STATE OF MICHIGAN

IN THE SUPREME COURT

In the Matter of SKYLER LEROY McBRIDE,
ALEXANDER GARAND McBRIDE, and
SAWYER DALE McBRIDE, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

Supreme Court No. 136988

v.

RONALD D. McBRIDE, JR.,

Court of Appeals No. 282062
Lower Court No. 06-009381-NA

Respondent Appellant,

and

SUSAN McBRIDE,

Respondent.

PETITIONER-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO RESPONDENT-APPELLANT'S AMENDED APPLICATION FOR LEAVE TO APPEAL

KURT C. ASBURY (P36595)
BAY COUNTY PROSECUTING ATTORNEY
ATTORNEY FOR PETITIONER-APPELLEE
BY: SYLVIA L. LINTON (P42125)
Assistant Prosecuting Attorney
1230 Washington Avenue - Suite 768
Bay City, Michigan 48708
(989) 895-4128

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[1] *Lassiter v. Dept of Social Services*, 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 23 1023 (1989).

TABLE OF AUTHORITIES

FEDERAL CASES CITED:

MICHIGAN CASES CITED:

OUT-OF-STATE CASES CITED

STATUTES CITED

RULES CITED

OTHER AUTHORITIES CITED

STATEMENT OF JURISDICTION

By Order dated February 20, 2009, this Honorable Court required Petitioner-Appellee and Respondent-Appellant to file Supplemental Briefs within 42 days addressing various issues.

STATEMENT OF QUESTIONS PRESENTED

I. **DID THE TRIAL COURT VIOLATE MCL 712A.17c AND MCR 3.915(B)(1) WHEN IT DENIED RESPONDENT-APPELLANT FATHER'S REQUEST FOR APPOINTED COUNSEL?**

Petitioner-Appellee answers, "Yes," and therefore ***admits error***

Respondent-Appellant answers, "Yes"

II. **DID THE TRIAL COURT VIOLATE RESPONDENT-APPELLANT FATHER'S DUE PROCESS RIGHTS UNDER *LASSITER* WHEN IT DENIED HIS REQUEST FOR THE APPOINTMENT OF COUNSEL.**

Petitioner-Appellee answers, "No"

Respondent-Appellant answers, "Yes"

III. **ASSUMING THE TRIAL COURT'S DENIAL OF COUNSEL VIOLATED MCL 712A.17c AND/OR MCR 3.915(B)(1) AND/OR THE DUE PROCESS CLAUSE, MAY SAID DENIAL NEVERTHELESS BE SUBJECT TO A HARMLESS ERROR ANALYSIS?**

Petitioner-Appellee answers, "Yes"

Respondent-Appellant answers, "No."

IV. **IS THE DEPARTMENT OF HUMAN SERVICES ASSERTING "INCONSISTENT POSITIONS" WHEN IT ARGUES HARMLESS ERROR BASED UPON THE UNIQUE FACTS AND CIRCUMSTANCES OF A PARTICULAR CASE?**

Petitioner-Appellee answers, "No."

Respondent-Appellant's answer is unknown

V. **ASSUMING THAT DENIAL OF COUNSEL CAN CONSTITUTE HARMLESS ERROR, CAN 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, PREVENT SUCH A DENIAL OF COUNSEL FROM BEING HARMLESS IN THE PRESENT CASE?**

Petitioner-Appellee answers, "No."

Respondent-Appellant's answer is unknown.

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

Petitioner-Appellee accepts the "Statement of Proceedings and Facts" set forth in Respondent-Appellant-Father's Amended Application for Leave to Appeal. Additional facts may be found in the body of Petitioner-Appellee's Brief.

ARGUMENT

I. THE TRIAL COURT VIOLATED MCL 712A.17c AND MCR 3.915(B)(1) WHEN IT DENIED RESPONDENT-APPELLANT FATHER'S REQUEST FOR APPOINTED COUNSEL; THEREFORE, PETITIONER-APPELLEE-DHS *ADMITS ERROR* AS TO THIS ISSUE.

A. *STANDARD OF REVIEW.*

Petitioner-Appellee DHS [hereinafter "the Department"] agrees with Respondent-Appellant Father [hereinafter "Father"] that the interpretation and application of statutes and court rules are questions of law which are reviewed de novo. *In re Lee*, 282 Mich App 90; ___ NW2d ___ (issued January 15, 2009) (**Appendix A**), citing *People v. Kimble*, 420 Mich 305, 308-309; 684 NW2d 669 (2004).

B. *DISCUSSION.*

The Department ***admits error*** as to this issue.[2]

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[2] Said admission is based ***solely*** upon the fact that MCR 2.004 was not complied with in this case. Had said rule been complied with and had Father still waited until the very start of the termination hearing to request appointed counsel, then the trial court's denial of counsel would have been both reasonable and proper under the circumstances. See, *In re B__,M___,P___*, 704 SW2d 237 (Ct. App. Mo, 1986) wherein the Missouri Court of Appeals for the Southern District found that a request for counsel made at the beginning of a termination hearing was properly denied. See also, *In re Hall*, 188 Mich App 217, 222; 469 NW2d 56 (1991) which states, in relevant part, that "MCR 5.915(B) charges parents with 'some minimum responsibility' in regard to having counsel appointed for their benefit....MCR 5.915(B) requires affirmative action on the part of a respondent in order to have an attorney appointed at statutory review hearings."

II. THE TRIAL COURT DID NOT VIOLATE RESPONDENT-APPELLANT FATHER'S DUE PROCESS RIGHTS UNDER *LASSITER* WHEN IT DENIED HIS REQUEST FOR THE APPOINTMENT OF COUNSEL.

A. ***STANDARD OF REVIEW.***

The Department agrees with Father that this issue involves a question of constitutional law and is therefore subject to de novo review. *People v. Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007); *In re CR*, 250 Mich App 185, 203; 646 NW2d 506 (2002).

B. ***DISCUSSION.***

The denial of counsel in this case did not violated Father's due process rights under the federal constitution; thus, there was no *Lassiter* violation. Similarly, said denial did not violate Father's due process rights under the Michigan constitution, either.

