

STATE OF MICHIGAN
IN THE SUPREME COURT

In re Destiny Hicks and Elijah Brown
Minors/Appellants

Supreme Ct. No.

Ct. of Appeals No. 328870

Wayne Circuit Ct. No. 12-506605

Department of Health and Human Services
Petitioners

v.

Shawanda Brown
Respondent

MINOR CHILDREN'S
APPLICATION FOR LEAVE TO APPEAL

William Ladd P30671
LGAL for Minor Children
Michigan Children's Law Center
One Heritage Place Ste. 210
Southgate, Mi. 48195
Ph. 734 281-1900

Date: 5/24/2016

Table of Contents

	<u>Page</u>
Index of Authorities	iii – v.
Statement of Judgment and Order Appealed From And Relief Sought	vi.
Children’s Statement of Questions Presented	vii.
Children’s Statement of Facts	1 -15
Proceedings Below	16
Children’s Argument	
I. The Respondent-Mother Was Not Entitled To Special Protections Under the Americans With Disabilities Act In Her Parental Termination Case Where She Failed to Properly Preserve the Issue, Where the Agency Provided Extensive Services Appropriate to Her Needs.....	
	17
A. The Issue Was Not Properly Preserved in the Trial Court	17-19
B. Standard of Review	19
C. Argument	
1. Reasonable Efforts To Reunite the Children With the Parent Are Only One Consideration That a Court Must Evaluate in a Termination Case and the Agency Made Reasonable Efforts in This Case.....	19-22
2. Reasonable Efforts Were Made Here and Appellant Never Challenged Those Determinations in the Trial Court	22-24
3. Regardless of Whether or Not Appellant Was a Qualified Individual With a Disability Under the Americans With Disabilities Act the Agency Made More Than Sufficient Accommodations to Her Limitations	25-30
4. The Decision of the Court of Appeals Here Is Inconsistent With the Jurisprudence of Many Other States.	30-32
II. The Court of Appeals Decision Here Violated Both the Statutory and Substantive Due Process Rights of the Children Where It Placed Primary Emphasis on the Statutory Interests of the Parent Rather Than On The Interests of the Children, Who Have the Countervailing Interests in Safety and Permanency.....	
	32-34
Relief Requested	35
Appendices .	

- a. Trial Court Order Following Hearing to Terminate Parental Rights
Entered 7/27/2015**
- b. Court of Appeals Opinion, In re Hicks/Brown Minors, Dkt. No.328870,
(For Publication, Released 4/26/2016)**
- c. In the Matter of Isreala Greene, Dkt. Nos. 286252, 286253, 286254
(Unpublished, Released 3/24/09)**

Index of Authorities

	<u>Page</u>
<u>Cases</u>	
<u>Michigan</u>	
Beason v. Beason, 435 Mich 791 (1991)	27
In re Hicks/Brown, ___ Mich App. ___; (Dkt. No. 328870, Released For Publication 4/26/16)	17
In re Mason, 486 Mich 142 (2010)	20,22
In re Rood, 483 Mich 142 (2009)	32
In re Terry, 240 Mich App. 14 (2000)	14,18,19,26,29,32
In the Matter of Greene, Dkt. Nos. 286252, 286253, 286254 (Unpublished, Released 3/24/09)	26
McCormick v. Carrier, 487 Mich 180 (2010)	19
People v. Smith, 482 Mich. 292 (2008)	27
<u>Federal</u>	
Bragdon v. Abbott, 524 U.S. 624 (1988)	25
Lehman v. Lycoming Cty. Children’s Services Agency, 458 U.S. 502 (1982)	34
Martin v. Discount Smoke Shop, Inc., 443 F.Supp. 2d 981 (C.D. Ill, 2006)....	25
Suter v. Artist M., 503 U.S. 347 (1992)	21
<u>Other States</u>	
Adoption of Gregory P., 747 N.E. 2d 120 (Mass.Sup.Jud’l.Ct.,2001)	31
In re B.C., 21 N.E. 3d 308 (Ohio Sup. Ct. 2014)	34
In re B.S., 693 A.2d 716 (Vt.Sup.Ct. ,1997)	25
In re Chance Jahmel B., 723 N.Y.S. 2d 634 (Fam.Ct. N.Y., 2001).....	32
In re La’Asia S., , 739 N.Y.S. 2d 898 (Fam. Ct. N.Y. , 2002)	31

<u>Other States</u>	<u>Page</u>
In re Dependency of M.S.R., 271 P. 3d 234 (Wash. Sup. Ct. 2012)	34
In re Shirley B., 18 A. 3d 40; 419 Md. 1 (Md. 2011)	21
In re Victoria M., 207 Cal.App. 3d 1317; 255 Cal.Rptr. 498 (Cal.Ct. of Apps. 5 th Dist. 1989).....	30,31
In re Walter P., 228 Cal.App. 3d 113; 278 Cal.Rptr. 602 (Cal.Ct. of Apps. 4 th Dist. 1991)	31
In re Welfare of A.J.R., 896 P.2d 1298 (Wash.App. 1995).....	32
In the Interest of Jane Doe, 60 P. 3d 285 (Hawaii Sup. Ct., 2002)	31
In the Interest of K.C., 362 P. 3d 1248 (Utah Sup.Ct., 2015)	28
New Jersey Div. of Youth and Family Services v. A.G. 782 A.2d 458 (N.J. Super. A.D. 2001)	32
People in Interest of C.Z., 360 P. 3d 228 (Colo. Ct. Apps. 2015).....	32
<u>Michigan Statutes</u>	
MCL 330.1100a(25)(i)- (v)	26
MCL 712A.18f(1).....	20,21
MCL 712A.19a(2)	20,21
MCL 712a.19a(6).....	21,30
MCL 712A.19b(3)(c)(i)	15
MCL 712A.19b(3)(g)	15
<u>Michigan Court Rules</u>	
MCR 7.215(J)(1)	18
MCR 7.305(B)	vi.

Federal Statutes and Regulations

42 U.S.C. 671(a)(15) 20,21,33

42 U.S.C. 675(5)(E) 20

42 USCA 12102(1)(A) 25

42 USCA 12102(2)(A) 26

42 USCA 12132 31

45 C.F.R. 1356.21(b) 21,33

45 C.F.R. 1356.21(b)(2)(i) 20

Other States Statutes

West’s Ann. Cal. Civil Code Sec. 232 30

Other

Carelink, www.carelinknetwork.org (Accessed 1/22/16) 10

HUD Housing Choice vouchers Fact Sheet, www.portal.hud.gov/hudportal/ HUD?src+/topics/housing_choice_voucher_program_section8 (Accessed 1/24/16) 23

Neighborhood Service Organization, www.nso.mi.org (Accessed 1/22/16)...9

Parent Partners, www.Childwelfare.gov/pubPDFs/CAparentpartner jobDescriptionpdf (Accessed 1/24/16) 24

Statement of Judgment and Order Appealed From
And Relief Sought

The minor children here seek leave to appeal to this court pursuant to **MCR 7.305(B)** from a decision by the Court of Appeals in **In re Hicks/Brown Minors, Docket No. 328870 (Released 4/26/16)(Attached)**. In that decision the Court of Appeals reversed the termination of the respondent-mother's parental rights. The children now ask that this court grant leave to review and to reverse the decision of the appeals court because the court improperly found that the agency had not made proper accommodations for the mother's claimed disability pursuant to the American's With Disabilities Act.

Children's Statement of Questions Presented

I. Was The Respondent-Mother Entitled To Special Protections Under the Americans With Disabilities Act In Her Parental Termination Case Where She Failed to Properly Preserve the Issue, Where the Agency Provided Extensive Services Appropriate to Her Needs?

Minor Children Answer No
Trial Court Answers No
Court of Appeals Answers Yes
Respondent-Mother Answers..... Yes
Department of Health and Human Services Answers No

II. Did The Court of Appeals Decision Here Violate Both the Statutory and Substantive Due Process Rights of the Children Where It Placed Primary Emphasis on the Statutory Interests of the Parent Rather Than On The Interests of the Children, Who Have the Countervailing Interests in Safety and Permanency?

Minor Children Answer Yes
Court of Appeals Answers No
Respondent-Mother Answers No
Department of Health and Human Services Answers Yes

Children's Statement of Questions Presented

I. Was The Respondent-Mother Entitled To Special Protections Under the Americans With Disabilities Act In Her Parental Termination Case Where She Failed to Properly Preserve the Issue, Where the Agency Provided Extensive Services Appropriate to Her Needs?

Minor Children Answer No
Trial Court Answers No
Court of Appeals Answers Yes
Respondent-Mother Answers..... Yes
Department of Health and Human Services Answers No

II. Did The Court of Appeals Decision Here Violate Both the Statutory and Substantive Due Process Rights of the Children Where It Placed Primary Emphasis on the Statutory Interests of the Parent Rather Than On The Interests of the Children, Who Have the Countervailing Interests in Safety and Permanency?

Minor Children Answer Yes
Court of Appeals Answers No
Respondent-Mother Answers No
Department of Health and Human Services Answers Yes

Children's Statement of Facts

Destiny Hicks (dob 1/29/12) and Elijah Brown (dob 2/7/13) are the children who are the subjects of this appeal. Destiny came to the attention of the juvenile court (Wayne County Circuit Court's Family Division-Juvenile Section) on 4/11/12 when the court held a preliminary hearing. At that hearing the court was informed that Destiny had been placed outside of her mother's care on 4/10/12. That hearing was continued for the agency to file an amended petition with more specific allegations. At the continued hearing held on 4/25/12 the court referee authorized the petition and authorized continued placement for Destiny. The court also made a finding that the agency had made reasonable efforts to prevent the removal of the child, based upon the fact that the agency had met with the mother and had made efforts to convince the mother to keep the child in her care, but these efforts had been unsuccessful. The agency had identified relatives both in Michigan and Cleveland, Ohio but the respondent mother refused to move in with either person. The agency had also identified Alberto Hicks as the putative father and they had assisted him in establishing paternity. **T. 4/25/12, pp. 3-12**

The Original Adjudication and Disposition

Subsequently the father filed a demand for a trial by jury. At a pretrial held on 5/21/12 before Judge Christopher Dingell, the court was made aware of the fact that the father might have Native American heritage. The court was hearing the case in tandem with a case entitled In re Brown, Ct. No. 12-505,860 and Mr. Hicks was identified as a non-parent adult in that case. **T. 5/21/12, pp. 3-4** At a subsequent hearing the respondent mother Shwanda Brown was identified as the

adult sibling in the companion Brown case. **T. 10/16/12, pp. 3-5** The issues regarding Indian heritage were resolved as to Mr. Hicks at a hearing held on 11/15/12 where the court admitted a number of documents regarding notice to the identified Indian tribes and the Bureau of Indian Affairs. **T. 11/15/12, pp. 3-9**

The trial was held on 1/28/13 before Judge Christopher Dingell. At that hearing the agency first withdrew it's request for termination of parental rights against the father Mr. Hicks. In response Hicks withdrew his jury demand. **T. 1/28/13, pp. 3-7** The respondent-mother did not appear in court for the hearing but she was represented by counsel. Cordell Huckaby, a Protective Services worker testified as the petitioner on behalf of the Department of Human Services (now Department of Health and Human Services or DHHS). Mr. Huckaby testified that in April 2012 the mother had come into his office and stated that she could not care for her daughter Destiny. Respondent reported that she was staying with her mother and her children, along with at least two men. Respondent insisted that she could not care for Destiny. Huckaby spent the next to 4 ½ to 5 ½ hours attempting to convince Ms. Brown otherwise, to no avail. During those extensive discussions the mother had stated that she did not have a place to stay and that she knew she could not continue staying with her mother Cleo Brown (Destiny's maternal grandmother) because the grandmother lived with a convicted felon Steven Butler.¹ The worker went on to state that the mother admitted that she was overwhelmed with the care of her child, both financially and physically. He also noted that she was "very stressed". **T. 1/28/13, pp. 3,9-11, 16-18**

¹ Butler had been listed as the Non-Parent Adult in the instant case until the allegations had been dismissed at the beginning of the hearing. **T. 1/28/13, pp. 5-7f**

Beth Houle, the foster care worker, testified that she had been on the case since 10/24/12. She stated that she had had difficulties establishing contact with the mother and that Ms. Brown's first visit with Destiny was on 12/12/12, after an extended period without visitations. The mother had no explanation for her failure to visit. More specifically the Assistant Attorney General asked the worker:

Q-And when's the first time that the mother visited with this child?

A- It was December 12th, 2012.

Q- Okay. And that's not since you took over the case in October, but that dates back to the beginning of the case?

A. Yes

Q- So between the time when the child came into care in April and December 12th, 2012 that approximately eight month period the mother did not visit at all?

A- That's correct.

Q- Did you have—when you spoke to the mother, did you ask her why she'd not been visiting with her baby?

