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STATE OF MICHIGAN

COURT OF APPEALS

In re BARBER/ESPINOZA, Minors.

FOR PUBLICATION
September 19, 2024
9:00 a.m.

No. 369359
Lenawee Circuit Court
Family Division
LC No. 23-000033-NA

Before: GADOLA, C.J., and PATEL and YOUNG, JJ.

YOUNG, J.

Respondent appeals as of right the order terminating her parental rights to her minor children, CB and ME, under MCL 712A.19b(3)(b)(*i*) (parent's act caused child or sibling sexual abuse and sexual abuse is reasonably likely to happen again), (b)(*ii*) (parent failed to prevent sexual abuse and sexual abuse is reasonably likely to happen again) and (j) (reasonable likelihood of harm). Respondent contends the trial court violated her due process rights by failing to advise her of her appellate rights and not investigating her claim of a breakdown in the relationship with her counsel. Respondent also contends that the trial court clearly erred by finding that she subjected the children to aggravated circumstances under MCL 722.638. Because the trial court committed plain error affecting respondent's substantial rights, we reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Petitioner filed a permanent custody petition that alleged it was contrary to the children's welfare to remain with respondent because of improper supervision, sexual abuse, sex trafficking, threatened harm, and drug abuse. The petition was based largely on a forensic interview with CB. At the preliminary hearing, caseworkers offered testimony about the statements CB made during the interview. CB disclosed that on two separate occasions, respondent observed adult men sexually abusing CB and failed to do anything to stop the abuse. The abuse included oral and anal penetration. CB stated that respondent allowed one of the incidents to occur in order to get drugs from the man. CB was between the ages of two and four during the first incident, and about nine years old during the second incident. CB witnessed respondent use drugs, and believed respondent abused heroin. CB suffered from substantial mental health issues for which she received treatment.

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The trial court suspended all respondent's parenting time and contact with the children after a preliminary hearing, finding that the testimony offered by the caseworkers provided probable cause to support the allegations in the petition. In a subsequent written order, the trial court authorized the petition, found that reasonable efforts to prevent or eliminate removal were not required because of aggravated circumstances involving CB's disclosures about sexual abuse, and removed the children from respondent's care, placing them with their father. At no point did the trial court inform respondent of her right to appeal its removal decision.

At the beginning of the termination hearing, respondent told the trial court that she believed her attorney was doing a poor job counseling her because he did not believe respondent was innocent. The trial court informed respondent that issues between herself and her attorney did not concern the trial court, and that she needed to address the matter with the Public Defender's Office. However, in light of the issues between respondent and her attorney, the trial court adjourned the termination hearing. When the termination hearing resumed, respondent returned with the same attorney, who continued to represent her until the conclusion of the lower court proceedings.

The trial court ultimately found statutory grounds to assume jurisdiction, and it terminated respondent's parental rights under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), and (j) after finding that respondent neglected her children, abused drugs, engaged in domestic violence against her wife, attempted suicide while in the presence of her children, and sex trafficked CB. The trial court found that termination was in the children's best interests because respondent was an unfit parent who caused the children life-long trauma; termination would provide the children with permanency, stability, and finality; and the children did well in their placement with their father. This appeal followed.

II. STANDARDS OF REVIEW

We review for clear error a trial court's factual findings in child protective proceedings. MCR 2.613(C); *In re Benavides*, 334 Mich App 162, 167; 964 NW2d 108 (2020). A finding of fact is clearly erroneous when the reviewing court has a definite and firm conviction that a mistake was made. *Id*. We review the trial court's application of statutes and court rules de novo. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

This Court's "primary task in construing a statute, is to discern and give effect to the intent of the Legislature." *In re AGD*, 327 Mich App 332, 343; 933 NW2d 751 (2019). "The words used by the Legislature in writing a statute provide us with the most reliable evidence of the Legislature's intent." *Drew v Cass County*, 299 Mich App 495, 499; 830 NW2d 832 (2013). Courts must give meaning "to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent." *Vermilya v Delta College Bd of Trustees*, 325 Mich App 416, 419; 925 NW2d 897 (2018) (quotation marks and citation omitted). When determining the meaning of a statute's plain language, this Court examines "the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme." *Kemp v Farm Bureau Gen Ins Co of Mich*, 500 Mich 245, 252; 901 NW2d 534 (2017).

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However, because respondent never raised her claims of error in the trial court, these issues are unpreserved. See *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). Unpreserved errors in child-protective proceedings are reviewed for plain error. *Id*. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011) (quotation marks and citation omitted). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Utrera*, 281 Mich App at 9; see also *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019) ("the error must have seriously affected the fairness, integrity or public reputation of judicial proceedings") (cleaned up). The party asserting plain error bears the burden of persuasion with respect to prejudice. *In re Pederson*, 331 Mich App 445, 463; 951 NW2d 70 (2020).

III. ANALYSIS

Respondent argues the trial court violated her due process rights by failing to advise her of her appellate rights and not investigating her claim of a breakdown in the relationship with her counsel. Respondent also contends the trial court clearly erred by finding that she subjected the children to aggravated circumstances under MCL 722.638. We first address respondent's claim of error regarding the trial court's aggravated-circumstances finding.

A. AGGRAVATED CIRCUMSTANCES

Respondent specifically argues that she was entitled to reunification services because " 'sex trafficking' is not a defined or listed basis for aggravated circumstances . . . ." Respondent also questions CB's credibility and argues that she never trafficked her daughter. Respondent acknowledges that she made sufficient mistakes for the trial court to take jurisdiction of the children, "such as using illegal drugs while being the[ir] primary caregiver," but argues that reunification efforts were necessary with no aggravating circumstance present. Notably, petitioner "concedes, unfortunately, that sex trafficking one's child is not considered an aggravating circumstance under MCL 722.638," but argues that the trial court nevertheless correctly determined that reunification efforts were unwarranted because "it would be detrimental to the children's wellbeing." We conclude that the trial court erred when it ruled that aggravating circumstances existed and that petitioner did not need to offer reunification services to respondent. This error was plain, and this plain error prejudiced respondent.

"Reasonable efforts to reunify the child and family must be made in *all* cases except those involving aggravated circumstances . . . ." *In re Simonetta*, 340 Mich App 700, 707; 987 NW2d 919 (2022) (omission in original; quotation marks and citation omitted). "Absent aggravating circumstances, the DHHS has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights." *Id*. (quotation marks and citation omitted).[1]

[1] To the extent petitioner argues that reunification services were unnecessary because it requested termination at the initial disposition, we disagree. See *Simonetta*, 340 Mich App at 707 n 2 ("Many opinions issued by this Court incorrectly state that the DHHS is not required to provide

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Under MCL 712A.19a(2),

> [r]easonable efforts to reunify the child and family must be made in all cases except if any of the following apply:
>
> (a) There is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in [MCL 722.638(1) and (2)].

