made with respect to a child, … and in making such reasonable efforts, *the child's health and safety shall be the paramount concern*; **** **(D)** reasonable efforts of the type described in subparagraph (B) shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that —

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efforts are designed to avoid unnecessary removals of children from their homes, but fails to mention that the children were residing with their non-respondent father at the time the case against mother was initiated.[5] Thus, these two children were not "removed" from their mother's home.

Ms. Espinoza's Brief concedes "[a]ggravated circumstances include severe abuse, such as criminal sexual conduct," but then goes on to incorrectly claim that the parent herself must have committed the criminal sexual conduct. Appellee Brief, pp 7-8. Ms. Espinoza cites in passing *Simonetta*, 507 Mich 943 (2021) and *Simonetta*, 340 Mich App 700, 707 (2022), for the proposition that parents are to be "…given every opportunity to reunify unless clear statutory grounds for bypass [of reasonable efforts] are met." Brief, p 9. But, this broad proposition does nothing to justify the Court of Appeals' (and Ms. Espinoza's) strained "construction" of the statute. Indeed, as the Court of Appeals has previously instructed, aggravated circumstances are the sort of circumstances that "represent demonstrably violent or indisputably abusive conduct that causes long-lasting harm." *Simonetta*, 340 Mich App at 708. Ms. Espinoza's intentional proffering of her young daughter to adult male sexual predators would undoubtedly rank high on the list of "demonstrably violent or indisputably abusive conduct that causes long-lasting harm" to excuse the making of reasonable efforts.

As part of her misdirection, Ms. Espinoza misrepresents the LGAL's arguments: "The L-GAL contends that the trial court correctly found aggravated circumstances because Ms. Espinoza *failed to protect* CB from abuse by others." Appellee Brief, p 9, and 19-20. This is not accurate. The LGAL argued – and the facts and record established – that *Appellee Mother herself abused*

(i) 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(a)(15)(a), (d) (bold emphases, original; italics added).

[5] See, LGAL Application, Statement of Facts and Appendix C, addendum p 4.

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the child when she intentionally offered the innocent child's body to adult men for sex so that Appellee could get her next "fix." See LGAL Application, Argument I.

In adopting the Court of Appeals' incorrect construction, Ms. Espinoza reiterates: "The statutory language explicitly requires that the perpetrator of the sexual abuse must be either a 'parent, ...'" Appellee Brief, p 9. Where is the explicit language in the statute that states "a parent must commit the criminal sexual conduct" of a child? It is not there. As the LGAL noted in her Application, had the Legislature intended to require that **a parent herself** commit the proscribed egregious abuse, the statute would simply read: "A parent has committed 1 of the following…" See LGAL Application, pp 19-20.

Accordingly, the Court of Appeals' decision should be peremptorily reversed, or leave should be granted to the LGAL.

III. Ms. Espinoza's claim that she "merely neglected" the children, rather than abused them, is a bald misstatement of the law and contrary to the facts.

Ms. Espinoza urges this Court to view her acts as mere "neglect." Appellee Brief, 9-10. She relatedly claims the LGAL has presented a "broad definition of abuse…" and asserts: "Here, ***Ms. Espinoza did not directly harm her child***; her failure to intervene constitutes neglect,…" *Id*. These empty claims distort the facts and are a misstatement of the law, which defines abuse as "[h]arm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, …" MCL 722.622(g). Here, CB was not accidentally or negligently left alone with adult male drug dealers: **Ms. Espinoza placed this child directly into harm's way** as she awaited "payment" by drugs from the dealers. The facts of this case, which the Court of Appeals itself designated as "disturbing"

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and "concerning,"[6] make clear that the Barber/Espinoza children were not merely neglected, but they were abused by Ms. Espinoza, as that term is defined under Michigan law.

Accordingly, the Court of Appeals' decision should be peremptorily reversed, or leave should be granted to the LGAL.

IV. Ms. Espinoza's claim that the Court of Appeals correctly "decided" the alternative basis for affirmance per MCL 722.638(3), is not accurate; however this Court need not decide subsection (3) given the clear grounds for peremptory reversal based on the Court of Appeals' errors with regard to MCL 722.638(1) and (2).

Appellee Mother claims that the Court of Appeals "addressed" or "decided" the separate grounds for termination at initial disposition contained in MCL 722.638(3), but that is not accurate. Rather, the Court gave only a passing reference to the alternative basis for affirmance. See, slip op p 7, n3. Constraints on the length of this Reply preclude the LGAL from addressing remaining misleading and inaccurate arguments in Appellee's Brief. This Court need not get to any decision concerning subsection (3), however, given that subsections (1) and (2) could not be clearer: here, the DHHS was required to petition; the DHHS did so, and it stated specifically the aggravated circumstances present in this case. The aggravated circumstances meant that the DHHS was excused from making any reasonable efforts to reunify the children with their mother.

Accordingly, the Court of Appeals' decision should be peremptorily reversed, or leave should be granted to the LGAL.

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

[6] "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." *Barber/Espinoza,* slip op, p 8, n4.

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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, Dated: November 29, 2024

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CERTIFICATE OF LGAL's COMPLIANCE IN HER REPLY BRIEF

The undersigned certifies that, based upon the word count function of the word-processing system used to prepare the LGAL's Reply Brief, there are approximately 3,000 countable words contained within those portions of the Reply subject to the type-volume limitation set forth in MCR 7.212(B) and MCR 7.305(A)(1), including footnotes and text contained within embedded graphics.

Respectfully submitted, Dated: November 29, 2024

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