

STATE OF MICHIGAN
IN THE SUPREME COURT

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

IN THE MATTER OF RICHARD HUDSON,
DENNIS MORGAN, and MICHAEL MORGAN,
Minors.

Supreme Court
No. 137362

Court of Appeals
No. 282765

CLINTON COUNTY PROSECUTOR'S OFFICE and
DEPARTMENT OF HUMAN SERVICES,

Family Court
No. 05-018269-NA

Copetitioners-Appellants,

-vs-

MELANIE MORGAN,

Respondent-Mother-Appellee,

ANDREW TANNER,

Respondent-Father.

**CO-PETITIONER-APPELLANT'S REPLY BRIEF TO APPELLEE'S BRIEF ON
APPEAL**

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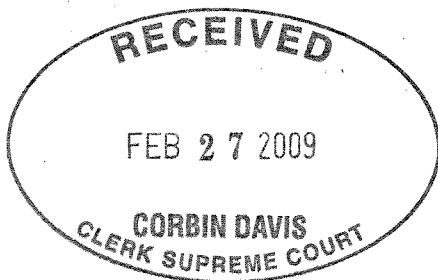


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ARGUMENT I

WHERE RESPONDENT-APPELLEE HAD NO HOUSING NOR JOB AFTER TWO AND ONE HALF YEARS, THE TRIAL COURT DID NOT CLEARLY ERR WHEN IT FOUND CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE STATUTORY GROUNDS FOR TERMINATION.

It is not necessary for this Court to find that all of the bases relied upon by the Trial Court to terminate Respondent's parental rights were established in the court below. Rather, if any one of the bases was established by clear and convincing evidence it would require reversal of the judgment of the Court of Appeals, and reinstatement of the decision of the lower court terminating parental rights. *In re Sours*, 459 Mich 624; 593 NW 2d 520 (1999).

In August 2006, Michigan was criticized for failing to move children quickly into safe, stable, permanent homes either through reunification with their birth families or adoption and for failing to provide children with adequate medical, dental and mental health services in the class action lawsuit filed in federal court. In July 2008, a settlement agreement was reached. Interestingly, in order to ensure faster progress toward placement of children in permanent homes, an order was entered October 24, 2008, that DHS would simultaneously plan for children's reunification with parents while also planning for their adoption, should reunification prove impossible. *Dwayne B. v Granholm*, 2007 US District ED Mich, # 2:06-cv-13548.

The court may consider terminating parental rights if the conditions which led to adjudication haven't been resolved in 182 days--six months after the initial dispositional order. MCL 712A.19(b)(3)(c)(i); MSA 27.3178(598.196)(3)(c)(i). Furthermore, the Court was required to determine if the conditions leading to the proceedings could be

rectified within a reasonable time. *In re Dahms*, 187 Mich App 644; 468 NW2d 315 (1991). Respondent had already had 26 months from Adjudication, 25 months from the first dispositional, well over the six months contemplated by statute. The Trial Court had given her over two years and Respondent had yet to resolve the conditions that brought the children into care at the time of the termination hearing.

The court requires respondents to do more than attend parenting classes and counseling. *In re Gazella*, 264 Mich App 668, 676-677; 692 NW2d 708 (2005). They must show parenting behaviors changed to the point where the children would no longer be at risk in their custody. Respondent was unable to show she benefited to the extent she could care for the children. Simple compliance is not enough. Such an interpretation would violate common sense and the spirit of the juvenile code, which is to protect children and rehabilitate parents whenever possible so that parents will be able to provide a home for their children that is free of neglect. *In re Gazella, supra.*

In an effort to achieve a permanent placement for the child, including either a safe return to the child's home or alternative permanency plan, a permanency planning hearing must be held within 12 months after removal. The court must return the child home unless there is risk of substantial harm or order the agency to initiate termination proceedings unless clearly not in the best interests of the child. Failure to comply is substantial risk. MCL 712A.19a(5); MCR 3.976(E). Progress was not made until the Permanency Planning hearing, held in September 2006. Even though there was a positive cocaine drop which Respondent denied, the Court allowed Respondent more time.

