Public Policy Position
Amicus Brief in *Blackman v Milward*

The Family Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 2,622 members. The Family Law Section is not the State Bar of Michigan and the position expressed herein is that of the Family Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Family Law Section has a public policy decision-making body with 22 members. On May 17, 2025, the Section adopted its position after a discussion and vote at a scheduled meeting. 15 members voted in favor of the Section's position, 0 members voted against this position, 3 members abstained, 4 members did not vote.

The Section voted to support the Appellee's position and agreed that the Trial Court's order should be affirmed, the case should not be remanded, and the statutory section in question, MCL 722.1445(2), is not subject to the 3-year time limitation found elsewhere in the Revocation of Parentage Act.

Explanation:
MCL 722.1445(2) Does Not Contain a Statute of Limitations and Reading One Into the Law is Contrary to the Principles of Statutory Interpretation as MCL 722.1445(2) is unique in ROPA for its absence of limitation language and the Principles of statutory construction compel the conclusion that there is no time limitation in an action under MCL 722.1445(2). The Section further argued The Circuit Court Did Not Err When it Found Clear and Convincing Evidence, as Required by MCL 722.1445(2), to Revoke Defendant's Paternity.

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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

SHANNON BLACKMAN,

Plaintiff-Appellee/,
Cross-Appellant,

v.

TYLER DAVID MILWARD,

Defendant-Appellant/
Cross-Appellee.

Supreme Court No.: 167867
Court of Appeals No.: 367240
Calhoun County Circuit Court
Case No.: 2019 – 2623 – DS

AMICUS CURIAE BRIEF

FAMILY LAW SECTION COUNCIL
MICHIGAN STATE PLANNING BODY FOR LEGAL SERVICES,
LEGAL SERVICES ASSOCIATION OF MICHIGAN,
MICHIGAN COALITION TO END DOMESTIC AND SEXUAL VIOLENCE,
& CRIME VICTIMS LEGAL ASSISTANCE PROJECT

By: Emily Miller (P78551)
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STATEMENT OF INTEREST OF AMICUS CURIAE

The Family Law Section Council (FLS), Michigan State Planning Body for Legal Services (MSPB), Legal Services Association of Michigan (LSAM), Michigan Coalition to End Domestic and Sexual Violence (MCEDSV), and Crime Victims Legal Assistance Project (CVLAP) (collectively, "Amici") respectfully submit this Amici Curiae brief to the Michigan Supreme Court in *Blackman v. Milward*. With this brief, the Amici seek to advance their interests in and commitment to providing fair and equal access to the Michigan justice system for victims of sexual assault.[1]

I. Family Law Section Council

FLS Council is the governing body of the Family Law Section of the State Bar of Michigan. FLS 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

[1] Pursuant to MCR 7.312(H)(5), Amici state that no counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than Amici, their members, or their counsel made any such monetary contribution.

law. The Council presents its position on the issues as invited by this Court in its April 4, 2025 Order.

II. Michigan's State Planning Body for Legal Services

MSPB is an unincorporated association of over forty individuals—leaders in the judiciary, the State Bar, state and regional advocacy programs, and community organizations who are interested in Michigan's indigent civil legal aid and indigent defense systems. MSPB acts as a forum for planning and coordinating the state's efforts to deliver civil and criminal legal services to the poor. MSPB was initially created through a mandate of the Legal Services Corporation ("LSC"). Although LSC no longer requires that states have a formally designated State Planning Body, MSPB has continued to function at the request of the programs and their state funder. The stated mission of MSPB is to plan, organize, and coordinate an effective civil legal services delivery system in the State of Michigan. In addition to coordinating *pro bono* services, MSPB advocates on behalf of the state's indigent population to the State Supreme Court, the State Bar, and the State Court Administrative Office. MSPB is committed to assuring equal access for the poor and marginalized to the legal system, including the family court system. The SPB presents its position on the issues as invited by this Court in its April 4, 2025 Order.

III. Legal Services Association of Michigan

LSAM is a Michigan nonprofit organization incorporated in 1982. LSAM's members are eleven of the largest civil legal services organizations in Michigan and collectively provide legal services to low-income individuals and families in more than

50,000 cases per year.[2] LSAM members have broad experience with a variety of family law cases where a low-income parent's rights to custody of his or her child are at stake—these involve custody and parenting time cases, third-party custody actions, minor guardianship cases, child abuse and neglect cases, paternity proceedings, and adoption proceedings. LSAM members share a deep institutional commitment to ensuring that the rights of low-income families, parents, and children are respected in these proceedings. Almost all LSAM members work daily—*e.g.*, in public benefits, family law, and housing cases—with low-income families involved in and impacted by domestic and sexual violence, paternity, or similar family-law proceedings. LSAM members are institutionally interested in and committed to providing fair and equal access to the justice system for low-income individuals and survivors of sexual assault. The SPB presents its position on the issues as invited by this Court in its April 4, 2025 Order.

