8 Mar '09

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Markey, PJ, and Whitbeck and Gleicher, JJ)

In the Matter of Richard Hudson, Dennis Morgan, and Michael Morgan,
Minors

Supreme Court No. 137362

Court of Appeals No. 282765

v

Clinton County Prosecutor's Office and
Department of Human Services
(Clinton County Circuit Court)

Trial Court No. 05-018269-NA

Co-Petitioners-Appellants,

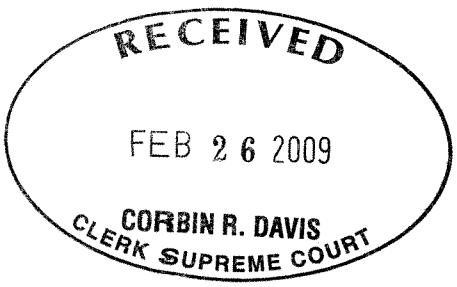
v

Melanie Morgan,

Respondent-Mother-Appellee,

Andrew Tanner,

Respondent-Father



BRIEF OF *AMICUS CURIAE* THE STATE BAR OF MICHIGAN'S CHILDREN'S LAW SECTION

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Report on Public Policy Position

Name of Section: Children's Law Section

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Other: *amicus curiae* brief in the matter of Hudson Morgan Minors

Date position was adopted: February 19, 2009

Process used to take the ideological position: Discussion at Council meetings on January 15 and February 19, 2009.

Number of members in the decision-making body: 16

Number who voted in favor and opposed to the position:
11 in favor
1 abstained

FOR SECTIONS ONLY:
P This subject matter of this position is within the jurisdiction of the section.
P The position was adopted in accordance with the Section's bylaws.
P The requirements of SBM Bylaw Article VIII have been satisfied.
If the boxes above are checked, SBM will notify the Section when this notice is received, at which time the Section may advocate the position.

Position: The Section respectfully requests that the Court affirm the decision of the court of appeals holding that the trial court clearly erred in termination respondent-mother's parental rights absent clear and convincing evidence supporting any statutory ground for termination of parental rights.

THE STATE BAR OF MICHIGAN'S
CHILDREN'S LAW SECTION

respectfully submits the following position on:

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In re Hudson/Morgan Minors; MSC No. 137362

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The Children's Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Children's Law Section only and is not the position of the State Bar of Michigan. To date, the State Bar of Michigan does not have a position on this matter.

The total membership for the Children's Law Section is approximately 400 members.

The position was adopted by a unanimous vote of the Council of the Children's Law Section after a discussion at the January 15 and February 19, 2009 meetings, held in conformance with the Section's bylaws. The number of members in the decision-making body is 16. Eleven members voted in favor, and one member abstained from voting on the position that is presented in this Amicus Brief.

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STATEMENT OF BASIS OF JURISDICTION

Appellant, Clinton County Prosecutor's office and Clinton County Department of Human Services (co-petitioners) filed a timely Application for Leave to appeal the August 28, 2008 judgment of the Court of Appeals. On October, 2008, this Court (1) granted the application for leave to appeal, (2) directed the parties to include among their briefs several issues, and (3) invited the Children's Law and Family Law sections of the State Bar of Michigan to file *Amicus Curiae* briefs. The Children's Law Section submits this *Amicus Curiae* brief in response to the Court's invitation.

STATEMENT OF RELIEF SOUGHT

The Children's Law Section requests this Court affirm the Court of Appeals' judgment and adopt its reasoning as it properly recognizes that strict adherence to the weighty burden of establishing statutory grounds for termination of parental rights by clear and convincing evidence is essential to the functioning of the child welfare system, and for each member of the families within it. Application of the clear and convincing standard is consistent with the safeguards necessary to protect a parent's fundamental rights and also as a proper interpretation of court rules and statutes prescribing proper procedures for abuse and neglect proceeding.

Amicus Curiae, the Children's Law Section of the State Bar of Michigan, respectfully requests this Court to affirm the Court of Appeals decision as it properly found that the heightened evidentiary burden had not been met and that termination of Ms. Morgan's rights was contrary to the children's best interests.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals properly hold that the trial court erred in finding that statutory grounds for termination of parental rights were established by clear and convincing evidence where much of the evidence was speculative in nature and there was little to no evidence linking allegations to Ms. Morgan's unfitness or the specific harm that she posed to the children if they were returned to her care?

   The Children's Law Section answers: Yes.

2. Did the trial court improperly weigh purely economic factors beyond Ms. Morgan's control in rendering her "unfit," and improperly interpret the Juvenile Code as requiring complete financial independence and individual home ownership as prerequisites to parental fitness?

   The Children's Law Section answers: Yes.

3. Did the Trial Court err in finding that termination of Ms. Morgan's parental rights was not contrary to the children's best interests where there was evidence indicated that breaking the parent child bond would be harmful to them?

   The Children's Law Section answers: Yes.

4. Did the Trial Court violate Ms. Morgan's right to Due Process rights by failing to appoint counsel during proceedings that could eventually lead to termination of her parental rights where the trial court was on notice that Ms. Morgan was indigent and Ms. Morgan did not expressly waive her right to appointed counsel?

   The Children's Law Section answers: Yes.

STANDARD OF REVIEW

This Court reviews a Courts decision to terminate parental rights for clear error. MCR 3.977(J); *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). It reviews a trial court's factual findings in support of termination for clear error. *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

INTRODUCTION

Amicus Curiae the State Bar of Michigan's Children's Law Section is a unique group comprised of members who are (1) prosecutors representing petitioners; (2) L-GAL's representing children; (3) retained counsel who represent parents; and, (4) appointed counsel who have served as parents and children's attorneys. Although the group's diverse membership consists of many different viewpoints, we share an overwhelming understanding of the sensitivity of these proceedings, the constitutional rights at stake, and the importance of working hard to recognize what is in a child's best interest.

