STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Judges Elizabeth Gleicher, Kirsten Frank Kelly, Anica Letica

IN RE BATES MINORS,

Supreme Court No. 165815

Court of Appeals No. 361566

Grand Traverse Circuit Court No.
18-004645-NA

____/

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid.

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SUPPLEMENTAL BRIEF ON APPEAL OF APPELLEE DEPARTMENT OF HEALTH AND HUMAN SERVICES

ORAL ARGUMENT REQUESTED

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Dated: April 8, 2024

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STATEMENT OF JURISDICTION

This Court has jurisdiction under MCR 7.303(B)(1) to review by appeal a case after a decision by the Court of Appeals.

On March 23, 2023, the Court of Appeals—in a split decision—affirmed the trial court's order terminating Bates' parental rights. *In re Bates,* unpublished per curiam opinion of the Court of Appeals, issued March 23, 2023 (Docket No. 361566) (*Bates I*), (attached as Appendix A). Bates filed a motion to reconsider, which was denied on May 22, 2023. (5/22/23 COA Order, attached as Appendix B.)

Bates filed an application for leave to appeal. MCR 7.305(C)(2)(c). On October 20, 2023, this Court— while retaining jurisdiction—remanded the matter to the Court of Appeals to address whether the trial court erred in concluding that termination was in the children's best interest. *In re Bates*, ___ Mich ___(2023) (*Bates II*), (attached as Appendix C.) The Court of Appeals issued a decision on December 21, 2023, again affirming the trial court's decision in a split decision. *In re Bates*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2023 (Docket No. 361566) (*Bates III*), (attached as Appendix D).

On January 31, 2024, this Court scheduled oral argument on the application.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

On January 31, 2024, the Court issued an order asking the parties to address the following three questions:

1.A. Whether, when a child is in the care of a relative, the trial court is required to consider and eliminate available alternative remedies short of termination as a matter of constitutional due process, see generally *Washington v Glucksberg*, 521 US 702, 721 (1997) (The government may not infringe on fundamental liberty interests "unless the infringement is narrowly tailored to serve a compelling state interest.")?

Appellant's answer: Yes

Appellee's answer: No.

Trial court's answer: No.

Court of Appeals' answer: No.

1.B. Whether, when a child is in the care of a relative, the trial court is required to consider and eliminate available alternative remedies short of termination by statute, see MCL 712A.19b(5)?

Appellant's answer: Yes.

Appellee's answer: No

Trial court's answer: No.

Court of Appeals' answer: No.

1.C. Whether the trial court erred in this case?

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: No.

Court of Appeals' answer: No.

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STATUTE INVOLVED

MCL 712A.19b provides in pertinent part:

> (5) If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made.

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INTRODUCTION

Under Michigan's child welfare laws, every family that comes before the trial court is unique and should be evaluated for permanency that is in each child's best interests. The applicable statutory scheme and case law considers these interests for children on an individual basis. There is a recognition built into the law that even when statutory grounds for termination of parental rights are present, a termination of parental rights will not always be in a child's best interests and therefore should not always happen. But the law also recognizes that in cases where a respondent parent poses a danger to the child, termination of parental rights may be the only appropriate outcome, even if it temporarily disrupts the safe care of a child by a non-respondent parent or a potential guardian. The Legislature envisioned and intended that trial courts terminate only one parent's parental rights when circumstances warrant it.

In this way, the law is child-centered, and it already weighs less restrictive outcomes for best-interest determinations where appropriate, on a case-by-case basis. And there are some cases where a termination of parental rights is necessary for a child's protection and well-being, regardless of alternative options. It is important that this Court honor the statutory framework and not impose a rule that will not serve the interests of children.

Applying these standards here, this Court should affirm the decision below. Catherine Bates has two children – AUB and ADB. The Department of Health and Human Services first investigated Bates in early 2018 when her blood alcohol content was a 0.337 and the children were in her care. DHHS offered Bates services

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to address her substance abuse issues. DHHS investigated Bates again in November 2018 after she fell and told medical personnel she had been drinking and taking pills. While DHHS filed a petition following the November 2018 complaint, that petition was withdrawn in early 2019 because Bates and the children's father came to an agreement through Friend of the Court, reinstating her unsupervised visits after Bates completed substance abuse treatment.

In between these DHHS investigations, ADB was diagnosed with type 1 diabetes when he was just seven years old. DHHS received a third complaint in December 2019 after ADB went into diabetic ketoacidosis and nearly died while in Bates' care. He spent weeks in the hospital recovering. Bates did not take responsibility for her role in ADB's illness— even though she admitted she failed to regularly check his blood sugar, withheld insulin, and failed to check for ketones in his urine.

Meanwhile, Bates continued to drink. She pled guilty to third-degree child abuse in late 2020 and served some jail time. She was placed on probation following her 2021 release and quickly violated probation when she stole alcohol twice in July 2021. She even relapsed in early 2022, just months before the trial court heard testimony on DHHS' petition for termination of her rights.

There is no other outcome that ensures the children's safety besides termination of Bates' parental rights because she has repeatedly demonstrated she cannot maintain her sobriety, let alone provide proper care for her children.

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Catherine Bates and Laramie Bates[1] were married and had two sons. They are ADB (now age 13) and AUB (now age 9). (7/30/21 DHHS Pet; 4/7/21 DHHS Am Pet; 7/30/21 DHHS Am Pet.) Laramie Bates filed for divorce in late 2017 because Bates began abusing alcohol and benzodiazepine shortly after AUB's 2015 birth. (3/30/22 Tr. pp 143, 145.)

