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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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NON-RESPONDENT FATHER'S SUPPLEMENTAL BRIEF IN SUPPORT OF THE LGAL'S APPLICATION FOR LEAVE TO APPEAL , AND OF THE LGAL/DHHS'S JOINT SUPPLEMENTAL BRIEF

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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. 3

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. 3

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TABLE OF AUTHORITIES

The non-respondent father adopts and restates the Table of Authorities in the LGAL-Appellant and DHHS's Joint Supplemental Brief. In addition:

CASES

In re Stowe, 162 Mich App 27, 32 (1987). 2

Nichols v. Prosecuting Atty for Oakland Cnty, 35 MichApp 580, 582-83 (1971). 2

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STATEMENT AS TO JURISDICTION

The non-respondent father adopts the LGAL and the Department's position and restates their Statement as to Jurisdiction, as provided in the LGAL-Appellant and DHHS's Joint Supplemental Brief.

STATEMENT OF DECISION APPEALED AND RELIEF SOUGHT

The non-respondent father adopts the LGAL and the Department's position and restates their Statement of Decision Appealed and Relief Sought as provided in the LGAL's Application for Leave and in the LGAL-Appellant and DHHS's Joint Supplemental Brief.

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

The non-respondent father adopts and restates the Statement of Grounds for Appeal and Why This Court Should Grant Leave, as provided in the Appellee-LGAL's Application for Leave, and in the LGAL-Appellant and DHHS's Joint Supplemental Brief.

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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

Non-Respondent Father: No

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

Non-Respondent Father: No

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: Presumably No

Appellant-LGAL: Yes

Appellee-Petitioner DHHS: Yes

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Appellee-Respondent Mother: Presumably No

Non-Respondent Father: Yes

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: Presumably No

Appellant-LGAL: Yes

Appellee-Petitioner DHHS: Yes

Appellee-Respondent Mother: Presumably No

Non-Respondent Father: Yes

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

Non-Respondent Father: No

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INTRODUCTION

The Non-Respondent Father adopts and restates the Introduction as provided in the LGAL-Appellant and Petitioner-Appellee's Joint Supplemental Brief.

In addition, the Non-Respondent Father states as follows: The Court of Appeals' erroneous reading and interpretation of the plain language of the applicable statutes is dangerous. Said interpretation affords a loophole for abusive parents who have allowed heinous sexual acts to happen to their children by providing an opportunity for reunification, simply because they themselves did not commit the sexual assaults upon their children which they facilitated, encouraged and/or allowed. Determining that a statute intended to ***protect children*** requires that the DHHS make reasonable efforts for reunification when a parent proffers her child to her drug dealers in exchange for drugs, does the exact opposite of protecting children. In this particular case, it forces the abused and traumatized child to reunify with the very person who was the catalyst for the child's sexual abuse and sodomy, so the respondent mother could get her drug fix. The Court of Appeals' published decision in this case will require children to reunify with their abusive parents, simply because their parent was the "puppet master" (aider and abettor) of the abuse, but not the principal.

STATEMENT OF FACTS

The non-respondent father adopts and restates the Statement of Facts as provided in the LGAL-Appellant and Petitioner-Appellee's Joint Supplemental Brief.

In addition, the non-respondent father (Mr. Barber) states as follows: The history of how and why Mr. Barber gained custody of the minor children from the respondent mother (Ms. Espinoza) in this case is relevant and important for this Court to take judicial notice of.[1] In April

[1] "Judicial notice may be taken at any stage of the proceeding." MRE 201(e). Appellate courts can take judicial notice on their own initiative of facts not noticed below. McCormick, Evidence (2d ed), s 333, pp 771, 773. Documents that are part of lower court records in this or other cases are within this Court's purview under principles of judicial notice, based on the one court of justice concept found in Michigan's Constitution. Const 1963, art 6, § 1; *People v Snow*, 386 Mich 586, 591 (1972). In *Snow*, this Court held that information about some 200 criminal sentences compiled in an affidavit were subject to judicial notice. The Court held that "[t]he results in the 234 cases

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2021, in the Lenawee County case, *Barber v Espinoza*, Case No. 11-37423-DS, the non-respondent father was granted exclusive parenting time through an ex parte order because Ms. Espinoza had crashed her vehicle with the children in the car, and was suspected of being under the influence.. In November 2021, Mr. Barber was granted another ex parte order giving him exclusive parenting time, after Ms. Espinoza overdosed in front of her children. Due to respondent-mother's ongoing issues with drug use, homelessness, and domestic violence, the non-respondent father filed a Motion to Change Custody, Parenting Time and Support on January 24, 2022. On February 24, 2022, the non-respondent father was granted sole physical custody of the minor children, and the respondent-mother was granted 6 hours of parenting time per week. See LGAL-Appellant and Petitioner-Appellee's Joint Appendix 4, pp. 028a-029a.

