

STATE OF MICHIGAN
IN THE SUPREME COURT

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

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

Supreme Court
No. 137362

Court of Appeals
No. 282765

CLINTON COUNTY PROSECUTOR'S OFFICE and
DEPARTMENT OF HUMAN SERVICES

Family Court
No. 05-018269-NA

Co-Petitioners-Appellants,

-vs-

MELANIE MORGAN,

Respondent-Mother-Appellee

ANDREW TANNER,

Respondent-Father

RESPONDENT-MOTHER-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION

Respondent-Mother-Appellee does not contest that this Court has jurisdiction in this matter. MCR 7.301(A)(2).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. DID THE TRIAL COURT ERR IN FINDING THAT CLEAR AND CONVINCING EVIDENCE EXISTED TO TERMINATE THE PARENTAL RIGHTS OF MELANIE MORGAN TO HER THREE CHILDREN, RYAN, DENNIS AND MICHAEL?

The trial court answered “No” to the question.

The Court of Appeals answered “Yes” to the question.

Respondent-Mother-Appellee answers “Yes” to the question.

II. DID THE TRIAL COURT’S FAILURE TO APPOINT COUNSEL FOR MELANIE MORGAN UNTIL TWO WEEKS PRIOR TO THE FINAL COURT HEARING AND RELIANCE ON MS. MORGAN’S INVALID JURISDICTIONAL PLEA TO REDUCE THE CO-PETITIONER-APPELLANT’S EVIDENTIARY BURDEN RENDER THE PROCEEDINGS FUNDAMENTALLY UNFAIR AND VIOLATE HER STATUTORY AND CONSTITUTIONAL RIGHTS?

The trial court did not answer this question.

The Court of Appeals answered “No” to the question.

Respondent-Mother-Appellee answers “Yes” to the question.

COUNTER-STATEMENT OF FACTS

The trial court terminated the parental rights of Melanie Morgan to her three children, Ryan (DOB 4/5/91), Dennis (DOB 7/7/99), and Michael (DOB 10/17/02), despite uncontroverted evidence that each of the children had a strong bond with their mother and did not want that relationship permanently severed. Clear evidence also demonstrated that Ms. Morgan had addressed every issue that led to the children's adjudication and had overcome additional issues identified by the trial court and the Michigan Department of Human Services (hereinafter "DHS").¹

The DHS filed a petition concerning the three children on September 13, 2005 and a preliminary hearing was held the next day. At the outset of the preliminary hearing, the trial court advised Ms. Morgan and her husband, both of whom were respondents in the matter, of their right to a court-appointed attorney. (Appendix 1b). The court also informed both parents of the nature of the proceedings in the following way:

“If I take jurisdiction that doesn't mean the kids leave the house. Sometimes it's – I have to remove kids but there are times that I don't have to remove kids. We can still provide services and work with you but the kids don't have to be put in foster care or with a relative. So if you look at this and say you know, we can admit certain things here – and I

¹In its brief, Co-petitioner-Appellants inappropriately reference facts about the children in their foster homes that took place over nine months after the termination of Ms. Morgan's parental rights, see Pet. Br. at 10, and include documents in its appendix that were created after the termination. See Appendix 124a. These facts have no relevance to the issue before the court – whether the trial court's decision to terminate Ms. Morgan's parental rights was clearly erroneous. The facts were not before the trial court at the time of its decision, are not germane and should not be part of the record in this case. As this Court has repeatedly stated, “It is totally inappropriate to weigh the advantages of a foster home against the home of the natural and legal parents. Their fitness as parents and question of neglect of their children must be measured by statutory standards without reference to any particular alternative home which may be offered to the [child].” *In re JK*, 468 Mich 202, 224 n 21; 661 NW2d 216 (2003) (citing *Fritts v Krugh*, 354 Mich 97, 115; 92 NW2d 604 (1958)).

take jurisdiction we don't have to remove the children just because that happens." (Appendix 2b).

At no point during the preliminary hearing did the trial court inform Ms. Morgan that the proceedings could result in the termination of her parental rights.

After a brief discussion about the right to a court-appointed attorney, the trial court concluded, "I will have you fill out a financial form, each of you needs to fill this out and then if you can't afford an attorney, it will be provided at county costs." (Appendix 3b) (emphasis added). The trial court, however, only provided Ms. Morgan an attorney two weeks prior to the final termination of parental rights hearing, which occurred over two years later.

Despite determining that both parents sought the assistance of an attorney, the trial court continued with the preliminary hearing and immediately assumed jurisdiction over the children based on a plea entered by both parents. Specifically, Ms. Morgan admitted that (1) she and Michael Morgan, the father of Dennis and Michael, had been adjudicated for neglect in 1999 "and participated in services at that time," and received services again between November 2004 and May 2005 (Appendix 146a); (2) on September 12, 2005, the family home "was found to be in deplorable conditions" (Appendix 146a); (3) Mr. Morgan's alcoholic older brother was sharing the home (Appendix 146a); (4) both parents twice failed to pick up one of the children from school during his first week in attendance (Appendix 147a); and (5) Ryan had anger and aggression issues (Appendix 149a; 4b).

Additionally, Mr. Morgan alone admitted that (1) "there have been allegations of drug use in the home," and that he had tested positive for marijuana on November 29, 2004, but thereafter tested negative (Appendix 5b); (2) several other people lived in the

home, including one who had an outstanding arrest warrant (Appendix 149a; 6b); and (3) he had pled guilty to attempted larceny in 1988, using marijuana in 1998, operating under the influence in 2002, and in 2005 was "the passenger in a vehicle in which a bag of marijuana was found on the back seat," although all charges against him ultimately were dismissed. (Appendix 7b).

Prior to accepting the plea, the trial court attempted to advise both parents of the consequences of the plea and the waiver of their rights, including the right to a trial. (Appendix 7b). The court explained that the plea would allow the family "to begin services" (Appendix 7b), but never mentioned that the plea could be used against them at a subsequent termination of parental rights hearing. The court accepted the plea and immediately exercised jurisdiction over the children. (Appendix 8b).

After accepting the plea, the trial court ordered the children to remain in the home. (Appendix 9b). Additionally the court ordered both parents to participate in services, comply with drug screens, evict Mr. Morgan's brother from their home and prohibit other adults from living there, submit to psychological evaluations, cooperate in arranging psychological and sexual abuse evaluations of the children, and refrain from using alcohol or drugs in the home. (Appendix 9b).

The dispositional hearing was conducted on October 14, 2005. Tonya Bentley, a DHS case worker, testified that the family overall "has been doing very well," was participating in services, and was "making substantial progress." (Appendix 10b). Ms. Bentley reported that a Families First worker felt "very encouraged by their motivation and their ability to work together as a family" (Appendix 10b), and recommended that the DHS remain involved for at least another three months. (Appendix 11b). Ms. Bentley

noted that Ms. Morgan had missed one drug screen, and needed to participate in the drug screens and the substance abuse assessment." (Appendix 12b). The trial court continued its prior orders and stated that it was "pleased to hear of the progress and participation and cooperation of the family in this matter." (Appendix 13b).

On November 22, 2005, the DHS filed a motion to show cause, alleging that Ms. Morgan tested positive for opiates, and "[t]hat although this Court ordered that no other adults live in the home, it appears that there are still a number of individuals frequenting the home, including Claude Hubbard, who had his parental rights terminated." (Appendix 14b).

The trial court conducted a show cause hearing on November 28, 2005. At the hearing, Mr. Morgan requested assistance in overcoming his drug problem and did not deny using drugs. (Appendix 15b). Ms. Morgan testified that she had prescriptions for the medication causing the positive drug screens.² (Appendix 16b). A case worker from the DHS, filling in for the assigned worker, also testified at the hearing. (Appendix 17b).