A- I did, and she didn't really have an answer. She did say that she wasn't – she didn't have bus tickets at one point; and I did attempt to send those to her. **T. 1/28/13, p. 27**

Even after the mother started visitations she was inconsistent, missing 3 of the 7 visits scheduled before the court date on 1/28/13. **T. 1/28/13, pp. 34-36**

When the mother did visit she had difficulties engaging with and supervising Destiny. As a result the worker often had to redirect the mother. Ms. Houle related that at one visit Destiny crawled out of the visitation room and the mother made no effort to stop her. At another visit Destiny had a dirty diaper, and the mother made no effort to change it, instead she merely laughed when the worker showed her where the diapers were. **T. 1/28/13, pp. 27,30,34**

Ms. Houle stated that the mother admitted that she had an unstable housing situation. The mother first reported that she lived with her mother, but she moved to stay with her aunt and then she went back to stay with her mother, all within the

three months from October to December 2012. Ms. Brown explained that her mother had kicked her out of her home and that the aunt did not have room for her. When she returned to the grandmother's home she was sleeping on the couch. **T. 1/28/13, pp. 28-29** Following this testimony the trial court found that there was sufficient evidence to support the court taking temporary custody of the children as to both parents. **T. 1/28/13, p. 43**

The court held a dispositional hearing on 1/29/13 where the court admitted treatment plans as to both Ms. Brown and Mr. Hicks. The court adopted a treatment plan for the mother which included requirements that the mother should be involved in parenting classes; that she be in individual counseling, that she participate in a Clinic for Child Study evaluation, that she visit regularly with the children and that she participate in an educational program. The mother was also required to obtain and maintain suitable housing and a legal source of income and obtain prenatal care because she was pregnant. The father Hicks was presented with a similar treatment plan. **T. 1/29/13, pp. 3-6**

Adjudication and Disposition For Elijah

Elijah Brown was born on 2/7/13. A petition for temporary custody was authorized on 2/13/13. Alberto Hicks was identified as the putative father. **T. 2/26/13, pp. 3-6** A trial in Elijah's case was held on 4/9/13. The mother made admissions at the hearing. She admitted that when Elijah was born she did not have suitable housing and that she still did not have suitable housing. These housing problems dated back to at least 2012 with her not having suitable housing for Destiny. She did state that she had started a treatment plan in Destiny's case and

that some of her services had started. She also admitted that she was living in a shelter through Genesis House. Based upon these admissions the court made Elijah a temporary court ward. The court also found that Elijah's legal father had not been identified. The court adopted the treatment plan that was in place as to Destiny, and added a requirement that the mother participate in a psychiatric evaluation. The agency did make the court aware that the mother had been referred to parenting classes but that she had already been **T. 4/9/13, pp. 8-20**

Periodic Review Hearings

The court then embarked on an extensive series of review hearings. For an extended period of time the court attempted to identify a suitable relative caretaker for the children and it set a concurrent plan of guardianship to help accomplish the relative plan. At the first review hearing held on 4/23/13, Joann Brown, a maternal aunt, had been identified as a potential relative caretaker, but she had been ruled out because she did not have suitable housing and there was substance abuse in her home. As to the mother, the agency reported that she remained in the shelter, and she was being referred to Focus Hope which could provide her with a variety of services including job skills training, employment referrals and housing assistance. The agency was also planning to re-refer the mother to parenting classes as soon as the mother filled out a referral form. She had also been involved in therapy at the agency. **T. 4/23/13, pp. 8-13**

At that hearing the court also admitted a Clinic for Child Study evaluation of the mother conducted on 4/19/13 by Dr. Kai Anderson, a psychiatrist. In the report the respondent-mother reported that she had recently started individual therapy at

Franklin Wright Agency and that she was beginning to visit regularly with the children at that agency. The examiner did note that the mother had some difficulty with mathematics and that her memory was impaired. The report stated that the mother appeared to have some cognitive limitations, but she demonstrated the capacity to think abstractly. In conclusion the examiner recommended that:

“Due to her limited support system, concern about her cognitive limitations and her history of depression, Ms. Brown will require additional support during her Court involvement. It is suggested that she be provided with a parent peer mentor in addition to her therapist to provide with additional support.” **Clinic for Child Study, Admitted 4/23/13, at p. 6**

At the hearing held on 7/23/13 the foster care worker reported that the mother was sleeping on a couch in her uncle’s home. The week before the mother had gone to the agency and told the worker that she did not feel safe in that home. After attempts to place the mother in a shelter proved unsuccessful, she had located a friend’s home to stay, but she did not want to stay there and had returned to the uncle’s home because there were no other relatives willing to have the mother stay with even for a night. At the end of the hearing the court renewed its order for parenting classes, because the mother had been terminated from an earlier program. . **T. 7/23/13, pp. 5-10**

The court also admitted a psychological and a psychiatric evaluation at the 7/23/13 review hearing.. In the psychological the examiner noted that she immediately observed cognitive deficits and that Brown demonstrated limited insight. However Brown presented as an accurate historian and to be in good contact with reality. In the assessment the examiner found that Brown had a Full Scale IQ of 70, which placed her in the 2nd percentile and within the borderline

range of intellectual functioning. Her reasoning was also determined to be in the 2nd percentile. As a result of the evaluation the examiner recommended that Brown be involved in individual therapy "... to address underlying emotional distress and other factors that affect Ms. Brown's judgment , parenting skills and daily functioning." The evaluation also recommended that Brown be involved in parenting classes that include role-playing. Finally the report stated that Brown's cognitive skills were very limited and that "... it might be beneficial to administer a measure of adaptive functioning...' to determine strengths and weaknesses.

Psychological Evaluation, Juvenile Assessment Center, 5/9/13, at p. 4

In a subsequent psychiatric evaluation the examiner reported that Brown had reported that she was receiving parenting classes through the JAC as well as in-home adult services through Lutheran Child and Family Services. The evaluation took note of the earlier psychological evaluation and the fact that it found that that she had a full scale IQ of 70. The psychiatric evaluation recommended that Brown needed to participate in more parenting classes to improve her ability to provide appropriate parenting to her children, it stated that she could benefit from a parent partner and case management services through a community mental health agency such as NSO or Community Link. **Psychiatric Evaluation, Juvenile Assessment Center, 5/30/13, at p. 4**

At the hearing held on 10/15/13 the court was informed that the mother had been provided with a parent partner to assist her with parenting issues. The agency worker informed the court that the mother had been referred three separate times

for parenting classes, but a new referral was required because the referral agency had recently discontinued the service through no fault of the mother. The mother was also attempting to qualify for SSI (Supplemental Security Income), while she remained living with her uncle. **T. 10/15/13, pp. 6, 10-14** At the next review hearing held on 1/15/14 the mother had made some progress on the treatment plan. She had completed parenting classes and the worker said that she could refer the mother for one-on-one parenting classes. The mother had also been referred to Michigan Rehabilitation Services (an agency that provides housing and employment counseling to persons with disabilities). The mother reported that she had her own room in the uncle's home. However, the worker reported that the mother continued to have problems at the visits, needing to be redirected by the workers. Also the uncle had informed the worker that there was not enough space in his home for the children. The mother did continue in therapy and with the parent partner and the worker had assisted the mother in applying for disability. However the mother had also had a recent emergency mental health hospitalization for suicidal ideation. At this point the court continued the concurrent plan of guardianship or reunification.

T. 1/15/14, pp. 5, 9-15, 20

Based upon the court's directions the agency continued to investigate potential relative placements. The maternal great-grandmother was found to be too old to be a guardian and the uncle could not care because he lived with a woman who did not want the children placed in her home. The mother had made some progress on the plan and had recently started mental health services at Northeast Guidance Center. **T. 2/13/14, pp. 4-7** While these circumstances continued at

subsequent review hearings, the court chose not to order the filing of a termination petition. **T. 2/13/14, p. 12; T. 5/13/14, p. 4**

At the hearing held on 8/13/14 the new foster care worker Yasmin Gibson testified that while the mother had been referred to Michigan Rehabilitation Services (MRS), she had not followed up with the documentation. She had also not been in recent contact with the parent partner. The worker was helping the mother with job applications, and the therapist was providing similar assistance. Based upon a request from the mother's counsel the court ordered that the agency refer the mother for services through the Neighborhood Services Organization (NSO).² **T. 8/13/14, pp. 6-10, 15** This was the first time that counsel had requested in court these services, but even at this point she had some difficulty explaining what they were:

The Court: Now NSO, what are you talking about?

Ms. Gilfix: -- that was followed through. Well, they provide services, your honor. In fact, I was provided with information from the last worker, for the last two workers ago regarding NSO intake services. And they provide services, parenting and other kind of intense services for parents. And I think that would be something that Ms. Brown would benefit from. **T. 8/13/14, p. 13**

At the hearing held on 11/7/14 the foster care worker Yasmin Gibson reported that in order to comply with the court's order to pursue a guardianship with the maternal great-grandmother in Ohio she had contacted her several times.

² Neighborhood Service Organization is a local nonprofit agency which provides clinical and outpatient services for adults with mental illness; older adult mental health support, advocacy and outreach; and developmental disability services for adults and children. www.nso-mi.org (accessed 1/22/16)

The great-grandmother had consistently said that she would not care for the children, given that she was too old. Suddenly, the great grandmother had changed her position, saying that she would take the children, but she would give them to the mother. The agency considered this plan to be a significant risk to the children. The mother had also reported to the worker that she was planning to move to Ohio because she was about to be evicted from her uncle's home. The uncle had informed the worker on several occasions that he planned to put the mother out of his home.

T. 11/7/14, pp. 6-9

Ms. Gibson had also made efforts to refer the mother to the Neighborhood Service Organization. However, to do so she needed to have the mother released from her existing services at Carelink.³ Ms. Gibson had made a request for the release on behalf of the mother, and she was also planning to help her fill out the application for the NSO. In addition Ms. Gibson reported that the mother's therapist had offered to help the mother with her application for subsidized housing but Ms. Brown had said that she would do it on her own. **T. 11/7/14, pp. 11-14**

The court held an expedited review hearing on 11/26/14 where the agency reported that the maternal great-grandmother had again stated that she would take the children with the understanding that the mother would care for them. In addition the worker reported that she was still working to have the mother released from the program at Carelink so that she could be enrolled at the NSO. Ms. Gibson had followed up on this referral with the change to NSO and that agency had noted

³ Carelink is an agency which provides comprehensive community based supports to youth and adults with serious emotional and behavioral health issues. www.carelinknetwork.org (accessed 1/22/16)

that the mother was already receiving comparable services. At the conclusion of this hearing the court ordered that the agency file a termination petition as to both children. **T. 11/26/14, pp. 5-9, 13**

Three months later the agency had yet to file the termination petition. Ms. Gibson did report that she was making continuing efforts to transfer the mother's service's to the NSO, but that the mother had to take some initiative in the transfer. **T. 2/20/15, pp. 10-14** Then on 5/20/15 Ms. Gibson reported that the mother was in compliance with the therapeutic services offered by Franklin Wright Settlement, including individual therapy and assistance with obtaining housing and employment. The therapist had assisted the mother with this by personally taking the mother to fill out job applications. The worker continued her attempts to have the case transferred to the NSO, but the release from Carelink had been denied. However, Carelink continued to provide services to the mother. In addition the mother was receiving mental health services through Northeast Guidance. Ms. Gibson had contacted that agency which had informed her that they also provided services to developmentally delayed clients, comparable to those offered by the NSO. To receive these services the mother would simply need a new assessment. Ms. Gibson did express concerns about the mother's lack of consistent visitation and her failure to attend GED classes. **T. 5/20/15, pp. 7- 12**

By 6/18/15 the agency had filed a termination petition as to both parents. **T. 6/18/15, pp. 4-11** The hearing on the termination petition was held on 7/27/15 with Ms. Gibson testifying as the petitioner. By the time of the hearing she had been on the case for 14 months. Ms. Gibson then summarized the elements of the

treatment plan, which had originally had been adopted in January 2013. Ms. Brown had been ordered to participate in a Clinic for Child Study evaluation and she had completed that evaluation on 3/19/13. That evaluation recommended that:

It is suggested that she be provided with a parent peer mentor in addition to her therapist to provide her with additional support. She should continue to visit with her children twice per week, attend her therapy sessions, look for independent housing and complete her education. **Clinic for Child Study, 3/19/13, Admitted 4/23/13, p.6**

The mother was also required to complete parenting classes. She had been referred three times, and she finally completed the classes in January 2014. Although Ms. Brown had completed these classes, she had not benefitted from them. Ms. Gibson explained that at times the mother was only physically present at the visits. She would let the children climb and jump on things and put things in their mouths. The children would also dart into traffic when leaving the building. The mother would not engage with the children at the visits. **T. 7/27/15, pp. 10-12**

The mother had completed a psychological evaluation on 5/9/13 and psychiatric evaluation on 5/30/13. The mother was also required to establish safe and suitable housing. When the children were originally placed into care the mother had reported that she was homeless. At the time of the termination hearing , which was more than three years later, she still did not have appropriate housing. The agency's workers had assisted the mother in filling out an application for Section 8 housing (subsidized housing), but the mother had never followed through with the application. The worker had also periodically attempted to help the mother get into a shelter, but Ms. Brown always resisted. The mother never explained why she

would not go to a shelter, even though those programs could have also assisted her in getting permanent housing. **T. 7/27/15, pp. 13-14, 30, 47-48**

The mother was also required to establish a legal source of income. The mother did not have a source of income when Destiny was originally placed into foster care and she never reported an independent source of income. She had worked with the therapist from Franklin Wright Settlement on securing a job. The therapist had helped her filling out job applications and had taken her to job sites. On at least one occasion the mother had failed to appear for a job orientation. The mother had been attempting to obtain a source of income by applying for SSI, and she had an attorney to assist her. However the mother reported that the attorney told her not to contact him anymore. The worker had tried to assist the mother's application by providing a copy of the psychological for the attorney. **T. 7/27/15, pp. 22-24, 31,36**

Ms. Brown had participated in therapy, primarily through Franklin Wright. The therapy had been ongoing up until right before the termination hearing when it had been suspended because the mother had left the state. Along with providing the individual therapy the therapist had come to the agency to observe some of the mother's visits with the children. She would provide the mother with parenting advice at these visits. The agency had also provided the mother with a parent partner for much of the case. This service was terminated in early 2015 because of lack of contact with the mother. The worker later learned that the mother had moved to Ohio on 7/3/15 and did not plan to return. **T. 7/27/15, pp. 25-26,45,50**

The mother had also been offered regular visitations with the children. From the beginning of Destiny's case in April 2012 until December of 2012 the mother had failed to visit with Destiny. After that the mother's visits had been inconsistent. Oftentimes she would cancel the visits. Even before she left for Ohio the mother had stopped visiting with the children, with her last visit with the children coming on 6/19/15. When the mother did visit she had difficulties interacting with the children. Sometimes she would come into the room and she would have to be told to interact with the children and she would have to be encouraged to interact with both Destiny and Elijah. During the visits the agency workers would have to supervise respondent and the children very closely, to make sure that the children were safe and that respondent and the children were behaving appropriately. Then after the visits the workers would talk to the mother about what had happened. **T. 7/27/15, pp. 17-18,20-21, 26, 43-44**

Ms. Gibson testified that she had investigated various relatives for placement of the children, but none of them were suitable. The maternal great-grandmother had been contacted and she was not willing to care for the children, but she was willing to have the mother and the children stay with her with the mother caring for the children. The worker and the agency had determined that that was not safe for the children. The maternal grandmother had also been considered, but she was not appropriate because she had an open Protective Services case of her own. **T. 7/27/15, pp. 32**

During the pendency of the case the worker became aware that the mother had some cognitive limitations, with Ms. Gibson stating that she understood that the

mother was at the borderline range of cognitive functioning. In response she had helped the mother to fill out applications to switch her case over to a developmental disability program. This was part of a referral to the NSO, with the worker and the mother going over the application together. Ms. Gibson noted that Ms. Brown could read the application and Ms. Brown had stated that she understood what she was reading. Unfortunately the worker was not able to enroll Ms. Brown in the services at NSO, but she continued to receive mental health services at Northeast Guidance. Ms. Gibson learned that Northeast Guidance also had a program for developmentally delayed individuals for which the mother could apply. To facilitate this service the mother needed to have an evaluation. The worker provided the agency with the information needed for the referral but respondent did not cooperate. The mother's move to Ohio had prevented this change in program. **T. 7/27/15, pp. 38-40**

Ms. Gibson was the sole witness for the petitioner. The mother offered no witnesses. Following arguments by counsel the court made findings of fact and law. The court terminated the appellant-mother's rights pursuant to **MCL 712A.19b(3)(c)(i) and 712A.19b(3)(g)**. The court also found that termination of the mother's rights was in the best interests of both children. The court also terminated the rights of the legal father of Destiny and the unidentified father of Elijah.

