STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Gleicher, Fitzgerald and Hoekstra

In re SKYLER LEROY MCBRIDE, ALEXANDER GARAND MCBRIDE, and SAWYER DALE MCBRIDE, Minors.

DEPARTMENT OF HUMAN SERVICES,
Plaintiff-Appellee,

v

RONALD D. MCBRIDE, JR.,
Respondent-Appellant,

and

SUSAN MCBRIDE
Respondent.

/

Supreme Court No. 136988

Court of Appeals No. 282062

Bay County Circuit Court
No. 06-009381-NA

BRIEF OF ATTORNEY GENERAL AS AMICUS CURIAE

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3. The trial court's failure to comply with MCR 2.004 rule bars the action requested by the moving party. Therefore, applying MCR 2.004's prohibition resolves the question without reaching the issue presented by this Court. 11

4. By statute and court rule, the prosecuting attorney may serve as a legal consultant for the Department of Human Services in child protective proceedings, but the Attorney General retains the ultimate authority to represent the Department in these actions. The Attorney General here, however, is merely serving as an amicus, and the prosecuting attorney for Bay County represents the position of the Department of Human Services on appeal. 15

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QUESTIONS PRESENTED

In an order dated February 20, 2009, this Court invited the Solicitor General to respond to the following six questions:

(1) whether the trial court violated MCL 712A.17c and MCR 3.915(B)(1) by denying the respondent-appellant father's request for the appointment of counsel to represent him at the trial on the supplemental petition requesting termination of his parental rights;

(2) whether the trial court violated the respondent's due process rights under *Lassiter v Dept of Social Services*, 452 U.S. 18; 101 S. Ct. 2153; 68 L. Ed. 2d 640 (1981), by denying the request for counsel;

(3) if the trial court violated MCL 712A.17c, MCR 3.915(B)(1) or the Due Process Clause, whether such an error may be harmless, *In re Clemons*, unpublished opinion per curiam of the Court of Appeals, issued August 19, 2008 (Docket No. 281004); *Lassiter*, *supra*;

(4) whether the Department of Human Services is asserting inconsistent positions regarding the harmlessness of the error in denying counsel in termination of parental rights cases, cf., e.g., *In re Clemons*, *supra*, and the instant case;

(5) if a denial of a request for counsel can constitute harmless error, whether the existence of an alternative placement plan or guardianship option, such as those provided for in MCL 712A.19a(7) and MCL 700.5201-5219, can prevent a denial of a request for counsel from being harmless; and

(6) if the existence of an alternative placement or guardianship option can prevent a denial of a request for counsel from being harmless, by what standards should a court evaluate feasibility of the alternative placement or guardianship option in determining whether the error was harmless.

INTRODUCTION

Although not framed by this Court's order in this fashion, this case implicates an incarcerated parent's right to participate in the proceedings by the State where the State takes jurisdiction over that parent's children, provides a plan for the review of this parent's conduct, and finally terminates that parent's right to his children. As outlined in the dissent in the Court of Appeals in this case, respondent Ronald McBride ("Respondent") did not have an opportunity to participate in the adjudicative hearing on September 26, 2006 in which the State court took jurisdiction, and respondent did not participate at the dispositional review hearings on February 7, 2007, March 26, 2007, May 7, 2007, and July 30, 2007. Respondent appeared telephonically at the October 10, 2007 termination hearing, and the State court denied respondent's request for counsel. Respondent's right as an incarcerated person under Michigan law to participate in the proceedings is a threshold question before reaching the issue of the appointment of counsel.

In MCR 2.004, this Court has created a bright-line rule, providing that a State court must enable an incarcerated parent to participate in an action involving the neglect, or foster care placement of minor children or the termination of parental rights. The failure to comply with this rule bars the action requested by the moving party under MCR 2.004(F). This rule admits of no exception. In other words, this rule forecloses the opportunity for a harmless-error analysis. Thus, under MCR 2.004(F), the paramount error here -- failing to enable respondent to participate in the adjudicative and dispositional review hearings and the failure to appoint counsel – requires this Court to reverse the decision of the Court of Appeals.