The trial court found both parents to be in contempt of the court's previous orders. It found that Mr. Morgan admitted to drug use and Ms. Morgan admitted that she used opiates and failed to provide proof that she had a valid prescription. (Appendix 18b). The court ordered, among other things, that the parents comply with all drug rehabilitation services and drug screens and that Ms. Morgan provide all prescriptions to the DHS and gave the DHS the discretion to remove the children if either parent failed to

² A protective services report dated January 9, 2006 details Ms. Morgan's reason for needing prescribed medications. Ms. Morgan told the worker that she hurt her back in 2003 and was never able to finish physical therapy. She stated she had been given Vicodin a number of times and experiences chronic pain due to her back problems and her dental issues. She explained that her teeth do not have enamel on them and that she continued to have problems with abscessing. (Appendix 19b)

submit to drug or alcohol screens or if either parent was noncompliant with drug rehabilitation. (Appendix 20b).

The trial court conducted a dispositional review hearing on January 12, 2006. Ms. Bentley testified at the hearing. She described the home as continuing to be clean and though it was cluttered, stated that the home did not pose a risk to the children “in any way, shape or form.” (Appendix 154a). Ms. Morgan continued to work with her therapist, Joanne Giordano, and the entire family was cooperative with the DHS. (Appendix 154a). Ms. Bentley testified that Ms. Morgan tested positive for opiates due to medicine Ms. Morgan had taken due to dental and back pains. (Appendix 21b). Though Ms. Bentley had some concerns about the number of people living in the home, she stated that they “interacted appropriately with the children.” (Appendix 21b). All three children appeared to be doing very well. (Appendix 155a).

Ms. Bentley did not request that the children be removed from Ms. Morgan’s home. (Appendix 156a). She believed that any risk to the children could be alleviated with intensive therapy. (Appendix 163a). Ms. Bentley expressed concern of the impact of removal on the children, especially Ryan who had a close bond with his mother and emphasized that there was no evidence that the children faced any physical risk from being in the home. (Appendix 156a; 22b).

The court ordered the children removed from the home of both parents because of the continued positive drug screens of both parents and because additional family members continued to frequent the home. (Appendix 167a; 23b). In its written order, the court, however, noted that the “home is appropriate,” that there was “[n]o risk to children as to condition,” that the parents were “cooperative,” and that the children were “doing

well.” (Appendix 24b-25b). The court also found that the children would need “intensive therapy” if they were to remain in the home but did not articulate why that option was not pursued as opposed to removal. The court ordered frequent, supervised parenting time between both parents and the children.

On April 13, 2006, the trial court held another review hearing. DHS caseworker Julie Bunch testified that the children had a difficult time adjusting to foster care and that Ryan, in particular, had a very difficult time rationalizing why he was placed into care. (Appendix 27b). She testified that the children all had physical exams and that no major medical concerns were noted. (Appendix 168a). She stated that Mr. Morgan indicated that he would not be participating in services, wished to release his parental rights and wanted to “drop out of the picture” as he blamed Ms. Morgan for the children’s removal. (Appendix 28b-29b). According to Ms. Bunch, Ms. Morgan stated that she had been attending weekly NA/AA meetings, continued in her PATS substance abuse program, continued in her counseling sessions with Joanne Giordano and was seeking employment but remained unemployed, which had been the case since 2003. (Appendix 169a; 30b, 31b). Ms. Morgan had tested positive for Vicodin, which she used due to the fact that she had been in great pain. (Appendix 26b, 30b). Ms. Morgan also showed Ms. Bunch paperwork that her mother had purchased a two-bedroom trailer for her to reside in. (Appendix 169a). Ms. Morgan had been evicted from her rental home and had briefly cohabited with Mr. Morgan prior to arranging to live with her mother. (Appendix 169a). The trial court continued its prior orders. (Appendix 32b).

On July 13, 2006, the trial court conducted a review hearing. DHS case worker, Scott Campau, testified at the hearing. Mr. Campau testified that Ryan, who maintained

a close relationship with his mother (Appendix 134a), was in a new foster placement (Appendix 33b) and that Dennis stated that he wanted to go back home and live with his mother (Appendix 170a). The Updated Service Plan prepared by Mr. Campau also noted that Michael was quite tearful upon removal. (Appendix 135a). Ms. Morgan was participating in the reunification plan though Mr. Campau characterized her progress as “minimal at best.” (Appendix 172a). She tested positive for opiates a week before the hearing³ and for cocaine in May 2006 (Appendix 172a) but was participating in her outpatient substance abuse treatment program through PATS and was attending AA/NA meetings. (Appendix 138a). Ms. Morgan remained unemployed though she had put in several applications to secure full-time employment. (Appendix 173a). Mr. Campau also expressed some concern about the size of Ms. Morgan’s new home but suggested that he “[m]ay be able to figure out some other housing alternatives prior to reunification that may be more beneficial to the children.” (Appendix 173a). According to Mr. Campau, parenting time between Ms. Morgan and the children was “going fairly well” although he noted one incident where Ms. Morgan arrived late to the visit and lost her temper. (Appendix 174a; 34b). At the hearing, Ms. Morgan apologized for losing her temper at the visit and expressed her appreciation for DHS’ involvement in her life for giving her “the opportunity to try to prove” herself. (Appendix 35b, 36b). The trial court continued its prior orders finding that “some progress was made during the reporting period.” (Appendix 37b).

On September 7, 2006, the trial court conducted a permanency planning hearing. Mr. Campau testified that Ryan had moved to his third foster home (Appendix 41b-42b;

³ According to the case worker’s report for the hearing on 7/13/06, Ms. Morgan showed the worker documentation and prescriptions for Vicodin. (Appendix 38b-40b).

43b) and in his report to the court noted that Dennis “frequently inquires as to when he can go home with his mother, and being in foster care is clearly stressful to him.” (Appendix 41b-42b). Mr. Campau said that Ms. Morgan had “made progress” since the last court hearing and had obtained full time employment. (Appendix 44b). Mr. Campau described how Ms. Morgan had opened a savings account and was using it to pay her bills, including a \$400 fee necessary to restore her driver's license. (Appendix 45b). He explained that “[s]he's continuing to attend AA and NA meetings once to twice per week” (Appendix 45b), that she completed the PATS substance abuse program (Appendix 46b) and that no problems had occurred with respect to parenting time. (Appendix 45-46b). He denied that Ms. Morgan had any difficulty managing all three children during the visits. (Appendix 47b). Mr. Campau reported that according to Ms. Morgan’s therapist, Joanne Giordano, Ms. Morgan was “doing really really well” in her sessions, “really addressing the issues and kind of delving deep into those right now,” and regaining control over her life and increasing her self-esteem. (Appendix 46b). On the negative side, Campau reported that Ms. Morgan tested positive for cocaine and opiates, which she denied.⁴ (Appendix 177a). Overall, Mr. Campau concluded that Ms. Morgan had been cooperative with all recommendations and opined that “[s]he truly does want the best for the kids.” (Appendix 48b). He again noted, with respect to Ms. Morgan’s housing, that if reunification was imminent, “we might be able to get creative with some things and figure it out.” (Appendix 178a).

After hearing the evidence, the court remarked, “I was really happy to hear about the progress you had been making. I have never had a parent come in and set up a savings account while they have been going through the programming so that they could have a

⁴ The record does not contain any proof of a positive drug screen for cocaine around this time period.

plan and make regular payments to get their drivers [sic] license back. I mean, the fact that you have a full time job, you're enjoying your job, you have made such great strides . . ." (Appendix 49b). The trial court continued its prior orders and did not authorize the filing of a termination of parental rights (hereinafter "TPR") petition.

Another dispositional review hearing was held on December 7, 2006. Patrick Synder, Ryan's case worker from Child and Family Services, testified that visits between Ryan and his mother were appropriate and had all gone well. (Appendix 51b-52b). Mr. Campau also testified. He stated that Ms. Morgan "has made some pretty good progress," specifically that she completed the PATS substance abuse program, attended weekly AA or NA meetings, had no positive drug screens, and regularly attended and progressed in individual therapy. (Appendix 53b). Mr. Campau remarked

And one of the things that she has really done a good job with I think over this report period is managing money and budgeting and that sort of thing, which have been a big problem in the past. She was able to pay off a \$350 bill to the State of Michigan to have her driver's license reinstated and that was something that she had set up in the previous quarter. . . . (Appendix 54b).

