STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

In the Matter of:
Nykyla McCarthy, minor,

Department of Human Services,
Petitioner-Appellee,
vs.

MSC CASE NO: 151039
CT. APP. CASE NO. 318855
LOWER CASE NO. 07-739244 NA

TRACY REED,
Respondent-Appellant,

THE MINOR CHILD'S
RESPONSE BRIEF TO APPLICATION FOR LEAVE TO APPEAL

* * *

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STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF REQUESTED

Pursuant to MCR 7.302, Respondent-Appellant Tracy Reed requested leave to appeal to this court from the January 15, 2015 decision of the Court of Appeals that affirmed (after remand) the the trial court's Order from August 29, 2013 that terminated her parental rights to this child.

This brief is being filed in response to this Court's March 26, 2105 Order directing the parties and LGAL to address whether termination was in the best interests of the child. On behalf of the Minor child, this LGAL requests this Honorable Court to grant the Application for Leave to Appeal to this Court and reverse both the trial and appellate court decisions for termination of parental rights and remand to the trial court with instructions to continue further reunification and/or alternative planning efforts as to this child because termination was not in the best interests of this child. The other issues previously raised by Respondent-Appellant in the Application will not be addressed in this brief.

STATEMENT OF QUESTION PRESENTED

I **WHETHER THE CIRCUIT CLEARLY ERRED WHEN IT DETERMINED THAT TERMINATING RESPONDENT'S RIGHTS WAS IN THIS CHILD'S BEST INTERESTS GIVEN HER 14 YEAR OLD AGE, HER STATED PREFERENCE AGAINST TERMINATION AND THE LACK OF AN ADOPTION PLAN?**

The LGAL answers, "Yes".

The Petitioner-Appellee answers, "No".

The Respondent-Appellant answers, "Yes".

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STATEMENT OF JURISDICTION AND GROUNDS FOR REVIEW

The LGAL agrees with the jurisdictional statement submitted by Respondent-Appellant.

The LGAL contends that this Honorable Court should consider this appeal pursuant to MCR 7.302 (B) (5). This case is an appeal from decisions by both the trial and the lower appellate courts that were clearly erroneous and that will cause a material injustice.

The LGAL contends that termination was clearly against this child's best interests.

STATEMENT OF FACTS

Overview

The LGAL on behalf of the Minor Children accepts Respondent-Appellant's Statement of Facts. It should be noted that this LGAL was the attorney for this child and her siblings in all of the neglect proceedings involving them. A brief summary will be given to assist the court regarding the somewhat convoluted procedure in this matter.

Prior termination proceedings

This neglect case restarted in Oakland County Circuit Court in April 2009 as a temporary custody case because of the difficulties Respondent-Appellant, Ms. Reed was having with her oldest child, Jasmine Nabors; the other three children were not named in the petition or removed at that time. (See petition dated April 8, 2009.) At the same time, a delinquency incorrigibility petition was filed against Jasmine Nabors. The incorrigibility petition was tried before Referee Alvin and the child found incorrigible and put in a residential placement; the delinquency disposition was held on June 22, 2009.

At first, DHS was in agreement not to proceed with the neglect case if the family got services. See 5-6-09 p 4; 6-22-09 p 7. This went on until September 2009 when DHS refused to dismiss its neglect petition (as to the child Jasmine Nabors only) and the DHS made a Judge demand after which the case was moved to Judge Brennan. See, 9-1-09 p8-10.

The temporary petition was amended to add the other three children in January 2010. 1-13-09 pp 13-14. After a jury found jurisdiction after a trial held in February 2010 (2-4-10 pp 202-03), the case did proceed as a temporary custody case, and a PAA adopted in April 2010. (*See* 4-27-10pp 19-20.)