IV. Crime Victims Legal Assistance Project

The Crime Victims Legal Assistance Project ("CVLAP") is a team of over thirty attorneys, housed in civil legal service organizations in Michigan, who specialize in providing trauma-informed, survivor-centered, free legal assistance to victims of crime, including individuals who have been sexually assaulted. CVLAP is funded by the

[2] LSAM's members are: Lakeshore Legal Aid, Legal Aid and Defender, Legal Aid of Western Michigan, Legal Services of Eastern Michigan, Legal Services of Northern Michigan, Michigan Advocacy Program, Michigan Indian Legal Services, Michigan Migrant Legal Assistance Program, Michigan Legal Services, Michigan Poverty Law Program, and the University of Michigan Clinical Law Program.

Victims of Crime Act, Violence Against Women Act, and the Crime Victims Sustainability Fund.

V. Michigan Coalition to End Domestic and Sexual Violence

The Michigan Coalition to End Domestic and Sexual Violence ("MCEDSV") is a nonprofit membership organization comprised of more than seventy nonprofit organizations across the state of Michigan dedicated to the empowerment of all victims of domestic and sexual violence, and human trafficking. MCEDSV seeks to build a legacy in which these forms of violence no longer exist. MCEDSV regularly participates as amicus curiae in select state and federal cases that present issues of broad importance to victims of domestic and sexual violence such as this one.

INTRODUCTION

The Amici submit this brief in favor of Plaintiff-Appellee/Cross-Appellant to ensure that the clear language and intent of MCL 722.1445(2) is upheld through proper statutory interpretation and to clarify the requirements of a proper fact-finding hearing. More specifically, the Amici assert that an action to revoke an acknowledgement of parentage based upon a claim that the child was conceived as a result of nonconsensual sexual penetration, MCL 722.1445(2), is not subject to the limitations period set forth in MCL 722.1437(1) and that the Calhoun Circuit Court did not err at its properly held fact-finding hearing, when it determined that the child was conceived as a result of nonconsensual sexual penetration. MCL 722.1445(2).

ARGUMENT

This case presents the Michigan Supreme Court with the opportunity to uphold the requirements of Michigan's version of the Rape Survivor Child Custody Act ("RSCCA"), MCL 722.1445(2), to ensure that it is interpreted as written and intended, and to affirm the Calhoun County Trial Court's proper application of the law to the case at hand. 34 U.S.C 21301 et seq.

I. MCL 722.1445(2) DOES NOT CONTAIN A STATUTE OF LIMITATIONS AND READING ONE INTO THE LAW IS CONTRARY TO THE PRINCIPLES OF STATUTORY INTERPRETATION

The question presented is whether an action brought under MCL 722.1445(2) is subject to what may appear to be the general 3-year statute of limitations set forth in MCL 722.1437 relative to actions seeking to revoke paternity. As such, the issue is one of

statutory construction, the standard of review of which is de novo. *Micheli v Mich Auto Ins Placement Facility*, 340 Mich App 360, 367; 986 NW2d 451 (2022).

The apparent controversy lay in the fact that a general statute of limitations may appear to govern *all* paternity-revoking actions under the Revocation of Paternity Act ("ROPA"). Since the motion in this case was brought under MCL 722.1445(2), which is legislatively organized under ROPA, it might seem, therefore, that its relief is subject to that apparently general statute of limitations. (Moreover, it is also true that there is no explicit exemption in MCL 722.1445(2) from that limitation.)

In addressing this issue, however, the Court of Appeals determined that the MCL 722.1437 limitation does not govern motions filed pursuant to MCL 722.1445(2). *Blackman v. Milward*, 2024 Mich App LEXIS 8738, at 15 (Docket No. 367240). This was correct for the following reasons.

A. MCL 722.1445(2) is unique in ROPA for its absence of limitation language.

One is based on the fact that a statute of limitations explicitly applies to every revocation action or motion authorized under the various ROPA provisions, except an action brought under MCL 722.1445(2).

Each is hereby summarized.

MCL 722.1437

Under MCL 722.1437 ("Section 7"), an action to revoke an acknowledgment of parentage, filed under that section 7, by a mother, an acknowledged parent, an alleged father, or a prosecuting attorney, must be brought within 3 years after the child's birth or within 1 year after the date of the acknowledgment, whichever is later. (Subsections (4)

and (5) of this provision demonstrate that the key issue to be addressed in such an action is a correct factual determination of the child's genetic father.)

MCL 722.1438

This provision addresses the scenario in which a genetic determination of paternity is contested. It, too, explicitly imposes the 3-year/ 1-year limitation

MCL 722.1439

This provision authorizes a man (an "affiliated father" per MCL 722.1433(b)) whose paternity had been determined in a court proceeding--but who had failed to participate in that proceeding--to have that determination set aside. The same 3-year/1-year limitation explicitly applies.

MCL 722.1441

This provision, authorizing a court to determine a child to have been born out of wedlock, is also explicitly governed by the same limitation.

Revocation actions or motions under these four provisions (all of which explicitly impose the time limitation) are categorically different from MCL 1445(2) (which does not) in two ways that reveal why it is unreasonable to gratuitously import those limitations to MCL 1445(2).