In light of this analysis, the Department of Attorney General shall respond to the first four questions asked of this Court. The remaining two questions are mooted by the other answers.

First, the State court violated respondent's right to the appointment of counsel at the termination hearing, thereby violating MCL 712A.17c and MCR 3.915(B)(1).

Second, the State court also violated respondent's due process rights under *Lassiter v Dep't of Social Services,* 452 US 18 (1981) in the facts of this case – respondent was given inadequate notice, denied the opportunity to participate in the earlier proceedings, and denied counsel when requested at the termination hearing.

Third, this Court need not reach the issue whether a violation of MCL 712A.17c, MCR 3.915(B)(1), or the Due Process Clause is subject to harmless-error analysis because the State court's action also violated MCR 2.004, which provides for its own remedy in MCR 2.004(F). The rule requires the global solution that "a court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings." Because respondent was not given an opportunity to participate in the earlier proceedings as provided by MCR 2.004 where he could have requested and received court-appointed counsel, and the State court refused to appoint respondent counsel at the termination hearing, the violation of MCR 2.004 requires reversal without a harmless-error analysis.

Fourth, the Department of Attorney General did not participate in the proceedings in the action taken in *In re Clemons* (No. 281004). Although the Attorney General serves as counsel for the Department of Human Services, with regard to the representation of the Department in this case, the Attorney General and the local prosecutor are taking adverse positions to one another. The Juvenile Code provides that the local prosecutor shall serve as the legal consultant to the Department of Human Services under MCL 712A.17, but the Attorney General has supervisory authority over all prosecutors under MCL 14.28 and MCL 14.30. This authority includes the right to direct the prosecution to take a particular action in an appellate case. In this case, because of its posture, the Attorney General is not exercising his authority but rather is serving in the role of an amicus.

FACTS AND PROCEEDINGS

The Department of Attorney General refers the Court to the respondent's statement of facts provided in his application for leave to this Court.

ARGUMENT

The failure of the trial court to comply with MCR 2.004 requires this Court to reverse the termination of respondent's parental rights because this is the relief mandated by MCR 2.004(F).

A. Standard of Review

This evaluation of this Court's questions requires the review of a statute and court rule. As such, these are legal questions subject to de novo review.[1] Insofar as this Court is required to engage in a constitutional analysis, this also implicates constitutional questions that are reviewed de novo.[2]

B. Analysis

The trial court violated MCL 712A.17c and MCR 3.915(B)(1) by failing to determine whether respondent was indigent and eligible for an attorney. In fact, the trial court did not enable respondent to participate in the adjudicative and disposition reviewing hearings. These actions also violated respondent's right to due process under *Lassiter*. Regardless whether these violations under MCL 712A.17c, MCR 3.915(B)(1), or *Lassiter* are subject to a harmless error analysis, this Court is required under MCR 2.004(F) to reverse the termination of respondent's parental rights where the trial court did not comply with the remaining provisions of MCR 2.004 because it did not provide respondent an opportunity to be heard at the prior hearings and failed to appoint counsel at the termination hearing. The Attorney General did not file a brief in *In re Clemons,* and is serving as only an amicus in this case. He is not exercising his supervisory authority over the local prosecutor in this case, even though he reserves this right by statute and Michigan law.

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[1] *Cardinal Mooney High School v MHSAA,* 435 Mich 75, 80; 467 NW2d 21 (1991).
[2] *Sidun v Wayne Co Treasurer,* 481 Mich 503, 508; 751 NW2d 453 (2008).

1. By failing to enable respondent to participate at the adjudicative and dispositional review hearings and by failing to determine whether respondent was indigent and eligible for appointed counsel under MCL 712A.17c and MCR 3.915(B)(1), the State court violated both the statute and the court rule.

