

**In the Michigan Supreme Court**

Appeal from the Michigan Court of appeals  
Donald S. Owens, Deborah A. Servitto and Elizabeth L. Gleicher

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IN THE MATTER OF GENEVIEVE BROOKELYN HANSEN  
Minor child

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DEPARTMENT OF HUMAN SERVICES;  
Petitioner/Appellee

Supreme Court Docket No. 139507  
Court of Appeals No: 289903  
Lower Court No: 07-000083-NA

v

Billy Joe Hansen  
Respondent/Appellant

---

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**BRIEF ON APPEAL—APPELLEE  
ORAL ARGUMENT REQUESTED**

Respectfully submitted,



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## **STATEMENT OF JURISDICTION**

Appellant's statement of jurisdiction is complete and correct.

## STATEMENT OF QUESTIONS INVOLVED

- I. Whether the trial court clearly erred in terminating Appellant's parental rights to Genevieve Hansen pursuant to MCL 712A.19b(3)(h) where: Appellant was incarcerated for a period exceeding two years; he left Genevieve to be cared for by her mother, who he knew to be an unfit parent; Genevieve's subsequent placement was arranged exclusively by Genevieve's mother and the department of human services; and the trial court made explicit findings that each of the prongs were satisfied.

Petitioner/Appellee answers "No."

Respondant/Appellant answers "Yes."

- II. Whether the trial court clearly erred in terminating Appellant's parental rights under MCL 712A.19b(3)(c)(i) when the initial petition was filed because both parents were unavailable to care for Genevieve due to incarceration, both parents continued to be unavailable to care for Genevieve at the time of the termination hearing, Appellant's continued unavailability was due to his continued incarceration, and Appellant's earliest release date was over 12 years in the future.

Petitioner/Appellee answers "No."

Respondant/Appellant answers "Yes."

- III. Whether this Court should reverse the lower court's termination of Appellant's parental rights to Genevieve for failing to explicitly find that termination was in Genevieve's best interests where: Genevieve has little to no relationship with Appellant; the family who has raised her since she was 2 weeks old are able and wanting to adopt her; and Genevieve will be almost 14 years old at Appellant's earliest release date, having spent all but 2 weeks of that time in the care of the parents she knows as momma and dada.

Petitioner/Appellee answers "No."

Respondant/Appellant answers "Yes."

- IV. Whether Appellant received ineffective assistance of counsel at the termination hearing where: there is no evidence that beneficial circumstances were not made known to the court; Appellant's trial counsel conferred with Appellant immediately before declining to present proofs; his counsel argued in closing that Appellant had attempted to be involved in Genevieve's life and that termination would violate his due process rights; and Appellant has not established a reasonable probability that the outcome of the termination hearing would be different absent the alleged deficiencies.

Petitioner/Appellee answers "No."

Respondant/Appellant answers "Yes."

## STATEMENT OF FACTS

Genevieve Brookelyn Hansen (hereinafter “Genevieve”) was born to Amber Teschler (hereinafter “Ms. Teschler”) and Billy Joe Hansen (hereinafter “Appellant”) on October 18, 2007. 163a. Genevieve was Ms. Teschler’s 7<sup>th</sup> child. 14a. Ms. Teschler was 23 years old. 14a. At the time of Genevieve’s birth, Ms. Teschler was listed as a perpetrator of Child Abuse and Neglect on the Central Registry. 14a. She had previously had 6 children removed from her care. 21a. Ms. Teschler’s first involvement with CPS occurred because her child tested positive for marijuana. 14a. Ms. Teschler’s parental rights were terminated to her 6<sup>th</sup> child through Macomb County. 14a.

On November 2, 2007, Children’s Protective Services (hereinafter “CPS”) made an unannounced home visit to Ms. Teschler’s residence. CPS went to her home because Genevieve’s birth triggered a Birth Match, which alerted CPS that Ms. Teschler had a prior termination. 14a. Upon arrival, the CPS worker could smell an “intense odor of marijuana.” 42a. Ms. Teschler admitted to the CPS worker that she had smoked marijuana a couple hours prior, and while Genevieve was present in the next room. 42a. Ms. Teschler had been using controlled substances at least 2-3 times per week since the age of 12. 16a. The police were called and Ms. Teschler was subsequently arrested. 42a.

At the time of Ms. Teschler’s arrest, Appellant was in jail pending charges related to driving intoxicated and causing death, which left no one to care for Genevieve. 42a. CPS was not immediately looking to file a petition and asked if anyone could care for Genevieve temporarily. 42a. Ms. Teschler suggested Kelly Woroniak (paternal aunt of Genevieve). 42a. The child was accordingly placed with Kelly Woroniak temporarily. 42a.

When the CPS worker discovered that Ms. Teschler would be in jail longer than anticipated, he determined it was necessary to file a petition. 42a. The abuse/neglect petition was filed 11/5/2007. 5a. A hearing was held that same day and at its conclusion Genevieve was placed in the care and supervision of the Department of Human Services (hereinafter "DHS"). 10a. The referee's decision to place Genevieve with DHS was based on the fact that both parents were in jail and had no ability to provide for the care of Genevieve. 10a.

A pretrial conference was held December 12, 2007, at which time the court took jurisdiction over Genevieve pursuant to a plea by Amber Teschler. 23a-25a. The Dispositional Hearing was held January 9, 2008. 41a. At the time of the Dispositional Hearing, termination was not being sought against either parent.

Subsequently, Ms. Teschler abandoned Genevieve and Appellant pled guilty to two counts of operating a motor vehicle while intoxicated, thereby causing death. 164a. On June 12, 2008, Appellant was sentenced to no less than 14 years in jail. 164a. Appellant's earliest release date is August 7, 2021. 164a. Genevieve will be 13 years old at Appellant's earliest release date. 164a.