Mr. Campau reported that apart from Ms. Morgan's history of substance abuse, his only concern involved her alleged relationship with Mr. Morgan. (Appendix 180a).

Notwithstanding these concerns, Mr. Campau recommended that Ms. Morgan begin having unsupervised visitation with all three children in her residence to give her the opportunity to "demonstrate whether or not she has the ability to do more responsible things with her kids." (Appendix 179a). The therapist for the children also supported unsupervised visits (Appendix 179a) as did Ms. Morgan's therapist. (Appendix 50b).

Mr. Campau relayed concerns regarding the placement of the two younger children, whose foster parent had admitted to spanking children in her care. (Appendix

55b). He stated, "I have a pretty serious issue with having kids removed from one home for neglect, going into another and then being physically hit." (Appendix 55b). Mr. Campau opined that problems with the foster parent had impacted the reunification process (Appendix 55b) and continued:

I don't want [respondent's] reunification efforts to be hampered by the other things going on in the case. I don't think that's fair to her and I don't think that's fair to the kids. And, no, she hasn't been perfect and she has done some things that are certainly concerning, but I also think she deserves a valid chance at reunification with the kids and I think that's in their best interest at this point. (Appendix 56b).

The trial court continued its prior orders, and provided the DHS with discretion to permit unsupervised parenting time. (Appendix 57b).

The next review hearing occurred on March 8, 2007. Mr. Snyder testified that Ryan continued to look forward to visits with his mother (Appendix 59b) and noted in his report that unsupervised visits had gone well. (Appendix 58b). Mr. Campau testified that Ms. Morgan tested positive for Vicodin in December 2006 which resulted in the suspension of her unsupervised visitation after only a couple of visits with Ryan.⁵ (Appendix 181a). According to Mr. Campau, Ms. Morgan continued to make progress in therapy, paid off additional debts, and maintained employment. (Appendix 182a; 60b).

The trial court summarized its findings as follows:

I'm so torn, [respondent], I have to tell you because I really give you credit for a lot of things that have occurred. You know, we--we did have some setbacks and you have been strong enough to break away from [Morgan]. You have made some progress, you have maintained your employment, you're paying down your bills. You're heading in some very positive directions at a time I don't think it's easy, your children were removed from your care and you really had

⁵ DHS believed that Ms. Morgan had tested positive for cocaine in January 2007 but subsequent testing revealed that the result was a false positive. (Appendix 60b).

to climb out of a difficult position you were in and you have been doing that.

And--but because of some of the substance abuse concerns and . . . other areas where we haven't had follow through, we're not at a place to return the children and it is getting tough and--and it is getting to a point where we are going to have to make a decision. I don't want to terminate your parental rights, I think these boys are very bonded to you and--and I think you have been working. You have shown them that you're working hard to get them back but there comes a point where the lack of permanency no matter how hard you're trying hurts them. And particularly if something should occur, your rights are terminated and I can't keep the younger boys in their placement, if that's--if that's what's going to happen, that's another concern to me if that can't be an adoptive placement for them.

So I guess I'm just saying this to you, I don't want you to be discouraged because you have done some very--you have been very strong and done some very positive things. And you have shown your boys that you are willing to make them a priority but you need to think about those areas where there is still problems [sic] and make--and try and draw down for some strength to make progress in those areas because we are getting to a point where we are going to have to get off the fence here. . . . (Appendix 183a-184a).

The court again afforded the DHS discretion regarding the terms and conditions of Ms. Morgan's parenting time. (Appendix 184a).

On June 7, 2007, the court conducted the next review hearing. Mr. Campau informed the court that the license of the foster parent caring for Ms. Morgan's two youngest children was being suspended, necessitating their move to a new foster home. (Appendix 64b). With regards to Ms. Morgan, he informed the court that she had lost her job but shortly thereafter located another one, although it paid significantly less and lacked the benefits of her previous employment. (Appendix 64b). Ms. Morgan continued to live with her grandmother (Appendix 65b), and had one positive drug screen. (Appendix 66b). Mr. Campau related that Ms. Morgan reported having had eight teeth pulled, and that she received a prescription for Vicodin to manage her pain, which

produced the positive result. (Appendix 66b). When questioned by the trial court, Campau admitted that visitation continued to go well and that Ms. Morgan "requires a minimal level of supervision." (Appendix 67b). He additionally conceded that termination "would be hard" on the younger boys because "[t]hey have a definitive bond with mom. They enjoy seeing mom during the visits and they certainly look forward to those visits each week." (Appendix 65b). Mr. Campau also stated that he did not believe that Ms. Morgan was still in a relationship with Mr. Morgan. (Appendix 66b).

Mr. Snyder testified that Ryan was in his fourth foster home. (Appendix 68b). Ms. Morgan's parenting time with Ryan had gone well and she enjoyed unsupervised visitation with Ryan "[j]ust about every weekend" since mid-February. (Appendix 69b). Ms. Morgan was always on time for visits and there was never any indication that there was anything negative going on in Ms. Morgan's home during the visits. (Appendix 70b). Ryan's foster parents had no complaints about the visits. (Appendix 70b). Mr. Snyder testified that termination was not in Ryan's best interests. He stated, "I don't think that termination is appropriate for a 16 year old at this point, I think that the bond that he has-- that Ryan has with his mother is strong and I don't think that she is any danger to him." (Appendix 71b). Documentation confirmed that Ryan had expressed a strong desire to be with his mother and out of the foster care system. (Appendix 61b-62b).

Ms. Morgan provided testimony as well. With regards to the one positive drug screen, she explained that her doctor had prescribed Vicodin after a recent dental operation and after she notified the doctor about her prior substance abuse problems. (Appendix 77b). She reported that she was still going to NA meetings, was chairing her first meeting at the end of the month and took the boys for a NA ceremony "because it's

something I want to share with them.” (Appendix 72b). She continued to live with her grandmother who had repeatedly told her that she would move out of the house to ensure that there would be adequate room for the boys upon reunification. (Appendix 73b).

The trial court authorized the DHS to file a petition to terminate Ms. Morgan’s parental rights but permitted supervised parenting time until the filing of the petition. (Appendix 73b).

On September 6, 2007, Mr. Campau filed an updated service plan with the court. In the report, Ryan was described as being “extremely angry” (Appendix 74b) and Dennis was consistently stating that he did not want to live with his foster parents and wanted to return home to his mother’s. (Appendix 75b). Dennis was also expressing anger over not being able to return home. (Appendix 76b).

Mr. Campau characterized Ms. Morgan’s progress as being “good.” (Appendix 77b). She was doing well during her visits and the family was “clearly bonded” to one another and interacted appropriately. (Appendix 66b). Mr. Campau recommended in the report that Ms. Morgan “visit with her children in a more natural environment such as her own home.” (Appendix 66b). Supervision during the visits was “minimal” due to the fact that there did not appear to be any danger in it. (Appendix 79b). She did not test positive for any substances (Appendix 78b-79b) and attempted to obtain stable employment and housing. (Appendix 79b). Her therapist indicated that Ms. Morgan “had made a lot of progress” and had “stabilized emotionally” and was “capable of caring for her children.” (Appendix 79b).

A permanency planning hearing was held on September 6, 2007. Mr. Campau testified that Ms. Morgan’s therapist did not support the termination of her parental rights

and believed that if the case was “on the front end without having removal,” that “removal wouldn’t even take place” given Ms. Morgan’s significant progress. (Appendix 80b-81b). Therapy for Ms. Morgan had ended in the middle of July based on an assessment that Ms. Morgan had “stabilized emotionally” and was “capable of caring for her children.” (Appendix 79b). The therapist expressed a willingness to work with Ms. Morgan again “if her services were needed.” Such a request was not made.

