IN THE SUPREME COURT
STATE OF MICHIGAN

Appeal from the Michigan Court of Appeals
Judges Gleicher, P.J., Fitizgerald and Hoekstra

IN RE SKYLER MCBRIDE, ALEXANDER GARAND MCBRIDE, AND SAWYER DALE MCBRIDE, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

SC: 136988
COA: 282062
Bay CC Family Division 06-009381-NA

RONALD MCBRIDE, JR.,

Respondent-Appellant,

and

SUSAN MCBRIDE,

Respondent.

BRIEF OF AMICUS CURIAE NATIONAL LIFERS OF AMERICA, INC.

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STATEMENT OF QUESTIONS PRESENTED

II. Did the trial court violate MCL 712A.17c and MCR 3915(B)(1) by denying the respondent-appellant father's request for the appointment of counsel to represent him at trial on the supplemental petition requesting termination of his parent rights?

Amicus Curiae National Lifers of America, Inc. answers, "Yes."

II Did the trial court violate respondent's due process rights under *Lassiter* v *Department of Social Services*, 452 US 18; 101 SCt 2153; 68 LEd 640 (1981), by denying his request for counsel?

Amicus Curiae National Lifers of America, Inc. answers, "Yes."

III Can a trial court's failure to appoint counsel in response to a request from an incarcerated indigent parent in a termination of parental rights case ever be harmless?

Amicus Curiae National Lifers of America, Inc. answers, "No."

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STATEMENT OF FACTS

Thousands of Michigan's 50,000-plus prisoners have children and have an interest in the conduct of court actions involving minor children, including custody, guardianship, domestic relations, neglect, foster-care placement, or termination of parental rights.

Nation-wide, two-thirds of mothers held in a state prison and nearly half of fathers reported living with their minor children just prior to incarceration. Among incarcerated parents living with their minor children prior to incarceration, more than three-quarters of mothers and just over a quarter of fathers reported providing most of the daily care of their children. More than half of mothers and fathers in state prisons reported having provided primary financial support to their minor children. Exhibit 1.

Most people in prison are indigent and unable to afford counsel, even in matters involving their minor children. The vast majority, through no fault of their own, are unable to effectively present their own cases to the court. Without appointed counsel, there is no legal assistance available and scant resources and opportunity for self-help for these incarcerated parents..

Assistance

Legal Services Corporation rules forbid recipients of any LSC funding from any litigation on behalf of any incarcerated person. 45 CFR 1637.3.

Prison Legal Services of Michigan, Inc. (PLSM) had a section dedicated to family law, but PLSM closed in October 2008 due to lack of funding.

Since the early 1980s the Michigan Department of Corrections (MDOC) had allowed prisoners to assist one another with court cases through "legal assistance agreements." They

were part of the 1985 access to courts settlement in *Hadix* v *Johnson*, ED Mich, 80-73581-JF, and the 2003 access to courts settlement in *Cain* v *MDOC*, Court of Claims No. 88-61119-AZ. As a result of the federal and state Prison Litigation Reform Acts, the *Hadix* access settlement was dismissed in 2000, and the *Cain* settlement expired in November 2005. On January 1, 2007, the MDOC abolished legal assistance agreements. Director's Office Memorandum 2007-5 (01/01/07).

Prison Law library clerks are forbidden by the law library policy from helping others: "Neither staff no prisoner clerks shall provide legal advice beyond instructions on the use of the law library collection." {D 05.03.115(L) (07/21/08).

Policy Directive 05.03.116(K), Prisoners' Access to the Courts, provides, " ... prisoners shall have access to legal research materials through law libraries and provided legal assistance through the Legal Writers program ... ."

The Legal Writers are prisoners who have completed a six-week training program in post-conviction and conditions of confinement/civil rights law. There are one or two Legal Writers at most prisons. They are allowed to assist prisoners who are not able to help themselves, defined as those without a high school diploma or GED, who do not understand English, or who health services or psychological services say are unable to help themselves. They may also assist prisoners in segregation who have a court deadline. PD 05.03.116(Q). (Current MDOC policy directives are available at www.michigan.gov/corrections/policy directives.)

