

**IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals
(Murray, C.J., Ronayne Krause, Tukel, J.J.)**

IN RE KOPCZYK, MINORS,

Supreme Court No.: 161878

**Court of Appeals No.: 348999
Consolidated with
Court of Appeals No.: 349687**

**Macomb County Circuit Court
Lower Court Nos.: 16-191-NA and
16-192-NA
Hon. Mark S. Switalski**

**BRIEF OF AMICUS CURIAE CHILD USA IN SUPPORT OF NON-RESPONDENT
MOTHER'S APPLICATION FOR LEAVE TO APPEAL**

THIS APPEAL INVOLVES THE CUSTODY OF MINOR CHILDREN

Liisa R. Speaker (P65728)
Speaker Law Firm, PLLC
Attorneys for Non-Respondent Mother
819 N. Washington Avenue
Lansing, Michigan 48906
Ph.: (517) 482-8933
E: lspeaker@speakerlaw.com

Dennis A. Johnston (P27286)
Johnston Karam Associates
Attorneys for Respondent-Father
43550 Elizabeth Road, Suite 100
Clinton Township, Michigan 48036
Ph.: (586) 465-8500
E: dennisjohnstonlaw@gmail.com

Jean Cloud (P51930)
Joshua D. Abbott (P53528)
Emil Semaan (P73726)
Macomb County Prosecutor's Office
Attorneys for Petitioner MDHHS
1 S. Main Street
Mount Clemens, Michigan 48043
Ph.: (586) 469-5674
E: emil.semaan@macombgov.org

Mayssa Attia (P56752)
Mayssa Attia JD, PC
Guardian Ad Litem
49 Macomb Place, Suite 30
Mount Clemens, Michigan 48043
Ph.: (313) 218-2047
Fax: (313) 881-6358
E: mayssaattia@gmail.com

Alexander S. Rusek (P77581)
White Law PLLC
Attorneys for Amicus Curiae CHILD USA
2549 Jolly Road, Suite 340
Okemos, Michigan 48864
Ph: (517) 316-1195
Fax: (517) 316-1197
E: alexrusek@whitelawpllc.com
W: www.whitelawpllc.com

Marci A. Hamilton, Esq.
CEO & Legal Director, CHILD USA
Fels Institute of Government Professor
of Practice, University of Pennsylvania
3508 Market Street, Suite 202
Philadelphia, Pennsylvania 19104
Ph: (215) 539-1906
E: marcih@sas.upenn.edu

Lauren Majewski, Esq.
Staff Attorney, CHILD USA
E: lmajewski@childusa.org

Jessica Schidlow, Esq.
Staff Attorney, CHILD USA
E: jschidlow@childusa.org

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**BRIEF OF AMICUS CURIAE CHILD USA IN SUPPORT OF NON-RESPONDENT
MOTHER'S APPLICATION FOR LEAVE TO APPEAL**

STATEMENT OF INTEREST OF AMICUS CURIAE

CHILD USA is the leading national nonprofit think tank working to end child abuse and neglect in the United States. CHILD USA pairs the best social science research with the most sophisticated legal analysis to determine the most effective public policies to end child abuse and neglect. CHILD USA produces evidence-based solutions and information needed by courts, policymakers, organizations, the media, and society as a whole to increase child protection and the common good. This case presents questions involving whether standing issues may preclude parents from advocating for their child's best interests, especially when the child is unable to do so themselves, and the weight to be given to a child's disclosure of sexual abuse and the methods for determining whether such disclosure is sufficient evidence to support the termination of parental rights. This Court's decision in this case will have a significant impact on child welfare cases throughout the state of Michigan and beyond. Therefore, the questions presented in this case are central to CHILD USA's mission of advocacy for children's rights and abuse prevention across the nation.

I. ARGUMENT

In May 2016, 4-year-old MK disclosed to Non-Respondent Mother that she had been sexually abused by Respondent Father. Additional disclosures were made during a forensic interview and later to the child's therapist, Child Protective Services ("CPS") workers, the criminal detective, and the court-appointed evaluator. A physical examination also revealed injuries to MK's genitals consistent with the reported history of abuse. Thereafter, CPS substantiated a case of sexual abuse against Respondent-Father and Respondent-Father pled no-contest to felonious assault against his own daughter in a criminal case arising from the same facts.

The Department of Health and Human Services ("DHHS") subsequently petitioned the court to terminate Respondent-Father's parental rights. The Trial Court held that DHHS had not proven grounds for termination and, in so ruling, ignored serious physical, psychological, and corroborative testimony of sexual abuse. Non-Respondent Mother then appealed the Trial Court's decision. The Court of Appeals dismissed Non-Respondent Mother's appeal for lack of standing, contrary to established Michigan precedent, and affirmed the Trial Court's ruling that DHHS had not proven grounds for termination, without a proper review of the record.

This Court must grant leave to correct the clearly erroneous decisions of the lower courts that will result not only in non-protection of children at risk from abusive parents, but in an added exposure to those risks by denying children the physical and psychological safety of a supportive parent. Amicus Curiae seek to educate courts about the harms exacted upon children based on incorrect judgements about veritable allegations of sexual abuse and the denial of standing to parents seeking to present evidence of their child's best interests. To advance society's interest in responding to and preventing child sexual abuse, Amicus Curiae argues that courts must reject

outdated assumptions and biases and depend on up-to-date scientific research to inform credibility assessments related to disclosures of sexual abuse.

II. SOCIETY HAS A COMPELLING INTEREST IN PREVENTING & RESPONDING TO CHILD SEXUAL ABUSE

Child sexual abuse is a widespread public policy crisis. The long-term impacts of child sexual abuse are devastating for individual victims and society at large. Society pays a steep price when courts discredit veritable allegations of child sexual abuse. Therefore, the public has a significant interest in seeing that courts base decisions about child welfare on the best science.

