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STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
(GADOLA, C.J., AND PATEL AND YOUNG, JJ.)

IN RE BARBER/ESPINOZA, MINORS,

Supreme Court Case No. 167745
Court of Appeals Case No. 369359

39th Circuit Court – Lenawee County
Case No. 23-000033-NA

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LGAL-APPELLANT AND PETITIONER-APPELLEE'S JOINT SUPPLEMENTAL BRIEF IN SUPPORT OF THE LGAL'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT AS TO JURISDICTION

The Michigan Court of Appeals issued its published decision on September 19, 2024. The LGAL's application for leave to appeal was timely filed within 42 days of the Court of Appeals' decision.[1] This Court ordered the LGAL to file this Supplemental Brief by March 7, 2025, answering five specific questions set forth in this Court's Order dated January 24, 2025. This Supplemental Joint Brief of the LGAL and the Department of Health and Services (Department) is submitted with a Motion to Extend the Time for Filing to March 10, 2025, and if granted, this Brief is timely filed. This Court has jurisdiction per MCR 7.303(B)(1).[2]

STATEMENT OF DECISION APPEALED AND RELIEF SOUGHT

The LGAL and the Department join in and restate the Statement of Decision Appealed and Relief Sought as provided in the LGAL's Application for Leave.

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

The LGAL and the Department join in and restate the Statement of Grounds for Appeal and Why This Court Should Grant Leave, as provided in the Appellee-LGAL's Application for Leave.

The LGAL and the Department further state that since the issuance of *In re Barber/Espinoza*,[3] the Court of Appeals has applied the holding of *Barber/Espinoza* in at least four cases, including one published case,[4] and one of which demonstrates the material injustice of leaving *Barber/Espinoza* undisturbed.[5] Additionally, since the filing of the LGAL's Application

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[1] MCR 7.305(C)(2)(a).

[2] MCR 7.303(B)(1), *see also* MCR 7.305(B)(3), (5)(a) and (b).

[3] Appx 001a-013a (**Appx 1** – *In re Barber/Espinoza*, _ Mich App _; _ NW2d _ (2024)).

[4] *In re Walters*, ___ Mich App ___, ___; ___ NW3d ___ (2025) (Docket No. 369318).

[5] MCR 7.305(B)(5)(a); *See* Appx 014a-020a (**Appx 2** – *In re D. A. Story, JR.*, unpublished per curiam opinion of the Court of Appeals, issued Feb. 26, 2025 (Docket No. 371170)) (The Court of Appeals exercised its discretion to review issues not raised by the parties on appeal, including whether reasonable efforts were provided when no aggravated circumstances existed. In *Story*, there were three children in the family home, in which the respondent resided as part of the family for seven years. The Department petitioned to terminate the respondent's parental rights based on sexual abuse, severe domestic violence, and physical abuse. The trial court released the child to his non-respondent mother, with whom he was

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for Leave to Appeal, the *Barber/Espinoza* published decision is in conflict with another decision of the Court of Appeals.[6]

living prior to and at the time the petition was filed. The respondent sexually abused and physically harmed one of the children who lived in the family home as one of the children, however because the child was a cousin of, not a sibling of, the respondent's child, the Court of Appeals determined that aggravated circumstances did not exist and remanded for reasonable efforts to be afforded to the respondent.).

[6] MCR 7.305(B)(5)(b); *See* Appx 021a-027a (**Appx 3** – *In re SJ*, unpublished per curiam opinion of the Court of Appeals, issued Feb. 11, 2025 (Docket No. 369626)) (The Department moved to terminate a respondent mother's parental rights at initial disposition pursuant to MCL 712A.19b(3)(b)(ii) and (j), on the basis that the respondent knew the child was being sexually abused and did not comply with safety plans to ensure her child's safety. At the time of the petition, the child's "father had sole physical custody but shared legal custody with the respondent." The respondent in that case argued that the lower court erred by failing to consider a guardianship in lieu of terminating her parental rights. In its analysis, the Court of Appeals considered when the permanency goal of guardianship is appropriate pursuant to MCL 712A.19a(8). But the panel declined to apply the permanency planning statute, specifically noting, "**It is undisputed that termination was sought with the initial petition; thus, MCL 712A.19a is inapplicable here.**") (emphasis added).

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STATEMENT OF QUESTIONS PRESENTED
(PER ORDER OF THE MICHIGAN SUPREME COURT, JANUARY 24, 2025)

I. Whether reasonable efforts to reunify the child and the respondent must be made where the respondent was not the perpetrator of criminal sexual conduct involving penetration, but instead facilitated, encouraged, or allowed such conduct by a third party in exchange for some benefit to the respondent, see MCL 712A.19a(2)(a), MCL 722.638(1) and (2)?

Trial Court: No

Court of Appeals: Yes

Appellant-LGAL: No

Appellee-Petitioner DHHS: No

Appellee-Respondent Mother: Yes

II. If reasonable efforts must be made where the respondent was not the perpetrator of criminal sexual conduct involving penetration, but instead facilitated, encouraged, or allowed such conduct by a third party in exchange for some benefit to the respondent, whether the lack of reasonable reunification efforts in this case was plain error affecting the respondent's substantial rights, see generally *In re Ferranti*, 504 Mich 1, 29 (2019)?

Trial Court: No

Court of Appeals: Yes

Appellant-LGAL: No

Appellee-Petitioner DHHS: No

Appellee-Respondent Mother: Yes

III. Whether the Department of Health and Human Services satisfied the requirements of MCL 722.638(3) when it filed an amended petition seeking to terminate the respondent's parental rights at the initial disposition?

Trial Court: Presumably Yes

Court of Appeals: No

Appellant-LGAL: Yes

Appellee-Petitioner DHHS: Yes

Appellee-Respondent Mother: No

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IV. If the Department of Health and Human Services satisfied the requirements of MCL 722.638(3), whether the termination of the respondent's parental rights should be affirmed under that provision?

Trial Court: Presumably Yes

Court of Appeals: No

Appellant-LGAL: Yes

Appellee-Petitioner DHHS: Yes

Appellee-Respondent Mother: No

V. Whether the failure to advise the respondent of her right to appeal following the preliminary hearing was plain error affecting the respondent's substantial rights, see MCR 3.965(B)(15)?

Trial Court: No

Court of Appeals: Yes

Appellant-LGAL: No

Appellee-Petitioner DHHS: No

Appellee-Respondent Mother: Yes

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INTRODUCTION

Among examples of the extreme advocacy afforded to the respondent mother in this case by the Court of Appeals, the Court of Appeals improperly read and interpreted the plain language of statutes, it failed to consider the specific facts of this case, which were not contested on appeal by the mother – to the exclusion of the children, and most reprehensibly, it announced that in the state of Michigan, parents can sell their children for drugs and they will be entitled to government funded reasonable efforts so their children can be returned to their care.

Left undisturbed, *Barber/Espinoza* proclaims that parents who prostitute their children for drugs are not in the same category as parents who abandon their children, or who batter their children, or who have been convicted of felonious assault resulting in serious bodily injury to one of their children, who are exempt from receiving reasonable reunification efforts. Instead, parents who prostitute their children for drugs are – in the view of activist Michigan Court of Appeals in *Barber/Espinoza* – in the same category as parents who struggle with unstable housing, mental illness, or cognitive impairments, thus entitled to "reasonable" reunification efforts for their children to be returned to their care and custody. The practical impact of the Court of Appeals opinion should sound the alarm for child advocates everywhere – the laws put in place ***to protect children*** surely are not intended to cause them more harm.

An additional concern is the fact that not only did the Court of Appeals bend over backwards to give the respondent more than she is entitled to, but the Court of Appeals did so based on factual inaccuracies:

1) **Fallacy:** Aggravated circumstances did not exist because the sexual abuse alleged was not perpetrated by the respondent.[7]

   Fact: Aggravated circumstances existed pursuant to the plain language of MCL 722.638(1) and (2). The respondent was the perpetrator. She abused the child, or the sibling of the child, and the abuse included criminal sexual conduct involving penetration.

2) **Fallacy:** The children were "removed" from the respondent's care and custody and "placed" with their nonrespondent father.[8]

[7] *In re Barber/Espinoza*, _ Mich App at _; slip op at 4-5.

[8] *Id*. at _; slip op at 2.

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Fact: The children were in the primary physical custody of their nonrespondent father for the two years preceding the petition.[9] Accordingly, the trial court ordered them to remain in the care and custody of their nonrespondent father after the preliminary hearing.[10]

3) **Fallacy:** The petition submitted at the trial court was a "permanent custody petition".[11]

   Fact: The petition requested the trial court take jurisdiction over the children and respondent mother and terminate her parental rights at initial disposition.[12] A permanent custody petition would require a request to terminate both legal parents' parental rights for the children to be adopted.[13]

4) **Fallacy:** Failure to provide the respondent with reasonable efforts towards reunification dispensed with a critical aspect of child proceedings, which prejudiced the respondent by impairing her fundamental right to direct the care, custody, and control over her children.[14]

   Fact: The Department and the trial court complied with applicable court rules and statutes to ensure respondent's fundamental right to direct the care, custody, and control over her children was not impaired without adequate due process.[15] The respondent

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[9] *See* Appx 028a-029a and 138a (**Appx 4** – Trial Ct. Espinoza v Barber, Operative Custody Order, March 10, 2022 and **Appx 5** – Non Jury Trial Tr. vol. 2, Dec. 28, 2023).