In this case, the Children's Law Section as *Amicus Curiae*, sympathizes with the difficulty that a trial court undertakes when it removes children from homes and is eventually asked to make decisions that will forever change those children's lives. However, it is that very power and the gravity of its consequences, which warrants oversight to prevent Michigan's children from being removed from their parents unnecessarily–without showing parental unfitness. Moreover, the Legislature specifically recognized the serious nature of termination proceedings by requiring a statutory ground to be established by ***clear*** and ***convincing*** evidence– not speculative evidence.

At a time when our state ranks near the top with the highest unemployment and foreclosure rates in the country, we must avoid setting a trend that condones termination of parental rights as a legally appropriate remedy based on poverty related concerns alone. Nor can we impose unreasonable requirements, such as total financial independence and independent home ownership, as prerequisites for maintaining parental rights. With twenty-percent of Michigan's children under five years of age currently living at the poverty level, it is highly unlikely that their parents are able

to provide for them without some form of assistance– whether provided by the government or family members. The Juvenile Code does not contemplate that a parent cannot reside with relatives. Public policy favors encouraging parents to seek help from their families, before relying on the state.

This Court should pursue outcomes that are consistent with Legislative intend and that encourage people to improve their situations for the sake of their children. The Court should adopt language reaffirming that neither the Legislature, nor this Court, have ever required perfection or complete financial independence in order for our citizens to preserve their parental rights. Instead they have required that the parent comply with the services recommended by DHS and become "fit" parents.

STATEMENT OF FACTS

The facts and proceedings most pertinent to the legal issues presented in this *Amicus Curiae* brief are summarized as follows:

The Department of Human Services became involved in the lives of Melanie Morgan and her three children, Ryan (DOB 4/5/91), Dennis (DOB 7/7/99), and Michael (DOB 10/17/02), in 2005 after Ms. Morgan entered a plea to the following allegations: (1) she and Michael Morgan, (Dennis and Michael's father), had been adjudicated for neglect in 1999 and received services in 1999, 2004 and 2005; (2) on September 12, 2005, the family home "was found to be in deplorable conditions"; (3) Mr. Morgan's alcoholic older brother was sharing the home; (4) both parents twice

failed to pick up one of the children from school during his first week in attendance; and, (5) her oldest child, Ryan had anger and aggression issues.[1] (At-Apx at 147-149a).

The trial court accepted the pleas of both Melanie Morgan and Michael Morgan, although the couple had not been informed that the plea resulting in jurisdiction could eventually lead to termination of their parental rights to each of the children.[2] (Ae-Apx at 7b). Subsequently, the DHS left the children in the home and the family began participating in services which including drug screens, evicting Mr. Morgan's brother from their home, and prohibiting other adults from living at the home, along with completion of psychological evaluations, submitting the children for psychological and sexual abuse evaluations, and refraining from use of drugs and alcohol. (Ae-Apx 9b).

After beginning services, the family had a few hiccups. In November 2005, the trial court learned that Mr. Morgan was still battling his drug problem, the family was associating with adults who were not suitable to be around children. (Ae-Apx at 15-16b). Additionally, Ms. Morgan's drug

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[1] Mr. Morgan admitted to additional allegations, specifically: (1) "there have been allegations of drug use in the home," and that he had tested positive for marijuana on November 29, 2004, but thereafter tested negative; (2) several people lived in the home, including one who had an outstanding arrest warrant; and (3) he had pled guilty to attempted larceny in 1988, using marijuana in 1998, operating under the influence in 2002, and in 2005 was "the passenger in a vehicle in which a bag of marijuana was found on the backseat," although charges against him were ultimately dismissed. However, this appeal involves Ms. Morgan's parental rights and evidence regarding the allegations leading to termination of those rights.

[2] Trial courts should be wary of accepting pleas where respondents have not been afforded an attorney and where those parents are not advised that jurisdiction could result in termination of parental rights. This is especially true in light of the fact that a disproportionate number of abuse and neglect cases involve respondent parents who may have limited capacity to understand the gravity of their legal situation given low-IQ, age, educational background, or alcohol or drug abuse. If they are not fully informed of the consequences, the knowing and voluntary nature of their plea is presumptively suspect.

screen came back positive for opiates, although later testimony corroborated that she had a valid prescription resulting from extensive dental work. (Ae-Apx at 18-19b). A few months later, the trial court ordered that the children be removed from the home, despite the caseworker's testimony that they were not in danger, and that the family home was no longer "deplorable." (Ae-Apx at 23b). Testimony showed that the children maintained a strong emotional bond with their mother and removal could have a negative impact on the children. (At-Apx at 156a, 163a). The accuracy of the caseworker's concern was highlighted at a hearing three months later when the trial court heard testimony that the children were having a difficult time adjusting to foster care. (Ae-Apx 27b).

Meanwhile, Mr. Morgan discontinued his participation in services and indicated to the court that he wished to relinquish his parental rights. Ms. Morgan, however, was actively participating in services, yielding positive results. Although the record indicates that Ms. Morgan had slipped up by testing positive for cocaine in May 2006, there is no evidence of a positive drug screen in the record. Further, Ms. Morgan provided prescriptions for the Vicodin which caused a positive result for opiod testing. In any event, she consistently attended an outpatient drug treatment program and had obtained housing for the children. (Ae-Apx 45b-46b). By September 2006, Ms. Morgan had obtained employment, managed to get her finances in order, and continued to attend drug counseling and substance abuse programs. (Ae-Apx at 45b). Additionally, parenting time was going well, and the caseworker indicated that foster care was stressful to the children and they all expressed a strong desire to return home to their mother. (Ae-Apx at 65b).