Dr. Hutchins, the children’s therapist, told Mr. Campau that the boys clearly have a bond with their mother and that termination would be harmful though the boys would certainly have “an opportunity” to be successful long term in an adoptive placement. (Appendix 81b). Mr. Campau reported that Ms. Morgan quit her job because she was not getting paid by her employer but had “put a lot of effort” into finding another job and had located a potential employer. (Appendix 81b-83b). Ms. Morgan had no positive screens during the reporting period and had provided Mr. Campau with a prescription accounting for her previous positive result for opiates in June 2007. (Appendix 83b). She was still attending NA classes and according to her therapist had “come a long, long way with the substance abuse issues.” (Appendix 83b).

At the conclusion of the hearing, the court again authorized the DHS to file a TPR petition citing a concern about the lack of permanency for the children. (Appendix 190a).

On November 7, 2007, the DHS filed a petition seeking termination of Ms. Morgan’s parental rights pursuant to MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j). On November 14, 2007, the trial court appointed counsel for Ms. Morgan, who had been without counsel throughout the proceeding.

On November 29, 2007, Mr. Campau filed an updated service plan with the trial court. The report described Ryan as being “extremely angry” and as having a “difficult time appropriately expressing his thoughts and feelings.” (Appendix 90b). Dennis was described as “having some difficulty in bonding with his new foster family” and as being “resistant to them up to this point.” (Appendix 91b). He repeatedly asked about going home to live with his mother and did not understand why he was currently in care. (Appendix 92b).

The final termination of parental rights hearing commenced on November 30, 2007. Four witnesses testified at the hearing. Tonya Bentley, the initial case worker, explained that she became involved with Ms. Morgan’s family in September 2005 "after receiving a referral with concerns about substance abuse in the home, dirty home conditions, and overall physical neglect of the children, including improper supervision." (Appendix 93b). Ms. Bentley additionally described concerns regarding "the number of people living in the home," and the use of alcohol by those people. (Appendix 192a; 93b). She admitted that Ms. Morgan cooperated and cleaned the home, but noted that the family "continued to struggle financially." (Appendix 197a-198a). Ms. Morgan's drug screens were occasionally positive for opiates, and Ms. Morgan "had struggled with depression and was in counseling." (Appendix 197a-198a). Ms. Bentley discontinued working with Ms. Morgan and her family in January 2006. (Appendix 204a).

Patrick Snyder, Ryan’s foster care case worker, testified that he had worked with Ms. Morgan and Ryan. Mr. Snyder described Ms. Morgan’s relationship with Ryan as "very good . . . and, in light of everything that I have seen, I cannot imagine that she poses any harm or risk to Ryan's mental health or well-being." (Appendix 94b-95b).

Mr. Snyder relayed that Ms. Morgan had not missed a single weekly visit. (Appendix 94b).

Scott Campau, the DHS case worker for the family, testified that he had become involved in the case in June 2006. (Appendix 95b). When he became involved in the case, the main issues confronting Ms. Morgan were housing, substance abuse, employment, emotional stability and parenting. (Appendix 213a). He testified that Ms. Morgan lived with her grandmother in a two bedroom trailer for the majority of the case, that the environment was not “wholly inappropriate” (Appendix 215a) and that if the grandmother moved out of the home, “it is likely something could be worked out in that situation.” (Appendix 96b). He acknowledged that Ms. Morgan maintained employment consistently until February 2007 (Appendix 213a) and after losing that job, had subsequently obtained employment at two different locations. (Appendix 227a; 97b). Ms. Morgan also worked on paying off her previous debts (Appendix 97b) and provided a prescription for her positive drug screen for opiates in June 2007. (Appendix 98b).

Mr. Campau testified that Ms. Morgan had “made quite a bit of progress in terms of her parenting.” (Appendix 213a). He, however, expressed concern regarding her lack of current employment, her "dependent personality," her lack of independent housing and her failure to divorce Mr. Morgan, with whom he believed Ms. Morgan was "maintaining some sort of a relationship." (Appendix 213a). On cross-examination, however, Mr. Campau admitted, “I don’t know I could tell you that during my involvement on the case they were living together, or I don’t think that I could testify to the closeness of their relationship” and that he doubted that they were living together. (Appendix 99b-100b).

In Mr. Campau's opinion, Ms. Morgan could not meet the emotional needs of her children on a consistent basis and could not meet their physical needs. (Appendix 217a). When he attempted to testify about Ms. Morgan's diagnosis made in a previous psychological evaluation, Ms. Morgan's counsel objected because he was not present at the earlier hearings and that there was no foundation for introducing the report into evidence. (Appendix 210a). The court overruled the objection stating that MCR 3.977(G)(2) was controlling and that since "these are one continuous proceedings," "this information has been incorporated into earlier hearings." (Appendix 210a).

Mr. Campau further testified about the close relationship between the children and their mother. He stated that Ryan often expressed a desire to return to his mother's care (Appendix 219a), Michael was still "connected with his biological family" (Appendix 226a), and that Dennis still struggled to connect with his foster family because of his close ties to his birth family. (Appendix 226a; 101b). In his service plan immediately preceding the final hearing, Mr. Campau reported that Dennis did not want to live with his foster parents and instead wanted to go home to his mother. (Appendix 92b).

Nevertheless, Mr. Campau speculated that termination of Ms. Morgan's parental rights "would be in Ryan's emotional best interests," because Ryan "harbors a tremendous amount of guilt for where he is, where his brothers are, for what his mother's station in life is, and has made it clear that he feels some level of obligation to help support his mother and his grandmother." (Appendix 225a). Regarding the younger children, Mr. Campau believed that termination would better serve the emotional interests of Dennis than Michael because Dennis was "likely to have some of the same difficulties that Ryan has seen over the past few years." (Appendix 226a; 101b).

Finally, Richard Hudson, Ms. Morgan's father, testified that a two-bedroom home had been purchased in Lansing for Ms. Morgan and her children. (Appendix 231a). He explained that he and his mother currently lived in the home with Ms. Morgan, but that they would move out within a couple of weeks if Ms. Morgan regained custody of her children. (Appendix 231a; 102b). Mr. Hudson stated that he and his mother owned vehicles that Ms. Morgan could use (Appendix 232a) and that Ryan had continued to visit them in the home. (Appendix 103b). He also testified that he had no information that Ms. Morgan and Mr. Morgan were seeing each other (Appendix 103b) and informed the court that Ms. Morgan was participating in the Michigan Works program to help locate employment. (Appendix 233a).

The trial court found that the DHS had met its burden of proving statutory grounds to terminate Ms. Morgan's parental rights. The court acknowledged that Ms. Morgan loved her children (Appendix 104b) but that the reasons for adjudication continued to exist. (Appendix 105b). Specifically, the court found the following reasons for the children's adjudication: "dirty, deplorable home" conditions, substance and alcohol abuse in the home, lack of supervision of the children, financial problems, strains for the family, prior CPS involvement, and Ms. Morgan's mental health and physical health issues. (Appendix 105b). The court found that Ms. Morgan had not dealt with those conditions. (Appendix 105b). The court also determined that additional conditions came to the court's attention after jurisdiction was obtained – housing, employment and the "discovery of the children's physical and mental health needs" -- and that Ms. Morgan failed to address those conditions as well. (Appendix 105b).

The court also found that the children's best interests would be served by terminating Ms. Morgan's parental rights. It found that Ms. Morgan was "unable to meet the continued physical and emotional needs" of the younger boys and that Dennis and Michael "cannot wait longer for permanency." (Appendix 106b). With regards to Ryan, the court found that termination was necessary because he needed "the ability to be able to move on" and that he needed "someone to help him have the opportunity to move forward without carrying that burden with him." (Appendix 107b). Based on these findings, the trial court terminated Ms. Morgan's parental rights to all three children.

