

**State of Michigan
In The Supreme Court
On Appeal from the Michigan Court of Appeals
(Gadola, Patel, Young)**

IN RE BARBER/ESPINOZA, Minors. Supreme Court No. 167745

Court of Appeals No. 369359

Lenawee County Circuit Court
Case No. 23-000033-NA
Hon. Anna Marie Anzalone

Nastassja A. Thomas (P83409)
VIRTUOUS LEGAL SERVICES
Attorney for Petitioner-DHHS
PO Box 221
Saline, MI 48176
(734) 506-0561
nthomas@vlspllc.com

Vivek S. Sankaran (P68538)
CHILD WELFARE APPELLATE
CLINIC- UNIVERSITY OF
MICHIGAN LAW SCHOOL
Attorney for Respondent-Mother
701 S. State St.
Ann Arbor, MI 48109
(734) 763-5001
vss@umich.edu

Carson K. Howatt (P87613)
PUBLIC DEFENDER'S OFFICE
Lawyer-Guardian Ad Litem
113 W. Front St.
Adrian, MI 49221
(517) 264-5348
carson.howatt@lenawee.mi.us

Nicole S. Underwood (P76073)
UNDERWOOD LAW, PLLC
Attorney for Father
126 E. Church St.
Adrian, MI 49221
(517) 260-1576
nicoleunderwoodlaw@gmail.com

**BRIEF OF AMICUS CURIAE
FAMILY LAW SECTION OF THE STATE BAR OF MICHIGAN**

- Oral Argument NOT Requested -

By: Jordan M. Ahlers-Smith (P84538)
Co-Chair, Amicus Committee
State Bar of Michigan
Family Law Section
819 N. Washington Ave.
Lansing, MI 48906
(517)482-8933
jahlers@speakerlaw.com

TABLE OF CONTENTS

Index of Authorities	3
Statement of Interest of Amicus Curiae.....	5
Statement of Jurisdiction.....	6
Statement of the Questions Involved.....	7
Statement of Facts.....	7
Legal Standard	8
Argument.....	8
I. In a child welfare case, any action affecting a legal parent’s right to care, custody, and/or control of their child is a “removal” under the Juvenile Code, which requires the parent to be afforded all due process rights permissible in that proceeding, including the advice of appellate rights. As such, the Trial Court’s failure to advise Respondent-Mother of her appellate rights following the preliminary hearing was a plain error affecting Respondent-Mother’s substantial rights.....	8
A. A parent’s “custody” is defined by statute.....	9
B. The precedent of this Court is supportive of a broader definition of “removal” than what has been articulated by the Court of Appeals.	11
C. The narrow definition of “removal” leads to absurd results, deprives parents of fundamental rights, and encourages bad behavior on the part of child protection agencies and non-respondent parents.	13
D. Based on the above precedent, the Trial Court’s failure to advise Respondent-Mother of her appellate rights was a plain error affecting her substantial rights.	15
Relief Requested.....	16

INDEX OF AUTHORITIES

Cases:

<i>Dailey v Kloenhamer</i> , 291 Mich App 660; 811 NW2d 501 (2011).....	10-11
<i>In re AJR</i> , 342 Mich App 1; 993 NW2d 1 (2022)	8, 10-14
<i>In re AP</i> , 283 Mich App 574; 770 NW2d 403 (2009)	11
<i>In re Barber/Espinoza</i> , ____ Mich App ____; ____ NW3d ____ (2024).....	7, 15
<i>In re Credit Acceptance Corp</i> , 273 Mich App 594; 733 NW2d 65 (2007)	15
<i>In re Ferranti</i> , 504 Mich 1; 934 NW2d 610 (2019).....	7
<i>In re Mason</i> , 486 Mich 142; 782 NW2d 747 (2010)	11-12
<i>In re Rood</i> , 483 Mich 73; 763 NW2d 587 (2009)	9-11, 15
<i>In re Sanders</i> , 495 Mich 394; 852 NW2d 524 (2014)	12
<i>Merecki v Merecki</i> , 336 Mich App 639; 971 NW2d 659 (2021)	11
<i>People v Cole</i> , 491 Mich 325; 817 NW2d 497 (2012).....	10
<i>Reist v Bay Co Circuit Judge</i> , 396 Mich 326; 241 NW2d 55 (1976)	9
<i>Richardson v Jackson Co</i> , 432 Mich 377; 443 NW2d 105 (1989).....	10 n 2
<i>Rossow v Aranda</i> , 206 Mich App 456; 522 NW2d 874 (1994).....	11
<i>Santosky v Kramer</i> , 455 US 745; 102 SCt 1388; 71 Led2d 599 (1982)	9
<i>Shann v Shann</i> , 293 Mich App 302; 809 NW2d 435 (2011).....	11, 14