By September 2007, when the trial court ordered a termination petition, there was no evidence that Ms. Morgan was still in contact with Mr. Morgan. (Ae-Apx at 77b). To the contrary, the only evidence presented to the trial court is that Ms. Morgan had substantially complied with

services recommended by DHS to address the problems which brought the family within the jurisdiction of the court and that each of the children expressed a strong desire to return to their mother. (Ae-Apx at 75-76b). In fact, Ms. Morgan's therapist had ended therapy earlier that summer, and she was given a clean bill of mental and emotional health. (Ae-Apx at 79b). Further, the children's therapist indicated that all three boys had a strong bond with their mother and that termination would be harmful to them. (Ae-Apx at 81b). By this time, Ms. Morgan was again unemployed but all evidence indicated that she was avidly looking for employment. (Ae-Apx at 81-83b). DHS filed a petition to terminate Ms. Morgan's rights to all three of her boys in November 2007. After two years of completing services on her own, without the urging of counsel, the trial court finally appointed and attorney to represent Ms. Morgan.

Given the favorable testimony about Ms. Morgan's progress at the September 2007, coupled with the positive descriptions in the September 2007 USP, it is unclear how the descriptions of Ms. Morgan's abilities led to a conclusion that she could not care for her children just two months later. This is especially confusing since nothing negative occurred between September and November 2007 that would raise concerns about Ms. Morgan's parental.

September 2007 USP/Permanency Planning Hearing	**Termination Hearing November 2007**
Children wanted to return home with mother. (Ae-Apx at 74b).	Ms. Morgan Poses no risk to Ryan. (Ae-Apx at 94b-95b). Ms. Morgan never missed a visit. (Ae-Apx at 94b).
Ms. Morgan's Progress was good. (Ae-Apx at 76b).	No testimony that she failed to progress. Only concerns about finances, employment and housing. No evidence that Ms. Morgan was still involved with Mr. Morgan. (Ae-Apx at 103b).

Campau, the primary caseworker, Recommends visits in natural setting like Ms. Morgan's home. (Ae-Apx at 66b).	Campau says Ms. Morgan could not meet the emotional or physical needs of the children on a consistent basis. (At-Apx at 217a).
No positive drug screens. (Ae-Apx at 78-79b). Provided authentic prescription for pain pills accounting for positive screen in June. (Ae-Apx at 83b). Ms. Morgan still attended NA classes and hade "come a long way with substance abuse issues." (Ae-Apx at 83b).	No evidence presented to show that Ms. Morgan continued to have a drug problem. Only that she had complied with services relating to substance abuse.
Therapy ended at Therapist's recommendation in July 2007. Therapist said Ms. Morgan "stabilized emotionally" and was "capable of caring for her children." (Ae-Apx at 79b). "Significant progress." (Ae-Apx at 80-81b). ***Does not recommend termination.***	Therapist does not testify at hearing. Campau testifies that Ms. Morgan cannot meet emotional or physical needs of children. (At-Apx at 217a).
Children's therapist told caseworker that termination would be harmful to children due to the bond with their mother (Ae-Apx at 81b).	Campau admitted that children very connected with their mother and all expressed a desire to return home. (At-Apx at 219a, 226a; Ae-Apx at 92b). Termination in Ryan's best interest because he feels "guilty," and because his brothers would be upset if Morgan's rights were terminated to the younger boys and not to Ryan. (At-Apx at 225a). Termination in younger children's interest because they ***could have*** some of the guilt that Ryan has. (At-Apx at 226a).
Morgan quit one job because boss did not pay her. She put a lot of effort into finding new employment. (Ae-Apx at 81b-83b).	Ms. Morgan was actively seeking employment and was signed up with Michigan Works. (At-Apx at 233).

After hearing the testimony of four witnesses, the trial court terminated respondent's parental rights to all three children. (At-Apx at 32a). The trial court found that Ms. Morgan failed to deal with the conditions which brought her within the court's jurisdiction, namely: deplorable home conditions, substance abuse, lack of supervision of the children, financial problems, strains

for the family, prior CPS involvement, and discovery of the children's physical and mental health needs. (Ae-Apx at 105b). Despite testimony regarding the children's strong bond with their mother, their desire to return home, their difficulty adjusting to foster care, and their therapist's contention that termination would be harmful to them, the court found termination was not contrary to the children's best interests because the younger boys needed permanency and Ryan needed to "move on." (Ae-Apx at 107b).[3]

The Court of Appeals reversed the order of the Clinton County Circuit Court terminating Ms. Morgan's parental rights. The Court of Appeals held that there was insufficient evidence to establish any statutory ground for termination of parental rights by clear and convincing evidence. The unanimous opinion cited a ***complete lack of any evidence supporting termination*** of Ms. Morgan's parental rights. (At-Apx at 7a-24a).

ARGUMENT

I. The Court of Appeals Correctly Reversed the trial court's decision termination respondent mother's parental rights where there was a lack of evidence supporting any statutory ground for termination of parental rights

The rights of parents and children to live together as a family is a right widely acknowledged by both the United States Supreme Court and the Michigan Supreme Court as an important one that is entitled to Due Process protections in addition to protections required by the Legislature. *Troxel v Granville*, 530 US 57, 69, S Ct 2054 (2000). Children share in this due process

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[3] The children's therapist previously indicated that termination would be harmful to the children, but would give them a chance at an adoptive placement. There were several instances illustrating that all three children were having difficulty adjusting to foster care.

liberty interest with their parents. In *In re Clausen*, 442 Mich 648; 502 NW2d 649 (1993), this Court specifically recognized that children and parents have a mutual due process liberty interest. *Id* at 686. Recognition of the importance of this relationship is found in statue, case law, and court rules. *In re Brock*, 442 Mich 101, 109; 299 NW2d 752 (1993).