On August 26, 2008, the Court of Appeals, in a unanimous decision, reversed the trial court's decision, observing that there was a "dearth of evidence supporting any of the statutory grounds invoked by the circuit court," and that affirming the termination order "would cause substantial injustice." *In re Richard Hudson, Dennis Morgan and Michael Morgan*, unpublished per curiam opinion of the Court of Appeals, issued August 26, 2008 (Docket No. 282765). (Appendix 7a-24a.).

On September 23, 2008, the DHS filed an application for leave to appeal, which this Court granted on October 30, 2008.

ARGUMENT

I. THE TRIAL COURT ERRED IN DETERMINING THAT CLEAR AND CONVINCING EVIDENCE EXISTED TO TERMINATE MELANIE MORGAN'S PARENTAL RIGHTS TO HER THREE CHILDREN.

Standard of Review

A trial court's decision to terminate parental rights is reviewed for clear error. MCR 3.977(J); *In re Sours Minor*, 459 Mich 624, 633; 593 NW2d 520 (1999). This standard controls the review of "both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest. *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A decision is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

Argument

Both this Court and the United States Supreme Court have long recognized that cases involving the involuntary, permanent termination of parental rights are "unique in the kind, the degree, and the severity of the deprivation they inflict." *In re Sanchez*, 422 Mich 758, 766; 375 NW2d 353 (1985); *MLB v SLJ*, 519 US 102, 118; 117 S Ct 555; 136 L Ed 2d 473 (1996). A decision to terminate parental rights is both total and irrevocable, and, unlike other custody proceedings, it leaves the parent, who possesses a constitutional right to direct the upbringing of his or her child, *Santosky v Kramer*, 455 US 745, 753;

102 S Ct 1388; 71 L Ed 2d 599 (1982), with no legal right to visit or communicate with the child, to participate in, or even to know about any important decision affecting the child's religious, educational, moral, or physical development. It is not surprising that this forced dissolution of the parent-child relationship "has been recognized as a punitive sanction by courts, Congress and commentators," *Sanchez, supra* at 766, and has been described by many courts as the equivalent of a "civil death penalty." See, e.g., *ME v Shelby County Dep't of Human Resources*, 972 So 2d 89, 102 (Ct Civ App Ala 2007); *In re Tammila G*, 148 P 3d 759, 763 (Nev 2006); *In re KAW*, 133 SW 3d 1, 12 (Mo 2004).

In order to protect the fundamental rights at stake in termination proceedings, a parent's unfitness, prior to termination, must be proven by clear and convincing evidence, the most stringent standard of proof applied in civil proceedings. *Santosky, supra* at 769; MCL 712A.19b(3). As described by this Court:

Evidence is clear and convincing when it produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue... Evidence may be uncontroverted, and yet not be clear and convincing." *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995).

Additionally, demonstrating parental unfitness is a weighty burden. The fundamental liberty interest of the parent "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State," *Santosky, supra* at 753, nor can a termination decision be based solely on a belief that the child's best interests mandates the result. *In re JK, supra* at 211. As noted by the United States Supreme Court, little doubt exists "that the Due Process Clause would be offended '[if] a State were to attempt to force the breakup of a natural family, over the objections

of the parents and their children . . . for the sole reason that to do so was thought to be in the children's best interest.” *Quilloin v Walcott*, 434 US 246, 255; 98 S Ct 549; 54 L Ed 2d 511 (1978).

Here, the trial court terminated the parental rights of Melanie Morgan to Ryan, Dennis and Michael pursuant to the following statutory provisions: MCL 712A.19b(3)(c)(i); MCL 712A.19b(3)(c)(ii); MCL 712A.19b(3)(g) and MCL 712A.19b(3)(j). (Appendix 105b). As will be discussed more fully below, the trial court erred because clear and convincing evidence did not exist to support any of its findings.

A. Clear And Convincing Evidence Did Not Exist To Find Grounds For Termination Under MCL 712A.19b(3)(c)(i).

MCL 712A.19b(3)(c)(i) permits a court to terminate parental rights if “[t]he conditions that led to the adjudication continue to exist” without reasonable likelihood of rectification. Under Michigan law, a trial court can adjudicate children and place them under the court’s jurisdiction in one of two ways. A parent can request a trial to resolve the allegations in the petition against her or she can admit to one or more of the allegations that then form the basis for the court’s adjudication. MCR 3.971; MCR 3.972.

In this case, the trial court adjudicated the children based on admissions made by both Ms. Morgan and Michael Morgan at the preliminary hearing. Specifically, the parents pled to the following petition allegations that led to the children’s adjudication: (1) Ms. Morgan and Michael Morgan had been adjudicated for neglect in 1999 "and participated in services at that time," and received services again between November 2004 and May 2005 (Appendix 146a); (2) on September 12, 2005, the family home "was found to be in deplorable conditions" (Appendix 146a); (3) Mr. Morgan's alcoholic older

brother was sharing the home (Appendix 146a); (4) both parents twice failed to pick up one of the children from school during his first week in attendance (Appendix 147a); (5) “there have been allegations of drug use in the home”; (6) multiple people lived in the home, including one with an outstanding arrest warrant; and (7) Ryan had anger and aggression issues (Appendix 149a; 4b).⁶

To sustain a termination decision based on MCL 712A.19b(3)(c)(i), the trial court must first determine that the conditions that led to the adjudication continued to exist at the time of the hearing. Here, however, Ms. Morgan had addressed each of the adjudication conditions over which she had control.⁷ At the time of the hearing, no one contested that Ms. Morgan had the capacity to maintain a clean and appropriate home and had markedly improved her parenting skills. (Appendix 213a). She attended virtually every visit with her children, interacted appropriately with them and required “a minimal level of supervision”, as conceded by her case worker Scott Campau. (Appendix 67b). The children looked forward to seeing her and shared a very close bond with their mother. (Appendix 156a, 134a, 135a, 170a, 219a, 226a; 22b, 41b-42b, 59b, 65b, 71b, 81b, 94-95b). The older children, Ryan and Dennis, repeatedly voiced a strong desire to return to their mother’s custody. (Appendix 134a, 170a, 219a; 41b-42b, 64b).

The adjudication-related concerns regarding the suitability of Ms. Morgan’s residence no longer applied. Ms. Morgan moved out of the home shortly after the

⁶ In its opinion, the trial court erroneously found that the family’s financial problems and Ms. Morgan’s mental and physical health issues were reasons for the court’s adjudication. (Appendix, 105b). This is incorrect as neither Ms. Morgan nor Mr. Morgan pled to allegations related to either of these factors.

⁷ Both parents pled to an allegation that Ryan had anger and aggression issues. (Appendix, 149a; 4b). It is unclear as to the relevance of this allegation to the court’s adjudication of the children since a child’s anger and aggression, alone, do not provide sufficient grounds for the court to obtain jurisdiction over the child. Similarly, it is also unclear as to what steps Ms. Morgan could have taken during the pendency of the case to resolve these issues since the evidence suggests that much of Ryan’s anger and aggression stemmed from his removal from his mother’s care and his lack of a relationship with his biological father. (Appendix, 149a).

children were removed in January 2006 and resided with her grandmother in a two bedroom residence. (Appendix 169a, 215a, 231a). No evidence suggested that Ms. Morgan had contact with any of the unsuitable individuals who frequented her home at the outset of the case, such as Mr. Morgan's alcoholic brother, nor did any evidence indicate that anyone else potentially harmful to the children resided with her. In fact, the court and the DHS allowed Ryan to visit Ms. Morgan in her home without supervision during the proceedings which occurred without any incident. (Appendix 58b, 70b, 103b). Ms. Morgan, Ryan's foster care worker, and Ryan's foster parents all agreed that the visits in Ms. Morgan's home went very well. (Appendix 70b).