[10] *See* Appx 147a-151a (Appx 6 – Trial Ct. Order after Prelim., Feb. 17, 2023).

[11] *Barber/Espinoza*, _Mich App at _; slip op at 1.

[12] *See* Appx 152a-164a and 165a-174a (**Appx 7** – Pet'r's Initial Pet., Feb. 16, 2023 and **Appx 8** – Pet'r's Am. Pet., June 28, 2023).

[13] *See* MCL 712A.19b(1).

[14] *Barber/Espinoza*, _Mich App at _; slip op at 9.

[15] *See In re Sanders*, 495 Mich 394, 422; 852 NW2d 524 (2014) ("Adjudication protects the parents' fundamental right to direct the care, custody, and control of their children, while also ensuring that the state can protect the health and safety of the children."); *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993) ("The procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of this interest."); and *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000) ("As we have stated, MCL 712A.19b(3) […] requires that the petitioner prove by clear and convincing evidence at least one ground for termination. A respondent is afforded the opportunity to present evidence and witnesses at a hearing on the termination of parental rights and to confront and cross- examine evidence and witnesses used against the respondent. The court must state its findings and conclusions on the record or in writing. Once the petitioner has presented clear and convincing evidence that persuades the court that at least one ground for termination is established under subsection 19b(3), the liberty interest of the parent no longer includes the right to custody and control of the children.") (citations omitted).

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was afforded an attorney at each stage of the proceeding, she was afforded a sound adjudication trial, and she was afforded the heightened burden of proof at the initial disposition phase.[16]

Following *Barber/Espinoza*, the Court of Appeals has now declared in another published opinion that MCL 712A.19a(2) contains an exclusive list of the exceptions to the Department's duty to make reasonable efforts toward reunification. The *Walters* Court stated: *"Under no circumstances may a trial court terminate a parent's rights without first finding that one of these exceptions [listed in MCL 712A.19a(2)] applies*."[17]

The blanket language in *Walters* not only alleviates the Court of Appeals from considering whether due process has been afforded in child protective proceeding cases on a case-by-case basis[18] – as is required to ensure the courts are assessing the particular interests and safety of the actual individual before them – it also demands that the Department and trial courts ignore the unique facts of each case and the relevant court rules and statutes that govern those facts – apparently, even to the exclusion of the children's welfare.

In this supplemental brief, the LGAL and the Department focus on the court rules and statutes applicable to this case based on the accurate facts outlined above, and as the LGAL summarized in the Statement of Facts section of the LGAL's Application.

For the sake of brevity and compliance with the governing court rules, this supplemental brief is presented as an addendum to the LGAL's Application for Leave to Appeal and the LGAL's Reply Brief, both of which are incorporated herein by reference.

STATEMENT OF FACTS

In proceedings below, the Department mistakenly adopted a narrow interpretation of MCL 722.638(1).[19] Upon review of the LGAL's application for leave filed in this Court, the Department

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[16] *Id*.

[17] *In re Walters*, ___ Mich App at ___; slip op at 1 (emphasis added).

[18] *See In re Rood*, 438 Mich 73,77; 763 NW2d 587 (2009) (holding, "We evaluate whether a particular parent was afforded minimal due process on a case-by-case basis.").

[19] At the trial court level, the Department amended its Petition citing to MCL 722.638(3) as the statutory grounds for Termination of Initial Disposition (*see* Appx 165a-174a (**Appx 8** – Am. Pet.)) and "conceded" that "sex trafficking" is not an enumerated aggravating circumstance. (Appx 175a-194a

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acknowledges its misapplication of the law in this regard. Now, the Department joins the LGAL in its application for leave and its reply brief, incorporating the LGAL's statement of facts from same with the addition of facts stated in the arguments of this Brief. Notably, the salient facts of this case are undisputed.

The Court of Appeals itself found that Respondent Mother subjected the children to a long history of abuse and neglect.[20] The Court of Appeals acknowledged the "extremely serious facts of this case …"[21] and it referred to the actions the respondent subjected the child to as "sexual abuse" in its published decision.[22] On the record before the Court of Appeals – and before this Court now – ***there is no question that CB was sexually abused, and that CB's mother, Ms. Espinoza, facilitated, encouraged, or allowed the abuse.*** These facts were uncontested by Ms. Espinoza in her answer to the LGAL's application for leave.[23] The same facts were relied on by the trial court when it found grounds for termination existed, by clear and convincing evidence, under MCL 712A.19b(3)(b)(ii) and (j), and a preponderance of the evidence supported it was in the children's best interests to terminate Ms. Espinoza's parental rights.[24] Notably, Ms. Espinoza has not challenged the trial court's legal conclusions as to termination and best interests. Thus,

(**Appx 9** – Pet'r's Br. on Appeal, May 25, 2024)). As the LGAL correctly noted in the Application, this Court is not bound by the Department's previous (and erroneous) concession. *See* Appx 230a (**Appx 10** – Appellant-LGAL Appl. for Leave to Appeal) (citing *People v Novak*, 489 Mich 941, 942; 798 NW2d 17 (2011)).

[20] *Barber/Espinoza*, _ Mich App at _; slip op at n 5 and n 7.

[21] *Id*. at _; slip op n 4 (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.").

[22] *Id*. at _; slip op n 5 (The Court of Appeals wrote: "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***." And "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***…") (emphases added).

[23] *See* Appx 241a-252a (**Appx 11** – AE-Resp't's Answer to Appl. for Leave to Appeal, Nov. 8, 2024).

[24] Appx 127a-141a (**Appx 5** – Non Jury Trial Tr. vol. 2, Dec. 28, 2023).

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because those findings were and remain uncontested, this Court can confidently conclude that the trial court did not clearly err in making those findings.[25]

STANDARDS OF REVIEW

The LGAL and the Department join in and restate the Standards of Review, as provided in the LGAL's Application for Leave.

ARGUMENT

I. Aggravated circumstances existed and reasonable efforts were not required because by facilitating, encouraging, or allowing a third party to sexually abuse her child, the respondent abused the child and the abuse included criminal sexual conduct involving penetration.

Introduction

The Court has directed the parties to brief "[w]hether reasonable efforts to reunify the child and the respondent must be made where the respondent was not the perpetrator of criminal sexual conduct involving penetration, but instead facilitated, encouraged, or allowed such conduct by a third party in exchange for some benefit to the respondent, see MCL 712A.19a(2)(a), MCL 722.638(1) and (2)."[26] The LGAL and the Department answer that the respondent abused the child, and the abuse included criminal sexual conduct, and thus, and reasonable efforts are **not** required to reunify respondent with her children pursuant to MCL 722.638(1) and (2).

Discussion

A. *The respondent mother abused her child, and the abuse included criminal sexual conduct per MCL 722.638(1).*

The Court of Appeals opinion finds that the "plain language" of MCL 722.638(1) requires the respondent parent be the perpetrator of the offense listed in MCL 722.638(1)(a).[27]

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[25] *See In re JS & SM*, 231 Mich App 92, 98-99; 585 NW2d 326 (1999), overruled in part on other grounds by *In re Trejo*, 462 Mich 341, 353; 612 NW2d (2000).

[26] *In re Barber/Espinoza*, _Mich _; _ NW2d _ (2025).

[27] *Barber/Espinoza*, _ Mich App at _; slip op at 7-8 (In a passing footnote, the Court of Appeals justified its ruling that the respondent must be the perpetrator of the enumerate acts of abuse by incorrectly citing to "MCL 722.638(3)[,] [which] 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

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Respondent's conduct was at times referred to by the Department, the lower court, and the Court of Appeals as "sex trafficking", a legal term, it seems that the issue of whether respondent abused the child was at points confused with whether "sex trafficking" one's child is in fact "abuse" as defined by the Child Protection Law. Regardless of the terminology used, respondent's conduct constitutes abuse. In addition to the LGAL's argument in its application for leave on this issue, which articulated how the facts of this case constitute aggravated circumstances,[28] it is important to note that leaving the Court of Appeals opinion undisturbed would wholly ignore the definition of "child abuse" in the Child Protection Law.

As respondent herself noted in her response to the LGAL's application, "Under Michigan law, 'child abuse' is defined as 'harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment."[29] Contrary to respondent's claim that her conduct simply amounted to "neglect" of her child, her conduct was blatant abuse.[30]

(1) *The respondent abused her child by harming her child's health or welfare through nonaccidental physical or mental injury by permitting her child to be sexually abused by respondent's drug dealer.*

The respondent abused CB by nonaccidental physical or mental injury – respondent's actions when she orchestrated, arranged, scheduled or otherwise allowed the access to her minor daughter by adult male drug dealers for sex in exchange for drugs to respondent were intentional.[31] The Court of Appeals referred to Ms. Espinoza's abuse of her daughter in this way as "sexual abuse."[32] Although MCL 722.638(1) does not require a criminal conviction of child abuse for it to

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722.638(3)(i) [sic] (parent convicted of murder of another child) with MCL 722.638(3)(iii) [sic] (parent convicted of aiding or abetting in the murder of another child).").

[28] Appx 269a-274a (**Appx 10** – AT-LGAL Appl. for Leave to Appeal, Oct. 31, 2024).

[29] Appx 249a-250a (**Appx 11** – AE-Resp't's Answer to Appl. for Leave to Appeal, Nov. 8, 2024) (citing to MCL 722.622(g)).