A Permanency Planning Hearing was held October 22, 2008. 81a. At that hearing, the referee recommended that termination proceedings be initiated against each parent based on Ms. Teschler's abandonment of Genevieve and Appellant's incarceration. 118a-119a.

A Termination Hearing was held December 16, 2008. 123a. As a result of that hearing, the parental rights of both Ms. Teschler and Appellant were terminated. 121a-122a, 161a-162a. With respect to Appellant, the court found statutory grounds to terminate pursuant to MCL 712A.19b(3)(c)(i) and MCL 712A.19b(3)(h). 121a-122a, 161a-162a. In stating its findings, the lower court referee stated, "there's been no showing made here today that it is contrary to the

best interests of Genevieve Hansen and that Mr. Bill Hansen's rights should not be terminated." 158a. The referee went on to state, "[i]n fact, the record speaks to the fact that his sister is ready, willing and able to provide an adoptive home for Genevieve. And very frankly, that is the only home that Genevieve has known since the time of her birth." 159a. The recommendation proposed by referee and subsequently adopted as the order of the circuit judge does not specifically find that termination is in Genevieve's best interests. 161a-162a.

## ARGUMENT

To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination set forth in MCL 712A.19b(3) has been met by clear and convincing evidence and that termination is in the best interest of the child(ren). MCL 712A.19b(5); *In re Sours Minors*, 459 Mich 624, 632-633; 593 NW2d 520 (1999). MCL 712A.19b provides in relevant part:

“(3) 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:

...

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

...

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.”

Termination of a parent's rights need be supported by only a single statutory ground.

MCL 712A.19a(3); *In re SD*, 236 Mich App 240, 247; 599 NW2d 772 (1999).

### I. THE LOWER COURT DID NOT TREAT APPELLANT’S INCARCERATION AS AUTOMATIC GROUNDS FOR TERMINATION AND DID NOT CLEARLY ERROR IN TERMINATING APPELLANT’S PARENTAL RIGHTS PURSUANT TO MCL 712A.19B(3)(H).

The Michigan Supreme Court reviews a Circuit Court’s termination of parental rights for clear error. *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). Clear error is

the standard for “both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest.” *Id.* “A circuit court’s decision to terminate parental rights 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 JK*, 468 Mich 202, 209; 661NW2d 216 (2003). The decision must strike the reviewing court as more than just maybe or probably wrong. *In re Trejo Minors*, at 356. However, the court must give due regard to the trial court's unique ability to assess the witnesses' credibility. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

*A. Pursuant to §19b(3)(h), Termination Is Not Automatic Where A Parent is Imprisoned For A Period Exceeding 2 Years And The Lower Court Did Not Treat Termination As Automatic In This Case.*

MCL 712A.19b(3)(h) provides grounds to terminate a parent’s parental rights where: (1) the parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years; (2) the parent has not provided for the child’s proper care and custody; and (3) there is no reasonable expectation that they will be able to provide proper care and custody within a reasonable time considering the child’s age. MCL 712A.19b(3)(h). Thus, under the plain language of the statute, termination is not automatic where a parent is imprisoned for a period exceeding two (2) years. Likewise, the Court of Appeals noted in *In re Green* that incarceration is not an automatic trigger for termination of parental rights under §19(b)(3)(h). *In re Green*, unpublished opinion per curiam of the Court of Appeals, issued July 7, 1998 (Docket No. 207029) 175a-176a. Accordingly, incarceration for a period exceeding two years does not by itself establish grounds for termination.

Furthermore, Appellant's contention that "[t]he trial court determined that Mr. Hansen's lengthy period of incarceration, by itself, established grounds to terminate his parental rights" is without merit. Appellant's brief at 12.

It is well settled that courts speak through their written orders rather than their oral statements. *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009); *Brausch v Brausch*, 283 Mich App 339, 353; 770 NW2d 77 (2009); *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). The written recommendation of the referee, which was adopted as the order of the circuit judge, specifically provided: "[t]he referee further finds that Mr. Hansen has not provided for the proper care and custody of Genevieve, and there is no reasonable likelihood that he will be able to [provide] her with proper custody and care within a reasonable period of time, contrary to §19b(3)(h)." 162a. Thus, Appellant's parental rights were terminated under subsection (h) after the court specifically found that each of the three prongs had been satisfied. Accordingly, Respondent's incarceration for a period exceeding two (2) years was not an automatic ground for termination in law or on the facts of this case.

*B. The Lower Court Did Not Clearly Error In Finding Clear and Convincing Evidence To Establish Each Prong Of MCL 712A.19b(3)(h).*

Pursuant to MCL 712A.19b(3)(h), grounds for termination exist where: (1) the parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years; (2) the parent has not provided for the child's proper care and custody; and (3) there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age. MCL 712A.19b(3)(h). The two-year period of incarceration referenced in subsection (h) begins at the time of the termination hearing. *In re Perry*, 193 Mich App 648, 650; 484 NW2d 768 (1992); *In re Neal*, 163 Mich App 522, 527; 414 NW2d 916 (1987). Furthermore, the court in *In re SD* read subsection (h) to refer

exclusively to the ability of the incarcerated parent to provide a normal home within two years. *In re SD*, at 247.

The lower court properly found the first prong under subsection (h) to be satisfied. Appellant was imprisoned August 6, 2007 and his earliest release date is not until the year 2021. 164a. The Termination Hearing was held December 16, 2008. 123a. Thus, even measured to Appellant's earliest release date, Genevieve would be deprived of a normal home with Appellant for over 12 years. Accordingly, the first prong under subsection (h) was properly satisfied.