The United States Supreme Court has recognized the importance of the parent-child relationship. "In contrast to loss of custody, which does not sever the parent-child bond, parental status termination is irretrievably destructive of the most fundamental family relationship." *MLB v SLJ*, 519 US 102, 121; 117 S Ct 555(1996). Therefore, constitutional and Legislative safeguards must be followed to avoid unwarranted judicially ordered separation of families.

To pass constitutional muster, the proof supporting a court's termination decision must qualify at least as clear and convincing. *Santosky v Kramer*, 455 US 745, 768-770; 102 S Ct 1388 (1982). This is, "the most demanding standard applied in civil cases." *In re Martin*, 450 Mich 204, 227; 528 NW2d 299 (1995). Clear and convincing evidence is "evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Id.*

In reviewing the trial court's decision to terminate parental rights for clear error, the appellate court must not substitute its own judgment. MCR 2.613(C); *In re Miller*, 433 Mich 431; 445 NW2d 399 (1995). Instead, after reviewing the record, the Court must be left with a firm and definite conviction that a mistake has been made.

While the appellate court must give deference to the trial court's credibility determinations, that deference should not prohibit thoughtful appellate review that is within the scope of the clear error standard. Adopting unlimited deference could essentially prevent litigants from receiving fair

appellate review. MCR 2.613(C). In identifying a complete absence of evidence supporting statutory grounds for termination in this case, the Court of Appeals did not substitute its own judgment, but instead recognized that legislatively established burden of proof had not been satisfied. Therefore, its decision was not a misapplication of the clear error standard of appellate review. (At-Apx at 98a).

Additionally, the proposition that a parent's fitness is not a static concept is one that is legislatively recognized. For instance, the legislature, in most abuse and neglect cases, requires the Department of Human Services to offer services and allow parents time to remedy the conditions which caused them to be under the jurisdiction of the court in the first place.

A. The trial court's application of facts to the statutory grounds for termination fails to recognize the Petitioner's heavy evidentiary burden.

The Court of Appeals correctly concluded that the trial court erred in finding grounds for termination of Ms. Morgan's parental rights under MCL 712A.19b(3). The grounds cited in the petition for termination are MCL 712A.19b(3)(c)(i), (c)(ii), (g), (j).

First, the Petitioner failed to meet its burden of establishing that MCL 712A.19b(3)(c)(i) was established by clear and convincing evidence. The statute provides that the court shall terminate parental rights if the petitioner establishes either of the following by clear and convincing evidence:

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> > (i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

712A.19b(3)(c)(i) . To meet the heavy burden of establishing this (or any) statutory basis for termination, the Petitioner was required to present "evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue," that the allegations in the original petition remained at the time of termination of parental rights. *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995).

The conditions leading to adjudication included: (1) she and Michael Morgan (Dennis and Michael's father), had been adjudicated for neglect in 1999 and received services in 1999, 2004 and 2005; (2) on September 12, 2005, the family home "was found to be in deplorable conditions"; (3) Mr. Morgan's alcoholic older brother was sharing the home; (4) both parents twice failed to pick up one of the children from school during his first week in attendance; (5) there have been allegations of drug use in the home; (6) multiple people living in the home, including one with an outstanding arrest warrant; and, (5) Ryan had anger and aggression issues. (At-Apx at 147-149a). Notably, the trial court stated that financial concerns were conditions that led to adjudication, but those concerns were not pled to and cannot properly be considered in an evaluation of whether MCL 712A.19b(3)(c)(i) has been satisfied by clear and convincing evidence. The inquiry must be based on an evaluation of conditions concerning parental fitness present at the time of the termination hearing, not in the past. *In re Sours*, 459 Mich 624, 626; 593 NW2d 520 (1999).

In this instance, the record is clear that Ms. Morgan ameliorated each of the issues which brought her within the court's jurisdiction. Petitioner erroneously contends that in order to remedy issues relating to housing, Ms. Morgan was required to own her own home, and a large one at that. Specifically, Petitioner states, "no one contested Respondent had the capacity to maintain a clean

home, they failed to mention that she had no home at all for the boys!" Petitioner further suggests that Ms. Morgan bore the burden of demonstrating that she could provide for the boys financially and emotionally completely on her own in order to prove her parental fitness.[4] (At-Br at 22).

In order to adopt the proposition that a respondent parent in a termination proceeding must prove that he or she can remedy financial and housing concerns independently would be contrary to statute and public policy. Instead of requiring a respondent to become "fit" without help, the Juvenile Code directs that services be provided, often at county expense, to address the conditions which rendered a parent unfit at the time of adjudication. MCL 712A.18f(1), (3), (5). It would be unfair to require complete financial independent to preserve a familial relationship, especially in light of the current economic climate. According to a recent study by Kids Count in Michigan, child poverty jumped 40 percent between 2007 and 2007, meaning one out of every four young children under the age of five lives in poverty. Additionally, one out of every 389 households in Michigan is currently in foreclosure. With the grim reality of the state's economy taking shape, Michigan's families would be in jeopardy if we impose a requirement that all parents must be homeowners and that they cannot rely on financial help from family members or government assistance in times of need. The saying, "it takes a village to raise a child" properly reflects the concept that parents often need to rely on their families and communities to assist them in raising their children. Parents should not be punished or stigmatized for seeking such help–let alone have their parental rights terminated. Instead, parents who have the courage to seek assistance should be applauded because they are acting in the best interest of their children.

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[4] Petitioner states, "Even Respondent's father testified that he lived with Respondent and his mother in the two bedroom home". (At-Br at 19).

