

**IN THE MICHIGAN COURT OF APPEALS**  
**Appeal from the Wayne County Circuit Court**

[Below is a brief filed a few years ago by the University of Michigan Child Welfare Appellate clinic in an appeal of an order terminating our client's parental rights. Out of respect for our client's privacy, we've edited the brief to remove identifying information. We've called our client "Ms. Baker" although that is not her real name. We've similarly changed other names to keep it readable.]

## INTRODUCTION

In child welfare cases, DHHS and courts are under certain very clear obligations to ensure that parents' rights to their children are terminated only when absolutely necessary. In this case, DHHS and the trial court each failed to meet one of their duties before terminating the parental rights of Krista Baker.

DHHS has a duty to tailor its service plan to the parent in question; its duty is heightened when that parent has a disability. Here, however, DHHS never accommodated Ms. Baker's learning disability and refused to be flexible regarding the provision of her services. Despite DHHS's own failure, it held Ms. Baker accountable for her inability to complete the service plan. The court therefore incorrectly determined DHHS had made reasonable efforts toward the reunification of Ms. Baker and her children.

In addition, the court has a duty to conduct an individualized inquiry into whether termination is in the best interests of each child in question. It must consider factors like the child's bond with her parent, the child's placement with a family member, and, where appropriate in terms of the child's age, the child's own preference. The court also has an affirmative obligation to consider alternatives to termination, like guardianship, that would satisfy the same state interests but intrude less on a parent's fundamental right to provide

for the care and custody of her children. It may not rule out the possibility of guardianship based simply on the ages of the children in question. Here, the court failed to meet any of these obligations. It nonetheless found that termination was in each of Ms. Baker's children's best interests.

The court's actions had severe consequences: they broke apart a family. To correct that error, this Court should reverse the trial court's decision to terminate Ms. Baker's parental rights.

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## **STATEMENT OF THE BASIS OF JURISDICTION**

This is an appeal as of right of the trial court's decision to terminate the parental rights of Krista Baker to her children AB, MB, and KB. A trial court's order terminating parental rights is appealable to this Court by right. MCR 3.993(A)(2). The trial court held a termination trial in this matter over July 1, July 16, and July 26, 2019. The trial judge made a ruling from the bench to terminate Ms. Baker's parental rights on July 29, 2019. The trial judge subsequently issued a written opinion and Order of Termination on August 1, 2019. Ms. Baker requested court-appointed counsel on July 26, 2019. The trial court filed a claim of appeal with this Court on August 16, 2019.

## STATEMENT OF QUESTIONS INVOLVED

1. Under MCL 712A.19a(2), DHHS must make “reasonable efforts to reunify the child and family” before the court can terminate parental rights, which in turn requires tailoring services to a parent’s individual needs. Here, DHHS failed to provide services to accommodate Ms. Baker’s disability, and it failed to be flexible in delivering services tailored to Ms. Baker’s other needs. Did the trial court err in finding DHHS had made reasonable efforts to reunify Ms. Baker with her children, and thus err in deciding to terminate her parental rights?

The Trial Court answered “No.”  
Appellant-Mother answers “Yes.”

2. Under MCL 712A.19b(5), the court must conduct an individualized inquiry for each child to determine whether terminating parental rights is in that child’s best interests. In its inquiry, it must consider the child’s bond with the parent, whether the child is already living with a relative, and, in a manner that is appropriate to the child’s age, the child’s preference. Here, the court did not conduct an individualized inquiry for each child. Even if it had, the evidence on these factors does not support that it was in the children’s best interests to terminate their mother’s parental rights. Did the court err in finding best interests?

The Trial Court answered “No.”  
Appellant-Mother answers “Yes.”

3. When the state infringes upon a parent’s fundamental liberty interest in the care, custody, and management of her child, it must consider less restrictive alternatives to termination, like guardianship. See *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982); *Bernal v Fainter*, 467 US 216, 219; 104 S Ct 2312; 81 L Ed 2d 175 (1984). Moreover, the state may not dismiss guardianship as an option based solely on a child’s age. *In re Timon*, 501 Mich 867, 867; 901 NW2d 398 (2017). Here, the court did not consider guardianship for any of Ms. Baker’s children, and its failure to consider guardianship for MB and KB was based solely on their ages. Did the court err in finding termination was nonetheless in the children’s best interests?

The Trial Court answered “No.”  
Appellant-Mother answers “Yes.”

## STATEMENT OF FACTS

On May 22, 2017, DHHS removed MB, KB, and AB from their home with their mother, Krista Baker, and MB and KB's father, Robert Little. 7/12/17 CPS Investigation Report at 12. It did so in response to a complaint it had received a month earlier alleging Mr. Little had sexually abused AB. *Id.* AB was twelve years old. *Id.*

The alleged abuse in the complaint had taken place months earlier, near the end of 2016. Ms. Baker was out of the house, caring for her eldest daughter, Sarah, who was having a miscarriage. 11/20/17 Tr. at 17:15–18. That night, when Ms. Baker was with Sarah, Mr. Little allegedly sexually abused AB. *Id.* When Ms. Baker found out about her daughter's allegations that Mr. Little had abused her, she took action. Within a few days, she had Mr. Little removed from their home. 11/20/17 Tr. at 29:20–24. She also took AB to the hospital for a rape kit. *Id.* at 29:9–14.

Several months later, when DHHS received the complaint, it conducted an investigation. 7/12/17 CPS Investigation Report at 12. In its investigation report, DHHS noted Ms. Baker had contacted law enforcement about AB's allegations. *Id.* at 1. DHHS also conducted a Kids Talk Interview with MB, KB, and AB. *Id.* at 12. At this interview, a DHHS employee believed, based on his observations, that Ms. Baker was under the influence of drugs. 5/22/17 Authorized Petition at 5.

On May 22, 2017, exactly one month after receiving the complaint about Mr. Little, DHHS submitted a petition to terminate the parental rights of both Mr. Little and Ms. Baker. *Id.* The petition alleged abuse by Mr. Little of AB but also included concerns regarding Ms. Baker's allegedly ongoing substance abuse. *Id.* at 4. It also alleged that the children had witnessed, on multiple occasions, Mr. Little verbally abusing their mother, and that Mr. Little had physically abused KB. *Id.* at 4–5.

### **Ms. Baker Had Previously Benefited from DHHS Intervention**

DHHS's immediate move to terminate Ms. Baker's parental rights in 2017 appears to have stemmed from her prior involvement with the system years earlier. In 2013, DHHS removed all of Ms. Baker's children in response to a series of complaints centered mostly around Ms. Baker's struggles with prescription drug abuse. 5/30/13 Corrected Petition; 7/8/13 Amended Petition. Ms. Baker had a history of medical and pain management issues, which resulted in prescription drug abuse. See 8/9/13 Clinic for Child Study Report on Evaluation of Krista Baker at 3, 5. She has suffered from seizures since 2008, which led to chronic back pain and other injuries. 8/9/13 Clinic Report. Her primary care physician at one point prescribed her Vicodin and Xanax for tonic-clonic seizures and for back pain. *Id.* at 4. Ms. Baker later admitted to struggling with Vicodin addiction. *Id.*

With the help of DHHS's intervention in 2013, Ms. Baker was able to overcome her issues and recover her children. After DHHS filed a petition for termination of Ms. Baker's parental rights, the court ordered services for Ms. Baker. *Id.*; 7/25/13 Order of Adjudication. These services focused on substance abuse, parenting skills, communication, and employment. 7/25/13 Parent-Agency Treatment Plan. Ms. Baker complied with all of the ordered services. See 5/12/14 Permanency Planning Hearing Court Report; 10/7/14 Permanency Planning Hearing Court Report. After finding that she was "in full compliance with her service plan," the court concluded that Ms. Baker was able to care for her children and returned them to her home. 8/6/14 Order Following Dispositional Review and Permanency Planning Hearing. In January of 2015, the court deemed Ms. Baker to have successfully completed her treatment plan and dismissed her children as court wards. 1/6/15 Order Following 1/5/15 Dispositional Review and Permanency Planning Hearing.

