State of Michigan
Supreme Court

Appeal from The Michigan Court Of Appeals
Michael J. Talbot, P.J., and Jane E. Markey And Michael J. Riordan, JJ.

In the Matter of:

Jordan Gonzalez, dob: 9/5/2001
Esdeanna Heeren, dob: 10/26/2002
Kylea Heeren, dob: 2/16/2004
Carmen Heeren, dob: 10/03/2005

Supreme Court No. 147515
Court of Appeals No. 309161
(Consolidated with No. 312691)
Circuit Court No. 08-036989-NA
Muskegon Co. Cir. Court
Hon. William C. Marietti

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Appellee Lori Scribner's Brief on Appeal

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November 29, 2013

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Statement of Questions Presented

A. Whether the Court of Appeals erred in holding that there is a preference for relatives under MCL 712A.19c(2) when a circuit court decides whether to create a juvenile guardianship after parental rights have been terminated?

Grandmother:	No
DHS:	Yes
TC:	Yes
COA:	No

B. If such a preference exists, whether the paternal grandmother was entitled to that preference where her son's parental rights to the children had been terminated?

Grandmother:	Yes
DHS:	No
TC:	NA
COA:	Yes

C. Whether the Court of Appeals erred by not applying a clear error standard of review to the Muskegon Circuit Court Family Division's determination of the children's best interests pursuant to MCL 712A.19c?

Grandmother:	No
DHS:	Yes
TC:	Yes
COA:	No

D. Whether the circuit court erred by using the best interests factors enumerated in MCL 722.23 of the Child Custody Act in deciding whether to grant the petition for a juvenile guardianship?

Grandmother:	Yes
DHS:	No
TC:	NA
COA:	Yes

E. Whether the Court of Appeals erred by reversing the circuit court on the ground that it was improper to compare the foster parents with the proposed guardian, or erred on any other basis?

Grandmother:	No
DHS:	Yes
TC:	Yes
COA:	No

Counter-Statement of Basis of Jurisdiction

Appellee does not dispute appellant's Statement of Jurisdiction.

Counter-Statement of Facts

Introduction: Appellee Lori Scribner ("Lori") is the paternal grandmother of three of the four minor children involved in this action. Lori is a registered nurse licensed in both Michigan and Florida. Her son, Joseph, was the biological and legal father of all of the children but the oldest, Jordan. The children were removed from their home on February 8, 2008, pursuant to a neglect petition filed in Muskegon County. They were made temporary wards of the court pursuant to an adjudication order dated February 22, 2008.

As stated in DHS's brief, information in the neglect case that predates Lori's motion to intervene is "not relevant to the present proceedings because they pre-date the petition filed after the parents' rights had been terminated."[1] Nevertheless, a substantial portion of the Statement of Facts found in the DHS/MCI joint brief (pp 1-6) relies on extra-record material that was not admitted into evidence during the juvenile guardianship proceeding. That material pre-dates Lori's motion to intervene. It concerns only the neglect proceedings against the children's parents. Lori was not notified of those proceedings, she was not a party in those proceedings, she had no opportunity to participate in those proceedings, nor could she examine or cross-examine witnesses during those proceedings.

During the period prior to filing her motion to intervene, Lori justifiably relied on DHS and its contractor, Holy Cross, to advance her request for placement of the children as mandated by law. Her alleged failure to object to placement recommendations made by DHS/Holy Cross and the resultant trial court placement decisions, of which she had no prior knowledge, cannot be held against her. Nor can the statements of Lori's son since the suitability of a relative's home is not conditioned on parental approval.

[1] DHS brief, FN 34 at p 6.

Factual History: The four children involved in this case are Jordan Gonzalez, DOB 09/05/2001; Esdeanna Heeren, DOB 10/26/2002; Kylea Heeren, DOB 02/16/2004; and Carmen Heeren, DOB 10/03/2005. The biological father of Jordan is Richard Bellow. The biological father of the other three children is Joseph Heeren. The biological mother of the children is Kathleen Bolduc.[2]

After the children were removed from their home on February 8, 2008, they were initially placed by DHS in two separate foster homes.[3] Jordan was placed in the Cottrell foster home in Spring Lake.[4] The girls were placed in the Blain foster home in Muskegon.[5] Once it was determined that there was no need for Jordan to be separated from his sisters, the Blain home requested that he be placed there.[6] Despite this request, all four children were moved to the Koetje foster home in Tustin, Michigan, on October 10, 2008.[7]

Lori consistently requested that all four children be placed with her starting in the summer of 2008 when the children had been in foster care only a few months.[8] Her relationship with the children was always regular, consistent, and long-standing.[9] The relationship went back to Jordan's birth in 2001.[10] Although Jordon is not Lori's biological grandchild, she always viewed him as "my grandson."[11] DHS and the GAL also consistently treated Lori as Jordan's grandmother throughout the trial court proceedings. The Court of Appeals recognized this, and

[2] App 51a-54a.
[3] App 57a.
[4] App 62a.
[5] App 117a
[6] App 118a.
[7] App 220a.
[8] App 960a.
[9] App 1108a-1109a.
[10] App 951a-952a.
[11] App 951a.

it did the same.[12]

The children spent one to two weeks each summer with Lori, and she watched them frequently on other occasions.[13] The summer of 2007, Lori came up from Florida to spend 12 days with the children.[14] After the children were placed in foster case, Lori spent three days with them during the summer of 2008 during the children's visit with their mother.[15] She also saw the children during the summer of 2009 at a visit arranged at a McDonald's restaurant by Andrea Hagen of Holy Cross, the foster placement agency.[16]

There was also frequent, typically weekly, telephone contact between Lori and the children.[17] When the three younger children were in their original foster placement, the foster parent encouraged Lori to maintain regular telephone contact with them by directly calling the foster home.[18] She had less contact with Jordan during much of 2008 because he was in a different foster home.[19] When telephone contact directly with the children at their current foster home was forbidden, Lori maintained phone contact with the children by calling them during their regular visits with their mother.[20]

Because the foster home was prematurely identified by DHS and Holy Cross as an adoptive placement, both agencies did their best to sever contact between Lori and the children, going so far as to refusing to arrange for visits and cutting off direct telephone communication.[21] After approximately 25 attempts contacting Holy Cross, at the end of May 2010, Lori was finally

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[12] App 16a, 18a.
[13] App 951a.
[14] App 953a.
[15] App 974a.
[16] App 976a.
[17] App 955a.
[18] App 955a-956a.
[19] App 956a,
[20] App 957a.
[21] App 957a.

allowed to resume regular telephone contact.[22] She was never allowed to call the foster home directly to speak with the children. Instead, she was required to call the caseworker's phone.[23] It was clear to Lori that DHS, Holy Cross, and Bethany Christian Services, the eventual adoption agency, saw her as a threat to their plan to have the children adopted by their new foster parents.[24]

Lori also maintained contact by sending the children birthday and Christmas presents throughout the time they were in foster care. The gifts were routed through the foster care agency, Holy Cross, as instructed by caseworker Andrea Hagen during Lori's initial telephone contact with her in October of 2008. Unfortunately, for reasons that were never satisfactorily explained to Lori, the gifts she sent were returned unopened. Undeterred, rather than sending actual gifts, Lori sent gift cards to the children through Holy Cross for Christmas of 2008. They too were returned. It wasn't until Christmas of 2009 that her gifts finally made it to the children, but that was only because she routed them through the children's mother who still had court-

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[22] App 959a.

[23] *Id*.

[24] Pursuant to DHS rules governing adoption:

> Payment for adoption is based on an outcome based reimbursement system. Agencies are recognized for achieving outcome related to the timeliness of placement ….
>
> * * *
>
> A five-month premium rate ($8,660.00) will be paid to an agency that places a child in its care in adoption within five months of the child's permanent wardship.

http://www.michigan.gov/dhs/0,4562,7-124-5455_7199-14181--,00.html (last visited 11/28/13).

Because DHS and its contractors refused to consider placing the children with their grandmother, the children were already in an "adoptive placement" with the foster parents before parental rights were terminated. As a result, the agency stood to gain at least $8660 per child for this placement, or $34,640.

ordered visitation.[25]

In addition to fighting the DHS foster care system to maintain contact with her grandchildren, Lori continued to advance her request that the children be placed with her. She increased her work hours to be able to afford a large home to accommodate the children, as Muskegon DHS told her she must to be able to have all four children placed with her.[26] By July of 2009, she saved enough money to purchase a five-bedroom 2600 to 2700 square foot home in an excellent neighborhood with good schools in St. Augustine, FL.[27] The school district in which Lori resides, St. Johns County, was rated A and ranked the best in Florida.[28] It offered high-quality services to meet all of the children's special needs.[29] With a fine home and excellent schools ready for the children, Lori notified DHS she was ready to accept them into her home.[30]

Continuing to delay and place obstacles in Lori's way, DHS responded that Lori needed to have her home inspected before the children could be placed with her. Lori attempted for many months to arrange for an inspection. She called DHS and Holy Cross twice weekly.[31] DHS and Holy Cross passed the buck back and forth trying to determine which agency was responsible for contacting Florida authorities to arrange for the inspection.[32]

It wasn't until March of 2010 that Lori was contacted by Florida authorities to schedule the inspection belatedly requested by Michigan through the Interstate Compact on the Placement

[25] App 100a-1002a, 1005a-1014a.
[26] App 960a.
[27] App 966a-969a.
[28] App 969a.
[29] App 969a-971a,
[30] App 961a-962a, 966a.
[31] App 962a-963a.
[32] App 963a.

of Children (ICPC).[33] At that time, Lori was told by Florida authorities that she would not only need to have her home inspected, but that she would also need to become a licensed foster parent.[34] Lori promptly applied for her foster care license and took the required training ten-week training class starting in April 2010.[35] After a thorough investigation by Florida authorities, Lori became licensed as a foster parent in August of 2010.[36]