Bates' first contact with DHHS was in April 2018 after police went to her house and found her intoxicated while the children were there – Bates' vomit was all over the house. (*Id.* at 83.) Her preliminary breathalyzer test (PBT) showed a BAC of .337. (*Id.*) DHHS put services into Bates' home, and she engaged in those services. (*Id.*)

Despite services to address her substance abuse, her second contact with DHHS was seven months later because she did not stop using alcohol or pills and failed to treat her mental health issues. (*Id.* at 80.) Specifically, Bates called EMS after she fell, hurt herself badly, and admitted to EMT's she had been drinking and abusing her benzodiazepines. (*Id.*) DHHS filed a petition and placed the children with their father (he was not a respondent). (12/6/18 DHHS Pet; 3/30/22 Tr. pp 80–81.) DHHS withdrew its petition in April 2019 after the parents entered a stipulated order in Friend of the Court, requiring Bates to submit to a substance abuse assessment and follow all recommendations and, after two months of

[1] DHHS will refer to the mother as "Bates" throughout this brief and to the father as "the father" to avoid confusion.

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compliance, allowing her parenting time to resume as unsupervised. (3/30/22 Tr. p 81.) During those two months, Bates had supervised visitation with the boys. (*Id.*)

Bates' third contact with DHHS just eight months later, in December 2019. (*Id.* at 88.)

ADB is diagnosed with type one diabetes.

ADB was first diagnosed with type one diabetes on September 2, 2018, when he was just seven years old. (*Id.* at 146.)

Following his diagnosis, the father said he and Bates received a series of trainings from ADB's endocrinologist and other medical professionals before ADB was discharged from the hospital in 2018. (*Id.* at 147.) Dr. Aditya Dewoolkar is ADB's endocrinologist; he was not ADB's initial treating doctor. (*Id.* at 11.) Specifically, the father testified ADB required at least three to four blood sugar tests per day, but he could have between ten and twelve blood sugar tests each day depending on his activity level or if he was ill. (*Id.* at 149.) If ADB presented with low blood sugar, he received glucose, waited 15 minutes, and his blood sugar was checked again. (*Id.* at 150.) If ADB presented with high blood sugar, he received an insulin correction. (*Id.*) The doctor agreed parents or caregivers would receive this training before a child's initial discharge. (*Id.* at 19–20.) Dr. Dewoolkar also said parents and caregivers build on training by participating in additional classes that are offered virtually or in person. (*Id.* at 20.)

Importantly, the father said he *and Bates* received instructions for what to do if ADB became ill. (*Id.* at 147.) Specifically, if ADB became ill, his blood sugar

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checks needed to increase, especially if he was not eating. (*Id.* at 20–21.) In addition to more frequent blood sugar checks, urine was to be tested for ketones. (*Id.* at 15.) Ketones in urine indicate that the body does not have enough insulin, so the patient needs additional insulin to prevent diabetic ketoacidosis. (*Id.* at 14.) Diabetic ketoacidosis (DKA) is a serious complication of diabetes that, without treatment, can lead to death.

Bates admitted she did not participate in any diabetes training other than the initial 2018 training. (4/1/22 Tr. p 9.) Even though she claimed she received the training on what to do if ADB became ill, she insisted she had no idea what ketones were, how to test for them, or that she should be testing ADB's blood sugar more if he was sick or giving him insulin more frequently if he was not eating. (*Id.* at 9, 12.)

While ADB transitioned to an insulin pump shortly after his December 2019 hospitalization and the father participated in the training to manage the pump, Bates did not take any additional classes until her own alleged diabetes diagnosis in 2022. (3/30/22 Tr. pp 23, 148; 4/1/22 Tr. p 12.) She admitted she only "read some literature about how some food affect[ed] glycemic index" and read some pamphlets from the hospital; she did not do any internet research and did not know how to treat diabetes when ADB became ill. (4/1/22 Tr. pp 9–10.)

ADB goes into DKA in December 2019.

ADB and AUB went to Florida with Bates in early to mid-December 2019. (3/30/22 Tr. p 151.) Because ADB's blood sugar readings are inputted into a

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glucometer to memorialize the levels, the father knew his blood sugar was stable in Florida – indeed, the father noted that the maternal grandparents, not the mother, managed Adrian's diabetes while in Florida. (*Id.* at 152.) The father picked up the children on December 20, 2019; ADB's blood sugar was high, and he had a large number of ketones in his urine. (*Id.* at 153.) The father increased ADB's insulin and flushed the ketones with fluid, as is the protocol for high ketone levels. ADB's blood sugar and ketones were both within normal range when his father dropped the children to Bates on Christmas Eve. (*Id.*)

Bates took the children to a hotel to go swimming during the time she had them. (*Id.* at 229.) ADB did not swim because he had been vomiting and, instead, sat at the side of the pool. (*Id.*) While Bates *assumed* ADB's blood sugar was low because of the excessive vomiting, there were no low blood sugar readings; all the readings on the glucometer were so high (over 600) that the glucometer just read "HI." (4/1/22 Tr. p 15; Glucometer Recs.) Bates claimed she allowed ADB to test his own blood, and he told her about the reading for her to record; according to Bates, ADB gave her low readings. (4/1/22 Tr. pp 16–17.) She claimed she input all the numbers ADB provided, except there were no low readings on the glucometer – all the readings were high or out of range. (*Id.* at 15.) She then changed her testimony to say that she checked ADB's blood sugar. (*Id.* at 17.) In other words, Bates said she allowed a nine-year-old with a serious illness to check his own blood sugar without her oversight and then changed her testimony and said she checked ADB's blood sugar. (*Id.* at 16–17.)