Proceedings Below

The mother Shwanda Brown appealed the case to the Court of Appeals. The Court of Appeals, in a decision released on 4/26/16, reversed the termination of Brown's parental rights to both children. The panel found that the Department of Health and Human Services and the court were aware of respondent having a disability but the agency service plan never specifically addressed that disability by providing reasonable accommodations. Because of this failure the panel found that the agency had failed in its duty to provide reasonable efforts to reunify the family and that without the reasonable efforts there was not sufficient clear and convincing evidence to support termination of Brown's parental rights. In doing so the panel applied a de novo review analysis even though the issue was not properly preserved in the trial court.

Children's Argument

I. The Respondent-Mother Was Not Entitled To Special Protections Under the Americans With Disabilities Act In Her Parental Termination Case Where She Failed to Properly Preserve the Issue, and Where the Agency Provided Extensive Services Appropriate to Her Needs

A. The Issue Was Not Properly Preserved in the Trial Court

The Court of Appeals, in its opinion expressly addressed the question of preservation. The court relied upon **In re Terry, 240 Mich App. 14 (2000)** which discussed the question of when a parent must preserve a challenge to the level of services provided:

Any claim that the FIA is violating the ADA must be raised in a timely manner... so that any reasonable accommodations can be made. Accordingly, if a parent believes that the FIA is unreasonably refusing to accommodate a disability, the parent should claim a violation of her rights under the ADA, either when a service plan is adopted or soon afterward. The court may then address the parent's claim under the ADA. Where a disabled person fails to make a timely claim that the services provided are inadequate to her particular needs, she may not argue that petitioner failed to comply with the ADA at a dispositional hearing regarding whether to terminate to terminate her parental rights. In such a case, her sole remedy is to commence a separate action for discrimination under the ADA. At the dispositional hearing, the family court's task is to determine as a question of fact, whether petitioner made reasonable efforts to reunite the family, without reference to the ADA. **In re Terry, supra at 26 (emphasis added); see In re Hicks/Brown, ___ Mich App. ___, (Dkt No. 328870, Released, For Publication 4/26/16), slip at p. 9**

In its opinion here the Court of Appeals held that, despite the fact that appellant's trial counsel did not raise a claim of failure to accommodate her client's disability until August 13, 2014, the claim was not waived under Terry because the

improper because it constitutes a de facto overruling of **In re Terry, supra** by another panel of the court and because it was improper on the facts of the case.

1. The Court of Appeals Panel Here Improperly Overruled a Previous Decision of the Court

MCR 7.215(J)(1) provides that:

(1) Precedential Effect of Published Decisions. A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1,1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided by this rule.

In the instant case the Court of Appeals either overruled or essentially ignored the rule set out in *Terry* by allowing a parent to assert a claim under the ADA 18 months after the service plan was adopted for the child Destiny and 15 months after the plan was adopted for Elijah. **T. 1/29/13, pp.3-6; T. 4/9/13, pp. 18-20** The clear intent expressed in the holding in *Terry* was that the request for accommodations under the ADA should be front loaded in the case, rather than back loaded as occurred here. The result here then was exactly what the court in *Terry* meant to prohibit, a claim under the ADA that was dilatory in nature, meant primarily to hold off a pending termination case. For that reason alone the decision of the Court of Appeals here was clearly erroneous.

2. The Finding of the Court Appeals That The issue Was Properly Preserved Was Factually Erroneous

Moreover, the Court of Appeals finding that the ADA was preserved was factually erroneous. In its opinion the panel places primary emphasis on a claim that appellant's counsel properly raised a claim under the ADA at the review hearing held on 8/13/14. This finding mischaracterizes what appellant's attorney stated and

at the very least greatly expands, if not overrules the court's holding in Terry. As noted *infra*, appellant's counsel stated that:

The Court: now NSO, what are you talking about?

Ms. Gilfix:-- that was followed through.

Well, they provide services, your Honor. In fact I was provided with information from the last worker, for the last two workers ago regarding NSO intake services. And they provide services, parenting and other kinds of intense services for parents. And I think that would be something that Ms. Brown would benefit from. **T. 8/13/14, p. 13**

Nowhere here did counsel for the mother specifically state that the mother had a certified disability or make a claim of a violation of her rights under the ADA. **See In re Terry, supra at 26.** Without this appellant did not properly preserve the issue and the Court of Appeals decision was clearly erroneous as to the issue of preservation.

B. Standard of Review

The issues presented here are questions of law which this court reviews *de novo*. **McCormick v. Carrier, 487 Mich 180 (2010)**

C. Argument

1. Reasonable Efforts To Reunite the Children With the Parent Are Only One Consideration That a Court Must Evaluate in a Termination Case and the Agency Made Reasonable Efforts in This Case

a. Reasonable Efforts Under Federal and Michigan Law

Appellant argued here that the fact that the agency must make reasonable efforts to reunify the children with the parent becomes a precondition to any termination case. This claim both misstates the applicable law and it ignores the facts of this case. Similarly, the Court of Appeals stated that before the trial court can consider termination the agency must make "reasonable efforts to reunite the

children with the parent”. **MCL 712A.19a(2)** Reasonable efforts for reunification are generally accomplished through a case service plan. **In re Mason, 486 Mich 142,156 (2010); MCL 712A.18f(1)** The Court of Appeals then noted that the reasonable efforts requirement stems from federal law. The Court of Appeals relied upon 45 CFR 1356.21(b) states that state agencies are required to make reasonable efforts to, first,

“...maintain the family unit to prevent the unnecessary removal of a child from his or her home, as long as the child’s safety is assured; to effect the safe reunification of the child and family (if temporary out of home placement is necessary to ensure the immediate safety of the child); and to make and finalize alternate permanency plans in a timely manner when reunification is not appropriate or possible. (emphasis added)

The federal rule then goes on to emphasize that:

In determining reasonable efforts to be made with respect to a child and in making such reasonable efforts, the child’s health and safety must be the paramount concern. **See 42 U.S.C. 671(a)(15)**(which has the same language regarding “the child’s health and safety shall be the paramount concern”).

The federal rules also make clear that the trial court make a determination that reasonable efforts must be made to accomplish one or more of a variety of permanent plans, not simply reunification:

(i) The title IV-E agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect (whether the plan is reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement) within twelve months of the date the child is considered to have entered foster care. **45 C.F.R. 1356.21(b)(2)(i)**

See also 42 U.S.C. 675(5)(E) which requires that if a child has been in foster care for 15 of the most recent 22 months the state shall file a petition to terminate parental rights of the parents and to identify a qualified family for adoption unless

certain conditions exist. **See also MCL 712A.19a(6)** which codifies the 15 of 22 month rule in state law.

Thus, under the applicable federal law, which is also codified in state law, the agency must engage in reasonable efforts to accomplish the identified permanency plan, which can include reunification to the parent, but presumptively would be adoption after a child has been in foster care for 15 of the past 22 months. Moreover, the primary consideration in determining reasonable efforts must be the child's health and safety. **See 45 C.F.R. 1356.21(b)**. In this sense the analysis by the Court of Appeals ignored the interests of the children in considering the reasonable efforts made by the agency. The emphasis should have been on determining whether or not the agency made reasonable efforts to accomplish the identified permanent plan, which at the later stages of the case became adoption. Moreover, even when the permanent plan was reunification the primary consideration was always the health and safety of the children, not simply the interests and needs of the parent.

Finally, it should be noted that in the case of **Suter v. Artist M., 503 U.S. 347 (1992)** the United States Supreme Court held that the reasonable efforts section of the Adoption Assistance and Child Welfare Act(the very same **Sec. 42 U.S.C. 671(a)(15)**) was not enforceable in a private cause of action in federal court, at least in part because the statute does not provide any guidance as to how "reasonable efforts" are to be measured. Similarly, the applicable Michigan statutes provide no definition of "reasonable efforts". **See MCL 712A.18f(1), (4) and MCL 712A.19a; See In re Shirley B. 18 A. 3d 40; 419 Md. 1 (2011)** (which discusses at

length the fact that “reasonable efforts” is not defined in the federal law and the rationale for this). Given this the determination of whether reasonable efforts were made in any particular case should, except in very rare instances, be left up to the trial court. In contrast here the Court of Appeals engaged in an extensive de novo review of the circumstances of the case below, rather than giving proper deference to the trial court.

2. Reasonable Efforts Were Made Here and Appellant Never Challenged Those Determinations in the Trial Court

In this case the trial court consistently found that the agency had made reasonable efforts to reunite the children with the parent. **T. 4/23/13, pp. 17-19; T. 7/23/13, p.10; T. 8/13/14, p.18; T. 11/7/14, p. 17; T. 11/26/14, p. 13; T. 2/20/15, p.17 (where the trial court ordered the filing of a termination petition but continued reunification efforts); T. 5/20/15, p. 15** Appellant never appealed these determinations regarding reasonable efforts. Moreover, while in Mason the respondent parent was never provided with rehabilitative services, here those services were in place for at least 30 months, albeit to no avail. **In re Mason, supra at 160; Compare infra.**

The appellant was provided with an elaborate array of services, which included parenting classes, psychological and psychiatric evaluations, housing referrals and assistance with filling out housing applications as well as advice regarding placement in a shelter; supervised visitation and individual therapy, among others. **T. 7/27/15, pp. 10- 25** But these services were not merely generic in nature, rather they were specifically directed to the particulars of the case and were modified as the case progressed. More specifically, while the mother had

completed parenting classes in January 2014, the workers at the agency and the therapist continued with one-on-one and hands on parenting instruction. At the visits the workers would have to tell the mother to engage with the children, because she would not do this on her own. Ms. Gibson, the petitioner from Wellspring Lutheran Services, testified that the agency workers would direct the mother to change the children's diapers. They would also sit in on the visits to make sure that that the children were safe and they would talk to the mother after the visits to help her process what had happened at the visit. The therapist from Franklin Wright Settlement also came to some of the visits to both watch and then to direct the mother on different things to do with the children. **T. 7/27/15, pp. 20-21, 45**

Similarly the agency workers went out of their way to assist the mother in attempting to get safe and suitable housing. Ms. Gibson testified that her predecessor foster care worker had helped the mother prepare a Section 8 housing application.⁴ The mother had not followed up with the application. The worker had also conferred with the mother about going to various homeless shelters. These could have assisted her with more permanent housing but the mother refused to stay in a shelter. **T. 7/27/15, pp. 13-14** The agency had also made extensive efforts to assist the mother it getting a legal source of income. The therapist from Franklin Wright had assisted the mother with this goal. She had taken the mother to various

⁴ Section 8 housing or the housing choice voucher program is the federal government's major program for assisting very low-income families, the elderly and the disabled to afford decent, safe, and sanitary housing in the private market. **HUD Housing Choice Vouchers Fact Sheet, at: www.portal.hud.gov/hudportal/HUD?src+/topics/housing_choice_voucher_program_section_8 (Accessed 1/24/16)**

places like McDonald's and Family Dollar, as well as helping her fill out applications. The mother had failed to follow up on these applications. The mother had also applied for SSI benefits, but had been denied. The worker had attempted to help the mother in appealing this decision by providing her juvenile court attorney with the psychological evaluation to be provided to the SSI attorney. **T. 7/27/15, pp.**

7/27/15, pp. 22-24,30,36

The agency had also made elaborate efforts to identify and investigate a relative suitable for placement for the children. They had contacted the children's great grandmother, who had stated that she was not willing to care for the children herself. While she had eventually stated that she would have the children placed with her she meant that the mother would care for the children in her home. The agency determined that this was not appropriate or safe for the children. Similarly the agency had investigated the maternal grandmother and found that she was not appropriate given that she had her own open Protective Services case as a respondent. **T. 7/27/15, p. 32** Finally, the agency had provided the mother with a parent partner⁵, who had been on the case for an extended period of time until that service was closed for lack of contact by the mother. **T. 7/27/15, p. 50**

Given the extensive services that were provided to appellant throughout the pendency of the case it was clear that the agency met the reasonable efforts requirement, regardless of the extent of its applicability in termination proceedings.