As relevant here, MCL 722.638 states:

> (1) The department shall submit a petition for authorization by the court under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, if 1 or more of the following apply:
>
> (a) The department determines that a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling of the child and the abuse included 1 or more of the following:
>
> * * *
>
> (*ii*) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.
>
> * * *
>
> (2) In a petition submitted as required by subsection (1), if a parent is a suspected perpetrator or is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk, the department shall include a request for termination of parental rights at the initial dispositional hearing as authorized under section 19b of chapter XIIA of 1939 PA 288, MCL 712A.19b.

Here, CB alleged she was sexually abused by two of respondent's male friends, respondent was aware of this and did not act to protect CB, and respondent allowed one of these assaults to occur in exchange for drugs from the man. The trial court found that CB's allegations of abuse constituted aggravated circumstances under MCL 722.638(1) and (2), making reunification efforts unnecessary.

CB unquestionably alleged abuse via criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate. But this case is complicated because the sexual abuse was committed by an unrelated adult not living in the home, while respondent allegedly facilitated or allowed the abuse. Thus, the key question here is whether criminal sexual

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reunification services when termination of parental rights is the agency's goal.") (quotation marks and citation omitted).

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conduct against a minor child enumerated in MCL 722.638(1)(a)(ii) must be perpetrated by "a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home" to constitute an aggravated circumstance warranting termination at the initial disposition. Notably, because respondent never challenged petitioner's claim regarding aggravated circumstances in the trial court apart from questioning CB's credibility, the court never substantively addressed MCL 722.638 and whether the unique circumstance at issue is indeed contemplated as an aggravated circumstance therein.

This Court has addressed this precise question under analogous facts in two relatively recent unpublished[2] cases. This Court first decided *In re Boyce*, unpublished per curiam opinion of the Court of Appeals, issued January 23, 2020 (Docket No. 348992). *Boyce* involved a minor child's allegations that the respondent, the child's mother, "accept[ed] money to allow a 34-year-old man to have sex with [the child]." *Id*. at 1-2.

> The man in question, Oscar Edwards, admitted that he engaged in sex with the child; he denied that he paid [the] respondent, but asserted that [the] respondent was present and aware of the situation. . . .
>
> As the DHHS and police investigation unfolded, the allegations of human trafficking became more tenuous. Instead, the record suggests that [the child] was . . . troubled . . . [and] sought out older boys on the Internet. She then fell into an improper (and illegal) relationship with Edwards. As [the child] was only 12 years old, she could not consent to any sexual relationship, even one with an older teenager, and certainly not one with a 34-year-old man. Although [the] respondent had not instigated the sexual encounters, she admitted that she knew [the child] had engaged in sexual acts with several older males. [The r]espondent responsibly authorized the insertion of a subcutaneous birth control device in [the child]'s arm. However, [the] respondent failed to protect her 12-year-old daughter from the sexual predators she encountered. [The r]espondent admitted that she had met 34-year-old Edwards, but believed he was only 16 or 17 years old. She asserted in a police interview that a 16 or 17-year-old male was an "age appropriate" romantic partner for her 12-year-old daughter. And [the] respondent conceded that she left Edwards alone in her hotel room with [the child], enabling Edwards to sexually penetrate her vulnerable daughter. [*Id*. at 2 (footnotes omitted).]

The trial court found that aggravating circumstances existed and reunification efforts were unnecessary, and the respondent appealed. *Id*. at 2-3. Affirming this decision, this Court reasoned:

> On th[e] record [here], the court could easily determine that [the child] was the victim of "[c]riminal sexual conduct involving penetration" and that [the] respondent "plac[ed] the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk." Accordingly,

[2] "Unpublished opinions are . . . not binding authority but may be persuasive or instructive." *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 726 n 5; 957 NW2d 858 (2020).

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> we discern no error in the circuit court's assessment that reunification efforts were not required in this case. [*Id*. at 4.]

Therefore, while it did not discuss the statutory language in detail, *Boyce* indicates that a parent subjects a child to aggravating circumstances when the child is sexually abused by an unrelated adult living outside the home *if* the parent placed the child at an unreasonable risk of harm because of their failure to take reasonable steps to intervene to eliminate that risk. This would clearly apply where a parent actively sex traffics their own child. However, this Court more recently reached a contrary interpretation of MCL 722.638 in *In re Bergren*, unpublished per curiam opinion of the Court of Appeals, issued June 3, 2021 (Docket No. 354767).

In *Bergren*, DHHS argued in the trial court that aggravated circumstances existed and reunification efforts were not required because "[the] respondent knew his daughter had been abused and he returned her to a home where that abuse occurred, and, thereafter, he allowed the sexual abuse to continue." *Id*. at 3-4. The trial court "concluded that, even though the facts of this case do not constitute 'aggravated circumstances' for purposes of MCL 722.638(1), MCL 722.638(2) authorize[d] the court's determination that reasonable efforts to reunify [the] respondent with his child were not required in this case because [the] respondent had put the child at risk." *Id*. at 4. This Court concluded that this was legal error, reasoning as follows:

> MCL 722.638(2) requires a two-part analysis. It requires DHHS to include a request for termination of parental rights at the initial disposition if (1) the parent is the perpetrator or if the parent placed the child at an unreasonable risk of harm *and* (2) the filing of the petition is mandatory under MCL 722.638(1). The court did not appear to consider both factors but, instead, only focused on [the] respondent's role in exposing his daughter to an unreasonable risk of harm. However, according to the plain language of the statute, a petition mandated by subsection (1) is necessary in order to trigger subsection (2). Yet, the trial court acknowledged, correctly, that the facts do not bring this case within the ambit of MCL 722.638(1).
>
> As indicated above, MCL 722.638(1) requires DHHS to file a petition for authorization under MCL 712A.2 where there are any of several aggravating circumstances. In light of the facts in this case, the most relevant circumstance is MCL 722.638(1)(a)(*ii*): "Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate." . . . However, *for criminal sexual conduct involving penetration to constitute an aggravating circumstance under MCL 722.638(1), the perpetrator must be "a parent, guardian, or custodian, or person who is 18 years of age or older and who resides for any length of time in the child's home . . . .*" Where, as here, the perpetrator was less than 18 years old and is neither a parent, guardian, or custodian of the child, the conduct at issue is not an "aggravated circumstance" for purposes of MCL 722.638(1). Because a petition was not mandated under subsection (1) of MCL 722.638, subsection (2) does not apply. Accordingly, the trial court's reliance on MCL 722.638(2) as authority to support its ruling that DHHS did not have to make reasonable reunification efforts was clearly erroneous. [*Id*. at 4-5 (footnote omitted; emphasis

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added).]

As such, and contrary to *Boyce*, *Bergren* instructs that criminal sexual conduct as an aggravating circumstance must be committed by a parent or other specifically listed person in MCL 722.638(1)(a). We conclude that *Bergren* provides the proper interpretation. Critically, *Boyce* incorrectly conflates the related but distinct requirements of MCL 722.638(1) and (2), both of which must be separately satisfied to establish an aggravating circumstance warranting termination at the initial disposition. By the statute's plain language, MCL 722.638(2) requires that DHHS file for termination at the initial disposition when the parent is "suspected of placing the child at an unreasonable risk of harm because of the parent's failure to take reasonable steps to intervene to eliminate that risk" *and* the petition is mandatory under MCL 722.638(1). And MCL 722.638(1)(a) clearly contemplates abuse perpetrated by only certain limited categories of people. Indeed, allowing aggravating circumstances to apply generally to cases involving criminal sexual conduct perpetrated by anyone so long as the parent is "suspected of placing the child at an unreasonable risk of harm because of the parent's failure to take reasonable steps to intervene to eliminate that risk" would render superfluous the Legislature's clear instruction that the various categories of abuse be perpetrated by "a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home."