Meanwhile, Lori's persistence in seeking restoration of actual rather than telephone contact with the children finally met with success in July of 2010. The children were smiling and happy to see their grandmother after being kept apart by DHS and Holy Cross for almost a year.[37] Lori saw no problems during that initial two-hour visitation on July 27, 2010.[38] There was a second visit the following day at the same park in Cadillac that lasted more than the scheduled 2 hours.[39] The second visit was equally successful, with the children happy, playful, and hugging "Grandma Lori."[40]

That changed dramatically after the children had a "family meeting" with the foster parents and the foster parents told them to keep the meeting's contents a secret. The third visit, July 29, did not start well. The children came to the visit fearful and it appeared to Lori that they'd been traumatized.[41] The children reported that they had a "family meeting" with their foster parents the night before, but that they "were not allowed to talk about it."[42] Esdeanna in

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[33] App 853a.
[34] App 962a-963a.
[35] App 870a.
[36] App 855a, 858a.
[37] App 976a-978a.
[38] App 979a.
[39] App 977a, 980a-982a.
[40] App 983a.
[41] App 984a.
[42] *Id*.

particular, and also Kylea, seemed more fearful than Carmen and Jordan.[43] Even Carmen stated that the foster mother told her she wasn't safe with Lori.[44] Throughout the visit, the children repeated that they would be in trouble if they talked about what was discussed in the family meeting.[45]

Although the planned trip by Lori and the children to the zoo was not scheduled to be supervised, Holy Cross sent two people plus a transporter because the children were "afraid."[46] The implication that the children were afraid of her upset Lori. She was convinced that the children's reaction at the start of the visit was the result of "psychological abuse" inflicted on them in an effort to turn them against her for the purpose of facilitating the children's adoption by their foster parents.[47]

When they stopped at a restaurant on the way to the zoo, Esdeanna remained fearful and didn't want to go into the restaurant. She told Lori that she wasn't supposed to come near her and would get in trouble if she did.[48] At the zoo, as the visit progressed, the children relaxed. However, as they were getting ready to leave the zoo, Esdeanna had to go to the bathroom. When there was a problem getting the stall door closed in time, she wet her pants and became very upset. She expressed fear that she would by physically punished by her foster parents if they learned that she wet her pants.[49]

The children's fearfulness and comments so concerned Lori that she raised the issue with

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[43] *Id*.
[44] App 991a-992a.
[45] App 992a.
[46] App 986a.
[47] App 986a-987a,
[48] App 988a.
[49] App 989a-990a.

one of the Holy Cross supervisors who said he would discuss it with the foster parents.[50] The next day, July 30, Lori called DHS to express her concerns.[51] When she heard nothing, she made a follow up call several days later on August 4, 2010.[52]

Lori's expression of concern from the children only further hardened the position of DHS and Holy Cross against her. She was forced to file two motions to obtain visitation with the children at her home in Florida. As part of that process, she paid the fees for an independent court-ordered psychological assessment of the children. That assessment included the question of whether the children would be traumatized, as alleged by DHS and Holy Cross, if the children were allowed spend time with Lori in Florida. It also included an interview with, but not evaluation of, Lori.

The psychologist who conducted that assessment, Joseph Auffrey, Ph.D., concluded that trauma was unlikely and that the children could transition to residing with Lori in Florida if ordered by the court.[53] Dr. Auffrey testified that "coaching" of the children to hold a negative view of their grandmother (Lori) or an overly positive view of the foster home by either the foster parents or those allied with them was a "good possibility."[54]

In his written report, Dr. Auffrey elaborated on the question of the children being influenced against their grandmother for the alleged purpose of promoting their adaptation to their foster home:

> These children, individually and collectively, have obviously been subjected to indoctrination and alienation in regard to the various parent figures in their lives. It seems highly likely that the Child Protective Services and Foster Care system has tried to steer these children in the direction of adapting to a new life after

[50] App 992a.
[51] App 993a.
[52] *Id*.
[53] App 1051a-1053a.
[54] App 1047a.

> parental termination. Probably many well-intended individuals have "helped" the children to shape their interpretations. More recently, perhaps, the foster-parent home may have introduced the children to a new value system, which is now seen as preferred and superior to alternatives. * * * [55]

This indoctrination and alienation included DHS, Holy Cross, and the foster parents telling the children they missed a planned vacation in order to have a visit with their grandmother shortly after a court date on August 26, 2010.[56]

Despite Dr. Auffrey's report and testimony and the availability of Florida foster care officials to monitor the visits, DHS steadfastly opposed or ignored for several months Lori's request for visitation with the children at her home in Florida over Thanksgiving and again at Christmas.[57] Under oath in open court, Holy Cross social worker Ruth Andres spoke of her own fear of flying and, on that basis alone, concluded that the children would be afraid of flying to Florida to visit Lori.[58]

At the conclusion of the November 17, 2010, hearing date, the trial court granted Lori's request for visitation with the children at her home in Florida over the Thanksgiving and Christmas breaks. The court reserved the right to cancel the Christmas visitation if either Dr. Auffrey or Ruth Andres, after meeting with the children upon their return from Florida, concluded that the Thanksgiving visit was problematic.[59]

Lori Scribner and her daughter-in-law, Kim Heeren, flew with the children from Michigan to Florida at the beginning of the first court-ordered Florida visitation over Thanksgiving break.[60] The children were brought to the airport by a Holy Cross worker and

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[55] App 1b
[56] App 1085a.
[57] App 1081a-1082a, 1131a
[58] App 1120a-1121a.
[59] App 1137a-1140a.
[60] App 1298a, 1319a.

were a little nervous at first, but once on the plane they were excited about the trip and competed for a window seat.[61] Once in Florida with Lori, the children enjoyed a variety of activities ranging from attending a Christmas lighting ceremony in downtown St. Augustine, taking trolley rides, visiting a fort and the fountain of youth, attending church, swimming, and trying different foods they had not previously eaten.[62] They also visited the school they would attend if allowed to live with their grandmother. They thought it was "awesome."[63] They also liked the church Lori attends in St. Augustine.[64]

Lori and her daughter-in-law, Kim Heeren, testified that the children enjoyed the visit, were not traumatized in any way, and were sad to leave at the end of the visit.[65] Patricia Swan, a Florida foster care licensing specialist, observed the four children while in Lori's care at Thanksgiving. Ms. Swan found the children to be happy and talkative.[66] Kim Heeren escorted the children back to Michigan from Florida after the Thanksgiving visit.[67]

After the Thanksgiving visit, there was disagreement between the parties as to how the visit went. Holy Cross social worker Ruth Andres testified that she thought the children were "angry" after they returned from Florida.[68] When she questioned them at the foster home, the three girls stated they did not want to return to Florida for Christmas. Jordan did not offer an opinion "one way or the other."[69]

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[61] *Id*.
[62] App 1299a, 1319a-1320a, 1325a.
[63] App 1300a-1301a.
[64] App 1301a.
[65] App 1301a, 1320a-1323a.
[66] App 1316a.
[67] App 1298a.
[68] App 1203a.
[69] App 1205a.

Questioned away from the foster home, according to Dr. Auffrey, the visit went well for the children. In a December 1, 2010, letter following the Thanksgiving visit, Dr. Auffrey wrote:

> Each child is interviewed individually. The children were unanimous in their reports of favorable adjustment on the trip without any indications of acrimony or symptom display. Each child reported favorable impressions of the home setting and family management by Grandma Lori.[70]

Dr. Auffrey testified that the children were seen directly following their return from Florida after the Thanksgiving visit.[71] There was nothing in the children's report to Dr. Auffrey to indicate that the visit produced anxiety, trauma, or had "any kind of negative impact" on the children.[72] Despite the favorable report from Dr. Auffrey, Holy Cross delayed giving permission for the children to travel to Florida for the Christmas break until just a few days before the children were scheduled to leave.[73] That delay substantially increased the cost of airfare Lori paid to fly the children to Florida for the Christmas visit.[74]

During the Christmas visit, the children spent much time with extended family and enjoyed it.[75] Patricia Swan also observed the children during the Christmas visit and concluded that they were having "a very good time."[76] Ms. Swan, a foster care case manager for five years and foster care licensing specialist for three years, said the children were "very happy" with their grandmother and thought they could adjust to living with her.[77] The Christmas visit lasted a few extra days due to a weather-related cancelation of the children's return flight by the airline.[78]

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[70] App 12b.
[71] App 1281a.
[72] App 1284a.
[73] App 1328a.
[74] App 1330a.
[75] App 1304a, 1306a-1307a, 1324a-1325a.
[76] App 1317a.
[77] App 1318a.
[78] App 1326a-1328a.

Following the Christmas visit, Dr. Auffrey met with the children on January 12, 2011. Although the adults may have been concerned about the weather-related delay in returning to Michigan, the children viewed it as an "adventure." As with the Thanksgiving visit, the children reported that they had a good time on the visit with their grandmother in Florida.[79] In summarizing his findings, Dr. Auffrey wrote in a letter dated January 12, 2011:

> All 4 of the Gonzales/Heeren children are seen this date, although the youngest, Carmen cannot be roused from deep sleep for interview. The 3 older kids are reporting positive experiences on their recent Christmas visit to Grandma Lori's home in Florida. They uniformly display positive mood state and also indicate favorable readjustments to school in Michigan. There is no pathology to report or indications of adjustment problems.[80]

Consistent with Dr. Auffrey's observations, the children's foster father noticed no school performance or behavior issues related to the children's Thanksgiving and Christmas trips to Florida.

Following successful completion of the Thanksgiving and Christmas visits, Ruth Andres testified that it didn't matter that Lori could provide an appropriate home, was a licensed foster parent, or that she was the children's grandmother. The fact that the children had formed a bond in their current foster home, alone, made the risk of placing the children with Lori greater than the benefit.[81] In rejecting the concept that the children might benefit from being placed with family, Andres boldly stated that "biological ties don't mean anything to children."[82] She stated that she was unaware of any law that gave placement priority to relatives of minor children.[83] If such a law exists, Andres would disagree with it.[84]

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[79] App 1285a-1286a.
[80] App 13b.
[81] App 1220a.
[82] *Id*.
[83] App 1221a.
[84] *Id*.

