

DEC 2013

STATE OF MICHIGAN
 IN THE SUPREME COURT
 APPEAL FROM THE MICHIGAN COURT OF APPEALS

TERM

MICHAEL J. TALBOT, P.J., and JANE E. MARKEY and MICHAEL J. RIORDAN, JJ.

In the Matter of COH, ERH, JRG, KBH, Minors.

DEPARTMENT OF HUMAN SERVICES,

Supreme Court
 Docket No. 147515

Petitioner/Intervening
 Respondent-Appellant,

vs.

LORI SCRIBNER,

Intervening Petitioner for
 Guardianship-Appellee.

Michigan Court of Appeals No. 309161
 14th Judicial Circuit Court-Family Division No. 08-036989-NA

JOINT BRIEF ON APPEAL – APPELLANT AND MCI SUPERINTENDENT

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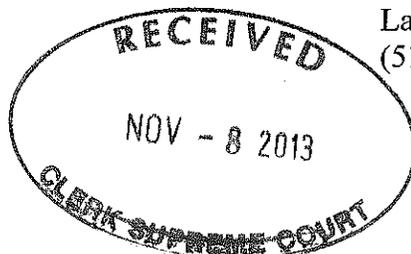


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STATEMENT OF THE QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS ERR IN HOLDING THAT THERE IS A PREFERENCE FOR RELATIVES UNDER MCL 712A.19C(2) WHEN A CIRCUIT COURT DECIDES WHETHER TO CREATE A JUVENILE GUARDIANSHIP AFTER PARENTAL RIGHTS HAVE BEEN TERMINATED?

Petitioner/Intervening Respondent-Appellant says, "Yes".
Intervening Guardianship Petitioner-Appellee says, "No".
The family court says, "Yes".
The Court of Appeals says, "No."

- II. IF A PREFERENCE FOR RELATIVES EXISTS FOR A JUVENILE GUARDIANSHIP UNDER MCL 712A.19C(2), IS THE PATERNAL GRANDMOTHER ENTITLED TO THAT PREFERENCE EVEN THOUGH HER SON'S PARENTAL RIGHTS TO THE CHILDREN HAD BEEN TERMINATED?

Petitioner/Intervening Respondent-Appellant says, "Yes".
Intervening Guardianship Petitioner-Appellee says, "Yes".
The family court did not answer this question.
The Court of Appeals says, "Yes."

- III. DID THE COURT OF APPEALS ERR BY NOT APPLYING A CLEAR ERROR STANDARD OF REVIEW TO THE MUSKEGON CIRCUIT COURT FAMILY DIVISION'S DETERMINATION OF THE CHILDREN'S BEST INTERESTS PURSUANT TO MCL 712A.19C?

Petitioner/Intervening Respondent-Appellant says, "Yes".
Intervening Guardianship Petitioner-Appellee says, "No".
The family court says, "Yes".
The Court of Appeals says, "No."

- IV. DID THE CIRCUIT COURT PROPERLY USE THE BEST INTERESTS FACTORS ENUMERATED IN MCL 722.23 OF THE CHILD CUSTODY ACT IN DECIDING WHETHER TO GRANT THE PETITION FOR A JUVENILE GUARDIANSHIP?

Petitioner/Intervening Respondent-Appellant says, "Yes".
Intervening Guardianship Petitioner-Appellee says, "No".
The family court says, "Yes".
The Court of Appeals says, "No."

STATEMENT OF THE QUESTIONS PRESENTED continued

- V. DID THE COURT OF APPEALS ERR BY REVERSING THE CIRCUIT COURT ON THE GROUND THAT IT WAS IMPROPER TO COMPARE THE FOSTER PARENTS WITH THE PROPOSED GUARDIAN, OR ERRED ON ANY OTHER BASIS?

Petitioner/Intervening Respondent-Appellant says, "Yes".

Intervening Guardianship Petitioner-Appellee says, "No".

The family court says, "Yes".

The Court of Appeals says, "No."

STATEMENT OF JURISDICTION

This Court granted leave.

STATEMENT OF THE FACTS

The Department of Human Services (DHS) appeals from the June 25, 2013, unpublished per curiam opinion of the Court of Appeals¹ that reversed the May 3, 2011, order of the 14th Judicial Circuit Court-Family Division for the County of Muskegon (the Honorable WILLIAM C. MARIETTI, presiding)² that denied the petition for guardianship filed by Lori Scribner (Scribner) under MCL 712A.19c(2).

The children at issue are Jordan Rick Gonzalez (“JRG” - d/o/b 09/05/2001), Esdeanna Renae Heeren (“ERH” - d/o/b 10/26/2002), Kylea Bradon Heeren (“KBH” - d/o/b 02/16/2004), and Carmen Olivia Heeren (“COH” - d/o/b 10/03/2005).³ Although they shared the same mother, Kathleen Bolduc, they had different fathers.⁴ JRG’s father was Richard Bellew and the girls’ father was Joseph Braden Heeren.⁵

“The ... children were removed from their home [on February 8, 2008,] due to physical neglect, medical neglect, and lack of supervision on the part of the mother, Kathleen ***Bolduc***.”⁶

Regarding placement, DHS followed the version of MCL 722.954a that was in effect at that time, which is found in 1997 PA 172, § 4(2). Efforts were made to place the children with relatives.⁷ Initially, protective services recommended separation of the girls from JRG “due to

¹ Appendix (App) 14a (*In the Matter of COH, ERH, JRG, KBH*, unpublished per curiam opinion of the Court of Appeals, issued June 25, 2013 (Docket No. 309161); 2013 WL 3198142 (hereinafter *In re COH*, opinion”).

² App 8a (05/03/2011 Order Re: Juvenile Guardianship). A copy of the family court’s 03/21/2011 Opinion Re: Appointment of Guardians is found at App 9a.

³ App 189a (Order Following Dispositional Review/Permanency Planning Hearing conducted on September 23, 2008, entered on October 21, 2008).

⁴ *Id.*, see also App 92a, 142a, 368 (07/03/2008 Dispositional Hearing Tr, p 5; 9/23/2008 Review Hearing Tr, p 6; 06/04/2009 Dispositional Hearing Tr, p 79).

⁵ *Id.*

⁶ App 102a (07/03/2008 Dispositional Hearing – Petitioner’s Exhibit 1 [Children’s Foster Care Initial Service Plan (“ISP”)] , p 4).

⁷ App 116a-117a (ISP, pp 19-20).

conflicts between children[, but t]his w[as to] be re-evaluated to determine if it is in the children's best interest to be placed together."⁸ Accordingly, JRG was placed with Linda and Bill Cottrell and the girls were placed with Emma Blain while DHS consulted with relatives.⁹

Five months later, on July 9, 2008, Scribner called DHS "regarding the Heeren girls", but not JRG, and the log of this call does not reference any interest in placement.¹⁰ There were no qualifying relatives for placement of the children.¹¹ Not even Scribner's son, Ron Heeren (the girls' father), suggested his mother (Scribner) as a possible placement for the children. Although Scribner testified that she maintains a relationship with her son Ron and talks to him "frequently",¹² Ron never offered Scribner to the DHS as a placement option during its preparation of the Initial Case Service Plan.¹³ Although the placement effort was the main issue at the September 23, 2008, review hearing,¹⁴ Ron also did not mention his mother (Scribner) as a

⁸ App 116a (ISP, p 19).

⁹ App 62a, 116a-117a, 1428a-1429a (04/09/2008 Pretrial Hearing – Petitioner's Exhibit 1 [Court Report], p1; ISP, pp 19-20; 02/09/2011 Guardianship Hearing Tr, pp 152-153).

¹⁰ App 160a, 1432a-1433a (09/17/2008 Updated Service Plan, p 9; (02/09/2011 Guardianship Hearing Tr, pp 156-157).

¹¹ App 64a, 77a, 116a-117a, 823a, 1407a-1408a (04/09/2008 Pretrial Hearing – Petitioner's Exhibit 1, pp 3, 16; ISP, pp 19-20; 08/09/2010 Guardianship Hearing Tr, p 18; 02/09/2011 Guardianship Hearing Tr, pp 131-132). Scribner acknowledged that she was not in a position to take the children when the children were removed. App 960a (08/26/2010 Guardianship Hearing Review Tr, p 131). When Holy Cross was assigned the case from the DHS, "there was a potential placement with ... the children's great uncle[, b]ut not with the grandmother." App 1407a (02/09/2011 Guardianship Hearing Tr, p 131). Scribner did not seek placement of the children in 2008 and in the two calls she made in 2008 (July 2008 and December 2008), she did not bring up placement. App 160a, 1407a, 1432a-1433a (09/17/2008 Updated Service Plan, p 9; 02/09/2011 Guardianship Hearing Tr, pp 131, 156-157). The Foster Care Review Board also reported in August 2009 that the DHS "has made diligent efforts to locate interested relatives. App 563a (08/25/2009 Dispositional Review Hearing – Petitioner's Exhibit 2 [Foster Care Review Board Report], p 4).

¹² App 948a (08/26/2010 Guardianship Hearing Tr, p 119).

¹³ App 109a (07/03/2008 Dispositional Hearing - Petitioner's Exhibit 1 [Initial Service Plan], p 11).

¹⁴ The mother's attorney informed the family court that "[t]he only dispute is the proposed placement, your honor." App 141a (09/23/2008 Review Hearing Tr, p 4). This dispute did not

possible placement for the children at that time.¹⁵ The family court expressed its frustration and concern about trying to place *four* children together, especially after being informed that the two other recent possible placements had fallen through, but the DHS representative informed the family court that the search for a viable placement was continuing and DHS expressed confidence that a viable placement would be found.¹⁶ The family court noted that “[t]here’s a preference of course for family but even the mother is opposed to that[.]”¹⁷

Scribner’s son Ron participated in the September 23, 2008, review hearing and although he was privy to these efforts to place his children, he did not offer his mother (Scribner) as a viable alternative.¹⁸ Instead, the only relative Ron mentioned was his Uncle Ron (who is the girls’ Great Uncle and Scribner’s brother) whom the child’s mother and the children’s attorney vigorously opposed.¹⁹ The children’s mother “prefer[red] for the three girls to stay where they are in the current foster home [because s]he knows they’re doing well there and she says that they really don’t know this proposed great-uncle, that would basically be a stranger to them even though it’s relation by blood So she’s [opposed] to the placement change” from foster care.²⁰ Although Scribner’s son Ron had initially noted that his Uncle Ron “seems paranoid at times”,

involve Scribner. Instead, it involved whether JRG should be placed with his paternal aunt, Erin Bellew, with the girls going with their paternal Great Uncle Ron (Scribner’s brother). App 139a, 141a-142a, 144a (09/23/2008 Review Hearing Tr, pp 3, 5-6, 8).

¹⁵ App 144a-150a (09/23/2008 Review Hearing Tr, pp 8-14).

¹⁶ App 148a-149a (09/23/2008 Review Hearing Tr, pp 12-13).

¹⁷ App 149a (09/23/2008 Review Hearing Tr, p 13). The mother opposed placement with the children’s great-uncle Ron, the girls’ father’s uncle, which was the only relative option presented for the girls. App 144a-147a (09/23/2008 Review Hearing Tr, pp 10-11). The mother preferred the foster care parents, where the children were doing well. *Id.*

¹⁸ App 149a-150a (09/23/2008 Review Hearing Tr, pp 13-14).

¹⁹ App 144a-147a (09/23/2008 Review Hearing Tr, pp 10-11).

²⁰ App 141a-142a (09/23/2008 Review Hearing Tr, pp 5-6).

he still thought Uncle Ron would be good for the children.²¹ He “also fe[lt] that the children would be safe with the foster parent[.]”²² However, his opinion about his Uncle Ron took a 180-degree turn when he learned that Uncle Ron was going to fight against reunification of the children with their mother and that Uncle Ron had deliberately instructed JRG to misbehave at the foster parents’ home.²³ After that, the girls’ father rejected his Uncle Ron as a suitable placement for the children, and, instead, supported the reunification plan with the mother, which included the children’s foster care placement as was preferred by the children’s mother.²⁴

Even before this September 23, 2008, hearing, Scribner’s son had already informed the DHS that “he feels comfortable with the placement of the girls” in foster care, and that he wanted them placed together with their brother (JRG) and wanted them to be near their mother to increase the possibility of reunification.²⁵ Thus, Scribner’s son did not advocate for moving the children over a thousand miles away to Florida to be with Scribner.²⁶

²¹ App 109a (07/03/2008 Dispositional Hearing - Petitioner’s Exhibit 1 [Initial Service Plan], p 11).

²² *Id.*

²³ App 149a-150a, 364a (09/23/2008 Review Hearing Tr, pp 13-14; 06/04/2009 Dispositional Hearing Tr, p 75). The children’s attorney informed the family court that the girls’ great-uncle’s “position [was] that mother wasn’t doing anything that was worth anything in order to have the children reunified and that he was going to do everything in his power to stop that reunification.” App 145a (09/23/2008 Review Hearing Tr, p 9). Also, following a visit with Uncle Ron, the boy returned to the foster care parents’ home and “start[ed] throwing feces around his room” because Uncle Ron told him to “misbehave in that home and that it would get him quicker with his uncle.” App 145a-146a (09/23/2008 Review Hearing Tr, pp 9-10).

²⁴ App 141a-142a, 149a-150a (09/23/2008 Review Hearing Tr, pp 5-6, 13-14).