At the time the Mr. Barber gained physical custody of the minor children in 2022, minor child CB had been in an inpatient mental health facility, was showing hyper-sexual behaviors at the age of 12, threatening suicide, and behaving in such a manner that was a clear cry for help. While at this time CB had not yet disclosed the sexual abuse her mother subjected her to, the child's behaviors were consistent with a child who had experienced sexual abuse, as CB has.

At the time the Petition was filed by the Department to terminate Ms. Espinoza's parental rights in February 2023, the parent-child bond had been deeply damaged between Ms. Espinoza and CB, due to Ms. Espinoza's prior conduct and behavior.

At the Termination Trial, minor child CB bravely testified about the horrific and gut-wrenching sexual abuse she endured so her mother could feed her drug addiction. In presenting her case at the combined adjudication trial/termination hearing, Ms. Espinoza and her two witnesses testified CB is a liar, despite Ms. Espinoza admitting she was an IV drug user around the time CB's abuse occurred, and despite Ms. Espinoza's own mother corroborating CB's testimony about one of her mother's drug dealers – "Bear" – residing on the family's property in a tent out back. See LGAL-Appellant and Petitioner-Appellee's Joint Appendix 5, p. 099a

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cited in the affidavit could have been judicially noticed under the 'one court of justice' doctrine." *Snow*, 386 Mich at 591. See, also, *Thomas v Thomas*, 176 Mich App 90, 93 (1989); *In re Stowe*, 162 Mich App 27, 32 (1987); *Nichols v Prosecuting Atty for Oakland Cnty*, 35 Mich App 580, 582-83 (1971).

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The respondent-mother in this case fails to acknowledge the trauma she has caused her children, not only from the sexual harm she subjected CB to, but also from the suicide attempt, the frequent domestic violence, the overdoses, and criminal behavior she has displayed in the presence of her children.

Requiring CB and ME to participate in services that constitute reasonable efforts to reunify the children with the respondent-mother will cause more trauma to the children, especially CB, and undo all the positive progress the children have made if this Honorable Court affirms the Court of Appeals' decision.

STANDARDS OF REVIEW

The Non-Respondent Father fully adopts and restates the Standards of Review, as provided in the LGAL's Application for Leave, LGAL/DHHS's Joint Supplemental Brief.

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.

The Non-Respondent Father adopts and restates Argument I, as provided in the LGAL-Appellant and Petitioner-Appellee's Joint Supplemental Brief.

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.

The Non-Respondent Father adopts and restates Argument II, as provided in the LGAL-Appellant and Petitioner-Appellee's Joint Supplemental Brief.

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.

The Non-Respondent Father adopts and restates Argument III, as provided in the LGAL-Appellant and Petitioner-Appellee's Joint Supplemental Brief.

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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.

The Non-Respondent Father adopts and restates Argument IV, as provided in the LGAL-Appellant and Petitioner-Appellee's Joint Supplemental Brief.

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.

The Non-Respondent Father adopts and restates Argument V, as provided in the LGAL-Appellant and Petitioner-Appellee's Joint Supplemental Brief.

CONCLUSION

The Court of Appeals' decision in this case sets a dangerous precedent that will cause irreparable harm to minor children – the innocent people parents are supposed to nurture and protect. Instead of holding as the paramount concern and purpose the safety and interests of the children, the Court of Appeals' decision prioritized the interests of the very person who caused her children trauma and harm in the first place and the decision **requires reasonable efforts** toward reunification for parents who prostitute their children out in exchange for drugs, so long as the parents are not the actual rapists or sodomizers themselves.

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STATEMENT OF RELIEF

The Non-Respondent Father respectfully asks this Court to peremptorily reverse the Court of Appeals' September 19, 2024, published decision and affirm the trial court's well-founded and correct decision terminating respondent mother's parental rights, to ensure that the aggravated circumstances presented by a parent bartering sex with her minor child in exchange for drugs continues to fall within the language of the statute, intent, and meaning of MCL 722.638, as it so clearly does.

Respectfully Submitted,

Dated: March 18, 2025

/s/ Nicole S. Underwood
NICOLE S. UNDERWOOD (P76073)

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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 2540 countable words and the typeface used in this brief is Times New Roman, set in a 12-point font, except for footnotes.

Dated: March 18, 2025

/s/ Nicole S. Underwood
NICOLE S. UNDERWOOD (P76073)

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