The child Jasmine remained out of Ms. Reed's custody but the other three stayed with her. 2-4-10 pp 206-08. Ms. Reed moved to Georgia and took Nykyla and Robin with her; she left Kyle in Michigan with his maternal grandfather. After DHS found out about the move and placement, the girls were returned to Michigan and placed and Kyle remained with his maternal relatives. 6-17-11 pp 27-29. *See also*, 12-9-10 pp 14-16.

A Supplemental Petition to Terminate was filed in March of 2011. After trial and best interest hearings, the court terminated Ms. Reed's rights as to three of the four children; the court did not terminate as to Nykyla McCarthy WHY??. Was it against her best interest to terminate?

These Proceedings before trial on Supplemental Petition

On March 5, 2012 the court adopted a new PAA with regard to Nykyla McCarthy only. Ms. Reed was residing out of state [in Georgia] and intended to remain out of state. 3-5-12 p 9. The terms of the agreement included: regular contact with the agency, individual therapy for Mother, regular contact with the child, a home assessment and verification of income. 3-5-12 pp 10-12. The court indicated that it was, "hopeful that . . . the goals can be accomplished. . . . 3-5-12 p 17.

The court held reviews on June 11, 2012 and July 30, 2012. At the July review Ms. Reed had made progress. She had completed a parenting class, was in counseling and had completed a private home study that found her home well suited for "family occupancy." The DFACS (Georgia Department of Family and Children's Services) study was still needed. 7-30-12 p 5-7. Ms. Reed's home had already been seen by the state of Georgia but the report not completed and that took six to eight weeks. Her concern was the investigator told her that she would not be approved because of her felony record. It would not be approved through the interstate compact.

At the permanency and planning hearing on October 29, 2012, there was concern about a lack of actual visits and because Georgia had denied the home study. 10-29-12 pp 5-6. The worker said it was denied because Ms. Reed did not provide requested documentation. 10-29-12 p 7. The court ordered the filing of a supplemental petition. 10-29-12 p 29 and 32-33.

The petition was filed on December 7, 2012. The pretrial on that petition was held on December 21, 2013.

Trial on the Supplemental Petition

The trial started on March 14, 2013. Ms. Reed was present with counsel. 3-14-13 pp 3-4 The prosecutor called Ms. Lori Lambersten. She is the foster care worker on the case and she works at the Ennis Center for Children. She wrote the petition to terminate. 3-14-13 pp 6-7. She talked about the current PAA filed in March of 2012. Ms. Reed was to have counseling. DHS approved her counselor but she stopped going in September 2012. She was to continue counseling and did not. 3-14-13 pp 8-9. Ms. Reed did successfully complete parenting classes. 3-14-13 p 10. She did not visit her child regularly in person. *Id.* Ms. Reed was to verify adequate housing and this was not done. 3-14-13 p 12. The state of Georgia denied her home for non-compliance. 3-14-13 p 12. She also did not have proof of Ms. Reed's income. 3-14-13 pp 12-13.

In January 2013 Ms. Reed said she was living in Michigan part time and gave a Belleville address. She never provided access to the home and she did not appear for supervised visits with her daughter at Ennis. 3-14-13 pp 14-15. She recommended termination. 3-14-13 p 16.

She became involved in the case because they expected to send the child home to her mother. The main thing that they needed was a home assessment. 3-14-13 p 17. The home

assessment was through the Interstate Compact. Ennis sent the request to Lansing DHS that in turn sent it to Georgia's DHS. She did not know the specifics as to how Ms. Reed was non-compliant. 3-14-13 pp 18-19. In Michigan, relatives with felonies or that are on the Central Registry are not eligible for placement. If Georgia had the same rules, Ms. Reed would be ineligible because of her felony. 3-14-13 pp 21-22. She has found that there are "significant challenges" when a person moves to another state in the middle of an abuse or neglect proceeding. 3-14-13 p 26. A parent has to do things on their own when they move. 3-14-13 p 27. They tried to reopen the home study with Georgia but Georgia denied that request. So based on this non-compliance and prior non-compliance by the Mother, the decision was made in October 2012 to file for termination. 3-14-13 p 29. Ms. Reed did pay to get a private entity home study. 3-14-13 p 32. Georgia said it might reopen if Ms. Reed acknowledged that the file was closed due to her non-compliance and if she promised to respond appropriately. This was never conveyed to Ms. Reed until two days before the recommendation to terminate rights because she stated she would just move back to Michigan. 3-14-13 pp 33-34. They had received a copy of her lease. 3-14-13 36.