A. *Child Sexual Abuse is Widespread*

Child sex abuse is a global and national scourge that is affecting individuals and families across all socioeconomic groups. While the prevalence of child sex abuse is difficult to determine because so many victims do not report or disclose their abuse, it is estimated that 1 in 4 girls and 1 in 6 boys are sexually abused before they reach the age of 18.¹ Rarely is the abuse perpetrated by a stranger to the child. Howard N. Syder, *Sexual Assault of Young Children as Reported to Law Enforcement*, DEP'T OF JUST., OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (July 2000), available at <https://www.bjs.gov/content/pub/pdf/saycrle.pdf>. In fact, the vast majority of abuse is perpetrated by an individual the child knows, usually an immediate family member. *See*

¹ American Psychological Association, *Understanding Child Sex Abuse*, available at <https://www.apa.org/pi/about/newsletter/2011/12/sexual-abuse> (last visited Jan. 22, 2020); *see also*, The National Child Traumatic Stress Network, *Child Sexual Abuse Fact Sheet*, available at https://www.nctsn.org/sites/default/files/resources//child_sexual_abuse_fact_sheet_parents_teachers_caregivers.pdf (last visited Jan. 22, 2020); National Sexual Violence Resource Center, *Understanding Child Sex Abuse Definitions and Rates* (Aug. 2012), available at https://www.nsvrc.org/sites/default/files/NSVRC_Publications_TalkingPoints_Understanding-Child-Sexual-Abuse-definitions-rates.pdf (last visited Jan. 22, 2020).

Kenneth Lanning, *Child Molesters: A Behavioral Analysis* 5 NAT'L CENTER FOR MISSING AND EXPLOITED CHILDREN (2010), available at <https://www.missingkids.org/content/dam/missingkids/pdfs/publications/nc70.pdf>. On average, studies using victim samples find that only 3% to 14.7% of sex crimes against children are perpetrated by strangers to the child. The other 85.3% to 97% of child sex crimes are perpetrated by adults whom the child knows. Biological parents and parental figures perpetrate 32% to 39.7% of all sexual assaults against child victims. *Id.* Intense feelings of fear, shame, and embarrassment associated with these heinous acts often dwarf victims' desires to disclose abuse. Hunter, S., *Disclosure of child sexual abuse as a life-long process: Implications for health professionals*, 32(2) AUSTRALIAN & NEW ZEALAND J. OF FAM. THERAPY 159, 164 (2011). As a result, victims often remain in the shadows, afraid to come forward. At least one-third of victims never disclose their abuse. *See* MARY-ELLEN PIPE et al., CHILD SEXUAL ABUSE: DISCLOSURE, DELAY, AND DENIAL 32 (2013).

Of those victims who *do* disclose, most are so disabled by the trauma they endure that they are unable to do so until much later in life. *See generally* BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA (2014) (hereinafter VAN DER KOLK); P. Trickett et al., *The Impact of Sexual Abuse on Female Development: Lessons from a Multigenerational, Longitudinal Research Study*, 23 DEV'T & PSYCHOPATHOLOGY, 453 (2011); S. J. Berkowitz et al., *The Child and Family Traumatic Stress Intervention: Secondary Prevention for Youth at Risk Youth of Developing PTSD*, 52 J. CHILD PSYCHOL. PSYCHIATRY, 676 (2011). The best available science suggests that the average age of disclosure of child sexual abuse is 52 years old. *See* CHILD USA, *Delayed Disclosure: A Factsheet Based on Cutting-Edge Research on Child Sex Abuse*, CHILDUSA.ORG, 3 (Mar. 2020) available at

<https://childusa.org/wpcontent/uploads/2020/04/Delayed-Disclosure-Factsheet-2020.pdf> (citing Spröber, N., et al., *Child sexual abuse in religiously affiliated and secular institutions: a retrospective descriptive analysis of data provided by victims in a government-sponsored reappraisal program in Germany*, BMC PUBLIC HEALTH, 14:282, doi: 10.1186/1471-2458-14-282 (2014)). The research suggests that a significant number of children continue to silently endure abuse and its negative sequela.

B. The Social and Economic Costs of Childhood Sexual Abuse are Severe

The effects of child sexual abuse can be profound, extensive, and lasting. Trauma affects childhood victims of sexual abuse or assault in a way that is wholly distinguishable from victims of other crimes. As explained by the Center for Disease Control (“CDC”), Adverse Childhood Experiences (“ACEs”) “have a tremendous impact on future violence victimization and perpetration, and lifelong health and opportunity.” U.S. Dep’t Health & Human Services, *The Adverse Childhood Experiences (ACEs) Study*, CENTERS FOR DISEASE CONTROL & PREVENTION (1997) available at <https://www.cdc.gov/violenceprevention/childabuseandneglect/acestudy/>; see also Felitti, et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14(4) AM. J. PREV. MED. 245 (1998) (hereinafter Felitti); S.R. Dube et al., *Childhood Abuse, Household Dysfunction, and the Risk of Attempted Suicide Throughout the Life Span: Findings from the Adverse Childhood Experiences Study*, 286 JAMA 24, 3089 (Dec. 2001) (explaining that childhood trauma can lead to negative health outcomes). The ACE Study is one of the largest investigations of the effects of childhood abuse, definitively shows a strong correlation between ACEs and negative effects across the lifespan, including, disrupted neurodevelopment; impaired

social, emotional, and cognitive development; psychiatric and physical disease; and disability. *See, e.g.,* Feletti, at 245-58; R. Anda, et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood*, 256 EUR. ARCH PSYCHIATRY CLIN. NEUROSCIENCE 174, 175 (Nov. 2005) (“Numerous studies have established that childhood stressors such as abuse or witnessing domestic violence can lead to a variety of negative health outcomes and behaviors, such as substance abuse, suicide attempts, and depressive disorders”); M. Merricka., et al, *Unpacking the impact of adverse childhood experiences on adult mental health*, 69 CHILD ABUSE & NEGLECT 10 (July 2017); *see also* Sachs-Ericsson, et al., *A Review of Childhood Abuse, Health, and Pain-Related Problems: The Role of Psychiatric Disorders and Current Life Stress*, 10(2) J. TRAUMA & DISSOCIATION 170, 171 (2009) (explaining that adult survivors are thirty percent more likely to develop serious medical conditions such as cancer, diabetes, high blood pressure, stroke, and heart disease); T.L. Simpson, et al., *Concomitance between childhood sexual and physical abuse and substance use problems: A review*, 22 CLINICAL PSYCHOL. REV., 27 (2002) (finding that adult survivors of child sexual abuse are nearly three times as likely to report substance abuse problems than their non-survivor peers).