We note that the trial court stated at respondent's termination hearing, after its initial determination regarding aggravated circumstances, that reasonable efforts were not made because "the Court[] in the previous order determined that it would be detrimental to the children's health and safety." To the extent the court was relying on MCL 722.638(2)'s language related to a parent placing a child "at an unreasonable risk of harm" without considering that respondent herself did not engage in the sexual abuse at issue, it committed the same error as in *Bergren*.[3]

Where, as here, the perpetrators were neither a parent, guardian, or custodian of CB, and never resided with the children, the conduct at issue is not an "aggravated circumstance" for

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

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purposes of MCL 722.638(1).[4] Because a petition was not mandated under subsection (1) of MCL 722.638, subsection (2) does not apply. Accordingly, the trial court's finding of aggravated circumstances under MCL 722.638 and associated ruling that petitioner did not have to make reasonable reunification efforts were clearly erroneous.[5] Even so, reversal is only warranted if the trial court's error was plain, i.e., clear or obvious, and prejudiced respondent.

"A 'clear or obvious' error . . . is one that is not subject to reasonable dispute." *People v Randolph*, 502 Mich 1, 10; 917 NW2d 249 (2018) (quotation marks and citation omitted). We acknowledge the dearth of any published authority addressing the facts and question at issue, and indeed the conflicting unpublished authority on the matter. Nevertheless, we conclude that because our interpretation of MCL 722.638 is clearly provided by the statute's plain language and supported by a recent case from this Court, this is not an issue subject to a reasonable dispute.

Concerning prejudice, we acknowledge respondent merely contends there was no factual basis for finding aggravated circumstances and later terminating her parental rights, and that "she is entitled to reasonable efforts toward reunification, and she looks forward to the opportunity to work with [petitioner] to get her children returned to her." Respondent asserts tangentially under a separate issue[6] that the trial court prejudiced her because had she known she could have appealed

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[4] We acknowledge the extremely serious facts of this case. But while we might personally view a parent sex trafficking their child as particularly egregious conduct, that is not our role in this case or in our system of jurisprudence. If the Legislature desires such conduct to constitute an aggravating circumstance obviating the need for reunification efforts, it should amend the statutory scheme to so provide.

[5] We find no issue with the trial court's underlying factual finding that CB was subjected to the sexual abuse alleged, which respondent either facilitated or knew about without intervening. Respondent essentially challenges the credibility of CB's allegations, but we defer to the trial court on this matter. See *In re Schadler*, 315 Mich App 406, 408-409; 890 NW2d 676 (2016) ("In applying the clear error standard in parental termination cases, regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.") (quotation marks and citation omitted); *In re White*, 303 Mich App 701, 711; 846 NW2d 61 (2014) ("We defer to the special ability of the trial court to judge the credibility of witnesses."). Further, while respondent claims that the trial court was obligated to investigate whether CB's allegations were credible before concluding that aggravated circumstances were present, she fails to include any legal authority to support this claim. See *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 695; 880 NW2d 269 (2015) (holding that an issue is abandoned when a party failed to cite any supporting legal authority). And to the extent respondent contends that the trial court overlooked readily available evidence, none of the evidence she references was presented at the preliminary hearing. Even so, the trial court explicitly found CB credible at the termination hearing after respondent presented her side of the facts, including those she now references.

[6] Respondent provides two distinct assertions of prejudice regarding her claim that the trial court erred by not advising of her appellate rights. The first of these is not applicable at all to the instant subissue and is only discussed in the next subsection of this opinion. Because the second assertion

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the trial court's finding regarding aggravated circumstances, she would have done so and demonstrated that no such circumstances existed. According to respondent, she was prejudiced because the trial court improperly denied her reunification services and parenting time, and because she "suffer[ed] an unsubstantiated termination of her parental rights [that] deprived her of her contact with her children . . . [.]"

Notably, respondent provides no substantive argument that the outcome of this case was affected by the trial court's error, i.e., that she would have successfully attained reunification if services were properly provided. See *Pederson*, 331 Mich App at 463 ("It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.") (citation omitted); see also *In re MJC*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 365616) (2023), slip op at 7-8 (the trial court plainly erred by failing to provide and regularly update a case service plan, but reversal was unwarranted under the prejudice prong because the respondent could not establish "that he would have successfully attained reunification if a proper case service plan had been prepared and regularly updated.").

Nevertheless, we conclude that the trial court's error prejudiced defendant because (1) it is unclear how an aggrieved respondent could establish outcome-determinative error concerning the denial of reunification services altogether and (2) the error improperly dispensed with a critical aspect of a child protective proceeding—the requirement to offer reunification services before terminating parental rights—affected the very framework within which this case progressed, undermined the foundation of the rest of the proceedings, and impaired respondent's fundamental right to direct the care, custody, and control over her children.

Regarding the difficulty to establish outcome-determinative error, although we have not found authority addressing the matter, it logically appears that the error at issue would categorically deprive respondents the ability to challenge the case's outcome, or at least hinder this ability, because reunification services are the primary avenue through which a parent can demonstrate their willingness and ability to parent once a case commences. Indeed, respondent very well could have demonstrated that termination was unwarranted if she was successful with services, but she was erroneously deprived any opportunity to do so.

Moreover, we find the trial court's prejudicial errors in *Ferranti*, 504 Mich 1, analogous to the error here. In *Ferranti*, our Supreme Court concluded that the respondents were prejudiced by the trial court's adjudicative errors in taking the respondents' pleas. *Id*. at 29-31.

> The respondents were deprived of their fundamental right to direct the care, custody, and control over [their child] based on . . . invalid pleas. And the invalid pleas relieved the Department of its burden to prove that the respondents were unfit at a jury trial, with all of its due-process protections. These constitutional deprivations affected the very framework within which [the] respondents' case

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of prejudice is tangentially related to the aggravated-circumstances issue, however, we discuss it here first.

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> proceeded. There was error, it was plain, and it affected the respondents' substantial rights.
>
> Finally, we conclude that the error here seriously affected the fairness, integrity, or public reputation of judicial proceedings. . . . Th[e trial court's] failure[s] resulted in the respondents' constitutionally defective pleas and undermined the foundation of the rest of the proceedings. The defective pleas allowed the state to interfere with and then terminate the respondents' fundamental right to parent their child. Due process requires more: either a plea hearing that comports with due process and the court rule or, if [the] respondents choose, a trial. [*Id*. at 30-31 (citations omitted).]