**In Early 2018, the Court Found Termination Was Not in the Children's Best Interests**

But in 2017, when the new case was opened against Ms. Baker, DHHS attempted to proceed more swiftly. On the same day DHHS submitted its petition, the court held a preliminary hearing and Permanency Planning Hearing. See generally 5/22/17 Tr. At that hearing, Ms. Baker's attorney asked a DHHS employee whether the

agency would consider reducing the relief it sought with respect to Ms. Baker to temporary custody, since the bulk of the allegations in the petition related to Mr. Little and his sexual abuse of AB. 5/22/17 Tr. at 12:17–23. The DHHS employee stated he would not, because of the “ongoing concerns regarding mother’s substance abuse,” as well as allegations Mr. Little had abused Ms. Baker in the presence of the children. *Id.* at 12:24–13:13. At the end of the hearing, the court authorized DHHS’s petition.

In October of 2017, the court held a trial to consider both jurisdiction and the request to terminate the parents’ parental rights. Both Ms. Baker and Mr. Little pleaded to jurisdiction, agreeing the court had jurisdiction over MB, KB, and AB. 10/11/17 Tr. at 4–8. Mr. Little additionally pleaded to statutory grounds due to his involvement in an ongoing criminal proceeding regarding his alleged sexual abuse of AB. *Id.* Trial as to statutory grounds for termination for Ms. Baker and best interests for both Mr. Little and Ms. Baker was continued to another date. 10/11/17 Tr. at 12:17–18. The trial court subsequently held two more trial dates: one in November 2017 and another in January 2018. See 11/20/17 Tr.; 1/22/18 Tr.

Throughout this first trial, all parties agreed AB maintained a strong bond with her mother and did not wish to be adopted. Both AB’s caseworker, Ms. Morris, and the L-GAL stated AB did not want to be

adopted, and did not want her mother’s parental rights to be terminated. 11/20/17 Tr. at 55:23–24; *id.* at 16:4–6. Ms. Morris testified that AB got “upset even at the idea of” her mother losing parental rights to her. *Id.* at 55:21–22. She further testified that Ms. Baker and AB appeared to have a normal mother-daughter relationship. 11/20/17 Tr. at 55:2–4. Ms. Baker, DHHS, and the L-GAL all agreed throughout the first trial that the relationship between AB and her mother should be maintained, and that termination of Ms. Baker’s parental rights was not in AB’s best interests.

MB and KB also had a bond with their mother. Their DHHS worker testified that they were happy to see their mother whenever they saw her. *Id.* at 62:10–25. They hugged her and called her “mom.” *Id.* At one visit in November, Ms. Baker had brought them a race car track and had colored, painted, and played with the race car track with them. *Id.* MB and KB also actively wanted to be reunited with their mother. Counseling reports for MB<sup>1</sup> submitted to the court, for instance, consistently indicated MB missed his mother and wanted to be reunited with her. See, e.g., 3/8/18 Counseling Services Assessment and Treatment Plan Report (describing MB’s “fear and stress of not being with his immediate family—especially client’s mother”); 4/6/18 Counseling Services Assessment and Treatment Plan Report (“Client

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<sup>1</sup> No counseling reports for KB appear in the record.

has improved in coping skills, but misses being with his family, especially [sic] his mother. . . . Client is doing well in school and also indicates that when he is sad it is because he misses his mother and family.”).

In early 2018, at the close of the third day of trial, the trial court concluded statutory grounds were met. 1/22/18 Tr. at 23:25–24:4.

However, the court concluded it was not in any of the children’s best interests to terminate Ms. Baker’s parental rights. *Id.* at 25:6–10. The court based its conclusion on “the children’s bonds,” the fact “MB and KB are placed with a relative which weighs against termination,” and AB’s “wish that her rights not be terminated.” *Id.* at 25:11–16. The court ordered DHHS to pursue a plan to reunite Ms. Baker with her children. *Id.* at 26:12–13.

**DHHS Never Obtained a Proper Evaluation of Ms. Baker’s Learning Disability or Initiated Specialized Services to Address It**

But once those reunification efforts began, DHHS failed to set Ms. Baker up for the same kind of success she had achieved in 2013. This started with their treatment of her learning disability. Ms. Baker has had this learning disability for most of her life. 8/8/13 Clinic for Child Study Report on the Evaluation of Krista Baker at 6–7; 11/16/17 Clinic for Child Study Report on the Evaluation of Krista Baker at 3. She attended special education classes for this disability throughout

school. 11/20/17 Tr. at 37:17–19. The disability, in part, interferes with her “ability to remember dates accurately.” *Id.* at 22:18–20. She sometimes “forget[s] to go to things” because of seizures that exacerbate her disability. 4/16/18 Tr. at 9:7–12. At the time of the 2017 trial she had applied for, but was waiting to receive, Supplemental Security Income for her learning disability and her seizure disorder. 11/20/17 Tr. at 11:14–16.

There has never been a specific diagnosis for her learning disability. *Id.* at 37:12. In its 2018 order to begin services for Ms. Baker, the court ordered a psychological and psychiatric evaluation to fill this gap in information, specifically stating, “the psychological will also indicate whether mother needs special accommodations” for her learning disability. *Id.*; 1/31/18 Order of Disposition. However, DHHS never followed up about Ms. Baker’s disability. Her treatment plan, created two months after the court’s order, did not include any references to her disability. 3/12/18 Parent Agency Treatment Plan.

DHHS also took no steps to facilitate the court-ordered psychological evaluation. Three months after the order, Ms. Baker’s attorney indicated to the court that it was unclear whether DHHS was taking into account Ms. Baker’s learning disability when providing her services. 4/16/18 Tr. at 7:8–11. For the second time, the court ordered

DHHS to “closely monitor and provide mom with specialized services in accordance with any learning disability assessed.” *Id.* at 8:4–5.

But, again, there was no follow-up from DHHS. Seeing no action after another three months had passed, in July 2018, Ms. Baker’s attorney stated for a second time, “if the Court recalls, my client does have a learning disability.” 7/13/18 Tr. at 6:10–11. When reminded by the court of the post-trial order, DHHS stated the learning disability has always been “self-reported” and agreed Ms. Baker needed to “complete[] a psychological.” *Id.* at 6:18–22. DHHS representatives made no other statement about the steps they would take to address Ms. Baker’s learning disability.

DHHS referenced Ms. Baker’s learning disability twice more in the following months at court hearings, but only to note it had “no documentation of any learning disability.” 12/10/18 Tr. at 4:18–19; see also 9/14/18 Tr. at 4:19–21. No statements were made about the court order, the psychological evaluation, or any steps DHHS was taking to accommodate Ms. Baker’s disability. Over the remaining course of Ms. Baker’s case, the only mention of any effort by DHHS to accommodate her disability came from her caseworker. When asked whether DHHS provided any specialized services, she stated: “what I do for her is communicate through text messages so she always has the document

of what our conversation was.” 7/1/19 Tr. 29:17–18. She did not name any other services or accommodations DHHS provided.

### **DHHS Prevented Ms. Baker from Continuing to Work With Her Original Service Provider**

In addition to its failure to evaluate Ms. Baker’s disability or create a specialized plan for her, DHHS also did little to support her work with a service provider she had identified on her own. Prior to any court order in this case, Ms. Baker had sought out help in addressing her health challenges on her own initiative: she enrolled in psychiatric treatment, substance abuse therapy, and individual therapy from a provider called Team Wellness. 7/26/19 Tr. at 19:4–8. By January of 2018, she had submitted to DHHS a psychiatric evaluation, which contained diagnoses of major depressive disorder and bipolar disorder. 1/10/18 Psychiatric Evaluation. The evaluation contained recommendations and referrals for outpatient services and psychotropic drugs. *Id.* Ms. Baker additionally submitted a letter from Team Wellness verifying she had been receiving services there. 1/19/18 Team Wellness Center Letter. The letter stated that she saw each member of her care team at least once a month, and that her services included psychiatric services, therapy, care coordination, and peer support. *Id.* The letter further stated she had been compliant with all program rules and expectations. She also received random drug screens at Team Wellness. 4/16/18 Tr. at 6:25–7:1.

As instructed by a court order, shortly after receiving her treatment plan in this case Ms. Baker provided a release so DHHS could obtain information regarding her treatment from Team Wellness. *Id.* at 6:22–23. This compliance, along with Ms. Baker’s participation in the psychological evaluation and willingness to have her home assessed to determine whether it was suitable for her children, led the court to find she was making good progress toward her goals in March 2018, less than a year after the initial DHHS petition. *Id.* at 20–21.

