

STATE OF MICHIGAN  
IN THE SUPREME COURT

On appeal from the Court of Appeals  
Judge Markey Presiding, and Judges Whitbeck and Gleicher

IM THE MATTER OF RICHARD HUDSON,

Supreme Court No. 137362

DENNIS MORGAN, AND MICHAEL MORGAN,

Court of Appeals No. 282765

Minors.

Family Court No. 05-018269-NA

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CLINTON COUNTY PROSECUTOR'S OFFICE and

DEPARTMENT OF HUMAN SERVICES,

Copetitioners-Appellants,

V

MELANIE MORGAN,

Respondent-Mother-Appellee,

ANDREW TANNER,

Respondent-Father.

\_\_\_\_\_ /

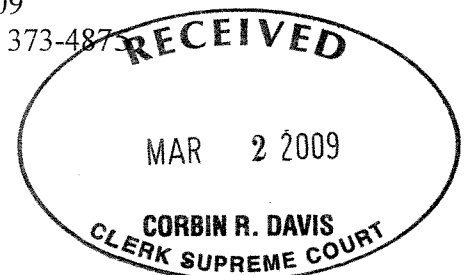
**BRIEF OF THE DEPARTMENT OF ATTORNEY GENERAL AS *AMICUS CURIAE***

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**INTEREST AND STATEMENT OF POSITION OF AMICUS CURIAE**

The Attorney General is authorized to intervene and appear before this Court on behalf of the State of Michigan or whenever the people of this State may have an interest.<sup>1</sup> The Attorney General represents the Department of Human Services, co-petitioner in this termination of parental rights' case. In addition, the People of this State have a significant interest in child welfare issues.

The Attorney General supports the position of the Clinton County Prosecutor on the four issues raised in this case.

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<sup>1</sup> MCL 14.28.

## QUESTIONS PRESENTED FOR REVIEW

- I. The family court may terminate parental rights if statutory grounds for termination are established by clear and convincing evidence. Copetitioners presented clear and convincing evidence of respondent-mother's inability to care for her three children despite being given assistance for over two years to do so. Given the evidence presented, the family court properly terminated respondent-mother's parental rights. Should this Honorable Court reverse the Court of Appeals' opinion concluding that the family court clearly erred when it terminated respondent-mother's parental rights?
  
- II. After the family court finds statutory grounds to terminate a parent's rights, it must order termination unless it finds that termination is clearly not in the children's best interest. Respondent-mother failed to progress to the point of having her three children returned for over two years and that failure had a negative effect on them. The family court did not clearly err when it determined that it was in the children's best interest to terminate. Should this Honorable Court reverse the Court of Appeals' opinion concluding that the family court clearly erred when it concluded that termination was in the children's best interest?
  
- III. This Honorable Court does not address constitutional issues unless they are necessary to resolve a case. The procedural due process issues raised for the first time in the Court of Appeals by respondent-mother can be addressed on alternate grounds. Should this Honorable Court review respondent-mother's constitutional claims?
  
- IV. Procedural due process requires notice and an opportunity to be heard. Respondent-mother was represented by a court-appointed attorney at the hearing where her parental rights were terminated. The Court of Appeals rejected respondent-mother's argument that her due process rights were violated. Should this Honorable Court review the Court of Appeals' opinion on the procedural due process issue?

**STATEMENT OF PROCEEDINGS AND MATERIAL FACTS**

The Attorney General accepts the Statement of Material Proceedings and Facts in the Clinton County Prosecutor's Office's Brief.

## ARGUMENT

**I. The family court may terminate parental rights if statutory grounds for termination are established by clear and convincing evidence. Copetitioners presented clear and convincing evidence of respondent-mother's inability to care for her three children despite being given assistance for over two years to do so. Given the evidence presented, the family court properly terminated respondent-mother's parental rights.**

**A. Standard of Review**

The Attorney General agrees with the standard of review set forth by the Clinton County Prosecutor's Office.

**B. Argument**

The Attorney General agrees with the argument set forth by the Clinton County Prosecutor's Office that the family court correctly concluded that copetitioners had presented clear and convincing evidence to terminate respondent-mother's parental rights on four separate statutory grounds.<sup>2</sup>

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<sup>2</sup> MCL 712A.19b(3)(c)(i)-(ii), (g) and (j).