²⁵ App 176a (09/23/2008 Review Hearing – Petitioner’s Exhibit 1 [Updated Service Plan], p 25).

²⁶ It is noted that a placement in Florida would have been inconsistent with MCL 712A.18f(3), requiring that “[t]he case service plan ... provide for placing the child in the most family-like setting available and *in as close proximity to the child’s parents’ home as is consistent with the child’s best interests and special needs*” (emphasis supplied).

The first time Scribner’s son suggested that his mother might be willing to take the children “if necessary” was during the termination trial on June 4, 2009. Her son’s attorney, David Kortering, introduced Scribner’s June 2, 2009, letter addressed to the family court, App

At the September 23, 2008, review hearing, the family court stated the placement goal for the four children: “the objective here is to get these kids together” because “[t]hat’s the only thread of stability that these children have in their lives is each other, unfortunately” and “[t]he only stability, the only rock in the water is each other, it’s sad” and “they need to be together.”²⁷ This was also the stated goal of the girls’ father (Scribner’s son).²⁸ Accordingly, on October 3, 2008, JRG’s placement was moved to the home of his current foster care parents, Terry and Dorice Koetje, and the girls’ placement was changed to the Koetje home on October 10, 2008.²⁹

The Foster Care Review Board would report a year later in August 2009 that the DHS “has made diligent efforts to locate interested relatives.”³⁰ The foster care father, Terry Kotje, testified that, “at the time that the children came [to their home in October 2008], the

550a (App 496a, 06/04/2009 Dispositional Hearing Tr, p 208 [Respondent’s exhibit L]), and informed the family court that Scribner would “help out any way she could possibly, help out even taking the children *if necessary*.” App 496a (06/04/2009 Dispositional Hearing Tr, p 208 [emphasis supplied]). Thus, Scribner made a conditional offer to consider petitioning for guardianship “[i]n the event that the children are not returned to their parents[.]” App 550a. The children had been in foster care for 16 months at this point. The family court terminated the fathers’ rights, but not the mother’s and, instead continued the goal of reunification with the mother. App 521a-522a, 525a-526a, 551a (06/04/2009 Dispositional Hearing Tr, pp 233-234, 237-238; 06/08/2009 Order Terminating Parental Rights).

²⁷ App 148a-149a (09/23/2008 Review Hearing Tr, pp 12-13). This change was also authorized by MCL 712A.13b(1)(a). It is also consistent with the goal of keeping siblings together if possible. App 1486 (DHS’s Children’s Foster Care Manual - 04-01-2008 [“CFF”] 722-3, p 3): “[e]fforts to place sibling groups in the same out-of-home placement must be given priority”). Also, “[w]hen there are at least two options for placement, one with adult relatives and the other with a sibling in foster care or an adoptive home, **and both are equal** in placement selection/best interest criteria, preference should be given to placement with the sibling.” App 1487a (CFF 722-3, p 4 [emphasis in the manual]).

²⁸ App 176a (09/23/2008 Review Hearing – Petitioner’s Exhibit 1 [Updated Service Plan], p 25).

²⁹ App 220a, 1405a (12/18/2008 Dispositional Hearing – Petitioner’s Exhibit 1 [Updated Service Plan 12/06/2008 for period 10/03/2008 to 12/06/2008], p 9; 02/09/2011 Guardianship Hearing Tr, p 129).

³⁰ App 563a (08/25/2009 Dispositional Review Hearing – Petitioner’s Exhibit 2 [Foster Care Review Board Report of July 17, 2009], p 4).

grandmother was not involved in their life from what we had ever heard.”³¹ Before December 2008, the foster care caseworker, Andrea Hagen, had no information that Scribner was involved.³² Scribner called the foster care worker for the first time in December 2008, and rather than ask about placement, she asked where she could send Christmas presents.³³

DHS thus made its final placement decision in October 2008, and no challenge to that placement decision was pursued under 1997 PA 172, § 4a(3), MCL 722.954a(3) (now 2010 PA 265, § 4a[6], MCL 722.954a[6]), and it is *not* the subject of this appeal.³⁴

³¹ App 1345a (02/09/2011 Guardianship Hearing Tr, p 69).

³² App 1406a (02/09/2011 Guardianship Hearing Tr, p 130).

³³ App 1406a-1407a, 1408a (02/09/2011 Guardianship Hearing Tr, pp 130-131, 132). There is only one record call from Scribner to DHS on July 9, 2008, “regarding the Heeren girls”, but not Jordan, and it does not reference any interest in placement. App 160a, 1432a-1433a (09/17/2008 Updated Service Plan, p 9; (02/09/2011 Guardianship Hearing Tr, pp 156-157). Given Scribner’s son’s failure to mention her at the September 23, 2008, hearing as a possible placement for the girls, App 149a-150a (09/23/2008 Review Hearing Tr, pp 13-14), even though Scribner testified that she and her son talk to each other “frequently”, App 948a (08/26/2010 Guardianship Hearing Tr, p 119), it follows that Scribner was not seeking placement when she called on July 9, 2008.

³⁴ The Court of Appeals referred to two telephone calls Scribner made to the foster care worker, one in May 2009 and one in October 2009, when Scribner mentioned the word guardianship. App 18a (*In re COH* opinion, p 5). These calls are not relevant to the present proceedings because they pre-date the petition filed after the parents’ rights had been terminated. In any event, the Court of Appeals’ apparent view that these two calls (made five months apart) establish her efforts to achieve placement or a guardianship of the children at either of those times is clearly erroneous. Scribner’s actions and words demonstrate that she had no immediate interest in a guardianship until *after* the respective parental rights to the children had been terminated. First, the caseworker told her that, if she wanted to pursue a guardianship, she would have to file a petition in the Muskegon County Court. App 1409a-1410a (02/09/2011 Guardianship Hearing Tr, pp 133-134). She did not file anything. Second, after the call in October 2009, she failed to return the caseworker’s call. App 1412a, 1413a, 1438a-1439a (02/09/2011 Guardianship Hearing Tr, pp 136, 137, 162-163). Third, Scribner wrote two letters that establish, definitively, that her interest in a guardianship was conditional—“[i]n the event that the children are not returned to their parents” or “mother”. App 550a, 720a (Scribner’s June 2, 2009, and September 23, 2009, letters to the family court). Fourth, at the June 4, 2009, termination trial involving her son, his attorney, David Kortering, introduced Scribner’s June 4, 2009, letter, App 550a, and informed the family court that Scribner would “help out any way she could possibly, help out even taking the children *if necessary*.” App 496 (06/04/2009 Dispositional Hearing Tr, p 208 [emphasis supplied]). And, fifth, Scribner was working with the

Scribner pursued a guardianship of the children on July 1, 2010, after the mother did not contest the allegations of the termination petition with the understanding that, in lieu of committing the children to the jurisdiction of the Michigan Children's Institute (MCI), the family court would entertain Scribner's petition for juvenile guardianship.³⁵ Thus, the family court was aware that the girls' *grandmother* was seeking guardianship,³⁶ and it specifically noted this fact in the first paragraph of its opinion, identifying Scribner as "grandmother of three of the children[.]"³⁷

When Scribner filed her petition, the recommended permanency plan "ha[d] been changed to termination of parental rights *and adoption*" because the children "have been in foster care for 15 of the last 22 months."³⁸ Thus, DHS's permanency plan concurrently involved reunification and adoption leading up to the mother's termination of parental rights.³⁹ DHS was preparing its recommendations of a permanency plan and produced its report on August 26,

mother's attorney as evidenced by Scribner's September 23, 2009, letter that was submitted to the family court on November 17, 2009, by the mother's attorney. App 720a. Thus, although she used the word guardianship, she chose not to pursue it until after the parents' rights were terminated.

³⁵ App 794a-802a (07/01/2010 Permanent Wardship Hearing Tr, pp 3-11). An order to this effect was entered on July 12, 2010. App 804a (07/12/2010 Order Following Hearing to Terminate Parental Rights).

³⁶ App 794a-795a (07/01/2010 Permanent Wardship Hearing Tr, pp 3-4).

³⁷ App 9a (Opinion Re: Appointment of Guardian, p 1).

³⁸ App 562a (emphasis supplied; 08/25/2009 Dispositional Review Hearing – Petitioner's Exhibit 2 [Foster Care Review Board Report of July 17, 2009], p 3).

³⁹ App 1147a-1148a (11/17/2010 Post-Termination/Permanency Planning Hearing - Petitioner's Exhibit 1 [Permanent Ward Service Plan ("PWSP")] dated 08/26/2010 *Report Period* 05/29/2010 to 08/26/2010, pp 1-2). Concurrent planning is permitted under MCL 712A.19(12) ("[r]easonable efforts to finalize an alternate permanency plan may be made concurrently with reasonable efforts to reunify the child with the family"). Also, "[r]easonable efforts to place a child for adoption or with a legal guardian, including identifying appropriate in-state or out-of-state options, may be made concurrently with reasonable efforts to reunify the child and family." MCL 712A.19(13).

2010, which covered the period of 05/29/2010 to 08/26/2010.⁴⁰ While DHS was doing so, and within a month after filing her guardianship petition, Scribner was allowed some supervised visitation with the children.⁴¹ During and afterwards, Scribner made unsubstantiated accusations against the foster care parents, including that the foster care parents were starving and “beat[ing]” them.⁴² This was a traumatic experience for them.⁴³ Scribner “conveyed [to protective services] significant concerns regarding the children’s safety [while in the foster care parents’ care] to the point where they would be at ... risk of a fatal harm. That they would be abused to the point that they would be – killed.”⁴⁴ Scribner asserted that “they ... were significantly at risk and if someone didn’t intervene that the children would be at risk of dying in the foster home.”⁴⁵ She reported maltreatment, improper care, physical abuse and neglect at the hands of the foster care parents, including that “the children were being starved in the foster home” and “were being beaten by the foster parents, that [one of the children] had bruising [as] ... a result of ... a physical incident by the foster parents.”⁴⁶ Such “allegation of physical abuse

⁴⁰ App 1147a. (Permanent Ward Service Plan dated 08/26/2010).

⁴¹ App 976a (08/26/2010 Guardianship Hearing Tr, p 147).

⁴² App 904a-905a, 919a (08/26/2010 Guardianship Hearing Tr, pp 75-76, 89; App 1164a (PWSP dated 08/26/2010, pp 18-19). The family court confirmed that her accusations were “unsubstantiated”. App 12a (Opinion Re: Appointment of Guardian, p 4). Her accusation about starving the children was made even though she acknowledged to the family court that they did not appear malnourished. App 90a (08/26/2010 Guardianship Hearing Tr, p 151).

⁴³ The foster care father testified that, “there was a lot of acting out after ... that time period between a number of the kids.... [KBH] not so much, but ... [ERH] being quite scared of having to be taken somewhere that she didn’t want to go. [COH] showing a lot of anger, acting out violently[,] ... and [JRG] having ... similar type, he, he wasn’t as violent acting, but real ... prone to being defiant, not being cooperative, things like that.” App 1349 (02/09/2011 Guardianship Hearing Tr, p 73).

⁴⁴ App 905a (08/26/2010 Guardianship Hearing Tr, p 76).

⁴⁵ *Id.*

⁴⁶ App 896a-897a, 899a, 900a, 902a (08/26/2010 Guardianship Hearing Tr, pp 67-68, 70, 71, 73).

[results in] an automatic [and complete] investigation.”⁴⁷ And, where the allegation involves “injuries on their buttock or genitalia that [protective services] cannot by policy observe[, it] would request that the child undergo a physical examination with a physician which [it] did request.”⁴⁸ All the children went through more than one complete physical examination that “are rather invasive,”⁴⁹ and the police department was notified.⁵⁰ At the hospital, the children were “visibly fearful sitting on the foster parents [sic] lap. Very clingy. Didn’t want to leave. The nurse had gone out ... to the lobby to request that [the child] come back to be examined and she didn’t respond to the nurse. She did not want to go back to the examination room.”⁵¹ And, the child with the alleged bruise on the buttocks “was extremely upset about the exam.”⁵²

When this was brought to the family court’s attention by the children’s attorney,⁵³ Scribner’s attorney denied that Scribner “report[ed] *anything* to protective services.”⁵⁴ She added: “In fact it was [the children’s attorney] who told me that had occurred and I contacted [Scribner] and *she had no idea* so this was not Ms. Scribner reporting it.”⁵⁵ This denial by Scribner was proven false at a later hearing.⁵⁶ Although the allegations arose from Scribner’s

⁴⁷ App 901a (08/26/2010 Guardianship Hearing Tr, p 72).

⁴⁸ *Id.* It appears that protective services treated it as a possible sexual assault because there was an allegation of bruising on the buttock, which triggers a complete physical examination. App 901a (08/26/2010 Guardianship Hearing Tr, p 72).

⁴⁹ App 904a (08/26/2010 Guardianship Hearing Tr, p 75).

⁵⁰ App 901a-904a, 907a (08/26/2010 Guardianship Hearing Tr, pp 72-75, 78).

⁵¹ App 902a (08/26/2010 Guardianship Hearing Tr, p 73).

⁵² App 1153a (PWSP dated 08/26/2010 - log entry for 07/30/2010, p 7).

⁵³ App 813a-816a (08/09/2010 Guardianship Hearing Tr, pp 8-11).

⁵⁴ App 817a (8/9/2010 Guardianship Hearing Tr, p 12).