But a short time later, DHHS stated it had “not been able to get that documentation” from Team Wellness regarding Ms. Baker’s treatment services, and that without that documentation they “can’t say she’s in compliance.” 9/14/18 Tr. at 5:7–17. When asked about her efforts to obtain this documentation, Ms. Baker’s caseworker only stated, “I’ve had conversations with [Team Wellness] but nothing in writing.” 7/1/19 Tr. at 30:24. When DHHS was unable to obtain information from Team Wellness, its response was to present two paths forward: either Ms. Baker would get the documentation herself, or the court would re-refer for services through a different DHHS-approved provider. 9/14/18 Tr. at 5:12–14. DHHS did not offer to make efforts to obtain the documents itself. Rather, the caseworker put the burden of this change on Ms. Baker, stating she would need to “refer

[Ms. Baker] for additional services” in order to achieve compliance because “[Ms. Baker] wasn’t providing the documentation.” 7/1/19 Tr. at 30:15–19; 7/26/19 Tr. at 18:22.

The court chose to order re-referrals for services in September 2018. *Id.* at 10:10–11. Ms. Baker’s understanding of her obligations from her caseworker at this point was that she needed to quit Team Wellness services and only attend a DHHS-approved service provider. 7/16/19 Tr. at 12:15–24. She therefore stopped regularly attending Team Wellness in late 2018. *Id.* Despite the court-ordered referral, there was a period of several months where Ms. Baker was not receiving any services. DHHS claimed services “could not even start” because it was not able to contact Ms. Baker at her address. 3/18/19 Tr. at 5:10–2. Yet Ms. Baker’s attorney informed the court that Ms. Baker had lived at the same address for six years and had not received any referrals at that address. *Id.* at 7:7–10. The court found Ms. Baker was not making progress toward her goals and, in March 2017, once again ordered re-referrals for services. *Id.* at 7:7–10. These services started in April 2019. 7/1/19 Tr. at 31:15. DHHS later referenced these re-referrals for services as evidence of non-compliance with services. 7/26/19 Tr. at 24.

**DHHS Did Not Provide Ms. Baker Services She Required to Reunify with her Children**

One allegation in DHHS’s original petition, and an ongoing DHHS claim during the case, was that Ms. Baker did not have a proper home for her children. In July of 2018, Ms. Baker asked for a home assessment in order to demonstrate she had suitable housing for her children. 7/10/18 Court Report. DHHS claimed that it did not have an address for Ms. Baker. 7/13/18 Tr. at 4:10–11. Yet the house she wanted assessed, [XXX] St. in Ecorse, was one where she had been living for six years, and where her children had been living with her prior to DHHS involvement. 7/16/19 Tr. at 9:17–10:9. DHHS was aware of this address: it listed [XXX] St. when it filed the petition in this case. 5/22/17 Authorized Petition. DHHS also stated prior to termination that Ms. Baker had been “served by certified mail,” and that this service of process was successful. 7/1/19 Tr. at 3:19–20. Lastly, a DHHS-recommended provider had been visiting Ms. Baker at her home to provide therapy services for four to five months. 7/16/19 Tr. at 11:25–12:14. Nonetheless, a year after she originally asked, Ms. Baker’s home had still not been assessed. *Id.* at 13:10–12.

The trial court specifically noted that a home assessment should have been done. In July 2019, when it learned DHHS had never bothered to do a home assessment, the court again ordered DHHS to do the assessment. The court even commented, “you’d think that a home assessment would be part of reasonable efforts.” *Id.* at 13:15–17.

Ms. Baker's case was then taken over by a new worker, who finally assessed her home less than two weeks before her parental rights were terminated. 7/26/19 Tr. at 5:11–23. During the assessment, her landlord verified she had been living there for six years. *Id.* at 8:14–18. The DHHS worker found Ms. Baker's home was suitable for her children. *Id.* at 9:3–4.

After Ms. Baker stopped attending Team Wellness, DHHS required her to attend a new facility for random drug screens. DHHS made little effort, however, to assist Ms. Baker with getting to those screens. In April 2017, Ms. Baker's attorney informed the court that Ms. Baker did not have access to reliable transportation, and that the DHHS facility was "quite a distance away." 4/16/18 Tr. 7:3–4. In at least two subsequent reporting periods, Ms. Baker missed all of the drug tests scheduled for her. See 7/13/18 Updated Court Report at 2–3; 9/10/18 Updated Court Report at 3. However, each time Ms. Baker took a random drug test in court the tests came back negative, including one she took on the day of the order to DHHS. 7/13/18 Tr. at 7:3–4; 7/26/19 Tr. at 9:19–23. At trial, though, DHHS characterized her missed drug tests as evidence she was still abusing drugs, and argued Ms. Baker was in "substantial non-compliance" with her treatment plan because she did not attend all of her services. See 7/26/19 Tr. at 23:13–16, 22:11–24:6.

## **Despite Little Change to the Children and Little Help from DHHS, the Court Terminated Ms. Baker's Parental Rights**

DHHS renewed its petition to terminate in April 2019, and a second trial regarding termination of Ms. Baker's and Mr. Little's parental rights began in July of that year. At the 2019 trial, testimony made it clear Ms. Baker continued to have a strong bond with each of the children. 7/1/19 Tr. at 22:9. Her visits with her children were always appropriate, and the caseworkers who supervised Ms. Baker's visits with her children testified MB, KB, and AB enjoyed seeing her. *Id.* at 31:22–24; 32:3–6.

Despite AB's continuing bond with her mother, however, DHHS and the caseworkers attempted to portray AB as having completely changed her mind about whether she wanted to be adopted. But their accounts were at times contradictory and ambiguous. Ms. Morris, AB's caseworker, testified AB had told her "she want[ed] to be a Knight, which is the foster parents' last name." 7/1/19 Tr. at 36:5. The L-GAL stated "[AB]'s indicated to me that she wants to live with Mr. and Mrs. Knight permanently. She wants to be adopted, she wants to be a part of a family." 7/26/19 Tr. at 25:1–26:2. But at the same time, when asked what AB's wishes were "regarding parental rights," the family's caseworker Ms. Crook stated, "At the time we spoke, she was not willing to provide me with an answer as to whether or not she wanted her mother's parental rights terminated." 7/1/19 Trial at 22:24–25.

The record even suggests DHHS employees had made efforts since the previous trial to get AB to change her answer about her preferences. During the second day of trial, Ms. Baker testified AB had told her several weeks prior that “they [the caseworker and foster care parents] was trying to get her to say that she wanted to be adopted,” but that it “didn’t matter” to AB, because she knew, “no matter what,” she would be able to have a relationship with both Ms. Baker and Ms. Knight. 7/6/19 Tr. at 11:6–7; 11:11–16. Then, during the final day of trial, Ms. Baker reported AB had been telling her she was “feeling pressure to say she wants to be adopted,” and AB had told her that “Ms. Crook, Ms. Knight and Latasha Morris, the other worker, all three were talking to her trying to get her to say something and she said, no, mom, I’m not going to say that unless such and such...” 7/26/19 Tr. at 10:25–11:11; 13:14–16. But despite all of this pressure from the workers, AB told Ms. Baker the day before the final day of trial that she wanted to continue to have a relationship with her and “she would—she really does want to come home.” *Id.* at 10:13–15.

It was also unclear whether AB was fully informed about the range of possibilities for future arrangements, since it did not appear anyone had discussed guardianship with her. Ms. Crook stated she had not discussed the possibility of guardianship with anyone, including AB or her caseworker Ms. Morris. 7/1/19 Tr. at 29:1–2. Ms. Morris

provided contradictory testimony that she had discussed guardianship, and that AB said no to it. 7/1/19 Tr. at 39:1–40:24. When asked how she knew AB wanted to be adopted instead, Ms. Morris stated, “her direct response is, she wants to be a Knight, which is the foster parents’ last name.” 7/1/19 Tr. at 36:5. Yet Ms. Baker testified AB wanted a relationship with both her and Ms. Knight, and that it didn’t matter to her whether she was adopted. 7/16/19 Tr. at 11:11–17.

In contrast to the extensive testimony regarding AB’s preferences, no one testified they had ever asked MB and KB about their preferences. MB and KB were still in a relative placement with their great-aunt, Ms. Little, at the time of the 2019 trial. At the start of the trial, no one had discussed guardianship with Ms. Little. The court ordered the parties to “explore” the “viability of guardianship” for MB and KB between the first and second trial dates in July 2019. 7/1/19 Tr. at 41:19–20. However, even after this order, DHHS continued to discuss adoption as if it were the only real option. The family’s caseworker, for instance, testified that “based on their ages,” adoption was a more realistic permanency plan than guardianship for the boys. 7/16/19 Tr. at 5:5–6. Neither she nor anyone else gave any other reason guardianship was inappropriate despite the fact that each of the children’s placements were stable as-is. In fact, Ms. Crook testified that “[i]f the Court were to grant [Ms. Baker] additional time to

complete her plan,” none of the children’s placements would be “in danger.” 7/1/19 Tr. at 32:17–20.