1. ***No Due Process Violation Under the U.S. Constitution***

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Matthews v. Eldridge*, 424 US 319, 334; 96 S Ct 893; 47 L Ed 2d 18 (1976), citing *Morrissey v. Brewer*, 408 US 471, 481; 92 S Ct 2593, 260; 33 L Ed 2d 484 (1972). Faced with this truism, the United States Supreme Court in *Lassiter* held that the Due Process Clause of the Fourteenth Amendment does ***not*** require the "appointment of counsel in every parental termination proceeding." *Lassiter*, 452 US at 31-32; 101 S Ct 2153. Rather, the right to counsel for indigent parents in termination proceedings is an issue which is to be decided on a case-by-case basis "by the trial court, subject, of course, to appellate review." *Id*, 452 US at 32; 101 S Ct 2153.

In determining whether an indigent parent has a right to appointed counsel, trial courts are to employ a balancing test. On one side of the scale are the three *Eldridge*

factors: (1) the private interests at stake;[3] (2) the government's interest;[4] and, (3) the risk that the procedures used will lead to erroneous decisions.[5] *Lassiter*, 452 US at 27; 101 S. Ct 2153. On the other side of the scale is the presumption that there is a right to appointed counsel only where the indigent parent, if he is unsuccessful, may lose his personal freedom. *Id.* The three *Eldridge* factors must first be balanced "against each other," and then their net weight is set "in the scales against the presumption." *Id.*[6] See also, *Mead*

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[3] "[A] parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter*, 452 US at 27; 101 S Ct 2153, citing *Stanley v. Illinois*, 405 US 645, 651; 92 St Ct 1208, 1212; 31 L Ed 551. However, "[o]n the other side of the termination proceeding are the often countervailing interests of the child." *Santoski v. Kramer*, 455 US 745, 789; 102 S Ct 1388; 71 L Ed 2d 599 (1982)(Rehnquist, J. dissenting).

[4] "Two state interests are at stake in parental rights termination proceedings – a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings." *Santoski, supra.*, 455 US at 766; 102 S Ct 1388. The state's interest in protecting the child is aligned with the child's interest to be free from an abusive environment. *Maryland v. Craig*, 497 US 836, 852-853; 110 S Ct 3157; 111 L Ed 2d 66 (1990). "Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision." *Lassiter*, 452 US at 27; 101 S Ct 2153

[5] "The procedural safeguards used in adjudicative hearings protect parents from the risk of erroneous deprivation of their liberty interest in the management of their children. Jurisdiction over a minor child is acquired by trial, plea of admission, or plea of no contest. Parents may demand a jury determination of the facts in the adjudicative phase of child protective proceedings. 'If the court acquires jurisdiction, the dispositional phase determines what action, if any will be taken on behalf of the child.' The termination of parental rights requires further dispositional hearings and proof of the statutory elements for termination by clear and convincing evidence." *In re PAP*, 247 Mich App 148,153; 640 NW2d 880 (2001)(internal citations omitted). See also, MCR 3.973.

[6] "The dispositive question...is whether the three *Eldridge* factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption and thus lead to the conclusion that the Due Process Clause requires the appointment of counsel when a State seeks to terminate

v. Batchlor 435 Mich 480, 492-493; 460 NW2d 493 (1990).

When the Supreme Court applied this balancing test in *Lassiter*, it concluded that the indigent parent was *not* entitled to appointed counsel because the case did not involve: (1) "allegations of neglect or abuse upon which criminal charges could be based;" (2) expert witness testimony; or, (3) "specially troublesome points of law, either procedural or substantive." *Lassiter*, 452 US at 31-32; 101 S Ct 2153. Additionally, and perhaps more importantly, the Court found that "*the presence of counsel for Ms. Lassiter could* ***not*** *have made a determinative difference.*" *Id* at 32-33; 101 S Ct 2153 (emphasis added).

Here, as in *Lassiter*, there were no allegations of neglect or abuse upon which criminal charges against Father could be based. Likewise, there were no "specially troublesome points of law, either procedural or substantive." Furthermore, although there were three expert witnesses – i.e., (1) Barb Goss, an expert in adult mental health treatment with a speciality in DBT; (2) Michelle Hugo, an expert in child and family therapy; and, (3) Janice Grigsby, an expert in substance abuse therapy – their testimony dealt exclusively with ***respondent-mother's*** addiction to prescription medications and/or its effect upon the children.[7] They provided no testimony and/or opinions whatsoever

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an indigent's parental status." *Lassiter*, 452 US at 31; 101 S Ct 2153.

[7] Ms. Goss and Ms. Grisby testified about respondent-mother's participation and progress in various treatment programs, and then gave their professional opinions regarding respondent-mother's prognosis. Ms. Goss opined that in a "best case scenario," it would take respondent-mother, minimally, one year just to get through phase one of DBT and another six months to reinforce the skills. [10/10/07 Term Hrg Tr at 43-46]. Similarly, Ms. Grigsby opined that respondent-mother would be in treatment for another three months and would need "a whole years' worth of aftercare." [10/10/07 Term Hrg Tr at 172-173].

Ms. Hugo testified regarding her observations and impressions of respondent-mother and the children. Ms. Hugo then opined that "it's my professional opinion that it would not be in the

regarding Father. Finally, and perhaps most importantly, the presence of counsel for Father could not have made a determinative difference.[8]

Based upon the foregoing, it is clear there is no due process right to appointed counsel in every termination case under the Fourteenth Amendment of the U.S. Constitution. *Lassiter, supra.* Whether a parent in a particular termination proceeding is entitled to appointed counsel under the Due Process Clause of the Fourteenth Amendment is a question to be answered by the trial court based upon the balancing test enunciated in *Eldridge, supra.* Application of said balancing test in the present case demonstrates that Father was not entitled to appointed counsel under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. It cannot be said, therefore, that the trial court violated Father's due process rights under *Lassiter.*

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kids' best interest for them to continue to drag this out any further. . . .[T]hey need to get on with not hoping and wishing and praying that mom will get better, and then only to see her maybe not as healthy as they hope because that causes a lot of disturbances in their behavior." [10/10/07 Term Hrg at 88-89].

Furthermore, all three of these expert witnesses were thoroughly cross-examined by both the children's attorney and respondent-mother's attorney.