Andres testified that children in foster care should be placed with a relative only if they "were not doing well where they are now."[85] Andres never spoke with Lori at any time before, during, or after the trial court proceedings before stating her view that it was too risky to place the children with her and that they should remain in the foster home.[86] However, she spoke with the foster parents "many times."[87]

Contrary to Ms. Andres' testimony, Dr. Auffrey saw no reason to believe that the children were uncomfortable with their grandmother or would be traumatized if placed permanently in her care.[88] He concluded that "the kids have established a relationship with Grandma Lori and her entire surroundings and situation enough so that they, they feel it's a significant part of them. They identify it as part of their family constellation."[89] If the children expressed negative feelings about their grandmother when seen by Ms. Andres, Dr. Auffrey attributed such comments to the "indoctrination" – the children perceived that Ms. Andres wanted to hear them say negative things about Lori.[90]

The foster father, Terry Koetje, testified. He works full-time doing log home restoration and made $26,000 in 2010. His wife, Derise, works half-time as a secretary earning $11,000 to $12,000 per year. [91] For their foster services taking care of the four Gonzalez/Heeren children, the Koetje's receive approximately $1,150 every two weeks, or nearly $30,000 per year.[92]

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[85] App 1237a.
[86] App 1229a.
[87] *Id*.
[88] App 1287a-1289a.
[89] App 1296a.
[90] App 1289a-1290a.
[91] App 1367a.
[92] *Id*.

This was the Koetje's first time having foster children.[93] Mr. Koetje acknowledged being told by Holy Cross that some of the discipline techniques he and his wife used on the children were not acceptable. These include making the children drink fish oil, putting drops of tabasco sauce on their tongues, and making them run laps around the house.[94]

Terry Koetje thought the children were "quite well" bonded to himself, his wife, and their children. Initially, the foster parents encouraged the children refer to them as "Aunt Derise and Uncle Terry" because that was more in keeping with their role as foster parents. However, after about a year, they let the children refer to them as "mom and dad."[95] The foster parents filed an adoption petition concerning the children which was pending during the hearing on Lori Scribner's juvenile guardianship request. Terry admitted that he and his wife were committed to adopt the children from the day they were placed with them and had discussed adoption for many years.[96] Holy Cross records show that the Koetje's asked about adoption even before parental rights were terminated.[97] Mr. Koetje expressed disappointment that the court did not terminate parental rights and make the children available for adoption when the termination issue first came up in 2009.[98]

The children had been in the Koetje foster home for only two months when the Koetje's had their first indirect contact with Lori Scribner. She sent a box of Christmas gifts.[99] The

[93] App 1356a
[94] App 1373a-1374a.
[95] App 1343a.
[96] App 1344a.
[97] App 1441a-1442a.
[98] App 1356a-1357a.
[99] App 1346a.

Koetje's made no effort to contact Lori to thank her for the presents or to have the children do so.[100]

The relationship between the Koetje's and Lori Scribner was not positive. The Koetje's obtained a Personal Protection Order (PPO) against the children's grandmother on the advice of the executive director of Holy Cross as a result of postings to the Internet made by Lori Scribner's brother.[101] The PPO prevented Lori from calling the children at the Koetje's home or sending gifts to the children there.[102] From Mr. Koetje's perspective, the PPO also prevented the Koetje's from calling or otherwise contacting the children when they were at Lori's home in Florida over Thanksgiving and Christmas.[103] Although weekly telephone contact between the children and their grandmother was finally arranged in 2010, Mr. Koetje testified that he and the Holy Cross caseworkers and supervisor decided to give the children the power to opt-out of the weekly calls from Lori.[104]

The Court Appointed Special Advocate (CASA) for the children, Victoria Brezna, acknowledged that she never met or spoke with Lori Scribner at any time during her service as the children's CASA[105], nor did she attempt to do so.[106] She also did not attempt to speak with Dr. Auffrey.[107]

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[100] App 1360a-1361a.
[101] App 1425a-1426a.
[102] App 1362a.
[103] App 1380a.
[104] App 1351a-1352a.
[105] "What Do CASA Volunteers Do?
CASA volunteers listen first. Then they act. Volunteers get to know the child by talking with everyone in that child's life: parents and relatives, foster parents, teachers, medical professionals, attorneys, social workers and others. They use the information they gather to inform judges and others of what the child needs and what will be the best permanent home for them." CASA Court Appointed Special Advocates for Children, available at http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301309/k.9D58/Volunteering.htm, last accessed November 28, 2013.

The Holy Cross foster care worker, Andrea Hagen, testified that she was first contacted by Lori Scribner in October of 2008, shortly after the children were placed in the Koetje home. However, the case file she received from DHS showed contact from Lori Scribner in July of 2008, several months before the children were placed in the Koetje foster home.[108] Ms. Hagen acknowledged that by May of 2009, when the children had been with the Koetje's only seven months, Lori contacted her directly asking for placement of the children with her in Florida.[109] At that time, Ms. Hagen testified that the children were not yet emotionally bonded with the foster parents. That bond was "slow to build."[110]

Ms. Hagen's records show that Lori continued to contact her on a regular basis requesting guardianship and seeking greater contact with the children.[111] In response to Lori's testimony that she called Ms. Hagen many additional times, Hagen admitted that she was having cell phone problems, needed a new phone, and didn't get calls or messages.[112] At no time did Ms. Hagen offer to assist Lori in obtaining guardianship of the children or contact DHS to have them provide assistance.[113] Indeed, she never asked Lori for her address.[114] Nor did Ms. Hagen contact the children's biological mother for information on the nature and extent of the relationship between Lori and the children.[115]

Hagen testified that DHS refused to consider Lori as a potential placement for the children because she lived in Florida and, at the time Lori first requested placement, the goal

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[106] App 1402a.
[107] App 1404a.
[108] App 1432a-1433a.
[109] App 1406a-1409a.
[110] App 1424a.
[111] App 1410a-1413a.
[112] App 1415a.
[113] App 1434a-1435a.
[114] App 1436a-1437a.
[115] App 1452a.

remained to reunify the children with their mother in Michigan. However, once the goal changed to termination of parental rights, no effort was made to contact Lori or reconsider her request for placement. Ms. Hagen blamed this oversight on "inexperience."[116] No family members were ever contacted about adopting the children, only the Koetje's.[117]

Procedural History: On July 1, 2010, Lori filed her motion to intervene in the neglect action for the purpose of seeking juvenile guardianship of the children. Her motion was filed pursuant to a newly enacted statute, MCL 722.875b, and newly adopted court rule, MCR 3.979. This was not a minor guardianship proceeding under EPIC (MCL 700.5204).

DHS, the LGAL, and the trial court consented to Lori's intervention in the neglect action and agreed to an evidentiary hearing on her juvenile guardianship petition. This consent was part of the trial court's acceptance of the mother's "no contest" plea to a petition to terminate her parental rights to all four children.[118] The parental rights of Joseph Heeren (father of the three younger children) and Richard Bellow (father of the oldest child) were terminated prior to Lori's juvenile guardianship request. The prosecutor, on behalf of DHS, conceded that if the guardianship request was denied by the trial court, "the grandmother would then be in a position to petition the MCI superintendent for adoption."[119]

The trial court conducted an evidentiary hearing over several days spanning more than six months in during the second half of 2010 and continuing into 2011. On March 21, 2011, the trial court issued a written opinion analyzing appellee's juvenile guardianship requests using the best interest factors found in MCL 722.23 and compared Lori's home with the home offered

[116] App 1437a.
[117] App 1453a.
[118] App 792a-803a.
[119] App 796a-797a.

by the foster parents.[120] The trial court emphasized that the children were in their foster home for approximately two years and that the foster parents had an adoption petition pending.[121]

The trial court did not acknowledge that Lori requested placement of all four children with her starting in the summer of 2009 when the children had been in their current foster home only a few months.[122] Nor did the trial court mention that Lori's relationship with the children was regular and long-standing, going back to the birth of Jordan, the oldest child, in 2001.[123] Also not mentioned in the trial court's decision were the steps Lori took to prepare to have the children move in with her. An order incorporating the trial court's ruling was entered on May 3, 2011.[124]

On May 11, 2011, Lori filed a timely appeal by right from the trial court's order. The Court of Appeals administratively dismissed Lori's appeal on June 15, 2011, "because this case is a child protective proceeding, not a domestic relations action." Lori's motion for reconsideration was denied by the Court of Appeals Court on July 20, 2011. Lori then filed a delayed application for leave to appeal. The Court of Appeals granted leave to appeal on July 23, 2012.

After briefs by all parties, oral argument took place on December 5, 2012. Neither the prosecutor nor the GAL appeared for argument. Meanwhile, on October 17, 2011, Lori filed petitions to adopt her grandchildren, along with her Section 45 motions. The hearings on the Section 45 motions took place over four days: February 10, May 2, May 3, and July 25, 2012. The trial court denied the motions in an opinion dated September 14, 2012. Lori, through

[120] App 9a-13a.
[121] App 9a.
[122] App 960a.
[123] App 951a-955a.
[124] App 8a.

different appellate counsel, filed an appeal by right from the Section 45 denial. That appeal was assigned Docket No. 312691.

After the December 5, 2012, oral argument in the juvenile guardianship appeal and receiving briefs from Lori, the GAL, and MCI in the Section 45 appeal, the Court of Appeals issued an order on March 26, 2013, consolidating the Section 45 and juvenile guardianship appeals.[125] The Court of Appeals ordered supplemental briefs from all parties in both cases addressing how review and disposition of the issues in each appeal would affect that other appeal.

After receiving the supplemental briefs, the Court of Appeals (TALBOT, PJ, and MARKEY and RIORDAN, JJ), issued its unanimous unpublished *per curiam* decision on June 25, 2013, reversing the trial court and remanding to the trial court for entry of an order granting Lori's request to be named juvenile guardian of the children.[126] The Court of Appeals held that DHS ignored its statutory obligation under MCL 722.954a(5) to favor placement of the children with a relative. Further, the trial court erred in using the best interest factors in MCL 722.23 (Child Custody Act) to compare Lori with the foster parents. The Court of Appeals determined that a juvenile guardianship is similar to an adoption. Comparisons of prospective adoptive homes are not generally allowed in adoption proceedings.