Statutes and Court Rules:

MCL 712A.1	5
MCL 712A.2(b)(1)(C).....	10
MCL 712A.13a	11, 14
MCL 712A.18f(1)	14
MCL 712A.19(3)	14
MCL 712A.19a	7, 14
MCL 722.21	5
MCL 722.26a(7)	10-11

MCL 722.638.....	7
MCR 3.965.....	7-8, 11, 13-16
MCR 3.966(A)(2)	14
MCR 3.975(C)	14
MCR 3.993(A)(1)	8
MCR 7.212(B)	17
MCR 7.303(B)(1)	6
MCR 7.312.....	5 n 1, 17

STATEMENT OF INTEREST OF AMICUS CURIAE

The Family Law Section Council¹ (“The Council”) is the governing body of the Family Law Section (“The Section”) of the State Bar of Michigan. The Section is comprised of over 2,500 lawyers in Michigan practicing in, and committed to, the area of family law. The Section members elect the members of the Council. The Council provides services to its membership in the form of educational seminars, monthly Family Law Journals (an academic and practical publication reporting new cases and analyzing decisions and trends in family law), advocating and commenting on proposed legislation relating to family law topics, and filing Amicus Curiae briefs in selected cases in the Michigan Courts. Because of its active and exclusive involvement in the field of family law, and as part of the State Bar of Michigan, the Council has an interest in the development of sound legal principles in the area of family law. The instant case presents an issue of the intersection of child welfare law (pursuant to the Juvenile Code, MCL 712A.1 *et seq*) and the definitions, legal concepts, and case law interpreting the Child Custody Act (MCL 722.21 *et seq*). This case specifically concerns the rights of parents and children who may not share equal parenting time pursuant to a court order. The Council, on behalf of the Section, presents its position on the issues as invited by this Court in its January 24, 2025 order.

¹ Pursuant to MCR 7.312(H)(5), the undersigned certifies that no counsel for a party authored the instant brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the instant brief, and no person other than the amicus curiae, its members, or its counsel, made such a monetary contribution.

STATEMENT OF JURISDICTION

The Section agrees that this Court has jurisdiction over the instant matter pursuant to MCR 7.303(B)(1).

STATEMENT OF THE QUESTIONS INVOLVED

In its January 24, 2025 order, this Court posed five questions:

(1) Whether reasonable efforts to reunify the child and the respondent must be made where the respondent was not the perpetrator of criminal sexual conduct involving penetration, but instead facilitated, encouraged, or allowed such conduct by a third party in exchange for some benefit to the respondent, *see* MCL 712A.19a(2)(a), MCL 722.638(1) and (2); (2) if reasonable efforts were required, whether the lack of reasonable reunification efforts in this case was plain error affecting the respondent's substantial rights, *see generally In re Ferranti*, 504 Mich 1, 29 (2019); (3) whether the Department of Health and Human Services satisfied the requirements of MCL 722.638(3); (4) if the Department of Health and Human Services satisfied the requirements of MCL 722.638(3), whether the termination of the respondent's parental rights should be affirmed under that provision; and (5) whether the failure to advise the respondent of her right to appeal following the preliminary hearing was plain error affecting the respondent's substantial rights, *see* MCR 3.965(B)(15)?

The Section does not take a position on questions one, two, three, and four. In regards to question five, the Section argues that it was a plain error affecting Respondent-Mother's substantial rights for the Trial Court to fail to advise Respondent-Mother of her right to appeal following the preliminary hearing, as, in a child welfare case, any action affecting a legal parent's right to care, custody, and/or control of their child is a "removal" under the Juvenile Code, which requires the parent to be afforded all due process rights permissible in that proceeding, including the advice of appellate rights.