[8] Justice Gleicher suggests that an attorney would have been able to "intercede on [Father's] behalf, or to communicate his ideas and opinions regarding his children's best interest." *Slip Op,* (Gleicher, J concurring in part and dissenting in part). However, Father was present at the termination hearing and ***did*** "communicate his ideas and opinions regarding his children's best interests." Specifically, at the beginning of the hearing, Father clearly indicated he was opposed to the termination of his parental rights. [10/11/07 Term Hrg Tr at 5]. He also stated "I love my children and I do not want to lose them. And I would love to hopefully have some sort of visiting rights and so would my parents and my other family members." [10/11/07 Term Hrg Tr at 221]. Furthermore, the trial court specifically addressed the best interest factor in this case even though it was not required to do so under the then-existing version of MCL 712A.19b(5). (Said statute was amended, effective July 11, 2008, to require that the trial court make an affirmative finding that termination of a parent's parental rights ***is*** in the best interest of the child. 2008 PA 199).

2. ***No Due Process Violation Under the Michigan Constitution***

In addition to requiring that trial courts apply the *Eldridge* balancing test to determine whether a federal due process right to counsel exists in a termination case, the *Lassiter* Court also opined that trial courts should examine the circumstances of each case individually because a right to appointed counsel might exist under their state constitutions and/or statutes. *Lassiter*, 452 US at 31-34; 101 S Ct 2153. See also, *In Re EJC*, 731 NW2d 402, 403 (Ct App Iowa 2007).

Admittedly, various panels of the Michigan Court of Appeals have found that the constitutional guarantee of due process "confer[s] to an indigent parent the right to appointed counsel at a hearing which may involve termination of parental rights." *In re Cobb*, 130 Mich App 598, 600; 344 NW2d 12 (1983).[9] In so finding, these panels invariably relied, either directly or indirectly, upon the broad language contained in Part II of Justice Levin's lead opinion in *Reist v. Bay Circuit Judge*, 396 Mich 326, 339-346; 241 NW2d 55 (1976). However, as correctly noted by Chief Judge Danhof, said reliance is misplaced:

> "The doctrine of stare decisis renders that broad language without precedential value because a majority of the justices sitting in *Reist* did not concur in Justice Levin's discussion of a *constitutional* right to court-appointed counsel at termination proceedings. Justice Coleman, writing separately, described part II as dicta 'concerning an unauthorized issue'. *Id.*, p. 357, 241 NW2d 55. She states that it presents 'a broad and indistinct vista of "liberties" to be protected and financial equalizing to be supplied.' *Id.*, p. 358; 241 NW2d 55. She noted that Michigan has long provided for

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[9] See also, e.g., *In re Powers*, 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 by *In re Trejo, Minors*, 462 Mich 341, 353; 612 NW2d 407 (2000); *In re Kenneth Jackson, Jr.*, 115 Mich App 40; 320 NW2d 285 (1982).

> appointment of counsel for indigents in every termination hearing and that the plaintiff in that case had counsel. *Id.*, p. 357; 241 NW2d 55. The issue actually decided by the *Reist* Court concerned an indigent parent's right to *appellate* counsel and to a transcript of proceedings furnished at public expense in an appeal from an order termination parental rights." *In re Perry*, 148 Mich App 601, 609-610; 385 NW2d 287 (1985)(footnotes omitted)(emphasis in original text).[10]

Thus, even though various Court of Appeals decisions have concluded there is a due process right to counsel in termination cases,[11] said decisions are based upon dicta from a non-authoritative plurality decision. As such, said decisions cannot properly form the basis for finding that a definitive due process right to counsel currently exists in termination cases. At best, said decisions simply demonstrate "it is unclear whether [a parent's] right to court appointed counsel is guaranteed by the Michigan Constitution." *In re Osborne*, 237 Mich App 597, 606; 603 NW2d 824 (2000), citing *In Re Sanchez*, 422 Mich 758; 375 NW2d 353 (1985) and *Reist, supra.*

Although it is unclear whether parents currently have a constitutionally-derived right to counsel in termination cases, it is crystal clear that parents have a statutorily-derived right to counsel. MCL 712A.17c. See also, MCR 3.915(B) and *In re Perri, supra.* Thus, at this point in time, any error arising from the denial of counsel must necessarily be viewed

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[10] See also, *Negri v. Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976)("Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation binding on this Court under the doctrine of Stare decisis.")

[11] Conversely, various Court of Appeals decisions have found that a parent's right to counsel during a termination proceeding is "derived entirely from Michigan statute and court rule." *In re Perri*, unpublished opinion per curiam of the Court of Appeals, issued May 8, 2008 (Docket No. 280156)(**Appendix B**).

Furthermore, this Honorable Court has specifically found that because termination proceedings are not criminal in nature, constitutional rights which are applicable in a criminal trial – such the Sixth Amendment right of confrontation – are not necessarily applicable in termination trials. *In re Brock*, 442 Mich 101, 107-108; 499 NW2d 752 (1992).

as a nonconstitutional error.[12] "A preserved nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v. Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). See also, *People v. Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002); *In re Perri, supra.*

A review of the record in this case indicates that Father's lack of counsel was not outcome determinative. During all relevant time periods, Father was incarcerated in prison "for CSC under thirteen" involving a female child, [11/06/06 Disp Hrg at 15]. His earliest possible release date is 2015. [09/29/06 Adj Hrg at 8]. Thus, as noted by the Court of Appeals:

> "It is undisputed that, because of his incarceration, respondent-father had not provided for the minor children's care or custody in three years and would not be able to provide for them for almost another eight years, by which time the two oldest children would have reached the age of majority and the youngest child would be 17 years of age." *Slip Op* at p.3.

Based upon the foregoing, the Court of Appeals correctly found that "even if respondent-father had been represented by counsel at the termination hearing, counsel could have provided no defense to these indisputable facts and, therefore, the trial court would have terminated respondent-father's parental rights." *Id.* Indeed, even Judge Gleicher had to admit as much: "I acknowledge that MCL 712A.19b(3)(h) creates a virtually irrebuttable presumption in favor of termination of respondent-father's parental rights. * * * [N]o realistic risk exists that respondent-father will ever reunite with his

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[12] This would seem the only logical conclusion given there is no ***clear*** constitutional right to counsel in termination cases at this time.

children." *Slip Op.*, Gleicher, J. (*concurring in part and dissenting in part*). It therefore appears that Father's due process rights under the Michigan constitution were not violated by the denial of counsel in this case because: (1) it is unclear whether such a due process right to counsel even exists in Michigan relative to termination cases; and, (2) under the applicable standard of review, the error was not outcome determinative.