Beyond the short and long-term effects to the individual victim, child sexual abuse also puts a significant economic strain on society at large. The negative effects over a survivor’s lifetime generate many costs that impact the nation’s health care, education, criminal justice, and welfare systems. Fang, et al., *The Economic Burden of Child Maltreatment in the United States & Implications for Prevention*, 36 CHILD ABUSE & NEGLECT 156 (2012) (explaining that the estimated average lifetime cost per victim of nonfatal child sexual abuse includes, in part: \$32,648 in childhood health care costs, \$10,530 in adult medical costs, \$144,360 in productivity losses, \$7,728 in child welfare costs, \$6,747 in criminal justice costs, \$7,999 in special education costs;

the estimated average lifetime cost per death includes: \$14,100 in medical costs, and \$1,258,800 in productivity losses). Estimates based on investigated cases place the economic burden of abuse at nearly \$2 trillion annually. See CHILD USA, *Fiscal Impact of SOL Reform*, (2018) available at <https://www.childusa.org/fiscalimpact>. That number is likely significantly higher considering the high incidence of unreported cases of child sexual abuse. *Id.* (noting nearly 1/3 of cases are never reported). As a result, society pays a hefty price when courts discredit veritable allegations of sexual abuse and fail to protect children from their alleged perpetrators.

III. THE SCIENCE OF DELAYED DISCLOSURE SHOULD INFORM COURTS' ASSESSMENTS OF CREDIBILITY

Most crimes of child sexual abuse have no witnesses, leave no physical evidence, and are concealed by the perpetrators. *See generally*, Brewer, et al., *Factors related to prosecution of child sexual abuse cases*, 6 J. CHILD SEXUAL ABUSE 91 (1997); Walsh et al., *Prosecuting Child Sexual Abuse: The Importance of Evidence Type*, 56:3 CRIME & DELINQUENCY, 436 (2010); *see also* Kerns, D.L., *Medical Assessment in Child Sexual Abuse*, SEXUALLY ABUSED CHILDREN & THEIR FAMILIES, 126 (Oxford 1981) (explaining that physical evidence is found in only 15% of confirmed cases); A. Heger, et al., *Children Referred for Possible Sexual Abuse: Medical Findings in 2,384 Children*, 26 CHILD ABUSE & NEGLECT 645 (2002). Since the child's testimony is often the only available evidence in child sexual abuse cases, the perceived credibility of the child's statements is largely determinative of case outcomes. Melkman, et al., *Credibility Assessment in Child Sexual Abuse Investigations: A Descriptive Analysis*, 67 CHILD ABUSE & NEGLECT 76 (2017) (explaining that the credibility of a child's testimony is the most essential factor in determining the substantiation of alleged sexual abuse). Therefore, it is essential that courts rely on science in

evaluating and interpreting the behaviors of victims of child sexual abuse, including children's disclosure patterns, to accurately assess the facts and identify the truth.

A. Barriers to Disclosure

Child victims encounter many barriers to disclosure following an abusive contact. Assuming the child is even aware of experiencing a sexual contact, the child may not be able to comprehend that contact as abuse for several reasons. For example, children often lack the cognitive ability to grasp the harmful nature of the abusive acts. See Kolko, D.J., et al., *Children's perceptions of their abusive experience: Measurement and preliminary findings*, 7(1) CHILD MALTREATMENT 42 (2002); Schönbucher, V., et al., *Disclosure of child sexual abuse by adolescents: A qualitative in-depth study*, 27(17) J. OF INTERPERSONAL VIOLENCE 3486 (2012); VAN DER KOLK; Teicher, M.H., et al., *The effects of childhood maltreatment on brain structure, function and connectivity*, 17(10) NAT. REV. NEUROSCIENCE 652 (2016). Similarly, young children, because they have limited knowledge about societal sexual taboos, may not appreciate that the abuse is wrong and inappropriate and therefore may be unlikely to disclose abuse to adults. Goodman-Brown, T. et al., *Why Children Tell: A Model of Children's Disclosure of Sexual Abuse*, 27 CHILD ABUSE & NEGLECT 525, 529-32 (2003).

The victim-perpetrator relationship can further deter reporting. See Smith, D.W., et al., *Delay in disclosure of childhood rape: results from a national survey*, 24(2) CHILD ABUSE & NEGLECT, 273 (2000); see also, Sjoberg, R.L. & Lindblad, F., *Limited disclosure of sexual abuse in children whose experiences were documented by videotape*, 159 AM. J. PSYCHIATRY 312 (2002). Sexual abuse is most frequently committed by family members or other adults who occupy positions of trust and authority in relation to the child. Paine, M. & Hansen, D.J., *Factors*

influencing children to self-disclose sexual abuse, 22 CLINICAL PSYCHOLOGY REVIEW 271, 276 (2002) (hereinafter Paine). Perpetrators use their position to “groom” their victims, a process whereby a potential offender will set up opportunities to abuse by gaining the trust of the child to prepare them for future abuse. See McAlinden, A., ‘*Setting ‘Em Up’: Personal, Familial and Institutional Grooming in the Sexual Abuse of Children*’, 15 SOC. & LEG. STUD. 339, 340 (2006).