STATEMENT OF FACTS

The Section concurs with the facts of this matter as presented by the Court of Appeals' opinion. *In re Barber/Espinoza*, ____ Mich App ____; ____ NW3d ____ (2024), slip op pp. 1-2, 10-11.

LEGAL STANDARD

The Section concurs with the standard of review presented in the Appellant's Application for Leave to Appeal. (10/31/2024 Application , pp. 16-17).

ARGUMENT

- I. **In a child welfare case, any action affecting a legal parent's right to care, custody, and/or control of their child is a "removal" under the Juvenile Code, which requires the parent to be afforded all due process rights permissible in that proceeding, including the advice of appellate rights. As such, the Trial Court's failure to advise Respondent-Mother of her appellate rights following the preliminary hearing was a plain error affecting Respondent-Mother's substantial rights.**

The Michigan Court Rules provide that, in child welfare proceedings, "any order removing a child from a parent's **care and custody**" is appealable to the Court of Appeals by right. MCR 3.993(A)(1)(emphasis added). To afford litigants in a child welfare proceeding proper due process, the Court Rules also require trial courts to advise the litigants of their appellate rights at various points in the proceeding, including following a preliminary hearing "[i]f the court orders removal of the child from a parent's **care or custody.**" MCR 3.965(B)(15)(emphasis added). The parties to this matter and, indeed, the Michigan Court of Appeals, have focused on the physical aspect of removing a child from one parent's physical "custody." *See In re AJR*, 342 Mich App 1, 6-7; 993 NW2d 1 (2022) ("a child is removed from a parent's care and custody when he or she is taken from that parent's residence and placed in a different residence").

However, because "custody" under Michigan law is **NOT** limited to simply the physical location of a child, defining a "removal" as only those instances where the child is taken from the actual, physical control of a respondent-parent impermissibly limits the definition of "custody" to only "physical custody," undermines decades' worth of precedent, and encourages game playing on the part of child protection agencies and non-

respondent parents to limit the constitutional rights of respondent-parents who do not physically possess the child at the time the petition and request to remove are filed. As such, the Section urges this Court to conclude that a “removal” is not limited to simply the physical act of transporting a child to a different location. The Section further urges this Court to conclude that, based on the statutory definition of “custody” as defined by the Child Custody Act, and the plethora of precedent regarding a parent’s constitutional right to control and direct the care and custody of their child, any action on the part of the court that limits and/or affects a legal parent’s right to the care, custody, and control of their child is a “removal” such that the parent has a right to appeal such action to the Michigan Court of Appeals by right.

A. A parent’s “custody” is defined by statute.

As summarized by this Court in *In re Rood*,

A natural parent has a fundamental liberty interest “in the care, custody, and management” of his child that is protected by the Fourteenth Amendment of the United States Constitution, *Santosky* [*v Kramer*, 455 US 745, 753;] 102 SCt 1388[; 71 Led2d 599 (1982)], and by article 1, § 17, of the Michigan Constitution, *see Reist v Bay Co Circuit Judge*, 396 Mich 326, 341–342; 241 NW2d 55 (1976) (Levin, J.) (stating that parents and children have fundamental rights “in their mutual support and society”). As the United States Supreme Court stated in *Santosky*, 455 U.S. at 753–754, 102 S.Ct. 1388:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.... When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

In re Rood, 483 Mich 73, 91; 763 NW2d 587 (2009).

The Juvenile Code itself does not define the term “custody,” however, MCL 712A.2(b)(1)(C) details that, for purposes of establishing jurisdiction over a child, “[w]ithout proper custody or guardianship’ does not mean a parent **has placed the juvenile with another person who is legally responsible for the care and maintenance of the juvenile** and who is able to and does provide the juvenile with proper care and maintenance.” This definition is not limited to simply the physical control of the child’s person or location, unlike the interpretation found in *AJR. AJR*, 342 Mich App at 6-7. Clearly and based on this plain language from the statute, the Legislature intended for “custody” to be defined in a broader sense: not only the physical control of the child, but also the legal authority to care for the child. *See, e.g. People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012) (The intent of the Legislature is expressed in the statute’s plain language.). This definition is consistent with the definition of “joint custody” found in the Child Custody Act²:

As used in this section, “joint custody” means an order of the court in which 1 or both of the following is specified:

(a) That the child shall reside alternately for specific periods with each of the parents.