The Legal Writers are not a source of assistance in termination of parental rights cases. They are allowed to assist eligible prisoners only in the areas of post-conviction and conditions

of confinement. They are not allowed to assist prisoners in court actions involving minors, including termination of parental rights. PD 05.03.116(P),

Self-Help

Self-help is not a meaningful option for much of the prison population. Seventy-five percent of America's state prisoners are high school dropouts. Exhibit 2. According to data from August 2000, fewer than half of the men entering a Michigan prison have a high school diploma, GED or better. Exhibit 3. Those who do are not in a much better position. MDOC test scores for those prisoners who had a high school diploma or GED show average spelling, reading, language and math abilities below ninth grade (based on TABE tests from June 1992 through September 2001). Exhibit 4. (Exhibit 5 is a brochure that explains the TABE test.) And over half of the male population in December 2001 had a history of mental health treatment before or during incarceration. Exhibit 6.

Self-help still is not a real option in family law cases even for those who are not burdened by illiteracy or mental illness. The "Minimum Collection for Law Libraries" adopted as part of the *Cain* access to courts settlement in November 2003 required, among other resources, Michigan Court Rules & Practice, Text, Forms & Evidence (West); Michigan Family Law (ICLE); and Michigan Probate Sourcebook (ICLE). Exhibit 7. After the *Cain* settlement expired, the MDOC deleted these books from the list. Michigan and Michigan Appeals Reports were limited to those after 1986. Cases such as *In Re Taurus F*, 415 Mich 512; 330 NW2d. 33 (1982) and *Mayberry* v *Pryor*, 422 Mich 579; 374 NW2d 683 (1985) are no longer required, nor are annotated evidence rules. Exhibit 8. As a result, the prison law libraries are not required to have the states or annotated rules governing domestic relations actions. Most libraries stopped

updating the books removed from the list for lack of funding, and many simply disposed of these volumes.

While the Library of Michigan will send prisoners photocopies of legal materials not available in prison libraries, the prisoner must request the exact citation and pay for the copies. The minimum charge is $5.00 even if it is just one page.

Without the assistance provided for in MCL 712A.17c and MCR 2.004, it is nearly impossible for incarcerated parents to adequately represent themselves in cases involving their minor children.

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

MCL 712A.17c(4) provides that the trial court "shall advise the respondent at the respondent's first court appearance" of the rights to an attorney at each stage of the proceeding; to have an attorney appointed if the respondent is financially unable to employ one; and if the respondent is not represented by an attorney, the right to request and receive a court appointed attorney at a later hearing.

MCL 712A.17c(5) provides, "If it appears to the court ... that the respondent wants an attorney and is financially unable to retain an attorney, the court shall appoint an attorney to represent the respondent."

MCR 3.915(B)(1)(a) provides that the court "shall" advise the respondent of the right to appointed counsel at the respondent's first court appearance.

MCR 3.915(B)(1)(b) provides, "The court shall appoint an attorney to represent the respondent at any hearing conducted pursuant to these rules" if the respondent requests appointment of an attorney and the court determines the respondent is financially unable to retain one.

MCR 2.004 reinforces the applicability of the statute and rule to prisoners. It governs cases involving minor children in which one of the parties is in a Michigan prison. *In Re BAD*, 264 Mich App 66; 690 NW2d 287 (2004). It provides that the party seeking an order regarding a minor child "shall" determine the prisoner's location, serve the papers on the prisoner, and include in the caption a notice "that a telephone hearing is required" by the rule. MCR 2.004(B).

When this has been done, the trial court "shall issue an order" to the Department of Corrections to allow the prisoner to participate in the hearing by telephone. MCR 2.004(C). Among other things, the purpose of the rule is to determine "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." MCR 2.004(E)(2).

"The use of the word 'shall' is mandatory and imperative and, when used in a command to a public official, it excludes the idea of discretion." *Township of Southfield* v *Drainage Board*, 357 Mich 29, 76; 97 NW2d 821 (1959).

The language of the statute and court rule is "clear and unambiguous" and judicial construction is impermissible. *City of Mount Pleasant* v *State Tax Commission*, 477 Mich 50, 53; 729 NW2d 833 (2007).

When the respondent requested counsel, the trial court had a duty to determine whether he could afford to retain counsel and, if he could not, it had a duty to appoint counsel.

The mandatory language of the statute and court rule creates a liberty interest that is protected under the due process clause of the United States Constitution. In *Mills* v *Rogers*, 457 US 291; 102 SCt 2442; 73 LEd2d 16 (1982), the Supreme Court held that, where state law recognizes substantive or procedural rights broader than those recognized by the Federal Constitution, state law defines the rights of persons with the state. 102 SCt 2449.