During the trial, Ms. Baker also reported a positive development in her ability to care for her children. Shortly before the second day of trial she received a lump sum of about \$24,000 to her bank account through Supplemental Security Income. 7/16/19 Tr. at 7:3–15. This lump sum was to correct for benefits the Social Security Administration had withheld from Ms. Baker since December 2016 while it investigated a potential overpayment issue. 7/5/19 Social Security Benefits Letter. This letter also confirmed her Supplemental Security Income payments of \$746 per month would begin again starting in August 2019. Ms. Baker planned to use the lump sum and disability payment money to support her children. 7/16/19 Tr. at 7:18. She also spoke about past instances where she had supported her children through money, gifts, and helping them buy clothes as needed seasonally. *Id.* at 7:20–8:23. She viewed this income as a means to access her services—for example, the money would alleviate her transportation challenges and allow her to “get herself to drug screens.” 7/26/19 Tr. at 27:3–4. DHHS did not ask the court for time to consider how this information might change their approach. No one from DHHS referenced the money or asked Ms. Baker any questions about it.

In the end, despite the fact that nothing about any of the children's placements had changed, and despite all the evidence that DHHS had cut off Ms. Baker's work with Team Wellness, failed to obtain assessments about her learning disability or her home, and offered no specialized services for her, the court terminated Ms. Baker's parental rights. The court found statutory grounds to terminate Ms. Baker's parental rights under MCL 712A.19b(3)(c)(i), (g), and (j). 7/26/19 Tr. at 30:18–19. The court also found it was in the best interests of all three children to terminate Ms. Baker's parental rights. The court stated, "these children need and deserve the stability and permanence of adoption, and AB has expressed that she wishes to be adopted." 7/26/19 Tr. at 31:23–25.

## ARGUMENT

### **I. DHHS did not make reasonable efforts to reunify the family and avoid termination of Ms. Baker's parental rights.**

#### *Standard of Review*

A trial court's decision to terminate parental rights is reviewed for clear error. MCR 3.977(J); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). A decision is clearly erroneous when, "although there is enough evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209–10; 661 NW2d 216 (2003).

#### *Argument*

DHHS failed to make reasonable efforts toward Ms. Baker when it did not accommodate her disability and when it refused to be flexible about the services in which she could enroll. DHHS has a duty to make "reasonable efforts to reunify the child and family." MCL 712A.19a(2). Reasonable efforts must include an effort by DHHS to make sure "services are tailored to meet each client's needs," as well as an effort to tailor state support in pursuit of successful service completion in a way that "recognize[s] the unique aspects of each case." MDHHS Services Requirements Manual 101 at 2. Here, DHHS failed to make reasonable efforts toward Ms. Baker in two separate ways. First, it

failed to provide services to accommodate her learning disability as required by the Americans with Disabilities Act (ADA). Second, it failed to be flexible regarding her service delivery when it refused to help her continue with a service provider (Team Wellness) with whom she was making progress. These failures to provide reasonable efforts created barriers that prevented Ms. Baker from successfully completing her service plan and led directly to the court's decision to terminate. They therefore merit reversal of the trial court's decision.

**A. DHHS failed in its duty under the ADA to provide accommodations for Ms. Baker's disability.**

DHHS failed in its duty under the ADA when it did not provide Ms. Baker with accommodations for her learning disability. The ADA creates a "statutory obligation[] to reasonably accommodate [a parent's] disability." *In re Hicks/Brown*, 500 Mich 79, 90; 893 NW2d 637 (2017). In order to reasonably accommodate a disability, DHHS must make "reasonable modifications to the services or programs offered to a disabled parent." *Id.* at 86. DHHS's failure to do so is in turn a failure of its basic obligations under the Probate Code: "[a]bsent reasonable modifications to the services or programs offered to a disabled parent, the Department . . . [has] failed in its duty to make reasonable efforts at reunification under MCL 712A.19a(2)." *In re Hicks/Brown*, 500 Mich at 86. In *Hicks*, the parent was an "intellectually disabled person" with two children. *Id.* at 82. After her

attorney argued that “the services offered by the Department did not sufficiently accommodate her client’s intellectual disability,” the court ordered DHHS to provide the requested individualized services. *Id.* at 89. But DHHS “failed to provide the specific services the court had ordered to accommodate” her disability, and instead only offered a generic service plan as it would to any other parent. *Id.* at 90. The court found that was not enough: “efforts at reunification cannot be reasonable . . . unless the Department modifies its services as reasonably necessary to accommodate a parent’s disability. And termination is improper without a finding of reasonable efforts.” *Id.*

The obligation to provide accommodations begins as soon as DHHS is put on notice. “Once the Department knew of the disability, its affirmative duty to make reasonable efforts at reunification meant that it could not be ‘passive in [its] approach . . . as far as the provision of accommodations is concerned.’” *In re Hicks/Brown*, 500 Mich at 87–88. The standard for notice to DHHS regarding accommodations is low: “[t]he client is not required to use specific words or phrases such as reasonable accommodations, ADA, or disability to prompt [a DHHS] employee’s obligation to record, consider, and provide a reasonable accommodation.” MDHHS Non-Discrimination in Service Delivery at 6.<sup>2</sup> In *Hicks*, the parent’s attorney asked DHHS for services that would

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<sup>2</sup> [https://www.michigan.gov/documents/dhs/Non-Discrimination\\_in\\_Service\\_Delivery\\_410968\\_7.pdf](https://www.michigan.gov/documents/dhs/Non-Discrimination_in_Service_Delivery_410968_7.pdf)

provide support for her client's disability during a hearing. *In re Hicks/Brown*, 500 Mich at 89. The court found this to be sufficient notice to trigger DHHS's obligations to provide accommodations. *Id.*

Here, DHHS had the requisite notice that Ms. Baker had a disability and needed accommodations. They were informed about her disability multiple times, through more than one channel of information. When asked about her learning disability at the 2017 trial, Ms. Baker described that she has had this disability "most of [her] life" and that it "interfere[s] with [her] ability to remember dates accurately." 11/20/17 Tr. at 22:14–20. DHHS had more detailed documentation of her disability from her 2013 case: Ms. Baker had previously explained that she "received special education services for her learning disability" and she "stopped attending school regularly in 8<sup>th</sup> grade in part because she was embarrassed by her learning issues." 8/8/13 Clinic for Child Study Report on the Evaluation of Krista Baker at 6–7. Her attorney later voiced support for the court's decision to order an assessment regarding special accommodations because "[Ms. Baker] testified that she has a learning disability." 1/22/18 Tr. at 30:6–7. Importantly, DHHS does not contest it was on notice. DHHS noted at a later Permanency Planning Hearing, "it's always been self-reported that mother had a learning disability." 7/13/18 Tr. at 6:21–22.

Ms. Crook also confirmed at the termination trial that Ms. Baker had told her about her learning disability. 7/26/19 Tr. at 29:5–6.

Yet DHHS never provided the necessary accommodations for Ms. Baker’s disability. Specifically, DHHS failed to follow two court orders directing it to obtain more information about her disability. The trial court first ordered a psychological evaluation in January 2018 that was “to include assessment as to mother’s need for special accommodations and services pursuant to ADA.” 1/31/18 Order of Disposition at 4. Three months later, Ms. Baker’s attorney reminded the court about the order, noting that, “I don’t know that her learning disability has been taken into account . . . in terms of altering the way and the manner in which these services are offered . . . but I’d ask that [DHHS] do so.” 4/16/18 Tr. at 7:8–11. At the close of this hearing, the court again ordered the department to “closely monitor” the results of the psychological report and “provide mom with specialized services in accordance with any learning disability assessed.” *Id.* at 8:4–6. The court echoed this point in its order, noting “Mother recently had a psychological evaluation, which should evaluate whether mother does have a learning disability requiring special ... services.” 4/17/18 Order of Disposition at 4.

However, DHHS never provided any report, evaluation, or diagnosis relating to Ms. Baker’s disability, nor did it ever indicate it

had learned more about her disability or attempted to design services around it. Five permanency planning hearings were held over the course of the next year, and there is no evidence from any of these hearings showing DHHS followed the court's orders, or DHHS subsequently acted upon any information it gained to modify Ms. Baker's treatment plan. See generally 7/13/18, 9/14/18, 12/10/18, 3/8/19, 4/15/19 Trs.