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Bates took ADB to urgent care a day or two before he was admitted to the hospital on December 28, 2019. (*Id.* at 18.) She claimed she did not know the urgent care staff did not check ADB's blood sugar. (*Id.*) She also claimed urgent care staff told her he had a non-diabetic-related virus and to stop checking his blood sugar even though the records from that visit show otherwise. (3/30/22 Tr. p 74; 4/1/22 Tr. p 31.) Even though Bates claimed ADB constantly tested his blood sugar while in her care, she agreed there had been no blood sugar tests on December 28, 2019, and only one on December 27, 2019. (*Id.* at 28, 31.) In fact, there were "HI" readings on the glucometer just twice on December 25, and December 26, 2019; there were *no other blood sugar readings on either day*. (Glucometer Recs.) Bates did not take ADB to the emergency department at Munson Medical Center until her friend, Jason Lehtola, came to her home and told her to do so. (3/30/22 Tr. p 266.) By the time Lehtola arrived, ADB was unresponsive. (*Id.*)

Upon their arrival to Munson's emergency department, Bates told medical personnel ADB's blood sugar had been in the 120's all day because "that was the information [she] had." (4/1/22 Tr. p 23.) Again, Bates admitted there had been only one blood sugar test on December 27, 2022, and none on December 28, 2022. (*Id.* at 28, 31.)

Shortly after ADB arrived at Munson, he was airlifted to DeVos Children's Hospital because he was suffering from DKA. (3/30/22 Tr. p 156.) Medical personnel told the father that ADB's condition "was not compatible with life," and they did not expect him to survive the night. (*Id.*) Dr. Dewoolkar said ADB

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presented as severely dehydrated, in kidney failure, having difficulty breathing, and with a blood sugar of 1600. (*Id.* at 12.) To put things into perspective, a normal blood sugar is between 70 and 100; ADB's was *16 times* the normal level. (*Id.*) Initially, ADB needed almost continual renal replacement therapy and was on three suppressor medications to make his heart pump. (*Id.* at 13.) ADB was in a coma for four days. (*Id.* at 156.) The doctors talked to the father about the possibility of dialysis because of the severe damage to his kidneys, and the doctors were unsure what long-term brain damage ADB would suffer. (*Id.*) ADB was intubated for long enough that he suffered pharyngeal and vocal cord damage and needed surgery to remove scar tissue. (*Id.* at 157.) ADB was hospitalized for 17 days and was released in January 2020. (*Id.* at 156.)

Dr. Dewoolkar explained DKA happens when the body does not have enough insulin and starts to break down fats and proteins. (*Id.* at 14.) When the body breaks down fats and proteins, acids build in the body and, as the condition worsens, bicarbonate and acid levels continue to rise and the need for hospitalization becomes greater. (*Id.* at 15.) Dr. Dewoolkar said the standard of care to prevent DKA is to ensure the body has enough insulin, which is why testing blood sugar is necessary for diabetics. (*Id.* at 14.) In addition, when a diabetic is ill or not eating as normal, the ketones must also be tested. (*Id.*) Ketones are tested by placing a test strip in a urine sample – if there are too many ketones in the urine, then the person should be given an insulin dose. (*Id.*) Dr. Dewoolkar said if these precautions are followed, the likelihood of a person going into DKA are greatly

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reduced or is zero. (*Id.*) The doctor also said that while many children have DKA episodes, it is "rare" to get to the point of medical intervention to keep the heart beating or are in kidney failure, as ADB endured. (*Id.* at 47–48.)

Bates did not take responsibility for her role in ADB's near-death experience.

Emily Marietta is a social worker in pediatric endocrinology at DeVos Children's Hospital. (3/30/22 Tr. p 70.) After meeting with Bates, Marietta was concerned about Bates' view of her role in his DKA – Bates did not understand how a parent's role in the child's diabetic management could lead to DKA. (*Id.* at 71.) Bates insisted ADB had a virus, which led directly to DKA. (*Id.* at 74.)

The protective services investigator for the December 2019 hospitalization said Bates did not understand her role in ADB's sickness or hospitalization. (*Id.* at 89.)

Indeed, Bates did not take any additional classes to learn more about pediatric diabetes or even to learn about ADB's pump until her own diabetes diagnosis and being placed on a pump herself. (4/1/22 Tr. p 12.) Bates insisted to the trial court she did not know what ketones were or how to monitor for them. (*Id.* at 12–13.)

Notably, during cross-examination from DHHS, Bates could not remember information that was not advantageous to her. For example, she could not remember talking to emergency room personnel after her fall in November 2018, could not remember receiving information about caring for ADB's diabetes when he

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is ill, could not remember being so late to ADB's endocrinologist appointment in October 2019 that he could not see the doctor, could not remember talking to police the night of ADB's hospitalization, and could not remember her interview with the detective investigating her for criminal charges in early 2020. (*Id.* at 8–9, 11, 13–14, 22.)

Bates pled guilty to third-degree child abuse.

On November 6, 2020, Bates pled guilty to third-degree child abuse. (3/30/22 Tr. p 91.) In January 2021, she was sentenced to five months in jail, receiving a 16-day jail credit. (*Id.*) Bates was released in April 2021, and was placed on probation. (*Id.* at 92.)

Bates' substance abuse.

Again, DHHS first investigated Bates in late 2018 after she fell and was hospitalized. (*Id.* at 80.) DHHS filed a petition with allegations that Bates had been intoxicated in November 2018 and had a BAC of .337 in April 2018 while the children were in her care. (*Id.* at 81, 83.) That petition was withdrawn in April 2019 after Bates completed alcohol and drug treatment and demonstrated a period of sobriety. (*Id.* at 81.)