The second prong of (h) is satisfied when a parent "has not provided for the child's proper care and custody." MCL 712A.19b(3)(h). The phrase, "proper custody," appears in both MCL 712A.2(b)(1) (hereinafter the "jurisdictional section"), and MCL 712A.19b(3)(h) (hereinafter "termination section"). In reviewing the language of the jurisdictional section in conjunction with other sections of the juvenile statute, this Court has said "'proper custody' relates to the appropriateness of the care given the child and the character of the home." *In re Taurus*, 415 Mich 512, 542; 330 NW2d 33 (1982). The court in *In re Systma* likewise addressed what the word "custody" refers to in the jurisdictional section. *In re Systma*, 197 Mich App 453; 495 NW2d 804 (1992). Throughout its discussion, the court used the word "care" interchangeably with the word "custody," thus equating custody with the appropriateness of the care available to the child. *Id.* at 455-457. In addition, courts have said, "[i]t is reasonable to conclude that words used in one place in a statute have the same meaning in every other place in the statute." *Little Caesar Enterprises v Dept of Treasury*, 226 Mich App 624, 630; 575 NW2d 562 (1997). It is therefore reasonable to attribute the same meaning to "custody" in the termination section that has been established in interpreting the jurisdictional section.

It is important to note, however, that the two sections do not use “proper custody” in the same context. “When the Legislature uses different words, the words are generally intended to connote different meanings. Simply put, ‘the use of different terms within similar statutes generally implies that different meanings were intended.’” *US Fidelity Ins & Guar Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 4; ---NW2d--- (2009). If the Legislature had intended the same meaning in both statutory provisions, it would have used the same words. *Id.*

With respect to the two sections in question, the legislator used different language. The jurisdictional section provides for jurisdiction when a child “is without proper custody or guardianship. MCL 712A.2(b)(1). Thus, the focus of that section is on the status of the child rather than the conduct of the parent. The focus of the termination section, however, is on the parent. §19b(3)(h) permits termination where, among other requirements, “the parent has not provided for the child’s proper care and custody.” MCL 712A.19b(3)(h). By the plain language of that section, the relevant inquiry is not just whether the child has proper care and custody, but whether the parent *provided for* that child’s proper care and custody. Thus, the termination section requires affirmative actions by the parent to insure that the child is properly cared for. Under the facts of this case, Appellant failed to take action to provide for Genevieve and therefore has not provided for Genevieve’s proper care and custody.

A parent fails to provide for proper care and custody when the custody they leave their child in is not appropriate. In *In re Rolack-Jones*, the respondent was convicted of bank robbery and sentenced to 5 ½ years to 40 years in prison. *In re Rolack-Jones*, unpublished memorandum opinion of the Court of Appeals, issued January 6, 2009 (Docket No. 287500) 171a. The respondent initially arranged for her mother to care for the child while she was in prison by way of guardianship. *Id.* at 1; 171a. The guardianship, however, was eventually terminated. *Id.*

171a. The respondent's parental rights were then terminated under MCL 712A.19b(3)(g) and the respondent appealed whether grounds had been properly established<sup>1</sup>. *Id*; 171a. The court of appeals opined that the trial court's decision to terminate the guardianship arrangement demonstrated that the provision of care and custody was not appropriate. *Id*; 171a. Accordingly, the *Rolack-Jones* court held that the trial court did not clearly error when it found that the respondent failed in the past to provide proper care or custody for the child. *Id*; 171a.

The case of *In re Alford*, likewise holds that if the care the parent provides for fails, then that parent has not provided for the child's proper care and custody. *In re Alford*, unpublished memorandum opinion of the Court of Appeals, issued February 23, 2006 (Docket No. 264512) 177a-178a. In *In re Alford*, the respondent was incarcerated and made arrangements for her mother to care for her son while she was in prison. *Id.* at 1; 177a. The respondent's mother later became ill and could no longer care for the child. *Id*; 177a. Therefore, the court said that the respondent was not able to make arrangements for her son for the entire period of her incarceration. *Id*; 177a. The court of appeals held that under those circumstances, the trial court did not clearly err in finding subsection (h) satisfied by clear and convincing evidence. *Id.* at 1-2; 177a-178a.

Similarly, in the case at hand, Appellant did not provide for appropriate care and custody for Genevieve. Appellant left Genevieve to be cared for by Ms. Teschler, who, by Appellant's own description, "posed a danger to Genevieve based on her history with the DHS, which included a prior termination, and her drug use in the presence of Genevieve." Appellant's brief at 27, note 12. Ultimately, the lower court's assumption of jurisdiction and subsequent termination of Ms. Teschler's parental rights demonstrate that this provision for Genevieve's

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<sup>1</sup> The language of MCL 712A.19b(3)(g) is almost identical to MCL 712A.19b(3)(h) and courts have interpreted "fails to provide proper care or custody for the child" in (g) to require the same showing as "has not provided for the child's proper care and custody" in (h). See for example, *In re Perry*, at 650-651.

care and custody was not appropriate. Accordingly, Appellant failed to provide for Genevieve's proper care and custody when he left her to be cared for by Ms. Teschler.

A parent fails to provide proper care for their child when they leave the child without an adult legally authorized to consent to medical decisions. In *In re Systma*, the court found that the children were without proper care under the jurisdictional section when there was no one authorized to consent to medical treatment and there was no clear and definitive plan for who would provide care for the children. *In re Systma*, at 456. The former was particularly important to the *Systma* court because at least one of the children was of such a condition that he required regular doctor visits. *Id.*

Likewise, in the case at hand, Genevieve was an infant who required all the special medical care of a child her age. Appellant took no action to assure that Genevieve had someone authorized to consent to her medical care and thus did not provide for her proper care and custody.