The single line of testimony from Ms. Baker's caseworker, at the termination trial, about how she dealt with Ms. Baker's disability does not suffice as proof of reasonable efforts. When Ms. Baker's attorney asked whether DHHS was providing specialized services for Ms. Baker to account for her learning disability, Ms. Crook could only offer "what I do for her is communicate through text messages so she always has the document of what our conversation was." *Id.* at 29:17–18. Ms. Crook did not articulate why she chose this strategy or how she felt it would help Ms. Baker with her learning disability. She did not name any other services or accommodations DHHS provided to help Ms. Baker.

DHHS attempted to sidestep its duty by shifting the burden to Ms. Baker to provide more information about her disability. Five months after the court's second order to accommodate Ms. Baker, DHHS opened a hearing by stating, "we've never gotten any

documentation from mother of this learning disability or where she's been diagnosed with a learning disability." 9/14/18 Tr. at 4:20–21. DHHS repeated this call for documentation from Ms. Baker at the next hearing. 12/10/18 Tr. at 4:16–21. When questioned about providing services to accommodate Ms. Baker's disability, Ms. Crook confirmed that from DHHS's perspective, the onus was on Ms. Baker to provide information: "[o]n several occasions I've requested any type of medical documentation that she could give." 7/1/19 Tr. at 29:5–12.

But if DHHS required more documentation, it was its responsibility to obtain it or work with Ms. Baker to obtain it. The MDHHS Non-Discrimination in Service Delivery Manual states that if a client requests an accommodation but "documentation of a disability is required," caseworkers have an affirmative obligation to "assist the individual in obtaining that documentation when possible." MDHHS Non-Discrimination in Service Delivery at 5. Specifically, if a client is "unable to get the documentation without help as a result of a disability," reasonable efforts to accommodate must include "making arrangements for a medical examination, making a request for documentation if the client is unable to do so or medical providers are unresponsive to client requests, etc." *Id.* at 7.

Ms. Baker's records and her repeated assertions that she had a learning disability triggered DHHS's duty to accommodate her under

the ADA. By not subsequently taking affirmative steps to obtain and act on documentation regarding her disability, and by mischaracterizing the burden to provide documentation as being on Ms. Baker, DHHS failed to accommodate her disability, and therefore failed to make reasonable efforts towards reunification.

**B. DHHS was not sufficiently flexible with Ms. Baker's service plan and its support of her successful completion of treatment.**

DHHS also did not meet its mandate to put forth reasonable efforts towards reunification when it failed to permit Ms. Baker to continue receiving services from Team Wellness, a provider she had chosen on her own and with whom she was working well. As noted above, part of DHHS's reasonable efforts obligation is a duty to make sure "services are tailored to meet each client's needs." MDHHS Services Requirements Manual 101 at 2. This stems from the idea that services should be designed in a way that addresses that specific parent's needs and the "unique aspects of each case." *Id.*

Yet here, DHHS was notably inflexible in its provision of services to Ms. Baker, making no effort to tailor a plan to her. First, it made virtually no efforts to work with the service provider Ms. Baker had sought out herself. Before the trial court ever ordered her to obtain services, Ms. Baker had already self-referred to Team Wellness. 7/26/19 Tr. at 19:4–8. Team Wellness could provide her with

psychiatric care, something recommended for her in earlier termination proceedings. 8/8/13 Clinic for Child Study Report on the Evaluation of Krista Baker at 11. Team Wellness verified that she was successfully receiving services there, including psychiatric services, therapy, care coordination, and peer support, as well as random drug screens. See 1/19/18 Team Wellness Center Letter; 4/16/18 Tr. at 6:25–7:1. She saw each member of her care team at least once a month and was compliant with all program rules and expectations. 1/19/18 Team Wellness Center Letter.

But DHHS refused to accept Ms. Baker’s work with Team Wellness as an indication of successful compliance with her service plan, based on its difficulty obtaining reports from Team Wellness. This was not due to any failure by Ms. Baker; in fact, the court ordered Ms. Baker to provide a signed release authorizing Team Wellness to hand over documentation regarding the services she was receiving to DHHS. 7/1/19 Tr. at 15:18–21. She did this in 2018, early on in her treatment plan. *Id.* This is where progress stalled. DHHS never obtained Ms. Baker’s records from Team Wellness. Ms. Crook “had conversations with them, but nothing in writing.” 7/1/19 Tr. at 30:23. Ms. Crook told Ms. Baker in early 2019 that she would need to “refer her for additional services” in order for Ms. Baker to achieve compliance. 7/1/19 Tr. at 30:15–19. The caseworker put the burden of

this change on Ms. Baker, stating she needed to engage in other services in part because “she wasn’t providing the documentation.” 7/26/19 Tr. at 18:22.

Ms. Baker’s perception of this back-and-forth was that she was being ordered to quit Team Wellness services and only attend a DHHS-approved service provider. 7/16/19 Tr. at 12:15–24. She therefore stopped regularly attending Team Wellness in late 2018. *Id.* However, DHHS never gave Ms. Baker any information or choices about what agency-approved provider might be a good fit for her needs. Ms. Baker had sought out Team Wellness because it offered psychiatric care. In making a new referral, however, Ms. Crook recited DHHS policy that “we don’t do referrals for psychiatric cared [sic]” and sent her to providers that only provided individual and substance abuse therapy. 7/1/19 Tr. at 16:5. This unwillingness to be flexible even after Ms. Baker followed DHHS instructions and discontinued her previous services represents a failure to make reasonable efforts towards reunification.

**C. DHHS’s lack of reasonable efforts led directly to the termination of Ms. Baker’s parental rights, and thus merits reversal.**

DHHS’s failure to make reasonable efforts to reunite Ms. Baker with her children requires this Court to reverse the order terminating her parental rights. The trial court found statutory grounds to

terminate Ms. Baker’s parental rights under MCL 712A.19b(3)(c)(i), (g), and (j). 7/26/19 Tr. at 30:18–19. But meeting statutory grounds under any of these sections requires a showing not just that Ms. Baker has failed to provide proper care, but will be unable to do so in the future. To justify termination of parental rights under (c)(i), the court had to find “there is no reasonable likelihood that the conditions will be rectified within a reasonable time.” MCL 712A.19b(3)(c)(i). Under (g), the court had to find “there is no reasonable expectation that [Ms. Baker] will be able to provide proper care and custody within a reasonable time.” MCL 712A.19b(3)(g). Under (j), the court had to find “a reasonable likelihood, based on the conduct or capacity of the child’s parent, that the child will be harmed if he or she is returned to the home of the parent.” MCL 712A.19b(3)(j).

But when DHHS fails to first meet one of its basic statutory obligations—in this case, providing reasonable efforts—a finding on any of these grounds is premature because “there is a ‘hole’ in the evidence on which the trial court based its termination decision.” *In re Rood*, 483 Mich 73, 127; 763 NW2d 587 (2009) (Young, J., concurring in part). Ms. Baker did not have a fair opportunity to receive services and benefit from them, and thus the trial court could not properly assess her future ability to provide a safe and caring home for her children.

This “hole” in the evidence was broadened when DHHS and the court both refused to acknowledge Ms. Baker’s receipt of a significant sum of money through Supplemental Security Income. Between the first and second days of the termination trial, she received about \$24,000 to her bank account to correct for improperly withheld benefits. 7/16/19 Tr. at 7:3–15; 7/5/19 Social Security Benefits Letter. It was also confirmed that Ms. Baker’s Supplemental Security Income payments of \$746 per month would begin again starting in August of 2019. *Id.* Ms. Baker planned to use the lump sum and disability payment money to support her children. 7/16/19 Tr. at 7:18. These funds would have also helped her access her services—for example, the money would alleviate her transportation challenges and allow her to “get herself to drug screens.” 7/26/19 Tr. at 27:3–4. But DHHS did not ask the court for time to consider how this information might change its approach towards reunifying her family, and the court did not acknowledge the funds in its finding of statutory grounds to terminate Ms. Baker’s rights. Without more information, it was premature for the court to conclude that Ms. Baker would not be able to meet the requirements of MCL 712A.19b(3)(c)(i), (g), and (j).