Respondent contends that there was not clear and convincing evidence to terminate under MCL 712A.19b(3)(c)(i) because the conditions which led to adjudication

did not continue to exist at the time of the hearing. Resp. brief, p 23. The children had been removed from a home found to be in deplorable condition. Respondent was evicted from the original home and stayed with her grandmother in a 2 bedroom trailer, (146a, 221a). Suitability of Respondent's residence certainly still applied at termination.

Despite the fact that Respondent claimed her grandmother and father would move out of their trailer to make room for the boys, they never had. In fact, Respondents had begged the Court not to kick grandma out because she had no where else to go at the onset of the case. (166a). In Spring 2007, Respondent claimed to be trying to get an apartment, trying to find someone else she could live with and staying with Michael Morgan's sister but never supplied an address.. (215a, 221a, 222a). Her father testified on November 30, 2007 that he had not moved out of his mother's trailer because his mother needed help with finances and Respondent could not support herself. Respondent had never supported herself and her children by herself (232a-234a).

The 'plan' referred to in Respondent's brief, p 28, to make room for the children is a contradiction. Family could not care for Respondent and the children and move out of the trailer to make room for them at the same time. Respondent's father was unemployed and her grandma received only social security and a pension (232a) and needed help herself (234a).

Two years passed and Respondent still had no room or home for the children. This is not the same as saying or requiring Respondent to 'own' a home, or even have her own home. No one in this case ever required Respondent to possess her own home and it certainly was not grounds to terminate her parental rights. To say or even imply that is disingenuous and also unfair to the children. Respondent was certainly aware that the

boys needed a stable place to live, a home, on their return to her. Respondent was relying on her family to care for herself. In addition, a previous placement request by Respondent's father had been denied. There were concerns about past criminal, mental health, substance abuse and his ability to provide structured supervision for Ryan (73a). A drug raid, deplorable home conditions and subsequent eviction were the housing conditions that caused the children to come within the court's jurisdiction. Multiple temporary homes, lack of effort, barely existing herself and no room for the boys were the housing conditions that was one factor causing termination of parental rights.

Respondent claims no one contested she could keep a clean and appropriate home. Respondent's brief, 23. This is untrue. Respondent was sleeping on a couch in her grandma and father's trailer. (231a) She had also stayed with her husband and husband's sister. (216a, 221a, 222a) She did not have an appropriate home for the children after 2 years to even show that she could keep it clean. Reunification was never likely in grandma's home. (73a, 173a)

Respondent claims the 'temporary lack of employment' was improperly cited for termination, Resp. brief, p 29. This was not a temporary condition. Respondent had not been employed since 2003 until obtaining employment one year after adjudication (176a). While she had the job, the caseworker and court did applaud and encourage her for her efforts. However, she lost the job due to falling asleep on the line (185a). Ironically, falling asleep was one of the initial concerns regarding Respondent and her failure to supervise the children (158a); she missed the psychological because she fell asleep (200a). She then obtained a job she soon quit. (236a) She was unemployed at the beginning of the case, and remained unemployed except for a job she was fired from and

one she quit. Respondent had never been able to support herself or the children (73a, 234a).

Respondent claims she had improved her parenting skills, attended visits and required a minimal level of supervision, Resp. brief, p 23. On the contrary, Respondent was so late to visitation one occasion that the children were leaving and Respondent and then Ryan became vulgar (197a). The 'minimal level of supervision' referred to, was during supervised visits for the two younger boys at the DHS office. (179a) Respondent admitted parenting problems in 2005 (146a) and supervision of the younger boys was not where it needed to be (158a). Respondent never had a place for her two younger sons to visit unsupervised throughout the case (187a).