Bates was probation after her jail release in April 2021; she violated her probation twice in July 2021 when she was arrested for retail fraud at Walmart and Meijer. (*Id.* at 93.) She stole alcohol at both locations. She was intoxicated at Meijer, and her BAC was .227. (*Id.* at 94.) Just three weeks later, CPS

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investigator, Vanessa Birch, and Bates' probation officer went to Bates' home. (*Id.*) Both Birch and the probation officer believed Bates was intoxicated; in addition, there was alcohol in her home, and she refused to participate in a PBT. (*Id.*) Bates was later jailed for violation of probation; she went into an inpatient alcohol treatment program on October 27, 2021, and she was released on December 6, 2021. (*Id.* at 232, 259.)

Even though by this time Bates had completed two treatment programs, Bates continued to abuse alcohol. The father showed Bridget Huhta (the assigned CPS ongoing worker) receipts from Walgreens in January 2022[2] when Bates made purchases with the children in her care – among those purchases were bottles of wine. (*Id.* at 236.) Just a month later, Bates' probation officer went to her home, and Bates admitted to a relapse. (*Id.*) Bates later made the same admission to Huhta. (*Id.* at 237.)

Despite Bates' admitted relapse, in April 2022, Bates told the trial court she still considered July 28, 2021, to be her sobriety date even though she drank in January and February 2022 because "sips" of wine were a "mistake" and a "learning experience." (4/1/22 Tr. p 24.) Bates also told the trial court her therapist did not consider July 2021 to be Bates' sobriety date because of the relapse in early 2022. (*Id.* at 37.)

[2] Bates and the father apparently still had a shared Walgreens account for reward points and the father could see what Bates purchased.

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The children participate in therapy and remain with their father.

Amie Ollis is ADB's therapist. (3/30/22 Tr. p 118.) As of March 2022, ADB had minimal stressors and was "thriving" at home and in school. (*Id.* at 119.) Despite Bates' claims to the contrary, Ollis described ADB's responses to questions about contact with Bates as "neutral" or a "flat affect." (*Id.* at 121, 130.) She did note that the only negative response from ADB had been the possibility of spending more time with Bates than he did. (*Id.*)

Ollis did not see any benefit to preserving the relationship between ADB and Bates. (*Id.* at 125.) She said he already experienced the loss of his mother and the trauma associated with it. (*Id.*)

The father said ADB was "annoyed" when Bates told ADB about her own diabetes diagnosis and her associated hospitalization. (*Id.* at 215–216.) ADB was annoyed because Bates compared her hospitalization with his experience, and ADB knew it was not the same because she did not almost die. (*Id.*) In addition, Bates had been telling people for nearly two years she had diabetes even though she was not officially diagnosed until 2022; before then she was considered pre-diabetic. (*Id.* 216.) ADB viewed Bates' characterization of her condition as "lies." (*Id.*)

Deanna Couture is AUB's therapist. (*Id.* at 103.) AUB told Couture that he wanted a relationship with Bates and wanted to visit her but also wanted "an adult" to come check to ensure his safety while he was with her because he knows he needs to be safe. (*Id.* at 113.) Couture also said AUB understood what addiction is and how it could change how people acted. (*Id.* at 104–105.)

The children have been placed with their father since December 2019.

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The trial court's findings.

In August 2021, Bates made admissions so the court could assert jurisdiction over the children. She admitted that on December 28, 2019, she failed to give ADB insulin causing him to go into DKA and be hospitalized. (8/10/21 Tr. pp 12–14.) She also admitted she suffered from substance abuse issues, had violated her probation, and had been jailed as a result. (*Id*. at 13.) The trial court accepted Bates' plea and heard testimony to determine if there were statutory grounds for termination of her parental rights and if so, whether termination of her parental rights was in the children's best interests. (*Id*. at 16.)

Following much testimony, the court ultimately determined DHHS had proven, by clear and convincing evidence, there were grounds for termination of Bates' parental rights under MCL 712A.19b(3) and that termination of her parental rights was in both children's best interests under MCL 712A.19b(5).

Proceedings in the Court of Appeals and the Michigan Supreme Court.

On May 27, 2022, Bates appealed the trial court's determination. In a split decision, the Court of Appeals affirmed that determination. (Appendix A.) Bates then filed a motion for reconsideration; that motion was denied. (Appendix B.) Thereafter, Bates filed an application for leave to appeal in this Court; this Court remanded the appeal to the Court of Appeals "for consideration whether the Grand Traverse Circuit Court clearly erred by concluding that termination of . . . [Bates'] parental rights was in the children's best interests." (Appendix C.) The Court of Appeals ordered supplemental briefing on October 26, 2023. (See 10/26/23 Order,

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attached as Appendix E.) The Court of Appeals again released a split opinion on December 21, 2023. (Appendix D.) This Court ordered additional briefing on January 31, 2024.

STANDARD OF REVIEW

Whether child protective proceedings complied with a parent's right to due process is reviewed de novo. *In re Sanders*, 495 Mich 394, 404–405 (2014).

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ARGUMENT

I. A proper best-interests analysis requires a trial court to weigh all evidence available to it and determine what will be in the best interests of each child in that family separately.

A trial court engages in a best interests analysis after determining there are statutory grounds under MCL 712A.19b(3) for termination of parental rights, shifting the focus from the parent to the child. *In re Moss*, 301 Mich App 76, 87 (2013). Any best-interest analysis requires weighing all available evidence, and the consideration of factors such as a parent's compliance with court-ordered services and the children's well-being while in the parent's care. *In re White*, 303 Mich App 701, 713–714 (2014). Other relevant factors may include the children's bond with the parent, parenting abilities, the children's need for stability and permanency, and the advantages of a foster home over the parent's home. *In re Olive/Metts*, 297 Mich App 35, 41–42 (2012). These factors should be considered for each child separately, although individual findings are not required where the children's interests are sufficiently similar. *In re White*, 303 Mich App at 715–716.