The Court of Appeals found "inexplicable" the position of the prosecutor and GAL opposing the grandmother's request for juvenile guardianship despite acknowledging that Lori was a fit and suitable relative placement and had a positive relationship with the children.[127] The Court of Appeals held that Lori was not given proper consideration as a placement for the

[125] App 14b.
[126] App 14a-19a.
[127] App 17a.

children after they were removed from the care of their parents. The actions of DHS and its contractor, Holy Cross, were equally inexplicable in failing to contact Lori and consider her as a placement for the children once the decision was made to terminate parental rights.[128]

The Court of Appeals declined to address the issues raised in Lori's Section 45 adoption appeal COA No. 312691). Placing the children with Lori as their juvenile guardian rendered the adoption issues moot. The matter was remanded to the trial court with instructions to enter an order granting the Lori juvenile guardianship of the children.[129]

On July 22, 2013, the Court of Appeals issued an order granting "immediate effect" to its decision reversing the trial court so that the children could be with Lori in time to start the new school year in Florida. The Court of Appeals also denied motions for remand and reconsideration filed by DHS. Finally, it struck the DHS answer to Lori's immediate effect motion because it contained extra-record material.[130]

Lori, through her trial counsel, Scott Nichol, Esq., sought an immediate remand hearing in the trial court for entry of an order granting Lori juvenile guardianship as directed by the Court of Appeals. The trial court declined to do so. Instead, it set a hearing two weeks later on the afternoon of August 5, 2013.

On the remand hearing date, DHS filed its application for leave to appeal to this Court. That filing was apparently followed by a motion for stay pending appeal and a motion for immediate consideration, neither of which were served on the grandmother's sole appellate counsel in the juvenile guardianship appeal. They were served only on Lori's trial court counsel, Mr. Nichol, who had not appeared in the juvenile guardianship appeal.

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[128] App 17a-18a.
[129] App 19a.
[130] App 20a.

After delaying 24 hours to allow this Court to rule on the DHS stay motion, the trial court on August 6, 2013, entered an order implementing the Court of Appeals "immediate effect" order.[131] That evening, the children were transferred to Lori's custody. The following day the children began their trip by car to Lori's home in Florida.

Without verifying proper service on Lori's appellate attorney in the juvenile guardianship matter or providing that attorney an opportunity to respond to the prosecutor's stay motion, this Court entered an order on August 7, 2013, staying the effect of the Court of Appeals decision. Lori's motion to vacate the stay was denied by this Court in an order dated August 13, 2013. The children were then returned from Florida to foster care.

On October 2, 2013, this Court issued an order granting DHS's application for leave to appeal from the Court of Appeals decision that Lori's juvenile guardianship petition be granted.[132] In the same order, this Court permitted MCI, which was a party to the Section 45 appeal (COA No. 312691) but did not participate in the juvenile guardianship proceedings, to intervene in this appeal. On the same date, MCI's application for leave to appeal from the Court of Appeals decision not to address the Section 45 issues was denied.

Argument

A. The Court of Appeals did not err in holding that there is a preference for relatives under MCL 712A.19c(2) when a circuit court decides whether to create a juvenile guardianship after parental rights have been terminated.

1. Standard of Review: Questions of law are reviewed *de novo*. *Matley v Matley*, 234 Mich App 535, 537, 594 NW2d 850, *vacated on other grounds*, 461 Mich 897, 603 NW2d 780 (1999).

2. Introduction: DHS argues that the relative preference policy that permeates federal

[131] App 15b.
[132] App 1540a.

and Michigan child welfare law is inapplicable to juvenile guardianship determinations. It then argues that even if such a preference is applicable, it is time-limited. DHS is wrong on both counts.

3. Law and Argument

a. The Relative Preference Requirement Applies to Juvenile Guardianship Determinations: DHS incorrectly claims that the preference for relative placement of children removed from their parents and placed in foster care does not apply in this case. The preference for relative placement over placement with strangers, such as state contracted foster parents, permeates Michigan law and is the undisputed public policy of the United States of America and the State of Michigan.

A central purpose of the juvenile guardianship legislation was to give the courts greater flexibility in finding permanent placements for children with relatives. As stated in the Senate Fiscal Agency's First Analysis to SB 668-672 completed November 27, 2007, the purpose of the legislation was:

> To provide more options and to help children move more quickly to permanent placements, it has been suggested that relatives or other individuals could be named as guardians for foster children, allowing them to maintain ties with their parents while being raised by others.[133]

The implementing legislation for financial assistance to juvenile guardians also contained a clear rationale supporting relative placements:

> When a child who has been the victim of abuse or neglect is under the jurisdiction of the family court, grandparents or other relatives often are willing to care for the child, either temporarily or as permanent guardians if necessary. Many believe that such arrangements are in the best interest of the child, who may feel more comfortable staying with a known relative than being placed in the foster care

[133] http://www.legislature.mi.gov/documents/2007-2008/billanalysis/Senate/pdf/2007-SFA-0668-A.pdf (last visited 11/22/2013).

system.[134]

After the juvenile guardianship legislation was passed, Kelly Howard, the Manager of Child Welfare Services for the State Court Administrative Office ("SCAO") created and distributed a document dated June 3, 2009, called "Juvenile Guardianship FAQ's."[135] This document also reflected the intent that juvenile guardianships be a vehicle for relative placements of children. In the section on "Benefits of Juvenile Guardianship," the following is listed among the benefits of the new law:

- **Allows child to exit foster care, but maintains family court jurisdiction.**
    - Permanency/stability.
    - More contact with siblings.
    - Pre-termination, maintains relationship with parents.
    - Some children do not want to be adopted and/or break ties with their birth parents.
- **Maintain family history and culture.** Some cultures believe that termination of parental rights defies important societal norms of extended family.

As stated by the Court of Appeals at p 4 of its decision, "Appellant [Ms. Scribner] is not married, but she raised five sons, mostly as a single parent. Her sons, like the minor children, are multi-racial. Appellant has family members, including her parents, a sister, and a niece, who live in Florida."[136] The juvenile guardianship statute was created for cases such as this one.

DHS takes too narrow a view of the statutory and court rule scheme governing the

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[134] Senate Fiscal Agency Analysis as Enacted of SB 227, Public Act 15 of 2009, http://www.legislature.mi.gov/documents/2009-2010/billanalysis/Senate/pdf/2009-SFA-0227-N.pdf (last visited 11/22/ 2013).

[135] http://www.michiganchildrenslawblog.com/wp-content/uploads/2009/06/juvenile-guardianship-faq.pdf (last accessed, 11/22/2013).). A webcast of the Juvenile Guardianship FAQ's training is available on the SCAO website, http://webcast.you-niversity.com/youtools/companies/viewArchives.asp?affiliateId=133&account=395247&routing=b2d50ec7&stm=PDKIKX0D (last visited 11/28/2013).

[136] Appellant's Appendix 17a.

appointment of a juvenile guardian. It asks this Court to construe the law in isolation from the rest of the Juvenile Code and Michigan's other statutes and rules that govern the placement of children in homes other than those of their parents.

The appointment of a juvenile guardian is a permanency planning option under the Juvenile Code, specifically under MCL 712A.19c . The Foster Care and Adoption Services Act, at MCL 722.954a(1), states: "If a child has been placed in a supervising agency's care under chapter . . . 712A.1 to 712A.32 [the Juvenile Code], the supervising agency shall comply with this section and sections 4b and 4c." When a child is removed from the care of a parent under the Juvenile Code, MCL 722.954a(2) requires DHS to promptly notify and consult with relatives to determine if there is a "fit and appropriate relative" with whom to place the child. MCL 722.954a(3) requires DHS to explain placement options with relatives, including becoming a licensed foster care home and seeking guardianship assistance.

As held by the Court of Appeals, MCL 722.954a(5) requires DHS to "give special consideration and preference to a child's relative or relatives who are willing to care for the child, are fit to do so, and would meet the child's developmental, emotional, and physical needs." This subsection does not limit the relative preference to only the initial placement decision following removal. Further, the statute applies to all "supervising agenc[ies]," not just DHS. The agencies with which DHS contracted in this case, Holy Cross and Bethany, were also obligated to follow the statute.

Based on these statutory provisions, the relative preference contained in MCL 722.954a applies to placement decisions made in abuse and neglect cases such as this one. The DHS argument at p 17 of its brief that the Legislature chose not to include relative preference language in MCL 712A.19c is meaningless because the relative preference MCL 722.954a(5) is applicable

to all placement decisions made in proceedings under the Juvenile Code, including MCL 712A.19c.

b. There is no "Separation of Powers" Issue: DHS argues a pp 25-27 that the Court of Appeals improperly invaded the province of the Legislature in recognizing a relative preference in juvenile guardianship determinations. This argument is without merit.

MCL 722.954a is part of the Foster Care and Adoption Services Act. MCL 722.954a(2) requires DHS (and its contractors) to set out a plan for how it will identify, locate, notify, and consult with relatives as part of the first case service plan for the child.[137] DHS also has a duty to tell the relatives of the placement options available to them, including foster care and guardianship.[138]

When DHS (or its contracting agency) finds a relative who is interested in having the child placed there, DHS must "give special consideration and preference to a child's relative or relatives who are willing to care for the child, are fit to do so, and would meet the child's developmental, emotional, and physical needs. The supervising agency's placement decision shall be made in the best interests of the child." The "special consideration and preference" to the relative must occur before determining any placement. MCL 722.954a(5).

After the family court obtains jurisdiction of the child, the court enters its first

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[137] "Upon removal, as part of a child's initial case service plan as required by . . . MCL 712A.18f, the supervising agency shall, within 30 days, identify, locate, notify, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs."