⁵ Parent Partners are life trained paraprofessionals who have successfully negotiated the child welfare themselves and who mentor parents currently involved in the system.

www.Childwelfare.gov/pubPDFs/CA_parentPartnerjobDescriptionpdf Accessed 1/24/16)

3. Regardless of Whether or Not Appellant Was a Qualified Individual With a Disability Under the Americans With Disabilities Act the Agency Made More Than Sufficient Accommodations to Her Limitations

a. Whether Appellant Was a Qualified Individual Under The ADA

For purposes of the ADA “disability “ is defined as “a physical or mental impairment that substantially limits one or more major life activities of such individual. **42 USCA 12102(1)(A)** For purposes of whether a person has a disability under the ADA is made by applying a three part test: 1. Whether the individual suffers from a physical or mental impairment, 2. Whether the life activity on which the individual relies is a “major life” activity, and 3. Whether the impairment “substantially limits “ that life activity. **See Bragdon v. Abbott, 524 U.S. 624,632 (1988)** In order to substantially limit a major life activity under the ADA the impairment must be significant. **Martin v. Discount Smoke Shop<Inc., 443 F.Supp. 2d 981 (C.D. Ill., 2006)**

In the trial court appellant did not establish that she suffered from a disability pursuant to the ADA. Similarly the Court of Appeals simply assumed that appellant suffered from a legally defined disability. This was particularly problematic because appellant’s trial counsel never expressly made such a claim, making it impossible for the trial court to effectively address the issue. Instead she argued on appeal that the psychological test which found that she had an IQ of 70 was sufficient. Appellant ignores the fact that she must establish that the claimed mental impairment must limit one or more major life activities, which include, but are not limited to: “caring for oneself, performing manual tasks, seeing,

hearing,....,learning, reading, concentrating, thinking, communicating and working”.

42 USCA 12102(2)(A) Appellant has not met these requirements under the ADA.

Similarly, appellant has not demonstrated that appellant qualifies as a person with a “developmental disability” under state law as defined in **MCL 330.1100a(25)(a)(25)**⁶, or as a person with an “intellectual disability” under the **DSM V (Diagnostic and Statistical Manual V)**⁷. Both documents have requirements dealing with life skills functioning similar to those provided in the ADA. Given this appellant’s assertion that she is a “qualified person” pursuant to the ADA is questionable at best.

Rather than simply assume that the respondent-mother had a disability, as both the appellant and the Court of Appeals did here, the better practice would be for the trial court to make a finding or determination on whether the parent had a disability under the ADA which would have qualified that person for reasonable accommodations. In the case of **In the Matter of Greene, Dkt. No. 286252 (Unpublished, Released 3/24/09)** a panel of the Court of Appeals held that the trial court must first determine whether a parent suffers from a “disability” under the ADA before it can “take into account the (parent’s) limitations or disabilities or disabilities and make any reasonable accommodations” under the ADA. **Id, slip at p. 3; citing In re Terry, 240 Mich App. at 26** While this would be a reasonable requirement where a parent has properly raised the issue of a potential disability

⁶ This statute has very extensive and specific requirements for the determination of a “developmental disability”, including, in part, that the condition is a severe, chronic condition, that it results in a substantial functional limitations in 3 or more areas of major life activity. **MCL 330.1100a(25)(a)(i)-(v)**

⁷ See Intellectual Disability Factsheet, American Psychiatric Association, www.DSMV, (Accessed 1/24/16)

under the ADA, the appellant did not properly raise the issue in the trial court, appellant did not ask for a remand for the trial court to make this determination and the Court of Appeals, like the appellant, simply assumed that the respondent-mother had a disability without a determination being made. Again, the appellate court should have given deference to the trial court on how it resolved the issue regarding the mother's limitations, rather than simply substituting its judgment for that of the trial court. **See People v. Smith, 482 Mich 292 (2008); Beason v. Beason, 435 Mich 791 (1991)**

b. The Agency Made Extensive Accommodations to Appellant's Potential Limitations

Even though there was a real question about the nature and extent of appellant's limitations the agency made extensive efforts to provide appropriate services and to assist the appellant in gaining additional services. Early in the case the agency referred the mother to Michigan Rehabilitation Services (MRS), which is a state agency which provides employment and job assistance for persons with disabilities.⁸ **T. 1/15/14, pp. 15-16** Subsequently the agency referred the mother to Northeast Guidance, an agency which provided the mother with mental health services, including psychiatric services and medication reviews. **T. 2/13/14, pp. 5-6** Then, by the fall of 2014 the agency was making efforts to refer the mother to the Neighborhood Services Organization, which provided specific services for persons with disabilities, including developmental disabilities. The services offered by that agency were similar to those already being provided to the mother, including

⁸ Michigan Department of Health and Human Services, Michigan Rehabilitation Services

assistance with housing and job referrals. **T. 11/26/14, pp. 8-10** Despite the fact that the referral to NSO would duplicate the services already offered to appellant the agency continued to work on processing the referral. These efforts were impeded by the fact that the mother had not filled out the necessary paperwork. Even then the agency was willing to help the mother fill out the application. The worker went out of her way to be assured that the mother understood the process and that she could read the documentation. **T. 2/20/15, pp. 10-15; T. 7/27/15, pp. 38-39**

During the whole period where the agency was attempting to transfer services to the NSO the mother continued to receive mental health services through Northeast Guidance. The worker eventually learned that Northeast Guidance provided services for developmentally delayed individuals similar to those provided to those offered by NSO. In response the worker made efforts to transfer the mother to those programs but the mother did not cooperate with this process, and the efforts eventually ended because appellant had moved to Ohio, and was no longer available for the services. **T. 7/27/15, pp. 39-40** Given these facts the agency made more than conscientious and extensive efforts to provide services which had been identified to meet her needs. They were in no way "cookie-cutter" services as appellant claimed. In fact the ADA has been interpreted to require only reasonable modifications in a termination case. **In the Interest of K.C. 362 P. 3d. 1248 (Utah Sup. Ct. , 2015)** Appellant was provided more than reasonable modifications here. Moreover, any failure to provide those services was directly attributable to the mother's lack of cooperation. The record here does not support appellant's claim

that the agency did not reasonably accommodate any purported disability. **In re Terry, 240 Mich App. 14 (2000)**

This conclusion is proper even considering the Court of Appeals' assertion of what kinds of accommodations "must be made." The panel here first stated that any reasonable accommodations must be individualized. The agency here provided both individualized services and individualized supervision of the mother in the services offered to respondent. In particular, when she had supervised visits at the agency, the workers provided interventions and directions during the visits and afterwards, to assure that the children were safe and that the mother was interacting appropriately. Similarly, to assist respondent with obtaining employment the therapist would help with filling out job applications and the therapist took the mother to job interviews. The workers also attempted to help respondent apply for SSI benefits, even by providing her with reports needed for her application. Clearly all of the services offered to respondent were individualized.

T. 7/27/15, pp. 11-14, 20-23, 36

Similarly, the agency made conscientious efforts to locate relatives who could either assist Brown with caring for the children or who could be independent caretakers. The agency found that some of the relatives were unsuitable or unwilling to assist respondent or in the case of the great-grandmother in Ohio that it was not safe to simply send the children to live there when the great grandmother was not willing to be an active caretaker. **T. 7/27/15, pp. 30-32** This decision was within the sound discretion of the agency. Moreover, the mother was provided services from a variety of specialized agencies, including Michigan Rehabilitation

Services, Northeast Guidance, and Carelink, all of which provided services for persons with developmental disabilities. **T. 5/2015, pp. 9-11; T. 7/27/15, pp. 38-40**

Finally, the Court of Appeals panel suggested that persons with disabilities should be afforded additional time to comply with a case service plan. In this case Brown was allowed 39 months to comply with the plan as to Destiny and 29 months for Elijah, which were both well beyond the statutory presumptive period of 15 months from the time of placement required in the law. **MCL 712A.19a(6)** Brown was therefore provided more than ample time to make “slow but steady progress” on the case service plan. In fact she failed to make such progress evidenced by her failure to visit regularly with the children, particularly at the end of the case when she stopped visiting for 5 weeks before the termination hearing. **T. 7/27/15, pp. 19,26**

4. The Decision of the Court of Appeals Here Is Inconsistent With the Jurisprudence of Many Other States.

The Court of Appeals decision here places great reliance on a California appellate court’s decision in **In re Victoria M., 207 Cal. App. 3d 1317; 255 Cal. Rptr. 498 (Cal. Ct. of Appeal, 5th Dist. 1989)**. Contrary to what the panel here asserts, **Victoria M.** is not factually or legally comparable to the instant case and its reasoning has not been applied extensively in California. Most importantly **Victoria M.** involved solely the application of California law, in particular that state’s termination statute. **See West’s Ann.Cal.Civ.Code Sec. 232** No where does the case refer to or apply the ADA to the termination proceedings. In fact **Victoria M.** has been distinguished by other cases in California, limiting it to the particular

circumstances of the case where the family was receiving services from a state regional center. **In re Walter P.**, 228 Cal.App. 3d 113; 278 Cal.Rptr. 602 (Cal.Ct. of Appeal, 4th Dist., 1991)⁹ Given this the California court's decision in **Victoria M.**, *supra* does not provide guidance on either the facts or the law in the instant case.

In fact, many courts in other states have held that the ADA does not apply to termination proceedings. In **Adoption of Gregory P.**, 747 N.E. 2d. 120 (Mass. Sup. Jud'l Ct., 2001) the court held that the ADA did not apply to termination proceedings because proceedings to terminate parental rights are not "services, programs or activities" for the purposes of 42 USC 12132 and the ADA could not be a defense in a termination proceeding. In a different vein the Supreme Court of Hawaii, in **In the Interest of Jane Doe**, 60 P. 3d 285 (Hawaii Sup.Ct., 2002) held that allegations of an ADA violation are not a defense to a termination proceeding because any purported violation may be remedied in a separate proceeding brought under the ADA. **See also In re B.S.** 693 A. 2d 716 (Vt. Sup Ct., 1997). The Hawaii Supreme, in *Jane Doe* also emphasized that there was nothing in the ADA that indicated that an appropriate remedy for an ADA violation was the reversal of a parental termination order, relying on **In re La'Asia S**, 191 Misc. 2d 28, 739 N.Y.S. 2d 898 (2002) Moreover, other state courts have emphasized that, in reviewing the applicable case law, that to allow the provision of the ADA to constitute a defense to

⁹ In distinguishing **Victoria M.**, *supra* the court in **Walter P.** held that: "We note that the court in **Victoria M.** cites absolutely no authority, either statutory or judicial, for its holding that the court must consider what a state regional center might do for a developmentally disabled parent before declaring a child of that parent free from parental custody and control. We, in turn, have found no such authority. **In re Walter P.**, *supra* at 128

a termination case would improperly elevate the rights of the parent over those of the child. **New Jersey Div, of Youth and Family Services v. A.G., 782 A.2d 458 (N.J. Super. A.D. 2001)**

In the states that do recognize the applicability of the ADA in termination proceedings the courts invariably affirm the decision of the trial courts, finding that reasonable accommodations were made to the parents. **People in Interest of C.Z., 360 P. 3d 228 (Colo. Ct. Apps. 2015); In re Chance Jahmel B. 723 N.Y.S. 2d 634 (Fam. Ct. N.Y., 2001); In re Welfare of A.J.R., 896 P.2d 1298 (Wash. App. 1995)**

Given these alternative approaches to the ADA in other states, the balanced approach taken by this court in Terry was more than reasonable. Both on the facts of this case and generally, the rule in **In re Terry, supra** is a reasonable and proper one that should not be overturned or distinguished in this case. The Court of Appeals here improperly ignored its own decision in Terry as it related to the preservation requirement and then it improperly expanded the application of the rule there to circumstances that did not merit reversal of the decision of the trial court's decision.

II. The Court of Appeals Decision Here Violated Both the Statutory and Substantive Due Process Rights of the Children Where It Placed Primary Emphasis on the Statutory Interests of the Parent Rather Than On The Interests of the Children, Who Have the Countervailing Interests in Safety and Permanency

A. Standard of Review

The issue here is a question of law which is reviewed de novo. **In re Rood, 483 Mich. 73 (2009)**

B. Argument

What the Court of Appeals ignored in its decision here was that not only did it have to consider the interests of the parent pursuant to the ADA but the court was also obligated to consider the interests of the children under both the applicable federal statutes regarding the protection of children in foster care and the general substantive due process rights of the children. The Court of Appeals failure to do so here, which was error.

When making determinations regarding reasonable efforts, particularly in the light of the applicable federal law, the court must always consider the interests of the children and that the law mandates that the child's health and safety must be the paramount concern. **42 U.S.C. 671(a)(15)(A); 45 C.F.R. 1356.21(b)**. Similarly, the mandate of the federal law is that the agency must make reasonable efforts to finalize a permanency plan, preferably adoption where return to the parent is not appropriate. **See 42 U.S.C. 671(a)(15)(C); 45 C.F.R. 1356.21(b)((2)** The clear intent of the federal law is that the agency and courts must make every effort to assure that the children are provided a timely permanent plan and that their interests are always paramount in considerations in the plan for the family. Given that, the courts must always balance the interest of the children against those of the parents. In this case the children had already been in foster care for more than 30 months at the time of the termination hearing. By the time that the Court of Appeals released its opinion in this case they had been in care another 9 months. The result of the Court of Appeals decision is to place the children back into limbo where they have no viable permanent plan and they will continue in that status for an extended

period of time. This result is in clear contravention of the language and intent of the applicable federal and state law.