[30] *Id*.

[31] *See* MCL 722.622(ee), citing to MCL 750.136b ("Physical harm" means any injury to a child's physical condition. MCL 750.136b(1)(e) and "Serious mental harm" means an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. MCL 750.136b(1)(g)).

[32] *Barber/Espinoza*, _ Mich App at _; slip op at n 5.

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be properly applied, the requirements of child abuse in the first degree are instructive as to what is "abuse".

To find someone guilty of child abuse in the first degree, there must be a finding that the [parent] must have intended to cause such harm or knew that their actions would likely result in such harm.[33] It is undisputed that the respondent facilitated, encouraged the sexual abuse of CB and/or permitted it to occur without intervening, which constitutes nonaccidental physical and mental injury. The nonaccidental physical and mental injury is further exacerbated by the actual injury to CB's body – she was sodomized, left with a bleeding "butt" as the child herself testified, and when she turned to the respondent for comfort and aid, she was dismissed while being tossed a handful of toilet paper and being told she would be "fine."[34] Beyond her physical injury and the assault on her body, CB suffered mental injury, and continues to suffer emotionally and psychologically, evidenced by her ongoing mental health needs, repeated suicide attempts, and inability to control her mood and behaviors.[35] Courts have recognized that "[e]ven when there is no palpable physical injury or overtly coercive act, sexual abuse of children causes substantial long-term psychological effects, with implications of far-reaching social consequences."[36] CB is

[33] MCL 750.136b(2) A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical harm or serious mental harm to a child.

[34] Appx 271a (**Appx 12** – Non Jury Trial Tr. vol. 1, Dec. 8, 2023).

[35] Appx 139a-140a (**Appx 5** – Trial Tr. vol. 2).

[36] *See* Appx 331a (**Appx 13** – *In re Boyce*, unpublished per curiam opinion of the Court of Appeals, issued Jan. 23, 2020 (Docket No. 348992)), (citing to *People v Benton*, 294 Mich App 191, 206; 817 NW2d 599 (2011)). This is akin to the facts in *Boyce*, which the Court of Appeals determined was decided wrongly in *Barber/Espinoza*. The victim child in *Boyce* had extreme mental and behavioral health issues and also needed substance abuse treatment "due to respondent's parenting choices." *Boyce*, unpub op at 6. As argued in the LGAL's Application for Leave, *Boyce* is more analogous to *Barber/Espinoza* and should have controlled its outcome. Appx 221a-223a (**Appx 10** – LGAL's Appl. for Leave).

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no exception.[37] Respondent knew, or should have known, that permitting adult males to sexually abuse her young child, would result in mental injury to the child.[38]

(2) *The respondent abused her child through sexual exploitation by allowing, permitting, or encouraging sexual intercourse of her child and her adult drug dealer.*

The respondent abused CB by way of sexual exploitation. Sexual exploitation is defined as "allowing, permitting, or encouraging a child to engage in prostitution, or allowing, permitting, encouraging, or engaging in the photographing, filming, or depicting of a child engaged in a listed sexual act as that term is defined in MCL 750.145c."[39] Respondent allowed, permitted, or encouraged her drug dealer to engage in sexual intercourse with her child.[40]

In *Adkins*, the Court of Appeals found MCL 750.145c(2) unambiguously indicates that persons who arrange for or attempt or prepare to arrange for child sexually abusive activity face criminal liability.[41] MCL 750.145c(2) does not require that the parent, or facilitator, actually commit the act of child sexual abuse to be liable for such offense, arranging for child sexually abusive activity is sufficient. The respondent in this case arranged for, by facilitating, encouraging and/or allowing, and failing to intervene, a child sexually abusive activity when the respondent left

[37] After the trial court's order terminating the respondent's parental rights, CPS received an additional complaint alleging additional instances of sexual abuse at the hands of the respondent's former romantic partner. The complaint was assigned, and the child was referred to another forensic interview. More recently, CPS received another complaint alleging that CB was engaging in sexual intercourse with two adult males. The complaint was screened out. *See* Appx 378a-383a (**Appx 19** – Child Protective Services Complaints, Feb. 8, 2024 and March 4, 2025).

[38] Even applying the lesser standard for Child Abuse – Third Degree pursuant to MCL 750.136b(5):

A person is guilty of child abuse in the third degree if any of the following apply:

(a) The person knowingly or intentionally causes physical harm to the child.

(b) The person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, and the act results in physical harm to a child.

[39] MCL 722.622(r).

[40] "Listed sexual act" means sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity. MCL 750.145c(1)(i).

[41] *People v Adkins*, 272 Mich App 37, 40-41; 724 NW2d 710 (2006).

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her drug dealer, an adult male, in a room alone with her young daughter, and the man put his penis in the child's anus, causing it to bleed, and then put his penis in the child's mouth.[42]

(3) *The respondent is as culpable as the principal who sexually abused her child as an aider and abettor when the respondent's actions assisted the principal to commit an act of criminal sexual conduct involving penetration on her daughter.*

In addition to the above, the respondent also abused CB under the aider and abettor theory,[43] and she is as culpable as the principal who ripped off CB's clothes, opened her legs, flipped her on her stomach, stuck his penis in her "butt," grabbed her side, sexually abused her, and then put his penis in her mouth.[44]

> The purpose of the aiding and abetting statute is to abolish the common law distinction between accessories before the fact and principals so that one who counsels, aids or abets in the commission of an offense may be tried and convicted as if he had directly committed the offense. The phrase "aids or abets" is used to describe any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime.[45]

Three elements must exist for one to be as culpable as a principal: "(1) the crime charged was committed by the defendant or some third person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement."[46]

Although not binding, an unpublished case, *People v McDaniel*, is relevant to the issue of whether the aider and abettor theory can be applied in a situation when a parent facilitates, encourages, or allows her child to be sexually abused as respondent did here.[47] In *McDaniel*, defendant-mother took her seven-year-old daughter to a room with an adult male and permitted

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[42] *See* Appx 271a and 292a-93a (**Appx 12** – Trial Tr. vol. 1).

[43] *See* MCL 767.39.

[44] Appx 291a-292a (**Appx 12** – Tr. vol. 1).

[45] *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004) (internal citations and quotation marks omitted).

[46] *Id*. at 67-68 (citing to *People v Carines*, 460 Mich 750, 768; 597 NW2d, 130 (1999)).

[47] Appx 334a-343a (**Appx 14** – *People v McDaniel*, unpublished opinion per curium of the Court of Appeals, issued June 20, 2024 (Docket No. 365866)).

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the adult male to sexually assault her daughter.[48] The mother was charged and convicted of CSC-I under an aider and abettor theory.[49] Though the mother in *McDaniel* did not herself sexually abuse her child, her conduct in facilitating the sexual abuse by her paramour meant that she was culpable as the principal.[50]

Similarly, in this case, it is undisputed that CB was subjected to criminal sexual conduct involving penetration.[51] It is undisputed that the respondent performed acts and/or gave encouragement to the principal that assisted in the commission of perpetrating criminal sexual conduct involving penetration against her daughter.[52] It is undisputed that the respondent had knowledge that the principal intended to engage in sexual activity with her child at the time that the respondent gave aid to the principal by taking drugs from the principal and leaving him alone with her daughter.[53] What CB testified to and spoke about during the CAC interview was a clear sale of this little girl by her mother so that her mother could obtain the drugs, which she then shot up in front of the child. Thus, the conduct alleged in this case – abuse of the child including criminal sexual conduct – as enumerated in MCL 722.638(1)(a)(ii), was in fact perpetrated by the respondent.

B. *Because aggravated circumstances existed, the Department was exempt from providing the respondent with reasonable efforts towards reunification.*

As articulated above, aggravated circumstances existed based on the plain language of MCL 722.638(1)(a)(ii).[54] The Department was required to file a petition requesting the court take jurisdiction of the children and the respondent under the mandate of MCL 722.638. The Department was also required to ask for termination of the respondent's parental rights at initial disposition under the mandate of MCL 722.638(2) because the respondent was the perpetrator of the abuse, and also placed the child at an unreasonable risk of harm by failing to take reasonable

[48] *Id*. unpub op at 1-2.

[49] *Id*. unpub op at 5.

[50] *Id*. unpub op at 1-2.

[51] *Barber/Espinoza*, _ Mich App at _; slip op at n 5.

[52] *Id*.

[53] *Id*.

[54] MCL 722.638(1)(a)(ii) (Ms. Espinoza "subjected the child to abuse" and "the abuse included 1 or more of the following: […] (ii) criminal sexual conduct involving penetration.").

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steps to intervene to eliminate the risk of abuse to the child.[55] Since both MCL 722.638(1) and (2) were satisfied, reasonable efforts to reunify the respondent and children were not required.[56]

II. Even if the facts of this case do not constitute aggravated circumstances, the lack of reasonable efforts did not amount to plain error affecting the respondent's substantial rights. The respondent was afforded adequate due process protections throughout the trial court proceedings.

Introduction

As its first question for supplemental briefing, this Court directed the parties to brief "[I]f [reasonable efforts must be made where the respondent was not the perpetrator of criminal sexual conduct involving penetration, but instead facilitated, encouraged, or allowed such conduct by a third party in exchange for some benefit to the respondent], whether the lack of reasonable reunification efforts in this case was plain error affecting the respondent's substantial rights, see generally *In re Ferranti*, 504 Mich 1, 29 (2019)[.]"[57] The LGAL and the Department have answered this Court's first question: "No, reasonable efforts are not required." However, if this Court determines that the facts of this case do not constitute aggravated circumstances, the lack of reasonable efforts in this case did not amount to plain error affecting the respondent's substantial rights.