[138] "(3) The notification of relatives required in subsection (2) shall do all of the following:
(b) Explain the options the relative has to participate in the care and placement of the child, including any option that may be lost by failing to respond to the notification.
(c) Describe the requirements and benefits, including the amount of monetary benefits, of becoming a licensed foster family home.
(d) Describe how the relative may subsequently enter into an agreement with the department for guardianship assistance." 722.954a(3).

dispositional order. Before the court may enter a dispositional order, DHS must provide the court a copy of child's first case service plan, and the court must consider the plan. MCL 712A.18f(4). That initial case service plan must include the reasons why the agency selected the placement it did for the child. MCL 712A.18f(3)(a). It must also include the information about how the agency is going to identify, locate, notify, and consult with relatives. MCL 722.954a(2). The court "may order compliance with any part of the case service plan as it deems necessary." MCL 712A.18f(4).

The court, therefore, is mandated to review the initial services plan. It is the court's obligation to ensure that DHS had complied with what the Legislature said must be in an initial services plan, including efforts to find and place the children with relatives.

If the child is not living with its parents, the family court must hold review hearings every 91 days. MCL 712A.19(3). At each review hearing, the court must review compliance with the case service plan with respect to the services offered or provided by DHS. The court shall also determine "the appropriateness of the child's placement." MCL 712A.19(8). DHS is permitted to make reasonable efforts to place the child for adoption or "with a legal guardian" at the same time it's trying to reunify child and parents. The agency must identify appropriate in and out-of-state options. 712A.19(13).

Once parental rights have been terminated, the court continues to hold review hearings, and DHS must file its reports about compliance with service plans or permanency planning, every 91 days. At each review hearing, "court shall review the appropriateness of a child's placement." MCL 712A.19c(1)(b). The court may appoint a guardian during a review hearing if it determines it's in the child's best interests. MCL 712A.19c(3).

DHS is wrong to argue that the court doesn't have to follow the requirements of MCL

722.954a based on a separation of powers claim. DHS must follow MCL 722.954a when it develops its "initial case service plan." The initial case service plan must include the relative identification, location, notification, and consultation plans. The court reviews all case service plans, including the initial one, before it can enter any dispositional orders. All orders after the first dispositional order are called supplemental orders of disposition. The court at each review hearing must review the child's placement to determine if it's appropriate. As noted above, one of the options at each review hearing, not just the initial review, is the appointment of a guardian.

If a relative requests to be appointed juvenile guardian, DHS is obligated to review that proposed change in placement. Under MCL 722.954a, DHS is required to give the relative "special consideration" and "preference." The court must then determine if DHS fulfilled that statutory obligation. If the court finds that DHS failed to provide the required preference, it may alter the case plan and order that the child be placed with the relative to comply with the relative preference statute. In this process, each actor has its appropriate role: (1) DHS offers services; (2) The court reviews the services to assure that DHS has complied with the statutory requirements. MCL 712A.19(6). There is no separation of powers problem.

c. Federal Law and DHS's Own Policies Require a Relative Preference: It is undisputed that all private child foster care and child placing contract agencies must also follow DHS policies, state law, and federal law. The federal statute on which MCL 722.954a is based requires states to have relative preference statutes in their state plans to receive federal funding. 42 USC § 671a(19).[139]

For Michigan to receive federal funding for its child welfare and foster care services, it

[139] "(19) provides that the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards…."

must "consider giving preference," but the Michigan statute goes farther. The Legislature required that the agencies "shall give special consideration and preference . . . ." MCL 722.954a(5). Under the Michigan statute, the agency does not merely consider giving that preference. It must actually give it.

DHS's own policies reinforce this interpretation. DHS Foster Care Manual (FOM 722-3), p 6, expressly acknowledges MCL 722.954a and the obligation to identify and provide a placement preference to relatives.[140] Each update to a child's case services plan, and each supplemental disposition order, must determine if there have been reasonable efforts to prevent or eliminate the need for the child's placement out of the parent's home. The obligation to "Search for absent parent or other relatives" is present at each 91-day review.[141]

A child placing agency must always seek out appropriate relatives as a foster care placement option when a child is initially removed from the parental home and at each review. The child placing agency must also consider relatives at the time the permanency plan becomes adoption. Relatives may be an appropriate placement when they have an established relationship with the child and/or provide a familiar environment for the child.[142]

d. The 2010 Amendment to the Foster Care and Adoption Services Act Was Remedial and Entitled to Retroactive Effect: The Court of Appeals properly applied the version of MCL 722.954a that was in effect at the time the trial court made its decision in March of 2011 instead of the version in effect when Lori filed her motion to intervene and seek juvenile guardianship in July of 2010. The 2010 legislation was remedial in nature and is entitled to retroactive effect.

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[140] Appellant's Appendix 1489a.
[141] FOM 722-6, http://www.mfia.state.mi.us/olmweb/ex/fom/722-6.pdf, p 22.
[142] FOM 722-6, p 25; FOM 722-7, http://www.mfia.state.mi.us/olmweb/ex/fom/722-7.pdf, p 1.

The legislative history of 210 PA 265 makes it clear that the amendatory language would "largely codify existing DHS policy regarding relative placement into the Foster Care and Adoptions Services Act." House Fiscal Agency Analysis of HB 4118, 03-23-2009, p 1. They were prompted in large part by the settlement of class action litigation against DHS in the case of *Dwayne B v Granholm*.[143] An objective of the plaintiff class in that litigation was to provide greater financial support and protection for children removed from their parents and placed with relatives.

As stated by this Court in *Leonard v Lans Corp*, 379 Mich 147, at 155, 150 NW2d 746 (1967), "Ample precedent exists for retroactive application of remedial statutes designed to correct defects in existing law or to provide procedures for enforcing existing liabilities, as distinguished from those creating new substantive rights or destroying vested rights." Amendments "designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good" are remedial in nature and entitled to retroactive effect. *Rookledge v Garwood*, 340 Mich 444, 65 NW2d 785 (1954). As such, DHS is wrong in its argument that the Court of Appeals improperly applied the current version of MCL 722.954a.

e. There is no Time Limit to the Relative Preference Requirement: To be eligible for federal dollars to pay child placing agencies and foster parents for their services, a state's child welfare plan must include many things. 42 USC 671(a) ("In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . ."). If a state's plan does not comply with Section 671, the state stands to lose great sums of federal assistance dollars. *See* 45 CFR 1355.40(e).

[143] No. 2:06-cv-13548, US District Court for the Eastern District of Michigan.

To ensure compliance with the federal requirements, the Department of Health and Human Services conducts Child and Family Services Reviews. Children's Bureau, *Child and Family Services Reviews Fact Sheet*.[144] In both its 2002 and 2009 reviews, the Department of Health and Human Services found that Michigan agencies were not making sufficient efforts to "locate and assess both maternal and paternal relatives as potential placement resources for children in foster care." *Final Report: Michigan Child and Family Services Review March 2010,* at p 40.[145]

In 1996, Congress amended 42 USC 671(a) to require that the state plan must include a mandate to its child welfare agencies to "consider giving preference to" a relative "over a non-related caregiver when determining ***a placement*** for a child." PL 104-193, 110 Stat 2105, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, August 22, 1996, codified at 42 USC 671(a)(18) (emphasis added).[146] Congress did not limit the time within which the relative should be preferred over the non-relative caregiver. Congress specifically chose the indefinite article "a" – "a placement." The use of that indefinite article applies the requirement to *any* placement, not one particular placement.[147]

In 1997, Michigan enacted its first version of MCL 722.954a. It stated:

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[144] http://www.acf.hhs.gov/programs/cb/resource/cfsr-fact-sheet (last visited November 21, 2013.
[145] http://1.usa.gov/1aqBb6e (last visited November 19, 2013).
[146] SEC. 505. KINSHIP CARE.
Section 471(a) of the Social Security Act (42 U.S.C. 671(a)) is amended—
* * * * *
(3) **by adding** at the end the following:
"(18) provides that the State **shall consider giving preference to an adult relative over a non-related caregiver when determining a placement** for a child, provided that the relative caregiver meets all relevant State child protection standards."
[147] Articles are adjectives and modify nouns. Paul Lynch, Allen Brizee, and Elizabeth Angeli, *Using Articles*, Purdue Online Writing Lab (2011), available at https://owl.english.purdue.edu/owl/resource/540/01/ (last visited November 18, 2013).

(2) Upon removal, as part of a child's initial case service plan . . . the supervising agency shall, within 30 days, identify, locate, and consult with relatives to determine placement with a fit and appropriate relative . . . **as an alternative to foster care."** (emphasis added).[148]

While this first iteration did not include the precise federal language that the "state shall consider giving preference to an adult relative over a non-related caregiver," 1997 PA 172 did require agencies to find and place children with relatives as an alternative to foster care.[149]

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[148] 1997 PA 172, Sec. 4a.

(1) If a child has been placed in a supervising agency's care under chapter XIIA of 1939 PA 288, MCL 712A.1 to 712A.32, the supervising agency shall comply with this section and sections 4b and 4c.

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

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

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

(3) A person who receives a written decision described in subsection (2) may request in writing, within 5 days, documentation of the reasons for the decision, and if the person does not agree with the placement decision, he or she may request that the child's attorney review the decision to determine if the decision is in the child's best interest. If the child's attorney determines the decision is not in the child's best interest, within 14 days after the date of the written decision the attorney shall petition the court that placed the child out of the child's home for a review hearing. The court shall commence the review hearing not more than 7 days after the date of the attorney's petition and shall hold the hearing on the record. [Emphasis added].

[149] The requirement to place with relatives came also from Lt. Gov. Connie Binsfeld's Children's Commission Report. A news release about the Binsfeld Report Dated July 2, 1996, entitled, *Governor Releases Children's Commission Report*, available at http://www.state.mi.us/migov/gov/pressreleases/199607/children.html specifically noted that "[a]mong the recommendations cited in the report are: . . . . Explore the appropriateness of ***'Kinship Care'*** as a ***first choice*** to provide protection to abused children. . . ." (emphasis added).

The bill's first legislative analysis also recognized this:

Supporting Argument

2010 PA 265 was designed to implement a class action settlement and codify existing DHS policy and the requirements of federal law into the Foster Care and Adoption Services Act. It replaced the "identify, locate, and consult with relatives to determine placement with a fit and appropriate relative . . . as an alternative to foster care," with the mandate to give "special consideration and preference" to a child's relative before it decided where to place a child [emphasis added]. This version remains in effect. Significantly, it does not specify a time frame within which the mandate operates. MCL 722.954a(5) provides:

> (5) Before determining placement of a child in its care, a supervising agency shall give special consideration and preference to a child's relative or relatives who are willing to care for the child, are fit to do so, and would meet the child's developmental, emotional, and physical needs. The supervising agency's placement decision shall be made in the best interests of the child. [MCL 722.954a(5)].