⁵⁵ *Id.* (emphasis supplied).

⁵⁶ App 905a, 1153a (08/26/2010 Guardianship Hearing Tr, p 76; PWSP dated 08/26/2010 - log entry for 07/30/2010, p 7). Scribner’s attorney contended that Scribner only represented that she did not make any allegations of *sexual* abuse. App 995a (08/26/2010 Guardianship Hearing Tr, p 166). That, of course, is not what Scribner’s attorney said at the August 9, 2010, hearing. Instead, she told the court that Scribner “didn’t report *anything* to protective services” and “she had *no idea* so this was not Ms. Scribner reporting it.” App 817a (emphasis supplied; 8/9/2010

supervised visits with the children, Scribner testified that the supervisors were not in a position to hear any of these statements from the child or children---about being slapped in the utility closet or not being allowed to eat.⁵⁷

In its August 26, 2010, Permanent Ward Service Plan, DHS reported that “[t]he foster parent’s [sic] love [the children] and have reported that they are interested in adopting the kids. The children have been placed in their home for approximately 21 months and there is a strong bond with the family. The children continue to report that they feel safe in their current foster home....”⁵⁸ Indeed, the foster care parents filed a petition for adoption and were willing to provide them with “a permanent, forever home.”⁵⁹ The DHS “recommend[ed] that [the children] remain in their current foster home [and] ... become MCI Wards so the adoption process for permanency can begin. The children have been in foster care for approximately 2 ½ years and the children need permanency in their lives.”⁶⁰ Holy Cross recommended “that the children continue in their current foster care placement and begin adoption proceedings with their current foster parents.”⁶¹ A week before the hearing conducted on February 9, 2011, a permanency planning conference (PPC) occurred and it was determined that the foster care parents were “suitable for adoption” and it was the PPC’s position “that the children should stay in [their]

Guardianship Hearing Tr, p 12). A bit more candor was in order given what the children had been put through by Scribner’s complaints to protective services. Indeed, her conduct emulated her brother’s. He also made complaints to protective services and deliberately led JRG to misbehave at the foster care parents. App 145a-146a, 898a, 906a (09/23/2008 Review Hearing Tr, pp 8-9; 08/26/2010 Guardianship Hearing Tr, pp 69, 76). Scribner acknowledged her close relationship with her brother and the fact that she stays there whenever she comes to Michigan. App 1022a (08/26/2010 Guardianship Hearing Review Tr, p 193).

⁵⁷ App 1015a-1016a (08/26/2010 Guardianship Hearing Tr, pp 186, 187).

⁵⁸ App 1164a (PWSP 08/26/2010, p 18).

⁵⁹ App 1344a, 1441a, 1442a (02/09/2011 Guardianship Hearing Tr, pp 68, 165, 166).

⁶⁰ App 1165a (PWSP 08/26/2010, p 19).

⁶¹ App 1186a (11/17/2010 Post-Termination/Permanency Planning Hearing - Petitioner’s Exhibit 2 [Court Report], p 2).

current foster care home pending adoption by the foster family.”⁶² The same recommendations were made in DHS’s November 24, 2010, Permanency Ward Service Plan for the *Report Period* 08/27/2010 to 11/24/2010, and in Holy Cross’s Court Report.⁶³ And, on February 9, 2011, the children’s attorney recommended at the conclusion of the guardianship proceedings that the children have permanence with the foster care parents.⁶⁴

Scribner testified that she had a loving and continuing relationship with the children that involved substantial in-person and telephonic contact.⁶⁵ The children’s attorney, on the other hand, informed the family court that the three girls (i.e., the only children actually related to Scribner) “don’t really know [her] that well.”⁶⁶ The foster care worker, Andrea Hagen, testified

⁶² App 1417, 1419a (02/09/2011 Guardianship Hearing Tr, pp 141, 143).

⁶³ App 1240a, 1241a, 1249a, 1271a (01/12/2011 Post Termination Hearing – Petitioner’s Exhibit 1 [PWSP dated 11/24/2010 *Report Period* 8/27/2010 to 11/24/2010], pp 1, 2, 10; 01/12/2011 Post-Termination/Permanency Planning Hearing - Petitioner’s Exhibit 2 [Court Report], p 2).

⁶⁴ App 1462a, 1465a (02/09/2011 Guardianship Hearing Tr, pp 186, 189).

⁶⁵ She testified that “I always talked with ‘em on the phone. I’d always take them for one to two weeks in the summer. I’d visit them frequently. Before I moved to Florida I would watch them frequently and we’ve always had a very close and loving relationship.” App 951a (08/26/2010 Guardianship Hearing Tr, pp 122). After moving to Florida, she said she “spoke to them frequently on the phone” and “would of course always talk to them on birthdays and Christmases and send them a gift and ... they were always very excited to see me, always very excited to talk to me when we called and I talked to ‘em at least once a week.” App 955a (08/26/2010 Guardianship Hearing Tr, p 126).

⁶⁶ App 816a (08/09/2010 Guardianship Hearing, p 11). After having visited Scribner over Thanksgiving, only the boy wanted to go to Florida to visit Scribner over Christmas. App 1393a-1395a (02/09/2011 Guardianship Hearing Tr, pp 117-119). The children lost a week of school at the end of the Christmas break because of a problem with their flight. App 1270a, 1304a (01/12/2011 Post Termination Hearing – Petitioner’s Exhibit 2 [Court Report], p 1; 02/09/2011 Guardianship Hearing Tr, p 28). ERH “cried the night ... before coming home ... because she was afraid that they weren’t going to get to come back here.” App 1396a (02/09/2011 Guardianship Hearing Tr, p 120). The boy wants to stay a while with Scribner and to live with the foster parents. App 1398 (02/09/2011 Guardianship Hearing Tr, p 122). All three girls do not want to live with Scribner, but rather they want to live with their foster parents as their forever, permanent home. App 1399a-1400a (02/09/2011 Guardianship Hearing Tr, pp 123-124). The CASA worker opined that it was in the best interests of the children to be permanently with the foster care parents. App 1187a, 1400a (11/17/2010 Post

about the very limited times that Scribner contacted DHS/Holy Cross in 2008 and 2009. The first call occurred on July 9, 2008, five months after the children were removed from their home, and it was “regarding the Heeren girls”, but not JRG, and it did not reference any interest in placement.⁶⁷ Her next call was made five months later in December 2008, and she did not ask about placement.⁶⁸ At that point, the children had been with their current foster care parents for two months. “[T]he grandmother was not involved in their life from what [the foster care parents] had ever heard.”⁶⁹ Scribner’s call to Andrea Hagen in December 2008 was about Christmas presents rather than placement.⁷⁰ It was in December 2008 that the foster care parents first became aware of Scribner.⁷¹ Andrea Hagen told Scribner she could send the gifts to Holy Cross and they would be distributed.⁷² A box thereafter arrived at Holy Cross from Target.⁷³ However, there were only three presents for the girls, none for the boy (JRG).⁷⁴ JRG “was quite excited [about the] Christmas gifts from Grandma Lori”, but the girls did not know who Grandma Lori was.⁷⁵ The oldest girl (ERH) asked “who’s Grandma Lori?”⁷⁶ JRG reminded her

Termination/Permanency Planning Hearing – Petitioner’s Exhibit 3 [CASA Court Report], p 1; 02/09/2011 Guardianship Hearing Tr, p 124).

⁶⁷ App 160a, 1432a-1433a (09/17/2008 Updated Service Plan, p 9; 02/09/2011 Guardianship Hearing Tr, pp 156-157).

⁶⁸ App 1406a, 1407a (02/09/2011 Guardianship Hearing Tr, pp 130, 131).

⁶⁹ App 1345a (02/09/2011 Guardianship Hearing Tr, p 69).

⁷⁰ App 1406a (02/09/2011 Guardianship Hearing Tr, p 130).

⁷¹ App 1345a-1346a (02/09/2011 Guardianship Hearing Tr, pp 69-70).

⁷² App 1406a (02/09/2011 Guardianship Hearing Tr, p 130).

⁷³ App 1411a (02/09/2011 Guardianship Hearing Tr, p 135).

⁷⁴ App 1345a-1346a, 1406a-1407a, 1410a-1411a (02/09/2011 Guardianship Hearing Tr, pp 69-70, 130-131, 134-135). The presents came from Target and there was a note in the box about which presents went to whom. App 1346a, 1436a (02/09/2011 Guardianship Hearing Tr, pp 70, 160). Scribner denied that she only sent presents to the girls and, in fact, claimed that the gifts came back to her undelivered, although she could not say whether they were “returned” to her, and her story on the subject is convoluted. App 1000a, 1001a, 1004a-114a (08/26/2010 Guardianship Hearing Tr, pp 171, 172, 175-185).

⁷⁵ App 1346a (02/09/2011 Guardianship Hearing Tr, p 70).

⁷⁶ *Id.*

that “you know Grandma Lori, she’s our grandma from Florida. And she says I’m not sure I remember.”⁷⁷ The two younger girls “didn’t know who [ERH] was talking about. They didn’t know who that was.”⁷⁸ Scribner’s next call came five months later on May 15, 2009,⁷⁹ to be followed with a contact three months later in August 2009.⁸⁰ Scribner was going to be in Michigan so a supervised visit was arranged in Cadillac.⁸¹ Ms. Hagen observed this first visit with the children in August 2009, and she noted that the boy (JRG) “definitely remembered [Scribner] more [whereas t]he 3 girls, well [the two younger girls, KBH and COH] really did not have a lot of recollection[, although ERH] I think remembered her, but [the boy, JRG,] ... was the one that ran up to her and knew exactly who she was.”⁸² The next contact occurred two months later on October 13, 2009.⁸³

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ App 1408a-1409a (02/09/2011 Guardianship Hearing Tr, pp 132-133). She left a message saying she was interested in a guardianship. Andrea Hagen called her back the same day and left a message. App 1410a (02/09/2011 Guardianship Hearing Tr, p 134). On May 28, 2009, Scribner called again and the two talked. Ms. Hagen “had looked into it and was able to tell her that if she wanted to file a guardianship petition, she needed to file that with the Muskegon County Court.” *Id.* However, at that time, the goal was reunification and, therefore, a guardianship would have been inappropriate, especially where Scribner lived over a thousand miles away in Florida. Although Scribner had not sought placement, Scribner also was not considered a placement option because she lived in Florida and the plan was reunification. App 1437a (02/09/2011 Guardianship Hearing Tr, p 161). See also footnote 83. In addition, about a week after Scribner and Ms. Hagen spoke, Scribner wrote the family court on June 2, 2009, that gives context to her guardianship inquiry. She was interested in a guardianship “[i]n the event that the children were not returned to their parents.” App 550a. Thus, her interest was only conditional.

⁸⁰ App 1410a (02/09/2011 Guardianship Hearing Tr, p 134).

⁸¹ App 1411a-1412a (02/09/2011 Guardianship Hearing Tr, pp 135-136).

⁸² App 1413a (02/09/2011 Guardianship Hearing Tr, p 137).

⁸³ App 1412a, 1413a, 1439a (02/09/2011 Guardianship Hearing Tr, pp 136, 137, 163).

Scribner left a voicemail about guardianship. *Id.* Ms. Hagen returned her call and left a message, but Scribner did not call her back. *Id.* By this time, Scribner indicated that her interest in guardianship was only “[i]n the event that the children [were] not returned to their parents” or “mother”. App 550a, 720a (Scribner’s June 2, 2009, and September 23, 2009, letters to the family court). Andrea Hagen, however, did not have any answers about guardianships (and “was

The family court conducted several hearings on Scribner's juvenile guardianship petition and considered the best interests of the children based on the Child Custody Act, MCL 722.21 *et seq.*, see MCL 722.23.⁸⁴ It issued its opinion on March 21, 2011, denying the petition because it was not in the children's best interests to create a guardianship.⁸⁵

Under factor (d) of the best interests factors, MCL 722.23(d), which focuses on "[t]he length of time the child[ren] ha[ve] lived in a stable, satisfactory environment, and the desirability of maintaining continuity[.]" the family court found:

- (d) This is where there is an overwhelming argument for denying the guardianship. These children were a mess emotionally and physically when they were removed from the care of their mother. All parties agree that they have made remarkable recovery since. This has been the result of the efforts of counselors, teachers, caseworkers and the foster family. The Court is extremely reluctant to undermine the stability and comfort that these children enjoy and place them in a different home, school, state and family. Certainly, the guardian can make a strong case that, given the opportunity, she could have generated similar results. However, that takes the focus off of what is best for the children and directs it on what may be fair for the guardian. Refer to the Court's comment at the outset: the focus must be on the best interests of the *children*.^[86]

not aware that [Scribner] did not know how to file a petition for guardianship), but if Scribner had indicated she needed help, Ms. Hagen would have tried to find the answer. App 1439a (02/09/2011 Guardianship Hearing Tr, p 163). Also, at that time, because reunification was the plan, App 676a-677a, 725a, 788a, 1344a, 1439a (11/17/2009 Review Hearing – Petitioner's Exhibit 2 [Updated Service Plan], pp 1-2; 11/16/2009 Order Following Dispositional Review/Permanency Planning Hearing; 05/05/2010 Order Following Dispositional/Permanency Planning Hearing; 02/09/2011 Guardianship Hearing Tr, pp 68, 163), a juvenile guardianship was not an option, especially with Scribner living over a thousand miles away in Florida. See Child Guardianship Manual, GDM 600, p 1A "[j]uvenile guardianship is available for temporary and permanent court wards and state wards *when reunification ... ha[s] been ruled out as permanency goals* [emphasis supplied]". <http://www.mfia.state.mi.us/olmweb/ex/gdm/600.pdf>. See also MCL 722.873(c) ("[a] child is eligible to receive guardianship assistance if the department determines that all of the following apply[, including]: "[r]eunification or placing the child for adoption is not an appropriate permanency option."