She was aware that Ms. Reed came to Michigan in June of 2012. She had no confirmation for her visit in October 2012. 3-14-13 pp 39-41. She was told that Nykyla spoke with her Mother five days a week by phone. They also had contact by Skype. Her Mother bought her the tablet to use for Skype and Facebook. The first tablet was lost or stolen and Ms. Reed had to replace it. 3-14-13 pp 45-47.

Ms. Reed is aware of Nykyla's problems at school and had been talking to Nykyla about those difficulties. 3-14-13 p 64. Ms. Reed's therapist in Georgia was approved by

DHS. 3-14-13 pp 65-66. Her phone calls to her daughter were frequent and appropriate with her daughter r. It did keep her connected to her daughter. 3-14-13 pp 69-70.

The court admitted the Georgia home study denial packet as Plaintiff's Exhibit 1 over objection. 3-14-13 pp 77-79.

Ms. Reed testified that she went to parenting classes that she was referred to by Georgia's DFACS (Human Services.) She received a certificate that was admitted as Respondent's Exhibit C. 3-14-13 pp 79-82. Ms. Reed is a hair stylist. She and a partner run a hair salon. There were 7 stylists and her, now there are only three other stylists. The others pay her and her partner to rent a chair. In 2011 she was independent and not a partner. That was what the tax form was from. It was from her tax preparer. 3-14-13 pp 83-86.

She provided the same form to Georgia DFACS. She also gave them a copy of her driver's license. She stopped counseling because they told her she was done. She switched to Biblical studies. 3-14-13 pp 87-88. DHS made the referral for a home assessment. The Georgia DFACS contacted her. She received a letter from the investigator that in June. 3-14-13 pp 89-90 .The letter said they were investigating her as a "relative" placement, not as her Mother. The letter gave a list of things she was to do. 3-14-13 pp 91-92. She had to complete a questionnaire. She had to get fingerprints. She had to have a criminal record check and a drug screen. She gave them her tax papers. She also had to get two references from people who were non-relatives. They told her they sent them. She filled out the firearms safety form and the child safety agreement. She also gave a form to her doctor confirming her medical health and last physical. 3-14-13 pp 93-96. The investigator said they were waiting on the medical records from her doctor. She recalls the investigator telling her that if she had a felony or was on the

central registry she would be denied as a relative placement. 3-14-13 pp 97-98. She was concerned and called her attorney. The investigator suggested an independent home evaluation by someone contracted through DFACS. 3-14-13 pp 98-99. So she got the independent evaluation. The independent evaluator prepared a report and took pictures. DHS said they would accept it at first then they changed their mind. These exhibits, A and B were admitted without objection. 3-14-13 pp 102-104. She knows they were waiting on the medical report. 3-14-13 pp 105-06. She was warned that the investigation would be closed out if they did not receive the form back. She was told they never received the medical letter from the doctor's office. 3-14-13 p 106.

She believes that her home is appropriate. She has a bed for Nykyla. She has adequate income and family support from Nykyla's Dad. She still has her apartment in Georgia. 3-14-13 pp 111-12. She did see her daughter in September and October 2012. She saw her in October at her father's (maternal grandfather's) home. 3-14-13 pp 112-13. Her father did not want issues DHS. 3-14-13 pp 113-14. She talks to her daughter almost every day. She has sent money for Nykyla. She has done all that was asked of her and she poses no risk to her daughter. 3-14-13 pp 115-16. The court suspended in person visitation in October 2012. 3-14-13 p 122.