As an initial matter, we acknowledge that "it is the adjudication that protects the parents' fundamental right to direct the care, custody, and control of their children, while also ensuring that the state can protect the health and safety of the children," *id*. at 29 (cleaned up), and that *Ferranti* partially relied on the specific due-process protections provided in adjudication trials. Here, the error took place before the adjudication, which was not tainted in any constitutional manner. But the error nevertheless impaired respondent's fundamental right to direct the care, custody, and control over her children in the first instance, and it unquestionably affected the very framework within which this case progressed and undermined the foundation of the rest of the proceedings. As explained, there is simply no way to know how termination may have proceeded differently when respondent was improperly denied any opportunity to rectify her situation and demonstrate a willingness and ability to parent notwithstanding her earlier concerning conduct. For these reasons, we apply *Ferranti* here and conclude that the trial court's error was prejudicial and affected respondent's substantial rights. We reverse the trial court's order terminating respondent's parental rights and remand for further proceedings consistent with this opinion.[7]

B. ADVICE OF RIGHTS

Respondent also argues that this Court should vacate the trial court's order terminating her parental rights because the trial court failed to advise respondent of her appellate rights concerning the children's removal. We conclude that the trial court committed plain error by failing to advise respondent of her appellate rights, which compounded the prejudice already discussed.

Respondent contends that the trial court violated MCR 3.971(B)(6)-(8) because it failed to advise her of her right to appeal the trial court's finding from the preliminary hearing that

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

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aggravated circumstances were present. MCR 3.971(B)(6)-(8) set forth the following requirements for trial courts:

> Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing that is made a part of the file:
>
> * * *
>
> (6) that appellate review is available to challenge any errors in the adjudicatory process, which may be challenged in an appeal from the court's initial order of disposition;
>
> (7) that an indigent respondent is entitled to appointment of an attorney to represent the respondent on any appeal as of right and to preparation of transcripts; and
>
> (8) the respondent may be barred from challenging the assumption of jurisdiction in an appeal from an order terminating parental rights if they do not timely file an appeal of the initial dispositional order under MCR 7.204 or a delayed appeal under MCR 3.993(C).

The foregoing court rules only apply to situations where the respondent offered a plea to establish a basis for the trial court to authorize a petition. MCR 3.971. Respondent did not offer a plea at the preliminary hearing, or at any other point during this case. During the preliminary hearing, the trial court specifically noted that respondent was not offering a plea. Because respondent did not offer a plea, MCR 3.971(B) is not applicable. Accordingly, the trial court did not violate MCR 3.971(B)(6)-(8) by failing to advise respondent of her appellate rights at the preliminary hearing.

Nevertheless, there is a separate court rule that requires trial courts to advise respondents of their appellate rights when removing a child. MCR 3.965(B)(15) states, "If the court orders removal of the child from a parent's care or custody, the court shall advise the parent, guardian, or legal custodian of the right to appeal that action." The trial court did not advise respondent of her right to appeal its decision to remove the children. Therefore, the trial court violated MCR 3.965(B)(15), committing clear or obvious error in the process. See *Randolph*, 502 Mich at 10.

As noted, respondent provides two assertions of prejudice under this error. First, respondent alleges that she was prejudiced because the trial court's failure to inform her of her appellate rights reinforced her belief that the trial court was not interested in being fair or objective with respect to her legal position. But respondent does not attempt to demonstrate how her personal beliefs about the trial court affected the outcome of the proceedings. See *Pederson*, 331 Mich App at 463 ("It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.") (citation omitted); see also *Bill & Dena Brown Trust*, 312 Mich App at 695 ("An appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for his or her claims.") (quotation marks and citation omitted). Therefore, we reject this assertion of prejudice.

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As already discussed, respondent also claims that the trial court's plain error prejudiced her because had she known she could have appealed the trial court's finding regarding the presence of aggravated circumstances, she would have done so and demonstrated that there were no aggravated circumstances. She emphasizes that the error led to the improper deprivation of contact with her children and eventual termination of her parental rights. We reiterate that respondent was prejudiced because the trial court's erroneous aggravated-circumstances finding impaired respondent's fundamental right to direct the care, custody, and control over her children in the first instance, and it unquestionably affected the very framework within which this case progressed and undermined the foundation of the rest of the proceedings. Notably, this occurred in conjunction with the initial removal of respondent's children. Thus, had the court instructed respondent of her appellate rights at this time as required, she very well could have succeeded on the aggravated-circumstances issue before the case proceeded immediately to termination.

C. BREAKDOWN OF RELATIONSHIP WITH COUNSEL

Respondent argues further that the trial court violated Code of Judicial Conduct, Canon 3(B)(1), by failing to investigate respondent's claim about the breakdown in her relationship with her attorney. We conclude that the trial court did not violate Code of Judicial Conduct, Canon 3(B)(1) by failing to further investigate respondent's claim that her attorney was doing a poor job representing her.

Code of Judicial Conduct, Canon 3(B)(1) states, "A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials." Preliminarily, respondent provides no caselaw or other authority demonstrating that Code of Judicial Conduct, Canon (3)(B)(1) requires trial judges to intervene in the attorney-client relationship. By failing to do so, respondent abandoned this argument. *Bill & Dena Brown Trust*, 312 Mich App at 695 (holding that when "a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned.") (quotation marks and citation omitted).

Moreover, the caselaw concerning this canon of judicial conduct interprets administration and administrative responsibilities within the context of behind-the-scenes court procedure and policy, not judicial investigations of attorney-client relationships. See *In re Davis*, 511 Mich 1003, 1005 (2023) (holding that the judge violated Code of Judicial Conduct, Canon (3)(B)(1) by failing to abide by the performance improvement plan, intentionally refusing to follow orders, sending ominous communications to court staff, and intentionally disconnecting the recording equipment inside the courtroom);[8] see also *In re Trudel*, 465 Mich 1314, 406; 638 NW2d 405 (2002) (holding that the judge violated Code of Judicial Conduct, Canon (3)(B)(1) by using court facilities and equipment for his personal use); *In re Seitz*, 441 Mich 590, 622; 495 NW2d 559 (1993) (holding that the judge violated Code of Judicial Conduct, Canon (3)(B)(1) by consistently failing to file

[8] "[A]n order of this Court is binding precedent on the Court of Appeals if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision." *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 371; 817 NW2d 504 (2012) (citation omitted).

required reports). Because Code of Judicial Conduct, Canon (3)(B)(1) does not mandate that a trial judge investigate the quality of attorney-client relationships, and the available caselaw does not interpret it as so, respondent's argument lacks merit.

It is worth noting that respondent did not terminate her attorney's representation. Her original attorney continued to represent respondent throughout the entire lower court proceedings. Had the relationship truly deteriorated, representation would not have been possible. Moreover, respondent did not allege that she was denied the effective assistance of counsel. Therefore, even if respondent was able to show that plain error occurred, she would not be able to demonstrate prejudice.

Reversed and remanded. We do not retain jurisdiction.

/s/ Adrienne N. Young
/s/ Michael F. Gadola
/s/ Sima G. Patel

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STATE OF MICHIGAN

COURT OF APPEALS

In re BOYCE, Minors.