One difference is that the limiting terms (articulated, for instance, in MCL 722.1437(2), MCL 722.1438(1), and MCL 722.1439(2)) are clearly predicated of each respective statutory section. And whereas MCL 722.1441 does not word it like the other three (that is, "An action *under this section* must be filed..."), it is clear that its limitation applies to the specifically described action relative to the determination that a child was

born out of wedlock. Therefore, because an action or motion under MCL 722.1445(2) is not an action brought under section 7, section 8, or section 9, nor is it an action to determine that a child was born out of wedlock, it is unreasonable to gratuitously import to it the limitations corresponding to those statutory sections.

There are two other ways to state the same argument. One is to note that if the Legislature intended to impose a statute of limitation applicable to all revocation actions or motions brought under the Act, the limitation language would have been stated as relevant to ROPA in general, rather than in these four sections, one by one. In MCL 722.1437, for example, it would have said, "in an action under this Act", rather than what it does say, to wit: "an action under this section".

The other is to observe how puzzling the fact is--if the intent were to impose a ROPA-wide limitation--that the limitations have also been redundantly added in those four provisions but not to MCL 722.1445(2).

Furthermore, while the remedies allowed under MCL 722.1445(2) somewhat mimic the remedies of those four provisions, the statement of these MCL 722.1445(2) remedies is void of any limitation language. This shows that the remedial actions through MCL 722.1445(2) are, unlike the parallel remedies in those four provisions, not time-limited.

Another difference is that these four provisions, unlike MCL 722.1445(2), all involve a potential factual correction as to the question of genetic paternity. The purpose of MCL 722.1437 is to remedy a situation in which the Affidavit of Parentage was

factually inaccurate as to the father's identity (because of one of the four scenarios set forth in (4)[3]). The purpose of MCL 722.1438 is to remedy a situation in which the relevant factual genetic information itself was suspect (because of one of the three scenarios set forth in MCL 722.1438(2)[4]). The purpose of MCL 722.1439 is to allow factual genetic information to contradict a court determination, which determination was very likely not based on any factual genetic information at all. And the purpose of MCL 722.1441 is to allow correct genetic factual information to effectively rebut the (factually incorrect) presumption that a child's parent's spouse is also the child's parent.

By contrast, in an action brought under MCL 722.1445(2), there is no factual genetic controversy: the controversy is not about the identity of the parties involved in the child's conception but, rather, in the circumstances surrounding the conception.

B. Principles of statutory construction compel the conclusion that there is no time limitation in an action under MCL 722.1445(2).

The issue here is whether limitation language should, because it is apparent elsewhere in ROPA revocation actions or motions, be read into MCL 722.1445(2). When interpreting a statute, this Court's "primary goal is to ascertain and give effect to the Legislature's intent." *Rouch World, LLC v Dept. of Civ Rights*, 510 Mich 398, 410; 987 NW2d

[3] **(a)** Mistake of fact.
(b) Newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed.
(c) Fraud.
(d) Misrepresentation or misconduct.
(e) Duress in signing the acknowledgment.

[4] **(a)** The genetic tests that established the man as a child's father were inaccurate.
(b) The man's genetic material was not available to the child's mother.
(c) A man who has DNA identical to the genetic father is the child's father.

501 (2022) In this task, consideration of the statute's "plain language" is critical (See *People v Pinkney*, 510 Mich 258, 272; 912 NW2d 535 (2018)), as is the objective of understanding "parts of the same statute ....as harmonious[ly] effectuating the intent of the Legislature." (*Burkhardt v Bailey*, 260 Mich App, 636, 651; 680 NW2d (2004))

MCL 722.1445(2) was enacted as part of the RSCCA, the key intent of which was (as the Court of Appeals in this case correctly identified) "to allow sexual assault survivors to terminate the parental rights of their offenders." *Blackman v. Milward*, 2024 Mich App LEXIS 8738, at 10 (Docket No. 367240); 34 U.S.C 21301 et seq. On this point, the intent behind MCL 722.1445(2) thus differs substantially from the intent behind MCL 722.1437.[5] Given this distinction, there is no logical basis for importing MCL 722.1437's corollary intent--regarding the time limitation-- on MCL 722.1445(2). That corollary intent is consistent with the general intent of MCL 722.1437 because it contributes to ROPA's goal of economically finalizing issues pertaining to factual genetic information. But these issues are necessarily absent from paternity considerations under the RSCCA. 34 U.S.C 21301.

It is apparent, furthermore, from a plain reading of ROPA that it authorizes various causes of action related to the revocation of paternity, all distinct from one another according to distinctive factual scenarios. To four of these causes of action, explicit time limitations are imposed. To one, MCL 722.1445(2), there is no time limitation. It may be supposed that a time limitation from another section could be

[5] Though, coincidentally, the relief granted in furtherance of their respective intents (a revocation of parentage) happens to be the same in both provisions.

imported to MCL 722.1445(2), for instance, by concluding that an action under that former section is substantially the same as the latter. And this is the essence of the Defendant's argument. However, this argument fails because the only similarity between an action under MCL 722.1437 and MCL 722.1445(2) is the similarity of the relief requested (This specious similarity is a point seized upon in Defendant's Reply Brief, which notes that Ms. Blackman's motion happens to have been titled "Motion and Affidavit to Revoke Acknowledgment of Parentage and Other Relief"). Because the respective factual analyses are, however, completely different, this implicit importation of limitation language is anything but plain.