The foster care worker did not encourage her to move to Michigan after Georgia denied the home study. She was told that the other home study and pictures would be sufficient. She could move here and have a job at her brother's nightclub. 3-14-13 pp 128-29. She never was told there was a problem with her income information. She was never asked for information from 2012. 3-14-13 pp 130-31.

She decided she would try to move back to Michigan. But she still has a lot of things

going on in Georgia. She has the apartment lease and a lease on the business. She is going to move into her brother's refinished basement apartment. 3-14-13 pp 135-36. She has also gone to New York for testing to be her uncle's kidney donor. 3-14-13 pp 137-38.

All parties rested. 3-14-13 pp 144-45. The prosecutor argued that the statutory grounds in the petition, MCL 712A.19b(3)(c)(i), MCL 712A.19b(3)(g) and MCL 712A.19b(3)(j) had all been met. 3-14-13 pp 145-46. Mother's attorney disputed this (3-14-13 pp 146-50), and this attorney contended that prosecutor had met his burden. 3-14-13 pp 151-53

The court ruled finding the statutory grounds had been made, adopting the LGAL's argument. Ms. Reed had not complied with the PAA. She did not continue therapy. 3-14-13 pp 153-54. The court also found that there was "no expectation" that proper care and custody would be resolved within a reasonable time. She herself is not stable and there is no clear plan. She has many financial issues and it was not credible that she intends to live in Michigan. She had not prioritized her child or seen her. The Georgia home study was just one aspect of the non-compliance and non-cooperation. 3-14-13 pp 154-157. The court ordered a psychological of the child and set the matter for best interests testimony. Phone and Skype contact could continue. 3-14-13 pp 158-59.

At the next hearing, Mother's attorney called Grace Anderson by phone. 5-1-13 pp 10-11. She is a certified Biblical Counselor at the Hebron Baptist Church in Dacula Georgia. This is a non-paid service. She last spoke to Ms. Reed in the fall of 2012. Before that she had seen her for about a year, every week at first then every other later. She was not sure why they stopped counseling but it had to do in part with Ms. Reed's employment. 5-1-13 pp 13-15. They talked about family issues, how to raise children and discipline. She had seen her 30 to 35 times. 5-1-

13 pp 15-16. She believed Ms. Reed had a good support system in Georgia. It was okay to stop counseling pending her child's return. 5-1-13 pp 18-19.

She believed that Ms. Reed was able to take care of her children when they stopped counseling. She believed this because Ms. Reed had grown and matured and realized that the children come first. 5-1-13 pp 23-24. She is only available on Mondays to counsel. She knew she had to take a parenting class and get records together. She did not know how often she came to Michigan to visit. 5-1-13 pp 25-26. She thought Ms. Reed's plan was to reunite with her children in Georgia. 5-1-13 pp 28-29. The child wanted in person visits with her mother in addition to phone and Skype. The court denied the request. 5-1-13 pp 32-33.

At the continued best interests hearing, the Ennis foster care worker Ms. Lambertsen testified that Nykyla came into care in November 2010. She came into care after her mother had issues with her older teenage sister Jasmine. She has been in the same licensed foster care placement since her removal. She asked for rights to be terminated for the best interest of the child. She did not believe the child had a real relationship with the Mother and she needs structure and stability. 7-15-13 pp 5-7. It was not clear where Ms. Reed was currently living or working. Nykyla has her own issues and she needs structure. 7-15-13 pp 7-8. She believed the bond was a "friendship bond". 7-15-13 p 9.

She was told by Ms. Reed that the reasons for the Georgia denial were the felony conviction and the doctor physical that was not received. 7-15-13 pp 14-15. She herself had never seen Nykyla with her Mother. The DHS would have returned the child if the Georgia study had gone through, despite the lack of "bond" between them. 7-15-13 pp 17-18. The foster care parent will keep Nykya if rights are terminated. 7-15-13 pp 24-25.