Further, the specific housing conditions which the Petitioner apprised Ms. Morgan of were the number of inappropriate people in the home (including a convicted felon and other inappropriate relatives), and the fact that the home was filthy. Since the time of the adjudication, Ms. Morgan lived with her father and grandmother, hardly the type of unsavory characters mentioned in the original petition. Further, Petitioner failed to present clear and convincing evidence that the grandparent's home was "deplorable" other than being small. If reunified, Ms. Morgan's father testified that he and the grandmother would move out so that Ms. Morgan and the children would have more space. However, even if the grandparents did not move out, the situation would be that three adults and three children would live in a two bedroom house. Although this is not the "ideal" situation, the Petitioner did not make a specific showing that it would put the children at risk.

Without considering financial concerns beyond Ms. Morgan's control, it is clear that she has remedied the concerns that brought her to the trial court's attention. Ms. Morgan substantially complied with substance abuse treatment and had valid excuses for the "dirty drops," which included a valid prescription. She further addressed any emotional issues such as depression and received a glowing report from her therapist, who said she was "emotionally stabilized" as recently as the summer 2007. With regard to financial concerns, Ms. Morgan had successfully paid off large portions of debt and had her driver's license restored. She became adept at managing her finances and testimony illustrated that Ms. Morgan was not unemployed due to her own laziness or bad choices.

Contrary to the trial court's characterization suggesting that Ms. Morgan should be faulted for quitting a job, the record indicates that she quit because her boss was not paying her. Since that

time, Ms. Morgan has actively sought employment. Certainly this type of evidence would satisfy the weighty clear and convincing standard because these conditions no longer exists. Ms. Morgan's progress toward parental fitness is well documented and does not require speculation to support a conclusion that she no longer poses a risk of harm to the children.

The trial court's conclusion that the conditions leading to adjudication continued to exist is merely speculative where Petitioner did not present current evidence to that effect. For instance, Petitioner notes that the caseworker, Mr. Campau, indicated a concern that respondent would meet friends who used drugs. (At-Br at 22). Additionally, Petitioner states as fact that Ms. Morgan was still associating with Mr. Morgan at the time of the termination trial, although the testimony of both Mr. Campeau and Mr. Hudson (Ms. Morgan's father), completely contradicts that assessment. Again, the trial court based this conclusion on mere speculation. Even if this scintilla of evidence somehow satisfies the clear and convincing standard, evidence about Ms. Morgan's vast improvements and substantial compliance with services shows that any conditions that still exist are likely to be cured in a reasonable amount of time considering the children's ages. In fact the caseworker mentioned that six more months might be appropriate. Since this is a reasonable amount of time, the statutory ground for termination of parental rights cannot be satisfied. None of the witnesses testified that six more months would increase the risk of emotional harm to the children.

B. The Court of Appeals Correctly held that the Trial Court erred in finding that MCL 712A.19b(3)(c)(ii), (g), and (j) had been met by clear and convincing evidence.

1. MCL 712A.19b(3)(c)(ii) allows termination of parental rights based on new conditions that come to the courts attention, only after notice and an opportunity to remedy those conditions.

The Trial Court erred in finding that MCL 712A.19b(3)(c)(ii) had been met by clear and convincing evidence where the termination hearing was void of testimony linking new conditions to possible harm to the children, and where Ms. Morgan was not given a reasonable opportunity to rectify any "new" conditions. Although Petitioner contends the trial court did not rely on MCL 712A.19b(3)(c)(ii), its bench Opinion incorporates language that triggers application of this section of the Juvenile Code. Specifically, the Trial Court, in terminating Ms. Morgan's parental rights cited, "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." (At-Apx at 31a-32a). The Statute provides:

> (ii) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

MCL 712A.19b(3)(c)(ii).

In *In re JK*, 468 Mich 215; 66 NW2d 216 (2003) this Court applied evidence of the parent's compliance with every term of the parent agency agreement as evidence tending to negate any statutory basis for termination. *JK, supra* at 214. A similar finding is warranted in this case where Ms. Morgan completed services and remedied everything within her control as required by the agency.

In any event, the "new" conditions mentioned by the trial court were remedied. As discussed above, the conditions relating to housing has been addressed, and Ms. Morgan is actively seeking employment, so it is not a condition that is likely to linger, thus there is not clear and

convincing evidence that those problems are not likely to be resolved within a reasonable time as the statute requires. However, the trial court's citation to the children's "physical and emotional needs" is vague as there was very little testimony presented demonstrating that these issues are not being addressed properly. With regard to the children's dental and hearing issues, the record indicates that the children have been treated. In terms of the children's emotional health, the trial court indicated its belief that, "the children need to move on." (At-Apx at 31a).

While the caseworker testified that the younger children may one day suffer from some of the same guilt and anger issues Ryan has, and that there are some anxiety issues, there was no testimony linking these emotional issues with likely harm if the children are returned to Ms. Morgan's care. Interestingly, nobody addressed thoroughly addressed whether the current emotional harm was exacerbated by the difficulty adjusting to foster care. Additionally there was no expert testimony showing that these conditions were pervasive or that Ms. Morgan would be ill-equipped to take the children to the therapist they were currently seeing.[5]

2. *MCL 712A.19b(2)(c)(g) requires clear and convincing evidence that the parent will be unable to properly care for her children within a reasonable time period.*

The Trial Court also erred in concluding that MCL 712A.19b(3)(g), and was established by clear and convincing evidence. Subsection (g) considers whether, "The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation

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[5] The Children's Law Section, *Amicus Curiae*, agrees with Appellee's argument that the Juvenile Code requires a supplemental petition where additional grounds for termination arise, and respondent must be afforded an opportunity to respond to the allegation, and therefore MCL 712A.19b(3)(c)(ii) cannot be satisfied where this requirement has not been fulfilled. MCL 712A.19(1); MCR 3.973(H)(2).

that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." MCL 712A.19b(3)(g)

There is no question that the first prong of this provision was previously satisfied when the trial court took jurisdiction. At that time, conditions in the home were"deplorable," the children lacked supervision, and Ms. Morgan struggled with substance abuse. These afflictions negated her ability to provide proper care for her children. The second prong requires the Petitioner to present clear and convincing evidence that there is no reasonable expectation that the parent will be able to provide proper care within a reasonable amount of time. That prong is not satisfied where the conditions which prevented her from providing proper care to her children cease to exist. Further, the Juvenile Code does not require that the respondent show that she is capable of providing proper care and custody without help from family or government assistance.