Discussion

A. *The adjudicative phase of the proceeding was procedurally sound.*

As argued above, aggravated circumstances exist in this case and the Department was rightfully exempt from providing the respondent with reasonable reunification efforts and the respondent's substantial rights were not affected. But if this Court determines that the respondent was entitled to reasonable efforts, the lack of reasonable efforts did not amount to plain error

[55] MCL 722.638(2).

[56] The LGAL and Department acknowledge that this language derives from the Permanency Planning statute – MCL 712A.19a(2), however, as argued in this supplemental brief, MCL 712A.19a would not apply to this case.

[57] *Barber/Espinoza*, _ Mich _.

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affecting her substantial rights – the respondent was afforded the built-in protections of the applicable child protection proceedings procedures.[58]

In *Ferranti*, this Court opined on the failure to comply with the court rules in taking a plea deprived the parents of their fundamental right to direct the care, custody, and control of their child because it dispensed with the *adjudicative phase without the built-in due process protections*.[59] In applying the framework established by *In re Ferranti*, the Court of Appeals determined that, because aggravated circumstances did not exist, failing to offer the respondent reunification efforts "affected the very framework within which this case progress and undermined the foundation of the rest of the proceedings[,]"[60] which impaired the respondent's fundamental right to direct the care, custody, and control of her children.[61] But an error at the adjudicative phase is not the same as an error in determining whether reasonable efforts towards reunification at the dispositional phase.[62]

When there is a request for termination of parental rights at initial disposition, the trial court makes a determination as to whether reasonable efforts are required at two phases of the proceedings – the preliminary hearing (whether reasonable efforts were made to *prevent* removal) and the initial disposition hearing (whether reasonable efforts must be made to *reunify* the family).[63] In both instances, the requirements are directives of Federal laws pertaining to foster

[58] *See In re Sanders*, 495 Mich 394, 422; 852 NW2d 524 (2014).

[59] *See generally In re Ferranti*, 504 Mich 1; 934 NW2d 610 (2019) (emphasis added).

[60] *Barber/Espinoza*, _Mich App at _; slip op at 10.

[61] *Id*. slip op at 8-9 (the Court of Appeals held that the respondent was prejudiced because "(1) it is unclear how an aggrieved respondent could establish outcome-determinative error concerning the denial of reunification services altogether and (2) the error improperly dispensed with a critical aspect of a child protective proceeding—the requirement to offer reunification services before terminating parental rights—affected the very framework within which this case progressed, undermined the foundation of the rest of the proceedings, and impaired respondent's fundamental right to direct the care, custody, and control over her children.").

[62] In *Barber/Espinoza*, the Court of Appeals acknowledged that the "adjudication protects the parents' fundamental right to direct the care, custody, and control of their children …." *Barber/Espinoza*, _ Mich App at _; slip op at 10, quoting *In re Ferranti*, 504 Mich at 29. But then goes on to assert that the "error" took place before adjudication. *Barber/Espinoza*, _ Mich App at _; slip op at 10.

[63] See MCR 3.965, MCR 3.973(F)(3) and MCL 712A.18f (emphasis added) (Reasonable efforts findings must be made at each subsequent hearing.).

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care funding.[64] Relevant to this argument is the determination of whether reasonable efforts are required to reunify the family.[65]

The Court of Appeals' finding that the "error" (i.e., the trial court's determination that aggravated circumstances existed and the respondent was not entitled to reasonable efforts towards reunification) took place before the adjudication, which "impaired respondent's fundamental right to direct the care, custody, and control over her children in the first instance …." suggests a fundamental misunderstanding about the process of child protective proceedings and constitutes a misapplication of the law. When termination of parental rights is requested at initial disposition, the court must find grounds to take jurisdiction over the family at the adjudicative phase before moving to the dispositional phase. It is at the dispositional phase that the court employs the heightened standard of proof – clear and convincing evidence – and makes a determination as to whether grounds for termination exist and whether aggravated circumstances exist, exempting the Department from offering the respondent reunification efforts.[66] Therefore, the "error" could not have taken place before the adjudicative phase.

As this Court noted in *Ferranti*, and as acknowledged by the Court of Appeals in *Barber/Espinoza*, it is the adjudicative phase that protects the due process rights of respondent parents.[67] In this case, neither the Court of Appeals nor the respondent raised any issues with the adjudication procedure or the detailed findings at the trial court level.[68] This Court has previously acknowledged: "…when a parent has been found 'unfit,' the state may interfere with a parent's

[64] *See generally In re Rood*, 483 Mich 73 (2009).

[65] The procedures governing preliminary hearings are further explored in Section V of this brief.

[66] *See* MCR 3.973(1), MCL 712A.18f(4) and MCL 712A.19b(4); *see also In re Simonetta (II)*, 507 Mich 943; 959 NW2d 170 (2021); and MCL 712A.19b(3).

[67] *Barber/Espinoza*, _ Mich App at _; slip op at 10, citing to *In re Ferranti*, 504 Mich 1, 29 (2019).

[68] *Id*. at _; slip op at n 5 and n 7 ("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 trial court explicitly found CB credible at the termination hearing after respondent presented her side of the facts[…]" and "[…] [T]he 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 house, and respondent's lifestyle choices.").

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right to direct the care, custody, and control of a child."[69] This Court has also held that a parent's right to control the custody and care of children "is not absolute, as the state has a legitimate interest in protecting the moral, emotional, mental, and physical welfare of the minor...."[70] The procedural safeguards in place during the adjudicative phase "protect the parents from the risk of erroneous deprivation" of their rights.[71]

Therefore, the alleged "failure" to provide respondent with reasonable efforts towards reunification did not impair her fundamental right to direct the care, custody, and control over her children in the first instance. The trial court found that respondent was unfit, permitting the court to move forward with orders of disposition.[72]

B. *The trial court made an appropriate order of disposition when it terminated the respondent's parental rights at the initial disposition phase of the proceeding.*

> Dispositional hearings simply do not serve this same function [as adjudication trials]. At the dispositional phase, the court is concerned only with what services and requirements will be in the best interests of the children. There is no presumption of fitness in favor of the unadjudicated parent. *See MCL 712A.18f*. The procedures afforded parents during the dispositional phase are *not* related to the allegations of unfitness because the question a court is answering at a dispositional hearing assumes a previous finding of parental unfitness.[73]

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[69] *In re Deng*, 314 Mich App 615, 623; 887 NW2d 445 (2016) (citing to *In re Sanders,* 495 Mich at 418 (2014) and *In re AP,* 283 Mich App 574, 592–593; 770 NW2d 403 (2009)).

[70] *Sanders,* 495 Mich at 409–410 (citation and quotation marks omitted).

[71] *Id*. at 406, quoting *In re Brock,* 442 Mich 101, 111 (1993); *see also In re Deng*, 314 Mich App at 626 ("[T]hrough the course of child protective proceedings, particularly the adjudicative phase, the parent loses the presumption of fitness, at which time the state becomes empowered to interfere in the family for the welfare of the child and to infringe on the parent's ability to direct the care, custody, and control of the child. Parental rights have not been irrevocably lost at this stage, but a determination of "unfitness so breaks the mutual due process liberty interests as to justify interference with the parent-child relationship.") (quotation marks and citations omitted).

[72] At the time the petition was filed, the trial court already had jurisdiction over the children through a custody file and the trial court had already ordered the children to the physical custody of their non-respondent father, CB was offered therapeutic supervised parenting time with the respondent and ME was permitted unsupervised weekend visits with the respondent. *See* Appx 344a-348a (**Appx 15** – Trial Ct. Espinoza v Barber, Operative Parenting Time Orders, Oct. 28, 2022 as modified by Order dated Dec. 19, 2022).

[73] *Sanders*, 495 Mich at 418.

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The heightened standard of proof of clear and convincing evidence at the termination phase sufficiently safeguards the parent's right to due process before permanently severing the parent-child relationship.[74] The Court of Appeals in *Barber/Espinoza* failed to consider the built-in safeguards of the adjudicative phase and the dispositional phase when it determined that failure to offer reasonable efforts impaired her fundamental right to direct the care, custody, and control over her children because it allowed the court to terminate her parental rights without an opportunity for the respondent to prove her willingness and ability to parent.[75] Additionally, the Court of Appeals ignored the grounds for termination alleged and found in this case – neither of which required the court to find whether the respondent rectified the conditions that led to adjudication.[76]

As the LGAL correctly observed in the Application, the respondent never requested any case service plan nor any reasonable efforts in the case leading to the termination.[77] The Department, however, offered voluntary services in prior CPS cases, which the respondent did not take advantage or failed to benefit from.[78] In the LGAL's reply, the LGAL also aptly noted how easily the respondent could have herself taken steps to demonstrate her desire to try to safely parent the children – but she failed to do so.[79] For example, at any time, the respondent could: "(a) stop using illegal drugs; (b) seek drug treatment; (c) submit clean drug screens; (d) stop 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."[80] When the trial court entered its initial disposition order, it was rightfully concerned with what was in the best interests of the children, which required it to find reasonable efforts towards reunification would be detrimental to the children's physical health or mental wellbeing.