Part of her recommendation was about the question regarding where Ms. Reed was living. Another issue is her concern about Ms. Reed's ability to parent a teenager. 7-15-13 pp 30-31.

Dr. Park is a psychologist at the Oakland County Psychological Clinic. He evaluated Ms. Reed and Nykyla McCarthy. Ms. Reed's evaluation was the week before and the child's was in April 2013. He also reviewed prior evaluations. 7-15-13 pp 36-37. His prior recommendation was termination of Ms. Reed's rights as to all four children. Her testing on the MMPI was invalid at the last interview. 7-15-13 pp 38-39. He had concerns about Nykyla being a teenager and having problems and the potential of problems arising like with her older sister. Another concern was her lack of actual contact or visits since October 2012. Nykyla also could not identify positive things about her mother. 7-15-13 pp 40-41. They have more of a "friend" relationship. Ms. Reed also feels that her children were wrongly removed. He believed rights should be terminated. 7-15-13 pp 42-43.

He believed that Ms. Reed did not understand the problems that Nykyla was having. He thought she needed therapy. 7-15-13 pp 47-48. This was probably the fourth time Ms. Reed took the MMPI. She did cooperate in the interview. She had driven in that morning from Georgia to attend the interview. 7-15-13 pp 51-52. The child is depressed and has exhibited unpredictable behavior. 7-15-13 pp 57-58. Her behavior would continue if she was returned to her mother. Ms. Reed did say she would look for a different school district. 7-15-13 pp 59-60. The evaluations were admitted without objection. 7-15-13 p 64.

The prosecutor called the child. Nykyla McCarthy. She is fourteen and she has lived with her foster mom since November 2010. 7-15-13 pp 67-68. She is stressed out because she wants to go home to her mom. She talks to her Mother almost daily and they Skype. Her

Mother gives her advice about problems and school issues. She did not tell her Mother about her bad grades. 7-15-13 pp 72-73. Her Mother gives her money for things. Her Mother sends money orders. Church is a part of her life and it was also when she was with her Mother. 7-15-13 pp 75-76. She does not care where she lives with her Mother. 7-15-13 pp 77-78. She attends Pontiac Middle School. 7-15-13 pp 82. She believed her mom would discipline her verbally. 7-15-13 pp 83-84.

She has always wanted to go back to her Mother. 7-15-13 pp 85-86. When she was living with her in Georgia they were in an apartment. She went to school and she had enough food. She loves her Mother and wants to live with her. 7-15-13 pp 87-88.

Ms. Reed was recalled. She has an apartment in Georgia. It is a two bedroom, two baths. 7-15-13 pp 87-98. She has talked about Nykyla's school with her foster mom. She loves Nykyla more than anything in this life. 7-15-13 pp 101-02. The court had to adjourn and set the arguments for a later date. 7-15-13 pp 123-24

The prosecutor argued that it was in the child's best interests to terminate because she did not consider her child's best interest. Ms. Reed has made no progress. 7-30-13 pp 6-8. Ms. Reed's attorney contended that it was in the best interests of this child not to terminate. 7-30-13 pp 14-17. The LGAL contended that the court should not terminate Ms. Reed's rights but look at an alternative plan of guardianship. This would give Nykyla stability but also give Ms. Reed more time to get herself together. 7-30-13 p 22.

The Court issued a written Opinion and Order dated August 29, 2013.

The Trial Court filed its Order of Termination and Opinion and Order on August 29, 2013. Review of the court file would support Respondent's statement that a copy of these

documents were never received by the Respondent from the court. Instead the documents were emailed to her by her trial counsel on September 10, 2013. (See Affidavit of Nicolas Camargo, Respondent's trial attorney.)