The court also adjudicated the children based on "allegations of drug use in the home." (Appendix 5b). Only Mr. Morgan admitted to this allegation and at the time of the adjudication, it was clear that the court's focus primarily was on Mr. Morgan. The initial case worker, Tonya Bentley, emphasized that Mr. Morgan "in particular" needed drug screens and treatment (Appendix 12b) and Mr. Morgan, during the short time he participated in the case, admitted that he needed help in overcoming his substance abuse problems. (Appendix 15b).

Ms. Morgan, however, participated actively in treatment. She completed a substance abuse assessment a treatment program called PATS, regularly attended AA and NA meetings and also submitted to virtually all required drug screens. (Appendix 138a, 169a; 29b, 45b, 46b, 53b, 77b, 83b). On a few occasions after the removal of the children, Ms. Morgan tested positive for opiates, which resulted from her use of prescription drugs, such as Vicodin, that her doctor prescribed to her for chronic back, neck and dental-related problems. (Appendix 16b, 21b, 26b, 30b, 66b, 77b). At the final

termination hearing on November 30, 2007, Mr. Campau acknowledged that Ms. Morgan had provided him with the relevant prescription information for her positive drug screen in June 2007. (Appendix 83b, 98b). As such, her last positive test, which resulted from using opiates or Vicodin, occurred in December 2006, approximately one year prior to the termination of parental rights hearing. (Appendix 181a). Again, between December 2006 and November 2007, there was no evidence that Ms. Morgan tested positive for illegal drug use. Not surprisingly, just two months prior to the termination hearing, Ms. Morgan's therapist, who had stopped her sessions with Ms. Morgan because she had stabilized emotionally (Appendix 79b), stated that she had "come a long, long way with the substance abuse issues." (Appendix 83b). Simply put, at the time of the trial court's decision, Ms. Morgan's substance abuse problem was no longer an issue.

Since Ms. Morgan had addressed the issues that formed the basis of the court's adjudication – her parenting skills, the dirty conditions of her residence, allowing inappropriate individuals to reside in her home, and substance abuse issues – the trial court's determination that clear and convincing evidence supported a finding under MCL 712A.19b(3)(c)(i) constitutes clear error.

B. Clear And Convincing Evidence Did Not Exist To Find Grounds For Termination Under MCL 712A.19b(3)(c)(ii).

The Department of Human Services also sought termination of Ms. Morgan's parental rights under MCL 712A.19b(3)(c)(ii), which requires the Department to prove five different elements: (1) "other conditions exist that cause the child to come within the court's jurisdiction," (2) the parent has received notice and a hearing about those conditions, (3) the parent received recommendations to rectify those conditions, (4) the conditions have not been rectified by the parent and (5) there is "no reasonable

likelihood” that the conditions will be rectified within a reasonable time considering the child’s age. MCL 712A.19b(3)(c)(ii). Here, the trial court, in its ruling, stated that the “other conditions that came within the court’s jurisdiction were housing problems, that she lost her original housing, employment, and this discovery of some of the children’s physical and mental needs” and found that Ms. Morgan did not remedy those conditions. (Appendix 105b). This decision was clearly erroneous for several reasons.

First, the Department presented no evidence that Ms. Morgan ever received notice and a hearing to determine whether other conditions existed that provided additional reasons for the children to come within the court’s jurisdiction. Although many review hearings were convened in the matter, at no point did Ms. Morgan receive specific notice that concerns had arisen that provided the court with additional grounds to assume jurisdiction over the children. According to MCL 712A.19(1), if the Department becomes aware of such conditions--additional evidence of abuse or neglect--a supplemental petition shall be filed, which then must be resolved at a review hearing. MCR 3.973(H)(2). Presumably, at such a hearing, the parent, after receiving notice of the Department’s allegations, would have the opportunity to contest the allegations. In this case, no such petition was ever filed outlining the Department’s additional concerns. This failure, under the plain language of MCL 712A.19b(3)(c)(ii) precludes a finding of termination under this statutory provision.

Second, even if the Department had provided the proper notice, which it did not, the conditions identified by the trial court at the termination hearing did not rise to the level that would have provided the court with additional grounds to assume jurisdiction over the children under MCL 712A.2(b). In *In re Taurus F*, 415 Mich 512; 530 NW2d 22 (1982),

this Court discussed the type of evidence required to sustain a jurisdictional finding. The Court stated, “Section 2(b) [of the Juvenile Code] set criteria for parents *who fall so far below the level of proper care* that they must be relieved of the custody of their children.” *In re Taurus F, supra* at 549 (emphasis added). This type of evidence did not exist to support findings that “other conditions” existed.

The first condition identified by the court in its ruling was Ms. Morgan’s housing. Shortly after the children’s removal, Ms. Morgan was evicted from her home and soon moved into a two bedroom trailer owned by her grandmother. (Appendix 169a; 215a; 231a). She resided there for nearly the entirety of the case.

The only concern about the suitability of this residence, which was described by the case worker in his service plans as being “adequate” (Appendix 63b, 79b) and not “wholly inappropriate” (Appendix 215a) was whether there was sufficient space for all three children. (Appendix 173a, 215a; 96b). The trial court apparently believed that the home was too small for three children. Though Ms. Morgan wanted to move to a bigger home, she lacked the financial means to do so.

A crowded home, however, should not form the basis for the court to assume jurisdiction over a child, nor should it constitute a reason to terminate a parent’s rights. Thousands of families throughout the State live in cramped conditions, often with relatives and extended family, unable to purchase a larger home because they cannot afford to do so. Never has this Court issued a requirement that poor parents seeking to reunify with their children must live in their own home with their children.

Such a requirement would contravene the long history of extended families supporting the rearing of children and would also sweep within the court’s ambit many

children who are well-cared for despite their less than ideal living conditions. The United States Supreme Court’s language in *Moore v East Cleveland*, 431 US 494; 97 S Ct 1932; 52 L Ed 2d 531 (1977), is instructive:

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. . . . Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life. *Moore, supra* at 504-505.

Ms. Morgan was certainly experiencing “times of adversity” and she appropriately relied on her extended family for housing assistance.

Additionally, in this case, Ms. Morgan and her extended family developed a plan to create more space for her children. At the final termination of parental rights hearing, Ms. Morgan’s father, who also resided in the home, testified that both he and the grandmother planned to move out of the house once the children were returned and that this had always been the family’s plan. (Appendix 231a; 73b, 102b). Even the case worker, on numerous occasions, acknowledged that Ms. Morgan’s housing was not an absolute bar to reunification (Appendix 173a, 178a, 215a), and stated that if reunification was imminent, “we might be able to get creative with some things and figure it out.” (Appendix 178a). Yet, no “reasonable efforts” were ever made by the DHS to assist Ms. Morgan to obtain more ideal housing. See MCL 712A.19a(2) (mandating “[r]easonable

efforts to reunify the child and family must be made in all cases” unless aggravating circumstances apply).

Though possessing one’s own home may be ideal, it should not constitute grounds to terminate a parent’s rights, especially if the parent lacks the financial means to do so. Courts across the country have agreed. See, e.g., *In re PC*, 165 Cal App 4th 98, 80 Cal Rptr 3d 595 (Cal Ct App 2008) (finding that poverty alone, even when resulting in homelessness and less than ideal housing arrangements could not constitute grounds to terminate parental rights); *SK v Madison County Dept of Human Resources*, 990 So 2d 887, 900 (Ala Ct Civ App 2008) (“[P]overty, alone, is not enough to warrant the termination of parental rights.”); *In re CT*, 648 SE 2d 708, 711; 286 Ga App 186 (Ga Ct App 2007) (noting that “although the mother may struggle financially and indeed may need assistance in the care of her children, the mere fact that she earns little money and lives in a modest home does not constitute clear and convincing evidence that the mother is unfit.”). The trial court’s determination that Ms. Morgan’s lack of perfect housing constituted an additional condition that caused the children to come within the court’s jurisdiction and a reason for terminating her parental rights was clearly erroneous.