A trial court's denial of the rights to appointed counsel under MCL 712A.17c and MCR 3.195(B)(1), and its failure to comply with the procedures in MCR 2.004, violates a parent's federally protected right to due process of law.

II The trial court violated the incarcerated respondent father's due process rights under *Lassiter* v *Department of Social Services*, 452 US 18; 101 SCt 2153; 68 LEd2d 640 (1981), by denying his request for counsel.

The Supreme Court's finding that the trial court's denial of counsel did not deny the petitioner in *Lassiter* due process was based on facts unique to that case. It pointed out that no criminal charges could have been brought against her, that no experts testified at the hearing, there were no troublesome points of law, there was little evidence she was interested in her son, she had expressly declined to appear at prior proceedings involving her son, her mother was not interested in caring for him, and she had accused her mother of committing the murder for which she was imprisoned.

In contrast to *Lassiter*, every termination of rights case brought the State of Michigan involves the testimony of experts - social workers, therapists and/or psychologists. According to the Court of Appeals majority opinion, p 4, this case involved the testimony of at least two experts: a substance abuse therapist and a children and family therapist.

Unlike Ms. Lassiter, the respondent in this case was interested in the children, his family stayed in contact with them, and they brought the children to visit him in prison until the trial court for no apparent reason forbade it. Respondent was not given anything like the notice required by MCR 2.004 until at least the seventh hearing in the case, Court of Appeals Dissent, (Dissent) pp 2-4, 7-8.

The facts of this case are not remotely close to those in *Lassiter*, and the trial court violated respondent's due process rights when it denied his request for counsel.

Analysis under *Lassiter* may be irrelevant. Federal law defines only the constitutional minimum, and a state may recognize broader protections. *Mills* v *Rogers, supra*, 102 SCt, 2449.

Michigan's statute and court rule created an unequivocal right to counsel when requested by an indigent parent. It is not subject to *Lassiter*'s case by case analysis. The statute and rule define the right to counsel in Michigan. Denial of counsel when requested by an indigent parent is a violation of due process.

III. A trial court's failure to appoint counsel at the request of an incarcerated indigent parent in a termination of parental rights case can never be harmless.

The mere fact that a parent is in prison is not dispositive of whether his or her parental rights will be terminated. The court has discretion not to terminate if it determines that termination will not be in the best interest of the children. *In Re Trejo Minors*, 462 Mich 341, 353; 612 NW2d 407 (2000).

A parent facing termination of parental rights needs to know what the state must prove to prevail, what evidence the state will present, and what evidence to present in his or her defense to establish that termination would not be in the best interest of the children. Typically, the parent's lawyer handles all or most of this.

The situation is different when an incarcerated parent is not represented. Few prisoners are trained in the law. Few have the knowledge an resources to marshal the evidence, witnesses, and experts to show the court that termination is not in the best interest of the children. And, most lack access to the statutes that govern the proceedings.

To determine whether or not termination is in the best interests of the children, a court should know, at a minimum:

What was the incarcerated parent's relationship with the children before prison?

Were the parent and children living together?

Was the parent supporting the children or paying child support?

Did the children visit the parent in prison?

Did the incarcerated parent stay in touch with the children with letters and phone calls?

Does the incarcerated parent have someone who could handle a guardianship?

What do the children want?

Is the incarcerated parent paying child support from prison?

The state continues to enforce parental responsibilities for incarcerated parents. Two MDOC Policy Directives deal with prisoners' payment of child support: PD 04.02.105(T)(3) and PD 04.02.107(L)and (M). The State Correctional Facility Reimbursement Act requires that courts consider a prisoner's support of dependents in deciding whether to award his or her assets to the state. MCL 800.404(5). Incarcerated parents are held to the same standard as non-incarcerated parents and allowed to defend against a step-parent adoption by showing continued regular communication with the children and/or continued support during the previous two years. MCL 710.51(6); *In re Caldwell*, 228 Mich App 116; 576 NW2d 724 (1998).

If the Petitioner's reason for seeking termination of the prisoner-parent's rights is to make the children available for adoption, the incarcerated parent may present evidence on whether that is a realistic possibility for these children. While newborns and young children are good candidates for adoption, children between 9 and 15 are not usually so adoptable. If the children are too old or unlikely to be adopted for other reasons, it may not be in the children's best interests to be sentenced to no contact with their incarcerated parent. Someone needs to present the court with alternative options, such as a guardianship, which would allow the children and their incarcerated parent to continue having contact. Although an incarcerated parent is not ideal, in many cases it may be better for the children than no parent. It is possible

for an incarcerated parent to play a vital and positive role in raising their children. Exhibit 9. Once a prisoner's parental rights have been terminated, the Michigan Department of Corrections does not allow the children to visit. PD 05.03.140(J)(4)(b) (10/01/2007), Prisoner Visiting.