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[74] *In re Moss*, 301 Mich App 76, 84-86; 836 NW2d 182 (2013) (citing to *Santosky v Kramer*, 455 US 754, 102 S Ct 1388, 71 L Ed 2d 599 (1982)).

[75] *Barber/Espinoza*, _ Mich App at _; slip op at 10.

[76] Appx 349a, ¶7.b. (**Appx 16** – Trial Ct. Order Following Hr'g to Term. Parental Rights, Jan. 2, 2024). *See also* MCL 712A.19b(3)(c)(i) or (ii) compared to MCL 712A.19b(3)(b)(ii) and (j).

[77] Appx 226a (**App 10** – LGAL Appl. for Leave).

[78] Appx 261a (**Appx 12** – Trial Tr. vol. 1).

[79] Appx 356a-357a (**Appx 17** – AT-LGAL Reply Br., Nov. 29, 2024).

[80] *Id*.

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Providing "reasonable efforts" in this case would have meant that children would be required to sit in the same room with the mother who tried to kill herself in their presence; who frequently engaged in domestic violence in their presence; who shot up and got high repeatedly in their presence; and for CB, it would mean being in the same room with the mother who prostituted her out to a drug dealer for her drug fix.[81] In the course of any "reasonable efforts" on the facts of this case, the children would be subjected to trauma triggers, additional emotional and psychological harm, and possibly to the continuing unsafe family home with the respondent.[82] In other words, in this case, typical "reasonable efforts" themselves would actually constitute a form of mental abuse to these traumatized children. No definition of "reasonable efforts" could contemplate such efforts by the Department as in any way "reasonable in the circumstances." It would also mean that the 14-year old child's courageous appearance in open court to testify at the combined adjudication trial/termination hearing, was for naught. For naught, the child's expressly-stated reasonable preference – to not see her mother and to protect her younger brother from her mother.[83] For naught, the child's re-living the trauma of multiple acts of sodomy committed by "Bear" (one of the mother's drug dealers), and the mother's rejection of the child when she complained that her "butt was bleeding."[84]

It is dangerous precedent indeed to hold that a parent who sold her child's body and innocence in exchange for drugs is entitled to more due process protections beyond those that have

[81] Appx 128a-135a (**Appx 5** – Trial Tr. vol. 2).

[82] The LGAL's reply brief identified the trial court's findings of most prominent facts, e.g., at the time of the combined adjudication trial/termination hearing respondent was recently charged with criminal offenses, including domestic violence, habitual offender, and respondent continued use of substances – including amphetamines and suboxone. Appx 216a-217a (**Appx 10** – LGAL Appl for Leave).

[83] CB testified that she loves her mom, misses her mom, but did not feel safe with her "because she lets me be sexually assaulted, she just lets me get –- go days without showering, days without eating. I know that's not just her fault because it wasn't just in her care, either, it was also, in my grandma's care. But, she has abused me, she has overdosed in front of me multiple times. She has really nicely messed me up." She also testified that she came forward to help protect her brother. Appx 274a-75a and 293a-94a (**Appx 12** – Trial Tr. vol. 1).

[84] *Id*. at Appx 293a.

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already been provided in procedurally sound proceedings, compared to those afforded to the innocent and traumatized child.[85]

III. The Department satisfied the requirements of MCL 722.638(3), when it utilized its discretion to seek termination of the respondent's parental rights at initial disposition with the concurrence of the LGAL.

Introduction

The Court has directed the parties to brief "whether the Department of Health and Human Services satisfied the requirements of MCL 722.638(3)[.]"[86] The LGAL and the Department answer "Yes," the Department satisfied the plain language requirements of MCL 722.638(3). However, because the above-detailed answers concerning subsections (1) and (2) of the statute clearly provide authority for this Court to vacate the Court of Appeals' erroneous decision and affirm the well-founded trial court decision to terminate respondent's parental rights, this Court could decide the instant matter on those bases alone.

Discussion

A. *MCL 722.638(3) grants the Department the discretion to seek termination of parental rights at initial disposition.*

The plain language of the statute accords the Department the discretion to file a petition for termination of parental rights at initial disposition if the following requirements are satisfied:

1. The Department must hold a conference among the appropriate agency personnel to agree upon the course of action.
2. The Department must notify the attorney representing the child of the time and place of the conference, and the attorney may attend.

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[85] *See In re Macomber*, 436 Mich 386, 389-390; 461 NW2d 671 (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 and confirming "the paramount purpose of the juvenile code being to provide for the well-being of children."); *see also*, 42 USC 678 ("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 [42 USC 671(a)(15)(D)] [i.e., aggravated circumstances cases].").

[86] *Barber/Espinoza*, _ Mich _.

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3. If an agreement is not reached at the conference, the Department director or the director's designee shall resolve the disagreement after consulting the attorneys representing both the Department and the child.

In this case, after mistakenly applying an overly-narrow reading of MCL 722.638(1), the Department filed an amended petition against respondent utilizing the discretionary authority of MCL 722.638(3).[87] The amended petition acknowledges that the Department personnel held a meeting with the LGAL (i.e., the children's attorney), and an agreement was made at that meeting – termination of the respondent's parental rights at initial disposition was necessary to safeguard the children and it was in their best interests.[88] Although this is not parsed out in the record below, the alignment of the LGAL and the Department on this matter is evidenced by this joint brief.

Though the LGAL and the Department were not able to locate any published decisions expressly construing MCL 722.638(3), there are several unpublished Court of Appeals decisions which expressly acknowledge and confirm the discretionary authority inhering in the Department by way of MCL 722.638(3).[89]

B. *There is no requirement from the plain language of MCL 722.638(3) that the respondent be convicted of an offense listed in MCL 712.19a(2)(b) for the Department to request termination at initial disposition or for the court to authorize a petition requesting the same.*

The Court of Appeals in *Barber/Espinoza* gave short shrift to the Department's alternative basis to request termination at initial disposition, MCL 722.638(3): it "addressed" this statutory basis for the Department to move forward with termination at initial disposition in a footnote

[87] *See* Appx 165a-174a (**Appx 8** – Pet'r's Am. Pet.).

[88] Even applying the *Barber/Espinoza* Court's finding that aggravating circumstances did not exist under MCL 722.638(1), the Department is not limited to the requirements of MCL 722.638(1) and (2). The Department is also required to take certain action depending on the category assigned to a CPS investigation, which is governed by MCL 722.628d. In this case, the Department was required to file a petition as this was a considered a Category I matter, which a court petition is required, and because the children were still seeing the respondent during parenting time, the Department determined the children were not safe and a petition for "removal" was needed. *See* MCL 722.628d(1)(e)(ii).

[89] The undersigned counsel were able to find 16 opinions in which 722.638(3) is cited. Of the 16, only one is published (i.e., *Barber/Espinoza*). In a majority of the remaining 15 opinions, the Department's discretion to file a petition seeking termination at initial disposition even if not required by MCL 722.638(1) and (2) is recognized.

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only.[90] In that short and virtually unsupported reference alone, the Court of Appeals effectively re-wrote MCL 722.638(3) to limit its application to cases in which respondents are **convicted** of enumerated charges in MCL 712A.19a(2)(b).[91] There is absolutely no language contained in the aggravated circumstances statute of the Child Protection Law that requires a parent to be convicted for a criminal offense for the statute to apply.[92]

Indeed, MCL 722.638(3) and MCL 712A.19a(2)(b) do not even reference one another.[93] Confusingly, the Court of Appeals failed to acknowledge that the only statute MCL 722.638(3) references is the termination statute – MCL 712A.19b.[94] To engineer its sought-after result, the Court of Appeals instead incorporates MCL 712A.19a(2)(b) (a statue not mentioned in MCL 722.638(3)). The Court of Appeals reasoned that because MCL 712A.2a(2)(b) lists additional circumstances when reasonable efforts are not required that are not listed in MCL 722.638(1) and (2), those circumstances must be present to in order to use MCL 722.638(3) as a basis to seek termination of parental rights at initial disposition.[95]

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[90] *Barber/Espinoza*, _ Mich App at _; slip op at n 3.

[91] *Id*.

[92] *See People v McIntire*, 461 Mich 147, 152-154; 599 NW2d 102 (1999) (This Court stated: "A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation. When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular case. […] These traditional principles of statutory construction thus force courts to respect the constitutional role of the Legislature as a policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility. Any other nontextual approach to statutory construction will necessarily invite judicial speculation regarding the probable, but unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences.") (emphasis in the original) (quotation marks and citations omitted); *see also Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993), *modified on other grds by Cramer v Transitional Health Servs of Wayne*, 512 Mich 23 (2023) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.") (citations omitted).

[93] *See* MCL 722.638(3) and MCL 712A.19a(2)(b).

[94] *See* MCL 722.638(3).

[95] *Barber/Espinoza*, _ Mich App at _; slip op at n 3. Of note, the Court of Appeals did not consider MCL 712A.19a(2)(c) ("The parent has had rights to the child's siblings involuntarily terminated and the parent has failed to rectify the conditions that led to that termination of parental rights.") and (d) ("The parent is required by court order to register under the sex offenders registration act.") in its modification of MCL 722.638(3), even though those subparagraphs are also considered exceptions to the requirement for reasonable efforts.