Moreover, the "harmony" of ROPA is evident in the linkage between the variously presented factual genetic determinations, on one hand, and the respective time limitations, on the other. To impose such linkage where a categorically different factual determination presents itself is to introduce statutory *dis*harmony.

This argument can be taken a step further. Lest one assume that the omission of limitation language in MCL 722.1445(2) was legislatively inadvertent, it must be noted that there certainly is a provision relative to the termination of the right to its relief. This is found under subsection (2), relative not to a chronological factor but, instead, to the circumstance under which "the biological parents cohabit and establish a mutual custodial environment for the child." Plainly, therefore, the omission of time-based limitation language was not because the Legislature somehow neglected to consider the issue of limitation. And this insight underscores the argument that the internal harmony

of ROPA is evident in recognizing that MCL 722.1437 and MCL 722.1445(2) both contain limitation language meaningful to the distinctive intentions of each provision: the former being chronological and the latter being circumstantial.

II. THE CALHOUN CIRCUIT COURT DID NOT ERR WHEN IT FOUND CLEAR AND CONVINCING EVIDENCE, AS REQUIRED BY MCL 722.1445(2), TO REVOKE DEFENDANT'S PATERNITY

This Court has asked whether the Calhoun Circuit Court erred by refusing to conduct a fact-finding hearing to determine whether the child was conceived as a result of nonconsensual sexual penetration and, if so, the requirements of such a hearing. "When reviewing a decision related to the Revocation of Paternity Act, this Court reviews the trial court's factual findings, if any, for clear error." *Glaubius v Glaubius*, 306 Mich App 157, 164; 855 NW2d 221 (2014). "A finding of fact is 'clearly erroneous' if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Roberts*, 292 Mich App 492, 808 NW 2d 290 (2011). The Amici do not believe that the Circuit Court erred and instead advocate for the position that the Circuit Court held a sufficient fact-finding hearing and that its ruling should be affirmed.

The requirements of a fact-finding hearing, depend heavily on the individual case before the Court. In order to prevail in revoking paternity of an acknowledged father under MCL 722.1445(2), a mother must prove "by clear and convincing evidence that the child was conceived as a result of nonconsensual sexual penetration." The law further instructs trial courts to conduct a "fact finding hearing" to determine whether revocation is appropriate. The term "fact finding hearing" is not defined in the statute. Therefore,

the meaning of this term "should be construed reasonably, keeping in mind the purpose of the statute," which is to "provide a mechanism to sever the parental rights of a rapist who fathers a child." *Draprop Corp. v. City of Ann Arbor*, 247 Mich. App. 410, 415, 636 N.W.2d 787, 789-790, (2001); *Blackman v. Milward*, 2024 Mich App LEXIS 8738 (Docket No. 367240).

In addition to considering the purpose of the statute, the Court is required to ensure that the parties are afforded proper due process. Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker. *Klco* v *Dynamic Training Corp,* 192 Mich. App. 39, 42; 480 N.W.2d 596 (1991). The opportunity to be heard does not always mean a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence. The opportunity to be heard requires a hearing to allow a party the chance "to know and respond to the evidence," but does not require "a full trial-like proceeding." *Galien Twp School Dist v Dep't of Ed (On Remand)*, 310 Mich App 238, 243; 871 NW2d 382 (2015). Further, a "trial court need not hold an evidentiary hearing if it can sufficiently decide an issue on the basis of evidence already presented." *Vittiglio v. Vittiglio*, 297 Mich. App. 391, 406, 824 N.W.2d 591, 599 (2012).

The Court has at its disposal a myriad of ways to find facts that will allow it to reach a conclusion on the legal issue at hand. While this may include presentation of evidence by witnesses in a traditional evidentiary hearing setting, that is not always

required. The Court can consider undisputed evidence. It can take judicial notice under MCR 201(e) at any stage of the proceeding and is a "substitute for proof." *Winekoff v. Pospisil*, 384 Mich. 260, 268, 181 N.W.2d 897, 901 (1970). The Court can also "consider evidence in light of court's general knowledge and experience in affairs of life, as well as facts which could be proved indirectly by other facts or circumstances, from which it usually and reasonably follows according to common experience and observation of mankind." *Hinterman v. Stine*, 55 Mich. App. 282, 222 N.W.2d 213 (1974).

The record in this case is comprised of almost entirely undisputed facts or facts established through judicial notice. Given the record, the Court's ruling to revoke Defendant's paternity was sufficiently resolved without the need for a full evidentiary hearing.