Courts deciding analogous cases have concluded that the parent did not provide for the child's proper care and custody. *In re Hurd* is closely on point and its reasoning should be found persuasive. *In re Hurd*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 1998 (Docket No 189579) 1b-4b. In that case, the respondent had his parental rights terminated pursuant to MCL 712A.19b(3)(h) and he appealed both the court's assumption of jurisdiction and the subsequent termination of his parental rights. *Id.* at 1; 1b.

With respect to jurisdiction, the respondent argued that "because he did not oppose the placement of his children with his parents and because he had a plan for the children's care and custody during his incarceration, the juvenile court did not have authority to assert jurisdiction. *Id.* at 3; 3b. The court recognized the general rule that "a child who is placed by the custodial

parent in the temporary custody of relatives is not without proper custody and guardianship unless the care being provided is neglectful,” but found that jurisdiction was proper.” *Id*; 3b. The court reasoned, “[r]espondent here did not place his children in the custody of relatives nor did he arrange for alternative care for his children while he was in prison. Rather, it was petitioner that placed the minor children in new homes.” *Id*; 3b. The court further noted that “respondent’s acquiescence in his parents’ request for guardianship is not tantamount to his providing the children with proper care and custody such that the juvenile court would be prevented from exercising jurisdiction.” *Id*; 3b.

On the issue of termination, the respondent argued that because the petitioner stepped into the situation before he was given the opportunity to place his children with relatives and that because he had a plan for their proper care and custody, termination was not proper. *Id.* at 3-4; 3b-4b. The court again disagreed, stating: “[t]he evidence demonstrated petitioner, and not respondent, placed the children into new homes thereby providing for their care and custody. *Id.* at 4; 4b. “[T]here was no evidence that he made or attempted to make any arrangements for them. The only evidence on the issue indicated that he merely supported his parent’s proactive request to be guardians.” *Id*; 4b. Finally, the court rejected the respondent’s argument that termination was inappropriate because he was not offered services or a treatment plan prior to the termination of his rights. The court stated, “[g]iven the length of time of his minimum sentence, services or a treatment plan would not assist him in being able to provide proper care and custody for the children within a reasonable time.” *Id*; 4b.

Likewise, in the case at hand, Appellant makes similar arguments but never took any proactive steps to provide for the care of Genevieve. Appellant was not present nor did he orchestrate from a-far Genevieve’s placement with the Woroniaks on November 2, 2007. To the

contrary, the record reflects that Ms. Teschler and CPS arranged for the Woroniacks to temporarily care for Genevieve. 42a. Appellant merely supported the placement arrangement arranged by others.

*In re Sanchez-Marrero* is likewise analogous to the present case and the court's reasoning should also be persuasive. *In re Sanchez-Marrero* involved a respondent's appeal from an order terminating his parental rights under §19b(3)(h). *In re Sanchez-Marrero*, unpublished opinion per curiam of the Court of Appeals, issued April 1, 2004 (Docket No. 250553) 5b-8b. In that case, the respondent father was incarcerated and left the child in the care of the child's mother. *Id.* at 2; 6b. After he was incarcerated, but before the child protective proceeding was initiated, the respondent asked his mother to care for his child if anything ever happened to him and the child's mother, to which she agreed. *Id.*; 6b. Respondent did nothing, however, to alter the fact that the child remained in the care and custody of the child's neglectful mother. *Id.*; 6b. Furthermore, the respondent was aware that his child was being neglected in the mother's care. *Id.* at 3; 7b.

The court held that there was clear and convincing evidence that the respondent had failed to supply the child proper care and custody. *Id.* at 2; 6b. The court was persuaded by that fact that after the respondent became incarcerated, "respondent did not arrange for the child's care outside the mother's neglectful custody, of which he was aware." *Id.* at 3; 7b. It was only after the commencement of the child protective proceeding that the grandmother had exclusive custody, which was accomplished pursuant to the petitioner's placement. *Id.*; 7b. Furthermore, neither the child's mother nor the respondent provided the grandmother with a power of attorney or other authority to manage the child's medical care. *Id.*; 7b. Finally, although the court recognized the general rule that a child is not without proper custody when placed in the

temporary custody of relatives, the court refused to follow that rule because the “respondent did not himself have custody of the child, which he relinquished to a suitable relative.” *Id.*; 7b.

Likewise, in the case at hand, Appellant did nothing to remove Genevieve from Ms. Teschler’s care, though he had knowledge that Ms. Teschler was not an appropriate parent. At the time of Genevieve’s birth, Ms. Teschler was 23 years old and had already had six children removed from her care. 14a, 21a. She had been using controlled substances 2-3 times per week since the age of twelve and had at least one prior CPS intervention for having a child test positive for Marijuana. 14a, 16a. Appellant was aware that Ms. Teschler had other kids that she was not permitted to see and that she was historically incapable of providing appropriate care for a child. 70a. In detailing her shortcomings as a parent Appellant stated, “it just seems like the past is reoccurring. You know, she has no control.” 70a. Clearly, Appellant was aware that Ms. Teschler’s issues were not new and that those shortcomings were simply reoccurring.

Appellant’s failure to arrange for alternative care prior to DHS’s involvement was unreasonable and clear evidence that he did not provide for Genevieve’s proper care and custody. Furthermore, Appellant, never arranged for the Woroniaks or any other adult to have legal authority to manage Genevieve’s medical care. Finally, even if Appellant supported the placement with the Woroniaks, Genevieve never arrived in their care until DHS stepped in and arranged the placement. For all of these reasons, Appellant has not provided for Genevieve’s proper care and custody.