⁸⁴ App 9a-13a (Opinion Re: Appointment of Guardian).

⁸⁵ App 9a (Opinion Re: Appointment of Guardian).

⁸⁶ App 10a-11a (Opinion Re: Appointment of Guardian, pp 2-3).

Under factor (h), MCL 722.23(h), which focuses on “[t]he home, school, and community record of the child[,]” the family court found:

- (h) As with factor (d), this is a compelling reason to deny the guardianship. The school district in which the guardian resides rates quite well. However, these kids have made significant progress in their school performances since coming into the care of the foster parents. The foster father is on the local school board and actively participates with his wife in the furtherance of their education. How uprooting them and changing schools would serve their best interests is highly questionable.^[87]

Under factor (i), MCL 722.23(i), which addresses “[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference[,]” the family court explained:

- (i) A significant amount of testimony was devoted to this from several sources. When all of the dust settles, the most objective, unbiased rendition was delivered by the CASA volunteer. The Court finds this to be the most credible evidence of the children’s preferences. Jordan is agreeable with either outcome. The girls are decidedly in favor of remaining in their existing placement on a permanent basis. Remember, these children have already had their preferences cast aside when removed from the care of their biological parents. To tell them, once again, what they think doesn’t matter, is not in their best interests. If they were expressing a preference for a dysfunctional, chaotic environment, which served their immature wants, then there would be a reason to trump their wishes. That, however, is not case here. They are expressing a desire to continue in the stable, loving, secure and trustworthy home that they have flourished in over the last two-and-one-half years. These are understandable preferences that should be accorded some deference.^[88]

The family court concluded that it was not in the children’s best interests to create a juvenile guardianship and its order to this effect was entered on May 3, 2011.⁸⁹ It is from this denial of guardianship, and not DHS’s placement decision, that generated this appeal. The Court of Appeals, however, faulted DHS and Holy Cross for not making a favorable placement

⁸⁷ App 11a (Opinion Re: Appointment of Guardian, p 3).

⁸⁸ App 12a (Opinion Re: Appointment of Guardian, p 4).

⁸⁹ App 8a (Order Re: Juvenile Guardianship).

decision with Scribner because she was a relative of the three girls and like a relative of JRG. It found facts contrary to those in the record and as found by the family court and reversed the family court. The DHS now appeals from that reversal.

LAW AND ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THERE IS A PREFERENCE FOR RELATIVES UNDER MCL 712A.19C(2) WHEN A CIRCUIT COURT DECIDES WHETHER TO CREATE A JUVENILE GUARDIANSHIP AFTER PARENTAL RIGHTS HAVE BEEN TERMINATED.

A. Standard of review

This Court “review[s] de novo the interpretation and application of statutes and court rules.” *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

B. Analysis of the issue

1. Rules of statutory interpretation.

When interpreting MCL 712A.19c(2), the Court’s “fundamental obligation ... is ‘to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute.’” *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007), quoting *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002); see also *People v Williams*, 491 Mich 164, 172; 814 NW2d 270 (2012). “This task begins by examining the language of the statute itself. The words of a statute provide ‘the most reliable evidence of its intent....’ If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written [and] ... [n]o further judicial construction is required or permitted....” *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) (citations omitted); *Williams*, 491 Mich at 172. “When parsing a statute, [the Court] presume[s] every word is used for a purpose. As far as possible, [it] give[s] effect to every

clause and sentence.” *Pohutski v Allen Park*, 465 Mich 675, 683-684; 641 NW2d 219 (2002). “A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself[.]” *Roberts v Mecosta Co General Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002), and “[o]nly where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent.” *Sun Valley Foods Co v Ward*, 460 Mich at 236. Finally, “[o]nce the Court discerns the Legislature’s intent, no further judicial construction is required or permitted ‘because the Legislature is presumed to have intended the meaning it plainly expressed.’” *People v Lowe*, 484 Mich 718, 722; 773 NW2d 1 (2009) (citation omitted).

2. Juvenile Guardianship under MCL 712.19c(2) is exclusively guided by the child’s best interests and subject to the family court’s discretion.

MCL 712A.19c(2) reads: “Subject to subsection (3) [which did not apply because the children had not yet been referred to the MCI Superintendent under MCL 400.203], if the court determines that it is in the child’s best interests, the court may appoint a guardian for the child.” The statute’s plain language reflects its discretionary nature. *In re Forfeiture of Bail Bond*, 276 Mich App 482, 492; 740 NW2d 734 (2007) (“[i]t is well settled that the statutory term ‘may’ is permissive and therefore indicative of discretion”). Thus, the Legislature’s use of the word “may” establishes that it intended to outline a permissive, as opposed to mandatory, action by the Judicial Branch and its sole barometer is the child’s best interests.

3. The Legislature chose not to include the term “relative” in MCL 712A.19c, and, therefore, this Court should not insert it judicially.

In MCL 712A.13a(1), the Legislature provided that, “[a]s used in this section and sections 2, 6b, 13b, 17c, 17d, 18f, 19, 19a, 19b, and 19c of this chapter”, the term “relative” shall

have the meaning ascribed in MCL 712A.13a(1)(j).⁹⁰ (Emphasis supplied.) The Legislature thus only expects the definition of the term “relative” to apply when “used” in any of the listed sections in MCL 712A.13a(1). Although one of the sections listed includes MCL 712A.19c, the term “relative” is not “used” in that section. Therefore, the Legislature did not intend for the term “relative” to have any bearing on the interpretation and application of MCL 712A.19c, including MCL 712A.19c(2). Said another way, because the term “relative” is not “used” in MCL 712A.19c, it is irrelevant and has no bearing to the interpretation and application of MCL 712A.19c, including MCL 712A.19c(2), as to the creation of a juvenile guardianship.

4. The Court of Appeals erroneously rewrote MCL 712A.19c(2) by grafting a preference for relatives from MCL 722.954a onto MCL 712A.19c(2) wherein no such preference exists.

The Court of Appeals judicially rewrote MCL 712A.19c(2), conflating the Executive Branch’s responsibility of considering a preference for relatives when placing a child under MCL 722.954a with that of the Judicial Branch’s discretionary determination whether it is in the child’s best interests to create a juvenile guardianship under MCL 712A.19c(2). However, the Court of Appeals did not apply the version of MCL 722.954a (found in 1997 PA 172, § 4a) that applied in 2008 when the children were placed. Instead, it applied the new version of MCL 722.954a (found in 2010 PA 265, § 4a), which became effective December 14, 2010—over five months after Scribner filed her petition on July 1, 2010, and over two years after the DHS made its placement decision in 2008.

Although the two versions of MCL 722.954a are similar, there are differences. A primary difference on the relative preference issue is the language now found in in 2010 PA 265, § 4a(5), which the Court of Appeals emphasized in reaching its decision. Subsection (5) reads:

⁹⁰ A discussion of the definition of “relative” and whether Scribner meets that definition is found in Argument II.B., *infra*.

Before determining placement of a child in its care, a supervising agency shall give special consideration and preference to a child's relative or relatives who are willing to care for the child, are fit to do so, and would meet the child's developmental, emotional, and physical needs. The supervising agency's placement decision shall be made in the best interests of the child.

This "special consideration and preference" requirement is not found in 1997 PA 172, § 4a. However, the language in subsection (2) of both 2010 PA 265, § 4a, and 1997 PA 172, § 4a, is substantially similar, except that 1997 PA 172, § 4a(2), includes the 90-day placement requirement that is now found in 2010 PA 265, § 4a(4), and 1997 PA 172, § 4a(2), did not require the DHS to "notify" relatives. These differences are noted as follows.

1997 PA 172, § 4a(2), provides:

Upon removal, as part of a child's initial case service plan as required by rules promulgated under 1973 PA 116, MCL 722.111 to 722.128, and by section 18f of chapter XIIA of 1939 PA 288, MCL 712A.18f, the supervising agency shall, within 30 days, identify, locate, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs as an alternative to foster care. Not more than 90 days after the child's removal from his or her home, the supervising agency shall do all of the following:

(a) Make a placement decision and document in writing the reason for the decision.

(b) Provide written notice of the decision and the reasons for the placement decision to the child's attorney, guardian, guardian ad litem, mother, and father; the attorneys for the child's mother and father; each relative who expresses an interest in caring for the child; the child if the child is old enough to be able to express an opinion regarding placement; and the prosecutor.

2010 PA 265, § 4a(2), in turn, provided a couple modifications that are highlighted hereinafter in italics and ellipses:

Upon removal, as part of a child's initial case service plan as required by rules promulgated under 1973 PA 116, MCL 722.111 to 722.128, and by section 18f of chapter XIIA of *the probate code of 1939*, 1939 PA 288, MCL 712A.18f, the supervising agency shall, within 30 days, identify, locate, *notify*, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs * * *.

The changes, in italics, include “the probate code of 1939” and “notify”, and the ellipses is inserted where the Legislature removed the phrase, “as an alternative to foster care.”

The new version of MCL 722.954a found in 2010 PA 265, § 4a, adds a new subsection (3), which refers to the word “notify” in 2010 PA 265, § 4a(2), which, again, is not found in 1997 PA 172, § 4a(2). New subsection (3) reads as follows:

(3) The notification of relatives required in subsection (2) shall do all of the following:

(a) Specify that the child has been removed from the custody of the child’s parent.

(b) Explain the options the relative has to participate in the care and placement of the child, including any option that may be lost by failing to respond to the notification.

(c) Describe the requirements and benefits, including the amount of monetary benefits, of becoming a licensed foster family home.

(d) Describe how the relative may subsequently enter into an agreement with the department for guardianship assistance.

As noted, however, the Legislature kept DHS’s mandatory 90-day placement deadline formerly found in 1997 PA 172, § 4a(2), but moved it to a new subsection (4) of 2010 PA 265, § 4a. Thus, the DHS must still make its placement decision within 90 days of the child’s removal and must give notice of this decision to those persons now listed in subsection (4)(b). Only during this 90-day window may a change in placements occur and then only when the new placement would be a relative. MCL 712A.19b(1). Afterwards, however, no changes in placement can be made absent one of the circumstances listed in MCL 712.19b(1), even if a relative thereafter comes forward. *Id.*

Finally, the Legislature retained the appeal process that allows a challenge to DHS’s placement decision, but it moved this appeal process from subsection (3) of 1997 PA 172, § 4a, to new subsection (6) of 2010 PA 265, § 4a, and it reads:

A person who receives a written decision described in subsection (4)^[91] may request in writing, within 5 days, documentation of the reasons for the decision, and if the person does not agree with the placement decision, he or she may request that the child's attorney review the decision to determine if the decision is in the child's best interest. If the child's attorney determines the decision is not in the child's best interest, within 14 days after the date of the written decision the attorney shall petition the court that placed the child out of the child's home for a review hearing. The court shall commence the review hearing not more than 7 days after the date of the attorney's petition and shall hold the hearing on the record.

Given that the Court of Appeals applied the new version of MCL 722.954a found in 2010 PA 265, § 4a, to this case, although the placement decision was made back in 2008, the following discussion addresses this new version to show that the Court of Appeals' grafting of 2010 PA 265, § 4a, onto the juvenile guardianship statute found in MCL 712A.19c(2) was clearly erroneous.

Under 2010 PA 265, § 4a(2), MCL 722.954a(2), the Legislature requires a preference to be given to a relative “[u]pon removal, *as part of a child's initial case service plan*[.]” (Emphasis supplied.) Thus, “the supervising agency^[92] shall, within 30 days, identify, locate, notify, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs.” 2010 PA 265, § 4a(2), MCL 722.954a(2). In addition, under the new language found in 2010 PA 265, § 4a(5), MCL 722.954a(5), “[*b*]efore determining placement of a child in its care, a supervising agency shall give special consideration and preference to a child's relative or relatives who are willing to care for the child, are fit to do so, and would meet the child's developmental, emotional, and physical

⁹¹ Rather than refer to subsection (4), the former version of MCL 722.954a(3) found in 1997 PA 172, § 4a(3), referred to subsection (2) because the 90-day placement-decision requirement was formerly found in subsection (2) of 1997 PA 172, § 4a.

⁹² The term “‘Supervising agency’ means the department if a child is placed in the department's care for foster care, or a child placing agency in whose care a child is placed for foster care.” MCL 722.952(l). For purposes of this discussion, the supervising agency will be referred to as the DHS.

needs. [And, t]he supervising agency's placement decision shall be made in the best interests of the child." (Emphasis supplied.)