Termination is in children's best interests where they are not safe in their parents' care because they have suffered "unexplained injuries consistent with serious abuse[.]" *In re VanDalen*, 293 Mich App 120, 141 (2011). Termination is also in children's best interests where a parent makes a "consistent lack of progress towards reunification — including her ongoing and unrectified substance-abuse issues[.]" *In re Atchley*, 341 Mich App 332, 347 (2022). Where children are doing well in a placement without the respondent-parent and do not even like speaking

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about that parent, the children's need for stability and permanency also support termination as being in the children's best interest. *Id.*

Further, where "a child is living with relatives when the case proceeds to termination [, that] is a factor to be considered in determining whether termination is in the child's best interests." *In re Olive/Metts*, 297 Mich App at 43. However, placement with a relative is not a bar to termination, provided termination is still considered to be in the child's best interests. *Id.*

A. Trial courts must assess any best-interest outcome for children on a case-by-case basis, which is distinct from deciding whether there are statutory grounds for termination of parental rights.

The Juvenile Code, MCL 712A.1 *et seq.*, lays out the way in which a trial court can take jurisdiction over children. *In re Sanders*, 495 Mich 394, 404 (2014). While the Fourteenth Amendment may restrict the government's ability to infringe on a fundament liberty interests unless that infringement is narrowly tailored to serve a compelling state interest, *Washington v Glucksberg*, 521 US 702, 721 (1997), the compelling state interest here is the protection of children and the process is narrowly tailored to meet that interest because Michigan's statutory framework already incorporates a parent's fundamental right to parent their child into its process for child protective proceedings.

In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase. See *In re Brock*, 442 Mich 101, 108 (1993). Generally, a court determines whether it can take jurisdiction over the child

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in the first place during the adjudicative phase. *Id.* Once the court has jurisdiction, it determines during the dispositional phase what course of action will ensure the child's safety and well-being. *Id.*

The court's authority to conduct those proceedings is found at MCL 712A.2(b), which encompasses child protective proceedings generally. *In re Sanders*, 495 Mich at 404. The first subsection of that statute gives the court jurisdiction over a child in cases of parental abuse or neglect and the second subsection allows for jurisdiction when the home environment is unfit based upon neglect or criminality. *Id.* at 405. To initiate a child protective proceeding, the petitioner must file a petition in the family division of the circuit court; the petition must contain facts that constitute an offense against the child under MCL 712A.2(b). See MCL 712A.13a(2); MCR 3.961. If the court authorizes the petition, the court may release the child to a parent, MCR 3.965(B)(12)(a), or, if the court finds that returning the child to the home would be contrary to the child's welfare, order that the child be temporarily placed in foster care, MCR 3.965(B)(12)(b) and (C). The respondent parent can admit the allegations in the petition or plead no contest to them. See MCR 3.971. Alternatively, the respondent parent may demand a trial (i.e., an adjudication) and contest the merits of the petition. See MCR 3.972. If there is a trial, the respondent parent is entitled to a jury, MCR 3.911(A), the rules of evidence generally apply, MCR 3.972(C), and the petitioner has the burden of proving by a preponderance of the evidence one or more of the statutory grounds for jurisdiction alleged in the petition. See MCR 3.972(E). When

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the petition contains allegations of abuse or neglect against a parent, and those allegations are proved by a plea or at the trial, the adjudicated parent is unfit. *In re Sanders*, 495 Mich at 405. The procedures employed in the adjudication phase protect the parent from the risk of erroneous deprivation of their parental rights. *Id.* at 406, quoting *In re Brock*, 442 Mich at 111.

Once a court assumes jurisdiction over a child, the parties enter the dispositional phase. *Id.* Unlike the adjudicative phase, here the rules of evidence do not apply, MCR 3.973(E), and the respondent is not entitled to a jury determination of facts, MCR 3.911(A). The purpose of the dispositional phase is to determine "what measures the court will take with respect to a *child* properly within its jurisdiction[.]" See MCR 3.973(A) (emphasis added).

If certain requirements are met, the court can terminate parental rights at the initial dispositional hearing, MCR 3.977(E); otherwise, the court continues to conduct periodic review hearings, where the court receives reports and hears evidence regarding the parent's progress and the children's status; the court may enter orders that provide for services, direct the child's placement, and govern visitation. See MCR 3.973(F); MCR 3.974; MCR 3.975. Before the court enters any order of disposition, however, DHHS must prepare a case service plan that includes a "[s]chedule of services to be provided to the parent . . . to facilitate the child's return to his or her home[.]" See MCL 712A.18f(3)(d). Ultimately, the dispositional phase ends with a permanency planning hearing, which results in either the dismissal of the original petition and family reunification, another permanent plan

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in the children's best interests, or the court's ordering the DHHS to file a petition for the termination of parental rights. *In re Sanders*, 495 Mich at 407. Indeed, at this point and at review hearings, many cases are resolved short of termination or reunification where trial courts direct DHHS or DHHS recommends custody to a parent, a guardianship, or some other arrangement for the child.

If a case does proceed to termination, DHHS must prove the allegations in the supplemental termination petition by clear and convincing evidence for the trial court to find statutory grounds for termination of parental rights under MCL 712A.19b(3). See MCR 3.977(F)(1), (H)(1). Once the court determines there is clear and convincing evidence to terminate, the court must then consider whether this is in the children's best interests under MCL 712A.19b(5).

The outcome Respondents seek—least restrictive options for children no matter the situation—creates dangerous precedent regarding the termination of parental rights. (See Res Br, pp 41–51.) The position that Respondent asks this Court to adopt is, in effect, a blanket rule that whenever there is a less restrictive outcome on the parents' rights, short of termination, that must be the outcome pursued, displacing the central question at this stage: *what is in the best interests of the child*. This position is flawed, however, and would fundamentally change Michigan law.