**II. After the family court finds statutory grounds to terminate a parent's rights, it must order termination unless it finds that termination is clearly not in the children's best interest. Respondent-mother failed to progress to the point of having her three children returned for over two years and that failure had a negative effect on them. The family court did not clearly err when it determined that it was in the children's best interest to terminate.**

**A. Standard of Review**

The Attorney General agrees with the standard of review set forth by the Clinton County Prosecutor's Office.

**B. Argument**

The Attorney General agrees with the argument set forth by the Clinton County Prosecutor's Office that the family court correctly concluded that termination was in the children's best interest.

**III. This Honorable Court does not address constitutional issues unless they are necessary to resolve a case. The procedural due process issues raised for the first time in the Court of Appeals by respondent-mother can be addressed on alternate grounds. This Honorable Court should not review them.**

**A. Standard of Review**

This Honorable Court does not unnecessarily address constitutional issues.<sup>3</sup> Moreover, this Honorable Court will uphold a lower court's decision found to be correct albeit for the wrong reason.<sup>4</sup>

**B. Argument**

For the reasons set forth in Issue IV, *infra*, the Court of Appeals reached the correct result and this Honorable Court should not review the constitutional issues raised by the Respondent-Mother.

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<sup>3</sup> *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001).

<sup>4</sup> *Washtenaw Co Health Dep't v T&M Chevrolet, Inc*, 406 Mich 518, 520 n 1; 280 NW2d 822 (1979); *Fout v Dietz*, 401 Mich 403, 407; 258 NW2d 53 (1977).

**IV. Procedural due process requires notice and an opportunity to be heard. Respondent-mother was represented by a court-appointed attorney at the hearing where her parental rights were terminated. The Court of Appeals properly rejected Respondent-Mother's due process argument.**

**A. Standard of Review**

Constitutional issues are reviewed de novo.<sup>5</sup>

Procedural due process in a neglect matter requires that the respondent be afforded notice of the nature of the proceedings and an opportunity to be heard.<sup>6</sup>

**B. Argument**

**1. The Court of Appeals correctly ruled that respondent-mother's procedural due process rights were not violated by the family court's failure to advise her that her plea could later be used as evidence against her in a proceeding to terminate her parental rights.**

Before accepting a plea of admission in a neglect matter, the family court must advise the respondent on the record or in a writing made part of the file of the allegations in the petition and of the right to an attorney if the respondent is without an attorney.<sup>7</sup> The family court must also advise the respondent that if it accepts her plea that she will give up her right to a trial by judge or jury, to have the petitioner prove the allegations in the petition by a preponderance of the evidence, to have witnesses against her appear and testify under oath at the trial, to cross-examine the witnesses and to have the court subpoena witnesses for her.<sup>8</sup> In addition, the court must advise the respondent of the consequences of her plea, “including that the plea can later be used as evidence in a proceedings to terminate parental rights if the respondent is a parent.”<sup>9</sup> Before accepting

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<sup>5</sup> *County Road Ass'n v Governor*, 474 Mich 11, 14; 705 NW2d 680 (2005).

<sup>6</sup> *In re Kirkwood*, 187 Mich App 542; 468 NW2d 280 (1991); *In re Slis*, 144 Mich App 678, 683; 375 NW2d 788 (1985).

<sup>7</sup> MCR 3.971(B)(1) and (2).

<sup>8</sup> MCR 3.971(B)(3)(a)-(e).

<sup>9</sup> MCR 3.971(B)(4).

the respondent's plea, the family court must satisfy itself that it was "knowingly, understandingly, and voluntarily made."<sup>10</sup>

Here, the family court failed to advise respondent-mother that her plea could later be used as evidence in a proceeding to terminate her parental rights,<sup>11</sup> but otherwise fully complied with the court rule.<sup>12</sup> The family court then took jurisdiction over the children based on respondent's plea of admission.<sup>13</sup>

Matters affecting the family court's exercise of jurisdiction may be challenged only on direct appeal of the jurisdictional decision, not by collateral attack in a subsequent appeal of an order terminating parental rights.<sup>14</sup> Because respondent-mother failed to challenge the family court's exercise of jurisdiction by way of interlocutory appeal based on an alleged defect in her plea proceeding, she cannot do so now.<sup>15</sup>

In any event, at the time respondent-mother pled, the petition only sought temporary jurisdiction over her children. Given that the family court informed respondent-mother that her children might be removed<sup>16</sup> and that her plea was not later used as evidence during her termination hearing,<sup>17</sup> the family court correctly concluded that respondent-mother's plea was knowingly, understandingly, and voluntarily made. The Court of Appeals recognized these facts and correctly held that respondent-mother was not denied procedural due process by the family court's omission.