When read in conjunction with the rest of MCL 722.954a, DHS and its contract agencies must **begin** the process of locating, contacting, and asking relatives about placement in the first 30 days after the child is removed from home. Once a relative is located and states that he or she wants to provide a place for that child to live, DHS must give special consideration and preference to that relative.

Not only is the DHS self-assessment to prepare for its 2009 Child and Family Services Review consistent with what the Legislature told it to do, its own policy manuals explain in further detail the relative search and preference process. In its report to the Federal Department of Health and Human Services before its 2009 review, the State Department of Human Services

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> The report of the Binsfeld Children's Commission states as a goal that timely and appropriate ***placement with extended family members (kinship care) be used as an alternative to foster care whenever possible.*** (emphasis added). [Senate Fiscal Agency, *S.B. 543 & 544 (S-1): First Analysis - MCI & Foster Care Supervision* at 3, available at www.legislature.mi.gov/.../billanalysis/Senate/pdf/1997-SFA-0543-A.pdf (last visited November 17, 2013).]

represented that not only were child protective services workers (CPS) looking for relatives, but foster care and adoption services workers were, too.

> Given the short period for compliance, the relative search begins as soon as the child is removed from the home (PSM 715-2). The CPS worker, at minimum, asks the parents and age-appropriate children to identify paternal and maternal relatives.
>
> Within ninety days after the initial placement, the foster care worker must make a placement decision and document the reason for the decision. The worker must send the placement decision to all relatives who expressed interest in having the child placed with them (FOM 722-3).
>
> The adoption worker must consider relatives at the time the permanency plan becomes adoption. Relatives may be an appropriate placement when they have an established relationship with the child and/or provide a familiar environment for the child (CFA 400). [Department of Human Services, *Michigan's Child and Family Services Review Statewide Assessment* 126-127 (August 2009), available at http://1.usa.gov/1fe5Nvr (last visited November 18, 2013).]

The Children's Foster Care Manual, FOM 721 *Foster Care* (effective December 2009) in its Philosophy Statement section states: "Relative care is a key to substantially reducing the negative effects of removal from parents and family while in temporary foster care. ***A child's relative network must be the preferred out-of-home placement for both temporary and permanent circumstances.*** (See FOM 722-3, Placement with Relatives.)" FOM 721 *Foster Care* at 1-2 [emphasis added]. "Temporary and permanent circumstances" directly contradicts the relative placement preference interpretation DHS would like this Court to adopt.

DHS's "placement with a relative is time-limited" premise is refuted by DHS's own Foster Care Manual. The Manual states:

> Preference must be given to placement with a relative if the relative family:
>
> - Meets the requirements in the DHS-588, Initial Relative Safety Screen.
> - Meets the needs of the child.
> - Keeps the siblings together.
> - Lives in close geographic proximity to where the child was living at the time of removal, unless it is in the best interest of the child to be placed with a relative in another location.

> If more than one relative is available for placement, each relative must be assessed to determine which of the potential relative placements would be most suitable.[150]

Another section of the DHS Foster Care Manual further demonstrates the lack of merit in DHS's time limitation argument:

> ***Over the course of a case***, if a child needs a *replacement*, the previously identified relatives must be considered as placement resources provided they meet the guidelines within the basic assessment process ….[151]

Finally, yet another section of the DHS Foster Care Manual dispels with absolute certainty the argument that the relative preference is time-limited:

> The foster care worker **must continue to pursue the identification and notification of relatives**. As other relatives are identified through the relative response forms, those relatives are to be contacted within five business days from receipt of the form. All contacts must be documented on the DHS-987, Relative Documentation Form. **Throughout the case, the foster care worker must continue to seek, identify and notify relatives until legal permanency for the child is achieved.**[152]

4. Conclusion: The arguments advanced by DHS that the relative preference requirement either doesn't apply at all to juvenile guardianship determinations, or is time-limited, are not persuasive. The Court of Appeals was correct in its assessment that the trial court reversibly erred when it failed to recognize that Lori was entitled to a relative preference when it considered her juvenile guardianship request.

B. The paternal grandmother was entitled the relative placement preference although her son's parental rights to the children had been terminated.

1. Standard of Review: Questions of law are reviewed *de novo*. *Matley v Matley*, 234 Mich App 535, 537, 594 NW2d 850, *vacated on other grounds*, 461 Mich 897, 603 NW2d 780

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[150] FOM 722-3, http://www.mfia.state.mi.us/olmweb/ex/fom/722-3.pdf, p 9 [Emphasis added.]
[151] *Id*.
[152] FOM 722-6, http://www.mfia.state.mi.us/olmweb/ex/fom/722-6.pdf, pp 6-7 [Emphasis added].

(1999).

2. Law and Argument: DHS belatedly asserts that Lori is no longer the children's grandmother and is therefore not a relative entitled to a placement preference. Throughout the trial court and Court of Appeals proceeding, DHS did not contest that Lori was the children's grandmother. Indeed, actions by the prosecutor on behalf of DHS demonstrate that DHS has waived this argument.

At the time Lori filed her motion to intervene and seek juvenile guardianship, DHS stipulated that Lori could file her petition as the children's paternal grandmother and have it heard by the trial court. Specifically, the prosecutor, on behalf of DHS, stated on the record in open court:

> Number one, we will agree that the children will not be committed to the Michigan Children's Institute for the purposes of adoption so that the Court can hear on its merits a petition for guardianship under the Juvenile Code as it relates to the paternal grandmother.[153]

The trial court responded:

> I have agreed that I will consider a petition that is being filed to establish a guardianship with the paternal grandmother Laurie [sic] Scribner.[154]

This statement by the prosecutor on behalf of DHS constitutes an intentional relinquishment of the right to challenge appellant's status as the children's paternal grandmother during the juvenile guardianship proceeding. *People v Carter*, 462 Mich 206, 215, 612 NW2d 144 (2000).

Further, DHS acknowledges a p 28 of its brief that "Nothing … in MCL 712A.19b indicates that a grandmother's relative status is terminated when her child's parental rights are terminated." That is a crucial concession since that statute is part of the Juvenile Code, the same

[153] Appellant's Appendix 794a-795a.
[154] Appellant's Appendix 798a.

code authorizing juvenile guardianships. Without direct statutory authority supporting its position that Lori is no longer a "relative," DHS resorts to statues and case law that are both inapplicable and directly contrary to the purpose of the juvenile guardianship law.

In re Beck, 488 Mich 6, 793 NW2d 562 (2010), cited by DHS actually undermines its position. In that case, this Court held that termination of a father's parental rights due to neglect did not cut off his parental responsibility for child support. This Court focused in *Beck* on whether there was specific statutory authority terminating the father's support obligation. Finding none, it would not read into the statute something that is not there. Here, this Court should not read into the statute something that is not there. The statute contains no language that terminates Lori's status as a "relative" upon termination of her son's parental rights.

Foster v Foster, 237 Mich App 259, 602 NW2d 610 (1999), relied on by DHS is an odd case. There was considerable confusion concerning which court had jurisdiction to address custody. However, in the end, the determinative factor barring the grandmother from seeking custody was the fact that parental rights were terminated and the child committed to MCI, ending the court's jurisdiction to hear the custody matter. The statement at the end of the *Foster* opinion quoted by DHS at p 28 of its brief was inserted as a seeming afterthought without analysis or citation to supporting authority. Because the jurisdictional question resolved the case, the panel's statement addressing the grandmother's status is non-binding *obiter dictum*. *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 216, 625 NW2d 93 (2000).

The definition of relative in MCL 712A.13a unequivocally includes as a relative a person who is "by blood, marriage, or adoption" a grandparent of a child. There is no suggestion that termination of parental rights cuts off the relative status of the parent's relatives. It is particularly interesting that the termination of the underlying legal relationship that creates status

as a child's relative does not, in turn, end that status. Persons related to a child only by marriage (step siblings, stepparents, stepgrandparents) continue to retain their relative status "even after the marriage [that conferred that status] has ended by death or divorce." MCL 712A.13a(1)(j).

Based on this language, the definition of "relative" in the Juvenile Code extends beyond so-called "derivative" rights. Once established, those rights are independent and free-standing. If DHS were correct, the rights of persons related by marriage would not survive the termination of that marriage – yet they clearly do. The inescapable conclusion is that the Legislature intended a child-centered focus when determining who is that child's relative. Here, Lori remains the children's grandmother despite termination of the underlying relationship that created that status.

DHS also relies on the Court of Appeals decision in *Porter v Hill*, ___ Mich App ___, ___ NW2d ___ (No. 306562, June 11, 2013). *Porter v Hill* addresses the question of standing to initiate a grandparenting time action under MCL 722.27b(1). It does not address the precise issue presented here, which is whether Lori remains the children's grandmother for purposes of the relative preference provisions in MCL 722.954a(5). In addition, the final chapter in *Porter v Hill* is yet to be written. On October 25, 2013, this Court ordered oral argument on the grandparents' application for leave to appeal.[155]

The purpose of the juvenile guardianship statute must also be considered. It is undisputed that a juvenile guardianship may be created either before or after termination of parental rights. As shown in *Argument A* above, placement with a relative to preserve a child's family history and culture is one of the key reasons to create a juvenile guardianship. With that purpose in mind, it would be illogical to declare that a relative requesting juvenile guardianship is entitled to

[155] Supreme Court No. 147333.

a preference on the day before termination of parental rights, but not on the day following.

The DHS Child Guardianship Manual lists as one of the reasons to create a juvenile guardianship:

> A relative is willing to provide a permanent home for the child but does not want to change the legal relationship (for example, grandparent or aunt) to the child.[156]

This demonstrates that preservation of the legal relationship of family members to the child is one of the goals of the juvenile guardianship statute.