A. Record on Appeal

On May 8, 2023 the Calhoun County Trial Court held a fact-finding hearing.[6] The hearing consisted of a presentation by Plaintiff's Counsel. Defendant, who appeared *in pro per*, was provided an opportunity to respond to the allegations and present his version of the facts and legal arguments, including his claim that the child's conception was

[6] Although the Trial Court's 2023 Opinion and Order states that it "did not conduct a fact-finding hearing as it was unnecessary," in fact, the Court did hold such a hearing and made findings of fact. The hearing consisted of oral arguments by both parties and findings based on undisputed facts, which were sufficient for the Court to reach a ruling. When a record clearly establishes that a trial court has "merely misstated," but correctly applied, the law, the error is harmless. *People v. Simpson*, 450 Mich. 862, 539 N.W.2d 204 (1995)(dissent). Further, MCR 2.613(A) states that an "error in a ruling or an order . . . is not ground for granting a new trial . . . unless refusal to take this action appears to the court inconsistent with substantial justice." For Defendant to prevail, he would have to show that it is more likely than not that the trial court's incorrect statement that it did not conduct a fact-finding hearing (despite the fact that it did) would affect the outcome of the case. *In re Miller*, 347 Mich. App. 420, 429, 15 N.W.3d 287, 292 (2023). Because the findings of fact in this case were undisputed, it is hard to imagine how the semantics of the Court's statement regarding what type of hearing it held would make any impact on its ultimate ruling.

"mutual and consensual" because it took place on March 18, 2018, a month after he was forced to resign from his teaching position on February 12, 2018. (Transcript Pg. 10, Lines 1 – 16). Following both parties' presentations, the Court make findings based on "undisputed facts," many of which were established through judicial notice (Transcript, Pg. 13, Line 21).

In its July 20, 2023, Opinion and Order, following Defendant's Motion for Reconsideration, the Trial Court laid out its factual findings with specificity:

STATEMENT OF FACTS

The Defendant became involved with the Plaintiff when she was 16 and he was her teacher. The parties engaged in sexual relations for approximately 1 ½ years resulting in the birth of ELMB on 12-14-2018 when Plaintiff was 17. Plaintiff was a minor during the entirety of the party's involvement.

The Defendant resigned his position as teacher on 2-12-2018, which was accepted by the school Superintendent on 2-13-2018.

Defendant was convicted of violating MCL 750.520d(1)9(e)(i), Criminal Sexual Conduct 3rd (student) (hereinafter CSC 3rd) in Calhoun County case 2018-3388-FH. Defendant was also convicted of CSC 3rd in Branch County case #19112651-FH-C and in St. Joseph County case # 1922618-FH-1. The offense dates that are the basis for Defendant's convictions commenced June 2017 when the Plaintiff was 16.

Defendant was also convicted in Calhoun County for Witness Bribing/Intimidation/Interference case # 2019-4008-FH, pursuant to MCL 750.1227.

A child, ELMB, was born on 12-14-2018. An Affidavit of Parentage was signed on 12-17-2018.

Plaintiff filed her Motion and Affidavit to Revoke Acknowledgment of Parentage and Other Relief on 4-28-2023. The motion hearing was held on 5-8-2023 and the Order Revoking Paternity was entered on 5-19-2023.

In addition to the Court's recitation of undisputed facts, the record also shows that Defendant's felony *Criminal Sexual Conduct 3rd* convictions were based on incidents that took place June 14, 2017 (St. Joseph), July 1, 2017 (Branch), July 30, 2017 (Calhoun). (OTIS

Record, Appendix D). The offense dates of Defendant's felony *Witness Bribing/Intimidation/Interfering with a Criminal Case* spanned from February 20, 2018, through November 1, 2018, all of which took place after Defendant's resignation (Transcript Pg. 10, Appendix C & E). Further, the Court's 2023 Opinion and Order found "that Plaintiff was laboring under duress" and "Defendant did not contest the issue of 'duress.'"(Order and Opinion, Page 5). Although the Court did not specify a date of conception in its ruling, based on the child's date of birth there are a range of potential dates (from February – April of 2018) when the child could have been conceived, as pictured in the graph below.

To better understand the requirements of a fact-finding hearing conducted pursuant to MCL 722.1445(2), we can apply the facts of this case to the elements that must be proven to result in revocation of paternity due to a child being "conceived as a result of nonconsensual sexual penetration."

B. Definition of Sexual Penetration

The first requirement of a section 1455(2) hearing is to determine whether there was sexual penetration. MCL 722.1445(4) states that "sexual penetration means that term as defined in section 520a of the Michigan Penal Code." MCL 750.520a(r) defines "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required."

In this case, it is undisputed that the parties engaged in sexual penetration that resulted in a child who was born on December 17, 2018. The exact date of sexual penetration that resulted in conception is unknown in this case, however, that issue can be resolved by turning to the second requirement of 1445(2), which addresses conception.

C. Definition of Conceived

The second requirement of a section 1445(2) hearing is to determine when the child was conceived. The terms "conceived" is not defined in the law. Although it is not specifically defined, the question of finding a date of conception – in the context of determining paternity – is a well tread legal path. Instead of attempting to pinpoint something that cannot be reliably ascertained, even by medical experts, Courts in Michigan and nation-wide have adopted gestational norms that provide a range of acceptable dates during which conception could have occurred.