UNPUBLISHED
January 23, 2020

No. 348992
Montcalm Circuit Court
Family Division
LC No. 2018-000834-NA

Before: MARKEY, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

The circuit court terminated respondent-mother's parental rights to her two daughters—BMB and BKB—under MCL 712A.19b(3)(b)(*i*) (child suffered physical injury or physical sexual abuse and is likely to suffer from injury or abuse in the foreseeable future) and (j) (reasonable likelihood that child will be harmed if returned to the parent). Respondent challenges the court's determination that aggravating circumstances existed, excusing the Department of Health and Human Services (DHHS) from providing reunification services, as well as the court's factual findings underlying the termination decision. We affirm.

I. BACKGROUND

Respondent, a mother of three, is no stranger to the child protective system. Twenty-two Child Protective Services (CPS) complaints have been raised against her since BMB's 2005 birth for issues ranging from physical abuse to medical neglect; two were substantiated. Respondent's eldest daughter, BB, has been in a guardianship with respondent's mother for several years. BMB had also previously been in a guardianship but had been returned to respondent's care. In March 2018, after respondent regained custody of BMB, CPS substantiated a complaint that respondent had not enrolled BMB and BKB in school for the 2017-2018 school year.

The allegations underlying the current action relate to respondent's inappropriate parenting of BMB. BMB was born in 2005 and was 12 years old when CPS took her into care. During a July 2, 2018 child forensic interview, BMB told an investigator that she and respondent used heroin, methamphetamine, bath salts, and marijuana together. BMB also accused her

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mother of accepting money to allow a 34-year-old man to have sex with her. The man in question, Oscar Edwards, admitted that he engaged in sex with the child; he denied that he paid respondent, but asserted that respondent was present and aware of the situation.[1] CPS placed BMB in a group home that provided services for the victims of human trafficking. Six-year-old BKB was placed with her biological father.

As the DHHS and police investigation unfolded, the allegations of human trafficking became more tenuous. Instead, the record suggests that BMB was a troubled child who sought out older boys on the Internet. She then fell into an improper (and illegal) relationship with Edwards. As BMB was only 12 years old, she could not consent to any sexual relationship, even one with an older teenager, and certainly not one with a 34-year-old man.[2] Although respondent had not instigated the sexual encounters, she admitted that she knew BMB had engaged in sexual acts with several older males. Respondent responsibly authorized the insertion of a subcutaneous birth control device in BMB's arm. However, respondent failed to protect her 12-year-old daughter from the sexual predators she encountered. Respondent admitted that she had met 34-year-old Edwards, but believed he was only 16 or 17 years old. She asserted in a police interview that a 16 or 17-year-old male was an "age appropriate" romantic partner for her 12-year-old daughter. And respondent conceded that she left Edwards alone in her hotel room with BMB, enabling Edwards to sexually penetrate her vulnerable daughter.

The circuit court found aggravating circumstances to pursue termination without providing reunification services. It suspended respondent's parenting time with both girls. Respondent then pleaded no contest to grounds for court jurisdiction. Thereafter, respondent did not appear at the final dispositional hearing or the termination hearing. At the close of the hearing, the court terminated respondent's parental rights under MCL 712A.19b(3)(b)(*i*) and (j) as follows:

> In this instance, the mother was clearly aware that her 12 year old daughter was engaging in acts of sexual intercourse with random men, and as a result had a birth control device planted in the 12 year old, perhaps 13 year old's, arm so she wouldn't get pregnant.[3] The mother was aware of the sexual activity.

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[1] With an altered offense date of September 2018, Edwards pleaded to three counts of third degree criminal sexual conduct against a person between the ages of 13 and 15. A criminal court sentenced Edwards to 10 to 15 years in prison. See OTIS, available at <http://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=573352> (accessed December 13, 2019).

[2] MCL 750.520b(1) provides no defense for a person who engages in sexual penetration with a child under the age of 13. MCL 28.728c(14) permits a convicted sex offender to avoid registration requirements, but only when the victim is between the ages of 13 and 16 and the offender is not more than four years older than the victim.

[3] BMB did not turn 13 until July 20, 2018, after she had been removed from her mother's care. Accordingly, all sexual acts described on the record occurred when the child was 12 years old or younger.

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> She was allowing the perpetrators in her home to visit the child, in motel rooms alone. . . .
>
> But regardless, [respondent] clearly knew that her daughter was engaging in sexual acts with other men, not just Oscar, other men. The mother identified these men. There was a man in Muskegon. There was Oscar, from Battle Creek, and there was another gentleman she also referenced and I couldn't catch the name if she even had a name for him. She was aware of these things, and she kept allowing it to happen. She claims some type of lack of knowledge because it was occurring when she wasn't around. That she'd find it on Facebook. I find that also incredulous to believe that she wasn't aware of these activities. She was aware of them, but it was okay because she thought they were 16, 15, 14, 17, however old she thought they were. Come to find out they're adult males, and she did nothing to protect her daughter, nothing.
>
> So I'm going to terminate her parental rights under . . . that theory, and also under MCL 712A.19b(3)(j). There's no question, in this Court's mind, that . . . there is a reasonable likelihood based on [respondent's] conduct, prior to the child's removal, that the child would clearly be harmed if returned to the mother's care . . . . [T]his case just boggles my mind that a woman who proclaims she was raised better than that would allow her 12 year old daughter to have intercourse [with] adult men, but perhaps it would be okay if these adult men look like they were 15 or 16, and it was age appropriate it was okay. That just shows a complete lack of insight, any insight, into the harmful effects that this was having on her daughter, and an utter lack of protecting her, and I'm just disgusted, frankly, with the mother's lack of parenting in this case.

The court further determined that termination of respondent's parental rights to young BKB was also required. The court found that termination of respondent's parental rights was in the best interests of both children based on respondent's failure to protect her children and lack of understanding regarding how to parent. The court opined that respondent "doesn't care what happens to these girls."

Respondent now appeals.

II. REUNIFICATION EFFORTS

Respondent challenges the circuit court's conclusion that reunification services were not required in this case because aggravated circumstances existed. We review for clear error a circuit court's factual findings in a child protective proceeding. See *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). "Generally, reasonable efforts must be made to reunite the parent and children unless certain aggravating circumstances exist." *In re Moss*, 301 Mich App 76, 90-91; 836 NW2d 182 (2013). Relevant to this appeal, pursuant to MCL 712A.19a(2)(a), "reasonable efforts to reunite the child and family are not required" if "[t]here is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in [MCL 722.638(1) and (2)]." MCL 722.638 describes the following "aggravated circumstances":

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> (1) The department shall submit a petition for authorization by the court under [MCL 712A.2(b)], if 1 or more of the following apply:
>
> (a) The department determines that a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling of the child and the abuse included 1 or more of the following:
>
> * * *
>
> (*ii*) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.
>
> * * *
>
> (2) In a petition submitted as required by subsection (1), if a parent is a suspected perpetrator or is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk, the department shall include a request for termination of parental rights at the initial dispositional hearing as authorized under . . . MCL 712A.19b.