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<sup>10</sup> MCR 3.971(C)(1).

<sup>11</sup> MCR 3.971(B)(4).

<sup>12</sup> Appellee's Appendix 1b-8b.

<sup>13</sup> Appellee's Appendix 8b. See record of trial/plea.

<sup>14</sup> *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993).

<sup>15</sup> *In re Hatcher*, 443 Mich at 444.

<sup>16</sup> Appellee's Appendix 2b.

<sup>17</sup> Appellant's Brief, 36; Appellant's Appendix 192a-207a.

**2. The Court of Appeals correctly ruled that respondent-mother's procedural due process rights were not violated when the family court appointed counsel for respondent-mother before her termination hearing.**

During a respondent's first court appearance in a neglect matter, the family court is required to advise the respondent of his right to an attorney at each stage of the proceeding and to court-appointed counsel if the respondent is indigent as well as of the right to request and receive a court-appointed attorney at a later proceeding.<sup>18</sup> If it appears to the court in a neglect proceeding that the respondent wants an attorney and is financially unable to retain an attorney, the court shall appoint one to represent him.<sup>19</sup> An adult respondent in a neglect proceeding may waive his right to an attorney.<sup>20</sup> The respondent is required to take affirmative action to initiate the appointment of counsel.<sup>21</sup>

The Court of Appeals correctly recognized that respondent did not take any action to request appointed counsel even though she was fully informed of her right to do so. (Appellant's Appendix 145a and Appellee's Appendix 1b and 3b).<sup>22</sup> Consequently, the Court of Appeals rightly held that respondent was not entitled to appointed counsel under either the statute or the court rule.

Nevertheless, respondent-mother argues before this Honorable Court that the family court should have stopped the preliminary hearing and determined whether

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<sup>18</sup> MCL 712A.17c(4) and MCR 3.915(B)(1)(a)(i) and (ii).

<sup>19</sup> MCL 712A.17c(5) and MCR 3.915(B)(1)(b)(i) and (ii).

<sup>20</sup> MCL 712A.17c(6) and MCR 3.915(B)(1)(c).

<sup>21</sup> *In re Hall*, 188 Mich App 217, 222; 469 NW2d 56 (1991).

<sup>22</sup> See also Summons: Order To Appear (Child Protective Proceeding) that provides:

**6. RIGHT TO ATTORNEY:** As a party, you have the right to be represented by an attorney. If you want an attorney, you should hire one immediately so the attorney will be ready on the hearing date. If you want an attorney but are not financially able to hire an attorney, the court should be contacted immediately about a court appointed attorney.

respondent-mother qualified for counsel and appointed one for her, stating that she never "explicitly" waived her right to court-appointed counsel. Appellee's Brief, 42-43.

The record reveals that after advising Respondents of their right to counsel, the family court specifically asked: "Do you want to be represented?" (Appellee's Appendix 1b and 3b). Only respondent-father replied that if the matter went further, he thought so. (Appellee's Appendix 3b). The family court then specifically advised each Respondent fill out a financial form, adding that if Respondents could not afford an attorney, one would be appointed for them. (Appellee's Appendix 3b). Respondent-mother responded: "Okay." (Appellee's Appendix 3b). The family court then asked if respondents wanted to admit any of the allegations or if they wanted the court to "set this for another hearing" so that they had "a chance to do that." (Appellant's Appendix 145a and Appellee's Appendix 3b). The respondents, who had reviewed the petition, stated that there were problems with the petition, but that they would be willing to admit to some of the allegations therein. (Appellant's Appendix 145a).

Given that respondent-mother proceeded with her plea, she waived her right to counsel<sup>23</sup> and the Court of Appeals correctly concluded that the family court complied with the applicable statutes and court rules.

Even though the Court of Appeals found no statutory or court rule violation, it went on to state that the "United States Constitution provides a right to counsel in parental termination cases," citing in *In re Powers*.<sup>24</sup>

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<sup>23</sup> See and compare *People v Scott*, 381 Mich 143, 147; 160 NW2d 878 (1968); *People v Dunn*, 380 Mich 693, 697; 158 NW2d 404 (1968); *People v Hoby*, 380 Mich 686, 689; 158 NW2d 392 (1968); *People v Gonzales*, 179 Mich App 477, 482; 446 NW2d 296 (1989).

<sup>24</sup> *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2000).