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Unlike MCL 712A.19a(2)(a), which specifically refers to MCL 722.638(1) and (2), MCL 712A.19b(2)(b) (or (c)-(d)) does not specifically refer to MCL 722.638(3). To read MCL 712A.19a(2)(b) into MCL 722.638(3) is contrary to the plain language of both statutes. Furthermore, it fails to consider what due process is required on a case on a case-by-case basis,[96] it limits the Department's discretionary ability to seek relief – aimed at protecting children and serving their best interests, and it impairs the trial court's broad discretionary authority to enter orders of disposition aimed at protecting the children's best interests. Thus, the Department, with the participation and agreement of the LGAL, satisfied the plain language requirements of MCL 722.638(3).

IV. Because the Department satisfied the requirements of MCL 722.638(3), termination of the respondent's parental rights should also be affirmed under that provision because the trial court's findings under MCL 712A.19b(3) and (5) were appropriate and remain uncontested.

Introduction

The Court has directed the parties to brief "if [the Department satisfied the requirements of MCL 722.638(3)], whether the termination of the respondent's parental rights should be affirmed under that provision[.]"[97] The LGAL and the Department believe that termination of the respondent's parental rights should also be affirmed under MCL 722.638(3) (as permitted by MCL 712A.19b). As noted above, subsections (1) and (2) of the statute clearly provide authority for this Court to vacate the Court of Appeals' erroneous decision, and affirm the well-founded trial court decision to terminate respondent's parental rights, this Court could decide the instant matter on those bases alone.

Discussion

A. *Utilizing MCL 722.638(3) conforms with the child protective proceedings procedures applicable to this case.*

The Legislature was clear that the Juvenile Code must be liberally construed to effectuate the spirit of the Juvenile Code.

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[96] *See Rood*, 438 Mich App at 77.

[97] *Barber/Espinoza*, _ Mich _

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> [The Juvenile Code] shall 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. [98]

The Michigan Legislature follows the federal government's mandates for the child's safety and well-being to be of paramount concern.[99] Various 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 child protective proceedings considering the individual facts of each case. Applying MCL 722.638(3) as the Department did in the trial court was entirely consistent with the broad grant of discretion the Legislature bestowed upon the Department and the trial court.

It is important to identify how child protective proceedings employ different court rules, statutes, and requirements depending on whether children remain in their home, whether they are removed from their home, or whether they are placed in foster care. In *Ferranti*, this Court thoroughly outlined Child Protective Proceedings relating to children who are placed in foster care.[100] Generally, a child protective proceeding begins with an investigation by the Department to determine whether a child was subjected to abuse or neglect.[101] If necessary, the Department may – or must – petition the court to take jurisdiction over the child(ren).[102] When the court receives a petition, it must hold a preliminary hearing when removal from the home is requested or conduct a preliminary inquiry when removal from the home is not requested.[103] If the court authorizes the petition, it moves to the adjudication phase, which determines whether the court can exercise jurisdiction over the children and respondents.[104] Once the court's "jurisdiction is established, the case moves to the dispositional phase."[105] During the dispositional phase, the court

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[98] MCL 712A.1(3).

[99] *See* 42 USC 678.

[100] *See generally Ferranti*, 504 Mich 1 (2019).

[101] *Id*. at 15.

[102] *Id*.; *see also* MCL 722.628 and MCL 722.638.

[103] *Ferranti*, 504 Mich at 15 and n 6.

[104] *Id*. at 15.

[105] *Id*. at 16.

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has the broad authority to enter orders appropriate for the welfare of the children.[106] If the child remains in foster care (i.e., removed from the home), there are review hearings and permanency planning hearings.[107] However, if the Department files a petition for termination of parental rights, the termination hearing is governed by MCR 3.977.[108]

In this case the Department received a complaint that respondent "sex trafficked" minor CB in exchange for drugs.[109] After a preliminary investigation by Children's Protective Services (CPS), including observing the forensic interview of CB, the Department filed a petition asking the trial court to take jurisdiction over the children and to terminate Ms. Espinoza's parental rights at initial disposition.[110] The original petition, and the amended petition, contained extensive essential facts, which were proven at trial, that supported the trial court's assumption of jurisdiction over the children.[111] The trial court appropriately held a preliminary hearing and authorized the filing of the petition finding there was probable cause to believe at least one of the allegations in the petition were true and could support the court's exercise of jurisdiction under the juvenile code.[112] It also determined that reasonable efforts to prevent removal were not necessary because aggravated circumstances existed and it would be detrimental to the children's welfare.[113]

Subsequently, the court moved to the adjudication phase. The adjudication phase of this case was without error, as even the Court of Appeals acknowledged.[114] There is no question that the respondent was protected from any erroneous deprivation of her parental rights at that point – the court found that grounds existed to exercise jurisdiction over the children and respondent.[115]

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[106] *Id*. (citing to MCL 712A.18(1)).

[107] *Id*. (citing to MCR 3.975(A); MCL 712A.19a(1) and (4); and MCR 3.976(A) and (B)(2)).

[108] *Id*.

[109] Appx 165a-174a (**Appx 8** – Am. Pet.)

[110] *Id*.

[111] Appx 152a-17a (**Appx 7** – Initial Pet. and **Appx 8** – Amend Pet). To clarify, in the *Barber/Espinoza* opinion, the Court of Appeals erroneously referred to the petition as a "petition for permanent custody." *Barber/Espinoza*, _ Mich App at _; slip op at 1. A petition for "permanent custody" would be a legal impossibility, considering the children at all times had a nonrespondent legal parent and the Department never sought jurisdiction over him.

[112] Appx 147a-151a (**Appx 6** – Prelim Order).

[113] *Id*.

[114] *Barber/Espinoza*, _ Mich App at _; slip op at 10.

[115] *See generally Sanders*, 495 Mich 394 (2014).

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Respondent did not challenge the court's findings or conclusions in these regards.[116] As the trial court moved to the dispositional phase, it utilized its "broad authority" to enter an order "appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained[]" by terminating the respondent's parental rights.[117] The relevant court rules and statutes applied to the facts of this case did not require the trial court to afford the respondent reasonable efforts.[118]

MCR 3.973 governs the Dispositional Hearing phase, which in relevant part reads:

> **MCR 3.973(F)** Dispositional Orders.
>
> **(1)** The court shall enter an order of disposition **as provided in the Juvenile Code and these rules**.
>
> **(2)** The court shall not enter an order of disposition until it has examined the case service plan as provided in MCL 712A.18f. The court may order compliance with all or part of the case service plan and may enter such orders as it considers necessary in the interest of the child.
>
> **(3)** The court, on consideration of the written report prepared by the agency responsible for the care and supervision of the child pursuant to MCL 712A.18f(1), shall, **when appropriate**, include a statement in the order of disposition as to whether reasonable efforts were made:
>
> **(a)** to prevent the child's removal from home, or
>
> **(b)** to rectify the conditions that caused the child to be removed from the child's home.[119]

As it relates to MCR 3.973(F)(1), the Juvenile Code permits the court to enter an order terminating parental rights at initial disposition pursuant to MCL 712A.19b(4)[120] and the court

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[116] *See generally* Appx 364a-377a (**Appx 18** – Resp't Br. on Appeal, March 18, 2024).

[117] *Ferranti*, 504 Mich at 16 (citing to MCL 712A.18(1)).

[118] *See* MCR 3.977, MCR 3.973, and MCL 712A.18f(1)(b).

[119] MCR 3.973 (emphasis added).

[120] MCL 712A.19b(4): 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.

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rules permit the same under MCR 3.977(E),[121] neither of which specify the requirement of reasonable efforts to reunify the family. As it relates to MCR 3.973(F)(2), the court is to look at a proposed case service plan as provided in MCL 712A.18f, however, MCL 712A.18f(1)(b) **allows the Department to justify a decision not to provide services to a particular family**.[122] Thus, the governing statutes and court rules, applicable to this case, do not cite to any statute or court rule governing permanency planning hearings, which are governed by MCL 712A.19a and MCR 3.976.

However, it is undisputed that the Court of Appeals, and this Court, have reiterated that:

> Many opinions issued by this Court incorrectly state that the Department "is not required to provide reunification services when termination of parental rights is the agency's goal." See, e.g., *In re Moss*, 301 Mich App 76, 91; 836 NW2d 182 (2013), quoting *In re HRC*, 286 Mich App 444, 463; 781 NW2d 105 (2009). Such statements are contrary to *Mason, Hicks*, and *In re Rood*, 483 Mich 73, 98-100; 763 NW2d 587 (2009), and should be viewed as inaccurate abbreviations of governing precedent.[123]

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[121] MCR 3.977(E): 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.

[122] *See In re Terry*, 240 Mich App 14, 25 n 4; 610 NW2d 563 (2000) ("Services are not mandated in all situations, but MCL 712A.18f(1)(b) requires petitioner to justify a decision not to provide services to a particular family.") (emphasis added). In this case, the Department alleged aggravated circumstances by way of sexual abuse and the trial court determined that reasonable efforts would be detrimental to the children's health/safety. Appx 147a-164a (**Appx 6** – Order after Prelim and **Appx 7** – Initial Pet.).

[123] *In re Simonetta (III)*, 340 Mich App 700 n 2; 987 NW2d 919 (2022); *see also In re Rippy*, 330 Mich App 350; 948 NW2d 131 (2019) (Beckering, J., dissenting).