(b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

MCL 722.26a(7). “Although not specifically designated in the statute, the custody described in § 6a(7)(a) is commonly referred to as joint physical custody, and that described in § 6a(7)(b) is referred to as joint legal custody.” *Dailey v Kloenhamer*, 291 Mich App 660, 670; 811 NW2d 501 (2011). Depending on the language of the court order, a parent’s “custody” of a child therefore could mean that the child “reside[s] alternately for specific periods with” that parent, that parent has “decision-making

² As both the Juvenile Code and the Child Custody Act “relate to the same person or thing, to the same class of persons or things, or have the same purpose or object,” this Court may read them *in pari materia*. *Richardson v Jackson Co*, 432 Mich 377, 384; 443 NW2d 105 (1989).

authority as to the important decisions affecting the welfare of the child,” or both. *Id.*

An order “removing” a child from a parent’s care impacts both the parent’s physical control of the child and the right of that parent to make important decisions concerning the child’s welfare, as the child has been placed in a different physical location and the parent does not have the ability to decide where that location is or when the child may be moved. MCR 3.965(B)(13)(b), (C)(2); MCL 712A.13a(5). Stated differently, an order “removing” a child from a parent’s “custody” eliminates (another definition for “remove” which was not considered by the *AJR* court) both the parent’s physical and legal custody. MCR 3.965(B)(13)(b), (C)(2); MCL 712A.13a(5). This definition also finds support in the fact that removal of a child from a parent’s care and custody in a child welfare case constitutes proper cause or change of circumstances to change custody. *Shann v Shann*, 293 Mich App 302, 306; 809 NW2d 435 (2011)(citing *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994)); see also *In re AP*, 283 Mich App 574, 603; 770 NW2d 403 (2009). Additionally, Courts of this State also do not differentiate between the two types of “custody” when considering proper cause or change of circumstances, meaning that a “removal” order can be used as proper cause or change in circumstances to justify revisiting either or both legal and physical custody. *Merecki v Merecki*, 336 Mich App 639, 647; 971 NW2d 659 (2021); *Shann*, 293 Mich App at 306.

B. The precedent of this Court is supportive of a broader definition of “removal” than what has been articulated by the Court of Appeals.

Although this Court has not explicitly provided a definition of “removal” in the context of the Juvenile Code, several other cases this Court promulgated about the rights of parents in child welfare proceedings support of a definition of “removal” that includes removing a parent’s right to make decisions about the welfare of their child.

As this Court noted in *Rood*, before a removal order may be entered, parents are afforded certain rights, including the ability to identify any “relatives of the child who might be available to provide care.” *Rood*, 483 Mich at 94-95; MCR 3.965(B)(14). This Court in *In re Mason* expanded

upon the idea behind this requirement in finding that the respondent-parent in that case may have been able to provide proper care and custody for the child “by voluntarily granting legal custody to his relatives during his remaining term of incarceration.” *In re Mason*, 486 Mich 142, 161 n 11, 163; 782 NW2d 747 (2010). This Court reiterated this principle in *In re Sanders* when overruling the “one parent doctrine,” and further noted that, when a respondent-parent takes steps to ensure that the legal authority to care for their child or children has been transferred to another, “[a]s long as the children are provided adequate care, state interference with such decisions is not warranted.” *In re Sanders*, 495 Mich 394, 421; 852 NW2d 524 (2014).