Additionally, and merely as an aside, the primary argument in favor of a due process right to counsel in termination cases is that:

> "'[T]he interest of a parent in the companionship, care, custody, and management of his or her children' . . .occupies a unique place in our legal culture. . . .Accordingly, although the Constitution is verbally silent on the specific subject of families, freedom of personal choice in matters of family life long has been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment." *Lassiter,* 452 US at 39; 101 S Ct 2153 (Blackmun, J., dissenting)(citations omitted).

Although this interest would seem to be equally compelling in divorce actions involving custody disputes, there is no due process right to counsel in such divorce cases. *Haller v. Haller*, 168 Mich 198; 423 NW2d 617 (1987). This is true even in those divorce cases where it is virtually certain that one parent will be awarded sole physical and legal custody of the child(ren) and the other parent will not be awarded any parenting time whatsoever.[13] Certainly, a parent's interest in "the companionship, care, custody and management of his or her children" in a divorce case is no less compelling than that of a parent in a termination

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[13] Take for example the present case. If Mrs. McBride had been a proper parent and had filed for divorce immediately upon Father's incarceration in prison, then, undoubtedly, this is *exactly* the situation which would have arisen. Thus, for all intents and purposes, Father's interest "in the companionship, care, custody, and management of his children" would have been completely curtailed during the children's minority. Yet in the divorce action, Father would not have had any due process right to counsel. *Haller, supra.*

proceeding.

Of course the Department fully understands that "a custody decree does not constitute a complete termination of the parental bond" because "[a] custody decree is subject to modification for proper cause shown[14]. . .[and] is only effective until the minor attains the age of majority." *Haller, supra* at 199. However, as previously noted, if the present case had been a divorce case rather than a termination case, the end result would have been exactly the same – Father would have been denied "the companionship, care, custody and management of his children" for the duration of their minority due to his incarceration. Furthermore, there is nothing to stop Father from contacting these children and re-establishing a relationship – albeit not a legal parent/child relationship – once he's released from prison.

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[14] Granted, "*Haller*...suggested that the fact custody decisions were subject to modification did not mandate the stringent due process considerations required in termination of parental rights cases." *Molloy v. Molloy*, 247 Mich App 348, 354; 637 NW2d 348 (2001). It must be remembered, however, that "[t]he loss of a parent's presence and contribution at each stage of a child's development cannot be compensated for after a modification of custody." *Id* at 355.

III. ASSUMING THE TRIAL COURT'S DENIAL OF COUNSEL VIOLATED MCL 712A.17c AND/OR MCR 3.915(B)(1) AND/OR THE DUE PROCESS CLAUSE, SAID DENIAL MAY NEVERTHELESS BE SUBJECT TO A HARMLESS ERROR ANALYSIS.

A. *STANDARD OF REVIEW.*

"The determination of what standard of review applies to a certain situation is a question of law. Questions of law are reviewed de novo." *People v. Walters*, 266 Mich App 341, 352; 700 NW2d 424 (2005).

B. *DISCUSSION.*

> *"Error of some kind [during legal proceedings] is unavoidable: judges are human and, despite their best efforts, are prone to human failings. The question for appellate courts is how to cope with the inevitable mistakes that creep into trial proceedings. In particular, what is the court to do if it is convinced that the error could not possibly have affected the result of the proceedings below? The solution – by now well established by rule, statute and decisional law – is to affirm the result in the lower court on the ground that the error was harmless."*[15]

The Department submits that harmless error is the appropriate standard of review to be applied when a parent facing the termination of his/her parental rights is denied appointed counsel. Said harmless error standard applies regardless of whether the denial of counsel violates the Due Process Clause of the Fourteenth Amendment or Michigan law.

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[15]Cooper, Jeffrey O., *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. Kan L Rev 309 (2002)(footnotes omitted). See also, Sweeney, Dennis J., *An Analysis of Harmless Error in Washington: A Principled Process*, 31 Gonz L Rev 277, 278 (1995-96)("'We should avoid multiple trials and attendant uneconomical use of judicial resources when the new trial will inevitably arrive at the same result.'").

1. ***Harmless Error Analysis Permitted under Federal Law.***

> *"[I]t is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to counsel....[A]s a litigant's interest in personal liberty diminishes, so does his right to appointed counsel."*[16]

The United States Supreme Court has made clear that the Due Process Clause of the Fourteenth Amendment does ***not*** require "appointment of counsel in every parental termination proceeding." *Lassiter,* 452 US at 31-32; 101 S Ct 2153. Whether appointed counsel is required in a particular termination proceeding is to be determined via the *Eldridge* balancing test. *Lassiter,* 452 US at 26-27; 101 S Ct 2153. Importantly, when the Supreme Court applied said balancing test in *Lassiter,* it clearly integrated a harmless error analysis therein – i.e., after finding that "the case presented no specifically troublesome points of law, either procedural or substantive," the Court specifically found that "***the presence of counsel for Ms. Lassiter could not have made a determinative difference.***" *Lassiter,* 452 US at 32-33; 101 S Ct 215 (emphasis added).

The *Lassiter* Court's integration of a harmless error analysis into the *Eldridge* balancing test is not surprising given that, even in criminal cases, "the [Supreme] Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." *Arizona v. Fulminante*, 499 US 279, 306; 111 S Ct 1246; 113 L Ed 2d 302 (1991). The Sixth Amendment right to counsel is one of those

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[16] *Lassiter,* 452 US at 25-26; 101 S Ct 2153.

constitutional errors which, even in a criminal case, "*can* be harmless."[17]

Furthermore, the integration of a harmless-error analysis into the *Eldridge* balancing test has been recognized by our own Court of Appeals. See, e.g., *In re Casey-Martin*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2009 (Docket No. 286907)(**Appendix C**) wherein the Court stated:

> "By applying the *Mathews [v. Eldridge]* balancing test in the instant case, it is unlikely that the risk of an erroneous deprivation was increased by respondent-father's absence because termination of his parental rights was based on his failure to comply with his treatment plan, address his mental heal issues, provide suitable housing, and demonstrate parental fitness. Although a further adjournment [of the permanent custody hearing] may not have been an onerous burden on the trial court, ***when considered in light of the minimal likelihood that such testimony could have altered the outcome of the trial, the denial of the request for adjournment did not constitute a denial of due process.***" (Emphasis added).