Grooming practices typically involve “normalizing sexualized behavior in the offender-child relationship by introducing increasingly intimate physical contact by the offender toward the victim, very gradually sexualizing the contact, and sometimes using child pornography to break down the child’s barriers. This gradual process and the relationship of trust and authority that the offender usually holds over the child, along with the child’s immaturity and subservience, serves to break down the child’s resistance.” U.S. Dep’t of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress* 21 JUSTICE.GOV (Aug. 2010). Because of these relational dynamics, victims often hold ambivalent and confusing feelings for their abusers. *Id.* (referencing a study by Berliner, L., & Conte, J.R., *The process of victimization: the victims’ perspective*, 14 CHILD ABUSE AND NEGLECT 29, 32 (1990), wherein over half of victims said that they loved, liked, needed, or depended on their abuser). Some victims even describe their relationship to the perpetrator as positive and express concern for the perpetrator’s well-being should they disclose the abuse. See Paine, at 277 (citing widely recognized clinical explanations offered to account for the phenomenon of victims protecting perpetrators including traumatic bonding and accommodation to abuse dynamics); see also Malloy, L.C., et al., *Filial dependency and recantation of child sexual abuse allegations*, 46(2) J. AM. ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY 162 (2007); McElvaney, R., et al., *Containing the secret of child sexual abuse*, 27(6) J. INTERPERSONAL VIOLENCE 1155 (2012).

B. Disclosure Is Often a Non-Linear Process, Instead of a Discrete Event

Disclosure, rather than a discrete event, is typically ongoing and incremental. See London, K., et al., *Review of the Contemporary Literature on How Children Report Sexual Abuse to Others: Findings, Methodological Issues, and Implications for Forensic Interviewers*, 16 *MEMORY*, 29 (2008). Young children in particular tend to offer partial disclosures or may disclose abuse in indirect or accidental ways. See, e.g., ROYAL COMM. INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE, *Final Report: Identifying and Disclosing Child Sexual Abuse*, 4 (2017) (hereinafter ROYAL COMMISSION) (“While some children who disclose may give a full and detailed account of their abusive experience, it is more common for children to offer hints or reveal pieces of information over time—not necessarily in chronological order and in some cases to a range of different people”) (*emphasis added*); see also, Leander, L., et al., *A Sexual Abuse Case Study: Children’s Memories and Reports*, 14 *PSYCHIATRY, PSYCHOL. & LAW* 120 (2007) (explaining that younger children who have been sexually abused generally do not give detailed testimonies of the abuse); Eisen, M., et al., *Memory and Suggestibility in Maltreated Children: Age, Stress Arousal, Dissociation, and Psychopathology*, 83 *J. OF EXPERIMENTAL CHILD PSYCHOLOGY*, 167, 169-70 (2002) (explaining that younger children tend to disclose even fewer details than older children); Ernberg, E., et al., *Prosecutors’ reflections on sexually abused preschoolers and their ability to stand trial*, 57 *CHILD ABUSE & NEGLECT* 21 (July 2016) (noting that young children in particular may make spontaneous statements about abuse that may be inconsistent with the ongoing conversation); Ungar, et al., *Patterns of abuse disclosure among youth*, 8(3) *QUALITATIVE SOCIAL WORK* 341, 349 (2009) (hereinafter Ungar) (explaining that children may signal to trustworthy adults that they are being, or have been abused, by changing their behavior—for example, older children may indirectly attempt to disclose or cope with their abuse through risk-taking behaviors

such as self-harming, suicidal behavior and disordered eating). Children may even describe an abusive experience in “non-literal” or even “fantastical” terms. *See* Everson, M.D., *Understanding Bizarre, Improbable, and Fantastical Elements in Children’s Accounts of Abuse*, 2 CHILD MALTREATMENT 134 (1997).

Children’s disclosures are rarely straightforward and may include recantations or inconsistencies in the story, especially when the abuse is perpetrated by a family member. *See, e.g.,* Hershowitz, I., et al., *Exploring the Disclosure of Child Sexual Abuse with Alleged Victims and Their Parents*, 31 CHILD ABUSE & NEGLECT 111 (2007) (explaining that the stress of disclosing and receiving potentially negative responses from caregivers may lead some children to recant in an attempt to alleviate the stress); Lyon, T.D, et al., *Child Witnesses and the Confrontation Clause*, 102 J. OF CRIMINAL LAW & CRIMINOLOGY, 1181, 1125 (2012) (“The same factors that increase delays in reporting increase the likelihood that the child’s report will be inconsistent over time”). In fact, there is evidence to suggest that recantation occurs in as many as 1 out of 4 of all cases. *See* Malloy, L., et al., *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY 162 (2007) (hereinafter Malloy). Inconsistencies in children’s disclosures of abuse are similarly common, and “may be due to reluctance rather than a false allegation.” Lyon, T.D., et al. , *Disclosure of Child Sexual Abuse*, APSAC HANDBOOK ON CHILD MALTREATMENT 233 (2011); *see also* Malloy.

There are also emotional expressions uniquely associated with child disclosures. While children may display a range of emotions related to disclosure, most child victims disclose abuse— if they disclose at all— in a calm and neutral manner. *See* Castelli, et al., *Children’s Perceived Emotional Behavior at disclosure and prosecutors’ evaluations*, 38(9) CHILD ABUSE & NEGLECT 1521 (2014) (hereinafter Castelli). It is critical for courts to understand the research on emotional

expression and disclosure because emotionality is often used, albeit inappropriately, as an indicator of credibility. Landström, S., et al., *Children's testimony and the emotional victim effect*, LEGAL & CRIMINAL PSYCHOLOGY (2013) (noting that emotional child victims have been shown to be perceived as more credible); *see also* Castelli (noting that emotional child victims are more likely to have their cases be prosecuted).