Appellant argues that once a case is begun, DHS and the trial court must collaborate with the parent to arrange for the child’s care, and that termination is not proper unless the petitioner can establish by clear and convincing evidence that the plan supported by the parent does not provide the child with proper care and custody. Appellant’s brief at 17-20. Under Appellant’s

approach, then, a parent's provision or failure to provide for adequate care is contingent upon that parent's ability to propose, with the help of the Michigan courts and the Department of Human Services, some other person who can provide their child with adequate care and custody. All failures prior to court intervention are disregarded in favor of the collaborative effort to develop a plan that adequately meets the child's needs. The effect is that under Appellant's approach, the phrase "has not provided for" in §19b(3)(h) refers specifically and exclusively to the parent's failure to propose an appropriate case plan. In the vast majority cases, this will require the parent's active resistance to DHS, as DHS and the parent must collaborate in developing the case plan, and DHS workers are statutorily required and specifically trained to identify and arrange appropriate placement plans in the most family like setting available and consistent with the child's needs.

Appellant misinterprets the purpose and effect of the guardianship laws, and the statutes that require DHS and the courts to involve the parents in the case development. See Appellant's brief at 17-19. Appellant references these laws as evidence that a parent may avoid termination by appropriately participating in case planning. Appellant's brief at 17-19. The better interpretation of those rules is that they exist to promote the best interests of the child, rather than to serve as an instrument to avoid termination or measuring stick for parental provision of care. Even the laws that allow a parent to avoid a mandatory termination petition when the child is cared for by relatives or when adoption is not an appropriate permanency plan do not negate a petitioner's ability to establish statutory grounds for termination. MCL 712A.19a(6). These new laws simply defer to the new overarching requirement that termination serve the child's best interests, and allow courts flexibility in achieving those best interests. Neither statute nor case

law identifies the planning process as the baseline for determining whether a parent has or has not provided for their child's care.

Appellant's interpretation is also contrary to any common sense understanding of what it means to provide for. Under Appellant's approach, the sole act required to provide for a child's care is to participate in the development of the case plan with DHS. Appellant's brief at 20. The parent need not actually arrange for the placement, but simply propose a viable care plan or support the placement arranged by DHS. Appellant's brief at 19-20. To support placement arranged by others and provided by others is not tantamount to providing for care. Moreover, it would be anomalous to judge whether a parent has provided for their child's care in the past without reference to that parent's conduct before courts are required to intervene.

Finally, Appellant's interpretation improperly ignores the statutory language that references what the parent has done in the past, and focuses only on the current plan for the child's future. The phrase "provided for" connotes affirmative acts. Furthermore, §19b(3)(h) refers to *the parent's* provision or failure to provide and is written in the past tense, indicating that it refers to actions done by the parent in the past to provide for the child. Thus, the statute requires (1) affirmative acts, (2) that those acts occurred in the past, and (3) that those acts are attributable to the parent. This requirement that the provision of care be made in the past and be attributable to the parent distinguishes the termination section from the jurisdictional section in child protective proceedings. While the jurisdictional section looks only at the status of the child, the termination section looks specifically at whether the parent has provided for the child in the past.

Appellant focuses on Genevieve's placement with the Woroniaks and argues that Genevieve has been provided for because this placement is appropriate and supported by

Appellant. Appellant's brief at 23. This argument is more appropriate in determining whether jurisdiction would be proper under the "without proper custody or guardianship" provision in the jurisdictional section. The termination section, however, is at issue in this case and has a different standard, as described above. Appellant has failed to show that the lower court clearly erred because he provided for Genevieve's care in the past, and in-fact the record indicates that he has not provided for her care. Appellant has not provided for Genevieve's proper care and custody because he did not take any affirmative action to remove Genevieve from the care of Ms. Teschler and he had no part in arranging for her subsequent placement with the Woroniaks.

Appellant further argues that Genevieve was voluntarily placed prior to court involvement. Appellant's brief at 20. This characterization of the initial placement is absurd in light of the fact that at the time of Genevieve's placement with the Woroniaks, Genevieve was less than a month old and Ms. Teschler was being hauled to jail, leaving her without a caregiver. It is even more absurd to equate that placement, and Appellant's subsequent approval, with an effort by Appellant to provide for the care and custody of Genevieve. The Woroniaks' compassion for their niece, and willingness to care for her in her time of need, can not be confused with a collaborative effort between the Woroniaks and Appellant to provide for Genevieve while Appellant is incarcerated. For the reasons set forth above, Appellant did not provide for Genevieve's care and custody and the lower court did not clearly error in concluding the same.

The third prong was also clearly satisfied. The third prong of subsection (h) is satisfied when there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age. MCL 712A.19b(3)(h). Genevieve was born October 18, 2007 and the earliest possible release date for Appellant is in the year

2021. Even assuming Appellant can provide for proper care and custody on the day he is released, a delay of over 12 years seems unreasonable on its face. 12 years is even more unreasonable when Genevieve's age is taken into consideration. In 2021, Genevieve will be turning 14 years old. At that time, Genevieve will have spent approximately  $\frac{3}{4}$  of her minor life with the Woroniaks. She will be an early teenager dealing with all of the stresses and changes of that age. To strip her from the only parents she has known would be a great hardship. It would force Genevieve to live in limbo for 14 years and deprive her of the permanency to which she is justly entitled. Under these circumstances, a delay of over 12 years before Appellant can possibly provide any care or custody is unreasonable. Accordingly, there is no reasonable possibility that Appellant will be able to provide proper care and custody within a reasonable time, and the lower court properly found statutory grounds for termination.