Moreover, the children's interests in a timely determination of permanency is part of their separate liberty interests involved in these proceedings. Courts in other states have recognized that the child's liberty interest in a dependency proceeding is very different from, but at least as great as the parent's. **In re Dependency of M.S.R., 271 P.3d 234 (Wash.Sup. Ct. 2012)**(finding that children have the due process right to counsel in dependency proceedings). In a recent decision of the Ohio Supreme Court the court also held that the children had separate liberty interests involved in a termination proceeding. More specifically the court emphasized that:

"There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home' under the care of his parents or foster parents, especially when such uncertainty is prolonged." **In re B.C., 21 N.E. 3d 308,313 (Ohio Sup.Ct.,2014), quoting Lehman v. Lycoming Cty. Children's Servs. Agency, 458 U.S. 502,513-514 (1982)**

Based upon these considerations the Ohio Supreme Court found that due process did not require that a parent be afforded a delayed appeal in a termination case. Similarly the children's due process interests here are in the timely resolution of their circumstances and the timely resolution of the permanent plan. The decision of the Court of Appeals here violates the interests of the children and was therefore erroneous. Appellate courts cannot simply assume that its decisions will have no adverse effect on the children in the case. Rather the court should have considered how its decision would effect the children and why its decision could be appropriate considering the potential impact on the children.

Relief Requested

For all of the foregoing reasons the children ask that this court should either peremptorily reverse the decision of the Court of Appeals and reinstate the termination order of the trial court or in the alternative to grant leave to appeal to this court.

Respectfully submitted,



**William Ladd P30671
LGAL for Destiny Hicks and
Elijah Brown
Michigan Children's Law Center
One Heritage Place Ste. 210
Southgate, Mi.
Ph. 734 281-1900**

Date: 5/23/2016

STATE OF MICHIGAN
IN THE SUPREME COURT

In re Destiny Hicks and Elijah Brown
Minors/Appellants

Supreme Ct. No.

Ct. of Appeals No. 328870

Wayne Circuit Ct. No. 12-506605

Proof of Service

I, William Ladd affirm that on 5/24/16 I served the following persons with the attached Application for Leave to Appeal, with attachments, in the above captioned case by either United States Mail or by applicable means of electronic service.

Vivek Sakaran
For Respondent Shawanda Brown
Child Advocacy Appellate Clinic
University of Michigan Law School
701 S. State St., 2023 South Hall
Ann Arbor, Mi. 48109-3091

Lesley Carr Fairrow
Asst. Attorney General
For Dept. of Health and Human
Services
3030 W. Grand Blvd. Ste. 10-200
Detroit, Mi. 48202

I have also provided, as required, a Notice of Filing of the Application for Leave to Appeal to the Clerks of the Michigan Court of Appeals and the 3rd Judicial Circuit Court's Family Division-Juvenile Section.

So stated,



William Ladd

Date: 5/24/2016

Minor Children's Appendices

- a) **Trial Court Order Following Hearing to Terminate Parental Rights**
Entered 7/25/15
- b) **Court of Appeals Opinion: In re Hicks/Brown Minors, Dkt. No. 328870**
(For Publication, Released 4/26/2016)
- c) **In the Matter of Isreala Greene, Dkt. Nos. 286252,286253,286254**
(Unpublished, Released 3/24/09)

STATE OF MICHIGAN
JUDICIAL CIRCUIT - FAMILY DIVISION
WAYNE COUNTY

ORDER FOLLOWING HEARING TO
TERMINATE PARENTAL RIGHTS, PAGE 1
ORDER 1 OF 1

CASE NO. 12506605
PETITION NO. 15003033
FILE COPY

Court address 1025 East Forest
Detroit, Mi 48207

Court telephone no.
313-833-5600

1. In the matter of (name(s), alias(es), DOB)
DESTINY SHEYENNE HICKS -DOB-01/29/2012, ELIJAH LEE BROWN -DOB-02/07/2013

PC TAKEN - 07/27/2015
ALL PARENTS TERMINATED

- 2. Date of Hearing: 07/27/2015 Judge/Referee: CHRISTOPHER D. DINGELL 40930
Bar no.
- 3. Removal date: 04/10/12 (Destiny) & 02/13/13 (Elijah) (specify for each child if different)
- 4. An adjudication was held and the child(ren) was/were found to come within the jurisdiction of the court.
- 5. A petition to terminate parental rights has been filed and notice of hearing on the petition was given as required by law.
- 6. Specific findings of fact and law regarding this proceeding have been made on the record or by separate written opinion of the court.

THE COURT FINDS:

- 7. a. Reasonable efforts were made to preserve and unify the family to make it possible for the child(ren) to safely return to the child(ren)'s home. Those efforts were unsuccessful.
- b. Reasonable efforts were not made to preserve and unify the family because it was previously determined in a prior court order to be detrimental to the child(ren)'s health and safety.
- c. Reasonable efforts were not required to preserve and reunify the family as determined in a prior court order. (This requires a permanency planning hearing within 28 days.)
- 8. The child(ren) is/are Indian as defined in MCR 3.002(12).
 - a. Active efforts have not been made.
 - b. Active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. These efforts have proved unsuccessful and there is evidence beyond a reasonable doubt, including qualified expert witness testimony, that continued custody of the child(ren) by the parent(s) or Indian custodian will likely result in serious emotional or physical damage to the child(ren).
 - c. Active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. These efforts have proved successful and there is not evidence beyond a reasonable doubt, including qualified expert witness testimony, that continued custody of the child(ren) by the parent(s) or Indian custodian will likely result in serious emotional or physical damage to the child(ren).
- 9. There is clear and convincing evidence that a statutory basis exists for terminating the parental rights of SHAWANDA S. BROWN(MOTHER), ALBERTO L. HICKS(FAT. OF DESTINY) & THE UNK. FATHER OF ELIJAH (WHO MIGHT BE ALBERTO L. HICKS), parent(s) of the child(ren),
Name(s) of parent(s)

10. Termination of parental rights is is not in the best interests of the child(ren).

IT IS ORDERED:

11. The parental rights of

SHAWANDA S. BROWN(MOTHER), ALBERTO L. HICKS(FAT. OF DESTINY) & THE UNK. FATHER OF ELIJAH (WHO MIGHT BE ALBERTO L. HICKS)
Name(s) of parent(s)

- are terminated, and additional efforts for reunification of the child(ren) with the parent(s) shall not be made.
- 12. a. The child(ren) is/are continued in the temporary custody of this court and remain in placement with the Department of Human Services for care and supervision.
- b. The child(ren) is/are committed to the Department of Human Services for permanency planning, supervision, care, and placement under MCL 400.203.
- 13. While the child(ren) is/are placed out of the home, the friend of the court shall redirect current support due on behalf of the child(ren) to the person with whom the child(ren) is/are placed as long as that person is not receiving foster care maintenance payments. Unpaid child support that charged during the unfunded placement shall also be redirected unless otherwise assigned.
- 14. The Director of the Michigan Department of Human Services is appointed special guardian to receive any benefits now due or to become due the child(ren) from the government of the United States.
- 15. Other: (Include reimbursement provisions as required by MCL 712A.18[2]. Attach separate sheet.)
- 16. The court reserves the right to enforce payments of reimbursement that have accrued up to and including the date of this order.
- 17. The supplemental petition to terminate the parental rights of _____ is denied.
- 18. A review hearing permanency planning hearing will be held 08/27/2015 09:00AM Date

CLERK OF COURT
WAYNE COUNTY CLERK
JUL 27 2015
BY *Janina A. Clark*

Recommended by:

Referee signature

07/27/2015

Date

NO LOAD

Load Number

Christopher D. Dingell
Judge CHRISTOPHER D. DINGELL (P-40930)

NOTE: If a child remains in foster care and parental rights are terminated in accordance with MCL 712A.19a(2), a permanency planning hearing must be held within 28 days. If proper notice has already been given, the permanency planning hearing can be conducted immediately following the termination hearing. This is especially useful in obtaining a uniform date for future permanency planning hearings when parental rights have been terminated to more than one child and the removal dates of the children are different. Use form JC 76.

USE NOTE: Do not use this form when terminating parental rights after release pursuant to the adoption code. Use forms PCA 318 and PCA 322. If one parent has signed a release under the adoption code, do not include his or her name in the order.

Do not write below this line - For Court use only

RECEIVED by MSC 5/24/2016 12:08:43 PM

STATE OF MICHIGAN
COURT OF APPEALS

In re HICKS/BROWN, Minors.

FOR PUBLICATION
April 26, 2016
9:00 a.m.

No. 328870
Wayne Circuit Court
Family Division
LC No. 12-506605-NA

Before: GLEICHER, P.J., and CAVANAGH and FORT HOOD, JJ.

GLEICHER, P.J.

Respondent-mother is a cognitively impaired young woman. When respondent's family support system fell apart, she relinquished custody of her two-month-old daughter to the Department of Health and Human Services (DHHS). Subsequently, the DHHS took respondent's newborn son into care. Although the child protective proceedings persisted for more than three years and the DHHS was well aware of respondent's special needs, the case service plan never included reasonable accommodations to provide respondent a meaningful opportunity to benefit. Absent such accommodations, the DHHS failed in its statutory duty to make reasonable efforts to reunify the family unit. And absent reasonable efforts, the DHHS lacked clear and convincing evidence to support the statutory grounds cited in the termination petition. We therefore vacate the circuit court's order terminating respondent's parental rights to her two minor children and remand for reconsideration following the provision of necessary accommodated services.

I. FACTUAL AND PROCEDURAL HISTORY

Psychological testing revealed that respondent has a Full Scale IQ of 70, placing her in the second percentile and borderline range of intellectual functioning. Her Verbal Comprehension index is 66, within the extremely low range. Her scores related to perceptual reasoning, processing speed, and working memory are equally low. Caseworkers commented on the overt appearance of respondent's impairment upon meeting her, as well as noting her difficulty in communicating on the telephone, her shyness and hesitancy, and her flat affect. Child Protective Services (CPS) had been intermittently involved in respondent's life since she was seven years old. Despite this early intervention and respondent's obvious cognitive or developmental impairments, she never received special education services as a child.

Respondent's mother, CB, is also cognitively impaired. For many years, CB's mother lived with CB and her four children to assist in running the household. Following the

grandmother's death, the family's wellbeing dramatically declined. In November 2011, CPS intervened and removed CB's minor children from her care. At that time, respondent (by then an adult), her boyfriend (AH), and CB's boyfriend, Steven Butler, a registered child sex offender, also lived in the home. Respondent's younger sister accused Butler of rape, but CB did not end their relationship.¹ A CPS worker advised the pregnant respondent that she would be required to make other living arrangements upon her child's birth but provided no services or assistance to the young, disabled mother.

Respondent's daughter, DH, was born on January 29, 2012.² CB subsequently threatened to evict respondent and the infant. On April 10, 2012, respondent appeared at the CPS office. She told CPS worker Cordell Huckaby that she was about to be homeless and felt overwhelmed by trying to care for two-month-old DH on her own. Huckaby reported that respondent "displayed abnormal behavior that presented concerns that she may have some untreated mental health issues." Huckaby spent more than four hours with respondent. With CB's help, Huckaby contacted various family members and friends to find housing for respondent and DH. Respondent's grandmother in Cleveland, Ohio offered mother and baby a home, as did a local family friend. Respondent declined both placements, and the DHHS took DH into care on an emergency basis and placed her with a nonrelative.

The circuit court did not adjudicate respondent unfit for another ten months; respondent bore no fault for this delay. In the meantime, due to a series of CPS and DHHS errors, respondent was denied parenting time. Huckaby was the only official present at the initial child protective hearings. He indicated that parenting time sessions had to be arranged through the DHHS caseworker. However, Huckaby was uncertain of the caseworker's identity. When respondent attempted to contact the DHHS to arrange visits, her messages received no follow up.

In late October 2012, the DHHS finally assigned a caseworker who appeared willing and able to assist respondent. Beth Houle initially had difficulty connecting with respondent, noting that "she was extremely hard to understand when she left messages." Houle arranged for supervised parenting time sessions starting December 12, 2012.

An adjudication trial was finally conducted on January 28, 2013, and Houle created an "Updated Service Plan" for respondent. This plan was actually the first service plan provided. Despite that DH had been in care for 10 months and CPS had been involved with respondent since November 2011, no services had yet been offered. Under the January 2013 case service plan, respondent was required to undergo a psychological evaluation, participate in therapy and parenting classes, visit the child for three hours each week, earn her GED, and find employment and a home. Respondent, pregnant with her second child, was then bouncing between the homes of various relatives.

¹ In the proceedings related to CB's parental rights, respondent asserted that Butler had raped her when she was 18 years old.

² Shortly after DH's birth, a protective order was entered precluding AH's contact with his daughter, leaving respondent to care for the child alone.

Respondent gave birth to her son, EB, on February 7, 2013. An aunt offered to give respondent and the baby a home but the DHHS deemed the placement inappropriate. Accordingly, the DHHS immediately took EB into care and placed him with his sister. At the preliminary hearing regarding EB's placement, a CPS worker, Jacqueline Baskerville, acknowledged that respondent has "emotional . . . and cognitive . . . issues - - impairments." The February 13, 2013 petition to take EB into care recited, "According to Hutzel Hospital social worker Vernice Muldrew, [respondent] was given a psychiatric evaluation and it was determined that she should reside in an adult foster care home as she will need assistance with her daily care."

Despite the recommendation that respondent be placed in adult foster care, she found herself living in a homeless shelter upon her hospital release. During a February 19, 2013 interview with DHHS work Joseph Emerinini, respondent expressed confusion as to why her children were in care, apparently forgetting that she had requested DH's placement. Emerinini elaborated:

[Respondent] appears to have some intellectual impairments. [Respondent] has difficulties in making decisions When leaving voice messages she is hard to understand, slurring words and during one message appeared to be coaxed by someone on what to say. [Respondent] only has completion of 9th grade education and has a hard time understanding simple tasks. [Respondent] . . . was not able to write in complete sentences.

While respondent could read to some extent, Emerinini described her comprehension level as low.

Case notes throughout the report also revealed Houle's concerns about respondent's capacity and abilities. On February 26, 2013, Houle informed respondent's therapist, Shelita Richmond, that respondent "is in need of guidance and understanding of how to be independent and self sufficient[.]" Houle described respondent as "quiet" and as needing specific direction because she would not do anything beyond the instructions given. Houle advised the parenting class coordinator that respondent "appears to have some cognitive delays and does not understand some things presented to her, and things need to be explained to her in simple terms."