Such a blanket rule examining least restrictive means would ignore the expansive body of Michigan precedent which states that the best-interest phase of a termination hearing must *focus on the child*. See, e.g., *In re Moss*, 301 Mich App at

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88; *In re Olive/Metts*, 297 Mich App at 43; *In re White*, 303 Mich App at 715–716. In advancing her argument that trial courts must adopt outcomes short of termination simply because those outcomes are available no matter the cost to the child, Respondent emphasizes the due process rights and liberty interests of the parents. See *id.* at 41–45. But this position is contrary to Michigan's child welfare statute and to the case law.

Respondent's claims that least restrictive outcomes should have been pursued as the primary legal directive—rather than protecting the child's welfare where there is already a basis for termination—may conflict with the law requiring termination when it is in the child's best interests. Put another way, a finding that termination is in the child's best-interest already necessarily means that there are no suitable alternative outcomes available. The Department and the courts reach that conclusion by examining the interests of the child first, not those of the parent.

In this way, Respondent's approach incorrectly assumes that DHHS has not already considered other outcomes in each case it brings before trial courts, and the Respondent's approach begins by starting with the due process rights of the parent rather than the welfare of the child. Ordinarily, reunification accords with the best interests of the child, but sometimes that is not the case. For that reason, DHHS may not explicitly say the words "termination is the least restrictive outcome in this case" when it brings a petition for termination, such a finding by DHHS is inevitably made in every single case where it asks a court to terminate parental rights. Termination is never pursued lightly; it is a rare and extreme option. Yet,

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in some cases, termination is, in fact, the only appropriate option consistent with children's best interests.

Some parents can resolve their issues (for example, whether relating to substance abuse or mental health), and they can provide a safe environment for their children. In these cases, where the child is no longer at risk of harm, there may be an option short of termination. And the trial court certainly employs such alternative options where appropriate. But where a parent has not made meaningful progress, has not benefited from services, and continues to endanger children, termination is the most appropriate option that ensures the safety and well-being of those children.

B. Termination of parental rights is in the best interests of some children even when a less restrictive option is available.

The U.S. Supreme Court has held that "the rights of parents are a counterpart of the responsibilities they have assumed." *Lehr v Robertson*, 463 US 248, 257 (1983). Indeed, parents must also demonstrate they can uphold their responsibilities as parents. When children suffer explained or even unexplained injuries and the parent either caused the injuries or lacked such regard for the child's safety and ongoing protection, like the minor in *In re VanDalen*, there is clear and convincing evidence that termination is in the children's best interests. *In re VanDalen*, 293 Mich App 120, 139–140 (2011). This is especially true when parents do nothing to demonstrate that they will not repeat this behavior and there is ample evidence to support "a finding that the respondent would be unable to

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safely parent her children anytime soon [,]" which shows that termination is in a child's best interest. *In re Mason/Williams*, unpublished per curiam opinion of the Court of Appeals, issued April 13, 2023 (Docket Nos. 362357 and 362772), (attached as Appendix F, p 6).

Respondent now claims that even if termination is supported by statutory grounds, termination of parental rights cannot be in the children's best interest where it is not the least restrictive option. (See Res Br, pp 41–51.) But that intermixes the parents' rights with the child's best interests. The question of the parents' rights is answered through the rigorous process of finding statutory grounds that open the door to the possibility of termination. And the best-interest phase is, and should be, focused on the child. See *In re Moss*, 301 Mich App at 87.

As Respondent points out, the notion of the least restrictive option has been applied by various state courts in parental termination cases. See, e.g., *Fla Dep't of Child & Fams v FL*, 880 So 2d 602, 608, 611 (Fla, 2004) ("the termination of parental rights to the current child must be the least restrictive means of protecting that child from harm"); *Int of B.T.B.*, 472 P3d 827, 841, 842 (Ut, 2020) ("a court must specifically address whether termination is strictly necessary to promote the child's welfare and best interest"); *People in Int of Am v TM*, 480 P3d 682, 687, 689 (Colo, 2021) ("a trial court must consider and reject less drastic alternatives to termination as part of its overall consideration"). Respondent uses Alabama as an ideal model for this Court to adopt a strict scrutiny standard for termination of parental rights. (Resp. Br, pp 41–51.) Notably, Respondent does not give any

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examples of scenarios in which there would ever be a circumstance where a trial court would have the authority to terminate parental rights because, according to Respondent, there will usually be an alternative outcome to termination of parental rights.

Like Michigan, Alabama requires a trial court's termination of parental rights be supported by clear and convincing evidence. *TDK v LAW*, 78 So 3d 1006, 1010 (Ala, 2011). Alabama also requires consideration of whether all viable alternatives to terminating parental rights have been exhausted. *Id.* at 1011. If there is a less drastic measure that will simultaneously protect the child from parental harm and preserve beneficial aspects of the family relationship, that alternative must be explored, especially when the respondent parent shares a deep and beneficial emotional relationship with the child. *Id.* at 1011. However, *even Alabama* does not require trial courts to reunite a family when a parent subjected a child to chronic physical abuse or when maintaining that relationship does a child more harm than good. *Id.*

In other states, even those that employ a least restrictive means analysis when considering best interests, courts are satisfied where the petitioner has made "a good faith effort to rehabilitate the parent and reunite the family." *Padgett v Dep't of Health & Rehab Servs*, 577 So 2d 565, 571 (Fla, 1991); see also *S.M. v Fla Dep't of Child & Fams*, 202 So 2d 769, 778 (Fla, 2016). Further, just because "some limited and highly restricted contact with a parent may pose no harm" this does not mean that a least restrictive outcome analysis is a bar to termination. *S.M. v Fla*