A thorough review of the Juvenile Code's section describing conditions warranting termination due to the parent's ability to provide proper care and custody cannot be interpreted to impose requirements of complete "independence" in order to demonstrate parental fitness. None of the statutory provisions relied on by the trial court to terminate Ms. Morgan's parental rights contain the terms "independently" or "without help." These ideas run contrary to the entire statutory scheme prescribed by the Legislature in developing the Juvenile Code. For instance, the Juvenile Code provides a statutory framework which favors reunification of families whenever possible. MCL 712A.19a(2).

Even if the trial court were correct that Ms. Morgan was not capable of providing proper care and custody at the time of the termination hearing, it erred in concluding that she could not be

reasonably expected to do so within a reasonable time where the caseworker testified that she could be ready in as few as six months. Therefore, termination of Ms. Morgan's parental rights under MCL 712A.19b(3)(c)(g) was not proper.

3. MCL 712A.19b(3)(c)(j) requires clear and convincing evidence that placing children in their parent's care would place them at risk.

The trial court also erred in finding that there was clear and convincing evidence that "there is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." MCL 712A.19b(3)(c)(j). Although there was speculative testimony that Ms. Morgan might meet friends who use drugs, is unemployed, and lives with her father, there was no evidence linking these facts to possible harm to the children if returned home. To the contrary, all of the visits were going well and the kids enjoyed their time with their mother. The Petitioner failed to show how the children would be harmed, other than indicating that Ryan felt responsible for his mother and that the other two kids would feel bad if rights to them were terminated, but rights to Ryan were not.

Additional testimony suggests that the younger boys, Dennis and Michael, might one day struggle with the same issues that Ryan has struggled with. However, Ryan's caseworker indicated that he did not think Ms. Morgan posed a risk to Ryan. The issues, including Ryan's feelings of guilt, are not enough to constitute harm which prevents a parent from regaining custody. Furthermore, conjecture that the two younger boys will feel angry or guilty in the future, does not qualify as "clear and convincing evidence," that the children will be harmed if returned to their mother's care.

Given the ample evidence indicating that Ms. Morgan made substantial progress and addressed the concerns that brought her with the trial court's jurisdiction, combined with her total cooperation with services, there is no indication that the children would be harmed or that they would not be properly cared for in the custody of Ms. Morgan. This case involves a substantial lack of current evidence supporting a finding of parental unfitness.

Since this case involves a substantial lack of current evidence of unfitness, it is not about whether the trial court properly weighed the credibility of witnesses and therefore, total deference to findings of fact is not required.[6] The Court of Appeals did not usurp the deference usually afforded to the trial courts and instead conducted a thoughtful review of the record, holding that the trial court erred in finding clear and convincing evidence of parental unfitness. Such action is effective appellate review under the clear error standard, and is not an inappropriate substitution of judgment. Where the appellate court notes a "dearth of evidence" supporting any ground for termination, it is reasonable that the Court would be left with a firm and definite conviction that a mistake had been made.

II. This Court should adopt best interest factors specifically recognizing the delicate nature of abuse and neglect proceedings.

Best interest factors specifically designed for termination of parental rights cases would have been helpful in this instance where the court over-emphasized stability in its best interest finding, despite evidence that Ms. Morgan could provide stability within a short period time of time,

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[6] For a discussion of "current" evidence required to establish parental unfitness, the Children's Law Section, Amicus Curiae, would direct this Court to the Family Law Section's brief as, Amicus Curiae, in *Hunter v Hunter* (Docket No. 136310).

if not now. The trial court considered psychological factors without current testimony from a psychologist or psychiatrist, and erroneously found that considerations of how things were prior to adjudication outweighed the efforts Ms. Morgan had made to improve her situation and the children's strong bond with their mother and their unequivocal desire to return home.

Unlike the Child Custody Act and the Adoption Code, the Juvenile Code does not provide best interest factors. Although the Code directs a trial court to make a best interest finding, and further provides that a guardian ad litem's duty in a juvenile proceeding is to determine the best interests of the child, the Legislature did not codify "best interests." MCL 712A.19b(5); MCL 712A.19d. Given the inconsistencies in the way trial courts apply the concept of "best interests" in juvenile proceedings, *Amicus Curiae, the* Children's Law Section, suggests that Michigan adopt best interest factors that take into account the gravity of termination proceedings and the fundamental rights at stake.

The plain and ordinary meaning of "best interests" found in Black's Law Dictionary "best interest of a child whose custody is in question has referenced more particularly to the moral welfare than to the mere comforts, benefits or advantages that wealth can give." Other jurisdictions seem to indicate that the appropriate procedure for determining a child's best interests in a termination proceeding is to apply a balancing test. The Texas Supreme Court adopted the following factors:

- the desires of the child;
- the emotional and physical needs of the child now and in the future;
- the emotional and physical danger to the child now and in the future;
- the parental abilities of the individual seeking custody;
- the programs available to assist these individual s to promote the best interest of the child;
- the plans for the child by these individual or agency seeking custody;

- the stability of the home or proposed placement;
- the acts omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and,
- any excuse for the acts or omissions of the parent.