Accordingly, time is of the essence for placement of the child *initially* after the child is removed from the parents and whether a relative should be given special consideration and preference is determined *before* the placement decision is made. 2010 PA 265, § 4a(2), (5), MCL 722.954a(2), (5). At this stage, biology plays a logical role because the Legislature recognizes that, given the immediacy and the probable familiarity of a relative with the child and vice versa, it would likely be in the child's best interests to go with a relative. This is especially true where reunification of the child with a parent remains a legitimate permanency goal. Because the child has suffered abuse or neglect, or both, the child's stability and comfort are paramount as quickly as humanly possible. Indeed, the Legislature imposes an additional deadline under 2010 PA 265, § 4a(4), MCL 722.954a(4) (as was the case when the placement decision was made under 1997 PA 172, § 4a[2]) of "[n]ot more than 90 days after the child's removal from his or her home, [for] the supervising agency [to] do all of the following: (a) *[make a placement decision]* and document in writing the reason for the decision[; and] (b) *[provide written notice of the decision and the reasons for the placement decision to the child's attorney, guardian, guardian ad litem, mother, and father; the attorneys for the child's mother and father; each relative who expresses an interest in caring for the child; the child if the child is old enough to be able to express an opinion regarding placement; and the prosecutor.]*" (Emphasis supplied.) Thus, the phrase "*[before determining placement of a child in its care]*" in 2010 PA 265, § 4a(5), MCL 722.954a(5) is in reference to 2010 PA 265, § 4a(4), MCL 722.954a(4) because subsection (4) establishes when the placement decision must be made. Consequently, 2010 PA 265, § 4a(5), MCL 722.954a(5); could logically be read as follows: "*[before*

determining placement of a child in its care [under 2010 PA 265, § 4a(4), MCL 722.954a(4)], a supervising agency shall give special consideration and preference to a child's relative or relatives who are willing to care for the child, are fit to do so, and would meet the child's developmental, emotional, and physical needs. [And, t]he supervising agency's placement decision shall be made in the best interests of the child." (Emphasis supplied.) This means, of course, that the relative preference is a timed preference. And, again, an appeal process is available under 2010 PA 265, § 4a(6), MCL 722.954a(6) (as was the case when the placement decision was made under 1997 PA 172, § 4a[3]).

Accordingly, because of the deadlines imposed in MCL 722.954a for the placement of children removed from their homes, coupled with the prohibition against changing placements of children once made, MCL 712A.13b(1)—regardless whether a relative may come forward afterwards⁹³—it follows that the preference for relatives during the initial stage of a child's removal does not carry over to MCL 712A.19c(2) after the parents' rights have been terminated.

5. MCL 712A.19c(2) has a different statutory goal than does MCL 722.954a.

MCL 712A.19c(2) also has a different statutory goal than does MCL 722.954a (as contained in either 1997 PA 172, § 4a or 2010 PA 265, § 4a). *First*, MCL 712A.19c applies to the Judicial Branch whereas MCL 722.954a applies to the Executive Branch. *Second*, as explained above, it is discretionary whereas MCL 722.954a mandates that the Executive Branch make a placement decision within 90 days after a child's removal, and, leading up to that 90-day placement decision, a preference for relatives is required. Once the placement decision is made

⁹³ To emphasize that there is no longer a relative preference after the 90-day placement decision is made, MCL 712A.13b(1)(b)(iii) only permits a change in placement if it is made "less than 90 days after the child's initial removal from his or her home, and the new placement is with a relative." There is no similar allowance for a change in placement, even with a relative, after the 90-day period for placement of the child expires. MCL 712A.13b(1).

within that 90-day period, however, a change in placement is not allowed absent specified statutory circumstances. See MCL 712A.13b(1). *Third*, MCL 712A.19c(2) applies after the parental rights have been terminated whereas the relative preference found in MCL 722.954a applies at the *initial* stage of removal of the child from his or her home and ends when the placement decision is made within 90 days of the child's removal from his or her home.

After the placement decision is made, permanency becomes the goal. See 1997 PA 172, § 4b(1), MCL 722.954b(1), which requires the DHS to "strive to achieve a permanent placement for each child in its care, including either a safe return to the child's home or implementation of a permanency plan, no more than 12 months after the child is removed from his or her home." Again, during this time, children shall not be moved from one placement to another absent limited statutory circumstances. See MCL 712A.13b(1). The DHS was required to follow its written policies and procedures for the foster care services it provided, AC, R 400.12403(1), and following the original placement decision, DHS's Foster Care Manual in 2008 provided that "[t]he placement selection must be made to minimize the number of placements for the child. Whenever possible, the initial placement should become the ongoing placement for the child."⁹⁴ Likewise, a consent decree reached in 2008 in the federal litigation of *Dwayne B v Granholm* (now *Snyder*), Case No. 2:06-13548 (ED Mich, Honorable NANCY G. EDMUNDS, presiding),⁹⁵

⁹⁴ App 1486a (CFF 722-3, p 3).

⁹⁵ "In 2006, a federal class action lawsuit was brought in the United States District Court for the Eastern District of Michigan against the Governor and the Department of Human Services (DHS), alleging that systemic deficiencies in Michigan's foster care system violated federal laws and regulations. *Dwayne B v Granholm*, Case No. 06-13548. In 2008, the parties entered into a consent agreement in which the defendants agreed to make certain changes in the state's foster care system." *Kent Co v State, Dep't of Human Services*, 490 Mich 898; 804 NW2d 556 (2011) (MARKMAN, J., concurring); see also *In re Rood*, 483 Mich 73, 106 n 48; 763 NW2d 587 (2009).

included the requirement for “DHS [to] strive to make the first placement the best and only placement.”⁹⁶

Thus, once the children were placed with their current foster care parents in October 2008, without objection under then-MCL 722.954a(3) as found in 1997 PA 172, § 4a(3) (now-MCL 722.954a[6] as found in 2010 PA 265, § 4a[6]), it would have been inappropriate, by law and court order, for DHS to change that children’s placement. Hence, castigating DHS and Holy Cross for not pursuing a placement change to Scribner is undeserved and not supported given her reticence to come forward. See Argument V.B., *infra*.

6. Policy is set by the Legislature not the Courts.

Regardless whether the Court of Appeals’ approach may, philosophically, be in a child’s best interests—viz., that being with a relative is best for a child regardless whether the child has been placed in a loving and stable family-like setting, is thriving in his or her placement and he or she wants to remain there—that is not the view as expressed by the Legislature in MCL 712A.19c(2).

“The responsibility for drawing lines in a society as complex as ours of identifying priorities, weighing the relevant considerations and choosing between competing alternatives is the Legislature’s, not the judiciary’s.” *O’Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979). The judiciary’s “task, under the Constitution, is the important, but yet limited, duty to read into and interpret what the Legislature has actually made the law.” *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 161; 680 NW2d 840 (2004). The “Legislature is free to make policy choices that, especially in controversial matters, some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot

⁹⁶ Settlement Agreement, p 3. http://www.michigan.gov/documents/dhs/DHS-LegalPolicy-ChildWelfareReform-Settlement_243876_7.pdf (accessed October 26, 2013).

give warrant to a court to overrule the people's Legislature." *Id.* "[W]hat this comes down to is that perhaps the Legislature's policy choice can be debated, but the judiciary is not the constitutional venue for such a debate. The Legislature is the proper venue. It is to that body that [advocates for a position] should make their argument." *Elezovic v Ford Motor Co*, 472 Mich 408, 425; 697 NW2d 851 (2005).

Here, these policy choices have been and continue to be debated both nationally (see, e.g., the debate over the value of the Adoption and Safe Families Act of 1997 [ASFA]⁹⁷) and within the State of Michigan (see, e.g., *In Our Hands: Report of the Binsfeld Children's Commission* [Lansing, Michigan, The Commission, 1996]⁹⁸). These policy choices are also now

⁹⁷ The ASFA is found at Pub L No 105-89; 117 Stat 2115 (1997) and it was adopted "to promote the adoption of children in foster care." The debate over ASFA continues. For example, see a favorable reference to the ASFA in Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60 BUFFALO L REV 1323, 1359 (December 2012) (*Bartholet*), where Professor Bartholet credits Congress for "tak[ing] steps to help move things in a positive direction for children" through the ASFA that "reduce[es], at least to some degree, the priority placed on family preservation, emphasizing the importance of child safety, and encouraging state systems to place a higher priority on adoption." And see a negative reference about the ASFA in Richard Wexler, *Take the Child and Run: Tales from the age of ASFA*, 36 NEW ENGLAND L REV 129, 130 (Fall, 2001), where Mr. Wexler argues that the ASFA "has caused untold misery for thousands of children. While supposedly intended to solve the problems of the foster care system, it has, in fact, worsened those problems. In the name of promoting adoption, it is creating a generation of legal orphans. And worst of all, in the name of child safety, it has made children less safe." See also Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L REV 113, 114 (2013) ("[t]he child welfare system is broken").

⁹⁸ As at the national level with the adoption of ASFA, substantial changes were made to Michigan's Juvenile Code and related statutes in the child protection arena based on the recommendations of the Binsfeld Commission (a/k/a the Binsfeld amendments), see 1997 PA 163 through 1997 PA 172, and Michigan must keep pace with federal legislation. See, e.g. *In re Rood*, 483 Mich at 102-106 (CORRIGAN, J.), 123 n 2 (CAVANAGH, J.). The value of the Binsfeld amendments is subject to local debate. See, e.g., the debate between Wexford County Probate Judge KENNETH L. TACOMA and FRANK E. VANDERVORT, JD in their respective articles, Tacoma, *Lost and Alone on Some Forgotten Highway: ASFA, Binsfeld, and the Law of Unintended Consequences*, and Vandervort, "The Road Goes on Forever and the Party Never Ends": A Response to Judge Tacoma's Prescription for a Return to Foster Care "Limbo" and

the subject of a consent decree in *Dwayne B v Granholm* (now *Snyder*), Case No. 2:06-13548 (ED Mich, Honorable NANCY G. EDMUNDS, presiding). It is, however, the legislation that is derived from these debates that the courts must interpret and apply.

Accordingly, based on the plain text of MCL 712A.19c(2) that leaves it to the family court's discretion whether to create a juvenile guardianship based solely on the child's best interests, there is no room for the judiciary to supplement this unambiguous language with a relative-preference requirement because the Legislature did not couch MCL 712A.19c(2) in those terms. Had the Legislature wanted MCL 722.954a to control the decision to be made under MCL 712A.19c(2) it would have said so. Indeed, the Legislature knows how to create a preference because it did so in 1997 PA 172, § 4a(2), MCL 722.954a(2) (now 2010 PA 265, § 4a[2] and [5]).⁹⁹ Another example is how former MCL 700.454(3) provided for the appointment of relatives as guardians as a preference with a list of priorities. The Legislature changed that preference with the creation of the Estates and Protected Individuals Code, MCL 700.1101 *et seq.*, and now allows the family court to appoint "[a] person interested in the welfare of a minor," with no patent preference for relatives. MCL 700.5204(1). Clearly, once parental rights are terminated, the Legislature intended that a child's best interests would trump biology and this is why it did not include a relative preference in MCL 712A.19c(2).

7. Conclusion.

Accordingly, for the foregoing reasons, the Court of Appeals clearly erred in reading into or grafting a "relative preference" requirement from MCL 722.954a onto MCL 712A.19c(2).

"Drift", in the State Bar of Michigan Children's Law Section, Vol X, Issue III (Spring, 2007). http://chanceatchildhood.msu.edu/pdf/CWLJ_sp07.pdf (accessed October 29, 2013).

⁹⁹ See and compare *Wesche v Mecosta Co Rd Com'n*, 480 Mich 75, 86; 746 NW2d 847 (2008) ("the Legislature knows how to create a statutory threshold when it wishes to do so").

II. IF A PREFERENCE FOR RELATIVES EXISTS FOR A JUVENILE GUARDIANSHIP UNDER MCL 712A.19C(2), THE PATERNAL GRANDMOTHER IS ENTITLED TO THAT PREFERENCE EVEN THOUGH HER SON'S PARENTAL RIGHTS TO THE CHILDREN HAD BEEN TERMINATED.

A. Standard of review

See Argument I.A.

B. Analysis of the issue

In 1999, the Court of Appeals held that, “once the rights of [the child’s] biological parents were terminated by the family division, [the grandparent’s] rights derivative of the parental relationship were also severed.” *Foster v Foster*, 237 Mich App 259, 263; 602 NW2d 610 (1999).

In 2004 PA 475, § 13a, the Legislature amended MCL 712A.13a and provided a definition for “relative”. MCL 712A.13a(1)(j). The rules for statutory interpretation as stated in Argument I.B. apply. However, one additional rule is that, “[w]hen a statute specifically defines a given term, that definition alone controls.” *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007).

MCL 712A.13a(1)(j) defines the term “relative” as follows:

(1) As used in this section and sections 2, 6b, 13b, 17c, 17d, 18f, 19, 19a, 19b, and 19c of this chapter: ***

(j) “Relative” means an individual who is at least 18 years of age and related to the child by blood, marriage, or adoption, as grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew or niece, first cousin or first cousin once removed, and the spouse of any of the above, even after the marriage has ended by death or divorce. A child may be placed with the parent of a man whom the court has found probable cause to believe is the putative father if there is no man with legally established rights to the child. A placement with the parent of a putative father under this subdivision is not to be

construed as a finding of paternity or to confer legal standing on the putative father.