II. THE TRIAL COURT DID NOT CLEARLY ERROR IN TERMINATING APPELLANT'S PARENTAL RIGHTS UNDER MCL 712A.19B(3)(C)(I) BECAUSE THE CONDITIONS THAT LEAD TO THE FILING OF A PETITION MAY PROPERLY BE CONSIDERED "CONDITIONS THAT LED TO THE ADJUDICATION," APPELLANT'S INCARCERATION LED TO THE FILING OF THE PETITION, AND HIS EARLIEST RELEASE DATE IS IN THE YEAR 2021.

The Michigan Supreme Court reviews a Circuit Court's termination of parental rights for clear error. *In re Trejo Minors*, at 356-357. Clear error is the standard for "both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *Id.* "A circuit court's decision to terminate parental rights 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 JK*, at 209. The decision must strike the reviewing court as more than just maybe or probably wrong. *In re Trejo Minors*, at 356. Furthermore, the court must

give due regard to the trial court's unique ability to assess the witnesses' credibility. *In re Miller*, at 337.

Statutory grounds exist to terminate parental rights pursuant to §19b(3)(c)(i) where (1) the parent was a respondent in an abuse and neglect proceeding, (2) 182 or more days have elapsed since the issuance of an initial dispositional order, and (3) the court finds clear and convincing evidence that (a) the conditions that led to the adjudication continue to exist and (b) there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age. MCL 712A.19b(3)(c)(i).

The first two prongs of §19b(3)(c)(i) are not at issue in this case. The first prong, which requires that the parent be a respondent, was clearly met, has not been contested, and was clearly satisfied. The second prong was likewise met as 182 days elapsed between the initial dispositional order dated January 14, 2008 and the termination hearing, which was held December 16, 2008. 40a, 123a. The only contested prong is the third, which the lower court properly found to be satisfied because the conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering Genevieve's age.

The general rule is that in determining the "conditions that led to the adjudication" for the purposes of §19b(3)(c)(i), a probate court may apprise itself of all relevant circumstances. *In re Jackson*, 199 Mich App 22, 26; 501 NW2d 182 (1993); *In re KO*, unpublished opinion per curiam of the Court of Appeals, issued August 29, 2000 (Docket Nos. 225036, 225295) 9b-17b; *In re TMA*, unpublished opinion per curiam of the Court of Appeals, issued September 17, 2009 (Docket Nos 290820, 290821, 290822) 18b-21b; *In re Brown*, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2009 (Docket No. 290768) 22b-23b. Conditions that

led to the filing of the initial petition are properly considered “conditions that led to the adjudication.” *In re Jackson*, at 26; *In re KO*, at 5; 13b. Although the probate court is not necessarily confined to the allegations in the petition, those allegations are relevant in determining what induced the petition’s filing. *In re KO*, at 6; 14b.

Appellant argues that since only Ms. Teschler admitted to any allegations, only those allegations serve as “the conditions that led to the adjudication.” Appellant’s brief at 24. Thus, Appellant construes the conditions that led to the adjudication to be limited to the conditions that served as a basis for the adjudication. This interpretation is too narrow and is inconsistent with the statutory scheme enacted for child protective proceedings, as well as the cases interpreting what conditions constitute the “conditions that led to the adjudication.”

Appellant’s approach is too narrow because he attempts to too closely pair adjudication and disposition. Because the court's jurisdiction is tied to the children, the petitioner is not required to obtain adjudication with respect to each parent involved in a protective proceeding before the family court can act in its dispositional capacity. *In re CR*, 250 Mich App 185, 205; 646 NW2d 506 (2002). Once the court acquires jurisdiction by virtue of one parent's plea or trial, it can enter an order of disposition against both parents, regardless of the evidence against the other parent. *Id* at 202-203; MCR 3.973(A); MCL 712A.6. Thus, the court’s dispositional options are not contingent upon the source or manner of adjudication. The impact of this scheme is that the legislator clearly intended to allow courts to enter orders and proceed as necessary and in the best interests of the child rather than constrain them to consider what is appropriate based solely on the allegations proven or admitted to during the adjudication phase.

Throughout the post adjudicative phase of child protective proceedings, the court considers all relevant circumstances and conditions regardless of whether those circumstances

have been proven to a given standard and by legally admissible evidence. MCL 712A.19; 712A.19a; MCR 3.973; MCR 3.975; MCR 3.976. Those same considerations impact the court's orders and the direction of the case. Given this scheme, it would be anomalous, in considering what conditions "led to the adjudication," if the court was not permitted to consider all circumstances that prompted the filing of the petition, but was limited to those allegations which were specifically admitted to. Those same circumstances, whether admitted to or not: are considered in the decision to file a petition in the first place; may be considered by the court in determining whether to authorize the filing of the petition; play a part in the development of the case; and impacted on the decision to pursue termination. Where the petitioner can prove by clear and convincing legally admissible evidence, as required by §19b(3), that those conditions led to the filing of the petition and continue to prevent the possibility of reunification, it would seem inconsistent with this statutory scheme to remove them from consideration under §19b(3)(c)(i) simply because they did not serve as the factual basis for adjudication.