Holley v Adams, 544 SW2d 367, 372 (Tex 1972). While this listing is by no means exhaustive, but does indicate a number of considerations which either have been or would appear to be pertinent.[7]

Minnesota courts have also articulated a balancing test which includes weighing, (1) the child's interest in preserving the parent-child relationship; (2) the parent's interest in preserving the parent-child relationship; and (3) any competing interest of the child (including health considerations, stability, and the child's preference). *In re RTB*, 492 NW2d 1 (Minn 1992).

The need to identify appropriate factors for trial courts to apply in termination proceedings is apparent where these findings are commonly based on improper considerations. For example, n *JK*, this Court noted that several of the trial court's written findings of fact suggested that it was influence by the advantages of the adoptive home compared to the mother's home. It highlighted that concern by cautioning the trial courts: "It is totally inappropriate to weigh the advantages of a foster home against the home of the natural and legal parents. Their fitness as parents and question of neglect of their children must be measured by statutory standards without reference to any particular alternative home which may be offered to the [child]." *In re JK*, 468 Mich at 215, FN 21, (quoting *Fritts v Krugh*, 354 Mich 97, 115; 92 NW2d 604 (1958).

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[7] The Texas statue governing termination proceedings is very similar to the Michigan statute. The factors identified in *Holley* are derived specifically for termination of parental rights cases, not custody or adoption proceedings.

Appellant improperly suggests that the reviewing courts can look to the children's progress in foster care or financial incentives related to foster care as evidence that the trial court made the appropriate finding that termination was not contrary to the children's best interests. (At-Br at 33). However, it is totally inappropriate to weigh the advantages of a foster home against the home of the natural and legal parents.

A. The Trial Court erroneously concluded that termination of Ms. Morgan's parental rights was not contrary to the children's best interests.

The trial court erroneously stated, "I have no evidence suggesting it would be contrary to any of the children's best interests to terminate." (At-Apx at 32a). With regard to the younger boys the trial court found that the physical needs that were neglected (referring to the time before the children came within the court's jurisdiction). (At-Apx at 31a). Ms. Morgan was unable to meet their needs, and the "children cannot wait six more months." (At-Apx at 31a). Yet, the Michigan Court of Appeals explained, "The goal of reunification of the family must not be lost in the laudable attempt to make sure that children are not languishing in foster care while termination proceedings drag on." *In re Boursaw* 239 Mich App 161; 607 NW2d 408 (1999).

The trial court's findings are clearly erroneous where testimony shows that the fact that the boy's physical needs were neglected in the past, but did not show that it was likely to happen in the future. Additionally, the agency provided services to rectify the boys' physical and emotional issues and there was no testimony indicating that the mother could not take the children to therapy to continue addressing their emotional needs.

Given the fact that Ms. Morgan made substantial progress by turning her life around, and the caseworker indicated that the family could be reunited in six months, the court should have weighed the children's strong desire to return to their mother more heavily. Given, the frequency with which the children expressed their desires to return to their mother, it was contrary to their best interest to break the parent child bond indefinitely where reunification was within reach considering the strong family bond.[8] (At-Apx at 134a, 170a, 219a; 41b-42b, 61b, 62b).

The trial court found that termination was not contrary to Ryan's (16 yrs.) best interests citing his emotional and physical needs that were once neglected by his mother. (At-Apx at 31a). The stated that Ryan is, "held back by a sort of a continued role reversal about his worrying about whether he needs to take care of his mother." (At-Apx at 32a). Basically, the trial court made a best interest finding that termination of Ms. Morgan's parental rights to Ryan was not contrary to his best interest because Ryan harbored guilt.

The best interest finding regarding Ryan (16 yrs.) is clearly erroneous based on the testimony about Ryan's strong bond with his mother, coupled with the fact that their relationship has been characterized as one that poses no risk to Ryan whatsoever. (Ae-Apx at 71b). Ryan's caseworker testified that termination was not appropriate for Ryan at 16 years of age. (Ae-Apx at 71b). Further, throughout the proceedings Ryan continuously stated that he wanted to return home

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[8] This Court should note that stability is not an automatic side-effect of termination of parental rights. Breaking familial ties is a crushing blow to both parent and child. Where the record shows that all three children have had trouble adjusting to foster care, it is unlikely that halting relations with the children's mother would immediately render them free of emotional difficulties. A child's memories of his mother are not erased over night.

to his mother, and he suffered through various foster placements. All indications pointed to the fact that Ryan would be harmed if the bond with his mother were permanently severed.

The only testimony to the contrary was that Ryan felt guilty; that he could get more money from the state if rights were terminated; and, that the younger boys would be upset if rights to Dennis and Michael were terminated, but rights to Ryan remained in tact. (Ae-Apx 32a).[9] None of these considerations is an appropriate factor to weigh in the context of a best interest analysis in an abuse and neglect case. While Ryan's feelings of guilt are unfortunate, there was no testimony illustrating how that guilt would dissolve if his relationship with his mother no longer existed.

Although the trial court concluded that Ryan needed to "move on," there was no expert or psychological testimony to support this conclusion and therefore, it does not outweigh his expressed desire to return home. Nor does it outweigh the testimony of his caseworker, Mr. Snyder, indicating that Ms. Morgan posed no risk to her son.

Further, the testimony indicating that the younger boys would be upset if they could no longer see their mother, but Ryan could, is not an appropriate consideration. The trial court cannot make such a final determination regarding a parent-child relationship based on how somebody that is not a part of that relationship would feel after termination. The relationship between a parent and each of her children is unique and as such, they need to be evaluated separately. The trial Court

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[9] The trial court indicated that it had not decided whether to terminate parental rights to Ryan prior to hearing the testimony. This indicates that it was persuaded by testimony regarding the younger boys and how they would feel if not all rights were terminated. This also raises a question as to whether the court had already decided prior to trial that termination was appropriate for the younger boys.

clearly erred in concluding that there was "no evidence" that termination of Ms. Morgan's parental rights was contrary to all three children's best interests.