In interpreting a statute, the legislative intent controls and courts look to the plain language.[3] The statute at issue here, MCL 712A.17c, provides that the trial court must provide an indigent parent with an attorney at the respondent's first appearance at a child protective hearing:

> (4) In a proceeding under section 2(b) or (c) of this chapter, the court shall advise the respondent at the respondent's first court appearance of all of the following:
>
> (a) The right to an attorney at each stage of the proceeding.
>
> (b) The right to a court-appointed attorney if the respondent is financially unable to employ an attorney.
>
> (c) If the respondent is not represented by an attorney, the right to request and receive a court-appointed attorney at a later proceeding.
>
> (5) If it appears to the court in a proceeding under section 2(b) or (c) of this chapter that the respondent wants an attorney and is financially unable to retain an attorney, *the court shall appoint an attorney to represent the respondent.* [Emphasis added.]

In brief, if the parent is facing child protective proceedings is indigent, the court must appoint an attorney if respondent requests one.

The court rules in Michigan that govern child protective service provide for similar protections as Michigan's statutory code. A court rule is subject to the same basic principles that govern statutory interpretation and should be construed in accordance with the ordinary and approved usage of the language in light of the purpose to be accomplished by its operation.[4] Like MCL 712A.17c, MCR 3.915(B)(1) also requires the court to inquire whether an indigent parent seeks appointed counsel and appoint counsel if requested:

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[3] *Lash v Traverse City,* 479 Mich 180, 187; 735 NW2d 628 (2007).
[4] *Lockhart v Thirty-Sixth Dist Court Judge,* 204 Mich App 684, 688-689; 516 NW2d 76 (1994).

(a) At respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules and that

(i) the respondent has the right to a court appointed attorney if the respondent is financially unable to retain an attorney, and,

(ii) if the respondent is not represented by an attorney, the respondent may request a court-appointed attorney at any later hearing.

(b) The court shall appoint an attorney to represent the respondent at any hearing conducted pursuant to these rules if

(i) the respondent requests appointment of an attorney, and

(ii) it appears to the court, following an examination of the record, through written financial statements, or otherwise, that the respondent is financially unable to retain an attorney.

Thus, under the court rule, if the parent is facing child protective proceedings is indigent, the court must appoint and attorney.

Here, respondent was not provided counsel at the termination hearing. Moreover, as outlined by the dissent in the decision of the Court of Appeals,[5] respondent was not represented by counsel at the adjudicative and dispositional review proceedings and was denied any participation until the termination hearing:

- September 14, 2006, respondent was not provided notice and did not appear at the preliminary hearing in which referee authorized petition and placed children in foster care;

- On September 18, 2006, respondent was served with petition but there was no motion or pleading indicating that respondent who was incarcerated should participate telephonically;

- On September 29, 2006, the adjudication hearing was held without respondent participating telephonically and without him being represented by counsel;

[5] *In re McBride*, unpublished opinion of the Court of Appeals, issued July 15, 2008 (Docket No 282062).

- On November 6, 2006, the dispositional review hearing was held without respondent participating telephonically and without him being represented by counsel;

- Respondent did not telephonically appear at the dispositional review hearings conducted on February, 7, 2007, March 26, 2007, May 7, 2007, or the July 30, 2007 permanency planning hearing and was not represented by counsel at any of these hearings;

- On August 27, 2007, the prosecution filed a petition seeking termination of both respondent's parental rights and the rights of Susan McBride.

- On September 13, 2007, the prosecution filed a motion to allow respondent to participate telephonically;

- On October 10, 2007, the termination hearing was conducted and respondent requested counsel – the court denied the respondent's request.

Under these facts, there can be no dispute that the trial court failed to comply with MCL 712A.17c and MCR 3.915(B)(1).

2. Under Lassiter, the trial court's actions deprived respondent of due process because respondent was not involved in the court proceedings prior to termination, and was denied counsel on the day of the termination hearing.

In *Lassiter v Dep't of Social Services of Durham Co, North Carolina*, the United States Supreme Court addressed whether the Due Process Clause of the Fourteenth Amendment requires the State to appoint counsel to represent a respondent in every proceeding to terminate parental rights.[6] In analyzing the question whether due process required the court to appoint counsel for an indigent parent, the Court weighed the factors set forth in *Mathews v Eldridge*.[7]

[6] *Lassiter v Dep't of Social Services of Durham Co, North Carolina*, 452 US 18; 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).
[7] *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 19 (1976).