The circuit court judge assigned to the matter also seemed to recognize respondent's impairment given the manner in which he spoke to respondent on the record. For example, at the adjudication trial in relation to EB, the court instructed:

[Respondent], you need to speak up as if you're mad at me so this nice young lady in front of me can prepare a transcript; okay?

And oh, by the way, I only eat attorneys; okay?

* * *

I'm going to ask you to do something that's really very rude. Your attorney is going to ask you questions. Could you answer them facing this nice young lady in front of me so she can prepare a good transcript of this.

The only time that respondent said anything beyond “yes” or “no” at any proceeding was at that trial. An attorney asked respondent whether she suffered from depression and she indicated, “When I get around people I be mad.”

Respondent was not evaluated by a psychologist and psychiatrist for the purposes of the case service plan until May 2013. Before that time, and without benefit of the knowledge of respondent’s cognitive abilities, the DHHS referred her for parenting classes and therapy. The agency also referred respondent to Focus Hope for GED preparation classes and employment and job skills training, with no concept of whether she could benefit from those services. Houle did note that the initiation of the various services had to be staggered because “[i]t appears that too much given to [respondent] at a time is overwhelming for her.” Houle also secured the appointment of a “parent partner” for respondent. However, that individual never testified at any hearing and the record is devoid of information regarding any assistance that person may have provided.

As noted, testing revealed that respondent had “low cognitive functioning.” The psychologist reported that respondent’s scores and lack of “insight” revealed that “she may be limited in her ability to independently manage more complex activities of daily living.” The psychologist recommended “behavioral therapy that utilizes in-session role-playing to address concerns.” The psychologist further opined, “It may be beneficial to administer a measure of adaptive functioning to determine specific strengths and weaknesses with regard to activities of daily living.” Neither recommendation was ever implemented.

Instead, for the next two years, the DHHS continued to provide services geared toward a parent of average cognitive functioning.³ Richmond provided more hands-on assistance during therapy sessions. She actively worked with respondent in her search for employment, Section 8 housing, and Social Security Disability (SSD) income. None of these attempts were fruitful. Houle was sensitive to respondent’s needs, but did not seek out specialized wrap-around services designed to assist the cognitively impaired.

The DHHS continued to search for an appropriate relative who could provide housing and parenting assistance to respondent. She moved in with her uncle, his girlfriend, and their children in May 2013, and remained in their home for nearly the entirety of the proceedings. Although respondent’s uncle was willing to provide additional assistance to respondent, he was not willing to have the children placed in his home. Respondent’s grandmother in Cleveland, Ohio indicated that respondent and the children could be placed with her. However, given her advanced age, the grandmother asserted that respondent would be entirely responsible for the children’s care. The DHHS found respondent ill-equipped to handle that responsibility.

The DHHS eventually transitioned respondent’s services to Michigan Rehabilitation Center, Northeast Guidance Center, and then Care Link. Although these agencies provide in-

³ Counsel for the DHHS had no objection to extending the case beyond the traditional 15 month period, acknowledging that respondent required additional time to benefit from services given her cognitive impairment.

depth services to the cognitively impaired, respondent was not referred for that type of assistance. Instead, respondent merely continued in parenting classes and therapy through these providers. In the summer of 2014, Yasmin Gibson replaced Houle as the caseworker assigned to the case. After that assignment, respondent's prospects quickly went downhill. Even two months after her assignment, Gibson knew very little about the status of respondent's case. Gibson did not understand the level of respondent's impairment and had made no follow-up with respondent's service providers. She also abruptly discontinued assisting respondent in her bid to secure Section 8 housing and SSD income.

Given the change in DHHS personnel, respondent's attorney, Julie Gilfrix, took a more proactive role. She requested that the DHHS transfer respondent's services to the Neighborhood Services Organization (NSO), which would provide intensive services even beyond the child protective proceedings. NSO secures employment opportunities for the cognitively impaired, as well as assistance in "supportive housing," educational support, and parenting classes.⁴ Gilfrix expressed concern that the DHHS had not provided her client "intense services" and was "not working with her individually" or "looking at her individual needs." Gilfrix was dismayed that Gibson assumed respondent could independently find a job when she "need[ed] assistance in reading" and completing the necessary applications. The circuit court dismissed Gilfrix's concerns, stating "I really don't think workers should be in the business of taking parents by the hand."

At a November 7, 2014 hearing, Gibson finally indicated that she was investigating the possibility of transferring respondent's services to NSO. For the next six months, Gibson made excuses and blamed the agencies for providing inaccurate information on how to secure the proper type of services for respondent. Finally, at a May 30, 2015 hearing, after which the circuit court ordered the DHHS to file a termination petition, Gibson reported that NSO denied respondent's application for services because the agencies that had been providing services throughout the proceedings could have been providing intensive wrap-around services for the cognitively impaired all along. Apparently neither Gibson nor Houle had ever investigated that possibility or referred respondent for the correct type of services.

On June 18, 2015, more than three years after DH had been taken into care, and despite that the DHHS had never secured services geared toward assisting a cognitively impaired parent, the DHHS filed a supplemental petition seeking termination. The petition cited that respondent had never taken her GED or secured housing or income. The DHHS continued that respondent had not benefited from services to the point she could safely parent her children.

Gibson was the only witness at the termination hearing. The DHHS did not call any service providers or respondent's therapist. The department presented absolutely no evidence, beyond Gibson's assertions, regarding whether specialized services would have assisted respondent in safely parenting her children. By the time of the termination hearing, respondent had moved in with her grandmother in Cleveland. Accordingly, Gibson opined that further

⁴ See Neighborhood Service Organization, <<http://www.nso-mi.org/index.php>> accessed April 18, 2016).

services would be impossible. In closing argument, Gilflix challenged Gibson's claims, noting that "reasonable efforts have not been made" and that respondent's residence in Cleveland was not permanent. Despite these pleas, the circuit court terminated respondent's parental rights under MCL 712A.19b(3)(c)(i) (grounds leading to adjudication have not been remedied and cannot be remedied within a reasonable time) and (g) (failure to provide proper care and custody).

II. LEGAL BACKGROUND

Parents have a "fundamental liberty interest . . . in the care, custody, and management of their child[ren]," a right that "does not evaporate simply because they have not been model parents." *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). In Michigan, a court may terminate a person's parental rights when clear and convincing evidence supports at least one ground elucidated in MCL 712A.19b(3). Before the court may consider termination, however, the DHHS must exert "reasonable efforts" to maintain the child in her or her parents' care, MCL 712A.18f(1), (4), and make "reasonable efforts to reunite the child and family." MCL 712A.19a(2).⁵ Reasonable efforts at reunification are made through a case service plan. See *In re Mason*, 486 Mich 142, 156; 782 NW2d 747 (2010); MCL 712A.18f(3). The need to make "reasonable efforts" stems from federal law. Pursuant to 45 CFR 1356.21(b), to remain eligible for foster care maintenance payments under Title IV-E, state agencies "must make reasonable efforts to maintain the family unit."

The reasonableness of the efforts provided affects the sufficiency of the evidence supporting the grounds for termination. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). However, neither the federal nor the state statutes define the "reasonable efforts" necessary to reunify or maintain the family unit. We know from our Supreme Court's differentiation of "reasonable" from "active" efforts under the Indian Child Welfare Act that "reasonable efforts" include a DHHS worker "making a referral for services and attempt[ing] to engage the family in services." *In re JL*, 483 Mich 300, 322 n 15; 770 NW2d 853 (2009). Our courts have not expressly defined the parameters of necessary services.

This system is complicated when the parent involved in a child protective proceeding suffers from some type of disability. According to *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, National Council on Disability (September 27, 2012), p 90: "Systematic discrimination by state courts, child welfare agencies, and legislatures against parents with disabilities and their families" have led to the removal of children from the care of disabled parents "with alarming frequency."⁶ Parents with intellectual and psychiatric

⁵ The statute provides that reasonable reunification efforts are not required in limited circumstances, such as where the parent has been convicted in the killing or serious injury of the child's sibling, has had his or her parental rights terminated to the child's sibling, is a registered sex offender, or if aggravated circumstances exist under MCL 722.638(1) or (2). MCL 712A.19a(2).

⁶ Available at <<https://www.ncd.gov/publications/2012/Sep272012/Ch13>> (accessed April 18, 2016).

disabilities face the steepest obstacles, experiencing discrimination based on stereotyping, “lack of individualized assessments,” and the failure to provide the types of services needed for the individual to benefit. *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts Under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act*, U.S. Department of Health and Human Services and Department of Justice, p 2.⁷ This discrimination is not new and has previously been approved by our country’s highest court. In *Buck v Bell*, 274 US 200, 207; 71 L Ed 1000 (1927), Justice Oliver Wendell Holmes, Jr. lauded forced sterilization of the mentally incompetent “who are manifestly unfit [to] continu[e] their kind.” As a result of institutional discrimination, parents with intellectual disabilities “lose[] children at a rate of 40 percent to 80 percent.” *Rocking the Cradle*, p 263. And termination is often based on the fact that the parent does “not receive services that address the effects of their disability on parenting.” *Termination of Parental Rights of Parents with Mental Disabilities*, Judge David L. Bazelon Center for Mental Health Law, p 2.⁸

When a disabled parent is a party to child protective proceedings, Section 504 of the Rehabilitation Act of 1973, 29 USC 794, and Title II of the Americans with Disabilities Act of 1990 (ADA), 42 USC 12131 *et seq.*, control the nature of the services that must be provided. Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 USC 12132. Section 504 of the Rehabilitation Act similarly provides that qualified disabled persons shall not “be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance” “solely by reason of her or his disability.” 29 USC 794(a). In adopting these acts, “Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.” *School Bd of Nassau Co, Fl v Arline*, 480 US 273, 284; 107 S Ct 1123; 94 L Ed 2d 307 (1987).

As stated by this Court in *In re Terry*, 240 Mich App 14, 25-26; 610 NW2d 563 (2000):

[T]he ADA . . . require[s] a public agency, such as the Family Independence Agency (FIA), to make reasonable accommodations for those individuals with disabilities so that all persons may receive the benefits of public programs and services. Thus, the reunification services and programs provided by the FIA must comply with the ADA. . . . [W]e discern no conflict between the ADA and Michigan’s Juvenile Code. Under MCL 712A.18f(4), before entering an order of disposition, the court must determine whether the FIA has made “reasonable efforts” to rectify the conditions that led to its involvement in the

⁷ Available at <http://www.ada.gov/doj_hhs_ta/child_welfare_ta.html> (accessed April 18, 2016).

⁸ Available at <<http://www.peapods.us/UserFiles/File/Termination%20of%20Parental%20Rights%20of%20Parents%20with%20Mental%20Disabilities.pdf>> (accessed April 18, 2016).

case. Thus, the state legislative requirement that the FIA make reasonable efforts to reunite a family is consistent with the ADA's directive that disabilities be reasonably accommodated. In other words, *if the FIA fails to take into account the parents' limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family.* [Emphasis added.]

The federal Departments of Health and Human Services and Justice have described, "Two principles that are fundamental to Title II of the ADA and Section 504 are: (1) individualized treatment; and (2) full and equal opportunity." *Protecting the Rights of Parents and Prospective Parents with Disabilities*, p 4. In this vein, 28 CFR 35.130(b) provides:

(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability --

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

* * *

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

* * *

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

45 CFR 84.4 provides substantively identical protection to “qualified handicapped” individuals.

Taken together, [the various provisions of 28 CFR 35.130(b), and by extension 45 CFR 84.4,] are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do. [28 CFR Part 35, Appendix B, § 35.130.]

III. PRESERVATION

Before we reach the substance of this case, we must resolve whether respondent preserved her challenge to the level of services provided.

As discussed in *Terry*, 240 Mich App at 26:

Any claim that the FIA is violating the ADA must be raised in a timely manner . . . so that any reasonable accommodations can be made. Accordingly, if a parent believes that the FIA is unreasonably refusing to accommodate a disability, the parent should claim a violation of her rights under the ADA, *either when a service plan is adopted or soon afterward*. The court may then address the parent’s claim under the ADA. Where a disabled person fails to make a timely claim that the services provided are inadequate to her particular needs, she may not argue that petitioner failed to comply with the ADA at a dispositional hearing regarding whether to terminate her parental rights. In such a case, her sole remedy is to commence a separate action for discrimination under the ADA. At the dispositional hearing, the family court’s task is to determine, as a question of fact, whether petitioner made reasonable efforts to reunite the family, without reference to the ADA.⁵

⁵ Any claim that the parent’s rights under the ADA were violated *must be raised well before a dispositional hearing regarding whether to terminate her parental rights*, and the failure to timely raise the issue *constitutes a waiver*. The focus at the dispositional hearing must be on the parent’s rights to the child and the best interests of the child under the Juvenile Code, and the parties and the court should not allow themselves to be distracted by arguments regarding the parent’s rights under the ADA. Given that the court must consider whether reasonable efforts were made to reunite the family, precluding specific reference to the ADA at the dispositional hearing is not likely to make any difference in terms of the outcome. [Emphasis added.]

Gilflix did not raise an ADA challenge at the time the case service plan was adopted. Neither did she wait until the termination hearing. On January 15, 2014, Gilflix inquired whether the DHHS could provide “one-on-one parenting help” for respondent and caseworker Houle promised to investigate this option. Gilflix specifically expressed concern that the DHHS was not providing the type of services necessary to accommodate her client’s disability on August 13, 2014, and continuously repeated her concerns thereafter. Gilflix requested that respondent receive specialized services for the developmentally disabled, the court ordered such services, and caseworker Gibson engaged in a series of errors ensuring that the services were never provided. The DHHS did not file its supplemental petition seeking termination until 10 months after Gilflix’s specific request for ADA-compliant services. The termination hearing took place on July 27, 2015, nearly a year after Gilflix first expressed her concern. Given the length of time between Gilflix’s objection and the termination proceedings, respondent’s challenges are not waived under *Terry*.⁹

We note, however, that experts have challenged the legitimacy of requiring parents to raise an ADA defense so long before the termination hearing. “[F]amily court cases do not always proceed . . . smoothly,” and the need to file an objection may not be apparent until later in the proceedings. Cecka, *No Chance to Prove Themselves: The Rights of Mentally Disabled Parents Under the Americans with Disabilities Act and State Law*, 15 Va J Soc Pol’y & L 112, 126 (2007). The court might order reasonable accommodation in services, but the DHHS’s failure to provide such accommodations may not immediately leap to counsel’s attention. *Id.* at 128. Moreover, the introduction of waiver principles is misplaced because a parent who raises such an objection “is not attempting to litigate the violation in family court;” rather, the parent is challenging the evidentiary support for the termination. *Id.* at 125.