DHHS also cannot “deliberately take[] action with the purpose of ‘virtually assur[ing] the creation of a ground for termination of parental rights,’ and then proceed to seek termination on that very

ground.” *In re B & J*, 279 Mich App 12, 20; 756 NW2d 234 (2008). In *B & J*, DHHS reported the parents to authorities because they were unauthorized immigrants, causing the parents to eventually be deported to Guatemala. *Id.* at 15. After a caseworker was “unable to find any services for [the parents] in their native country,” DHHS argued, and the trial court agreed, the parents could not provide proper care and custody and their rights could be terminated. *Id.* at 16–17. But the condition upon which the parents’ rights were terminated—their inability to provide proper care and custody given that they were in Guatemala with no access to services—had been created by DHHS’s own actions, a situation in which the court found DHHS “was not entitled to seek termination of respondents’ parental rights.” *Id.* at 19.

Here, DHHS’s failures to make reasonable efforts were eventually held against Ms. Baker as reasons to terminate her parental rights. First, DHHS’s failure to accommodate her learning disability contributed to her lack of compliance with the service plan. DHHS argued Ms. Baker was in “substantial non-compliance” with her treatment plan because she did not attend all of her services. See 7/26/19 Tr. at 22:11–24:6. But Ms. Baker noted her disability makes it difficult for her to remember dates accurately. 11/20/17 Tr. at 22:14–20. DHHS never made accommodations for Ms. Baker’s disability, and

accommodations would have helped her get access to more services as a part of her plan.

Second, despite indications that Ms. Baker was participating in and benefitting from services at Team Wellness, DHHS's failure to obtain information from Team Wellness morphed into claims from DHHS that Ms. Baker was not addressing her problems. 7/26/19 Tr. at 23:13–16 (“She missed . . . screens. No explanation for the missed screens. It shows that for all we know, if you’re missing screens, we don’t know what type of substance you’re using, so that’s a red flag for the Department.”). But DHHS had access to the necessary releases to obtain documentation from Team Wellness, and reasonable efforts on its part to obtain the documents would have helped the trial court to accurately assess her progress in treating any alleged substance abuse issues.

Finally, cutting off Ms. Baker from services at Team Wellness also led to reduced compliance when new services were offered that did not meet her needs. At Team Wellness, Ms. Baker received psychiatric services, therapy, care coordination, and peer support, as well as random drug screens. See 1/19/18 Team Wellness Center Letter; 4/16/18 Tr. at 6:25–7:1. She saw each member of her care team at least once a month and was compliant with all program rules and expectations. 1/19/18 Team Wellness Center Letter. Unfortunately,

there were hiccups after Ms. Baker left Team Wellness, with two re-referrals and a period of missed services before Ms. Baker became regular with another service provider. 7/26/19 19:17–19. DHHS penalized her for difficulties in complying with new providers and held the re-referrals issued against her. *Id.* at 24 (“The substance abuse services; she had been referred a couple times, been terminated.”). This inferred non-compliance became a key fact in the court’s eventual finding of termination. *Id.* at 31 (“[A]buse of substances is a major factor in this case. The parents have not addressed their substance abuse issues . . . [they] haven’t participated adequately in the substance abuse services, mental health services.”). The trial court improperly terminated Ms. Baker’s parental rights when a cumulative lack of reasonable efforts on DHHS’s part led to the grounds cited for termination.

**II. The trial court erred in finding it was in the best interests of AB, MB, and KB to terminate Ms. Baker’s parental rights.**

*Standard of Review*

A trial court’s decision to terminate parental rights is reviewed for clear error. MCR 3.977(J); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). A decision is clearly erroneous when, “although there is enough evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a

mistake has been made.” *In re JK*, 468 Mich 202, 209–10; 661 NW2d 216 (2003).

### *Argument*

The trial court also erred in finding it was in MB, KB, and AB’s best interests to terminate Ms. Baker’s parental rights. A court may only order termination of parental rights after it has found both statutory grounds for termination and that termination is in the child’s best interests. MCL 712A.19b. The trial court must find termination of parental rights is in the child’s best interests by a “preponderance of evidence on the whole record.” *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014).

Here, the trial court erred in finding it was in the children’s best interests to terminate Ms. Baker’s parental rights in three ways. First, the trial court failed to approach the best interests inquiry individually for each child. Second, even if the court had met its obligation to individualize its inquiry, the record does not support a finding of best interests, because each of the children had a bond with Ms. Baker, MB and KB were in a relative foster care placement, and AB did not clearly express a preference that she be adopted. Third, there was a less restrictive alternative means—namely, guardianship—to achieve the protections the court and DHHS sought, and the court’s failure to

adequately consider that alternative violated Ms. Baker’s due process rights and Supreme Court precedent.

**A. The trial court failed to conduct individualized best interests inquiries for each of the children.**

The court was required, but failed, to individualize its best interests inquiry for each child. The court instead made AB, KB, and MB subject to one overarching best interests inquiry. “[T]he trial court has a duty to decide the best interests of each child individually” when determining whether termination of parental rights is in that child’s best interests. *In re Olive/Metts*, 297 Mich App 35, 42; 823 NW2d 144 (2012). To that end, it must address significant differences between the interests of the children when making its determination of each child’s best interests. *In re White*, 303 Mich App at 715–16.

Here, the trial court failed to meaningfully evaluate each child’s needs and circumstances on an individualized basis, despite the fact MB and KB were situated quite differently from AB. First, while AB was in nonrelative foster care placement, KB and MB were placed with a relative. 7/1/19 Tr. at 35:6–7; 7/16/19 Tr. at 4:9–12. Second, while the record suggested AB may have become more open to the possibility of adoption over time, her brothers’ relationship with and feelings toward their mother did not change. There was never any dispute that MB and KB continued to “love their mother,” to be excited to see her in

visits, and to be strongly bonded to her in general. 7/26/19 Tr. at 25:22; 7/1/19 Tr. at 32:3–4.

Despite these differences, the court dealt with the three children all together. This is best evidenced by the way in which the change in the court’s perception of AB’s preferences led to a completely different finding for best interests for all three children. During the 2017 trial, the L-GAL requested the court find, based on his conversations with AB, that termination was not in her best interests. 11/20/17 Tr. at 16:4–6. The court then found termination was not in any of the children’s best interests, based on MB and KB’s placement with a relative (which the court specifically noted “weighs against termination”) and on “the children’s bonds, especially AB’s bond with her mother and her wish that her rights not be terminated.” 1/22/18 Tr. at 25:11–16.

Between the 2017 and 2019 trials, nothing changed about MB and KB’s placement or circumstances or their bond with their mother. Yet at the end of the 2019 trial, the court found it was in their best interests to terminate Ms. Baker’s parental rights. 7/26/19 Tr. at 31:23–25. The only thing that changed between the two trials was that the court found AB might have changed her mind about wanting to be adopted and wanting her mother’s rights to be terminated. Unlike in the first trial, during the second trial, for instance, the L-GAL told the

court it was now “in AB’s best interest that her parents’ rights be terminated,” since he believed she had changed her mind and now wanted to be adopted. 7/26/19 Tr. at 25:15–16:7. Even though this potential change did not bear at all on MB and KB’s placement or their circumstances, the court found it was in *all three* of the children’s best interests that their mother’s parental rights be terminated. This finding was impermissible, based on the court’s failure to assess the children’s interests individually.

**B. The evidence is insufficient to support a finding it was in the children’s best interests to terminate Ms. Baker’s parental rights.**

Even if the court had sufficiently individualized the best interests inquiry for each child, a finding of best interests was contrary to the evidence at trial. The trial court must weigh all available evidence before concluding termination is in a child’s best interests. *In re Payne/Pumphrey/Forston*, 311 Mich App 49, 63; 874 NW2d 205 (2015). In particular, the court must consider evidence of “the child’s bond to the parent.” *Id.* at 63; *In re Keillor*, 325 Mich App 80, 94; 923 NW2d 617 (2018). The court must also consider “the child’s views regarding the permanency plan in a manner that is appropriate to the child’s age.” MCL 712A.19a(3). It is also required to consider the fact that a child is living with relatives, because a child’s placement with relatives weighs against termination. *Olive/Metts*, 297 Mich App at 43;

*In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010); MCL 712A.19a(6)(a).

Here, the court did not properly consider these factors. There was not enough evidence to find that termination of Ms. Baker's parental rights was in MB and KB's best interests, because they continued to have a strong bond with their mother and to live with a relative. There was similarly insufficient evidence to support a best interests finding for AB, because she, too, continued to have a bond with her mother, and the evidence regarding her preferences was ambiguous.