The Court of Appeals was legally incorrect on that point. In fact, in *Lassiter v Dep't of Social Services of Durham Co, North Carolina*,<sup>25</sup> the United States Supreme Court held that the due process clause of the Fourteenth Amendment does not require the state to appoint counsel to represent a respondent in every proceeding to terminate parental rights and, instead, held that the decision of whether due process required the court to appoint counsel for an indigent parent would be made by the trial court after weighing the factors set forth in *Mathews v Eldridge*,<sup>26</sup> subject to appellate review.

Nearly six years before *Lassiter*<sup>27</sup> was decided, this Honorable Court stated in *Reist v Bay Circuit Judge*<sup>28</sup> that the court rule that required the court to appoint counsel for indigent parents at hearings which might involve termination of their parental rights was “constitutionally based.”<sup>29</sup>

*Reist* is not binding because it is *dicta*<sup>30</sup> and because it was a plurality decision.<sup>31</sup> Nevertheless, most Court of Appeals' panels,<sup>32</sup> save two,<sup>33</sup> have treated *Reist* as controlling.

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<sup>25</sup> *Lassiter v Dep't of Social Services of Durham Co, North Carolina*, 452 US 18, 31-32; 101 S Ct 2153; 68 L Ed 2d 640 (1981), *reh den* 453 US 927; 102 S Ct 889; 69 L Ed 2d 1023 (1989).

<sup>26</sup> *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 19 (1976).

<sup>27</sup> *Lassiter*, *supra*, 452 US 18.

<sup>28</sup> *Reist v Bay Circuit Judge*, 396 Mich 326, 346; 241 NW2d 55 (1976)(Levin, J., Kavanagh, CJ and Williams, J).

<sup>29</sup> *Reist v Bay Circuit Judge*, 396 Mich 326, 346; 241 NW2d 55 (1976)(Levin, J., Kavanagh, CJ and Williams, J).

<sup>30</sup> *People v Borchard-Ruhland*, 460 Mich 278, 286 n 4; 597 NW2d 1 (1999).

<sup>31</sup> *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976).

<sup>32</sup> *In re Powers*, *supra*; *In re EP*, 234 Mich App 582, 597-598; 595 NW2d 167 (1999), *overruled on other grounds* *In re Trejo*, 462 Mich 341, 353 n 10; 612 NW2d 407 (2000); *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988); *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986); *In Re Render*, 145 Mich App 344, 348; 377 NW2d 421 (1985); *In the Matter of Cobb*, 130 Mich App 598, 599; 344 NW2d 12 (1983); *In the Matter of Kenneth Jackson, Jr.*, 115 Mich App 40, 49; 320 NW2d 285 (1982); *Doe v Oettle*, 97 Mich App 183, 185; 293 NW2d 760 (1980).

Even so, it is clear that the Court of Appeals incorrectly believed that appointed counsel was required as a matter of federal constitutional law. Nevertheless, the question of whether the federal due process protection was violated by failing to appoint counsel should not be resolved in this case because respondent-mother had appointed counsel.

In fact, this Honorable Court has recently ordered oral argument on the issue of whether constitutional due process was violated by the family court's failure to appoint counsel for a respondent-father at his termination hearing in *In re McBride*.<sup>34</sup>

Consequently, even though the Court of Appeals' reasoning was not completely correct, it properly rejected respondent-mother's due process claims and this Honorable Court should not review that decision.

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<sup>33</sup> *In re Perry*, 148 Mich App 601, 609-610; 385 NW2d 287 (1986), *lv den* 426M867 (1986). See also *In re Osborne (Aft Rem)*, 237 Mich App 597, 606; 603 NW2d 824 (1999), *lv den* 461 Mich 931 (1999) stating that it was “unclear whether respondent’s right to court-appointed counsel is guaranteed by the Michigan Constitution”, but noting that court-appointed counsel was afforded under the statute and court rule.

<sup>34</sup> *In re McBride*, \_\_ Mich \_\_; \_\_ NW2d \_\_ (2009)(Docket No. 136988, *rel'd* February 20, 2009).

**Conclusion and Relief Sought**


For the reasons stated in this brief, the Attorney General respectfully request that this Honorable Court rule:

1. The family court did not clearly err when found that copetitioners had established four statutory grounds to terminate respondent-mother's parental rights.
2. The family court did not clearly err when it found that termination was not contrary to the children's best interest.
3. The Court of Appeals properly rejected respondent-mother's procedural due process claims and, therefore, this Honorable Court should not address them.
4. If this Honorable Court chooses to address respondent-mother's procedural due process claims, this Honorable Court should reject them because respondent-mother's due process rights were not violated.

Respectfully submitted,

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