From the start of these proceedings, it was clear that respondent had allowed her 12-year-old daughter to engage in sexual acts with multiple older males, including Edwards. Respondent knew BMB was sexually active and ensured that she was on birth control. Respondent admitted to police that she thought it was age appropriate for her 12-year-old child to have intercourse with teenage boys as old as 17. Respondent further described that she left her 12-year-old child alone in a hotel room with Edwards because she wanted to go downstairs and meet a friend. Respondent absurdly asserted that the 34-year-old Edwards (who was older than respondent) was a teenager. On this record, the court could easily determine that BMB was the victim of "[c]riminal sexual conduct involving penetration" and that respondent "plac[ed] the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk." Accordingly, we discern no error in the circuit court's assessment that reunification efforts were not required in this case.

III. STATUTORY GROUNDS

Respondent also challenges the evidence supporting the statutory grounds underlying the court's termination decision. Pursuant to MCL 712A.19b(3), a circuit court "may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence" that at least one statutory ground has been proven by the DHHS. MCR 3.977(A)(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). We review for clear error a circuit court's factual finding that a statutory termination ground has been established. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *Moss*, 301 Mich App at 80 (quotation marks and citation omitted). "Clear error signifies a decision that strikes us as more than just maybe or probably wrong." *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009).

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As noted, the court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(b)(*i*) and (j), which provide:

> The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> * * *
>
> (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
>
> (*i*) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.
>
> * * *
>
> (j) There is 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.

Even if the court could not conclude under factor (b)(*i*) that respondent's acts had caused BMB to suffer sexual abuse, termination of respondent's parental rights was supported under factor (j). The court need only find one statutory ground to support termination of parental rights. See *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009). The harm contemplated under factor (j) includes emotional as well as physical harm. See *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011). We have recognized that "[e]ven when there is no palpable physical injury or overtly coercive act, sexual abuse of children causes substantial long-term psychological effects, with implications of far-reaching social consequences." *People v Benton*, 294 Mich App 191, 206; 817 NW2d 599 (2011). This statement is proven true in this case.

The social file in this case includes reports prepared by social workers and therapists working with BMB. These reports indicate that despite therapy, BMB does not understand that she was the victim of sexual abuse. BMB expressed that she was in love with Edwards and blamed herself for the trouble Edwards and respondent faced. Although BMB did not have access to social media in her group home, BMB was intercepted "trying to solicit herself to a 19-year-old male" on social media during a community visit with her aunt. A psychologist conducted a trauma assessment and diagnosed BMB with post traumatic stress disorder and chronic type depression. The psychologist noted that BMB

> has excessive aggression toward self and others, explosive behavior, hyperactive, oppositional and defiant, extreme sexual behaviors, difficulty with sleeping, excessive mood swings, intense frequent anger, chronic sadness, withdrawn and emotionally numb, attention and memory problems, difficulty with authority, does not seek adult help with hurt or scared, and has a lack of appropriate boundaries in relationships.

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BMB was also required to participate in substance abuse programming while in care due to respondent's parenting choices.

The record clearly supports that BMB is a very troubled child. Respondent's failure to protect BMB from sexual predators and her use of serious controlled substances with BMB were major causes of the child's troubles. Historical patterns of physical abuse in respondent's home exacerbated BMB's difficulties. Respondent did not comprehend the harm that she had caused BMB, placing the blame on BMB's incorrigibility. It is clear that BMB has been traumatized by her mother's actions and inactions and faced a very real chance of continued harm if returned to her mother's care. Given the harm caused to BMB by respondent's inappropriate parenting, and respondent's failure to enroll her children in school, it is likely that BKB would fall prey to the same harms as her older sister in the future.

Accordingly, we discern no error in the circuit court's determination that termination of respondent's parental rights was justified.

IV. BEST INTERESTS

Respondent also contends that termination of her parental rights was not in her children's best interests. "Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012), citing MCL 712A.19b(5). "[W]hether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence." *Moss*, 301 Mich App at 90. The court should weigh all the evidence available to it in determining the child's best interests. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). And we review the court's factual findings in this regard for clear error. *In re Brown/Kindle/Muhammad Minors*, 305 Mich App 623, 637; 853 NW2d 459 (2014).

Factors relevant to the best-interest determination include "the child's bond to the parent, the parent's parenting ability, [and] the child's need for permanency, stability, and finality," as well as the advantages of the foster home over the child's home with the parent. *Olive/Metts*, 297 Mich App at 41-42 (quotation marks and citations omitted). "The trial court may also consider a parent's history of domestic violence, . . . the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App 701, 714; 846 NW2d 61 (2014). The circuit court must address the possibility of placement with a relative, which weighs against termination. *In re Gonzales/Martinez Minors*, 310 Mich App 426, 434; 871 NW2d 868 (2015). And the court must "consider the needs of each child individually." *White*, 303 Mich App at 714. Ultimately, "the focus at the best-interest stage [is] on the child, not the parent." *Moss*, 301 Mich App at 87.

We are concerned that the circuit court seemingly considered BKB's best interests as an afterthought and did not acknowledge at the best-interest stage that BKB had been placed with her father. However, given the extreme circumstances in this case, we cannot conclude that the circuit court erred in finding that termination of respondent's parental rights was in the best interests of both children.

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Throughout these proceedings, the DHHS presented evidence that respondent and her boyfriends had used extreme physical discipline against the children in the past. Respondent had neglected both children's education by failing to enroll them in school for the 2017-2018 school year. BKB missed kindergarten and had a serious speech delay, which apparently had not been addressed in any manner. A therapist noted that BKB looked to BMB for mothering, rather than respondent, evidencing respondent's neglect of her youngest child. And undisputed evidence supported that BKB had flourished in the care of her father and his girlfriend. The couple had dived into caring for BKB's special needs and the child showed significant improvement. This evidence supplemented the record that BKB faced a real possibility of future harm as a result of respondent's highly questionable parenting skills.

And given the record evidence, it is clear that BMB's bond with her mother is an unhealthy one. BMB reported that she used controlled substances with her mother. Respondent lacked any comprehension of how her failure to protect BMB from physical abuse as a young child and from sexual predators as a preteen had damaged BMB. BMB suffered severe emotional trauma that will affect her for the rest of her life. It is clear on this record that termination was in the children's best interests.

We affirm.

/s/ Jane E. Markey
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

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STATE OF MICHIGAN

COURT OF APPEALS

In re A. BERGREN, Minor.

UNPUBLISHED
June 3, 2021

No. 354767
Tuscola Circuit Court
Family Division
LC No. 19-011444-NA

Before: BECKERING, P.J., and FORT HOOD and RIORDAN, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court's order terminating his parental rights to his daughter, AB, pursuant to MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (g), and (j). Because we conclude that the trial court erred when it ruled that the Department of Health and Human Services was not required to provide services to respondent, we reverse the termination order and remand the matter for further proceedings.

I. FACTUAL BACK GROUND

Respondent, a single father of AB, married S. Johnson, a divorced mother of four children, in 2014. The blended family resided together until a divorce in January 2018. At that time, respondent and AB moved out of Johnson's home and into an apartment. In approximately August 2018, respondent and Johnson reconciled and, as a consequence, respondent and AB resumed living in the family home. At that time, Johnson's son, LJ, had elected to attend school in his mother's community; consequently, he too was living full-time in the home.