The general rule described in *Jackson* allows a court to consider conditions not specifically admitted to during the adjudication phase of child protective proceedings, and the statutory scheme makes it reasonable to do so. Furthermore, Appellant's incarceration was appropriate to consider as a condition that led to the adjudication. In this case, Appellant's incarceration was an allegation in the initial petition and was relevant to the court's initial placement of Genevieve with DHS. 10a. It was the fact that both parent's were incarcerated and unavailable to care for Genevieve that the CPS worker believed a petition was necessary. 42a. At the time of the termination hearing, Amber had disappeared and Appellant was in prison, rendering both unavailable to care for Genevieve. 164a. Thus, the very same conditions that led to the filing of the initial petition continued to exist. Therefore, case law permits courts to

consider circumstances outside those specifically admitted to in the adjudication phase, the statutory scheme supports the reasonableness of doing so, and Appellant's incarceration was pertinent and appropriate to consider under the facts of this case.

Proceeding with the understanding that the allegations contained in the initial petition could properly be considered under §19b(3)(c)(i) as conditions that led to the adjudication, it is clear that the third prong was properly satisfied. The conditions that led to the adjudication, as they relate to Appellant, were that Appellant was incarcerated and unable to care for Genevieve. 7a. It is undisputed that Appellant is still incarcerated. Furthermore, there is no reasonable likelihood that those conditions will be rectified within a reasonable time considering Genevieve's age, as Appellant will remain incarcerated until at least the year 2021. This period of time is unreasonable for the same reasons discussed above under the third prong of subsection (h). Therefore, the lower court did not clearly error in terminating Appellant's parental rights under §19b(3)(c)(i).

One common argument, which is not explicitly stated in Appellant's brief but is alluded to throughout his argument, is that it is unfair to terminate a parent that is not adjudicated to be neglectful of the child. This argument, however, improperly assumes that a parent who has not been adjudicated has not been neglectful. The laws of Michigan, and nature for that matter, require both parents to provide for their children. This legal and moral duty includes the requirement that a parent protect their child from harm, including that which may come from the other parent. The very fact that a child has been adjudicated abused or neglected necessitates some failure on the part of both parents, whether for causing the harm or by failing to protect the child from harm. Furthermore, the statutory requirements to terminate parental rights act to protect a so-called "non-offending parent" from termination without just cause. This is

accomplished through the requirement that statutory grounds be proven by clear and convincing legally admissible evidence, as well as an overarching requirement that the best interests of the child be served.

In the case at hand, Appellant left Genevieve with Ms. Teschler, who was not an appropriate caretaker. Ms. Teschler's drug use around Genevieve resulted in her arrest and incarceration, which left Genevieve without either parent to care for her. DHS and Ms. Teschler then arranged care with the Woroniaks for the time that she would be incarcerated. The fact that both parents were unavailable to care for Genevieve due to their incarceration and would remain unavailable for some period of time induced the petition's filing. 42a. At the time of the termination hearing both parents continued to be unavailable to care for Genevieve. Accordingly, the conditions that led to the adjudication continued to exist. Under these circumstances, the lower court did not clearly error in terminating Appellant's parental rights under §19b(3)(c)(i) and the decision should be affirmed.

III. THE LOWER COURT'S FAILURE TO EXPLICITLY FIND TERMINATION WAS IN GENEVIEVE'S BEST INTERESTS DOES NOT CONSTITUTE REVERSIBLE ERROR BECAUSE ALTHOUGH THE REFEREE SHOULD HAVE APPLIED THE POST AMEDMENT VERSION OF THE STATUTE, THE RECORD IS REplete WITH EVIDENCE TO SUPPOORT THAT FINDING.

The Michigan Supreme Court reviews a Circuit Court's termination of parental rights for clear error. *In re Trejo Minors*, 356-357. Clear error is the standard for "both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *Id.* "A circuit court's decision to terminate parental rights 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 JK*, at 209. The decision must strike the reviewing court as more than just maybe or probably wrong. *In re Trejo Minors*, at 356. Furthermore, the court must

give due regard to the trial court's unique ability to assess the witnesses' credibility. *In re Miller*, at 337.

MCL 712A.19b(5) permits the court to terminate a parents rights if there are statutory grounds for termination and termination is in the child's best interest. MCL 712A.19b(5). Pursuant to MCR 2.613, "[a]n error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613. MCR 2.613 applies to child protection proceedings. MCR 3.902.

Although the referee did not explicitly state that it is in the best interests of Genevieve to have Appellant's rights terminated, there was ample evidence to support that finding so the error was harmless. To begin, the Woroniaks are the only family Genevieve has ever really known and Genevieve identifies Kelly and Paul as momma and da-da. 148a. The Woroniaks and their children give Genevieve love, affection and guidance, and she is thriving in this stable environment. 54a, 82a. The Woroniaks are capable of providing proper food, clothing, education, medical care and other material needs to Genevieve, and in-fact, provide them with minimal assistance from DHS. 55a, 79a. Furthermore, the Woroniaks are prepared to take care of Genevieve forever. 149a. Genevieve will be 13 years old at Appellant's earliest release date. 164a. At that age, Genevieve will be coping with the normal stresses of being a teenager and continuance in a stable home with the Woroniaks is desirable and in Genevieve's best interests. Absent termination, Genevieve will be left in limbo and left to wonder what will happen if and when Appellant is released.

The referee aptly surmised the counterbalance in weighing Genevieve’s best interests: “there’s been no showing made here today that it is contrary to the best interests of Genevieve Hansen and that Mr. Bill Hansen’s rights should not be terminated.” 158a.

Where there is absolutely no showing that termination would be contrary to Genevieve’s best interests, the earliest she could possibly be reunited with Appellant is at or around the year 2021, and the only parents she has ever really know are ready, willing and able to provide a stable and loving adoptive home, the reasonable conclusion is that termination serves Genevieve’s best interests. Accordingly, although the referee applied the incorrect standard, that error was harmless because the evidence on the record favored termination. Therefore, the lower court should be affirmed.