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[17] See, e.g., *Satterwhite v. Texas,* 486 US 249; 108 S Ct 1792; 100 L Ed 2d 284 (1988)(finding that harmless error review is appropriate when counsel is absent from a critical stage of the proceedings); *Rushen v.* Spain, 464 US 114, 117 at fn. 2; 104 S Ct 453; 78 L Ed 2d 267 (1983)(finding that the right to be present during all critical stages of the proceedings and the right to be represented by counsel "as with most constitutional rights, are subject to harmless error analysis."); *United States v. Morrison*, 449 US 361, 361-362; 101 S Ct 665; 66 L Ed 2d 564 (1981)("Absent demonstrable prejudice or substantial threat thereof, from the violation of the Sixth Amendment [right to counsel], there is no basis for imposing a remedy in the criminal proceeding,..."); *Coleman v. Alabama*, 399 US 1, 11; 90 S Ct 1999; 26 L Ed 2d 387 (1970)("The test to be applied is whether the denial of counsel at the preliminary hearing was harmless error...").

Admittedly, the Sixth Amendment right to counsel has also been found to raise an irrebuttable presumption of prejudice which is not amenable to a harmless error analysis. See, e.g., *Arizona v. Fulminate, supra,* citing *Chapman v. California*, 386 US 18,23 at fn 8; 87 S Ct 824; 17 L Ed 2d 705 (1967); *United States v. Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984). However, for purposes of the present case, it bears repeating that said irrebuttable presumption is only applicable in a criminal proceeding or a quasi-criminal proceeding wherein the party's personal liberty/freedom is at stake. It is not applicable is a civil or quasi-criminal proceeding wherein there is no threat whatsoever to the party's personal liberty/freedom. *Lassiter, supra.*

See also, *In re Fee*, unpublished opinion per curiam of the Court of Appeals, issued August 21, 2008 (Docket Nos. 284044, 284045 and 284046)("With regard to the second *[Eldridge]* fact, the likelihood of an erroneous deprivation was not increased by respondent Tolliver's absence at the termination hearing because ***his presence would not have changed the result***.")(Emphasis added)(**Appendix D**).[18]

Given that the Due Process Clause does not require the appointment of counsel in every parental termination hearing, and given that the *Lassiter* Court integrated a harmless error analysis into the *Eldridge* balancing test, and given that the Sixth Amendment right to counsel in criminal cases is oft time subject to a harmless error analysis, it appears that a violation of the Due Process Clause relative to the right to counsel in a termination case ***is*** subject to a harmless error analysis.

2. ***Harmless Error Analysis Required Under Michigan Law.***

As noted by this Court, "[t]he juvenile code is intended to protect children from unfit homes rather than to punish their parents." *In re Brock, supra.* Subchapter 3.900 of the

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[18] The *Lassiter* Court's integration of a harmless error analysis into the *Eldridge* balancing test has also been recognized in other jurisdictions. See, e.g., *Clark v. Arkansas Dept of Human Services*, 90 Ark App 446; 206 SW2d 899, 905 (Ct. App. Ark, 2005) wherein the Arkansas Court of Appeals summarized the *Eldridge* factors and then stated that "[t]he right to counsel must be analyzed in light of two major factors: 1) whether or not the case presented any specially troublesome points of law, and 2) ***whether or not the presence of counsel could have made a determinative difference.***" (Emphasis added). See also, e.g., *KDGLBP v. Hinds County Dept of Human Services*, 771 So2d 907, 910 (Miss. Supr., 2000) wherein the Mississippi Supreme Court referred to the *Lassiter* Court's statement that "the presence of counsel could not have made a determinative difference for petitioner," and then held that "***[o]ne of the most important factors to be considered in applying the standards for court appointed counsel is whether the presence of counsel would have made a determinative difference.***" (Emphasis added).

Michigan Court Rules "govern[s] practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code." MCR 3.901(A)(1). MCR 3.901(A)(2) provides that "[o]ther Michigan Court Rules apply to juvenile cases in the family division of the circuit court only when this subchapter specifically provides." MCR 3.902(A) specifically incorporates the harmless error standard of the civil procedure court rules into the Juvenile Code by providing, in relevant part, that "[l]imitations on corrections of error are governed by MCR 2.613."[19] The harmless error rule of MCR 2.613(A) provides:

> "[A]n 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."

In light of the foregoing, it is clear the court rules governing termination proceedings under the Juvenile Code specifically require application of a harmless-error analysis. It therefore follows that a violation of MCR 3.915(B)(1) and/or MCL 712A.17c ***is*** subject to a harmless-error analysis. This conclusion is further supported by various decisions of our Court of Appeals:

1. "A second and independent basis for our affirmance rests upon a harmless-error analysis....We fail to see, and respondent has failed to indicate, how she was prejudiced by the absence of counsel..." *In re Hall, supra* at 222-223.

2. "However, a hearing held without counsel can be harmless error...." *In re Gentry*, unpublished opinion per curiam of the Court of Appeals, issued February 26, 2009 (Docket No. 287137)(**Appendix E**).

3. "Respondent was not harmed by a lack of representation during

[19] See also, *In re Lee, supra.*

certain stages of the proceedings." *In re Coleman*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2009 (Docket No. 287191)(**Appendix F**).

4. "Had counsel attended the hearing, it seems virtually certain that the court would have reached the same result, to proceed with termination proceedings." *In re Perri, supra.* (**Appendix B**).

5. "However, the deprivation of the right to counsel in the context of termination proceedings is subject to a harmless error analysis. Respondent has failed to show that he was harmed by the fact that he was unrepresented..." *In re Shabazz*, unpublished opinion per curiam of the Court of Appeals, issued February 10, 2009 (Docket No. 286130)(**Appendix G**).

6. "*Hall, supra* at 222, suggests that the deprivation of counsel at child protective proceedings can be subject to harmless-error analysis. Here, however, the error cannot be deemed harmless..." *In re Lyttle*, unpublished opinion per curiam of the Court of Appeals, issued October 6, 2000 (Docket No. 222488)(**Appendix H**).