1. Conceived as Defined in Michigan's Jurisprudence

Michigan Appellate Courts have relied on established gestational norms to define the plausible conception window, with the outer limit being approximately ten months

before birth. In *People v. Case*, the Court indicated that a "maximum period of gestation is 300 days, and the minimum 240 days, and the average 273 days." 171 Mich 282; 137 NW 55 (1912). In *Hude v. Vannest*, the Court acknowledged that intervals of longer than 300 days – an "extremely long period of gestation" – between conception and birth did not, as a matter of law, establish medical impossibility of paternity. 75 Mich. App. 490, 493, 255 N.W.2d 659, 661 (1977)(citing e.g. *George v George*, 247 Ark 17; 444 SW2d 62 (1969), *Ousley v Ousley*, 261 SW2d 817 (Ky App, 1953), *Pierson v Pierson*, 124 Wash 319; 214 P 159 (1923)). In *Shepard v. Shepard*, the Court stated that the gestational window of time is not exact as "[i]t is not a fixed period or fixed amount of time that it cannot deviate." 81 Mich. App. 465, 467, 265 N.W.2d 374, 376 (1978).

In addition to gestational norms, there is also precedent in Michigan case law for resolving date of conception ambiguity in favor of public policy. In *Sprenger v Bickle*, the Michigan Court of Appeals found an alleged father lacked standing to initiate a paternity action when conception occurred sometime either shortly before or shortly after the finalization of the mother's divorce. 307 Mich App 411, 419; 861 NW2d 52 (2014). The Court found that there "needs to be a finding *or an assumption*" regarding the date of conception that is "consistent with the equities of the case and the intent of the Legislature." *Id.* at 419 (emphasis added). All statutes "should be construed to prevent absurdity, hardship, injustice or prejudice to the public interest." *Franges v. General Motors Corporation; Betker v. General Motors Corporation; Schalk v. Michigan Sewer Construction Company*, 404 Mich. 590, 612, 274 N.W.2d 392, 399 (1979). Using "an assumption" that the child was conceived of rape if the mother was nonconsensual sexually penetrated by the

father during the possible window of conception, would uphold the intent of the Michigan Legislature in adopting the RSCCA, 34 USC 21301, which was meant to protect victims of sexual assault from being retraumatized by legal actions brought by their offenders to establish paternity and continue a relationship with the victim. An interpretation of the law that protects rape victims by making findings that are consistent with the equities of the case honors the purpose of the statute.

2. Conceived as defined in National Jurisprudence

Michigan is not the only state that has acknowledged that an exact date of conception is not essential to determine paternity. *In re Paternity of J.S.C.*, 135 Wis. 2d 280, 284-285, 400 N.W.2d 48, 51 (1986); *Beaudoin v. David* R.R., 152 A.D.2d 776, 777, 543 N.Y.S.2d 557, 557 (1989). "Since conception may result from any act within a considerable period, the exact date is immaterial where the question is as to the paternity of a child begotten during that period." *Weisser v. Preszler*, 62 N.D. 75, 80, 241 N.W. 505, 508 (1932). By focusing on a "reasonable range of time when the conception could have taken place," the Court need not "be dependent upon pure guesswork and speculation." *Smith* v. *Wise*, 234 So. 2d 145, 147 (Fla. Dist. Ct. App. 1970).

Like Michigan, "other jurisdictions have held that the ordinary period of gestation is a proper subject for judicial notice." *Melanson v. Rogers*, 38 Conn. Supp. 484, 491 (1982)(citing *Smith* v. *Wise*, 234 So. 2d 145 (Fla. Dist. Ct. App. 1970); *Steed* v. *State*, 80 Ga. App. 360, 56 S.E.2d 171 (1949); *State ex rel. Brown* v. *Middleton*, 259 Iowa 1140, 147 N.W.2d 40 (1966); *In re Walton's Estate*, 183 Kan. 238, 326 P.2d 264 (1958); *Silke* v. *Silke*, 325 Mass. 487, 91 N.E.2d 200 (1950); *Suzanne J.* v. *Russell K.*, 46 App. Div. 2d 935, 362 N.Y.S.2d

37 (1974); *Crawford* v. *Hasberry*, 21 Ohio Op. 2d 350, 186 N.E.2d 522 (1962). Like Michigan this range of time has been found to be as long as, or longer than, ten months. For example, North Carolina affirmed "judicial notice that the normal period of gestation is between seven to ten months." *State v. White*, 42 N.C. App. 320, 322, 256 S.E.2d 505, 507 (1979). Florida Courts have found a full gestational birth to be "anywhere from 260 days to as much as 300 days or even more." *Smith* v. *Wise*, 234 So. 2d 145, 147 (Fla. Dist. Ct. App. 1970). Oklahoma similarly accepts "10 months as the maximum period" of time for gestation. *Secondine v. Secondine*, 311 P.2d 215, 218 (1957). Nebraska has found the window of gestation to vary from 252 days to 300 days. *Souchek v. Karr*, 78 Neb. 488, 492, 111 N.W. 150, 151 (1907).

In this case, using a gestational norm to identify a window of time in which the child could have been reasonably conceived, protects the Plaintiff from having to testify about each instance in which she was sexually penetrated by her teacher that could have led to the conception of a child. Further, using an assumption that the sexual penetration was nonconsensual, based on the fact that the Defendant raped the Plaintiff during the window of conception, honors the purpose of the statute and the equities of the case.