Specifically, the Court in *Lassiter* indicated that *Mathews* created a three factor test to evaluate:

> *Mathews* propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.[8]

In the context of termination of parental rights of an indigent parent, the Court then identified the three variable competing interests under the *Mathews* analytical framework:

> [1] [T]he parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings);
>
> [2] the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and
>
> [3] the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.[9]

The Court then held that whether appointment of counsel for indigent parents facing termination of their parental rights is required by due process is resolved by the trial court's application of the *Mathews* factors, subject to appellate review.[10] Therefore, under federal due process, appointed counsel for an indigent parent facing termination of parental rights is not constitutionally mandated in all circumstances, but is examined on a case-by-case basis.[11] In applying this reasoning to the parent at issue in *Lassiter*, the Court held that there was no deprivation of due

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[8] *Lassiter,* 452 US 25.
[9] *Lassiter,* 452 US at 31 (paragraph breaks added)
[10] *Lassiter,* 424 US at 31-32.
[11] In reaching this conclusion, the Court in *Lassiter* recognized that the test adopted was the floor and not a constitutional ceiling. "A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution." *Lassiter,* 424 US at 33-34.

process because the parent had declined to appear at an earlier proceeding and expressed no interest in the appointment of counsel:

> [T]he trial court had previously found that Ms. Lassiter had expressly declined to appear at the 1975 child custody hearing, Ms. Lassiter had not even bothered to speak to her retained lawyer after being notified of the termination hearing, and the court specifically found that Ms. Lassiter's failure to make an effort to contest the termination proceeding was without cause. In view of all these circumstances, we hold that the trial court did not err in failing to appoint counsel for Ms. Lassiter.[12]

The facts of this case stand in contrast.

Respondent here was deprived of counsel throughout the preliminary, adjudicative, dispositional, and permanency planning proceedings and had his request for counsel at the termination hearing denied by the court. There is no indication that respondent did not wish to participate in the proceedings. In fact, respondent's first action at the termination hearing when telephonically joined to the hearing was to request counsel. The reason for lack of participation was based on the failure of the trial court to comply with Michigan's statutory code and rules for child protective hearings. Although there is a point when counsel would likely have been of limited value to respondent – given that he is facing at least another six years of incarceration on his conviction for first-degree criminal sexual conduct – the primary failure here was not related to the appointment of counsel but the failure to notify and allow respondent to participate in the prior proceedings. Thus, the factual analysis in *Lassiter* about the conduct of the proceedings there and the role that the attorney could have played in these proceedings is less relevant to the analysis here.[13] Rather, applying *Lassiter's* case-by-case analysis, the Attorney General concludes that respondent's due process rights under *Lassiter* were violated. This case is importantly distinguishable from *Lassiter*.

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[12] *Lassiter*, 424 US at 33.

[13] *Lassiter*, 424 US at 32-33 ("the absence of counsel's guidance on this point did not render the proceedings fundamentally unfair").

This conclusion is supported by the lead opinion's analysis in *In re Rood* in which this Court examined a similar factual situation in which the representative of the Department of Human Services systemically failed to inform the parent of the child protective proceedings.[14] In examining the failure to provide notice and an opportunity to be heard, the lead opinion determined that "the State did not provide adequate procedural due process."[15] The lead opinion noted that the State must make "reasonable efforts to notify [the parent] of the proceedings and allow him a meaningful opportunity to participate." As in *Lassiter,* the lead opinion noted that this is a case-by-case analysis.[16] In the circumstances of this case, the failure to provide respondent adequate notice, the failure to give him an opportunity to appear at the earlier dispositional review hearings, and the refusal to appoint him counsel at the termination hearing likewise violated respondent's right to due process.