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But it seems such holding may have been taken out of context. While *Moss* does not address the issue of aggravated circumstances, the case it quoted, *In re HRC*, considered aggravated circumstances. In *HRC*, the opinion cites *In re Terry* for the holding that reasonable efforts are not required when termination of parental rights is the agency's goal.[124] *In re Terry* appropriately cites to the statute that governs orders of disposition and notes that the Department must provide justification for not offering reasonable efforts.[125] Additionally, in reviewing the three often cited cases that have been used to reject the notion that "reasonable efforts are not required when termination is the Department's goal[,]" each case dealt with a respondent's due process rights when their children were in foster care, and termination of parental rights at initial disposition was not initially requested.

In re Hicks/Brown

In re Hicks, the court determined whether reasonable efforts were made to a respondent who needed accommodations under ADA. This Court found:

> Absent reasonable modifications to the services or programs offered to a disabled parent, the Department has failed in its duty under the ADA to reasonably accommodate a disability. In turn, the Department has failed in its duty under the Probate Code to offer services designed to facilitate the child's return to his or her home, see MCL 712A.18f(3)(d), and has, therefore, failed in its duty to make reasonable efforts at reunification under MCL 712A.19a(2).[126]

The holding was appropriate as the child in that case was in foster care, the respondent was working towards the goal of reunification, and the respondent's ability to parent her child was stifled by the Departments failure to comply with the ADA, therefore the efforts were not "reasonable efforts".

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[124] *See In re HRC*, 286 Mich App 444, citing to *In re Terry*, 240 Mich App 14, n 4 (2000), ("Services are not mandated in all situations, but MCL 712A.18f(1)(b) requires petitioner to justify a decision not to provide services to a particular family.").

[125] *Terry*, 240 Mich App at n 4. Additionally, the SCAO JC forms include an option for the court to determine that – other than aggravated circumstances - "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." (e.g., JC11a, JC 49, JC 17, JC63).

[126] *In re Hicks/Brown*, 500 Mich 79, 86; 893 NW2d 637 (2017).

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In re Mason

In re Mason, the respondent father was incarcerated and was not provided notice of the proceedings involving his child as required by court rule.[127] The child in the case was also in foster care and the Department offered services to the mother in that case.[128] The Department filed for termination of the respondent's parental rights under MCL 712A.19b(3)(c)(i), which would not have been possible to prove because the respondent was not provided an opportunity to participate in proceedings or to participate in case service plan.[129] In that case, this Court appropriately held:

> "The state is not relieved of its duties to engage an absent parent merely because that parent is incarcerated. In this case, once again, the DHS's efforts focused exclusively on the custodial mother and essentially ignored the father." Reasonable efforts to reunify the child and family must be made in *all* cases" except those involving aggravated circumstances not present in this case. MCL 712A.19a(2) (emphasis added). Here, because the DHS and the court failed to adhere to court rules and statutes, respondent was not afforded a meaningful and adequate opportunity to participate. Therefore, termination of his parental rights was premature."[130]

In re Rood

In re Rood, the main defect in that case was the Department's failure to provide adequate notice to the respondent regarding the proceedings and thereby violated his due process rights.[131] In that case, the child was removed from the respondent mother and placed in foster care.[132] However, the Department did not provide notice to the then-nonrespondent father. When the Department moved to terminate the respondent mother's rights, it also moved to terminate the father's parental rights despite not even involving him in the proceedings.[133] This Court analyzed the Department's failure to provide notice to the father and failure to attempt reunification efforts with him as a non-custodial parent under the Federal law framework of Title IV-E funding.[134] It

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[127] *In re Mason*, 486 Mich 142, 148; 782 NW2d 747 (2010).

[128] *Id*. at 147-148.

[129] *Id*. at 164-165.

[130] *Id*. at 152.

[131] *In re Rood*, 483 Mich 73, 118-119; 763 NW2d 587 (2009).

[132] *Id*. at 77-78.

[133] *Id*. at 82-83.

[134] *Id*. at 102-107.

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also noted that "[w]e evaluate whether a particular parent was afforded minimal due process on a case-by-case basis. Statutory requirements, court rules, and agency policies provide an important point of departure for this inquiry."[135]

The facts in this case are distinguishable from *Hicks*, *Mason*, and *Rood*. In this case, the children were not removed from their own home (nor from respondent mother) – as they remained in the care and custody of their non-respondent father where they had been for years preceding the filing of the petition in this case. Thus, the Department and court were not working under the Federal framework of Title IV-E funding in the present case. A permanency planning hearing was not required because the children did not "remain in foster care" and the court's determination that reasonable efforts were not required was made per the order of disposition.[136]

Additionally, even recent case law suggests that not all cases are subject to the permanency planning statute (i.e, MCL 712A.19a). Recently, in an unpublished case, *In re SJ*, the Department moved to terminate a respondent mother's parental rights at initial disposition pursuant to MCL 712A.19b(3)(b)(ii) and (j), on the basis that the respondent knew the child was being sexually abused and did not comply with safety plans to ensure her child's safety.[137] At the time of the petition, the child's "father had sole physical custody but shared legal custody with the respondent."[138] The respondent in that case argued that the lower court erred by failing to consider a guardianship in lieu of terminating her parental rights.[139] In its analysis, the Court of Appeals considered when the permanency goal of guardianship is appropriate pursuant to MCL

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[135] *Id*. at 77.

[136] The trial court's preliminary order indicates that reasonable efforts should not be made because aggravated circumstances. *See* Appx 149a ¶ 16.a. (**Appx 6** – Order after Prelim)). While that is an appropriate determination, it is a preliminary finding that would not be binding until proven at the initial disposition hearing, with the heightened standard of proof. If reasonable efforts were required at the preliminary hearing phase, then the respondent would have been offered a voluntary case service plan pending the adjudication and initial disposition hearing. The question at the adjudicative phase is whether the respondent subjected the children to the allegations contained in the petition, not whether she complied with a voluntary case service plan between the preliminary hearing and the adjudication trial. And the question at the initial disposition is what is necessary for the children's best interests, not whether the respondent complied with a voluntary case service plan. As stated earlier, the respondent was offered several voluntary services throughout her lengthy CPS history and did not engage in those services.

[137] *In re SJ*, unpub op at 1-2.

[138] *Id*. unpub op at 1.

[139] *Id*. unpub op at 6.

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712A.19a(8).[140] But the panel declined to apply the permanency planning statute, specifically noting, "It is undisputed that termination was sought with the initial petition; thus, MCL 712A.19a is inapplicable here."[141]

Similarly, in this case, the Department moved to terminate Ms. Espinoza's parental rights at the initial disposition pursuant to MCL 712A.19b(3)(b)(ii) and (j). This was based on similar facts as in *SJ*: Ms. Espinoza did not use her body to sexually abuse her child but she knew of such abuse and failed to protect their children against it. Also, as in *SJ*, the non-respondent father had sole physical custody of the children. Therefore, the holding that the permanency planning statute, MCL 712A.19a, would not apply here as it did not apply in *SJ*. Clearly, the Department and the court were authorized by the applicable statutes and court rules to proceed to termination of the respondent's parental rights at initial disposition without offering reasonable efforts towards reunification.

B. *It is uncontested that the lower court made appropriate findings to terminate the respondent's parental rights.*

Given that the trial court complied with the relevant court rules, there were no procedural defects in the trial court (and, again, the Court of Appeals itself acknowledged no error). As articulated in Section II of this brief, the trial court was justified in its order of disposition. Additionally, because ***no one contested*** the factual basis for terminating Ms. Espinoza's parental rights pursuant to MCL 712A.19b(3)(b)(ii) and (j), nor the trial court's conclusion that it was in the children's best interests to do so, this Court should accept those findings and conclusions as true.[142] Therefore, the termination of the respondent's parental rights should undisputedly be affirmed under MCL 722.638(3) and MCL 712A.19b.

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[140] *Id.*

[141] *Id.*

[142] *See In re JS & SM*, 231 Mich App at 98-99.

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V. The failure to advise Ms. Espinoza of her right to appeal following the preliminary hearing was not plain error affecting her substantial rights because the children were not removed from her care and custody.

Introduction

The Court has directed the parties to brief, "[w]hether the failure to advise the respondent of her right to appeal following the preliminary hearing was plain error affecting the respondent's substantial rights, see MCR 3.965(B)(15)."[143] The LGAL and the Department contend that there was not a removal in this case, therefore MCR 3.965(B)(15) does not apply and failure to advise the respondent of her right to appeal following the preliminary hearing was not plain error affecting the respondent's substantial rights.

Discussion

A. *A child is "removed" from a parent's care and custody when the child is taken from that parent's residence and placed in a different residence.*[144]

MCR 3.965(B)(15) requires the court to advise the respondent parent of the right to appeal an order removing the child from the respondent's care or custody.[145] Without considering the fact of whether the children were actually removed from the respondent's care and custody (which they were not), the Court of Appeals held, "The trial court did not advise respondent of her right to appeal its decision to remove the children. Therefore, the trial court violated MCR 3.965(B)(15), committing clear or obvious error in the process."[146]

The Court of Appeals has defined the terms "remove" and "removal" to mean when a court orders that a child be *physically transferred or moved* from the care and residence of a parent to the care and residence of some other person.[147] In *Detmer/Beaudry*, the trial court ordered the

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[143] *Barber/Espinoza*, _ Mich at _; slip op at 1.