Appellate Proceedings

Respondent timely requested Appellate counsel on September 20, 2013. The Court of Appeals found her request untimely and ordered the appeal to be filed as an Application for Leave to Appeal by order dated November 8, 2013. The Court of Appeals then denied the Application on January 29, 2014.

The Respondent filed an Application for Leave to Appeal to this Michigan Supreme Court and by order dated March 14, 2014 this court remanded the case to the Court of Appeals for "consideration as on leave granted." On September 23, 2014 the Court of Appeals remanded the matter for further proceedings in the trial court retaining jurisdiction. Specifically, the Court of Appeals ordered the trial court to "make brief, definite, and pertinent conclusions of law regarding the statutory grounds for termination." The court also issued a simultaneous opinion denying the due process argument and it based upon its ruling to remand, it did not address the argument regarding whether termination was in the child's best interest. After remand, the Court of Appeals by opinion dated January 15, 2015 again affirmed the trial court's decision to terminate and further found that termination was in the child's best interest.

Respondent has again filed an Application for Leave to Appeal to this Michigan Supreme Court. This is the LGAL's brief in response filed in response to this court's March 26, 2015 Order directing the parties to brief the issue as to whether termination was in this child's best interests.

ARGUMENT

In this appeal, the LGAL on behalf of the child agrees with Respondent-Appellant mother's argument that the Court of Appeals erred in terminating Respondent's rights to this child. Although there was no violation of due process and there was sufficient evidence to support the statutory bases for termination by clear and convincing evidence, as this attorney contended in the trial court, it is contended here; **it was not in the best interests of this child to terminate her Mother's parental rights.** The child was 14 years old at the time, she stated very clearly that she did not want her Mother's rights terminated, she was bonded to her Mother and there was no adoption plan in the works for her. Even if the trial court was not inclined to reunify this child with her Mother, there were available suitable plans short of termination to give this child stability.

ARGUMENTI

THE CIRCUIT CLEARLY ERRED WHEN IT DETERMINED THAT TERMINATING RESPONDENT'S RIGHTS WAS IN THIS CHILD'S BEST INTERESTS GIVEN HER 14 YEAR OLD AGE, HER STATED PREFERENCE AGAINST TERMINATION AND THE LACK OF AN ADOPTION PLAN

Standard of Review and Overview:

Respondent-Appellant contends that the Court clearly erred in its finding that termination of her parental rights would be in the best interests of this child. *In re Moss*, 301 Mich App 76, 83; (2013) states that the decision regarding whether termination is in the child's best interests is to be determined by a preponderance of the evidence. Review of the trial court's decision regarding the child's best interests is reviewed for clear error. *In re: Trejo*, 462 Mich 341, 356-357 (2000); MCR 3.977(K). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re: BZ*, 264 Mich App 286, 296-297 (2004).

This LGAL contends that on the whole record, it was not in the best interests of this child that her Mother's parental rights were terminated. This LGAL contends that the court did not give enough weight to the facts that this child was fourteen years old and she did not want her Mother's rights terminated and that there was no adoptive family in the picture. Although there is no clear guidance in the Juvenile Code, the Child Custody Act of 1970 in MCL 722.23 and both the Estates and Protected Individuals Code and the Probate Code in various places give weight to the child's preference if the child is of sufficient age, and often at age fourteen.

A. The Law does not clearly identify the best interests factors in a Juvenile Matter

The Juvenile Code does not define "best interests of the child" in a child protection proceeding. In contrast, the Child Custody Act of 1970, in MCL 722.23 outlines and identifies the factors to be, "considered, evaluated, and determined by the court." Because there is not a clear "best interests" section in the Juvenile Code, practitioners often look to the Child Custody Act factors as a guide for the discussion of the issue in abuse and neglect matters. Even this Court's March 26, 2015 Order refers to this section of the Child Custody Act.