Respondent claims there was a discovery of the children's physical and mental health needs, Resp. brief, p 31. At the outset, Respondent admitted that Ryan was angry and aggressive, (149a). He felt helpless and hopeless. (157a) On 1/12/06, while in Respondent's home, there was concern for his emotional welfare and depression (157a). His relationship with Respondent was one of friendship and as a result of poor parenting, Ryan was defiant (219a). Even in November, 2007, he felt so responsible for his mother, the decision to move on with his life needed to be made for him (226a). Dennis also had emotional problems due to Respondent's neglect (132a, 135a). Furthermore, the record is replete with the substantial medical and dental care, including ear surgery for Ryan and Dennis, eye surgery for Dennis and extensive dental work which needed to be provided to all the children while in foster care following removal from Respondent (73a, 135a, 172a, 212a). Respondent did not believe the children had any needs when they came into care (108a, 109a). DHS urged Respondent to obtain appointments for herself and they

would assist in payment (114a). She also was urged to enroll for insurance while she had her job and obtain care for herself in an effort to show she could do the same for the boys. She failed to do either for herself let alone the children. (182a).

Respondent claims, brief p 37, that immediately on removal, the three siblings were separated and placed in different foster homes. This is untrue. All three boys were placed together in the same foster home on January 12, 2006, where Ryan remained for almost five months. (133a) Additionally, it is not true that Ryan has no prospect of being adopted. This is untrue. Adoption is always the first goal. However, other permanency planning goals will be considered if an older child currently does not wish to be adopted. Adoptions are currently pending for a sixteen year old boy and a seventeen year old boy in Clinton and Gratiot County. In 2008, according to information provided by the Department of Human Services on 2/26/09, 170 children were adopted between the ages of 15-18.

Contrary to Respondent's claims, her addiction was problematic through the case. She tested positive at the outset (34a) and continued to be dirty after being shown caused (200a, 202a). She struggled with treatment (74a) and tested positive for opiates periodically. Caseworkers received no prescriptions except for the spring 2007 positive screen, (154a, 160a). However, Respondent had repeatedly been told not to obtain prescriptions for vicodin (73a, 186a) based on her diagnoses of Opioid Dependence (52a).

Respondent claims her mental health issues and her continued relationship with her husband was speculation. Resp. brief, p 47. However, despite his refusal to participate in services (103a), Respondent admitted contact with Mr. Morgan because it

was 'too hard without him' (74a) in June, 2006. Also on November 30, 2007, Compeau testified that he had spoken to her therapist the previous day, and she had indicated that she had concerns about the people Respondent chose to have around her, that although she'd made progress at times, she had serious reservations about what would happen if the children were home and that Respondent would have difficulty making consistent, appropriate choices for the children (235a). Further, Respondent admitted to her therapist continued involvement with Mike and her therapist did not believe that they were separated in 2007 (216a).

The Trial Court did not clearly err in finding that the statutory grounds for termination had been established by clear and convincing evidence. MCR 3.977(J); *In re Trejo*, 462 Mich 341; 612 NW2d 407 (2000). The children were removed from Respondent's care *In the Matter of Vanessa Lynn Henry*, unpublished opinion per curium of the Court of Appeals, issued August 4, 2005 (Docket No. 258869):

" . . . because of lack of housing and financial support. The evidence showed that respondent-appellant, being unable to support herself and her child, had a lengthy history of frequently moving and residing with friends and/or relatives. After assuming temporary jurisdiction over the child, the court ordered that respondent-appellant comply with her parent agency agreement, which, in pertinent part, required her to obtain and maintain suitable housing and consistent employment. At the time of the termination trial, respondent-appellant was employed and was residing with a friend, but planned to begin residing with her mother upon return of the child."

Respondent in *Henry* also contended she complied with many terms of the parent-agency agreement and she had a housing plan. However, the *Henry* Court found that the suitability of her proposed housing situation remained problematic given her history of repeatedly moving in and out of her mother's home. It stated:

"Given this lack of stability or permanency in respondent-appellant's housing situation over a period of more than two years, the trial court did not clearly err in concluding that respondent-appellant was unable to provide the child with a stable home.

The testimony also showed that respondent-appellant was unable to maintain consistent employment throughout the proceedings. Although respondent-appellant held several jobs for short durations throughout the proceedings and was employed at the time of the termination trial, she remained unemployed for a substantial part of the proceedings.