D. Definition of Nonconsensual

The third requirements of a section 1445(2) hearing is to determine whether the sex resulting in the child's birth was "nonconsensual." The term "nonconsensual" is not defined in the law. To reach a legally grounded conclusion on the issue of sexual consent, it is reasonable to examine existing law for guidance.

The Michigan Penal Code, which is referenced in section 1445(4), specifically its definition of sexual penetration (as outlined above), uses the term "Criminal Sexual Conduct" ("CSC") to describe crimes involving nonconsensual sexual contact of varying degrees (1st, 2nd, and 3rd degree). Broadly speaking, CSC is characterized by several overarching categories: a perpetrator's use of force or coercion, the vulnerability of the victim, the position of power of the perpetrator, or the perpetrator's commission of another felony. The severity of the CSC crime depends on the level of sexual contact and the circumstances of the parties and their actions.

1. Rape Based on Vulnerability and Positions of Authority

One category of CSC "reveals that the Legislature intended to protect persons in a certain age group or with certain vulnerability who encounter an individual in a position of authority or supervision over those persons." *People v. Lewis*, 302 Mich. App. 338, 346, 839 N.W.2d 37, 43 (2013). These crimes are distinguished by the youth or "mental incapacity" of the victims and the position of power of the assailants. MCL 750.520b - e Consent is not a defense when the victim is incapable of consent due to their age. *People v Starks*, 473 Mich 227, 235; 701 NW2d 136 (2005). Even if a child appears to "agree" to sexual penetration, their consent is legally and ethically invalid due to the inherent power dynamics between a child and an adult. Thus, sexual penetration with a minor in this category of CSC is criminal "irrespective of the victim's consent or experience." *People v. Benton*, 294 Mich. App. 191, 199, 817 N.W.2d 599, 605 (2011).

An example of this type of CSC focuses on protecting students who are preyed upon by their teachers, recognizing the inherent power imbalances in the student-teacher

relationship, as well as the youth of the victim. MCL 750.520d(1)(e)(i) states that a person is guilty of CSC 3rd if they engage in sexual penetration with a child who is "at least 16 years of age but less than 18 years of age and a student at a public or nonpublic school" and the accused "is a teacher." The statute does not require a teacher to be performing the role of teacher at the time of the sexual assault. Rather, "if the actor's occupation as a [teacher] allowed the actor access to the student of the relevant age group in order to engage in sexual penetration, the Legislature intended to punish that conduct." *People v. Lewis*, 302 Mich. App. 338, 347, 839 N.W.2d 37, 43-44 (2013). In other words, if the sexual penetration "occurs before school or after the school bell rings at the end of the day, or on a weekend, or during the summer" the act of sex between the teacher and student is still considered sexual assault. *People v. Lewis*, 302 Mich. App. 338, 347, 839 N.W.2d 37, 43-44 (2013) [7]

In the present case, if the minor child was conceived before Defendant's resignation on February 12, 2018, the child would unequivocally be the product of rape because the Michigan Penal Code makes clear that students, like Plaintiff, cannot consent

[7] In *People v. Hofman*, the Court found that a teacher must hold the status of being the victim's teacher at the time of the alleged acts, rather than being the student's "former" teacher. 981 N.W.2d 112, 115, 339 Mich. App. 65, 72 (2021). *Hoffman* was significantly different from the case at hand, however, because the accused never had a sexual relationship with her student when she was his teacher. In *Hoffman*, the sexual relationship developed after the accused had left her teaching position, attended university, and then began teaching at an entirely different school before reconnecting with her former student. 981 N.W.2d 112, 115, 339 Mich. App. 65, 72 (2021). The distinction of someone being a "former" teacher is not as apt in a situation in which a teacher grooms and rapes a student, is forced to leave their teaching position as a result of the CSC, and then continues to assault the student in the immediate aftermath of their resignation. Arguably a student in that situation would still merit protection. To find that sexual penetration of a student is not criminal simply because it took place a week after the assailant/teacher's forced resignation from the school for acts of pedophilia would be an absurd result and entirely against public policy.

to sexual penetration with teachers. During the May 8, 2023 hearing, Defendant conceded if the child was "conceived when I was a teacher, before - - February 12, 2018 then this - - these laws would apply, I would never be able to get parenting time" with the minor child because revocation of paternity would be appropriate. (Transcript, Page. 10, Lines 1 – 5). If the Court believed the child could have been conceived on or before February 12, 2018 then revocation would have been appropriate.

Further, if the Calhoun County Court applied the ruling in *People v. Lewis*, the fact that the Defendant was no longer acting as Plaintiff's teacher a month after his resignation did not mitigate the issue of consent. Because the Defendant used his position of authority to gain sexual access to Plaintiff while he was her teacher, his continued sexual relationship with Plaintiff was simply a continuation of the dynamic power that resulted in Plaintiff's inability to truly consent. If the Court believed the child could have been conceived after February 12, 2018 then revocation of paternity under this theory would have been appropriate.