IV. COURTS MUST REJECT FALSE ASSUMPTIONS & BIASES TO DISCREDIT REPORTS OF ABUSE

Insufficiently trained court professionals, relying on false assumptions, biases, and discredited practices, routinely fail to recognize or take seriously valid complaints of sexual abuse, particularly those raised by mothers and children. *See generally*, Bemiller, M., *When Battered Mothers Lose Custody: A Qualitative Study of Abuse at Home and in the Courts*, 5(3-4) J. OF CHILD CUSTODY 228 (2008); Dragiewicz, M., CIVIC RESEARCH INSTITUTE, *Gender Bias in the Courts: Implications for Battered Mothers and their Children*, DOMESTIC VIOLENCE, ABUSE, & CHILD CUSTODY: LEGAL STRATEGIES & POLICY ISSUES (§ 5.1–5.18) (Kingston, NJ 2010); Faller, et al., *Allegations of Sexual Abuse in Divorce*, 4(4) J. OF CHILD SEXUAL ABUSE 1 (1995); Meier, J.S., *Domestic Violence, Child Custody and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. OF GENDER, SOCIAL POLICY, & LAW 657 (2003) (hereinafter Meier). Myths regarding false allegations of sexual abuse and gendered assumptions about disclosure in particular, undermine the courts ability to provide the protection and safety that children need and for which the child welfare laws provide. Better decisions can be made if courts reject these outdated assumptions and rely instead on best practices and up-to-date scientific research, particularly when it comes to decisions regarding contact with an alleged abuser.

A. Myths Regarding Suggestibility and False Allegations of Abuse

Courts, relying on the misconception that false allegations of abuse are common, have notoriously viewed sexual assault claims with a degree of skepticism. *See, e.g.*, Meier. However, children rarely lie about sexual abuse. One prominent study on the issue concluded that intentionally false reports of sexual abuse by children comprise *less than 1% of all unsubstantiated reports of child abuse*. U.S. DEPT. OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH, AND FAMILIES, CHILDREN’S BUREAU, *Child Maltreatment*, 28-29 (2018), available at <http://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf>. In fact, child disclosers are the most reliable evidence of abuse as “the child is the one person who consistently has firsthand knowledge about possible child maltreatment or endangerment.” K. Faller, *Child Maltreatment and Endangerment in the Context of Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 429, 437 (2000). Myths about abuse disclosure persist, including the false assumption that children are inherently suggestible, and that their memories are unreliable. If courts perpetuate these myths, they risk failing to identify abuse and prevent future harm.

Decades of research on suggestibility however indicates that while some individuals are more suggestible than others, this characteristic is not dependent on age. *See, e.g.*, Holmgren, B.K., *Expert Testimony on Children's Suggestibility: Should It Be Admitted?* 10 APSAC ADVISOR 10, 11 (1997) (hereinafter Holmgren) (“Situational factors, such as the interview context, the nature of the questions used, and the strength of one's memory . . . interact with personality variables to influence the suggestibility of both children and adults”); *see also* Portwood, S.G., et al., *Adults’ Impact on the Suggestibility of Preschoolers’ Recollections*, 17 J. APPLIED DEV. PSYCHOL. 175, 177 (1996) (finding that children and adults are equally suggestible); Zaragoza,

M.S., *Memory, Suggestibility, and Eyewitness Testimony in Children and Adults* CHILDREN'S EYEWITNESS MEMORY 53 (1987) ("The belief that children are more suggestible than adults is pervasive, despite a serious lack of scientific evidence to support this notion. Recent studies have failed to uncover any simple relationship between suggestibility and age"). In fact, many children are simply resistant to suggestion or coaching. Holmgren, at 12.

Memory recollection and capacity vary depending on situational and personality factors that are largely independent of age. Saywitz, J., et al., *Interviewing Children In and Out of Court: Current Research and Practice Implications*, APSAC HANDBOOK ON CHILD MALTREATMENT 299, 351-56 (2002) (explaining that these abilities can change depending on a number of factors including the type of event experienced, the type of information being recounted, the conditions surrounding an interview, the language used, and post-event influences). In fact, in instances of abuse or neglect, research suggests that children's recollections of the events carry greater accuracy and are largely resistant to suggestibility. Ceci, et al., *The suggestibility of children: Scientific research and legal implications*, 86 CORNELL L. REV. 34 (2000).

B. Gendered Presuppositions Undermine the Child's Best Interests

A growing body of research has found that courts tend to view allegations of sexual abuse by protective parents, typically mothers, with a degree of skepticism that is unjustified. *See, e.g.*, L. Bancroft, et al., *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, 154, 162 (2d ed. 2012) ("Family courts and child protective services often appear skeptical of domestic violence or child abuse allegations brought by women in custody and visitation litigation, believing that such reports are exaggerated for strategic purposes"); *see also*, J. Meier, at 717 ("Many judges' and mental health professionals' resistance to taking seriously a

battered mother's claims of risk to children is driven, at least in part, by the fact that she is a litigant with a presumed self-interested bias against the opposing party, which casts doubt on all of her claims about the children's welfare"); CHILD USA, *Statistics on Child Abuse/Child Sexual Abuse and the Family Courts* available at <https://childusa.org/wp-content/uploads/2020/03/StatisticsonChildAbuseintheCourt.pdf>. (In a nationwide study of over 4000 cases, courts believed mother's claims only 21 percent of the time for child physical abuse and 19 percent of the time for child sexual abuse).

In fact, judicial skepticism persists even when abuse is proved in court. *Id.* (Even when the father's abuse is proved in the court, mothers lost custody to the proven abuser 13 percent of the time.) Not only are mothers' allegations discounted, but the child's disclosers of abuse are often viewed as being the result of maternal behaviors or attitudes, even though evidence of maternal coaching is rare. *See, e.g.,* K. Faller, *Coaching children about sexual abuse: A pilot study of professionals' perceptions*, 31(9) CHILD ABUSE & NEGLECT, 947, 949 (2007) (finding minimal evidence to support coaching as a significant factor in child's disclosures of abuse and concluding that, "children falsely claiming abuse or being coached to state they have been abused, when they have not, should **not** be a primary preoccupation of child abuse professionals") (emphasis added).