It is further noted that, “[i]f the [family] 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.” MCL 712A.19b(5). This Court stated in *In re Beck*, 488 Mich 6, 11; 793 NW2d 562 (2010), that “MCL 712A.19b pertains to the termination of parental rights.” Nothing, however, in MCL 712A.19b indicates that a grandmother’s relative status is terminated when her child’s parental rights are terminated. The Legislature certainly knows how to terminate the lineal or collateral kindred of a parent, see MCL 710.60(2) (adoption statute), but it did not do so under MCL 712A.19b. Hence, given the definition of “relative” in MCL 712A.13a(1)(j), and no indication in MCL 712A.19b that the relative’s status is terminated when the parent’s rights are terminated, a grandmother who is at least 18 years old and “related by blood” to the child continues to be a relative of her grandchild after her child’s rights are terminated.

Accordingly, because Scribner is at least 18 years old and is related to her son’s daughters “by blood”, it follows that she is a “relative” as that term is used in MCL 712A.2, 712A.6b, 712A.13b, 712A.17c, 712A.17d, 712A.18f, 712A.19, 712A.19a, 712A.19b, and 712A.19c. Thus, if there is a “relative preference” for guardianships under MCL 712A.19c, Scribner would be entitled to this preference. It is noted, however, that the term “relative” is not used in MCL 712A.19c(2) and, therefore, no relative preference should apply. See Argument I.B.

As noted, the Court of Appeals in *Foster* rejected the notion that a grandparent continues to have any rights regarding a grandchild after her child’s rights have been terminated. *Foster*,

237 Mich App at 263. However, the Court of Appeals did not have the benefit of the Legislature’s definition of “relative” in MCL 712A.13a(1)(j). *Foster*, however, only addressed the grandparent’s derivative *rights* of the parental relationship. The term “relative” is not self-executing. There must be a separate statute that grants some right to a “relative” before it has any meaning. Such a right cannot be found in MCL 712A.19c because the term “relative” is not used anywhere in MCL 712A.19c. Thus, given that the term “relative” as defined in MCL 712A.13a(1)(j) is only relevant if “used in ... section[] 19c”, MCL 712A.13a(1) (emphasis supplied), it follows that this definition of relative does not apply to MCL 712A.19c, including subsection (2). The Court would have to read into MCL 712A.19c(2) the term “relative”, and then conclude that it is thereby being “used in ... section[] 19c” before Scribner would qualify as a “relative” under MCL 712A.13a(1)(j). This is the province of the Legislature, however, not the courts. Thus, *Foster* could still control whether Scribner has any derivative rights to her grandchildren once her son’s rights were terminated. See, e.g., *Porter v Hill*, 301 Mich App 295; 836 NW2d 247 (2013) (“it would be anomalous for the Legislature to authorize a court to terminate a person’s parental rights on the basis of abuse but then to somehow ‘revive’ those rights for purposes of grandparent visitation”).

III. **THE COURT OF APPEALS ERRED BY NOT APPLYING A CLEAR ERROR STANDARD OF REVIEW TO THE MUSKEGON CIRCUIT COURT FAMILY DIVISION’S DETERMINATION OF THE CHILDREN’S BEST INTERESTS PURSUANT TO MCL 712A.19C.**

A. *Standard of review*

The determination of what standard of review applies to a certain situation is a question of law, which is reviewed *de novo*. *People v Walters*, 266 Mich App 341, 352; 700 NW2d 424 (2005).

B. Analysis of the issue

“The Michigan Court Rules govern practice and procedure in all courts established by the constitution and laws of the State of Michigan. Rules stated to be applicable only in a specific court or only to a specific type of proceeding apply only to that court or to that type of proceeding and control over general rules.” MCR 1.103. In juvenile proceedings, “[l]imitations on corrections of error are governed by MCR 2.613.” MCR 3.902(A). Accordingly, “[f]indings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” MCR 2.613(C). See and compare *In re Cornet*, 422 Mich 274, 277; 373 NW2d 536 (1985); (“a probate judge’s findings in proceedings to terminate parental rights must be reviewed under the clearly erroneous standard”); MCR 3.977(K) (“[t]he clearly erroneous standard shall be used in reviewing the court’s findings on appeal from an order terminating parental rights”).

A finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made. *Tuttle v Dep’t of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976).

In re Miller, 433 Mich 331, 337-338; 445 NW2d 161 (1989), this Court explained the deference to be accorded to the findings of the trier of fact under MCR 2.613(C):

The Court of Appeals did not address the important question of the deference to be accorded to the findings of the trier of fact. MCR 2.613(C) requires that in applying the principle that findings of fact may not be set aside unless clearly erroneous, regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.

The deference required by MCR 2.613(C) can make a critical difference in difficult cases such as the one before us. In contrast to the reviewing court, the trier of fact has the advantage of being able to consider the demeanor of the witnesses in determining how much weight and credibility to accord their testimony. It is noteworthy that Probate Judge Donald S. Owens not only

observed the demeanor of the witnesses during each of the two formal adjudications concerning Ryan Miller, but he also presided over a number of pretrial conferences and dispositional hearings held during the fifty months of probate court temporary jurisdiction leading up to the termination order.

Thus, in the context of a neglect-and-abuse case, this Court recognizes the breadth such cases have, expanding over the course of months or years and accumulating a large volume of information (by way of, *inter alia*, witness testimony and exhibits), which must be evaluated before the family court can come to a decision. As established in Argument V.B., that deference was not given by the Court of Appeals here.

IV. **THE CIRCUIT COURT PROPERLY USED THE BEST INTERESTS FACTORS ENUMERATED IN MCL 722.23 OF THE CHILD CUSTODY ACT IN DECIDING WHETHER TO GRANT THE PETITION FOR A JUVENILE GUARDIANSHIP.**

A. *Standard of review*

See Argument I.A.

B. *Analysis of the issue*

Under MCL 712A.19c(2), the Legislature trusts the discretion of the judiciary in addressing the best interests of the children (especially given that the judiciary is well-experienced in doing so vis-à-vis the Child Custody Act, MCL 722.21 *et seq.*)

In *In re Barlow*, 404 Mich 216, 235-236; 273 NW2d 35 (1978), this Court acknowledged that the Child Custody Act does not apply to termination proceedings in probate court. Nevertheless, it held that “the factors comprising the best interests of the child contained in the Child Custody Act [are] ... ones which the Legislature, case law and common sense would indicate ought likewise to be relevant in cases arising under § 39(1) of the Adoption Code.” It thus found “that the trial court properly looked to § 3 of the Custody Act for guidance in evaluating the best interests of the child in the case at bar.” *Id.* In permitting this use of the

factors from the Child Custody Act, the Court recognized that these best-interests factors could not simply be applied to the context of a termination of parental rights case:

Since, however, cases [involving possible termination of parental rights] may arise, as does this one, not in the context of two known disputing parties, application of the best interest test to these cases will differ from evaluation of the enumerated factors in the context of a typical dispute arising under the Child Custody Act. [*Id.*, 236.]

At the same time, however, the Court refused to remove these best-interests factors from the probate court’s arsenal when conducting the difficult task of deciding the best-interests issue in a termination case.

When *In re Barlow* was decided, the adoption code did not include a definition of the child’s best interests. MCL 710.22, however, was amended by 1980 PA 16 to include a list of best interest factors that are substantially similar to those in § 3 of the Child Custody Act, MCL 722.23:

The Child Custody Act, MCL 722.23	The Adoption Code, MCL 710.22
(a) The love, affection, and other emotional ties existing between the parties involved and the child.	(i) The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee or, in the case of a hearing under section 39 of this chapter, [FN1] the putative father and the adoptee.
(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.	(ii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father to give the adoptee love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.
(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.	(iii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father, to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws

<p>(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.</p> <p>(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.</p> <p>(f) The moral fitness of the parties involved.</p> <p>(g) The mental and physical health of the parties involved.</p> <p>(h) The home, school, and community record of the child.</p> <p>(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.</p> <p>(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.</p> <p>(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.</p> <p>(l) Any other factor considered by the court to be relevant to a particular child custody dispute.</p>	<p>of this state in place of medical care, and other material needs.</p> <p>(iv) The length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.</p> <p>(v) The permanence as a family unit of the proposed adoptive home, or, in the case of a hearing under section 39 of this chapter, the home of the putative father.</p> <p>(vi) The moral fitness of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, of the putative father.</p> <p>(vii) The mental and physical health of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, of the putative father, and of the adoptee.</p> <p>(viii) The home, school, and community record of the adoptee.</p> <p>(ix) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court considers the adoptee to be of sufficient age to express a preference.</p> <p>(x) The ability and willingness of the adopting individual or individuals to adopt the adoptee's siblings.</p> <p>(xi) Any other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody.</p>
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Thus, the Legislature has now spoken twice on what the best interests of a child mean from a policy perspective, and in each instance, the Legislature set forth nearly identical areas of concern which it deemed should be evaluated in a large category of inquiries into a child's welfare. Cf. *In re Barlow*, 404 Mich at 236. Thus, when the Legislature provides that a juvenile guardianship may be created if it is in the best interests of a child, it follows that the court may evaluate the best-interests factors already established by the Legislature in other circumstances where the welfare of the child is at stake.

The Court of Appeals in *In re JS and SM*, 231 Mich App 92, 102-103; 585 NW2d 326 (1998), rejected in part on other grounds by *In re Trejo*, 462 Mich 341, 353; 612 NW2d 407 (2000), approved of the lower court's application of the best-interests factors of the Child Custody Act to a termination-of-parental-rights case. In doing so, it, like this Court in *Barlow*, recognized that "the Child Custody Act ... is not applicable to proceedings in the juvenile division of the probate court." *Id.*, 100, quoting *In re Schejbal*, 131 Mich App 833, 835; 346 NW2d 597 (1984). As this Court did in *In re Barlow*, the Court of Appeals noted that "a literal application of the best interests factors of the Child Custody Act would not be sensible or indeed even possible [because] ... [t]he best interests factors [there] ... are aimed at determining which of the parties competing for custody of a child should be awarded custody in furtherance of the child's best interests." *Id.*, 100. The Court, however, provided an explanation as to why this perfect symmetry did not matter:

In our view, the point was to highlight that many, if perhaps not all, of the types of concerns about parental ability underlying the best interests factors of the Child Custody Act are highly relevant to a decision concerning whether parental rights should be terminated.... It is readily apparent that many of the concerns implicated by the best interests factors of the Child Custody Act would also be important in the context of a determination whether a parent has established that it would clearly not be in a child's best interests that parental rights be terminated. [*Id.*, 101-102.]

The Court of Appeals thus concluded that, although not binding on the probate court, “it is perfectly appropriate for a probate court to refer directly to pertinent best interests factors in the Child Custody Act in making a determination concerning whether a parent has established that termination of parental rights is clearly not in a child’s best interests.” *Id.*, 102-103.

Although MCL 712A.19c(2) does not include what factors a family court should use in evaluating whether to create a juvenile guardianship, the family court is in the business of deciding the best interests of children in domestic relations matters, terminations of parental rights and adoptions. Hence, it should be allowed to consult either the Child Custody Act or the Adoption Code, or both, in evaluating a child’s best interests on the subject of a juvenile guardianship.

The Child Custody Act was particularly apropos here. The unanimous view of DHS, Holy Cross, the CASA volunteer and the children’s attorney favored adoption over a juvenile guardianship, and the family court was quite familiar with the parties, the children and the dynamics of the case, including the proposed adoptive parents who already succeeded in providing love and stability for these young children for over two years. The Child Custody Act served as an excellent approach to this issue. There were competing interests in the children, which the family court acknowledged, but the court’s goal was not to decide “what is fair for those competing for their custody; rather the paramount concern [was] what is best for the *children.*”¹⁰⁰ In deciding this question, the family court was obviously privy to MCL 712A.19c(1) and its responsibility to achieve permanency for the children. Hence, it had to determine which of two viable permanency options were in the best interests of the children—juvenile guardianship or adoption. As explained in Argument V.B.1., the better option for

¹⁰⁰ App 9a (Opinion Re: Appointment of Guardian, p 1 [emphasis by the family court]).

permanency is adoption. Thus, a comparison between Scribner's proposed home as guardian and the recommended adoptive home of the foster parents justified the family court's evaluation of "a large category of inquiries into a child's welfare" that the best-interests factors of the Child Custody Act affords. *In re Barlow*, 404 Mich at 236. In fact, the use of these factors was even more compelling in the present context than was the case in either *In re Barlow* or *In re JS and SM* because the family court had a choice between two possible permanency options. This does not represent the "prototypical case under the Child Custody Act" where two parents dispute the custody of a child, but rather, it allowed the family court to decide "the paramount concern [of] what is best for the *children*"—i.e., whether to create a juvenile guardianship or to permit the case to proceed to adoption—the ultimate permanency option following termination. See Argument V.B.1. Thus, despite Scribner's petition, the family court could properly evaluate the children's stability with the foster care parents because they were more than mere foster care parents. They wanted to adopt the children, were being proposed by DHS, Holy Cross, the CASA volunteer and children's attorney to be the adoptive parents, and the children wanted to be adopted by them. To reject this opportunity for the children in favor of isolating the issue to Scribner and whether *she* should be guardian rejects the overarching responsibility of the family court to find permanence for the children that best suits them.

Accordingly, although clearly not mandatory, the family court cannot be faulted for consulting the best-interests factors in the Child Custody Act in resolving whether it was in the children's best interests to create a juvenile guardianship vis-à-vis their stability in a loving and stable home after the maltreatment they suffered and after their parents' rights had been terminated.