[144] *In re AJR*, 342 Mich App 1, 6-7; 993 NW2d 1 (2022).

[145] MCR 3.965(B)(15).

[146] *Barber/Espinoza*, _ Mich App at _; slip op at 11 (citation omitted). The Court of Appeals sua sponte raised this court rule, noting how respondent herself had cited only to the inapplicable rules governing advice of rights after entries of please. *See*, Appx 371a-72a (**Appx 18** – Resp't Appeal Br.).

[147] *AJR*, 342 Mich App at 6-7; *see also In re Detmer/Beaudry*, 321 Mich App 49, 64; 910 NW2d 318 (2017) (emphasis added).

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minor child to be physically placed with his nonrespondent father.[148] At the time of the order, the child was living primarily with his respondent mother and visiting with the nonrespondent father every other weekend.[149] The Court of Appeals determined that this order had effectuated a removal and that respondent was entitled to be advised of her right to appeal the removal pursuant to MCR 3.965(B)(15).[150]

The facts of *Barber/Espinoza* are the opposite of those in *Detmer/Beaudry*. The children in this case were not living with the respondent when the petition was filed; they resided at that time, and had been residing for years prior, with their nonrespondent father, and had visits with the respondent.[151] CB visited with the respondent in a therapeutic supervised setting and ME visited with the respondent three weekends a month.[152] Although the trial court's order after the preliminary hearing made finding indicating the children were "removed" from the respondent, the children were not ordered to be taken from the respondent's care and custody; they were simply ordered to ***remain with*** their nonrespondent father.[153] Accordingly, MCR 3.965(B)(15) does not apply, this the alleged "failure" to apprise respondent of rights to appeal under this inapplicable court rule provides no basis for relief to respondent, nor any plain error.

B. *Even if Ms. Espinoza was entitled to be advised of her right to appeal the preliminary order, the failure to advise her of the same was not outcome determinative.*

If this Court determines, contrary to binding precedent and the facts of this case, that the children were in fact somehow "removed" from the respondent's care and custody, and that the trial court committed plain error, the error did not affect the respondent's substantial rights. "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of

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[148] *Detmer/Beaudry*, 321 Mich App at 64.

[149] *Id*.

[150] *Id*.

[151] Appx 028a-29a, 138a, and 344a-48a (**Appx 4** – Custody Order; **Appx 5** – Trial Tr. vol. 2; and **Appx 15** – Parenting Time Orders).

[152] Appx 344a-48a (**Appx 15** – Parenting Time Orders).

[153] Appx 147a-151a, ¶¶ 12, 14.b, 25.b (**Appx 6** - Order After Prelim Hr'g); *See People v Davie (After Remand)*, 225 Mich App 592, 600; 571 NW2d 229 (1997) (holding that a trial court speaks through its orders) and *Micheli v Mich Automobile Ins Placement Facility*, 340 Mich App 360, 367; 986 NW2d 451 (2022) ("This Court will generally not reverse when a trial court reached a correct result, even if the trial court did so on the basis of incorrect reasoning.")

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the proceedings. The party asserting plain error bears the burden of persuasion with respect to prejudice."[154] The Court of Appeals held that the trial court's failure to advise the respondent of her right to appeal the "removal" order was prejudicial because the trial court erroneously determined aggravated circumstances existed, affecting the very framework in which the case proceeded, and therefore, if she was given her appellate rights, she "very well could have succeeded on the aggravated-circumstances issue before the case proceeded immediately to termination."[155]

As argued in the preceding sections of this brief, applying the plain language of MCL 722.638(1) and (2), the trial court accurately determined that aggravated circumstances existed in this case and reasonable efforts to prevent removal (or to reunify and preserve the family were not required). However, because the Court of Appeals held that the respondent could have been successful in proving aggravated circumstances did not exist at the preliminary hearing phase, and therefore she would have been entitled to reunification efforts,[156] it is necessary to distinguish the preliminary hearing phase from the dispositional hearing phase, which was thoroughly explored in Section II of this brief.

At the preliminary hearing, the trial court is required to make a finding that reasonable efforts were made to prevent removal when children are removed from their primary custodial parent and placed in foster care unless there are aggravated circumstances.[157] The respondent would have been entitled to reasonable efforts to prevent removal at the preliminary hearing phase. But because there was no removal and the children were not put into foster care, reasonable efforts to prevent removal were not required in this case.[158]

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[154] *Barber/Espinoza*, _ Mich App at _; slip at 3 (internal quotations and citations omitted).

[155] *Id*. slip op at 11.

[156] Although the Court of Appeals found that there is no way for an aggrieved respondent to prove their willingness and ability to parent without reasonable efforts, it is worth noting that the grounds for termination did not include MCL 712A.19b(3)(c)(i) or (ii), which permits the court to terminate parental rights for failure to rectify the conditions that led to adjudication or caused the children to come within the court's jurisdiction (i.e., "prove their willingness and ability to parent.") *See Barber/Espinoza*, slip op at 9.

[157] *See* MCR 3.965(C)(4).

[158] Despite not being required to make reasonable efforts to prevent removal, the Department made reasonable efforts to prevent the petition from being filed in hopes that the respondent would take advantage of and benefit from those services. Appx 261a (**Appx 12** – Trial Tr. vol. 1).

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Additionally, at the preliminary hearing phase, the court employs a probable cause standard of proof.[159] This is unlike the initial disposition phase in which the court employs a heightened standard of proof (i.e., clear and convincing) and the question relating to reasonable efforts is whether reasonable efforts should be made to reunify and preserve the family.[160] Thus, the respondent, on appeal, would have had to prove that in applying the probable cause standard of proof, the outcome of the preliminary hearing would have different, i.e., the trial court would not have maintained the children's primary residence with their non-respondent father, and she was entitled to reasonable efforts to prevent removal because aggravated circumstances did not exist.

In re Metheny, the Court of Appeals determined there was plain error when the court failed to advise a respondent mother of her rights to appeal a removal pursuant to MCR 3.965(B)(15).[161] But the court held that respondent mother did not establish that the error was outcome determinative, citing that the respondent stipulated to probable cause to authorize the petition and at the adjudication phase, she pleaded that she had a history of drug use that negatively impacts her ability to care for her minor children.[162] Ultimately the court found that she did not establish the error was outcome determinative.[163]

Similarly, in this case, the trial court repeatedly found that the respondent subjected the child to sexual abuse, subjected both children to mental and psychological harm, and was a neglectful parent at each stage of the proceedings – the preliminary hearing (probable cause standard), the adjudication trial (preponderance of the evidence standard), the initial disposition phase (clear and convincing evidence standard). The Court of Appeals and the respondent did not dispute those facts. Even if the respondent exercised her right to appeal after the preliminary hearing, the children would not have been removed from a nonrespondent parent to be placed with a respondent parent who sold her daughter for drugs, attempted suicide from her children, or committed the other numerous concerning acts referenced in the record. Even assuming there was a determination that aggravating circumstances did not exist under the plain language of MCL

[159] *See* MCR 3.965(B)(12) and MCL 712A.13a(2).

[160] *See* MCR 3.973(1), MCL 712A.18f(4) and MCL 712A.19b(4).

[161] Appx 395a (**Appx 21** – *In re Metheny*, unpublished per curiam opinion of the Court of Appeals, issued Jan. 16, 2025 (Docket Nos. 371386 and 371387), p 7)..

[162] *Id.*

[163] *Id.*

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722.638(1) and (2), the Department had the discretion to move forward with the petition and its relief requested through MCL 722.638(3). And as argued in the preceding sections of this brief, the outcome of the proceeding would have remained the same – the court would have exercised its jurisdiction based on a properly conducted adjudication trial, the court would have found clear and convincing evidence existed that CB was harmed by sexual abuse and the respondent was responsible for the harm, and based on the respondent's conduct and capacity, the children would be harmed if returned to the respondent's care and custody.[164]

CONCLUSION AND RELIEF REQUESTED

Of the few child protective trial court dispositions reversed by the Court of Appeals, this case created precedent that parents can prostitute their children in exchange for drugs and they will be **entitled** to reasonable efforts towards reunification.[165] Reasonable efforts would be required regardless of relevant court rules and statutes. Reasonable efforts would be required regardless of whether the child was removed from their non-respondent custodial parent, regardless of the child's preference, regardless of the child's sustained trauma, and regardless of whether the child has a stepparent who is willing to adopt and provide the child with a normal family home. For CB and ME, they deserve the maximum protection accorded to them by the rules and laws enacted to serve as safeguards for children. They deserve an opportunity to have finality and remain in the safety of their familial home with their father and stepmother. For CB and ME to settle into permanent normal family life, the LGAL and the Department respectfully ask this Court to reverse the Court of Appeals' decision in this matter and affirm the trial court's order terminating the respondent's parental rights.

[164] Appx 135a-40a (**Appx 5** – Trial Tr. vol. 2).

[165] Appx 385a, n 6 (**Appx 20** – Memorandum from SCAO – Child Welfare Services (Aug. 22, 2013)) (noting that more than 90% of the appeals related to child protective trial court dispositions were affirmed at the appellate level).

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH MCL 7.212

In compliance with MCL 7.212(B)(3) and ADM File No. 2019-16, I certify that this brief contains approximately 13,180 countable words and the typeface used in this brief is Times New Roman, set in a 12-point font, except for footnotes.

Dated: 03/10/2025

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