In reaching this conclusion, the Attorney General notes that the issue whether appointed counsel is *constitutionally* required for an indigent parent facing termination of parental rights has not been resolved in Michigan. Nearly six years before *Lassiter* was decided, a plurality of this Court stated in *Reist v Bay Circuit Judge* 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." [17]

Reist is not binding because it was a plurality decision.[18] Nevertheless, there have been at least seven panels of the Court of Appeals that have relied on *Reist* as controlling on this point,[19]

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[14] See *Dep't of Human Servs v Rood,* ___ Mich ___ ; ___ NW2d ____ (2009) (Corrigan, J., lead opinion).
[15] *Rood,* slip op, p 39 (Corrigan, J., lead opinion).
[16] *Rood,* slip op, p 52 (Corrigan, J., lead opinion).
[17] *Reist v Bay Circuit Judge,* 396 Mich 326, 346; 241 NW2d 55 (1976)(Levin, J., Kavanagh, CJ, and Williams, J).
[18] *Negri v Slotkin,* 397 Mich 105, 109; 244 NW2d 98 (1976).

while two other panels have correctly noted that this is an unresolved issue.[20] This Court need not resolve this issue here.[21]

3. *The trial court's failure to comply with MCR 2.004 rule bars the action requested by the moving party. Therefore, applying MCR 2.004's prohibition resolves the question without reaching the issue presented by this Court.*

In its question, this Court has asked whether the violation of MCL 712A.17c, MCR 3.915(B)(1), or the Due Process Clause may be subject to a harmless error analysis.[22] This Court need not reach this issue because its resolution is governed by MCR 2.004.

MCR 2.004 applies to an incarcerated parent facing termination of parental rights.[23] The rule requires that the party seeking an order involving a child take appropriate steps to confirm the parent's location, serve the parent, and include certain information in the petition filed with the court.[24] The rule provides for notice and participation of the incarcerated parent after these initial steps through a telephone conference:

> (C) When all the requirements of subrule (B) have been accomplished to the court's satisfaction, the court shall issue an order requesting the department, or the facility where the party is located if it is not a department facility, *to allow that party to participate with the court or its designee by way of a noncollect and*

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[19] See *In re Powers Minors,* 244 Mich App 111, 121; 624 NW2d 472 (2000); *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 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).

[20] *In re Perry,* 148 Mich App 601, 609-610; 385 NW2d 287 (1986). See also *In re Osborne (Aft Rem),* 237 Mich App 597, 606; 603 NW2d 824 (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.

[21] See also the order in *In re Hudson,* ___ Mich ___, ___; ___ NW2d ___ (2009)(Young, J., concurring), slip op, p 16 ("Through statute and court rules, Michigan has afforded respondent parents greater protection than that required by the federal constitution").

[22] *In re Clemons,* unpublished opinion per curiam of the Court of Appeals, issued August 19, 2008 (Docket No 281004).

[23] MCR 2.004(A)(2).

[24] MCR 2.004(B).

> *unmonitored telephone call in a hearing or conference,* including a friend of the court adjudicative hearing or meeting. The order shall include the date and time for the hearing, and the prisoner's name and prison identification number, and shall be served by the court upon the parties and the warden or supervisor of the facility where the incarcerated party resides. [MCR 2.004 (emphasis added).]

One of the clear purposes of this telephone participation is to enable the trial court to determine whether the incarcerated parent is indigent and in need of appointed counsel:

> (E) The purpose of the telephone call described in this rule is to determine
>
> > (1) whether the incarcerated party has received adequate notice of the proceedings and has had an opportunity to respond and to participate,
> >
> > (2) whether counsel is necessary in matters allowing for the appointment of counsel to assure that the incarcerated party's access to the court is protected,
> >
> > (3) whether the incarcerated party is capable of self-representation, if that is the party's choice,
> >
> > (4) how the incarcerated party can communicate with the court or the friend of the court during the pendency of the action, and whether the party needs special assistance for such communication, including participation in additional telephone calls, and
> >
> > (5) the scheduling and nature of future proceedings, to the extent practicable, and the manner in which the incarcerated party may participate. [MCR 2.004.]