A second condition identified by the trial court was Ms. Morgan’s employment. The court determined that Ms. Morgan’s temporary lack of employment was another condition which she failed to remedy and which provided a basis to justify the termination of her rights. (Appendix 105b). A parent’s temporary lack of employment should not constitute a condition that would permit the court to assume jurisdiction over a child and thus should not be a relevant condition under MCL 712A.19b(3)(c)(ii). In a

state in which over ten percent of the population is currently unemployed,⁸ the trial court's reasoning would provide the basis for thousands of children to come under the court's control regardless of the care they received in their home, simply because a parent was unemployed. Parents receiving cash assistance, unemployment assistance or supplement security income would be deemed presumptively unfit because they did not have a job. Again, neither this Court, nor the Court of Appeals, has ever imposed this type of requirement on families.

Yet, even if this Court concludes that a parent's lack of employment could constitute a condition that would permit a trial court to assume jurisdiction over a child, the clear evidence in this case indicates that Ms. Morgan maintained employment throughout the case. After the DHS directed Ms. Morgan to obtain employment, she immediately submitted applications for jobs (Appendix 173a) and obtained a full-time position for approximately ten months before her employer terminated her. (Appendix 213a; 44b). While maintaining her job, she demonstrated the ability to manage money to pay debts. (Appendix 182a; 45b, 54b, 60b, 97b). The trial court even praised Ms. Morgan for undertaking the responsibility to pay off her debts. The court stated:

I was really happy to hear about the progress you had been making. I have never had a parent come in and set up a savings account while they have been going through the programming so that they could have a plan and make regular payments to get their drivers [sic] license back. I mean, the fact that you have a full time job, you're enjoying your job, you have made such great strides. (Appendix 49b).

After she lost her job, she quickly located and worked at other lower paying jobs. (Appendix 227a; 64b, 97b). During any periods in which Ms. Morgan was unemployed,

⁸ According to official figures from the State of Michigan, the rate of unemployment in December 2008 was 10.6%. See Michigan Labor Market Information at <http://www.milmi.org/>.

she, in the words of the case worker, “put a lot of effort” into finding another job (Appendix 81b-83b), a finding corroborated by Ms. Morgan’s father at the TPR hearing, who testified that Ms. Morgan had recently sought the assistance of Michigan Works, a workforce development association, to locate employment. (Appendix 103b). As the Court of Appeals correctly concluded in its decision, “The employment-related evidence does not clearly and convincingly substantiate that respondent could not locate employment, or other economic assistance, within a reasonable time. Respondent’s temporary lack of employment does not render her unfit.” (Appendix 23a).

A third “other condition” noted by the trial court in its termination decision was the “discovery of some of the children’s physical and mental health needs.” (Appendix 105b). In its ruling, however, the court provides no detail as to the nature of those needs or the nexus between the children’s needs, Ms. Morgan’s responsibility for those conditions and her failure to remedy them. Importantly, the DHS service plan did not require Ms. Morgan to take any steps related to these issues.

At the first hearing after the children were removed from Ms. Morgan’s care, DHS case worker Julie Bunch testified that the children all had physical exams and that “no major medical concerns were noted.” (Appendix 168a). Although the children did need dental work, the children received treatment while in foster care. At the time of the final termination hearing, no evidence was presented as to any ongoing physical health concerns.

The two older children, Ryan and Dennis, did demonstrate mental health concerns while in foster care. Those concerns were only exacerbated by their separation from their mother as both children repeatedly voiced a desire to return to her care immediately.

(Appendix 134a, 170a, 219a; 41b-42b, 61b-62b). At the hearing in which the children were removed, the DHS case worker expressed concern about the negative impact of removal on the children's emotional well-being due to their close bond with their mother. (Appendix 156a). The instability of their placements also contributed to their mental health needs. Ryan spent time in at least four foster homes (Appendix 33b, 43b, 41b-42b, 68b) and Dennis, along with his younger brother, Michael, had to change foster homes after their foster parent's license was revoked for physically disciplining children in the home, an occurrence that clearly impacted the reunification process according to the case worker. (Appendix 55b, 64b).

Yet, despite these needs, the uncontroverted evidence showed that both children felt bonded to their mother and during the many visits with their mother, their mental health issues never created any problems for Ms. Morgan, who only required a "minimal level of supervision." (Appendix 44b-45b, 47b, 67b). Ryan had numerous visits in Ms. Morgan's home and all parties agreed that those visits went well. (Appendix 58b, 70b, 69b, 103b). Any finding that Ms. Morgan, at the time of the TPR hearing, was unable to care for the children due to their special needs was purely speculative, as noted by the Court of Appeals (Appendix 22a), since the undisputed evidence showed that she was able to care for them during visits and was never given the opportunity by the trial court to care for them on an extended basis prior to the termination of her parental rights.

Because Ms. Morgan offered her children adequate housing, maintained employment consistently throughout the case, and demonstrated the ability to address her children's physical and emotional needs, the trial court clearly erred in finding clear and convincing evidence of any conditions justifying termination under MCL

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

C. Clear And Convincing Evidence Did Not Exist To Find Grounds For Termination Under MCL 712A.19b(3)(g) Or MCL 712A.19b(3)(j).

The trial court also cited to MCL 712A.19b(3)(g) and MCL 712A.19b(3)(j) as additional statutory bases for termination but failed to identify specific facts in the record supporting these grounds. The court, however, did note additional factual concerns about Ms. Morgan – her alleged mental health issues and her alleged ongoing relationship with Mr. Morgan – as reasons why termination was appropriate. Clear and convincing evidence, however, supported neither of these findings.

In its opinion, the trial court concluded that Ms. Morgan “still has, I believe, mental health needs.” (Appendix 108b). No evidence supported this conclusion. At the outset of the child protective case, Ms. Morgan cooperated with a psychological evaluation during which she displayed symptoms of long-term depression and an anxiety disorder; the evaluator concluded that she would benefit from therapy to help her manage her emotional experiences. (Appendix 52a-54a). And in the initial months of the case, Ms. Morgan’s therapist, Joanne Giordano, also expressed concerns about Ms. Morgan’s level of functioning. (Appendix 154a).

Ms. Morgan, however, worked diligently to overcome those concerns. She consistently attended sessions with Ms. Giordano and steadily made progress. (Appendix 182a; 46b, 53b, 60b). At no point did anyone allege that Ms. Morgan was not cooperating with therapy. At the September 7, 2006 permanency planning hearing, the case worker reported that Ms. Morgan was “doing really really well” in her sessions with Ms. Giordano and was “really addressing the issues and kind of delving deep into those right now.” (Appendix 46b). She was regaining control over her life and increasing her

self-esteem. (Appendix 46b).

Her progress continued, confirmed by the evidence at every subsequent review hearing. Her therapy was discontinued in the middle of July 2007 after her therapist concluded that she had “stabilized emotionally” and was “capable of caring for her children.” (Appendix 79b). By September 2007, two months before the final TPR hearing, Ms. Giordano told the case worker that she opposed the termination request. (Appendix 80b-81b). She indicated to the case worker that Ms. Morgan had made a lot of progress over the time that she had worked with her. (Appendix 80b-81b). Ms. Giordano also told the case worker that if the case was “on the front end without having removal” that “removal wouldn’t even take place” given Ms. Morgan’s significant progress. (Appendix 80b-81b). The case worker’s speculation at the TPR hearing that Ms. Morgan may revert to “old behaviors” (Appendix 98b) does not constitute clear and convincing evidence that she had ongoing mental health problems. She consistently attended and benefitted from therapy and appropriately interacted with her children at every visit for over two years requiring little supervision.