IV. REASONABLE ACCOMMODATIONS

We now turn to the question of how reasonable accommodations are made in child protective proceedings. The DHHS directs that its workers “must recognize the individuality of all clients and their needs, as well as the extent of their capacities for self-determination” and “tailor[]” services “to meet each client’s needs and to recognize the unique aspects of each case.” *Services General Requirements Manual*, SRM 101, p 2.¹⁰ The DHHS gives its workers “examples of reasonable efforts,” including emergency caretakers, daycare and homemaker services, counseling, emergency shelter and financial assistance, parenting classes, self-help groups, mental health and substance abuse services, “home-based family services,” and

⁹ Respondent also argues that her trial counsel was ineffective in failing to raise her ADA challenge earlier in the proceedings. As we conclude that counsel did not waive review of this issue, we need not consider this claim.

¹⁰ The February 1, 2013 version of this section is available at <<http://www.mfia.state.mi.us/OLMWEB/EX/SR/Public/SRM/101.pdf#pagemode=bookmarks>> (accessed April 18, 2016).

vocational training. *Children's Foster Care Manual*, FOM 722-06, pp 10-11.¹¹ The DHHS acknowledges, "It is only when timely and intensive services are provided to families that agencies and courts can make informed decisions about a parent's ability to protect and care for his/her children." *Id.* at 15. The lack of investigation and services leaves "a 'hole' in the evidence" upon which the circuit court must base its ultimate decision. *In re Rood*, 483 Mich 73, 127; 763 NW2d 587 (2009) (YOUNG, J.).

The *Children's Foster Care Manual's* section on "special accommodations" makes no specific mention of how to assist mentally, developmentally, or cognitively disabled parents, giving individualized attention only to accommodations for the deaf and non-English speakers. FOM 722-06F.¹² Nationwide, "[l]ittle focus has been directed at providing parenting support and services as part of general support for people with intellectual disabilities . . ." *Rocking the Cradle*, p 263. In "most jurisdictions," reunification services "often do not address the parent's disability fully." Smith, *Fit Through Unfairness: The Termination of Parental Rights Due to a Parent's Mental Challenges*, 5 Charlotte L Rev 377, 401 (2014). Not having standards or a specialized protocol to deal with cognitively impaired parents creates a serious challenge for courts and caseworkers given that, as in this case, "[s]ocial workers are apt to have little or no training or experience in teaching mentally retarded adults; worse, research indicates that many may have no interest in the subject." Hayman, *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 Harv L Rev 1202, 1224 (1990).

Several government and scholarly sources are helpful in defining the types of reasonable accommodations that nevertheless must be made. The focal point of any reasonable accommodation analysis must be whether the services were individualized. Persons with intellectual disabilities "are markedly diverse as a group." *Id.* at 1213. Their conditions arise from different sources, they exhibit various symptoms, and they operate at varying levels of competence. *Id.* at 1213-1215. Accordingly, "[i]ndividuals with disabilities must be treated on a case-by-case basis consistent with facts and objective evidence." *Protecting the Rights of Parents and Prospective Parents with Disabilities*, p 4. The bar for reunification need not be lowered; rather "services must be adapted to meet the needs of a parent . . . who has a disability to provide meaningful and equal access to the benefit." *Id.* at 5.

Another common theme is that of interdependence, rather than forcing a parent to demonstrate the ability to independently parent a child. As noted in *Presumptions of the Law*, 103 Harv L Rev at 1253, "The law's insistence that the mentally retarded parent be measured 'standing alone' . . . fails to take seriously the social experience of many mentally retarded persons." Those with intellectual disabilities are often socialized to depend on family, peers, and

¹¹ The February 1, 2014 version of this section is available at <<http://dhhs.michigan.gov/OLMWEB/EX/FO/Public/FOM/722-06.pdf#pagemode=bookmarks>> (accessed April 18, 2016).

¹² The May 1, 2015 version of this section is available at <<http://dhhs.michigan.gov/OLMWEB/EX/FO/Public/FOM/722-06F.pdf#pagemode=bookmarks>> (accessed April 18, 2016).

service providers to achieve maximum success. *Id.* at 1253-1254; *Fit Through Unfairness*, 5 Charlotte L Rev at 387-388. In this vein, “[s]uccessful intervention strategies for mentally retarded parents might include foster placements of both parent and child, group homes, temporary live-in training programs, and parent-child daycare centers.” *Presumptions of the Law*, 103 Harv L Rev at 1256.

Experts also recommend the use of agencies and service providers experienced in dealing with persons with intellectual disabilities. Specialized agencies provide complete life training services, the benefits of which spill over into the child protective proceedings. Accordingly, the DHHS could coordinate reunification services with such providers. *Protecting the Rights of Parents and Prospective Parents with Disabilities*, pp 15-16; Watkins, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 Cal L Rev 1415, 1474 (1995). Specially trained personnel available at these agencies understand that goals must be defined “in terms of concrete tasks” that are easier to “comprehend and master.” *Presumptions of the Law*, 103 Harv L Rev at 1234. They recognize that instructions must be simplified, and that visual aids, “repetition, routine, and feedback” are vital. Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J of Contemp Health L & Pol’y 387, 424-425 (2000). The education and experience of the workers will also limit the extent to which parents with an intellectual disability are “judged against conventional norms for behavior.” *Presumptions of the Law*, 103 Harv L Rev at 1228. As noted by Hayman, for the untrained, “inarticulateness is perceived as stubbornness or stupidity; shyness or uncertainty, as indifference; and fear and insecurity, as aggression.” *Id.*

The concept of giving disabled parents additional time to benefit from services is also of import. State and federal law generally requires the responsible agency to seek termination of a parent’s rights if the child has been in foster care for 15 out of the previous 22 months. MCL 712A.19a(6); 42 USC 675(5)(E); 45 CFR 1356.21(i). Under Michigan law, the state may delay in filing a termination petition when “[c]ompelling reasons” exist or when the DHHS has not provided the family “with the services the state considers necessary.” MCL 712A.19a(b)(b), (c). These “time lines are often challenging—if not impossible—to comply with” for parents with certain disabilities. *Rocking the Cradle*, p 103. Parents with intellectual disabilities require the opportunity to make “steady but slow progress.” *Id.* Using the exceptions in the federal and state statutes supports the needs of the parent without compromising the needs of the child. *Protecting the Rights of Parents and Prospective Parents with Disabilities*, p 14.

Michigan caselaw is sparse regarding the level of services necessary to reasonably accommodate a disabled parent. *In re Newman*, 189 Mich App 61; 472 NW2d 38 (1991), exemplifies our cases involving the *absence* of reasonable efforts. There, the children were taken into care based on unsafe and filthy conditions in the home. *Id.* at 63. The state assigned an aide to assist the cognitively impaired mother in learning how to maintain a clean home. *Id.* at 66. The DHHS’s predecessor knew when the aide was assigned that the mother “because of her limited intellectual capacity, need[ed] hands-on instruction, most probably repeatedly.” *Id.* The aide purchased cleaning supplies for the mother but “stopped going into the house because it was so dirty.” *Id.* As noted by this Court:

This was the person who was supposed to help respondents remedy this problem, but she refused. How then can we say there is no reasonable likelihood that the conditions in the home would not be rectified within a reasonable time when the one person who could have helped respondents remedy the conditions refused to do so? [*Id.*]

In re Boursaw, 239 Mich App 161; 607 NW2d 408 (1999), concerned a mother suffering from mental illness. She was provided intensive mental health services throughout the proceedings and her therapist opined that with additional time, she might be able to safely parent her child. This Court found the lower court's termination decision "premature" as the evidence supported that the mother may be able to parent her child within a reasonable time. *Id.* at 177. *Boursaw* implies that psychiatric treatment may require time beyond the normal statutory limits of a child protective proceeding and that a parent's rights cannot be arbitrarily terminated at the end of a set period.

Terry, 240 Mich App at 16, involved a "developmentally disabled" mother. The mother sought out services from "the Developmental Disabilities program at Genesee County Community Mental Health," which coordinated its services with those provided in the child protective proceedings. *Id.* at 17. As in this case, the respondent experienced difficulty "in following through with tasks such as finding housing." *Id.* She lacked positive parenting role models as she had been abused as a child. *Id.* The respondent's therapist believed she could attain "basic parenting skills" with "an additional two to three years" of training, "but that she would always need assistance during difficult or stressful periods." *Id.* The caseworker opined that the "[r]espondent needed someone to live with her, not just oversee her progress." *Id.* at 18-19. Unfortunately, the respondent had no friends or family who could provide that support. *Id.* at 19.

Although this Court deemed waived the respondent's challenge to the level of services provided in *Terry*, *id.* at 27, the panel noted that it would have rejected her claims in any event.

It is undisputed that respondent was provided with extensive services, and there is no evidence that she was denied any services that are available to parents with greater cognitive abilities. The caseworkers were aware of respondent's intellectual limitations and would repeat instructions multiple times and remind her when tasks had to be completed. Respondent received assistance through GCCMH to address both personal and parenting problems in a program that was tailored to developmentally disabled persons. An arrangement under which respondent lived in the children's foster home was attempted but proved unsuccessful. Petitioner had no other services available that would address respondent's deficiencies while allowing her to keep her children. The ADA does not require petitioner to provide respondent with full-time, live-in assistance with her children. See *Bartell v Lohiser*, 12 F Supp 2d 640, 650 (ED Mich, 1998). [*Id.* at 27-28.]

A handful of unpublished opinions of this Court have also addressed whether reasonable accommodations were made in providing services to a disabled parent.¹³ In *In re Rice*, unpublished opinion per curiam of the Court of Appeals, issued November 12, 2013 (Docket No. 315766), unpub op at 2, this Court found reasonable accommodations where a psychologist evaluated the respondent and recommended tailored services, each service provider was notified regarding the respondent's special needs, and the providers expressly indicated that they modified their services for the respondent, with "methods such as repetition and role modeling."

This Court also found that reasonable accommodations were made in *In re Ali-Maliki*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2015 (Docket No. 321420). In that case, the DHHS provided services to the cognitively impaired mother for more than four years. *Id.*, unpub op at 2-3. These services included "individual therapy, parenting classes, two evaluations at the Clinic for Child Studies, two psychological evaluations, a psychiatric evaluation, supervised visitations, family therapy, Wraparound services, a parenting coach, and a parent partner. She also received services from an infant mental health specialist." *Id.*, unpub op at 3. The respondent was given the opportunity to parent her children while living with her parents who provided assistance, but even that proved too much. *Id.*, unpub op at 1. This Court ultimately agreed with the circuit court's assessment that reasonable efforts had been made, but that "the evidence amply demonstrates that respondent's limited cognitive abilities could not be accommodated to the degree necessary to enable her to parent the five children, four of whom have severe special needs." *Id.*, unpub op at 4.

In *In re White*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2012 (Docket No. 305411), unpub op at 2, the developmentally disabled and cognitively impaired mother ceded custody of her children to CPS in part "because she was overwhelmed." The record demonstrated that the respondent starting receiving services "long before the children were removed." *Id.*, unpub op at 4. And during the proceedings, the DHHS "provided respondent with family-reunification services to correct her parenting skills and coping deficits; she received psychological evaluations, parent-child bond evaluations, in-home parent classes, in-home parent coaching from an infant mental-health specialist, in-home community-living support services for home management, and supervised parenting time." *Id.*, unpub op at 2-3. These services were modified to accommodate the respondent's special needs. "She received hands-on demonstrations and proctoring that were consistent with the evaluating psychologist's recommendations." *Id.*, unpub op at 4. As the respondent had not benefitted from the extended, intensive services, this Court affirmed the circuit court's termination decision.

In another case, however, this Court found termination supported when "it became apparent that there were no services available that could help respondent-appellant parent his children because he was not capable of attaining the requisite level of parenting skills needed to parent the children." *In re Pomaville*, unpublished opinion per curiam of the Court of Appeals,

¹³ Unpublished Court of Appeals opinions are not binding, but may be considered persuasive or instructive. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

issued January 13, 2004 (Docket No. 247168), unpub op at 2. The respondent-father in that case was categorized as “developmentally delayed,” had an IQ of 54, and could not read. *Id.* The state “accounted for and reasonably accommodated respondent-appellant’s disability in its efforts to reunify the family by locating parenting classes to accommodate his reading disability, attempting to locate services that would enable respondent to parent his children and referring him to two doctors to evaluate his ability to parent with his disability.” *Id.* Where the parent cannot benefit even from modified services, however, termination is in the best interests of the children, this Court determined. *Id.*

Michigan jurisprudence has thereby recognized that reasonable accommodations must be tailored to the individual, to meaningfully that person in benefitting from services. Our courts have implied that a cognitively impaired parent could maintain custody of his or her child even if he or she requires assistance from a family member to safely care for the child but has not gone so far as to require the DHHS to consider an assistive housing arrangement such as parenting in a group home or a parent-child foster placement. This Court has recognized the benefit of the DHHS coordinating child protective services with organizations that serve the disabled community. And this Court has cited with approval lower court decisions to delay the initiation of termination proceedings when a disabled parent requires additional time to benefit from services because of their disability.