**1. The court's finding that it was in MB and KB's best interests to terminate Ms. Baker's parental rights is contrary to the evidence.**

The trial court's finding that it was in MB and KB's best interests to terminate Ms. Baker's parental rights was contrary to the evidence because of the boys' ongoing strong bond with their mother and their placement with a relative. The record contained extensive evidence showing Ms. Baker continued to have a strong bond with both boys. Ms. Crook, who supervised MB and KB's visits with Ms. Baker, testified "[t]here's a bond" between Ms. Baker and her sons. 7/1/19 Tr. at 22:8–9; *id.* at 32:5–6. She also testified that both MB and KB were consistently excited to see their mother. 7/1/19 Tr. at 32:3–4. Ms. Baker's desire to remain involved in her children's lives remained

unchanged. She testified, for example, that even while they were in their foster care placements, she provided essentials like winter clothes and school clothes for them. 7/16/19 Tr. at 8:9–23.

The evidence also suggested MB and KB actively preferred to reunite with their mother. The counseling reports for MB<sup>3</sup> submitted to the court, for instance, consistently indicate MB missed his mother and wanted to be reunited with her. See, e.g., 3/8/18 Counseling Services Assessment and Treatment Plan Report (describing MB’s “fear and stress of not being with his immediate family—especially client’s mother”); 4/6/18 Counseling Services Assessment and Treatment Plan Report (“Client has improved in coping skills, but misses being with his family, especially [sic] his mother. . . . Client is doing well in school and also indicates that when he is sad it is because he misses his mother and family.”).

The court’s best interests finding for MB and KB also cannot be reconciled with the fact that they continued to live in a foster placement with their paternal great-aunt, Donna Little. During the first trial, the court had concluded, based in part on the fact that “MB and KB are placed with a relative which weighs against termination,” that it was not in their best interests to terminate Ms. Baker’s parental rights. 1/22/18 Tr. at 25:11–16. During the 2019 trial, nothing

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<sup>3</sup> No counseling reports for KB appear in the record.

about their placement had changed. Nonetheless, the court concluded it was in MB and KB's best interests to terminate Ms. Baker's parental rights.

When the court announced its finding, it acknowledged the fact that “[p]lacement with relatives weighs against termination.” 7/26/19 Tr. at 31:20. However, this nominal reference to the law—and to the fact that the boys were in a relative placement—was insufficient in light of the wealth of evidence showing MB and KB were still doing very well in their placement with Ms. Little. See, e.g., 4/12/18 Initial Court Report at 2 (“Ms. Little reports that MB and KB continue to do well in her care. They continue to do well in school and there are no health or behavioral concerns.”); 7/10/18 Updated Court Report at 3 (same); 12/7/18 Updated Court Report at 3 (“Ms. Little reports that MB and KB continue to do well in her care. The[y] [sic] have started the new school year. There are no health concerns. Children continue to participate in therapy.”). MB and KB's continued wellbeing in their foster placement with their great-aunt cannot be reconciled with the court's conclusion that it was in their best interests to terminate Ms. Baker's parental rights.

**2. The court's finding that it was in AB's best interests to terminate Ms. Baker's parental rights is contrary to the evidence.**

The trial court's finding of best interests for AB is also contrary to the evidence because AB continued to have a strong bond with her mother and had not clearly expressed a preference for adoption. The court relied heavily on its view that AB wished to be adopted. It ultimately found termination of Ms. Baker's parental rights to be in AB's best interests because "AB has expressed that she wishes to be adopted, and the Court is of an opinion where AB, at the age of fourteen, her opinion is taken into consideration." 7/26/19 Tr. at 31:24–32. However, the record does not sufficiently support a finding that AB did in fact wish for her mother's parental rights to be terminated—and is certainly not clear enough to support the weight the court placed on its finding.

It was undisputed throughout the trial that AB maintained a bond, and wanted a continuing relationship, with her mother. According to the testimony at trial by the caseworkers, the L-GAL, and Ms. Baker, AB consistently expressed a desire to have a relationship with *both* her mother and her foster parents. See 7/26/19 Tr. at 10:25–11:11.

In the 2017 trial, there was no ambiguity regarding AB's preferences. It was undisputed that AB did not wish to be adopted. Ms.

Morris testified AB had told her she did not wish to be adopted, nor did she want her mother's parental rights to be terminated. 11/20/17 Tr. at 55:23–24. Ms. Morris even testified AB got “upset even at the idea of” her mother losing parental rights to her. 11/20/17 Tr. at 55:21–22.

Similarly, the L-GAL stated, based on a conversation he had with AB, that he did not think termination was in her best interests. *Id.* at 16:4–6. The court's subsequent finding that it was *not* in AB's best interests to terminate Ms. Baker's parental rights was based, at least in part, on AB's unambiguous wishes.

At the second trial, in contrast, there was conflicting testimony as to whether AB wished to be adopted or not. When asked what AB's wishes were “regarding parental “rights,” Ms. Crook stated, “At the time we spoke, she was not willing to provide me with an answer as to whether or not she wanted her mother's parental rights terminated.” 7/1/19 Tr. at 22:24–25. Ms. Morris testified that when she asked AB “what she want[ed] to happen on her case,” AB's “direct response” had been that “she want[ed] to be a Knight, which is the foster parents' last name.” 7/1/19 Tr. at 35:19–36:6. AB's “direct response” to Ms. Morris's question had thus crucially *not* been that she wanted to be adopted, or wanted her mother's parental rights to be terminated. Similarly, in his closing statement at trial, the L-GAL stated, “[AB] indicated to me that she wants to live with Mr. and Mrs. Knight permanently.” The L-GAL

then offered the opinion that this meant “[s]he wants to be adopted, she wants to be a part of a family.” 7/26/19 Tr. at 25:1–26:2. By the service providers’ accounts, even when AB made specific statements that could be construed to indicate her desire to stay in her foster placement, she did so in ambiguous terms.

These ambiguous accounts of AB’s preferences were further undercut by Ms. Baker’s testimony. On more than one occasion, AB told Ms. Baker that she was being pressured to say she wanted to be adopted. During the second day of the 2019 trial, Ms. Baker testified AB had told her, several weeks prior, “they [the caseworker and foster parents] was trying to get her to say that she wanted to be adopted,” but that it “didn’t matter” to AB, because she knew, “no matter what,” she would be able to have a relationship with both Ms. Baker and Ms. Knight. 7/6/19 Tr. at 11:6–7; 11:11–16. Again, during the final day of trial, Ms. Baker testified that, in another conversation, AB told her she was “feeling pressure to say she wants to be adopted,” and that AB had told her “Ms. Crook, Ms. Knight and Latasha Morris, the other worker, all three were talking to her trying to get her to say something and she said, no, mom, I’m not going to say that unless such and such...” 7/26/19 Tr. at 10:25–11:11; 13:14–16. Despite all of this pressure from the workers, AB told Ms. Baker—the day before the final trial date—she wanted to continue to have a relationship with Ms. Baker and “she

would—she really does want to come home.” *Id.* at 10:13–15. AB also, on other occasions, told Ms. Baker she “want[ed] to be reunited with” her mother. *Id.* at 11:4–6.

It was also unclear whether AB fully understood her options and the implications of her statements. The record suggests AB was not aware of the differences between adoption and guardianship because these differences had not been explained to her. See 7/1/19 Tr. at 28:24–25; 36:11–20; 40:22–24. Ms. Morris testified that she had discussed the differences between guardianship and adoption with AB, and that AB had still expressed a desire to be adopted. 7/1/19 Tr. at 36:11–20. However, Ms. Crook had testified earlier that there had been no exploration or discussion of guardianship yet at that point. *Id.* at 28:24–25. When Ms. Baker’s attorney cross-examined Ms. Morris, she asked her about Ms. Crook’s testimony and received no response: “Q: How do you explain Ms. Crook’s testimony that the two of you never had a conversation about guardianship? A: (No response.)” *Id.* at 40:22–24. Ms. Morris did not refute the premise of Ms. Baker’s attorney’s question that no one had discussed guardianship with AB.

Since AB’s ostensible preference did not factor in the possibility of guardianship, there was not enough evidence for the court to conclude she preferred adoption by the Kings *over guardianship*. Yet this is precisely what the court concluded. It ultimately found

termination of Ms. Baker's parental rights to be in AB's best interests because "AB has expressed that she wishes to be adopted, and the Court is of an opinion where AB, at the age of fourteen, her opinion is taken into consideration." 7/26/19 Tr. at 31:24–32.