V. THE COURT OF APPEALS ERRED BY REVERSING THE CIRCUIT COURT ON THE GROUND THAT IT WAS IMPROPER TO COMPARE THE FOSTER PARENTS WITH THE PROPOSED GUARDIAN, OR ERRED ON ANY OTHER BASIS.

A. Standard of review

The factual findings of the family court are reviewed for clear error. See Argument III.B.

A finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made. *Tuttle*, 397 Mich at 46.

The propriety of comparing the foster care parents with Scribner would be evaluated under the abuse-of-discretion standard given that the family court's decision whether to create a juvenile guardianship is discretionary. MCL 712A.19c(2). See Argument I.B.2., *supra*. There is nothing in the statute that suggests that the discretionary authority is limited by anything other than what is in the child's best interests. To that end, it follows that the family court may fashion any approach that will appropriately address the child's best interests, taking into consideration their circumstances (including their stability and well-being).

"An abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006) (citation and citation omitted). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.* (citation and citation omitted). Thus, an abuse of discretion can only be found when a court's decision falls outside the range of "reasonable and principled outcome[s]." *Id.*, 389.

B. Analysis of the issue

1. After termination, adoption rather than guardianship is the preferred permanency option.

The family court does not proceed in a one dimensional way in deciding what is in the best interests of children that come before it in an abuse-and-neglect case. After the parents' rights are terminated, the family court must review the appropriateness of the child's placement and the reasonable efforts being made to place the child for adoption or in other permanent placement in a timely manner. MCL 712A.19c(1)(a)-(c). At the forefront of the permanency effort is adoption.¹⁰¹ This is true because adoption creates the greatest degree of permanence by

¹⁰¹ Despite the debate about whether swifter termination of parental rights and adoption is the best policy, there is universal agreement that, after reunification, the legislative scheme makes adoption the preferred permanency option. See, e.g., Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U MICH JL REF 683, 729 (Summer 2001) ("Federal child welfare policy applies a preference for the adoption of children whose parents have been unwilling or unable to provide adequate childcare. The Adoption and Safe Families Act of 1997 (ASFA) marks a departure in articulated federal child welfare policy from family preservation to adoption"); see also Morgan B. Ward Doran & Dorothy E. Roberts, *Welfare Reform Ends in 2002: What's Ahead for Low-Income and No-Income Families?*, 61 MARYLAND L REV 386, 404 (2002) ("[b]ased largely on a reactionary response to the most egregious cases of child abuse reported in the popular media, ASFA radically transformed the focus of federal child welfare policy ... and creates a legislatively mandated preference for adoption"); *Developments in the Law—The Law of Marriage and Family, Unified Family Courts and the Child Protection Dilemma*, 116 HARV L REV 2099, 2101 (May, 2003) (the ASFA "reorders child protection priorities by readily embracing the idea that family preservation may not be in the best interest of a child; it emphasizes 'freeing' children for adoption by terminating the rights of abusive or neglectful parents. ASFA favors adoption because, among other reasons, it perceives adoption—correctly or not—as a quicker route to stability for children in many cases, and therefore as an option that satisfies a key assumption of the Act: that making earlier permanency decisions for long-term placement is always in the best interest of the child. To this end, ASFA sets strict timelines for achieving permanency"); Shimica Gaskins, *Is it Possible to Reform a Child Welfare System? An Evaluation of the Current Progress in the District of Columbia and the Advocacy Strategies that Led to Reform*, 5 WHITTIER J CHILD & FAM ADVOC 165, 178 (Fall, 2005) ("[o]ne of the major goals of ASFA is to increase the number of adoptions of children in foster care"); Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VIRGINIA J SOC POL'Y & L 409, 410, 413 (2005) ("[t]he Adoption and Safe Families Act of 1997 (ASFA) represented a major ideological shift in child welfare policy away from long term foster care and toward involuntary dissolution of old families and creation

giving the child a statutorily based Parent-Child relationship as if the child had been born to the adoptive parents. MCL 710.60.¹⁰² A guardianship is another permanency option, but it is less preferred because it is not as permanent. For example, the guardian can end a guardianship fairly easily by the filing of a petition for permission to terminate the guardianship. MCL

of new families” and “adoption has become the preferred alternative to foster care”); Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for “Impermanence”*, 34 CAPITAL U L REV 405, 407-408 (2005) (“[u]nlike the legislation that preceded it, ASFA placed an unambiguous priority on moving children from foster care and into adoptive homes by creating a hierarchy of preferred permanency goals”). Professor Mark F. Testa, Ph.D., in his article, *The State Construction of Families: Foster Care, Termination of Parental Rights, and Adoption, the Quality of Permanence – Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 VIRGINIA J SOC POL’Y & L 499, 509 (2005), noted that the NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES issued Adoption and Permanency Guidelines in 2000 that provided a hierarchy of permanency options, ranking, first, “reunification with the biological parents”, and, second, “adoption by the relative or foster family with whom the child is living.” Guardianship is not even the next preferred permanency choice. Instead, it comes in fourth and then only “when adoption is not possible”. (Quoting Nat’l Council of Juvenile and Family Court Judges, *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, p 14 [2000]).

Even advocates for guardianships acknowledge that “the prevailing opinion among judicial officers, state agencies and child advocates is that permanent legal guardianship is ‘second best’ to adoption in cases where reunification cannot be achieved.” Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 NYU REV L & SOC CHANGE 237 (2004). Professor Patten advocated in favor of subsidizing guardianships as an alternative to reunification or adoption. She acknowledged, however, that “[t]he passage of the Adoption and Safe Families Act (“ASFA”) in 1997 led child welfare agencies to focus on increasing the number of adoptions of children in foster care.” *Id.* She noted that, “[o]riginally referred to as an ‘adoption promotion’ bill, this federal legislative act was a response to the exploding number of children entering the foster care system and a corresponding dearth of exit opportunities to permanent homes.” *Id.* One of her main criticisms of adoption as serving as the best option for permanence is the necessity to terminate the parents’ rights. *Id.*, 239 (“the focus on coercively re-forming families through the termination of parental rights and subsequent adoption does a grave injustice to the true diversity of our American society”). This criticism, however, misses the mark when applying MCL 712A.19c(2), where the proposed juvenile guardianship is evaluated *after* the parents’ rights have been terminated.

¹⁰² The Eleventh Circuit cited Florida’s adoption statute, FLA STAT Ann 63.032(2), that contains similar language to MCL 710.60, and recognized the preeminence of adoption over a guardianship accordingly: “foster care and guardianship have neither the permanence nor the societal, cultural, and legal significance as does adoptive parenthood, which is the legal equivalent of natural parenthood.” *Lofton v Secy of Dep’t of Children & Fam Serv*, 358 F3d 804, 824 (CA 11, 2004).

712A.19c(12). The family “court may [also], on its own motion or upon petition from the department of human services or the child’s lawyer guardian ad litem, hold a hearing to determine whether a guardianship appointed under this section shall be revoked.” MCL 712A.19c(11). The ease with which a guardianship can be terminated establishes the potential for “double jeopardy” because the child has already suffered trauma from being removed and having his or her parents’ rights terminated.

Another example of where adoption is preferred over a guardianship is found in the guardianship assistance statute, which provides that “[a] child is [only] eligible to receive guardianship assistance if the department determines that ... [r]eunification or placing the child for adoption is not an appropriate permanency option.”¹⁰³ MCL 722.873(c). This is also consistent with how the relevant federal statute, the Adoption and Safe Families Act of 1997 (ASFA), operates.¹⁰⁴ See, e.g., 42 USC 675(F)(iii), which requires that, before establishing a permanency plan with a relative and receiving kinship guardianship assistance payments under

¹⁰³ DHS’s Child Guardianship Manual (GDM) 600, pp 1, 6, provides: “[j]uvenile guardianship is available for temporary and permanent court wards and state wards when reunification or adoption have been ruled out as permanency goals” and “Juvenile guardianship is an appropriate permanency goal only when reunification and adoption have been ruled out. If a relative or another adult with a significant relationship to the child is willing to adopt, the assigned worker must be able to demonstrate that there are compelling reasons why guardianship is the recommended permanency goal.” <http://www.mfia.state.mi.us/olmweb/ex/gdm/600.pdf> (accessed November 4, 2013).

¹⁰⁴ Under the ASFA, “Congress impose[s] a kind of ‘fish or cut bait’ discipline on the foster care process by instituting the permanency hearing. The requirement that an ultimate disposition be issued within twelve months of a child’s entering foster care leaves little time for ambivalence. Furthermore, the limited range of options available to courts under ASFA forces courts to choose quickly between stark alternatives[.]” Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV J ON LEGIS 1, 9 (Winter, 2001) See also *Bartholet, supra*, footnote 97, 60 BUFFALO L REV at 1359, wherein Professor Bartholet explains: The ASFA “reduced, at least to some degree, the priority placed on family preservation, emphasizing the importance of child safety, and encouraging state systems to place a higher priority on adoption.”

42 USC 673(3), the “agency” must establish “the steps that [it] ... has taken to determine that it is not appropriate for the child to be returned home *or adopted*.” (Emphasis supplied.)

Finally, 1997 PA 172, § 4b(2), MCL 722.954b(2) required that, “[i]f an adoptive family for a child has not been identified within 90 days after entry of an order of termination of parental rights, the supervising agency shall submit the necessary information for inclusion of the child in the directory of children [for adoption] described in section 8 [MCL 722.958].” Accordingly, there should be no doubt that the legislative scheme at issue favors adoption over guardianships when adoption is a viable option.

Because adoption is not always a viable option, the alternative of a juvenile guardianship is available. It would be odd as a policy matter to require a juvenile guardianship merely because a relative seeks it where viable adoptive parents are present. This is true because by the time termination occurs, the relative option has most likely been vetted and rejected. MCL 722.954a. That is certainly what occurred in this case. Also, by preferring a relative at this point, the Legislature would invite possible collusion with the very parents whose rights had been terminated.¹⁰⁵ The relative-guardian would have the authority to reunify the child with the terminated parent or allow contacts between them even after the family court had already determined that it was in the child’s best interests to terminate the parents’ rights and ordered that additional efforts for reunification of the child with the parent not be made. MCL 712A.19b(5). This very case serves as an example of this. During the Florida visit, Scribner

¹⁰⁵ A juvenile guardianship under MCL 712A.19c(2) is different than one created under MCL 712A.19a(7)(c). The latter form would create a permanent relationship between the guardian and ward, but does not involve termination of the parent’s rights. Thus, a relationship between child and parent can continue and allowing such parental relationship may serve a child’s best interests. That is not true, on the other hand, with a guardianship created under MCL 712A.19c(2) because the parent’s rights have been terminated and, therefore, it would not be in the child’s best interests to continue a relationship with the parent.

allowed her son to send a Christmas gift to the children and for the children to have telephone contact with their mother.¹⁰⁶

2. When Scribner filed her guardianship petition, the family court had before it two options for permanency—adoption and a guardianship—and the recommendations from DHS and the children’s attorney favored adoption by the foster care parents as the permanency option for the children.

MCL 712A.19c(1) requires the family court to conduct regular review hearings after termination. In conducting this review, it must determine the appropriateness of the permanency-planning goal for the child, the appropriateness of the child’s placement and the reasonable efforts being made to place the child for adoption or in other permanent placement in a timely manner. MCL 712A.19c(1)(a)-(c).

The clear recommendations from DHS, Holy Cross, the CASA volunteer and the children’s attorney were that the foster care parents be permitted to adopt the children.¹⁰⁷ Indeed, the foster care parents filed a petition for adoption and were willing to provide them with “a permanent, forever home.”¹⁰⁸ The August 26, 2010, Permanent Wardship Service Plan informed the family court that “[t]he children have been in foster care for approximately 2 ½ years and the children need permanency in their lives.”¹⁰⁹ A week before the hearing conducted on February 9, 2011, a permanency planning conference (PPC) occurred and it was determined that the foster care parents were “suitable for adoption” and it was the PPC’s position “that the

¹⁰⁶ App 1331a (02/09/2011 Guardianship Hearing Tr, p 55).

¹⁰⁷ App 1164a, 1186a, 1240a, 1241a, 1249a, 1271a, 1462a, 1465a (PWSP 08/26/2010, p 18; 11/17/2010 Post-Termination/Permanency Planning Hearing - Petitioner’s Exhibit 2 [Court Report], p 2; 01/12/2011 Post Termination Hearing – Petitioner’s Exhibit 1 [PWSP dated 11/24/2010 Report Period 8/27/2010 to 11/24/2010], pp 1, 2, 10; 01/12/2011 Post-Termination/Permanency Planning Hearing - Petitioner’s Exhibit 2 [Court Report], p 2; 02/09/2011 Guardianship Hearing Tr, pp 186, 189).

¹⁰⁸ App 1344a, 1441a, 1442a (02/09/2011 Guardianship Hearing Tr, pp 68, 165, 166).