2. Rape Involving the Commission of Any Other Felony

A second category of CSC is when sexual penetration "occurs under circumstances involving the commission of any other felony." MCL 750.520b(1)(c). This category of CSC punishes assailants who sexually assault victims while they are "directly impacted by the circumstances of the other felony" committed by the assailant, such as breaking and entering, giving illegal drugs to a victim, or using children to produce pornography. *People v. Lockett*, 295 Mich. App. 165, 179, 814 N.W.2d 295, 303 (2012). Although there must be a "direct interrelationship between the felony and the sexual penetration" the

statute "does not necessarily require that the penetration occur during the commission of the felony." *People v. Waltonen*, 272 Mich. App. 678, 680, 728 N.W.2d 881, 883 (2006). Further, this category of CSC "does not require proof of force or coercion and does not otherwise provide for the defense of consent." *People v. Waltonen*, 272 Mich. App. 678, 689, 728 N.W.2d 881, 888 (2006).

In the present case, the Defendant pled guilty to engaging in felonious witness intimidation for his actions spanning from February 20, 2018, through November 1, 2018 (Transcript Pg. 10, Appendix C & E). Plaintiff was the victim of this felony, and it was clearly interrelated to Defendant's sexual assault of Plaintiff because he was attempting use his power and authority over her to hide or destroy evidence of his assaultive sexual crimes. Thus, any acts of sexual penetration between the parties that took place from February 20, 2018, through November 1, 2018 would have occurred "under circumstances involving commission of" these felonies. Because consent is not a defense to this type of CSC, the Court could only conclude that any acts of sex during this time were nonconsensual and revocation of paternity would have been appropriate.

3. Raped Based on Force or Coercion

A third category of CSC occurs when a person uses force or coercion to accomplish sexual penetration. MCL 750.520b and d (CSC 1st and 3rd). Force or coercion are defined in MCL 750.520b(1)(f),[8] and include any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

[8] The definition provided in MCL 750.520b(1)(f) is referenced in MCL 750.520d(1)(b).

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.

(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

Consent is an affirmative defense to sexual acts accomplished through force or coercion. *People v Waltonen*, 272 Mich App 678, 689; 728 NW2d 881 (2006).

While the statute focuses largely on a perpetrator's use of threats or physical punishment, the existence of force or coercion is to be determined in light of all the circumstances and is not limited to acts of physical violence. *People* v *Malkowski*, 198 Mich. App. 610, 613; 499 N.W.2d 450 (1993). The Court has found individuals criminally liable of CSC when their acts of sexual violence were achieved through "implied, legal or constructive" coercion that result in victim submission. *People v. Premo*, 213 Mich. App. 406, 411, 540 N.W.2d 715, 717 (1995). For example, in the case of *People v. Reid*, a man was found guilty of CSC after sexually assaulting a fifteen-year-old child he had befriended for the purpose of providing the child with support and informal counseling. *Id*. During the assault, the child, who had ingested alcohol, followed the sexual commands of the

man and did not resist. Although the man did not hold any formal position of power over the child, like a therapist or teacher would, the man "exploited the special vulnerability attendant to his relationship with the [child] to abuse him sexually." *People v. Reid*, 233 Mich. App. 457, 472, 592 N.W.2d 767, 775 (1999). Therefore, in cases where a perpetrator gains access to a victim through a position of authority, sexual advances may be "accepted without protest" because the victim is "constrained by subjugation to other to do what his free will would refuse." *People v. Reid*, 233 Mich. App. 457, 469, 592 N.W.2d 767, 774, (1999); See also, *People v. Premo*, 213 Mich App 406, 410-411; 540 NW2d 715 (1995). *People v. Regts*, 219 Mich App 294, 296; 555 NW2d 896, 897 (1996).

In the present case, the Defendant clearly gained sexual access to the Plaintiff while he was a teacher by exploiting her vulnerability as his student. Defendant was also able to maintain control of Plaintiff's free will, even after his resignation, as evidenced by the fact that she was "laboring under duress" and unable to end the sexual relationship. (Order and Opinion, Page 5). The fact that Defendant turned to a new mechanism of control after his resignation, specifically felonious intimidation, threats and bribery, is further evidence that Defendant actively sought to subjugate Plaintiff's free will.

CONCLUSION

The Amici advocate for affirmation of the Calhoun County's revocation of Defendant-Appellant/Cross-Appellee's paternity based on the clear language and intent of MCL 722.1445(2) and the facts of this case. Additionally, the Amici assert that an action to revoke an acknowledgement of parentage based upon a claim that the child was

conceived as a result of nonconsensual sexual penetration, MCL 722.1445(2), is not subject to the limitations period set forth in MCL 722.1437(1) and that the Calhoun Circuit Court did not err at its properly held fact-finding hearing, when it determined that the child was conceived as a result of nonconsensual sexual penetration. MCL 722.1445(2).

Respectfully Submitted,

Date: 7/18/25

Emily Miller (P78551)
On behalf of the Amici

WORD COUNT CERTIFICATION

I certify that, pursuant to MCRs 7.212(B)(1), 7.312(A), and 7.312(H)(3), this brief contains 8,238 countable words.