Courts rely on the advocates on each side of the adversary process to investigate, present the facts, point out the relevant law, and argue each side's case so the court can reach a fully informed decision. When one side is not represented, the process breaks down. This case provides examples of the failure to present law, facts, and argument for the unrepresented respondent.

The trial court apparently was ignorant of MCR 2.004 and 3.915, and MCL 712A.17c, and the state's attorney did not call them to its attention. As a result, the respondent was denied his right to counsel.

Respondent's sister happened to attend a hearing in which respondent was not allowed to participate and she got into the record that children had been visiting him in prison when the family could take them. Dissent, pp 2-3. The trial court said it would consider whether not being able to see their father would be harmful to the children, yet it never did. Dissent, pp 3, 10 footnote 2. Counsel would have been able to develop the record and insure consideration of this forgotten, but important point.

It is the worst kind of speculation to claim that because no evidence was introduced showing that the decision was wrong that the unrepresented incarcerated parent was not harmed by the lack of representation. After the fact, there is no way of knowing what critical information never made it into the record or what compelling arguments could have but were not made.

To find the failure to appoint counsel harmless, a reviewing court must say to the parent, "You had no case," after the parent has been denied every means necessary to investigate, evaluate, develop, prepare and present his or her case. The court simply has no way of knowing whether the parent had a case that was not presented – unless the court does the investigation and evaluation itself. However, a judge is forbidden to investigate or advocate for either side. MCR 2.003((B)(2, 3, 4, and 6).

In *Powell* v *Alabama*, 287 US 45; 53 SCt 55; 77 Led 158; 84 ALR 527 (1932), the court equated denial of the right to counsel to denial of the due process right to a hearing. "Even the intelligent and educated layman has small and sometimes no skill in the science of law. ... He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one .... ." 287 US, 69.

RELIEF REQUESTED

Amicus Curiae National Lifers of America, Inc. respectfully requests that this Court find that failure to appoint counsel in a termination of parental rights case can never be harmless error; grant leave to appeal; or reverse the lower court decisions and remand to the trial court for a new hearing with appointed counsel for Respondent-Appellant.

Respectfully submitted,

April 2, 2009

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EXHIBITS

NOTE:

Exhibits 1 through 9 are not part of the record. MCR 7.316(4) allows the Court to add matters which should have been included. The United States Supreme Court has approved submission of not-of-record material by an amicus curiae. *Regents v Bakke,* 438 US 265, 316-317, 321-324 (1978), and *San Antonio School District* v *Rodriguez*, 411 US 1, 56-57 n 111 (1973), cited in Stern, *Appellate Practice in the United States*, 339 (BNA, 1981).

The tables in Exhibits, 3, 4, and 6 are based on data provided by the Michigan department of Corrections during discovery in *Cain* v *MDOC*, Court of Claims No. 88-61119-AZ.

Exhibit 1 — Bureau of Justice Report, *Parents in Prison and Their Minor Children* (Revised 1/08/09)

Exhibit 2 — *As Others See It: State dropout age should be 18*, Muskegon Chronicle, reprinted in Midland Daily News, Editorial Page, March 23, 2009.

Exhibit 3 — Table - Highest Level Grade Completed by MDOC male prisoners in August 2000.

Exhibit 4 — Table - Average TABE scores for MDOC male prisoners who had completed high school or earned a GED before prison based on tests between 6/1992 and 9/2001.

Exhibit 5 — Brochure explaining the TABE test.

Exhibit 6 — Table - MDOC male prisoners as of December 15, 2001 who had received mental health treatment before or during incarceration or both.

Exhibit 7 — Attachment A, Minimum Collection for Law Libraries, PD 05.03.115 (03/22/04), adopted in access to courts settlement in *Cain* v *MDOC*, 88-61119-AZ; Court of Claims.

Exhibit 8 — Current Attachment A, Minimum Collection for Law Libraries, PD 05.03.115 (07/21/08).

Exhibit 9 — *Model Father Behind Bars*, Detroit Free Press June 12, 2008, p 14 a.