Of course the Department readily admits that in ***applying*** the harmless error analysis in termination cases, the Court of Appeals has consistently found the lack of counsel to be harmless only when it involved a hearing other than the actual termination hearing itself. This does not mean, however, that the harmless error analysis is inapplicable whenever there is a lack of counsel at the termination hearing;[20] rather, this simply means that the Court of Appeals may not yet have been presented with a situation like the present wherein the lack of counsel at the termination hearing was harmless

[20] It must be remembered that "[r]ules of automatic reversal are disfavored." *In re Osborne*, 459 Mich 360, 369; 589 NW2d 763 (1999). See also, *People v. Murphy*, 481 Mich 919, 922; 750 NW2d 582 (2008)(Markman, J. concurring)("Were this Court to conclude that every absence of counsel at a critical stage requires automatic relief for a defendant, such a result would give no effect to *Satterwhite.*").

beyond a reasonable doubt.[21]

Based upon the foregoing, the Department submits not only that a harmless error analysis is required in parental termination hearings pursuant to the applicable court rules, but, also, that said analysis is to be applied even when there is a denial of counsel at the actual termination hearing itself.

3. ***Harmless Error Analysis Applied in Other Jurisdictions.***

Several other states have found that a harmless error analysis is applicable to the denial of counsel in termination cases – see, e.g., (1) Arkansas;[22] (2) Delaware;[23] (3) Florida;[24] (4) Georgia;[25] (5) Mississippi;[26] (6) Montana;[27] (7) North Dakota;[28] and, (8) Oregon.[29] Admittedly, not all of these out-of-state cases found the denial of counsel to be

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[21] See, *In re Osborne, supra, 459 Mich 360,* wherein this Court refused to reverse an otherwise proper termination of parental rights ***absent any demonstrated harm*** when the FIA was improperly represented by the attorney who previously represented respondent.

[22] *Briscoe v. Arkansas Dept of Humans Services*, 323 Ark 4; 912 SW2d 425, 427 (Ark. Supr., 1996); *Clark v. Arkansas Dept of Human Services*, *supra,* and, *Meza-Cabrera v. Arkansas Dept of Human Services*, 2008 WL 276290 *(Ct. App. Ark., 2008)*(**Appendix I**).

[23] *Walker v. Walker*, 892 A2d 1053 (Del. Supr, 2006); *Arthur v. Division of Family Services*, 867 A2d 901; 2005 WL 277710 (Del.Supr.); *Hughes v. Division of Family Services*, 836 A2d 498 (Del. Supr., 2003).

[24] *In the Interest of JB*, 624 So2d 792 (C. App. Fla, 1993).

[25] *In the Interest of KMC*, 273 Ga App 276; 614 SE2d 896 (Ct. App. Ga., 2005); *In the Interest of PDW*, ___ SE2d ___; 2009 WL 386411 (Ga App)(**Appendix J**).

[26] *KDGLBP v. Hinds Co Dept of Human Services*, *supra.*

[27] *In re PDL*, 324 Mont 327; 102 P3d 1225 (Mont. Supr, 2004).

[28] *In re the Adoption of JDF*, 761 NW2d 582 (N.D. Supr., 2009).

[29] *Hunt v. Weiss*, 8 P3d 990 (Ct. App. Ore., 2000).

harmless and only one of them found the denial of counsel at the termination hearing to be harmless.[30] However, what is important for our purposes is the fact that these jurisdictions ***applied*** the harmless error analysis to the denial of counsel in termination cases ***even when*** said denial occurred at the termination hearing itself.

4. ***Harmless Error Occurred in the Present Case.***

A review of the record in this case clearly demonstrates that the denial of counsel was harmless. Although the trial court failed to comply with MCR 2.004 by arranging to have a phone physically passed through the bars of Father's prison cell so he could verbally request counsel prior to the termination hearing, the trial court consistently notified Father of his right to counsel throughout the pendency of these proceedings. Prior to each and every hearing (save the initial Preliminary Hearing held on September 14, 2006), the trial court provided Father with a standardized "Notice of Hearing" form which contained

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[30] In a case very similar to the one at bar, the Supreme Court of Montana found that the denial of counsel throughout the termination proceedings was harmless error. *In re PDL, supra.* The father in said case was *never* notified of his right to counsel and was thus effectively denied his right to counsel throughout the proceedings. In finding said error to be harmless, the Supreme Court of Montana stated, in relevant part, as follows:

> "Although the District Court erred when not advising [father] of his right to counsel, we agree with the State that, in this case, the error is harmless as the lack of notice is not prejudicial to [father]. As discussed above, [father] was convicted of sexual abuse on a child, that of PDL's older half-sister, for which [father] is currently serving a lengthy sentence, one that will extend past the time PDL will reach majority, and this alone would be enough to have terminated his parental rights....***Even if [father] had been notified of his right to counsel, and counsel had presented testimony and other evidence, the outcome would have remained the same. The bottom line is there really is no way that an attorney would have made a difference under these circumstances and [father] cannot demonstrate prejudice where no reasonable court would have preserved his parental rights under the facts of record.***" (Emphasis added).

the following paragraph:

> "***If you are the*** juvenile or ***respondent, you have a right to be represented by an attorney.*** If you desire to employ an attorney, you should do so immediately in order that s/he may be ready at the hearing date. ***If you are financially unable to employ an attorney, you must notify the court immediately upon receipt of this notice***. If the court appoints an attorney, you may be required to reimburse the court in whole or in part for the cost of such services."[31]

This language clearly notified Father of his right to appointed counsel and simply required him to contact the court if he wanted to exercise that right.[32] Certainly, there was nothing to prevent Father from notifying the court *via mail* (or any other means) that he wished to have appointed counsel in this matter.[33]

Furthermore, it appears the trial court may have misunderstood the procedure for complying with MCR 2.004[34] and/or mistakenly believed that said rule had been complied

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[31] A copy of every Notice of Hearing sent to Father and Proof of Service thereof is attached as **Appendix K**.

[32] Needless to say, this is not a situation where the respondent was never informed of his right to counsel at all; on the contrary, respondent was informed of said right *in writing throughout the pendency of the proceedings.*

[33] See, *In re Peterson*, unpublished opinion per curiam of the Court of Appeals, issued December 4, 2003 (Docket Nos. 247424 and 247479)(**Appendix L**): "Applying *Hall* to the instant case, we conclude that it was respondent's responsibility under MCR 5.915(B) to affirmatively act and seek appointed counsel when he received the written notice of his right to counsel in July 2002. Respondent failed to do so and thus cannot now complain that he was denied his due process rights."