The overwhelming evidence suggests that court decisions are often informed by gender biases and incorrect assumptions about women's motivations for disclosing sexual abuse and advocating for their children's protection. Silberg, J., et al., *Abusers Gaining Custody in Family Courts: A Case Series of Over Turned Decisions*, 16(2) J. OF CHILD CUSTODY 140, 151-52 (2019) (finding that 67% of mothers were pathologized for advocating for the safety of their children. Attacks on mothers' credibility took a variety of forms including accusations of enmeshment, coaching, and/or "alienation."); *see also* Rivera, et al., *Abused Mothers' Safety Concerns and*

Court Mediators' Custody Recommendations, 27(4) J. FAM VIOLENCE 321 (2012). In effect, courts have tacitly encouraged perpetrators of abuse by shifting focus from the child's best interest to a presumption of dishonesty on the part of the protective parent.

V. INCORRECT JUDGEMENTS ABOUT VERITABLE REPORTS OF CHILD SEXUAL ABUSE INCREASE RISKS OF HARM TO THE CHILD & ENSURES THAT ABUSE REMAINS HIDDEN FROM THE PUBLIC

The process of disclosing abuse, and particularly how the disclosure is received by the person to whom it is made, can have significant health, socioemotional, and legal implications. Incorrect assessments of credibility based on the child's disclosures, particularly when informed by false assumptions and biases, discourage reporting, lead to poorer health outcomes, and increase the likelihood that the child will continue to be victimized.

A. Disbelief of Disclosers Discourages Reporting

Societal reception of sexual abuse disclosers impacts greatly victims' decision of whether and to whom it is safe to disclose. See McElvaney, et al., *To Tell or Not to Tell? Factors Influencing Young People's Informal Disclosures of Child Sexual Abuse*, 29(5) J. OF INTERPERSONAL VIOLENCE, 928 (2014) (hereinafter McElvaney) (noting that victims reports are not always perceived as credible and fears that one will not be believed may discourage reporting); Dollar, K. M., et al., *Influence of gender roles on perceptions of teacher/adolescent student sexual relations*, 50(1-2) SEX ROLES: A JOURNAL OF RESEARCH, 91, 98-9 (2004) (finding that the victim's experience seeking justice or accessing services can be greatly affected when courts misjudge the credibility of sexual abuse allegations). Children who expect their allegations of sexual abuse to be disbelieved are more reluctant to self-report. See McElvaney. The resulting non-disclosure

increases the likelihood of further abuse, precludes treatment, and may even put other children in danger of being abused. *See* ROYAL COMMISSION. However, when children have access to a trusted resource who can respond appropriately, studies show that children are more likely to disclose abuse. Ungar.

Similarly, courts that pathologize and discredit parental allegations of child sexual abuse, deny victimized and at-risk children of their primary protector and advocate—the non-offending parent who reports suspected abuse. Over time, this discreditation may discourage reporting of abuse. Stahly, et al., *Protective Mothers in Child Custody Disputes: A Study of Judicial Abuse*, DISORDER IN THE COURTS: MOTHERS AND THEIR ALLIES TAKE ON THE FAMILY LAW SYSTEM (A COLLECTION OF ESSAYS) (2004) (In a study of custody/abuse litigation, 63% of mothers indicated that they eventually stopped reporting abuse of their children that the children disclosed during visitations after being put in the custody of the alleged abusers).

B. Lack of Social Support Leads to Poorer Physical and Emotional Well-being Outcomes for Abuse Victims

Positive social support, including believing victims' disclosers, is strongly associated with better health and psychological outcomes for victims of child sexual abuse. *See, e.g.,* Hyman, et al., *Forms of Social Support that Moderate PTSD in Childhood Sexual Abuse Survivors*, 18 J. OF FAMILY VIOLENCE, 295 (2003) (documenting the health benefits of disclosing child sexual abuse to a supportive person and explaining the social support after disclosure may counteract the development of negative core beliefs about self-worth); Ullman, et al., *Trauma Exposure, Posttraumatic Stress Disorder and Problem Drinking in Sexual Assault Survivors*, 66 J. OF STUDIES ON ALCOHOL, 610 (2005).

Unsupportive responses to disclosure such as disbelief and minimization can intensify the victim's distress and are strongly associated with long term negative health and psychological outcomes for victims. *See generally*, Ullman, *Correlates and Consequences of Adult Sexual Assault Disclosure*, 11 J. OF INTERPERSONAL VIOLENCE, 554 (1996); *see also* R. Campbell et al., *Preventing the "Second Rape": Rape Survivors' Experiences With Community Service Providers*, 16 J. OF INTERPERSONAL VIOLENCE, 1239 (2001) (noting that adverse responses have been shown to hinder recovery in rape victims and are related to greater post-traumatic symptom severity); ROYAL COMMISSION (explaining that victims may experience "secondary wounding" or trauma resulting from others not believing or denying the discloser or minimizing the impact of the trauma from the sexual abuse).

In the legal context, many children experience "extreme demoralization and a sense of betrayal" when judges discredit accounts of abuse and order victims to have contact with their alleged abusers. Dallam, et al., *Recommended treatments for "parental alienation syndrome" (PAS) may cause children foreseeable and lasting psychological harm*, 13(2-3) J. OF CHILD CUSTODY, 134 (2016). The trauma of this betrayal can have lasting effects, including a profound mistrust in government and authority. *Id.*

A child victim's ability to access necessary services can be greatly limited when claims of sexual abuse are disbelieved. *See, e.g.*, Bornstein, et al., *Child abuse in the eyes of the beholder: Lay perceptions of child sexual and physical abuse*, 31(4) CHILD ABUSE & NEGLECT, 375 (2007) (finding that legal and mental health professionals who perceive the credibility of a child's discloser of abuse with skepticism will be negatively influenced when selecting treatment modalities for the child); *see also* McElvaney (Explaining that children who fear being doubted when disclosing will be more reluctant to confide in helping professionals).