These cases lend support to the notion that a “removal” encompasses far more than simply a relocation of the child from one address to another, as, although the respondent-parents made requests to have the placements of the children changed post-removal, it was up to the child protection agency and the court to decide whether to make those requested changes. *See Sanders*, 495 Mich at 402-403; *see also Mason*, 486 Mich at 148, 164. If the “removal” did not encompass a parent’s ability to make decisions about the welfare of their child, it would be contrary to law and the respondent-parents’ constitutional rights for the changes not to have been implemented immediately. *Sanders*, 495 Mich at 409. It is also important to note that the *AJR* case concerned whether an order continuing placement after removal constituted a “removal” for appellate purposes, rather than the order following a preliminary hearing where an initial “removal” occurs that is at issue here. *AJR*, 342 Mich App at 4-5. The child in *AJR* had been placed out of state with his father, and DHHS had requested (again, because the mother’s right to direct the care, custody, and control of the child had been “removed” in a prior court order) that the child be “reunited” with the mother in Michigan. *Id.* at 4. The *AJR* trial court denied the request and continued the placement, and the Court of Appeals dismissed for lack of jurisdiction, as the order continuing placement did not “remove” the children from one place to another. *Id.* at 6-7. While this definition is too narrow even for the circumstances in *AJR*, the outcome was correct as the mother’s legal right to direct the care, custody, and control of her child had already been “removed” by the time the order continuing placement had been issued by the original order “removing” the child, and thus, it could not constitute a “removal” under the definition advanced by the Section.

“Custody” under Michigan law encompasses legal custody and what has commonly been referred to as “physical” custody. Any order in a child welfare case that “removes” a parent’s ability to either have the child in their household **and/or** make decisions on behalf of the child is therefore an order removing the child from the parent’s “care and custody” and that parent is entitled to all the protections and due process rights afforded to any other respondent-parent in a child welfare proceeding.

C. The narrow definition of “removal” leads to absurd results, deprives parents of fundamental rights, and encourages bad behavior on the part of child protection agencies and non-respondent parents.

Although this Court’s query is limited simply to the advice of appellate rights under MCR 3.965(B)(15), should this Court adopt the Court of Appeals’ narrow definition of “removal,” as defined in *AJR*, 342 Mich App at 6-7, and advocated by the parties here (with the exception of Respondent-Mother), it will implicate far more rights than simply the right to appeal an order.

The *AJR* definition, as argued by the parties here, means that any respondent-parent who may only have legal custody of their child will have no right to appeal the deprivation of their right to make important decisions about their child until after the preliminary stage of the proceedings. The facts here demonstrate that a respondent-parent will not have a right to appeal until **after** their parental rights have been terminated. The definition of “removal” in *AJR* and that the parties are pushing also means that **any parent** who does not have physical possession of their child at the time the removal occurs or the removal request is filed, does not have a right to appeal the order removing the child, as the child would not have been “taken from that parent’s residence and placed in a different residence.” *AJR*, 342 Mich App at 6-7.

This means that, for example, if the non-respondent parent is the parent with less parenting time, to avoid having to defend an appeal on removal from a primary custodian or avoid having to do investigative work regarding placement of the child, all the child protection agency and the non-respondent parent have to do is wait until the child is in the home of the non-respondent parent and then file the petition. The child in that scenario

might only see the non-respondent parent for one night per week and the respondent-parent would still be precluded from appealing the order removing that child by right under the *AJR* and the parties' argued definition of "removal". As a "removal" is also essentially proof of proper cause or change of circumstances on its own, the non-respondent parent could use "removal" as a basis to revisit custody, even if the child welfare case closes later, successfully without termination (i.e. the conditions justifying the removal were rectified). *Shann*, 293 Mich App at 306. This is exactly what occurred in the *Shann* case. *Id.* at 304-306.

However, it is not just the respondent-parent's appellate rights at stake if "removal" is defined so narrowly: if the child is not "removed" from a respondent-parent, the child protection agency does not have to provide services to prevent removal nor does the agency have to attempt to rectify the conditions that led to removal, as the agency cannot attempt to rectify something that does not exist. MCL 712A.18f(1); MCR 3.965(D)(1). Respondent-parents under this definition of "removal" are not entitled to regular review hearings (as those are also premised on the date of "removal"). MCL 712A.19(3); MCR 3.966(A)(2); MCR 3.975(C). The court is not required to order parenting time with these respondent-parents, as the child was not "removed" from them. MCL 712A.13a(13). Most importantly, the narrow definition of "removal" advanced by the parties (again, with the exception of Respondent-Mother) would mean that those respondent-parents **are not entitled to reasonable efforts to reunify**, as, again, those services and reunification are premised on a "removal" of the child from the parent's care and custody. MCL 712A.19a(1). This means that, under the *AJR* definition as the parties argue it here, in **any** case where the respondent-parent was not in physical possession of their child at the time the removal occurred or the removal request was filed, the court can proceed directly to termination **at any time**, including at initial disposition, even where no aggravated circumstances exist.