MCR 2.004's provisions are consistent with what would be considered traditional concepts of notice and opportunity to be heard.[25]

Here, as already noted, respondent was denied initial notice, denied an ability to participate at the adjudicative and dispositional review hearings, and the court failed to appoint

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[25] See *Dow v Michigan,* 396 Mich 192, 205-206; 240 NW2d 450 (1976), quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950)("The 'opportunity to be heard' includes the right to notice of that opportunity. 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections'"). See also *Sidun*, 481 Mich at 513-515.

counsel at the termination hearing even though this was one of the basic reasons for the right to have the respondent participate by phone in MCR 2.004. Consequently, there was a violation of MCR 2.004.

MCR 2.004(F) then provides for its own relief where there is a failure to comply with the requirements of the remaining provisions of MCR 2.004:

> (F) *A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings, as described in this rule.* This provision shall not apply if the incarcerated party actually does participate in a telephone call, or if the court determines that immediate action is necessary on a temporary basis to protect the minor child. [Emphasis added.]

The language here is unambiguous. The rule does not admit of any exceptions and by its own terms would exclude a harmless-error analysis.[26]

In this way, this rule stands in contrast to all the other applicable rules which would be subject to harmless error. For the subchapter governing juvenile proceedings, MCR 3.902 provides that the limitations of error are governed by MCR 2.613:

> (A) In General. The rules are to be construed to secure fairness, flexibility, and simplicity. The court shall proceed in a manner that safeguards the rights and proper interests of the parties. Limitations on corrections of error are governed by MCR 2.613.

And MCR 2.613 is the harmless error rule:

> (A) Harmless Error. An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

[26] This amicus brief does not address the authority of the Court to create court rules with remedies that are not subject to a harmless-error analysis.

Significantly, MCR 2.004(F) is cross-referenced in comments to MCR 3.920, and is also incorporated by cross-reference in MCR 3.901(A)(2) and 3.920(A)(2). Because MCR 2.004(F) is the more specific court rule, it controls.[27] This also comports with common sense. Otherwise, the provision in MCR 2.004(F) that provides that this rule must be satisfied or the relief cannot be granted would be rendered meaningless. It provides a complete prohibition of relief to the moving party when there is a lack of compliance with the notice and participatory provisions. Therefore, the trial court could not terminate the father's parental rights based on the MCR 2.004(F)'s express language.[28] Once there is violation of MCR 2.004, the remedy provision requires that this Court reverse the relief that was granted to the moving party.

The fact that this rule requires reversal for any violation is consistent with the basic nature of the rights that it confers – notice and an opportunity to participate in the proceedings for an incarcerated parent. The rule appears to reflect the point that in the absence of this remedy, any deficiency in process might be rendered harmless given the legal position of an incarcerated parent with respect to that parent's children. This was the basis of the dissent in Court of Appeals below:

> I would hold that as in criminal cases, the complete denial of counsel during a critical stage of the proceedings--the adjudication hearing and termination trial--requires reversal. This is, after all, the remedy prescribed in MCR 2.004(F):
>
> > A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings, as described in this rule.

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[27] See *In re Haley*, 476 Mich 180, 198; 720 NW2d 246 (2006), citing *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994).

[28] This Court exclusively has the authority to determine rules of practice and procedure but should not enact court rules that establish, abrogate, or modify the substantive law because it extends beyond this Court's constitutional rule-making authority to establish practice and procedure. *McDougall v Schanz,* 461 Mich. 15, 26-27; 597 N.W.2d 148 (1999).

> This case is readily distinguishable from those involving an isolated failure of appointed counsel to attend a dispositional hearing or another similar, but limited, event in the course of the adjudicative process. Rather, the remedy set forth in MCR 2.004(F) should be reserved for cases such as this, in which the trial court failed to recognize respondent-father's right at the outset of the proceedings, failed to ever ascertain respondent-father's interest in and need for appointed counsel, and refused to appoint counsel during the termination hearing itself.[29]

This analysis gives effect to the remedy provision of MCR 2.004(F) and fits the facts of this case. Where MCR 2.004 is violated by the failure to provide notice, enable the respondent to participate, and then to deny his request for counsel, the remedy provision of MCR 2.004(F) is implicated. This is the basis on which this Court should reverse.