In January 2019, AB disclosed to her best friend's mother and occasional babysitter that sexual activity had been occurring between her and LJ. At the time, AB was 11 years old and LJ was 13. On January 26, 2019, the babysitter contacted respondent to inform him of AB's disclosures. Children's Protective Services ("CPS") began an investigation on January 28, 2019, and a criminal investigation similarly ensued. After AB's forensic interview in February 2019, petitioner, the Department of Health and Human Services ("DHHS"), filed a petition seeking termination of respondent's parental rights at the initial dispositional hearing.

The court found grounds to assume jurisdiction of AB at the conclusion of the adjudication trial in August 2019 and, after several adjournments, including a delay precipitated by the COVID-

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19 pandemic, the court held the initial dispositional hearing in July 2020. At the conclusion of this hearing, the court terminated respondent's parental rights under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (g), and (j). Thereafter, this appeal ensued.

II. ANALYSIS

Respondent first contends that the trial court erred by terminating his parental rights because petitioner failed to make reasonable efforts to reunite him with his daughter. We agree.

This Court reviews for clear error a trial court's finding that "reasonable efforts were made to preserve and reunify the family." *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005). "A finding is clearly erroneous if although there is 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 Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009) (quotation marks, citation, and brackets omitted). The interpretation and application of a statute is a question of law, which we review de novo. *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541; 840 NW2d 743 (2013). "When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct" *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

In *In re Hicks*, 315 Mich App 251, 264; 890 NW2d 696 (2016), aff'd in part, vacated in part on other grounds sub nom, *In re Hicks/Brown*, 500 Mich 79; 893 NW2d 637 (2017), this Court explained:

> Parents have a "fundamental liberty interest . . . in the care, custody, and management of their child[ren]," a right that "does not evaporate simply because they have not been model parents." *Santosky v. Kramer*, 455 US 745, 753, 102 S Ct 1388, 71 L Ed 2d 599 (1982). In Michigan, a court may terminate a person's parental rights when clear and convincing evidence supports at least one ground elucidated in MCL 712A.19b(3). Before the court may consider termination, however, the DHHS must exert "reasonable efforts" to maintain the child in his or her parents' care, MCL 712A.18f(1) and (4), and make "reasonable efforts to reunite the child and family," MCL 712A.19a(2). . . . The need to make "reasonable efforts" stems from federal law. Pursuant to 45 CFR 1356.21(b) (2015), to remain eligible for foster-care maintenance payments under Title IV–E, state agencies "must make reasonable efforts to maintain the family unit."

"The adequacy of the [DHHS]'s efforts to provide services may bear on whether there is sufficient evidence to terminate a parent's rights." *In re Rood*, 483 Mich at 89.

According to MCL 712A.19a(2), reasonable efforts to reunify a child with his or her family must be made in all cases except where, among other things, "[t]here is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in section 18(1) and (2) of the child protection law, 1975 PA 238, MCL 722.638." MCL 722.638(1) requires DHHS to submit a petition for the court's authorization if the child has suffered or is at risk of suffering one or more of certain types of aggravated abuse. MCL 722.638(1) states in relevant part:

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> (1) The department shall submit a petition for authorization by the court under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, if 1 or more of the following apply:
>
> (a) The department determines that a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling of the child and the abuse included 1 or more of the following:
>
> * * *
>
> *(ii)* Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate. . . .

Under MCL 722.638(2), when a petition is submitted as required by subsection (1)

> if a parent is a suspected perpetrator or is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk, the department shall include a request for termination of parental rights at the initial dispositional hearing as authorized under section 19b of chapter XIIA of 1939 PA 288, MCL 712A.19b.

Quoting MCL 712A.19a(2), the Michigan Supreme Court has stated on more than one occasion that " '[r]easonable efforts to reunify the child and family must be made in *all* cases' except those involving aggravated circumstances . . .." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010); see also *In re Hicks*, 500 Mich at 85 ("[u]nder Michigan's Probate Code, the Department has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental right."); *In re Rood*, 483 Mich at 99-100 (opinion by CORRIGAN, J.) ("Under MCL 712A.19a(2), [r]easonable efforts to reunify the child and family must be made in all cases" except those involving aggravated circumstances not present here.") (quotation marks omitted; brackets in the original). Likewise, this Court has recently reiterated that "[r]easonable efforts to reunify the child and family must be made in all cases except those involving aggravated circumstances under MCL 712A.19a(2)." *In re Rippy*, 330 Mich App 350, 355; 948 NW2d 131, 133 (2019).

The issue of reasonable efforts first arose in the present case when Johnson moved to peremptorily deny termination of parental rights. Johnson argued that, as to her four children, there were no aggravating circumstances, and therefore, reasonable efforts were required and she was entitled to a service plan. The trial court agreed, noting that her's was not an abuse case, but rather a neglect matter. Therefore, the court granted Johnson's motion, stating in its order: "The Court finds that this case does not involve "aggravated circumstances" pursuant to MCL 712A.19a(2)(a) and MCL 722.638(1). Therefore "reasonable efforts" must be made pursuant to MCL 712A.19a(2)."

Shortly thereafter, respondent reproduced Johnson's motion and brought the same issue to the court for consideration on his behalf. In response, DHHS argued that because there existed aggravated circumstances, reasonable efforts were not required. DHHS argued, essentially, that respondent knew his daughter had been abused and he returned her to a home where that abuse

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occurred, and, thereafter, he allowed the sexual abuse to continue. The court concluded that as to respondent's case, reasonable efforts were not required. After noting that it was required to consider each child and each parent individually, the court reasoned that under MCL 722.638(2), it could consider a request for termination at the initial dispositional hearing and, by implication, not require that reasonable efforts be pursued. The court stated:

> Specifically as it was placed within the petition, and the Court now having jurisdiction regarding [AB], while [respondent's] restoration [sic, representation?] of the statute, specifically in regard to the MCL 7. – 722.638 is correct for the first part of the statute; there is that second part of the statute and you true – correct and on point, Mr. Burgess [the child's legal guardian ad litem], and that is placing a child in an unreasonable risk of harm could then allow the Court, pursuant to that statute, under aggravated circumstances to go ahead and schedule a termination trial at the time of the initial disposition. Court is very much aware of the fact of the case of [*In re Mason*] in this matter. As it relates to what is required to reunify children and a family.
>
> But at this point in time pursuant to the remainder of that statute this Court determines that termination can occur at the initial disposition if that is the request of the Department of Health and Human Services.

Thus, the trial court concluded that, even though the facts of this case do not constitute "aggravated circumstances" for purposes of MCL 722.638(1), MCL 722.638(2) authorizes the court's determination that reasonable efforts to reunify respondent with his child were not required in this case because respondent had put the child at risk. In so doing, the trial court committed clear legal error. See *Fletcher*, 447 Mich at 881.