3. Conclusion: Irrespective of the way termination of parental rights may impact a grandparent or other relative's relationship with a child in other settings, in the juvenile guardianship setting that legal relationship is intended to exist independently of the parent's rights. It is not derivative and continues unabated after termination of parental rights. Lori Scribner remained, and still is, the children's grandmother, and was treated as such by DHS, after her son's parental rights were terminated.

C. The Court of Appeals did not err by failing to apply a clear error standard of review to the Muskegon Circuit Court Family Division's determination of the children's best interests pursuant to MCL 712A.19c.

1. Standard of Review: The applicable standard of review is a question of law reviewed *de novo*. *People v Walters*, 266 Mich App 341, 352 700 NW2d 424 (2005). When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct. *Fletcher v Fletcher*, 447 Mich 871, 881, 526 NW2d 889, 894 (1994).

2. Law and Argument: The trial court's determination of the children's best interests was not purely a question of law or a question of fact. It was a question of **both** fact and law. The trial court's analysis of the best interest of the children was inextricably tied to its use of the

[156] DHS Child Guardianship Manual, Juvenile Guardianship, GDM 600, http://www.mfia.state.mi.us/olmweb/ex/gdm/600.pdf, p 2.

wrong best interests factors and its failure to analyze the children's best interests in the context of the relative preference mandated by statute.

Whether the trial court used the correct best interests factors and whether it ignored a statutory preference are questions of law. As stated by the Court of Appeals at p 2 of its decision, "We review *de novo* issues involving the interpretation and application of statutes and court rules. *In re DMK*, 289 Mich App 246, 253, 796 NW2d 129 (2010)." Appellant's Appendix 15a.

This is not a case where the trial court made child custody findings using the correct statutory factors and those findings were then challenged on appeal. Appellate review in such a case would use the clear error standard. *Pierron v Pierron*, 486 Mich 81, 85, 782 NW2d 480 (2010). However, because the trial court conducted its best interests analysis using the wrong factors, the question is initially one of law. *Fletcher, supra* at 881..

In *Beason v Beason*, 435 Mich 791, 804-805, 460 NW2d 207 (1990), this Court stated:

> Where a finding is derived from an erroneous application of law to facts, the appellate court is not limited to review for clear error. Nor is an appellate court so limited where the trial judge's factual findings may have been influenced by an incorrect view of the law. [citations omitted.]

The trial court's best interests findings were "derived from an erroneous application of law to facts." Had the trial court correctly applied the law to the facts of the case, it would have reached a different conclusion because it would have been prohibited from engaging in a comparison of the home offered by Lori with the home offered by the foster parents. Further, had the trial court properly applied the law to the facts of the case, it would have been required to give a preference and special consideration to Lori under MCL 722.954a(5). In effect, this would be a presumption in her favor. Issues of presumptions and burdens of proof are legal questions reviewed *de novo*. *Pickering v Pickering*, 253 Mich App 694, 697, 659 NW2d 649

(2002).

3. Conclusion: Findings of fact using incorrect statutory factors are not entitled to substantial deference by an appellate court. The trial court's findings as to best interests were derived from erroneous application of law to fact. The Court of Appeals did not err in failing to use a clear error standard of review.

D. The circuit court erred by using the best interests factors enumerated in MCL 722.23 of the Child Custody Act in deciding whether to grant the petition for a juvenile guardianship.

1. Standard of Review: Questions of law are reviewed *de novo*. *Matley v Matley*, 234 Mich App 535, 537, 594 NW2d 850, *vacated on other grounds*, 461 Mich 897, 603 NW2d 780 (1999).

2. Law and Argument: The Child Custody Act, MCL 722.21 *et seq*., guides the court when hearing custody disputes between competing parties. It requires a subjective analysis of a child's best interests by comparing the competing parties on each of the factors contained in MCL 722.23.

At pp 32-33 of its brief, DHS correctly cites and quotes from *In re Barlow*, 404 Mich 216, 273 NW2d 35 (1978).[157] The quoted language from p 236 of *Barlow* demonstrates why the subjective best interests factors of MCL 722.23 are inappropriate when evaluating the subjective suitability of a prospective juvenile guardian. As DHS points out, after *Barlow*, the Legislature added best interests factors to the Adoption Code. MCL 710.22(g). The factors are not a mere incorporation of the Child Custody Act factors. Any reference to "competing parties"[158] or "parties involved"[159] was entirely omitted from MCL 710.22(g). This evidences the

[157] In *Barlow*, unlike this case, the parties agreed that the MCL 722.23 factors be used.
[158] The language used in MCL 722.23 at the time *Barlow* was decided.
[159] The current language used in MCL 722.23.

Legislature's intent to prohibit comparisons of prospective homes when making a permanent adoptive placement.

DHS also cites *In re JS and SM*, 231 Mich App 92, 585 NW2d 326 (1998). That decision undermines its position. The Court of Appeals held unequivocally that use of the MCL 722.23 factors in Juvenile Code proceedings "would not be sensible or indeed even possible" because there were intended for use when there are competing parties.[160] Citing this Court's decision in *Barlow*, the Court of Appeals held that "the Michigan Supreme Court recognized that the best interests factors from the Child Custody Act could not simply be applied to the context of a termination of parental rights case."[161]

Like adoption, a juvenile guardianship proceeding is not a dispute between competing parties. It is a permanency planning option approved by the Legislature for use in abuse/neglect proceedings under the Juvenile Code, MCL 712A.1 et seq. The legislative history for MCL 722.875b makes it clear that the new juvenile guardianship relationship was intended to facilitate the permanent placement of children under the jurisdiction of the family court[162] with relatives such as grandparents.

MCR 3.979 took effect on April 9, 2009. It states in relevant part, "If the court determines at a posttermination review hearing or a permanency planning hearing that it is in the child's best interests, the court may appoint a juvenile guardian for the child pursuant to MCL 712A.19a or MCL 712A.19c." The enabling statutes for this rule are MCL 712A.19a, MCL 712A.19c, and MCL 722.875b. MCL 722.875b states:

The legal guardianship shall be a judicially created relationship as provided for

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[160] *Id*, at 231 Mich App 100.
[161] *Id*, at 231 Mich App 101.
[162] It is undisputed that the children in this case remained wards of the court during the trial court's juvenile guardianship hearing.

> under sections 19a and 19c of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.19a and MCL 712A.19c, between the child and his or her guardian that is intended to be permanent and self-sustaining as evidenced by the transfer to the guardian of the following parental rights with respect to the child:
>
> (a) Protection.
> (b) Education.
> (c) Care and control of the person.
> (d) Custody of the person.
> (e) Decision making.

Prior to the adoption of MCR 3.979 and enactment of the enabling statutes, guardianships in abuse/neglect proceedings were created under the Estates and Protected Individuals Code (EPIC). Such guardianships were designed to be temporary. MCR 3.979(e). While often used in neglect proceedings, guardianships under EPIC were not meant to be part of the permanency planning goal for a neglected or abused child.

The juvenile guardianship statute and court rule changed the nature of guardianship in abuse/neglect proceedings. This new type of guardianship offers a lasting and permanent relationship with the child. The Legislature underscored the permanency of juvenile guardianship by denying parents standing to terminate the guardianship (pre- or post-termination), MCL 712A.19. The permanent nature of a juvenile guardianship is supported by funding, support payments, and post-permanency services at the same level as an adoptive placement under the Guardianship Assistance Act, MCL 722.881.

As a permanent and self-sustaining arrangement, a juvenile guardianship is much like an adoption. Therefore, the best interest factors contained in the Adoption Code must be used by courts when analyzing a juvenile guardianship request. Those factors are found at MCL 710.22(g). The table at pp 33-34 of DHS's brief shows that the MCL 722.23 (CCA) factors and the MCL 710.22(g) (Adoption Code) factors are similar in **what** they are designed to measure. However, they are crucially different in **how** they approach the task of determining a child's best

interests.

The Legislature intended that juvenile guardianship requests be assessed on their own merits using an objective rather than subjective standard given the similarities between Adoption Code and Juvenile Code guardianships. Both are focused solely on an objective assessment of fitness and propriety for the child or children involved.

Unlike the best interest factors contained in MCL 722.23, the Adoption Code factors do not permit a subjective or comparative analysis. The fitness or suitability of the "adopting individual" is objectively analyzed. The overarching criterion is the merit of the petitioner. No comparison with a competing party is permitted.

The focus of DHS's position in this case, and the reason for the trial court's rejection of the grandmother's juvenile guardianship request, was a subjective comparison of the grandmother's home with the home of the foster parents. Given the children's placement in the foster home for more than two years at the time of the trial court's decision, and the persistent efforts by Holy Cross to impede the grandmother's contact with the children, a subjective or comparative analysis is inherently improper.

The evidence presented to the trial court shows that Lori objectively satisfied the best interest requirements. It was undisputed that Ms. Scriber met all of the licensing requirements of the State of Florida to serve as a foster parent. The Holy Cross caseworker, Ms. Hagen, acknowledged that Ms. Scriber would also meet Michigan's foster care standards and was a suitable placement for the children. T 2/9/11, 161-162. Based on her limited contact with Ms. Scriber, she had no concerns about Ms. Scriber. T 2/9/11, 162.

Yet, neither Holy Cross nor DHS provided any assistance to Ms. Scriber in obtaining placement of the children even after a decision was made to seek termination of parental rights.

T 2/9/11, 163-164. This was a violation of MCL 722.954a as well as DHS's own policies. The DHS Child Guardianship Manual GDM 600, p1, requires the caseworker to "assist the prospective guardian and child to complete the Caregiver's Permanency Planning Checklist (DHS-2051)." That checklist is a precursor to appointment of a juvenile guardian.

That didn't happen because DHS and Holy Cross decided at the beginning of the process that the Koetje's would be allowed to adopt the children. The referral for adoption was made to Bethany Christian Services on April 30, 2009, well prior to termination of parental rights and any proper consideration of Lori as a permanent placement for her grandchildren. T 2/9/11, 164-166. No matter how many hoops DHS required Lori to jump through, and no matter how completely she satisfied all of the requirements for a juvenile guardianship, the decision to place the children with the foster parents for adoption was made impermissibly early.