Given the dearth of Michigan caselaw on point, we also reviewed the jurisprudence of our sister states. We found instructive to our current analysis *In re Victoria M*, 207 Cal App 3d 1317; 255 Cal Rptr 498 (1989). The respondent-mother in that matter had an IQ of 72, placing her “in the borderline range of intelligence.” *Id.* at 1321-1322. She had taken special education classes as a child and as an adult, “used social services agencies in the community extensively.” *Id.* The county department of social services (DSS) took the mother’s three children into care because the family was chronically homeless and the children were underfed, filthy, and infested with lice. *Id.* at 1322. Despite that the mother had “obvious handicaps,” *id.* at 1328, and that the DSS had intervened with the family in the past, *id.* at 1327, the DSS waited 16 months to provide psychological testing to assess the mother’s level of intellectual functioning. *Id.* at 1324. In the meantime, the mother was referred for generalized services and those providers questioned whether the mother could benefit given her obvious limitations. *Id.* at 1323-1324. The DSS was aware that specialized services for the developmentally disabled were available; it referred the mother’s son for such services at Valley Mountain Regional Center (VMRC). *Id.* at 1323-1324 and n 4. The mother eventually secured services for herself through VMRC, but the DSS failed to monitor her progress or coordinate with the agency. *Id.* at 1324, 1330. Of great concern, the DSS also provided little to no assistance in the very areas that brought the children into care. Her parenting class coordinator failed to address “health and hygiene concerns” with mother, incorrectly believing that she understood these concepts. *Id.* at 1328. And despite mother’s homelessness and extremely low income, the caseworker simply directed her to a local housing authority and told her to read the newspaper to find housing. *Id.*

The California Court of Appeals found “[t]he record . . . clear that no accommodation was made for [the mother’s] special needs in providing reunification services.” *Id.* at 1329. The court continued that the mother “obviously is developmentally disabled” and “[h]er disability should have been apparent to those assessing the suitability of services offered to her.” *Id.* The caseworker had already referred one of the children to VMRC, a “[r]egional center[] . . .

specifically designed to provide services to persons such as” the mother, but took no steps to secure similar assistance for her. *Id.* at 1329-1330. Given the insufficiency of the services provided, termination could not be supported by clear and convincing evidence on the ground that the mother had not benefitted from services. *Id.* We find *In re Victoria M* virtually indistinguishable from the case at bar, and adopt its reasoning.

Drawing from the caselaw, federal and state law and regulations, and the plethora of expert opinions on the topic, we take this opportunity to clarify what a court and the DHHS must do when faced with a parent with *a known or suspected* intellectual, cognitive, or developmental impairment. In such situations, neither the court nor the DHHS may sit back and wait for the parent to assert his or her right to reasonable accommodations. Rather, the DHHS must offer evaluations to determine the nature and extent of the parent’s disability and to secure recommendations for tailoring necessary reunification services to the individual. The DHHS must then endeavor to locate agencies that can provide services geared toward assisting the parent to overcome obstacles to reunification. If no local agency catering to the needs of such individuals exists, the DHHS must ensure that the available service providers modify or adjust their programs to allow the parent an opportunity to benefit equal to that of a nondisabled parent. If it becomes clear that the parent will only be able to safely care for his or her children in a supportive environment, the DHHS must search for potential relatives or friends willing and able to provide a home for all. And if the DHHS shirks these duties, the circuit court must order compliance. Moreover, consistent with MCL 712A.19a(6), if there is a delay in providing the parent reasonably accommodated services or if the evidence supports that the parent could safely care for his or her children within a reasonable time given a reasonable extension of the services period, the court would not be required to order the filing of a termination period merely because the child has been in foster care for 15 out of the last 22 months.

We emphasize that these requirements are not intended to stymie child protective proceedings to the detriment of the children involved. However, “[t]he goal of reunification of the family must not be lost in the laudable attempt to make sure that children are not languishing in foster care while termination proceedings drag on and on.” *Boursaw*, 239 Mich App at 176-177. In the event that reasonable accommodations are made but the parent fails to demonstrate sufficient benefit such that he or she can safely parent the child, then the court may proceed to termination. See *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012); *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005). If honest and careful evaluation reveals that no level or type of services could possibly remediate the parent to the point he or she could safely care for the child, termination need not be unnecessarily delayed. Yet, such assessment may not be based on stereotypes or assumptions or an unwillingness to make the required effort to accommodate the parent’s needs.

V. APPLICATION TO THE CURRENT CASE

The DHHS did not fulfill its duties in this case, and the circuit court failed to adequately recognize that shortcoming. The DHHS should have suspected (and likely knew) before the onset of these child protective proceedings that respondent is cognitively impaired. Houle, Baskerville, and Emerinini noted respondent’s disability upon first meeting her. Huckaby did not describe respondent as cognitively impaired, but believed she at least suffered from mental illness. As respondent’s compromised intellectual abilities were readily apparent, the DHHS

workers involved in CB's child protective proceedings were on notice by November 2011 that respondent required assistance. And no worker involved in the current proceedings has denied the obvious nature of respondent's condition.

Instead of acting post haste to secure psychological and psychiatric evaluations to determine whether reasonably accommodated services were necessary or offered potential benefit, the DHHS waited until May 2013—13 months after DH came into care—to secure these evaluations. In the meantime, the DHHS failed to make adequate efforts to provide respondent with parenting time, effectively denying her contact with her daughter for eight months.

Further, the DHHS failed to reconsider respondent's service plan after respondent was psychologically evaluated. The results of respondent's psychological evaluation were grim, revealing that respondent fell into the low and extremely low range on various assessments. She could read but lacked comprehension of the material perused and could not write in complete sentences. Yet, the DHHS ordered respondent to earn a GED and find employment and housing, and never revisited these mechanically-generated requirements. The psychologist recommended "administer[ing] a measure of adaptive functioning to determine specific strengths and weaknesses with regard to activities of daily living."¹⁴ This was never done. The result was that the DHHS ordered respondent to climb mountains that she could not possibly surmount. Specifically, respondent likely will never be able to read and comprehend the contents of a GED exam, hold down employment without an onsite mentor, or live independently. A service plan that ignored these realities was simply unreasonable and not individually tailored to the parent's needs.

Following the evaluations, the DHHS failed to consider whether respondent required specialized services for the cognitively impaired. The record establishes that several agencies provide wrap-around services for the cognitively impaired in the metropolitan Detroit area. Respondent was even referred for generalized services at some of those agencies. Yet, the DHHS did not seek to have respondent placed in any of the programs geared toward the cognitively impaired until several months after Gilflix objected in August 2014. The DHHS then delayed referring respondent for the proper type of services until the very eve of the termination hearing. Its employee made a half-hearted attempt to transfer respondent's services to the agency respondent's counsel recommended, failed to follow up in a timely manner, and ultimately denied respondent the type of services she required for several months. Although Houle informed the regular service providers that respondent was cognitively impaired and

¹⁴ "Adaptive functioning" is "the relative ability of a person to effectively interact with society on all levels and care for one's self; affected by one's willingness to practice skills and pursue opportunities for improvement on all levels. Often used to describe levels of mental retardation." <<http://medical-dictionary.thefreedictionary.com/adaptive+functioning>> (accessed April 18, 2016). "Tests of adaptive functioning evaluate the social and emotional maturity of a child, relative to his or her peers. They also help to evaluate life skills and abilities." Reynolds, Zupanick, & Dombeck, *Tests of Adaptive Functioning*, <<https://www.mentalhelp.net/articles/tests-of-adaptive-functioning/>> (accessed April 18, 2016).

required explicit and simple instruction, this was inadequate when more intensive services from specialized agencies were readily available.

The record is also devoid of information regarding the content of the parenting classes, job training, and GED preparation courses in which respondent participated. The psychologist noted that respondent required "in-session role-playing" to address concerns. Respondent also had difficulty reading and comprehending written material. The DHHS presented no witnesses from any service provider to describe how material was presented to respondent. Accordingly, we cannot know whether the limited accommodations recommended by the DHHS were even implemented in practice. And while the caseworkers testified that respondent's therapist provided a higher level of hands-on services to assist respondent in meeting her goals, that therapist was never presented to describe her role or respondent's progress. The DHHS also failed to present the parent partner who was apparently assigned to offer more in-depth assistance, and made no record of his particular services.

Certain evidence suggested that respondent may never achieve the ability to safely parent her children independently. As a result, the DHHS actively searched for a friend or family member to take in both mother and children and provide assistance with childcare. Respondent's grandmother in Ohio offered the family a home, but only if respondent was solely responsible for the children's care. The DHHS deemed this an inappropriate placement. However, the record is devoid of information regarding whether local services would be available to respondent in Ohio so that she could safely parent her children in her grandmother's home with some outside assistance.

Ultimately, respondent may be unable to overcome the conditions that brought her children into care. We readily acknowledge that even with appropriate assistive services she may be unable to safely parent her children. Investigation may reveal that no home is available to respondent where she may provide for her children without, or even with, outside assistance. Given the inadequate reunification services provided thus far, however, any such conclusion is premature. Accordingly, we must vacate the termination decision and remand for the provision of services with reasonable accommodation made for respondent's cognitive impairment.

We vacate the termination decision and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ISREALA GREENE, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ANGELA GREENE,

Respondent-Appellant.

UNPUBLISHED
March 24, 2009

No. 286252
Macomb Circuit Court
Family Division
LC No. 2005-059540-NA

In the Matter of THOMAS GREENE, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ANGELA GREENE,

Respondent-Appellant.

No. 286253
Macomb Circuit Court
Family Division
LC No. 2005-059541-NA

In the Matter of CHRISTIONA GREENE, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ANGELA GREENE,

Respondent Appellant.

No. 286254
Macomb Circuit Court
Family Division
LC No. 2005-059542-NA

In the Matter of ISAIHA GREENE, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ANGELA GREENE,

Respondent-Appellant.

No. 286255
Macomb Circuit Court
Family Division
LC No. 2005-059543-NA

In the Matter of SARAH GREENE, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ANGELA GREENE,

Respondent-Appellant.

No. 286256
Macomb Circuit Court
Family Division
LC No. 2006-000445-NA

Before: Jansen, P.J., and Borrello and Stephens, JJ.

PER CURIAM.

In these consolidated matters, respondent appeals by right the circuit court's termination of her parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i), (g), and (j). For the reasons that follow, we reverse and remand for further proceedings consistent with this opinion.

We perceive no error requiring reversal with respect to respondent's argument that her pleas were not knowing and voluntary. Respondent may not collaterally attack the circuit court's jurisdiction now when a direct appeal was available to her earlier in the proceedings. *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993). At any rate, the record establishes that respondent's pleas were knowingly and voluntarily made. See MCR 3.971(C)(1). When it initially appeared that respondent was having difficulty understanding the nature of the proceedings, the referee appointed a guardian ad litem for her. At the first plea hearing, respondent's guardian ad litem stated:

[Respondent] and I have discussed the issues pretty carefully. She understands that she has, I discussed with her her right to a trial before a referee, judge, or a jury, her right to contest these pleadings, that an amended petition has been filed, her right to call witnesses or cross-examine witnesses against her. She understands that she will be waiving those rights if she enter[s] a no contest plea and she wishes to enter a no contest plea to the petition as amended and would stipulate to the factual basis on the face of the petition itself from prior testimony.

Thereafter, respondent appeared before the referee at a subsequent hearing and pleaded no contest to the allegations in the petition concerning the remaining child. The court explained respondent's rights and respondent indicated that she understood them. Her attorney and guardian ad litem were both satisfied, and the court found the plea knowingly and voluntarily made. It was made clear to respondent that the remaining child was being incorporated into the terms of the already-existing parent-agency agreement. There is no indication on the record before us that respondent was unable to make knowing and voluntary pleas, especially in light of the fact that she was assisted by a guardian ad litem.

We do find error requiring reversal, however, in the circuit court's handling of respondent's request for additional services under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.* Respondent timely raised her request for additional services under the ADA early in the proceedings. *In re AMB*, 248 Mich App 144, 194-195; 640 NW2d 262 (2001); *In re Terry*, 240 Mich App 14, 26; 610 NW2d 563 (2000). The ADA requires the Department of Human Services (DHS) "to make reasonable accommodations for those individuals with disabilities so that all persons may receive the benefits of public programs and services." *Id.* at 25. "Thus, the reunification services and programs provided by the [DHS] must comply with the ADA." *Id.* "[I]f the [DHS] fails to take into account the [parent's] limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family." *Id.* at 26.

We note that, as used in the ADA, the word "[d]isability" means "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment," and includes "[a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 28 CFR 35.104. The record in this case tends to establish that respondent suffers from low cognitive functioning and mental health concerns. Nevertheless, the services provided for respondent were no different than those provided for parents with no mental health or ADA-related issues. Indeed, it appears that the circuit court never specifically determined whether respondent suffered from a "disability" under the ADA or whether she was entitled to special accommodations under the ADA.

It is axiomatic that the circuit court must first determine whether a parent suffers from a "disability" under the ADA before it can "take into account the [parent's] limitations or disabilities and make any reasonable accommodations" under the ADA. See *In re Terry*, 240 Mich App at 26. We conclude that the circuit court clearly erred by proceeding to terminate respondent's parental rights without first determining whether she suffered from a "disability" within the meaning of the ADA. MCR 3.977(J). We therefore reverse the termination of respondent's parental rights and remand. On remand, the circuit court must take evidence and

determine whether respondent suffers from a “disability” within the meaning of the ADA. If the court finds on remand that respondent does suffer from a “disability” under the ADA, the court must ensure that respondent receives services and accommodations consistent with the ADA’s requirements.¹

In light of our conclusions above, we need not consider the remaining arguments raised by respondent on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens

¹ We acknowledge that a parent cannot raise for the first time on appeal an alleged violation of an antidiscrimination statute, such as the ADA, to attack the validity of an otherwise-valid child protective proceeding. *In re AMB*, 248 Mich App at 195-196. However, the present case is unlike *In re AMB* because respondent here timely raised her ADA argument before the circuit court.