[34] This misunderstanding was apparent during the November 6, 2006 Dispositional Hearing when the trial court indicated its belief that because Father had been given notice and was in prison, he did not need to be ***physically present*** for the hearings: "Notice of hearing was given to all parties. The Lawyer/Guardian ad Litem has complied with the requirements. The legal father of all three children, Ronald McBride, Jr. He was notified- -we have a proof of service that he was notified in prison but at this point because of the fact that he's going to be in

with in this case. At the termination hearing, the trial court made the following statement:

> "Well, the record reflects that you were served right back in um September of '06 with not only the petition, but also with a Notice of Hearing that had on it the- -the notice that you had a legal right to be represented by counsel, and that if you couldn't afford an attorney, you were to contact the court and ask for one. And I do appoint attorneys for gentlemen in prison if they request it, but we never heard from you. And we- -we also- -you know, ***we could have included you in telephone conferences on all the hearings we've had previously, but you didn't make that request.*** And I do get that request routinely from gentlemen in prison who, you know- -they get a copy of the petition...." [10/10/07 Term Hrg. Tr at 222-223][Emphasis added].

This statement indicates that, at the very least, there was no ***intentional*** violation of MCR 2.004 in this case. On the contrary, it appears the trial court had a good-faith – albeit erroneous – belief that it had complied with said rule. Moreover, this is not a situation wherein the trial court initiated a sinister scheme to violate Father's right to counsel. Said violation was simply the unfortunate culmination of a "string of errors."

Finally, it is a simple and inescapable truth that Father's parental rights would have been terminated under MCL 712A.19b(3)(h) regardless of whether he had an attorney or not. This is true even if an attorney had represented Father from the very beginning of the dispositional phase of the proceedings. Therefore, the denial of counsel had absolutely no effect whatsoever on the outcome of this case.

Based upon all of the foregoing, it seems clear that the denial of counsel at the termination hearing was harmless error in this case.

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for many more years, *we don't need to bring him in- -um- -for the hearings.*" [11/06/06 Disp Hrg Tr at 17-18][Emphasis added].

IV. THE DEPARTMENT OF HUMAN SERVICES IS NOT ASSERTING INCONSISTENT POSITIONS REGARDING THE HARMLESSNESS OF THE ERROR WHICH ARISES FROM A DENIAL OF COUNSEL IN TERMINATION CASES; RATHER, THE DEPARTMENT IS ASSERTING ONE SIMPLE AND CONSISTENT POSITION – NAMELY, THAT DENIAL OF COUNSEL IN TERMINATION CASES MAY PROPERLY BE FOUND TO BE HARMLESS BASED UPON THE UNIQUE FACTS AND CIRCUMSTANCES INVOLVED IN A PARTICULAR CASE.

STANDARD OF REVIEW.

Whether the Department is asserting inconsistent positions regarding the harmlessness of the error in denying counsel in termination cases is a question of fact. This Court reviews questions of fact for clear error. *Blackhawk Dev Corp v. Dexter Village* 473 Mich 33, 40; 700 NW2d 364 (2005); *People v. LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

DISCUSSION.

The Department does not believe it has asserted inconsistent positions regarding harmless error in those termination cases wherein a parent is denied the right to counsel. On the contrary, the Department believes it has asserted the same, consistent position – namely, that denial of counsel in termination cases ***may*** properly be found to be harmless error based upon the unique facts and circumstances involved.

Admittedly, the applicable case law makes a very definite distinction between the denial of counsel at those hearings which are held prior to the termination hearing and the denial of counsel at the termination hearing itself. The former scenario has been found to

be harmless on several occasions,[35] while the latter has not.[36] However, as previously mentioned, this fact does not mean the harmless error analysis is inapplicable whenever there is a lack of counsel at the termination hearing; rather, this simply means the Court of Appeals may not have been presented with a situation like the present wherein the lack of counsel at the termination hearing was harmless beyond a reasonable doubt.

Nevertheless, the Department submits that the stage of the proceedings wherein the denial of counsel occurs is but one factor which should be (and has been) considered in applying the harmless error analysis. Likewise, whether counsel is subsequently provided at later hearings, including the actual termination hearing, is yet another factor which should be (and has been) considered in applying the harmless error analysis. There is nothing inconsistent about these arguments.

Furthermore, the mere fact that a denial of counsel at the actual termination hearing may rarely be harmless does not mean it can never be harmless.[37] Indeed, the instant case is the *perfect* example of when a denial of counsel at the termination hearing can properly be found to be harmless. It therefore seems inappropriate to impose a bright-line,

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[35] See, e.g., *In re Hall, supra*; *In re Gentry, supra., In re Coleman, supra; In re Shabazz, supra; In re Perri, supra;*

[36] The lack of counsel at the termination hearing was specifically found *not* to be harmless in *In re Powers, supra., In re Clemons, supra;* and, in *In re Lyttle, supra.*. Conversely, the lack of counsel at the termination hearing *was* specifically found to be harmless by the Court of Appeals in the present case.

[37] See, e.g., *In re PDL, supra* wherein the Montana Supreme Court found that a violation of the right to counsel throughout all of the termination proceedings was harmless error because father was serving a lengthy prison sentence and, therefore, "[e]ven if [father] had been notified of his right to counsel, and counsel had presented testimony and other evidence, the outcome would have remained the same."

per se rule whereby the denial of counsel at the actual termination hearing can never be harmless. Not only are "[r]ules of automatic reversal...disfavored,"[38] but such a *per se* rule would undermine the overriding goal of permanency planning – i.e., to get the child[ren] into a stable and permanent placement as soon as possible.[39]

Finally, as it relates specifically to the present case and the *Clemons* case,[40] the Department did not assert inconsistent positions in said cases. Indeed, the Department took no position whatsoever in either case. The Department was *not* a party to the *Clemons* case and *never* filed any briefs and/or pleadings in the appeal thereof.[41]

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[38] *In re Osborne, supra*, 459 Mich at 369. See also, *In re A.H.,* 359 Ill App 3d 173; 833 NE2d 915, 922-923 (Ct. App. Ill, 2005) wherein the Illinois Appellate Court for the First District, Fourth Division noted that "[b]ecause of the difference between criminal and termination proceedings, courts have cautioned against the mechanical application of criminal law standards to termination proceedings."