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Dep't of Child & Fams, 202 So. 2d at 779. The focus of a best interests hearing should be on the children's needs, not the parent's needs. *In re BTB*, 472 P3d 827 (Utah 2020). Moreover, if trial court adhere to the statutory framework, a parent's due process rights will be protected because of the implicit rule out nature of the proceedings. *Id.* The court's focus should be firmly fixed on the child's well-being. *Id.* Any procedure that contemplates terminating a parent's parental rights must satisfy due process. *People ex rel AM v TM*, 480 P3d 682, 687 (Colo, 2021). Both Utah and Colorado have held that if a trial court follows the required statutory framework, a trial court will have implicitly considered and ruled out less drastic measures to termination of parental rights. *Id*; *BTB,* 472 P3d 827. Indeed, Colorado gives primary consideration to a child's physical, mental, and emotional needs and even though a parent's rights are at stake, the determination of what will serve the best interests and welfare of a child is paramount. *Id.* at 687, 689. Put another way, "best" is a superlative and should be more than just adequate or good enough. *Id.*

What is in a child's best interests and a less restrictive option for a parent's rights may align and, on those occasions, an outcome short of termination may be appropriate. The concern, however, is when a child's best interests and a less restrictive outcome do not align—especially when those outcomes do not adequately protect children from emotional, mental, or physical harm or a child has articulated they do not want a relationship with the offending parent. There must be a balancing of the risk of harm posed by a respondent parent, the benefit of keeping

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parental rights intact, and, most importantly, a continuing focus on the child. For that reason, where there is clear and convincing that termination is warranted, the court examining the best interests of the child begins with the *child's* welfare, and what will ensure the *child*'s well-being and safety, rather than beginning with the question of what is the least restrictive means.

Indeed, other options, including custody orders, will not always sufficiently protect children from harm. For example, such an order would be inadequate in protecting children from a dangerous respondent parent should the non-respondent custodial parent die. It allows for the unreasonable risk that the dangerous parent will have the opportunity to assume custody of the children without any assurance of court oversight to ensure they have resolved the issues that brought the family to the court's attention in the first place. This risk is simply too great for children, especially when that parent has shown disregard for the children's safety in the past. Even if the custodial parent is living, contact between the parents may pose a significant risk of harm to the custodial parent, and, by extension the children, especially when the non-custodial parent has been violent with the custodial parent in the past. (See *In re Mason/Williams*, unpublished per curiam opinion of the Court of Appeals, Docket Nos. 362357 and 362772, rel'd 4/13/2023, attached as Appendix F.) The burden of constant vigilance and active protection against a dangerous parent should not fall upon a non-offending parent because of a blanket application of a less restrictive option to termination being available.

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While DHHS' argument and Respondent's argument may be similar in that there is agreement that trial courts should find that termination adequately protects a child's welfare and that this option will do so better than other available options, the difference is in the focus of the best-interest analysis. DHHS wants this Court to uphold the current law requiring trial courts to consider less restrictive options, but only in light of the first and controlling consideration, the best interest of the child, and continue to make findings that are in each child's best interests, rather than Respondent's desired outcome of trial court's utilizing a less restrictive option that may come at the cost of what the child needs or wants. Under MCL 712A.19a(6)(a), a court is not required to pursue the termination of parental rights if "[t]he child is being cared for by relatives." This Court has construed this circumstance as "weigh[ing] against termination," expounding that placement with family is "an explicit factor to consider in determining whether termination was in the children's best interests[.]" *In re Mason*, 486 Mich 142, 164 (2010). In MCL 712A.19a(4), the Legislature expressed its intent that permanency planning must include consideration of a guardianship and permanent placement "with a fit and willing relative." Appellate courts have reinforced the consideration of guardianship. In both *Affleck/Kutzleb/Simpson Minors* and *In re Timon*, this Court remanded cases for trial courts to make an individualized best-interests determination without regard to any policy disfavoring guardianship for children under a certain age. See *In re Affleck/Kutzleb/Simpson Minors*, 505 Mich at 858; *In re Timon*, 501 Mich 867 (2017).

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The clear and convincing analysis for statutory grounds under MCL 712A.19b(3) with the focus on the parent makes sense, just as the focus shift from the parent to the child for best interests under MCL 712A.19b(5) also makes sense. Appellate courts have held that "once a statutory ground for termination is established, i.e., the parent has been found unfit, the focus shifts to the child and the issue is whether parental rights *should* be terminated, not whether they *can* be terminated. Accordingly, at the best-interest stage, *the child's interest in a normal family home is superior to any interest the parent has*." *In re Moss*, 301 Mich App at 88 (emphasis added). See also *Santosky v Kramer*, 455 US 745, 760 (1982) ("After the State has established parental unfitness at that initial proceeding, the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge.").

For the best-interest analysis, DHHS and the courts must begin with the child and the child's welfare, not from a presumption that is rooted in protecting the liberty of the parent. Each child must be the focus of any best-interest hearing as the current case law requires; a child may need to close the chapter of trauma and move forward without the respondent parent just as a child may need to continue that parental relationship despite a parent's wrongdoing. Each case and each child are different and must continue to be evaluated in that way.

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C. The trial court did not err in terminating Bates' parental rights.

Subsection (j) requires the trial court to determine whether the parent's conduct would expose the child to a likelihood of harm if returned to the parent's home before termination of parental rights. MCL 712A.19b(3)(j).