**C. The court's best interests determination was impermissible because the court failed to fairly consider guardianship for the children as an alternative to termination.**

The court failed to consider guardianship for MB, KB, and AB as an alternative to termination. This failure is impermissible for two reasons: First, the court's determination violated Ms. Baker's due process rights because the Constitution requires the state to consider less restrictive alternatives when infringing upon a fundamental liberty interest. Second, with respect to MB and KB, the court's determination conflicts with Michigan Supreme Court precedent because the court allowed DHHS to ignore guardianship as an option based solely on the boys' ages.

**1. The court’s best interests determination violated Ms. Baker’s due process rights because termination was not the least restrictive means for providing for her children’s safety and well-being.**

The trial court’s finding that it was in MB, KB, and AB’s best interests to terminate Ms. Baker’s parental rights violated federal constitutional principles, because the court failed to consider guardianship as a less restrictive alternative to termination for all three children. The Supreme Court of the United States has consistently recognized a “fundamental liberty interest of natural parents in the care, custody, and management of their child.” *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982); see also *In re Sanders*, 495 Mich 394, 415; 852 NW2d 524 (2014) (“[T]he importance of the private interest at stake here—a parent’s fundamental right to direct the care, custody, and control of his or her child free from governmental interference—cannot be understated.”). “Few consequences of judicial action are so grave as the severance of natural family ties,” *MLB v SLJ*, 519 US 102, 119; 117 S Ct 555; 136 L Ed 2d 473 (1996), and so parents’ fundamental liberty interests in the care and custody of their children “do[] not evaporate simply because [the parents] have not been model parents or have lost temporary custody of their child to the State.” *Santosky*, 455 US at 753.

Where such a fundamental right is at issue, the Fourteenth Amendment’s Due Process Clause prohibits the government from

infringing upon “liberty interests *at all* . . . unless the infringement is narrowly tailored to serve a compelling state interest.” *Reno v Flores*, 507 US 292, 301; 113 S Ct 1439; 123 L Ed 2d 1 (1993). In order to be narrowly tailored, the state’s action must be the “least restrictive means available” to achieve its interest. *Bernal v Fainter*, 467 US 216, 219; 104 S Ct 2312; 81 L Ed 2d 175 (1984). Thus, when the court infringes upon a parent’s fundamental right to direct the care, custody, and control of her children, it must choose the least restrictive means available to provide for the safety and well-being of those children.

There are, of course, times the state has a compelling interest in a child’s safety that can only be met by ordering termination and adoption. “[I]t is undisputed that the state has a legitimate and important interest in protecting the health and safety of minors. . . . But this interest runs parallel with the state’s interest in maintaining the integrity of the family unit whenever possible.” *In re Sanders*, 495 Mich at 415–16. In cases where the parent is actively inflicting harm on the child, the only way to provide for the child’s safety may be to cut off all contact. See, e.g., *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013) (citing *Santosky*, 455 US at 767 n.17). In *Moss*, for example, the parent had attempted to suffocate her youngest daughter multiple times and had brought her children with her while purchasing drugs. *In re Moss*, 301 Mich App at 90. Because of the active danger the

mother posed to her children in that case, severing the ties between mother and children was necessary to provide for the health and safety of her children. *Id.*

Here, however, these concerns are not present, and guardianship was available as a less restrictive alternative to termination. The evidence unambiguously showed AB, MB, and KB were all doing well in their respective placements, and there was no reason to believe guardianship, as opposed to adoption, would have been harmful to the children. See, e.g., 4/12/18 Initial Court Report at 2 (“Ms. Little reports that MB and KB continue to do well in her care. They continue to do well in school and there are no health or behavioral concerns.”); 7/10/18 Updated Court Report at 3 (same); 12/7/18 Updated Court Report at 3 (“Ms. Little reports that MB and KB continue to do well in her care. The[y] [sic] have started the new school year. There are no health concerns. Children continue to participate in therapy.”); 4/12/18 Updated Court Report (“The forster [sic] parents state that Ara-Tasia [sic] is doing well in school and is a joy to be around.”); 9/10/18 Updated Court Report (same); 12/6/18 Court Report at 2 (same).

There was no dispute at any point in the proceedings that Ms. Baker had a bond with each of her children. Even the L-GAL, who advocated for termination, said in his closing statement, “I know the

children love their mother.” 7/26/19 Tr. at 25:22. This bond between Ms. Baker and her children could have been preserved by placing the children in guardianships; this in turn would have protected them from the considerable trauma that severing a child’s connection with her parent causes. See, e.g., Shanta Trivedi, *The Harm of Child Removal*, 43 N Y U Rev L & Soc Change 523, 528–29 (2019) (explaining that children suffer considerable trauma when they are separated from their parents).

MB, KB, and AB’s placements were not at any risk of ending if the court did not terminate Ms. Baker’s parental rights, further suggesting termination was not the least restrictive alternative. While both Ms. Little and Ms. Knight indicated a desire to adopt the children in their care, see 7/1/19 Tr. at 28:13–19; 40:1, they would not have refused guardianship if so ordered. Ms. Morris testified Ms. Knight had indicated to her that “if [guardianship] is what the Court ordered,” she would be willing to enter into a guardianship. 7/1/19 Tr. at 40:1. And before DHHS had ever discussed the possibility of adoption with Ms. Little, she had been willing to care for MB and KB on an ongoing basis.

Despite the fact that it was clearly an option, DHHS and the court never gave guardianship any real consideration for any of the children. DHHS never even discussed the possibility of guardianship

with AB before asking her about her preferences, and then attempted to use her ostensible preference for adoption as evidence it was in her best interests that she be adopted. See 7/1/19 Tr. at 36:11–20, 28:24–25, 40:22–24; 7/26/19 Tr. at 25:1–2. Even though AB’s foster parents would have been open to guardianship, see 7/1/19 Tr. 40:1, the court never ordered a serious discussion about the possibility of guardianship at trial, and as a result, it did not sufficiently consider that option.

**2. The court defied Michigan Supreme Court precedent by basing its rejection of guardianship for MB and KB entirely on their ages.**

The Michigan Supreme Court has expressly ruled rejecting guardianship on the basis of a child’s age alone to be impermissible, yet it appears this is precisely what the court did with respect to MB and KB. The court is required to make its best interests determination “*without regard to a generalized policy disfavoring guardianship for children under the age of 14.*” *In re Timon*, 501 Mich 867, 867; 901 NW2d 398 (2017) (emphasis added); see also *In re Affleck/Kutzleb/Simpson*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2019) (Docket No. 160235) (remanding and ordering the trial court to address “whether guardianship is appropriate for [the children] as part of its best-interest determinations without regard to a generalized policy disfavoring guardianship for children under the age of 10”).

Here, however, any discussion of the possibility of guardianship for MB and KB at trial centered around their ages. MB and KB were seven and six, respectively, when Ms. Baker's parental rights were terminated. See 5/22/17 Authorized Petition. During the first day of trial, Ms. Crook admitted, "we've not discussed guardianship [with Ms. Little] due to the ages of the children." 7/1/19 Tr. at 28:20–21. During the second day of trial, Ms. Crook testified that she believed "based on [MB and KB's] ages, also that adoption is a more realistic permanency plan than guardianship is in this case." 7/16/19 Tr. at 5:5–7. The court never ordered any further exploration of guardianship.

When the court announced its findings at the end of the 2019 trial, it was clear it had not meaningfully considered the possibility of guardianship but had instead simply presumed guardianship was inappropriate based on MB and KB's ages. The court's order following trial employed circular logic to conclude that in light of the boys' ages guardianship was not appropriate for them, simply because guardianship is generally not appropriate for young children:

The children need stability and permanence, which the relative caregivers are providing for KB and MB. The relative caregivers also wish to adopt KB and MB. Adoption is in the children's best interests over guardianship due in part to their age, the parents continued instability and the negative effect it has on the children. Adoption in lieu of guardianship is in the children's best interests and the appropriate permanency plan to safeguard the children's lives, physical health and

emotional well-being. Adoption best meets these young children's need for stability, permanence and finality.

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at 4. The only explanation the court offered for choosing termination and adoption *over guardianship* was the boys' ages. When considered a Little side MB and KB's placement with a family member and their ongoing bond with their mother, the court's failure to consider guardianship for them constituted not only a violation of constitutional due process, but a clear defiance of Michigan Supreme Court precedent.

## CONCLUSION

For the foregoing reasons, this court should reverse the trial's decision to terminate Ms. Baker's parental rights.

Respectfully submitted,

CHILD WELFARE APPELLATE CLINIC

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