C. Disbelief of Disclosers Increases the Likelihood of Ongoing Abuse

The research is clear that abuse is recurring in nature and is typically perpetrated by an individual with ongoing access to the victim. D. Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 8 (2006); J. Koziol-McLain et al., *Predictive Validity of a Screen for Partner Violence Against Women*, 21 AM. J. PREV. MED. 93, 99 (2001). Indeed, past abuse is often the best predictor of re-abuse and risk of ongoing harm. See McCoy & Finkelhor, *Prior Victimization: A Risk Factor For Child Sexual Abuse and for PTSD-Related Symptomology Among Sexually Abused Youth*, 19(12) CHILD ABUSE & NEGLECT 1401, 1415-17 (1995). In fact, the best research places the incidence of recurring child abuse at close to or just above fifty percent. See, e.g., S.R. Dakil, et al., *Recidivism in the Child Protection System: Identifying Children at Greatest Risk of Reabuse Among Those Remaining in the Home*, 165 ARCHIVES PEDIATRIC ADOLESCENT MED. 1006, 1008 (2011) (finding that 44% of children were re-reported as victims of repeat abuse during five-year study period). These studies likely underestimate the problem since child sexual abuse is notoriously underreported. See, e.g., A. Cederborg et al., *Delay of Disclosure, Minimization and Denial When the Evidence Is Unambiguous: A Multi-victim Case*, in *Child Sexual Abuse: Disclosure, Delay and Denial* 171 (2007). A perpetrator angered by the child's or protective parent's public disclosure of abuse may retaliate by increasing the severity and/or frequency of abuse if the perpetrator is permitted access to the child. ROYAL COMMISSION at 128-29.

The net effect is that child welfare proceedings frequently result in the endangerment of at-risk children and an added exposure to risk by permitting abusive parents to retain rights when there is substantiated abuse.

VI. DENYING STANDING TO NON-RESPONDENT PROTECTIVE PARENTS IN CHILD WELFARE PROCEEDINGS DAMAGES CHILDREN

Michigan law permitting non-respondent parents to have standing at termination hearings underscores the well-established policy that supportive parents are in the best position to understand the protective measures they must take in the face of known or suspected risks, including child sexual abuse. Denying standing to parents that seek to present evidence of their child's best interests subverts that policy and effectively dilutes the child's voice, undermines the protective relationship, and increases the risk future victimization.

A. Denying Standing to Protective Parents May Limit the Child's Access to and Meaningful Participation in Legal Proceedings

While the child's best interests inquiry is the putative subject of most child welfare proceedings, the child's voice is often lost in the courtroom. Unlike an adult litigant, a child is unable to contact and retain an attorney, get themselves to a courthouse, or do many other things necessary to act as a meaningful participant in litigation. While a Lawyer Guardian Ad Litem or other court-appointed child advocate can enable participation, the substitution of the advocate's own judgement on behalf of the child dilutes the child's voice. From its inception in juvenile court, the role of the Lawyer Guardian Ad Litem has been to serve as an officer of the Court, reviewing the facts and circumstances of the case and offering a recommendation that the judge can follow to render a decision. K. Federle, *Lawyering in Juvenile Court: Lessons from a Civil Gideon Experiment*, 37 *FORDHAM URB. L.J.* 93, 110 (2010).

There is no nationwide, uniform standard for the role and expected duties of the child's attorney but instead multiple state-based models of lawyering for children. C. Hastings, *Letting Down Their Guard: What Guardians Ad Litem Should Know About Domestic Violence in Child*

Custody Disputes, 24(2) B.C. THIRD WORLD L. J. 283, 293-96 (2004). Many states do not have court-enacted guidelines or standards in place establishing the functions of the Lawyer Guardian Ad Litem and counsel may be expected to advocate for the child's expressed wishes, the child's best interests, or some combination thereof. *Id.* Thus, even if a child can formulate and express a legal objective, the child may be represented by an attorney who is committed to protecting the child's interests but not necessarily to advocating for their expressed wishes. This is especially problematic in the context of abuse allegations as most Lawyer Guardians Ad Litem lack sufficient understanding and training in the dynamics of child sexual abuse and therefore are at a disadvantage when conducting evaluations or making recommendations to the court. C. Dalton, *When Paradigms Collide: Protecting Battered Parents and Their Children in the Family Court System*, 37 FAM. & CONCILIATION GIS. REV. 273, 285 (1999); see also C. Cuthbert et al., *Battered Mothers Speak Out: A Human Rights Report on Domestic Violence and Child Custody in the Massachusetts Family Courts* 19 WELLESLEY CENTERS FOR WOMEN (2002) (finding that insufficiently trained Lawyer Guardians Ad Litem recommend visitation and custody arrangements that are adverse to the safety of the children whose interests they are appointed to protect).

For a court to make determinations about the best interests of the child in child welfare proceedings, it is essential for the judge to understand the circumstances of the case from the perspective of the subject child. See, e.g., Comm'n on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care*, PEW 42 (May 1, 2004), available at https://www.pewtrusts.org/-/media/legacy/uploadedfiles/phg/content_level_pages/reports/0012pdf.pdf (encouraging greater participation by foster children in court proceedings and noting that children suffer a loss of self-

esteem when their views are never taken into account); J. Cashmore, *Promoting the Participation of Children and Young People in Care*, 26 CHILD ABUSE & NEGLECT 837 (2002); Ross, C., *A Place at the Table: Creating Presence and Voice for Teenagers in Dependency Proceedings*, 6 NEV. L.J. 1362, 1372-73 (2006) (describing studies showing that foster children want voice in court). Simply put, “[w]ithout the child’s perspective, judges may have little ability to understand the practical or emotional impact on a child of a given decision.” B. Atwood, *The Child's Voice in a Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 674 (2003).

For young children, especially those who cannot express themselves in the legal proceedings, a non-respondent parent may be the only means of ensuring that their perspective is wholly and appropriately conveyed to the court. *See, e.g.,* Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 297 (1999) (“Another means of allowing the child to be heard without causing undue harm to the child is through out-of-court statements made to another party”). A supportive parent is undeniably in the best position to advocate for their child's interests. Beyond that, the child has a right to rely on the contributions of each parent in proceedings where the outcome will have a direct effect on them and the way in which a parent can contribute to raising that child.