DHS argues at pp 36-37 of its brief that the Koetje's were more than mere foster parents, they were by the time of the juvenile guardianship proceedings, a prospective adoptive placement. However, if that is true, it is only because DHS violated both the statutory preference for relative placement its own policies to assist relatives in security placement of children removed from parental care. DHS is using its own misfeasance and malfeasance to justify the unconscionable delay in proper consideration of Lori's request that the children be placed with her.

While DHS is correct that adoption is usually preferred to juvenile guardianship as a permanency plan, DHS's own manual implementing the juvenile guardianship statute highlights an exception that preference. GDM 660, at p2, lists "reasons why adoption may not be appropriate." One reason is where "A relative is willing to provide a permanent home for the child but does not want to change the legal relationship (for example, grandparent or aunt) to the

child." These children already know and recognize Lori as their grandmother. It would be confusing to them to require adoption and make Lori their legal mother. The purpose of the statute is to provide a permanency option similar to adoption without severing all of the children's existing familial relationships.

3. Conclusion: The trial court erred in its use of the inherently subjective best interest factors contained in the Child Custody Act. The trial court should have used the objective factors contained in the Adoption Code because only those factors are consistent with the sole focus on whether Lori could provide a fit and appropriate home for her grandchildren. Had the factors in MCL 710.22g been used by the trial court, it would have avoided the impermissible comparison of the grandmother's home with the home of the contractual foster parents.

E. The Court of Appeals did not err by reversing the circuit court on the ground that it was improper to compare the foster parents with the proposed guardian, nor did it err on any other basis.

1. **Standard of Review:** The trial court's decision to compare Lori with the foster parents when assessing the children's best interests was not merely a question of fact. The best interests findings and the ultimate disposition were inextricably tied to the trial court's subjective (comparison) rather than objective (suitability) application of the best interests factors. Therefore, this question involves the application of law to fact.

Where a factual findings derive from an erroneous application of law to fact, review is not limited to clear error. *Beason, supra*, at 435 Mich 804-805. Appellate review of issues involving application of law to fact is *de novo*. *Attorney General v Lake States Wood Preserving, Inc*, 199 Mich App 149, 155, 501 NW2d 213 (1993).

2. Law and Argument: Juvenile guardianship is a permanency planning option under the Juvenile Code , MCL 712A.1 *et seq*. In Juvenile Code proceedings, the law presumes that a

child should be placed in the most family-like setting that will objectively meet his or her needs. MCL 712A.1(3); MCR 3.965(C)(2). When a child is removed from his or her home, the agency providing supervision of the child has 30 days to "identify, locate, notify and consult with relatives" to determine if there is a suitable relative with whom to place the child. MCL 722.954a(2). The agency has 90 days to decide whether to place the child with a relative. MCL 722.954a(4). If a family member such as a grandparent (see MCL 712A.18(1)(b)) is available and able to objectively meet the child's needs, the child should be placed there. In making that decision, placement with an objectively suitable relative should not be "subjectively" compared with any particular foster home or foster care in general. *In re Mathers*, 371 Mich 516, 530, 124 NW2d 878 (1963).

Placement decisions under the Juvenile Code, including whether to grant a juvenile guardianship, assess the merits of the prospective placement without making comparisons between that placement and other possible placements. In that respect, it resembles an adoption hearing. Adoption applications are judged on their own merits without direct comparison to other prospective adoptees. It is an "objective" test. The Foster Care and Adoption Services Act, at MCL 722.954a(2), defines the objective standard that must be met. A child will be placed with a relative if he/she is "a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs."

The court rule implementing the juvenile guardianship statute, MCR 3.979, does not provide for comparison between prospective guardian and other placement options. Instead, all of the references in are singular, strongly implying that the prospective juvenile guardian is to be assessed on his or her own merits without a subjective comparison with a foster placement or other possibilities. In addition, a juvenile guardianship can be created at two different points of

the neglect proceedings. The guardianship can be put in place at the time of the permanency planning hearing, before parental rights are terminated, or after termination. MCL 712A.19a. If the court is asked to make the determination of the best interests of the minor child to grant a juvenile guardianship pre-termination, the court must take into account the rights of the parents. If the request is made after parental rights are terminated, there is no party with a constitutionally protected right to the child against which to compare the proposed guardian. Foster parents have no such rights. That leaves only a purely objective standard when assessing the proposed guardian's request.

DHS argues at pp 39-42 of its brief that adoption is always preferred over juvenile guardianship. This is incorrect. DHS's own policy manual addressing juvenile guardianships recognizes situations where juvenile guardianship is the preferred permanency option. One of those situations exactly matches the facts of this case. As stated in the DHS Child Guardianship Manual, adoption may not be the preferred option where "A relative is willing to provide a **permanent** home for the child but does not want to change the legal relationship (for example, grandparent or aunt) to the child."[163]

Consistent with the permanent quasi-adoption nature of a juvenile guardianship, where, unlike the instant case,[164] the children have been committed to MCI, a post-termination appointment of a juvenile guardian requires the consent of the MCI superintendent. MCR 3.979(A)(3). If that consent is denied, MCR 3.979(A)(3) sets up a process essentially identical to a "Section 45" (MCL 710.45) adoption hearing. That lends even greater support for the view

[163] GDM 600, p 2. [Emphasis added.]
[164] The parties agreed, and the trial court ordered, that there would be no post-termination commitment of the children to MCI during the juvenile guardianship proceedings. Appellant's Appendix 796a-797a. Pursuant to the trial court's 07/12/201 order, the children remained temporary wards of the court. Appellant's Appendix 804a.

that the Legislature intended to create a status and process similar to an adoption.

DHS's primary strategy opposing Lori Scribner's juvenile guardianship request was to draw comparisons between her and the foster parents, the Koetje's. The prosecutor began his written closing argument with the statement, "The Court is now faced with a decision as to whether to remove these children from their loving, caring, nurturing home and place them with their grandmother." Prosecutor's Closing Argument, p 1. Without citing authority, the prosecutor asserted that a "clear and convincing evidence" burden should be placed on Ms. Scribner if she wanted to "change the established custodial environment" of the children. Prosecutor's Closing Argument, pp 9-10. The balance of the prosecutor's closing argument was an analysis of the MCL 722.23 factors directly comparing the foster home with the proposed home offered by the grandmother. Prosecutor's Closing Argument, pp 13-16.

These comparisons were inherently unfair and improper. They were based on the extended time the children were in their current foster home with the Koetje's (over two years at the time of the trial court's decision) compared to the few weeks the children were allowed to spend with their grandmother. This was especially egregious given that almost from the beginning of the children's placement in the current foster home, their grandmother made good faith, indeed extraordinary, efforts to have the children placed with her. Instead of working with Ms. Scribner and facilitating the children's placement with her, the foster care agency, Holy Cross, actively impeded the request to place the children in the most family-like setting with their grandmother. They continually ignored, indeed worked against, their statutory obligation under MCL 722.954a to give Lori special consideration as a preferred placement for the children.

That the trial court followed the prosecutor's lead and engaged in an improper subjective comparison of the grandmother's home with the foster home is evident. It viewed this as a child

custody dispute between competing parties under the Child Custody Act. Reference was made to "competing" parties when the trial court wrote at p 1 of its Opinion, "…it is not a matter of what is fair for those ***competing for their custody***…." [Emphasis added.] The trial court made the children's extended stay in foster care the central focus for its subjective comparison of that home with the home offered by the grandmother.

3. Conclusion: This is not a case of the foster family vs. Lori Scribner. There are no competing parties. The only issue is whether Lori Scribner can meet the statutory standard of showing that she is a fit an appropriate relative placement and that such placement is in the children's best interests. Unfortunately, nearly all of the trial court's best interests analysis involved a subjective comparison between the foster home and Lori's home. This was an erroneous application of that portion of the juvenile guardianship law imposing a best interests test. The Legislature could not have intended that courts engage in such a comparison. A juvenile guardianship is a dispositional option in an abuse/neglect case under the Juvenile Code. The standard for determining if a relative is an appropriate placement in neglect proceedings is objective, not subjective.

Ms. Scriber's request to be appointed juvenile guardian should have been evaluated on its objective merits. Using a subjective test here was especially unfair given the lengths to which the foster care agency went to impede the relationship between the children and their grandmother and stall her efforts to have the children live with her. The trial court was correctly reversed by the Court of Appeals on this issue.

Conclusion/Relief Requested

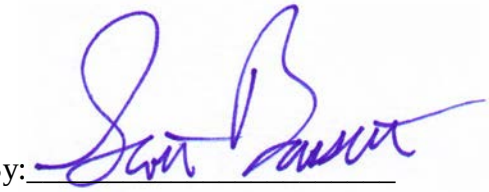
The conduct of DHS, Holy Cross, the Muskegon Prosecutor, and most recently the Attorney General, have in this case been "inexplicable." DHS and Holy Cross made a premature

and illegal decision to allow the foster parents to adopt these children. Lori contacted Holy Cross shortly after the children were transferred to the Koetje foster home to request placement with her in Florida. She did everything she was asked to prepare for the children to live with her. Yet nothing was good enough for Holy Cross and DHS despite a statutory mandate that Lori be given preference and special consideration.

DHS/Holy Cross then used their unconscionable delay in addressing Lori's request as a basis to ultimately deny her request. The only argument they could make against placing the children with Lori was the alleged trauma they would suffer if removed from the foster home. Not only should the children have been placed with Lori long before they spent two years in the foster home, the allegations of possible trauma were contradicted by the court-ordered psychologist. After assessing the children upon their return from two extended visits with Lori, he predicted that the children would transition well into the home of their grandmother.

The trial court rewarded the stalling strategy of DHS/Holy Cross and relied exclusively on the children's long-term stay in foster care when it denied the guardianship request. This was error for the reasons stated in the Court of Appeals decision. This Court should not further delay permanency for these four children. The Court of Appeals decision should be affirmed in its entirety and the children placed immediately with Lori.

Respectfully submitted,



By:_____ Dated: November 29, 2013

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