Given the continued instability of the respondent-appellant's housing situation and her inability to maintain consistent employment to support the child throughout the proceedings, we find no clear error in the trial court's findings that she failed to rectify the primary conditions that led to the adjudication of the child and there was no reasonable likelihood that she would be able to do so within a reasonable time." MCL 712A.19b(3)(c)(i).

Due to her transient nature and home conditions, the younger two boys had never even had unsupervised visits to Respondent's home. When Respondent had had sole care and custody of the children, medical and dental needs had not been taken care of. Based on her history and current evidence, Respondent could not provide basics to her children let alone provide them a place to live. Respondent's skills, residence, substance abuse and finances were all concerns at the beginning of the case as well as at the time of termination. MCL 712A.19b(3)(c)(i).

The Respondent claims the Court terminated parental rights pursuant to MCLA 712A.19b(3)(c)(ii). Resp. brief, p 25. This is not true. No other conditions arose during the course of the proceedings to cause a supplemental petition to be filed, giving notice to the parent and a hearing about the new allegations. No other hearings were scheduled other than the Show Cause Hearings and regular Review Hearings throughout the

proceeding. Respondent was well aware of the conditions she needed to rectify from the original petition and received recommendations about them throughout the case. MCLA 712A.19b(3)(c)(ii) is inapplicable.

The Trial Court stated, in summarizing conditions that brought the children within the Court's jurisdiction, "and further other conditions that came within the Court's jurisdiction were housing problems that she lost her original housing, employment, and this discovery of some of the children's physical and mental health needs." Everything mentioned by the Court were issues at the outset of the case and the allegations in the termination petition included allegations from the original petition and allegations related to drug screens, psychological assessments, the children and Respondent's health, the marital relationship, job, housing and Respondent's only partial compliance with services. (237a) 'Other conditions' referred to in the Court's ruling did not mean that the Court was terminating under 712.19b(3)(c)(ii). Any additional facts merely supported allegations made from the beginning of the case.

ARGUMENT III

WHERE THE ISSUES RAISED BY THE
RESPONDENT-APPELLEE IN THE COURT OF
APPEALS WERE PROPERLY DECIDED, THIS COURT
NEED NOT ADDRESS THEM FURTHER.

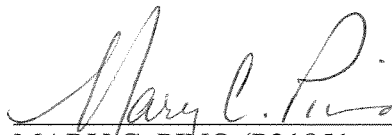
At respondent's first court appearance, the Court must advise respondents of their right to an attorney. The court must appoint an attorney for respondent at any hearing if respondent requests it, and it appears that respondent is financially unable to retain an attorney. MCR 3.915(B). The Court did advise Respondent of her right to counsel at the first hearing. Respondent never requested an attorney or even filed the financial statement discussed with the Court.

The Fourteenth Amendment of the United States Constitution does not require court-appointed counsel for a respondent in every termination of parental rights proceeding. *Lassiter v DSS of Durham Co, North Carolina*, 952 US 18, 31-32 (1981). *Reist v Bay Circuit Judge*, 396 Mich 326, 346 (1976), in a plurality opinion required appointment of counsel in proceedings that "may involve termination of parental rights". The Court of Appeals in *In re Perry*, 148 Mich App 601 (1986) held *Reist* was without precedential value. Here Respondent was provided counsel prior to the Termination Hearing.

RELIEF

We cannot delay permanence any longer for these children. The Trial Court properly terminated pursuant to MCLA 712A.19b(3)(i)(g) and (j). When applying the clearly erroneous standard, MCR 2.613(3) requires that regard be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. *In re Miller*, 102 Mich App 70; 451 NW2d 576 (1990). The Trial Court did not impose arbitrary deadlines. There comes a point in time where the Court must find permanence for the children. The Legislature did not intend that children be left in foster care indefinitely, but rather that parental rights be terminated if the conditions leading to the proceedings are not rectified within a reasonable time. *In re Dahms*, 187 Mich App 644; 468 NW 2d 315 (1991). Appellant respectfully requests reversal and reinstatement of the decision of the Trial Court.

Dated: February 27, 2009



MARY C. PINO (P31851)
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