The law on the issue is also not clear as to what factors are to be utilized in determining best interests. Other than a mandatory evaluation and discussion when the child lives with relatives at the time of the termination proceeding, *see, In re: Mason*, 486 Mich 142,164 (2010) and *In re: Mays*, 490 Mich 997 (2012), the published cases seem to piecemeal discuss the factors from the Child Custody Act; the majority of cases discussing best interests are not published opinions and at best they carry only persuasive authority.

In re: Olive/Metts, 297 Mich App 35, 41-42 (2012) does discuss some factors that a trial court may consider when evaluating best interests. These include, the child's bond, the parent's parenting ability, the child's need for permanency and the advantages of the foster home. But the court reiterates that the individual facts of each child's situation has to be looked at. *Id*, at 42.

B. The Child Custody Act, the Probate Code and The Estates and Protected Individuals Code give weight to the preference of the Child at age 14 or younger

In section MCL 722.23 of the Child Custody Act , titled ' "Best interests of the child" defined', subsection (i) states that the court should identify:

> The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

Case law interpreting this section leaves it to the trial court to determine whether a child is old enough to express a preference; those factual findings are reviewed for clear error. It should be noted that children as young a six years old have been found to be of sufficient age to express preference. *See, Kubicki v Sharpe,* 306 Mich App 525 at 544 (2014), citing *Bowers v Bowers*, 190 Mich App 51, 55 (1991).

Similarly, multiple sections of the Probate Code look to the "preference" of the children when making decisions regarding them. Among these is MCL 710.44 the Consent to Adoption section. MCL 710.44 (12) specifically lays out the factors for "best interest of the child" in that section. Among those is section (h) which states:

> (h) The child's reasonable preference, if the child is 14 years of age or less [sic and] if the courts considers the child to be of sufficient age to express a preference.

MCL 711.1 regarding name changes similarly states in section (6) that a 14 year old child must give written consent to his or her name change. The section continues to state that if the child is of "sufficient age to express a preference, the court shall consult a minor under 14 years of age as to a change in his or her name, and the court shall consider the minor's wishes."

The Estates and Protected Individuals Code also gives preference to a 14 year old's wishes in several sections. MCL 700.5203 allows a minor 14 years old or older to prevent the appointment of a guardian over him or her. Similarly, MCL 700.5213(1)(a) states that the minor must be served with the petition for appointment of a guardian over him or her and in (4) states that a minor 14 or older may have a appointed lawyer-guardian litem to represent and give the minor's preference.

In summary, there are many places in the law to look for factors to be considered when evaluating the "best interests" of the child, and they often give special consideration for older children, those 14 years old or younger if deemed appropriate by the court. This law is found in traditional "probate court" sections, and the Child Custody Act. These sections can be viewed as an acknowledgment that a 14 year old is mature enough to give a valid and meaningful preference. As in those statutes, this preference should also be given weight in a child protective proceeding under the Juvenile Code.

C. The facts did not support termination

The child was 14 years old when these proceedings occurred (her date of birth is June 2, 1999) , and she desperately wanted to live with her Mother. She also has a bond to her. 7-15-13 pp 72-73. This bond is one factor in the best interest determination. *See, In re: BZ*, 264 Mich App 286 (2004) at 301. Dr. Park testified in the previous hearings that Nykyla wanted to live with her mother. Nykyla testified to the same thing, that she wanted to go home with Ms. Reed.

Another factor in the "best interest" analysis is the parent's parenting ability. *See, In re: Jones*, 286 Mich App 126, 129-30 (2009). Ms. Reed testified that she completed parenting classes and she was gaining insight into how her behavior affected her kids. *Id.*

Another factor in the "best interest" analysis is the child's need for permanency and stability and finality. *See, In re: Gillespie*, 197 Mich App 440, 446-47 (1992).