¹⁰⁹ App 1165a (PWSP 08/26/2010, p 19).

children should stay in [their] current foster care home pending adoption by the foster family.”¹¹⁰

And, on February 9, 2011, the children’s attorney recommended at the conclusion of the guardianship proceedings that the children have permanence with the foster care parents.¹¹¹

Accordingly, the family court had before it two options for permanency—adoption and a guardianship. It recognized this in its opinion, stating: “The ... grandmother of three of the children has requested that the Court consider appointing her guardian for all four [children and] ... the foster parents, who have provided a home for the children for over two years, have filed a petition for adoption.”¹¹²

3. The family court’s decision was not clearly erroneous.

Rather than accord the proper deference or follow the proper standard of review, see Argument III, the Court of Appeals viewed the facts in a light most favorable to Scribner. If she testified to it, it was true as far as the Court of Appeals was concerned. Perhaps one of the most glaring factual errors is the Court of Appeals’ statement that “the trial court failed to give any special consideration or preference to appellant, the grandmother of the minor children.”¹¹³

Although such consideration is not required, see Argument I.B., the family court obviously knew that the girls’ grandmother was seeking guardianship. It agreed to “hear on its merits a petition for guardianship under the Juvenile Code as it relates to *the paternal grandmother*.”¹¹⁴ Also, its

¹¹⁰ App 1417, 1419a (02/09/2011 Guardianship Hearing Tr, pp 141, 143).

¹¹¹ App 1462a, 1465a (02/09/2011 Guardianship Hearing Tr, pp 186, 189).

¹¹² App 9a (Opinion Re: Appointment of Guardian, p 1).

¹¹³ App 17a (*In re COH* opinion, p 4).

¹¹⁴ App 794a-795a (07/01/2010 Permanent Wardship Hearing Tr, pp 3-4 [emphasis supplied]).

opinion's first paragraph identified Scribner as "grandmother of three of the children[.]"¹¹⁵

Thus, by entertaining her petition, it bestowed a preference upon her.¹¹⁶

The Court of Appeals singularly considered Scribner's testimony and concluded that "the grandmother of the children ... has an established and continuing relationship with the minor children[.]"¹¹⁷ One must believe her testimony to come to this conclusion. However, the children's attorney informed the family court that the three girls (i.e., the only children actually related to Scribner) "don't really know [her] that well."¹¹⁸ The foster care worker, Andrea Hagen, testified about the very limited and sporadic times that Scribner contacted DHS/Holy Cross in 2008 and 2009.¹¹⁹ Her first contact with Scribner was December 2008,¹²⁰ and the same was true with the foster care parents, although the children had been with them for two months at that point.¹²¹ "[T]he grandmother was not involved in their life from what [the foster care

¹¹⁵ App 9a (Opinion Re: Appointment of Guardian, p 1 [emphasis supplied]).

¹¹⁶ Although it was understood that Scribner could file the petition as part of the mother's plea, the family court was not required to proceed in this manner.

¹¹⁷ App 17a (*In re COH* opinion, p 4).

¹¹⁸ App 816a (08/09/2010 Guardianship Hearing, p 11). After having visited Scribner over Thanksgiving, only the boy wanted to go to Florida to visit Scribner over Christmas. App 1393a-1395a (02/09/2011 Guardianship Hearing Tr, pp 117-119). The children lost a week of school at the end of the Christmas break because of a problem with their flight. One of the children "cried the night ... before coming home ... because she was afraid that they weren't going to get to come back here." App 1396a (02/09/2011 Guardianship Hearing Tr, p 120). JRG wants to stay a while with Scribner and to live with the foster parents. App 1398 (02/09/2011 Guardianship Hearing Tr, p 122). All three girls do not want to live with Scribner, but rather they want to live with their foster parents as their forever, permanent home. App 1399a-1400a (02/09/2011 Guardianship Hearing Tr, pp 123-124). The CASA worker opined that it was in the best interests of the children to be permanently with the foster care parents. App 1187a, 1400a (11/17/2010 Post Termination/Permanency Planning Hearing – Petitioner's Exhibit 3 [CASA Court Report], p 1; 02/09/2011 Guardianship Hearing Tr, p 124).

¹¹⁹ App 160a, 1406a, 1407a, 1432a-1433a (09/17/2008 Updated Service Plan, p 9; 02/09/2011 Guardianship Hearing Tr, pp 130, 131, 156-157).

¹²⁰ App 1406a, 1407a (02/09/2011 Guardianship Hearing Tr, pp 130, 131).

¹²¹ App 1345a-1346a (02/09/2011 Guardianship Hearing Tr, pp 69-70).

parents] had ever heard.”¹²² Scribner sent some Christmas gifts in December 2008.¹²³ JRG “was quite excited [about the] Christmas gifts from Grandma Lori”, but the girls did not know who Grandma Lori was.¹²⁴ The oldest girl (ERH) asked “who’s Grandma Lori?”¹²⁵ JRG reminded her that “you know Grandma Lori, she’s our grandma from Florida. And she says I’m not sure I remember.”¹²⁶ The two younger girls “didn’t know who [ERH] was talking about. They didn’t know who that was.”¹²⁷ Scribner’s next call came five months later on May 15, 2009,¹²⁸ to be followed with a contact three months later in August 2009.¹²⁹ Scribner was going to be in Michigan so a supervised visit was arranged in Cadillac.¹³⁰ Ms. Hagen observed this first visit with the children in August 2009, and she noted that the boy (JRG) “definitely remembered [Scribner] more [whereas t]he 3 girls, well [the two younger girls, KBH and COH] really did not have a lot of recollection[, although ERH] I think remembered her, but [the boy, JRG,] ... was the one that ran up to her and knew exactly who she was.”¹³¹ The next contact occurred two

¹²² App 1345a (02/09/2011 Guardianship Hearing Tr, p 69).

¹²³ App 1345a-1346a, 1406a-1407a, 1410a-1411a (02/09/2011 Guardianship Hearing Tr, pp 69-70, 130-131, 134-135). The gifts came from Target for only three of the children, not JRG, and there was a note in the box about which presents went to whom. App 1346a, 1436a (02/09/2011 Guardianship Hearing Tr, pp 70, 160). Scribner denied this, claiming she sent four gifts and they came back to her undelivered, but her story on the subject is convoluted. App 1000a, 1001a, 1004a-114a (08/26/2010 Guardianship Hearing Tr, pp 171, 172, 175-185). One would have to disbelieve the caseworker and the foster care parents in order to find Scribner credible here.

¹²⁴ App 1346a (02/09/2011 Guardianship Hearing Tr, p 70).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See footnote 79.

¹²⁹ App 1410a (02/09/2011 Guardianship Hearing Tr, p 134).

¹³⁰ App 1411a-1412a (02/09/2011 Guardianship Hearing Tr, pp 135-136).

¹³¹ App 1413a (02/09/2011 Guardianship Hearing Tr, p 137).

months later on October 13, 2009.¹³² Accordingly, Scribner's testimony and the Court of Appeals' findings do not line up with those who worked with the children on a day-to-day basis.

Importantly, the family court found that "[t]hese children were a mess emotionally and physically when they were removed from the care of their mother."¹³³ Where was Scribner? According to her, she "always talked with 'em on the phone. I'd always take them for one to two weeks in the summer. I'd visit them frequently. Before I moved to Florida I would watch them frequently and we've always had a very close and loving relationship."¹³⁴ Given the pitiful condition of these children, however, how could she not see the need for intervention? She also testified that, after moving to Florida, she "spoke to them frequently on the phone" and "would of course always talk to them on birthdays and Christmases and send them a gift and ... they were always very excited to see me, always very excited to talk to me when we called and I talked to 'em at least once a week."¹³⁵ Over the course of this period, her son was assaulting the mother,¹³⁶ having sex in front of the children,¹³⁷ the children's maltreatment was patent, and even Scribner's brother Ron was so upset with the mother's behavior that, within two months of taking her in, he "kicked" her out of his home because of her behavioral and other issues and

¹³² See footnote 83.

¹³³ App 10a (Opinion Re: Appointment of Guardian, p 2).

¹³⁴ App 951a (08/26/2010 Guardianship Hearing Tr, pp 122).

¹³⁵ App 955a (08/26/2010 Guardianship Hearing Tr, p 126).

¹³⁶ App 493a-494a, 524a-525a (06/04/2009 Dispositional Hearing Tr, pp 205-206, 236-237).

The children "have all openly talked of their 'daddy making their momma bleed' and putting a gun to her head" and ERH reported how their mother would lock them in the basement away from daddy." App 277a (03-10-2009 Review Hearing - Petitioner's Exhibit 3, pp 1-2).

¹³⁷ 255a, 320a, 352a, 519a (03/10/2009 Review Hearing Tr, p 3; 06/04/2009 Dispositional Hearing Tr, pp 32, 63, 230). The children were having unusual play time that caused concern to the foster care parents. App 276a-277a (03-10-2009 Review Hearing - Petitioner's Exhibit 3, pp 1-2).

thereafter fought reunification.¹³⁸ The stark difference between the physical evidence (the children) and Scribner's claims of "frequent" contact with the children render her testimony incredible and the Court of Appeals' findings in favor of her testimony clearly erroneous.

The same is true with the Court of Appeals view that, "[a]lthough the minor children may have found greater stability with the foster care parents than they had with their [grand]mother, this 'stability' stems primarily from the failure of DHS and Holy Cross to consider [Scribner] as a possible permanency provider for the children"¹³⁹ This is an unfair and inaccurate portrayal of DHS and Holy Cross. When the placement decision was made, there were no qualifying relatives for placement of the children.¹⁴⁰ Not even Scribner's son, Ron Heeren (the girls' father), suggested his mother (Scribner) as a possible placement for the children. Although Scribner testified that she maintains a relationship with her son Ron and talks to him "frequently",¹⁴¹ Ron never offered Scribner to the DHS as a placement option during its preparation of the initial case service plan.¹⁴² Neither did he mention Scribner as a possible placement for the children during the September 23, 2008, review hearing even though there had been difficulty in finding a suitable placement for these four children, and the placement effort was the main issue at the September 23, 2008, review hearing.¹⁴³ Instead, he preferred foster

¹³⁸ App 145a, 161a, 315a, 347a, 468a (09/23/2008 Review Hearing Tr, p 8; 09/23/2008 Review Hearing – Petitioner's Exhibit 1 [ISP], p 10; 06/04/2009 Dispositional Hearing Tr, pp 27, 59, 180).

¹³⁹ App 17a, 18a (*In re COH* opinion, pp 4, 5).

¹⁴⁰ See footnote 11.

¹⁴¹ App 948a (08/26/2010 Guardianship Hearing Tr, p 119).

¹⁴² App 109a (07/03/2008 Dispositional Hearing - Petitioner's Exhibit 1 [Initial Service Plan], p 11).

¹⁴³ App 144a-150a (09/23/2008 Review Hearing Tr, pp 8-14).

care and proximity to the mother so that reunification efforts could be made.¹⁴⁴ And, the family court noted at the time that “[t]here’s a preference of course for family but even the mother is opposed to that[.]”¹⁴⁵ Later, the Foster Care Review Board reported that DHS “has made diligent efforts to locate interested relatives.”¹⁴⁶ Accordingly, it is inaccurate to contend or even imply that DHS and Holy Cross failed to consider Scribner as a placement option or that Scribner was a viable placement choice when DHS was statutorily charged with the responsibility of placing the four children within 90 days after their removal. 1997 PA 172, § 4a(2), MCL 722.954a(2) (now 2010 PA 265, § 4a[4]).

The Court of Appeals failed to give appropriate deference to the family court that was in the trenches with these children for three years leading up to its decision that it was not in the children’s best interest to create a juvenile guardianship. *In re Miller*, 433 Mich at 337.

The family court’s factual findings are not clearly erroneous and its decision against creating a juvenile guardianship was a reasonable and principled one and, therefore, it did not abuse its discretion given, *inter alia*, the availability of a more permanent adoption option with the foster care parents who—over the course of two-and-a-half years—provided love, comfort and stability for these four young children that “were a mess emotionally and physically when they were removed from the care of their mother.”¹⁴⁷

¹⁴⁴ App 109a, 141a-142a, 149a-150a, 176a (07/03/2008 Dispositional Hearing - Petitioner’s Exhibit 1 [Initial Service Plan], p 11; 09/23/2008 Review Hearing Tr, pp 5-6, 13-14; 09/23/2008 Review Hearing – Petitioner’s Exhibit 1 [Updated Service Plan], p 25).

¹⁴⁵ App 149a (09/23/2008 Review Hearing Tr, p 13). The mother opposed placement with the children’s great-uncle Ron, the girls’ father’s uncle, which was the only relative option presented for the girls. App 144a-147a (09/23/2008 Review Hearing Tr, pp 10-11). She preferred the foster care parents, where the children were doing well. *Id.*

¹⁴⁶ App 563a (08/25/2009 Dispositional Review Hearing – Petitioner’s Exhibit 2 [Foster Care Review Board Report of July 17, 2009], p 4).

¹⁴⁷ App 10a (Opinion Re: Appointment of Guardian, p 2).

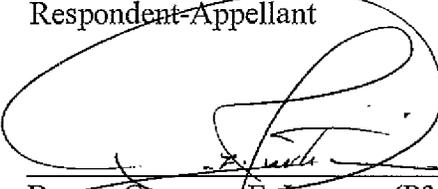
RELIEF REQUESTED

FOR THE FOREGOING REASONS, Dale J. Hilson, Prosecuting Attorney in and for the County of Muskegon, by Charles F. Justian, Chief Appellate Attorney, respectfully requests that this Honorable Court reverse the decision of the Michigan Court of Appeals.

Respectfully submitted,

DALE J. HILSON
Muskegon County Prosecuting Attorney
Attorney for Petitioner/Intervening
Respondent-Appellant

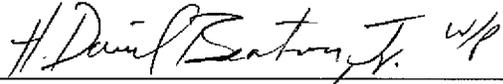
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