ADB was diagnosed with type 1 diabetes in September 2018. (3/30/22 Tr. p 146.) Before ADB was even discharged from the hospital, both his parents received training on how to test his blood sugar, draw insulin, when to give an insulin correction, when to give glucose, and what to do when ADB was ill. (*Id.* at 147, 150; 4/1/22 Tr. p 9.) Despite Bates' agreement and her participation in the initial training in 2018, she claimed she had no idea how to manage ADB's diabetes when he became ill. (4/1/22 Tr. pp 9, 12.) Moreover, she failed to participate in any additional training or classes to become more familiar with pediatric diabetes and how to address ADB's needs. (*Id.* at 9.) In fact, she admitted she did not inform herself about ADB's diabetic needs until her own diabetes diagnosis in 2022. (3/30/22 Tr. pp 23, 148; 4/1/22 Tr. p 12.)

Not only did Bates demonstrate a total disregard for ADB's health and well-being, but she also continued to abuse alcohol. After her jail release in April 2021, Bates was on probation. She violated her probation twice in July of that year when she stole alcohol from both Walmart and Meijer. (3/30/22 Tr. p 93.) She was drunk at Meijer and her BAC was .227. (*Id.* at 94.) Bates was also drunk a few weeks later when the CPS ongoing worker and her probation officer went to her home. (*Id.*)

Thereafter, Bates was arrested for probation violation and eventually she went into an inpatient program and was discharged on December 6, 2021. (*Id.* at 232, 259.) Yet, her drinking continued into 2022; Bates minimized her responsibility when she said the early 2022 "sips" of wine did not count as a relapse. (*Id.* at 236; 4/1/22 Tr. p 24.)

Since DHHS filed its petition in December 2019, Bates has persisted in her failure to recognize any flaw in her decision-making skills or judgment. Her cavalier attitude towards Adrian's serious illness and towards her own alcoholism left the trial court with no option but to find that her actions demonstrate a great likelihood that she would expose the children to harm. *In re Miller*, 433 Mich 331, 345 (1989); MCL 712A.19a(5). The trial court did not clearly err when it terminated Bates' parental rights to the children under MCL 712A.19b(3)(j).

Not only was there clear and convincing evidence to terminate Bates' parental rights under MCL 712A.19b(3), the preponderance of the evidence that supported the termination of her parental rights to ADB and AUB also supported the finding that termination was in their best interests under MCL 712A.19b(5).

Once a statutory ground for termination has been established, the trial court must conclude that termination of parental rights is in the children's best interests *before* it can terminate parental rights. MCL 712A.19b(5); *In re Olive/Metts*, 297 Mich App at 40. When making the best-interests determination, the trial court may consider the entire record. *In re Pederson*, 331 Mich App 445, 476 (2020). "If the court finds that there are grounds for termination of parental rights and that

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termination of parental rights is in the child[ren]'s best interests, the court shall order termination of parental rights and order those additional efforts for reunification of the child[ren] with the parent[s] not be made." MCL 712A.19b(5). "In deciding whether termination is in the child[ren]'s best interests, the court may consider the child[ren]'s bond to the parent, the parent[s'] parenting ability, the child[ren]'s need for permanency, stability, and finality, and the advantages of a foster home over the parent[s'] home." *In re Olive/Metts*, 297 Mich App at 41-42 (citations omitted). "The trial court may also consider a parent[s'] history of domestic violence, the parent[s'] compliance with his or her case service plan, the parent[s'] visitation history with the child[ren], the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App at 714. The factors identified in these cases are not an exhaustive list for a trial court to consider.

Again, Bates' first contact with DHHS was in April 2018 after police went to her house and found her intoxicated while the children were there – Bates' vomit was all over the house. (*Id.* at 83.) Her preliminary breathalyzer test (PBT) showed a BAC of .337. (*Id.*) DHHS put services into Bates' home, and she engaged in those services. (*Id.*)

Again, despite services for Bates to address her substance abuse throughout 2018 and 2019, her second contact with DHHS was in late 2018 because she did not stop using alcohol or pills and failed to treat her mental health issues. (*Id.* at 80.) Specifically, Bates called EMS after she fell, hurt herself badly, and admitted to EMT's she had been drinking and abusing her benzodiazepines. (*Id.*) DHHS filed a

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petition and placed the children with their father. (12/6/18 DHHS Pet; 3/30/22 Tr. pp 80–81.)

The trial court utilized a less restrictive outcome in April 2019 when DHHS withdrew its petition after the parents entered a stipulated order in Friend of the Court, requiring Bates to submit to a substance abuse assessment and follow all recommendations and, after two months of compliance, allowing her parenting time to resume as unsupervised. (3/30/22 Tr. p 81.) During those two months, Bates had supervised visitation with the boys. (*Id.*)

But despite all these services to address her substance abuse, Bates kept drinking and her attitude towards ADB's illness, and her own alcoholism demonstrates she is not able to make decisions that are in either child's best interests. In addition, the children's therapists explained their reluctance to have ongoing relationships with Bates. Ollie said ADB showed a "flat affect" when talking about Bates and became animated only when she raised the possibility of ADB spending more time with Bates. (3/30/22 Tr. pp 121, 130.) She did not see any benefit for ADB to preserve that relationship. (*Id.* at 125.) Couture said while AUB wanted a relationship with Bates, he wanted "an adult" to check on him when he was with his mother. (*Id.* at 113.)

In the end, Bates' relationship has been damaging to her children, endangering their welfare. Termination – rather than any alternative relationship – was in their best interests. The trial court did not clearly err in terminating Bates' parental rights to both children.

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CONCLUSION AND RELIEF REQUESTED

DHHS requests that this Court allow each child that comes before a trial court to achieve permanence that is appropriate and safe for that child regardless of a less restrictive option if that option is not the best outcome for that child.

Respectfully submitted,

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