MCL 722.638(2) requires a two-part analysis. It requires DHHS to include a request for termination of parental rights at the initial disposition if (1) the parent is the perpetrator or if the parent placed the child at an unreasonable risk of harm *and* (2) the filing of the petition is mandatory under MCL 722.638(1). The court did not appear to consider both factors but, instead, only focused on respondent's role in exposing his daughter to an unreasonable risk of harm. However, according to the plain language of the statute, a petition mandated by subsection (1) is necessary in order to trigger subsection (2). Yet, the trial court acknowledged, correctly, that the facts do not bring this case within the ambit of MCL 722.638(1).

As indicated above, MCL 722.638(1) requires DHHS to file a petition for authorization under MCL 712A.2 where there are any of several aggravating circumstances. In light of the facts in this case, the most relevant circumstance is MCL 722.638(1)(a)(*ii*): "Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate." None of the other aggravating circumstances listed by MCL 722.638(a) are at issue, nor is there any evidence that respondent's parental rights to another child have been terminated, voluntarily or involuntarily, MCL 722.638(b). However, for criminal sexual conduct involving penetration to constitute an aggravating circumstance under MCL 722.638(1), the perpetrator must be "a parent, guardian, or custodian, or person who is 18 years of age or older and who resides for any length of time in the child's home . . . ." Where, as here, the perpetrator was less than 18 years old and is neither a parent, guardian, or custodian of the child, the conduct at issue is not an "aggravated circumstance"

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for purposes of MCL 722.638(1). Because a petition was not mandated under subsection (1) of MCL 722.638, subsection (2) does not apply. Accordingly, the trial court's reliance on MCL 722.638(2) as authority to support its ruling that DHHS did not have to make reasonable reunification efforts was clearly erroneous.[1]

The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (g), and (j), which permit termination of parental rights under the following circumstances:

> (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
>
> (*i*) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.
>
> (*ii*) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.
>
> * * *
>
> (g) The parent, although, in the court's discretion, financially able to do so, fails to provide proper care or custody for the child and there is no reasonable

[1] We acknowledge that some decisions from this Court have indicated that DHHS is not required to provide reunification services where termination is the agency's goal. See, e.g., *In re Moss*, 301 Mich App 76, 91; 836 NW2d 182 (2013); *In re HRC*, 286 Mich App 444, 463; 781 NW2d 105 (2009). However, both *Moss* and *HRC*, involved aggravated circumstances. *HRC* explicitly entailed aggravated circumstances under MCL 722.638(1)(a)(*ii*), and *Moss* entailed a respondent who attempted to suffocate her youngest daughter, conduct arguably falling under MCL 722.638(1)(a)(*vi*). To the extent that these cases stand for the proposition that

> reasonable efforts at reunification are not required in cases other than those with aggravated circumstances set forth in MCL 712A.19a(2), it runs afoul of our Supreme Court's explicit statements to the contrary in *In re Mason,* 486 Mich at 152; 782 NW2d 747, *In re Rood*, 483 Mich at 99-100; 763 NW2d 587, and *In re Hicks*, 500 Mich at 85 & n 4; 893 NW2d 637. We are bound by Supreme Court precedent. *In re Nestorovski Estate*, 283 Mich App 177, 206; 769 NW2d 720 (2009) (SAAD, C.J., dissenting) ("Michigan Supreme Court precedent that is binding on this Court does not permit an inferior court, appellate or trial, to overrule Supreme Court precedent[.]"). [*Rippy*, 330 Mich App at 371 (BECKERING, J., dissenting).]

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> expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
>
> * * *
>
> (j) There is 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.

Each of these provisions requires a showing that the minor child, in some manner, would be at risk of future abuse or neglect if returned to the parent's care. In its written opinion following the termination hearing, the trial court opined that it did not believe that respondent "fully understands what is necessary to protect AB from any further abuse," referred more than once to respondent's "head in the sand" attitude, and echoed the concern of AB's therapist about respondent's obliviousness to AB's over-sexualized behavior,[2] and that returning her to respondent would cause a regression in her sense of security. On the basis of respondent's past conduct, the court concluded that, for purposes of MCL 712A.19b(3)(b)(*i*) and (*ii*) and (3)(j), there was a reasonable likelihood that AB would suffer harm or abuse if returned to respondent. As to § 19b(3)(g), the court found that respondent could provide financially for AB, but concluded that his past conduct established that he could not provide proper care and custody for her.

However, as already explained, respondent was entitled to reunification services, and DHHS had a duty to provide them.[3] Without providing respondent reunification services, and

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[2] Between September 2019 and January 2020, AB's therapist, Karshibia Davidson, observed five visits between respondent and AB. Davidson testified at the termination hearing that she was concerned with respondent's conduct during the visits. AB exhibited sexualized behavior with respondent. She sat suggestively with her legs openly toward respondent. While looking at respondent, AB also put her hand under her shirt and touched her breasts throughout the visits. This was not normal behavior for a girl AB's age, but it was normal for a sexual abuse victim. Respondent failed to acknowledge or redirect AB's behavior and it did not seem to bother him. There was no change in facial expression and he did not engage in any body movement. Davidson was concerned about respondent's ability to model appropriate behavior and help AB continue to implement coping strategies and maintain appropriate boundaries. She did not think he was able to do so. As a result, Davidson was concerned about AB's safety going forward and the risk of future trauma. Respondent testified that he thought AB adjusted her bra a few times, and that when she did, he looked away so as not to embarrass her. He said that if AB had actually been groping her breast he would have said something.

[3] Foster care worker Ashley Kingman testified that, on multiple occasions, the department offered respondent services, but he consistently refused, stating that he did not think he needed services. However, whatever services were offered can hardly be considered reunification efforts, given that the department's goal was always termination, and Kingman testified that services were offered, not with the intent to reunify respondent and his daughter, but because "the Department does not decide whether termination occurs."

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assessing his participation in and benefit from such services, concluding that AB will suffer abuse or harm or improper care is little more than speculation arising from respondent's prior conduct. In other words, the inadequacy of DHHS's efforts to provide reunification services renders the evidence insufficient to establish the statutory grounds to terminate respondent's parental rights. See *In re Rood*, 483 Mich at 89.

In conclusion, the trial court correctly concluded that this case does not involve aggravated circumstances. However, the court committed clear legal error by concluding that, even absent aggravated circumstances, MCL 722.638(2) relieved DHHS of its duty of making reasonable efforts at reunification. Without proving respondent with a meaningful opportunity to engage in services designed to remove the barriers to reunification with his daughter, there is a "hole in the record," *In re Mason*, 486 Mich at 142, that renders the evidence insufficient to terminate respondent's parental rights, see *In re Rood*, 483 Mich at 89. Accordingly, we reverse the trial court's order terminating respondent's parental rights and remand this matter for further proceedings consistent with this opinion.[4]

Reversed and remanded. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood
/s/ Michael J. Riordan

[4] Respondent also challenged the trial court's findings and conclusions with regard to the statutory grounds for termination and that termination was in the child's best interests. We need not address these issues further, given our disposition of respondent's challenge to petitioner's failure to make reasonable efforts at reunification.