B. Denying Standing to Protective Parents Undermines the Protective Relationship and Increases the Risk of On-going Abuse

A child who is sexually abused by a parent may be the most vulnerable of all victims. In the short term, a child who is sexually abused can develop post-traumatic stress disorder, with symptoms such as flashbacks, recurring nightmares, insomnia, and difficulty concentrating. B. Andrews, et al., *Gender, Social Support, and PTSD in Victims of Violent Crime*, 16 J. OF TRAUMA STRESS, 421, 424 (2003). Young children are also likely to exhibit increased aggression and

sexualized behaviors in the aftermath of abuse. Friedrich, W.N., et al., *Child Sexual Behaviour Inventory: Normative, psychiatric, and sexual abuse comparisons*, 6 CHILD MALTREATMENT 37, 46 (2001). To begin the healing, child victims require safety, support, and stability to process their trauma. To that end, caregiver response and, in particular, maternal response, has been consistently identified as having a critical influence on post-abuse outcomes for child victims. See, e.g., Barker-Collo, et al., *Models of response to childhood sexual abuse: their implications for treatment*, 4(2) TRAUMA VIOLENCE ABUSE, 95 (2003); Yancey, et al., *Relationship of personal, familial, and abuse-specific factors with outcome following childhood sexual abuse*, 15(6) AGGRESSION & VIOLENT BEHAVIOR 410, 414-17 (2010) (explaining that higher levels of parental support have been linked with lower ratings of children's depressive symptomatology); Feiring, et al., *Ethnic status, stigmatization, support and symptom development following sexual abuse*, 16 J. INTERPERS. VIOL. 1307, 1309 (2001) (finding that higher caregiver response is linked to fewer externalizing and delinquent behaviors); Bolen, et al., *Parental Support and Outcome in Sexually Abused Children*, 16 J. OF CHILD SEXUAL ABUSE, 33 (2007) (noting that higher levels of parental support are associated with less posttraumatic stress symptomatology); Spacarelli & Kim, *Resilience Criteria and Factors Associated with Resilience in Sexually Abused Girls*, 19 CHILD ABUSE & NEGLECT, 1171 (1995) (finding higher levels of parental support associated with lower levels of shame). In fact, "[n]on-offending parents are the single most important resource that children have after they have experienced intrafamilial abuse." Child Sexual Abuse Comm., *Caring for Kids: What Parents Need to Know about Sexual Abuse*, NCTSN (2009), available at https://www.nctsn.org/sites/default/files/resources/fact-sheet/caring_for_kids_what_parents_need_know_about_sexual_abuse.pdf. Where a non-offending parent appears to support the alleged perpetrator, further harm is inflicted upon the child.

Courts that deny protective parents standing, undermine the parents' ability to provide physical and psychological safety to the vulnerable child. Under these circumstances, "children suffer from the knowledge that the person they loved most in the world . . . was disempowered to do anything to protect them." Laurie Udesky, *Custody in crisis: How family courts nationwide put children in danger* (December 11, 2016) (quoting Joyanna Silbert) available at <https://www.salon.com/2016/12/11/custody-in-crisis-how-family-courts-nationwide-put-children-in-danger/>.

The damage is especially grave when courts require, or even leave the opportunity open for, contact with the alleged abuser. *See, e.g.,* Silbert, et al., *Abusers gaining custody in family courts: A case series of over turned decisions*, 16(2) J. OF CHILD CUSTODY 140, 158-62 (2019) (explaining that when courts provided access to the alleged abuser, children became increasingly depressed and anxious and began exhibiting dissociative symptoms, regressive behaviors, school problems, and sexually acting out). Alternatively, courts that provide protective parents standing to present evidence of abuse and to share the child's best interests send a clear message to the child that the legal system recognizes the important role of the caregiver in providing physical and psychological safety to that child.

CONCLUSION

For the foregoing reasons, Amicus Curiae CHILD USA files this brief in support of Non-Respondent Mother and urges this Court to grant leave to correct the clearly erroneous decisions of the lower courts that endanger children across the State of Michigan and undermine the quality of the national body of child welfare case law.

Respectfully Submitted,

Date: 10/16/2020

/s/ Alexander S. Rusek

Alexander S. Rusek (P77581)

White Law PLLC

Attorneys for Amicus Curiae CHILD USA

2549 Jolly Road, Suite 340

Okemos, Michigan 48864

Ph: (517) 316-1195

Fax: (517) 316-1197

E: alexrusek@whitelawpllc.com

W: www.whitelawpllc.com

Marci A. Hamilton, Esq.

CEO & Legal Director, CHILD USA

Fels Institute of Government Professor

of Practice, University of Pennsylvania

3508 Market Street, Suite 202

Philadelphia, Pennsylvania 19104

Ph: (215) 539-1906

E: marcih@sas.upenn.edu

Lauren Majewski, Esq.

Staff Attorney, CHILD USA

E: lmajewski@childusa.org

Jessica Schidlow, Esq.

Staff Attorney, CHILD USA

E: jschidlow@childusa.org

PROOF OF SERVICE

I certify that on the date below that the Brief of Amicus Curiae CHILD USA in Support of Non-Respondent Mother's Application for Leave to Appeal and this Proof of Service were filed with the Court Clerk of the Michigan Supreme Court by eFiling through the Court's eFiling system and copies of the same were served on all other parties through the Court's eFiling system.

I declare under the penalty of perjury that the above statement is true to the best of my information, knowledge, and belief.

Respectfully Submitted,

Date: 10/16/2020

/s/ Alexander S. Rusek

Alexander S. Rusek (P77581)

White Law PLLC

Attorneys for Amicus Curiae CHILD USA

2549 Jolly Road, Suite 340

Okemos, Michigan 48864

Ph: (517) 316-1195

Fax: (517) 316-1197

E: alexrusek@whitelawpllc.com

W: www.whitelawpllc.com