In this case, the current foster caregiver said she would keep Nykyla for the long term. However, she did not say she would adopt her. It should be noted that in fact the child is no longer with the foster parent but instead placed with the paternal grandfather. If the court placed her in guardianship, she could be maintained in her current placement with court supervision

while Ms. Reed worked on her own situation. A guardianship would ensure that this child would be protected because there would be court jurisdiction and monitoring, and control over the Mother's interactions with Nykyla. Further, the guardianship would remain open until Mother proved that she could provide a safe and stable home for her child.

Finally, another factor, similar to the last one, in the "best interest" analysis is where the children are placed at the time of the hearing. *See, In re: Olive/Metts*, 297 Mich App 35 (2012). While in that case the court focused on the child's relative placement, it clearly said that the current living situation had to be considered. In this case the child was living in a foster care home; this child did not want to be adopted and **the foster care placement was not interested in adopting her.** Despite these facts, the court did not focus on the child, but on the Mother's failings. Respondent is a difficult person and her stubbornness and inability to get along with DHS and its employees obviously impeded her progress throughout this matter. But termination should not be used as a punishment--t should be used to improve the situation of the child. Here there was no real "permanent plan".

Looking at the record as a whole and weighing the above factors there was not even a preponderance of the evidence, let alone clear and convincing evidence that termination was in Nykyla McCarthy's best interest. It is understandable that the court was frustrated about the length of time that this case has gone on. However, as in the prior termination proceeding, in this one, it was not in the best interests of this child to terminate. For this reason the order terminating parental rights should be reversed.

RELIEF REQUESTED

The Order Terminating Parental Rights dated August 29, 2013 should be reversed and the case remanded for other alternative planning as to this child.

Respectfully submitted,

Dated: April 13, 2015

Stephen Raimi (P19195)
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April 15, 2015

Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
925 Ottawa St.
Lansing, MI 48913

RE: **MI Sup Ct No: 151039**
Ct App No: 318855
Trial Ct No: 07-739244 NA
In re: Nykyla McCarthy

Dear Sir/Ms:

Enclosed please find one original LGAL Brief filed in Response to Respondent-Appellant Tracy Reed's Application for Leave to Appeal and seven copies, and Proof of Service for filing. I am court appointed.

This brief is being filed in response to this court's March 26, 2105 Order directing the parties and LGAL to address whether termination was in the best interests of the child. If questions remain, please call this office.

Sincerely,

Stephen A. Raimi

Encl.
cc: Susan Loveland for Appellant
Oakland County Prosecutor for DHS

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

In the Matter of:
Nykyla McCarthy, minor,

Department of Human Services,
Petitioner-Appellee,

vs.

TRACY REED,
Respondent-Appellant,

MSC CASE NO: 151039
CT. APP. CASE NO. 318855
LOWER CASE NO.07-739244 NA

PROOF OF SERVICE

Nancy A. Plasterer, of the City of Bloomfield Hills, County of Oakland, State of Michigan, states that on the 15th day of April 2015, she served a copy of:

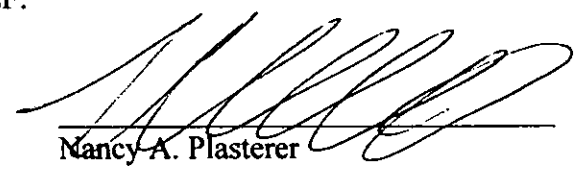
THE MINOR CHILD'S
RESPONSE BRIEF TO APPLICATION FOR LEAVE TO APPEAL

upon:

Susan Loveland	Oakland County Prosecutor
2360 Orchard Lake 108	1200 N. Telegraph
Sylvan Lake, MI 48320	Pontiac, MI 48341

by placing said documents in a properly addressed envelope, and depositing same in a United States Mail Receptacle with first class postage prepaid.

I DECLARE THAT THE STATEMENTS ABOVE ARE TRUE TO THE BEST OF MY INFORMATION, KNOWLEDGE AND BELIEF.



Nancy A. Plasterer