III. The trial court proceedings did not conform with the Due Process protections required in termination of parental rights case.

An un-preserved claim of constitutional error is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

There are three elements of plain error review: (1) the error occurred, (2) the error was clear or obvious, and (3) the plain error affected substantial rights. *Carines, supra* at 763.

Termination of parental rights proceedings seeking to sever the parent-child relationship involve the potential deprivation of the most sacred of fundamental rights and therefore, require the protections of Due Process. *In re Powers*, 244 Mich App 111; 624NW2d 472 (2000). In recognition of the rights at stake, the Children's Law Section, *Amicus Curiae*, adopts Appellee's articulation of Constitutional rights involved in these proceedings and incorporates by reference its discussion of the important procedural safeguards that must be adhered to in termination of parental rights cases with regard to appointment of counsel. see, eg, (Ae-Br at 40-45).

In this instance, the trial court adequately informed Ms. Morgan of her right to counsel and further indicated that if she could not afford an attorney, one would be provided at county expense. (At-Apx at 145a). It is unclear whether the financial forms were completed, but the trial court was well aware of Ms. Morgan's indigence as it was allegedly one of the concerns that brought the case within the courts jurisdiction. (At-Apx at 29a, citing "financial concerns").

When the court noted the financial concerns as a reason for taking jurisdiction, knowing that the proceedings could lead to termination of Ms. Morgan's parental rights, it had a duty to provide

her with court appointed counsel. Although a parent can waive her right to counsel, failing to expressly request counsel cannot serve as a knowing waiver of this right. MCR 3.965(B)(3). Since the trial court was on notice of Ms. Morgan's indigence and Ms. Morgan did not waive her right to counsel, failure to provide appointed counsel at the jurisdictional phase of these proceedings satisfies the *Carines* test for plain error.

The record is replete with evidence showing that Ms. Morgan, without counsel, was able to (1) improve her financial condition, (2) cooperate with caseworkers, (3) attend scheduled parenting time, (4) actively participate in substance abuse treatment, (5) separate from her dependant relationship with Mr. Morgan and (6) take thoughtful and active steps to remedy her physical and emotional issues. Her active participation and ability to turn her life around pursuant to agency recommendations illustrates her devotion to maintaining a bond with her family by preserving her parental rights. Outside of the confines of the courthouse, Ms. Morgan did almost everything that was expected of her.

Yet, Ms. Morgan had no one to protect her from the indiscriminate admittance of evidence throughout the proceedings. Ms. Morgan's participation in the trial court proceedings illustrates the likelihood that with the help of a trained advocate, she could have cross-examined witnesses and prevented the unnecessary removal of the three children from her home since the children were removed without any evidence that they would be at risk if they continued to reside in her care.

Without an attorney to advocate for placement alternatives, Ms. Morgan lacked the ability to prevent removal by applying relevant law and advocating for the children's continued placement in her custody. The severe consequences of the children's removal is demonstrated most aptly by

Ms. Morgan's therapist who opposed termination as recently as September 2007 and stated, "if the case was on the front end without having removal...removal wouldn't even take place" given Ms. Morgan's significant progress. (Ae-Apx at 80b-81b). Although Ms. Morgan was adequately represented at the termination trial, removal of the children and their lengthy stay in foster care without objection, proved to be outcome determinative–resulting in the termination of her parental rights. Consequently, failure to appoint counsel to this indigent mother served to render the proceedings against her substantially unfair. *Carines, supra* at 763(holding that reversal is required where trial court's errors "seriously affected the fairness, integrity or public reputation of judicial proceedings."

CONCLUSION

Ms. Morgan has suffered hard times due to bad choices and involvement with the wrong people and unfortunately, her children suffered as a result. After years of living hard and fast, she received a shocking wake-up call–the risk of losing the children. Faced with a consequence that, for a mother, is worse than death, Ms. Morgan took the steps necessary to turn her life around for the benefit of her children. In two years, she managed to remedy the demons that plagued the past decade of her life, without the benefit of an attorney to advocate this progress to the court.

Her efforts were in vain, as the trial court terminated her parental rights based heavily on economic factors beyond her control and despite the fact that reunification was possible. In abuse and neglect proceedings the goal is to remedy the concerns which brought the family to the courts attention and pursue reunification where. The standard is not defined as one requiring complete

financial independence, or perfect parenting. And this standard should not be applied at a time when our state is suffering one of the worst recessions in its history.

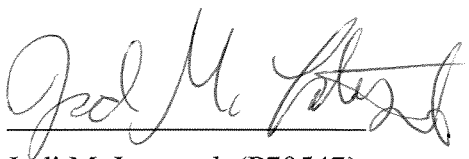
By requiring strict adherence to the clear and convincing standards, the Courts and Legislature aim to protect all parties involved in abuse and neglect proceedings. The weighty evidentiary standard guarantees that Constitutional rights will be honored and that termination of parental rights will occur when necessary to protect Michigan's children, only after the parent is proven to be unfit.

The Court of Appeals did not substitute its judgment in reversing the trial court's order terminating Ms. Morgan's parental rights because the complete lack of current evidence to any of the statutory grounds for termination reasonably left the Court with a firm and definite conviction that a mistake had been made. Since the Court of Appeals correctly applied the clear error standard of appellate review, reversal is unwarranted. Narrowing the clear error standard of review would substantially interfere with a litigant's right to thoughtful appellate review.

RELIEF REQUESTED

Amicus Curiae respectfully requests this Court affirm the Court of Appeals order reversing the termination of Ms. Morgan's parental rights.

Date: February 26, 2009



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