[39] As this Court has noted, "[t]he amendments to the law addressing the termination of parental rights enacted by 1994 PA 264 reflected on-going concern that children were languishing indefinitely in the temporary custody of the court." *In re Trejo, supra,* 462 Mich at 351.

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

[41] A copy of the Court of Appeals Docket Sheet is attached as **Appendix N** and reveals the following relevant facts: (1) the plaintiff-appellant in said case was Catholic Social Services of Oakland County, *not* the Department; (2) on 02/13/2009 a TPR Advisory was sent to Attorney General Michael A. Cox; (3) on 02/15/2008 a correspondence was received by the Court of Appeals from attorney Julie A. McMurtry (who, upon information and belief, is an Assistant Attorney General) stating that the Department was not participating in the appeal; (4) on 04/21/2008 the Court of Appeals had telephone contact with Diana at the Attorney General's Office wherein it was indicated that the Attorney General was *not* participating in the Appeal; (5) on 05/06/2008 it was noted that "ptys 2 & 4" (i.e., Appellee Catholic Family Services and Appellee Latrecha Adell Fox, Guardian) had *not* been served with the claim, and that said parties were given until 5/27/08 to file their briefs. Notwithstanding said extension of time, it appears that neither of said parties filed a brief; thus, the Court of Appeals issued its opinion without the benefit of any input from the Petitioner-Appellee, either.

Similarly, the Department did *not* file a brief in the present case.[42] Thus, the Department never asserted a position in either case relative to the harmlessness of the error involved in the denial of counsel.

Based on the foregoing, it seems rather clear that the Department has not asserted inconsistent positions regarding the harmlessness of the error involved in the denial of counsel in termination cases. This is especially true in the present case and the *Clemons* case wherein the Department asserted no position whatsoever.

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[42] The Department's response brief in this case was due on or about the date that the undersigned attorney began her employment with the Bay County Prosecutor's Office as the sole appellate attorney therein. The prior appellate attorney was unable to file a brief in this case due to her retirement; and, although the undersigned attorney was able to file a response brief in the corresponding case terminating Mother's parental rights (COA No. 282243), the undersigned attorney was unable to file a response brief on behalf of the Department in the instant case.

V. ASSUMING THAT DENIAL OF COUNSEL IN TERMINATION CASES CAN CONSTITUTE HARMLESS ERROR, 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, CANNOT PREVENT A DENIAL OF COUNSEL FROM BEING HARMLESS IN THE PRESENT CASE.

STANDARD OF REVIEW.

Whether the existence of an alternative placement plan or guardianship option could prevent the denial of counsel from being harmless in this termination case is a question of fact. This Court reviews questions of fact for clear error. *Blackhawk Dev Corp, supra; LeBlanc, supra.*

DISCUSSION.

At all times relevant to the instant appeal, MCL 712A.19a(6) and (7) read as follows:

> (6) If the court determines at a permanency planning hearing that the child should not be returned to his or her parent, the court shall order the agency to initiate proceedings to terminate parental rights to the child not later than 42 days after the permanency planning hearing, unless the court finds that initiating the termination of parental rights to the child is clearly not in the child's best interests.
>
> (7) If the agency demonstrates under subsection (6) that initiating the termination of parental rights to the child is clearly not in the child's best interests, then the court shall order either of the following alternative placement plans:
>
> (a) If the court determines that other permanent placement is not possible, the child's placement in foster care shall continue for a limited period to be stated by the court.
>
> (b) If the court determines that it is in the child's best interests based upon compelling reasons, the child's placement in foster care may continue on a long-term basis.[43]

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[43] The Department acknowledges that MCL 712A.19a was amended effective July 11, 2008 and that said amendment significantly changed subsections (6) and (7) – and also added

Under this statute, the existence of an alternative placement plan or guardianship option ***cannot*** prevent a denial of counsel from being harmless. Simply stated, the existence of such alternative placement plans and/or guardianship options have no bearing whatsoever upon the ***termination*** of a parent's parental rights.[44] Indeed, such alternative placement plans and/or guardianship options only come into play if and when the trial court determines that "initiating the termination of parental rights to the child is clearly ***not*** in the child's best interests." MCL 712A.19a(6) and (7). No such determination was made in this case. On the contrary, the trial court specifically found that termination of Father's parental rights ***was*** in the children's best interests.

Based on the foregoing, the Department submits that existence of an alternative placement plan and/or guardianship option, such as those provided for in MCL 712A.19a(7) and MCL 700.5201-5219, could not have prevented the denial of counsel from being harmless in this case.

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subsection (9). However, because the Order of Termination in this case was entered on November 7, 2007, the amendments to MCL 712A.19a have no bearing on this case. Therefore, the Department takes no position regarding the effect of said amendments upon the harmlessness of any error which may arise from the denial of counsel in future termination proceedings.

[44] As aptly observed by the Supreme Court of Delaware: "[Respondent-Father] maintains that the failure to appoint counsel adversely affected him because, without counsel, Grandmother did not fully appreciate what she could do to obtain custody of [the child]. The problem with this argument is that no action Grandmother might have taken would have changed the result as to [Respondent-Father]. His parental rights would have been terminated in any event." *Arthur v. Division of Family Services, supra* at 867 A2d 901; 2005 WL 277710 (Del.Supr. 2005).

Likewise, in the present case, neither an alternative placement plan nor a guardianship option would have changed the result as to Father – his parental rights would have been terminated under MCL 712A..19b(3)(h) regardless.

RELIEF REQUESTED

WHEREFORE, for all of the reasons herein stated, the People respectfully request that this Honorable Court ***deny*** Appellant-Respondent's Amended Application for Leave to Appeal, and affirm the Court of Appeals' decision, accordingly.

Respectfully submitted,
BAY COUNTY PROSECUTOR'S OFFICE

Sylvia L. Linton

SYLVIA L. LINTON (P42125)
Assistant Prosecuting Attorney
1230 Washington Avenue, Suite 768
Bay County Court Facility
Bay City, Michigan 48708
(989) 895-4250

Dated: March 31, 2009