Depriving respondent-parents of these fundamental rights in a child protection proceeding was not the Legislature's intent when it drafted the Juvenile Code and this Court should not adopt the *AJR* definition, nor the application of the *AJR* definition the parties are pushing. Instead, this Court should articulate that "removal" is any action taken by the State that affects a legal parent's right to care, custody, and control of their child.

D. Based on the above precedent, the Trial Court's failure to advise Respondent-Mother of her appellate rights was a plain error affecting her substantial rights.

Applying the foregoing arguments to the facts of this matter, it is clear that the Trial Court's failure to advise Respondent-Mother of her appellate rights was a plain error affecting her substantial rights, as the Court of Appeals concluded. *Barber/Espinoza*, ____ Mich App at slip op pp. 11-12.

The Trial Court committed an error and that error was plain. The court rule is clear that the Trial Court was required to advise Respondent-Mother of her right to appeal the order following the preliminary hearing and the Trial Court did not do so. MCR 3.965(B)(15); *In re Credit Acceptance Corp*, 273 Mich App 594, 600; 733 NW2d 65 (2007) (use of the word "shall" in a court rule designates a mandatory provision). The Trial Court was required to advise Respondent-Mother of her appellate rights because the Trial Court's order "removed" both children from Respondent-Mother's "care and custody." MCR 3.965(B)(15). At the time the petition was filed, Respondent-Mother had joint legal and physical custody of ME, who resided with Respondent-Mother for three weekends per month, and joint legal custody of CB. (Appellee's Appendix, pp. 12b, 28a-29a). Respondent-Mother was therefore a "custodial parent" to both children and the Trial Court's order "removed" the children from her "care and custody" as it prevented Respondent-Mother from exercising her rights to direct the care, custody, and control of the children as a "custodial parent." *See Rood*, 483 Mich at 91. Further, as articulated in the Court of Appeals' opinion, this error affected Respondent-Mother's parental rights as, had Respondent-Mother been advised of her right to appeal this order, "she very well could have succeeded on the aggravated-circumstances issue before the case proceeded immediately to termination." *Barber/Espinoza*, ____ Mich App at slip op p. 12.

RELIEF REQUESTED

Amicus Curiae, The Family Law Section of the State Bar of Michigan, respectfully requests this Court affirm the Court of Appeals' opinion as to Issue 5, the Trial Court's failure to advise Respondent-Mother of her appellate rights pursuant to MCR 3.965(B)(15). Amicus Curiae further requests this Court clearly articulate that, in a child welfare case, any action affecting a legal parent's right to care, custody, and/or control of their child is a "removal" under the Juvenile Code, which requires the parent to be afforded all due process rights permissible in that proceeding, including the advice of appellate rights.

Respectfully submitted,

The Family Law Section of the
State Bar of Michigan

By: /s/ Jordan M. Ahlers-Smith
(P84538)

Co-Chair, Amicus Committee

819 N. Washington Ave.

Lansing, MI 48906

(517) 482-8933

jahlers@speakerlaw.com

Date: April 14, 2025

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in MCR 7.312(A) and MCR 7.212(B). I certify that this document contains 3,112 countable words. The document is set in Georgia Pro, and the text is in 12-point type with 18-point line spacing and 12 points of spacing between paragraphs.

The Family Law Section of the State Bar
Of Michigan

By: /s/ Jordan M. Ahlers-Smith
(P84538)

Co-Chair, Amicus Committee

819 N. Washington Ave.

Lansing, MI 48906

(517) 482-8933

jahlers@speakerlaw.com