4. *By statute and court rule, the prosecuting attorney may serve as a legal consultant for the Department of Human Services in child protective proceedings, but the Attorney General retains the ultimate authority to represent the Department in these actions. The Attorney General here, however, is merely serving as an amicus, and the prosecuting attorney for Bay County represents the position of the Department of Human Services on appeal.*

The Attorney General serves as the legal counsel to the Department of Human Services. In child protective proceedings, by statute under MCL 712A.17(5), the local prosecuting attorney may provide legal consultation to the Family Independence Agency (now Department of Human Services) where requested to do so by the court:

> In a proceeding under section 2(b) of this chapter, upon request of the family independence agency or an agent of the family independence agency under contract with the family independence agency, *the prosecuting attorney shall serve as a legal consultant to the family independence agency or its agent at all stages of the proceeding.* [MCL 712A.17(5); emphasis added.]

The corresponding court rule provides for the same role for the prosecutor attorney:

> (A) General. On request of the court, the prosecuting attorney shall review the petition for legal sufficiency and shall appear at any child protective proceeding or any delinquency proceeding.

* * *

[29] *McBride,* slip op, p 10 (Gleicher, J., dissenting).

(C) Child Protective Proceedings.

(1) Legal Consultant to Agency. *On request of the Michigan Family Independence Agency or of an agent under contract with the agency, the prosecuting attorney shall serve as a legal consultant to the agency or agent at all stages of a child protective proceeding.* [MCL 3.914; emphasis added.]

Thus, the prosecuting attorney plays a vital role in the conduct of child protective proceedings.

In addition to the Attorney General serving as counsel to the Department of Human Services, the Attorney General also supervises and advises the prosecuting attorneys of the State under MCL 14.30:

> The attorney general shall supervise the work of, consult and advise the prosecuting attorneys, in all matters pertaining to the duties of their offices[.]

As the chief law enforcement officer of the State, the Attorney General is ultimately the "exclusive representative" of the people in criminal cases in Michigan's courts if there is a disagreement with the local prosecutor over a case.[30]

Ordinarily, of course, the local prosecuting attorney and the Attorney General operate collaboratively and in tandem. It is a rare instance when these law enforcement officers take different legal positions. Other than child protective actions in Wayne County, generally the legal actions taken by the Department of Human Services in child protective actions are conducted by the local prosecuting attorney, including filing briefs in the appellate case. In this case, the Department of Attorney General has taken a position that is different from the one presented to

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[30] *People v Foster,* 377 Mich 233, 235 n 1; 140 NW2d 513 (1966), which provided as follows:

> The Mason county prosecuting attorney disagrees with his superior, the attorney general, and asks that we follow another line of cases holding, in so many words, that the selection by the accused of counsel precludes subsequent assailment by him, upon allegation of incompetence, of such selected counsel.
>
> We cannot, of course, recognize the prosecutor as representative of the people when a criminal case is before us on appeal. The attorney general is their exclusive representative here. CL 1948, § 14.28 (Stat Ann 1961 Rev § 3.181).

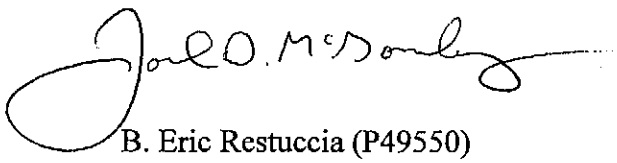
the Court by the prosecuting attorney from Bay County. Given the posture of the case, and the circumstances that gave rise to the different legal positions, the Attorney General has chosen to participate as an amicus – the Bay County Prosecutor's Office is serving as the advocate for the position of the Department of Human Services.

Conclusion and Relief Sought

WHEREFORE, the Attorney General respectfully requests that this Honorable Court reverse the decision of the Court of Appeals and remand the matter to the Bay County Family Court for further proceedings.

Respectfully submitted,

Michael A. Cox
Attorney General



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