**IV. APPELLANT’S INEFFECTIVE ASSISTANCE CLAIM SHOULD BE REJECTED BECAUSE HIS COUNSEL’S PERFORMANCE DID NOT FALL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND APPELLANT DOES NOT ESTABLISH A REASONABLE PROBABILITY THAT THE RESULT WOULD HAVE BEEN DIFFERENT ABSENT HIS CLAIMED DEFICIENCIES.**

Whether a respondent in a child protective proceeding was denied the effective assistance of counsel presents a question of constitutional law subject to review de novo. *In re C.R.*, at 197 citing *People v Toma*, 462 Mich 281, 310; 613 NW2d 694 (2000). “The right to counsel guaranteed by the United States and Michigan Constitutions, U.S. Const., Am. VI; Const. 1963, art. 1, § 20, is the right to effective assistance of counsel.” *In re CR* at 197. “Although the constitutional provisions explicitly guaranteeing the right to counsel apply only in criminal proceedings, the right to due process also indirectly guarantees assistance of counsel in child protective proceedings. Thus, the principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings.” *In re CR at 197*; see also *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988); see also *In re Trowbridge*, 155

Mich App 785, 786; 401 NW2d 65 (1986). Michigan statute also provides that a respondent in a child protective proceeding is entitled to an attorney, and a court appointed attorney if he is financially unable to hire one. MCL 712A.17c(4).

To preserve the issue of ineffective assistance of counsel for review, a defendant must move in the lower court for a new trial or a *Ginther* hearing. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987); *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Where ineffective assistance of counsel is not preserved, review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue. *People v Sabin* (On Second Remand), 242 Mich App 656, 659; 620 NW2d 19 (2000), citing *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

To establish a claim of ineffective assistance of counsel a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The right to counsel under the Michigan Constitution does not impose a more restrictive standard than that established in *Strickland. Pickens*, at 318-319. A court reviewing an ineffective assistance claim will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness. *In Re CR* at 198. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound

trial strategy. *Strickland*, at 690-691; *People v Stanaway*, 446 Mich 643, 687 (1994). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, at 694; *Stanaway*, at 687-688.

In the case at hand, the record is insufficient to establish either prong of Appellant's ineffective assistance claim. Appellant's first claimed deficiency is that there is no evidence that trial counsel requested any discovery or conducted an independent investigation. Appellant's Brief at 33. There is no record support, however, that Appellant's trial counsel *did not* request discovery nor is there evidence that he did not conduct an independent investigation. Appellant bears the burden of proving each element of an ineffective assistance claim and where the record does not support the claim, the deficiency is waived. *Sabin*, at 659. The record does not support any claim that Appellant's trial counsel's pretrial preparation was deficient.

Appellant's second claim is that at the termination hearing his attorney called no witnesses, did not cross examine Mrs. Woroniak, and did not introduce any evidence on Appellant's behalf. Appellant's Brief at 33. "[D]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) quoting *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

With respect to the attorney's decision not to call witnesses or introduce evidence, there is no evidence in the record that any evidence or witness could provide additional or different information than was otherwise presented. Furthermore, the record indicates that after the petitioner finished with proofs and the other two attorneys involved in the hearing declined to

call any witnesses, Appellant's counsel conferred with Appellant before making the decision not to put on additional proofs. 153a. The reasonable inference is that the decision not to call any witnesses was a trial strategy discussed with Appellant after all other proofs were in. Under these circumstances, it can hardly be said that these decisions fell below an objective standard of reasonableness.

Appellant's third claimed deficiency is that his counsel did not deliver an opening statement and the closing argument consisted of only five sentences. "[T]he waiver of an opening statement involves 'a subjective judgment on the part of trial counsel which can rarely, if ever, be the basis for a successful claim of ineffective assistance of counsel.'" *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) quoting *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). The waiver of opening statement did not fall below an objective standard of reasonableness, as evidenced by the fact that all other attorneys at the hearing likewise waived opening. 123a-124a. Furthermore, the closing statement delivered by Appellant's counsel made two intelligent arguments. First, counsel argued that Appellant was a good father by attempting to maintain contact with Genevieve. 155a. Second, counsel argued that termination would violate Appellant's due process rights. 155a. That a strategy does not work does not render its use ineffective assistance of counsel. *Petri*, at 412. Although counsel's closing did not succeed in forestalling termination, it certainly did not fall below an objective standard of reasonableness.

Appellant's fourth claimed deficiency is that his counsel did not object to application of the incorrect best interests determination. It is well settled that courts speak through their written orders rather than their oral statements. *In re Contempt of Henry*, at 678. The error in this case is the trial court's termination of Appellant's parental rights without affirmatively finding

termination in Genevieve's best interests. Accordingly, the error did not occur until the circuit judge signed the order on 12/17/08. 162a. Therefore, the error was an appealable issue rather than an objectionable issue. Furthermore, the Court of Appeals addressed the issue so Appellant was not prejudiced. 166a.

Even if this Court finds that Appellant's trial counsel was deficient, the claim must be denied because Appellant has made no showing that the result would have been different but for the deficiency. Accordingly, Appellant's claim of ineffective assistance of counsel should be rejected.

## CONCLUSION

For the reasons more fully set forth above, Appellee respectfully requests that this court affirm the lower court.

Dated: \_\_\_\_\_

*Respectfully submitted,*

A handwritten signature in black ink, appearing to read "C. B. MacBeth", written over a horizontal line.

Colin B. MacBeth

Attorney for Manistee Co. DHS/Appellee