The trial court’s conclusion that Ms. Morgan was maintaining an ongoing relationship with Mr. Morgan was also purely speculative. At the termination hearing, the case worker, Scott Campau, opined that Ms. Morgan was “maintaining some sort of a relationship” with Mr. Morgan. (Appendix 213a). Yet, only a few months earlier, Mr. Campau had testified that he did not believe that any such relationship existed. (Appendix 66b). And on cross examination, he admitted that he did not have any facts to support his opinion. He stated, “I don’t know I could tell you that during my involvement on the case they were living together, or I don’t think that I could testify to

the closeness of their relationship” and he doubted that they were living together. (Appendix 99b-100b). Ms. Morgan’s father, with whom she was living, also testified that he had no information that Ms. Morgan and Mr. Morgan were seeing each other. (Appendix 103b). The fact that Ms. Morgan did not formally divorce Mr. Morgan is irrelevant given the complete dearth of evidence demonstrating that they had any type of ongoing relationship. The trial court’s conclusion, which was based solely on Mr. Campau’s speculative testimony, was not supported by clear and convincing evidence.

Given the tremendous progress Ms. Morgan had made in (1) overcoming her substance abuse and mental health issues, (2) securing “adequate” housing, (3) actively searching and securing employment, and (4) maintaining her strong bond with her children by consistently having positive interactions with them, no evidence existed to justify the trial court’s conclusion that she could not offer them “proper care or custody” or that the children would be harmed if returned to her home. The trial court erred in making these findings.

D. Clear and Convincing Evidence Existed Showing That Termination Was Clearly Not In The Children’s Best Interests.

Since none of the statutory grounds cited by the trial court to terminate Ms. Morgan’s parental rights were supported by clear and convincing evidence, the trial court’s decision must be reversed. Additionally, even if such grounds existed, the record demonstrates that termination was clearly not in the best interests of the children, which provides an additional reason why reversal of the trial court’s decision is warranted.

MCL 712A.19b(5).⁹

⁹ This statutory provision was recently amended and the Juvenile Code now places the burden on the petitioner to affirmatively prove, by clear and convincing evidence, that termination of parental rights is in the child’s best interests. MCL 712A.19b(5)

Michigan statutes and case law do not define the factors that a trial court must consider in determining a child's best interests at a TPR hearing; instead the only guidance given to trial courts is to look at the complete record and the totality of circumstances when making this decision. *In re Trejo*, 462 Mich 341, 356; 612 NW2d 407 (2000). Here, the strong bond between Ms. Morgan and the children, the emotional harm caused by the removal, the disruption to the children's lives caused by the foster care system and Ms. Morgan's substantial progress in addressing all concerns are clear reasons as to why termination was not in the children's interests.

At the time the children were removed from their mother's care, the children, in the words of the DHS case worker, were doing very well and were closely bonded to their mother. (Appendix 155a). The case worker, at the January 12, 2006 removal hearing, expressed concerns about the emotional harm to the children posed by removal and placement in foster care. (Appendix 156a; 22b). Despite this testimony, the trial court removed all three children and placed them in care. (Appendix 167a; 23b).

Separation from their mother inflicted serious emotional damage on the children. Michael was tearful upon removal (Appendix 135a) and both Dennis and Ryan, throughout the entirety of the case, repeated their strong desire to be reunified with their mother, a feeling that was as strong at the time of the final termination of parental rights hearing. (Appendix 134a, 170a, 219a; 41b-42b, 61b-62b). Ryan's caseworker, Patrick Snyder, opposed the termination request, because of the close relationship between Ryan and his mother. (Appendix 71b). At the June 7, 2007 review hearing, Mr. Snyder stated, "I don't think that termination is appropriate for a 16 year old at this point, I think that the bond that he has – that Ryan has with his mother is strong and I don't think that she is

any danger to him.” (Appendix 71b). He further explained at the final TPR hearing that “in light of everything that I have seen, I cannot imagine that she [Ms. Morgan] poses any harm or risk to Ryan’s mental health or well-being” and described their relationship as being “very good.” (Appendix 94b-95b).

The bond of the younger children, Dennis and Michael, to their mother was equally as strong. Mr. Campau testified at the June 7, 2007 review hearing that termination “would be hard” on the younger boys because “[t]hey have a definitive bond with mom. They enjoy seeing mom during the visits and they certainly look forward to those visits each week.” (Appendix 65b). In September 2007, Dr. Hutchins, Dennis and Michael’s therapist, reiterated these concerns. She told Mr. Campau that the boys clearly had a bond with their mother and that termination would be harmful. (Appendix 81b). The bond that all three children had with their mother remained strong despite their physical separation, which, remained the case in part because Ms. Morgan consistently and appropriately visited the children throughout the entirety of the case.

Not only did the children remain close to their mother and oppose the request to terminate her rights, the record indicates that the foster care system failed at providing them safety and stability. Immediately upon removal, the three siblings were separated and placed in different foster homes. Ryan remained in a foster home apart from his two younger siblings who were placed together. Ryan’s transition into foster care was difficult. Throughout the case, he remained angry over his removal and desperately sought to return to his mother. (Appendix 134a; 27b, 61b-62b). He cycled through foster home after foster home; by the time of the final termination of parental rights hearing, he had been through at least four different homes. (Appendix 33b, 41b-42b, 43b, 64b). He

was a sixteen year old child who wanted to be with his mother and who had no prospect of being adopted, which the Department conceded by indicating that his alternate permanency planning goal was independent living. (Appendix 84b-87b). The trial court's decision deprived Ryan, without his consent, of the one legal relationship that he valued and instead left him alone to navigate the uncertainties awaiting him outside of the foster care system.¹⁰

Dennis and Michael also had difficulties in foster care. Although they remained in one foster home for quite some time, they were forced to move to another home, only five months before the final TPR hearing after their foster parent's license had been revoked after she was caught inappropriately physically disciplining children in the home. (Appendix 54b, 64b). The children entered foster care solely due to allegations of neglect and yet experienced abuse at the hands of their foster parent. Mr. Campau acknowledged that the incidents of abuse in the foster home negatively impacted the reunification process and that the transition to another home was difficult for the children. (Appendix 55b). At the time of the TPR hearing, the "permanency" of the younger children remained unsettled as they had just entered a new foster home. The one fact that remained constant for all three children was their steadfast love for their mother and their desire to return to her care. To terminate that relationship against the children's wishes in order to further a nebulous goal of permanency ran contrary to the children's interests.

¹⁰ Petitioner seems to suggest that an additional justification for termination in this case was the additional financial benefits that Ryan would receive from the State if his mother's rights were terminated. See Pet. Br. at 33 ("Testimony indicated that Ryan would also receive financial benefits if parental rights were terminated and for a longer period of time."). If, in fact, this is Petitioner's argument, then it raises serious constitutional questions as the State could then create the conditions – in this case added financial incentives for children permanently in foster care -- that could be used to justify the termination of a parent's rights. As the Court of Appeals noted in *In re B and J*, 279 Mich App 12, 20; 756 NW2d 234 (2008), "[A] state may not, consistent with due process of law, create the conditions that will strip an individual of an interest protected under the due process clause."

See In re Boursaw, 239 Mich App 161, 176-177; 607 NW2d 408 (1999) (“The goal of reunification of the family must not be lost in the laudable attempt to make sure that children are not languishing in foster care while termination proceedings drag on and on.”). Ms. Morgan, in light of her significant progress, provided the children with a real opportunity to be a family again, which they strongly desired, but the trial court denied. By doing so, the trial court reached a decision that was contrary to the children’s interests.

In light of the fact that clear and convincing evidence did not exist to support the trial court’s finding that statutory grounds to terminate existed and because termination was contrary to the children’s interests, the trial court’s decision must be reversed.

II. THE TRIAL COURT’S FAILURE TO APPOINT COUNSEL FOR MELANIE MORGAN UNTIL TWO WEEKS PRIOR TO THE FINAL COURT HEARING AND RELIANCE ON MS. MORGAN’S INVALID JURISDICTIONAL PLEA TO REDUCE THE CO-PETITIONER-APPELLANT’S EVIDENTIARY BURDEN RENDERED THE PROCEEDINGS FUNDAMENTALLY UNFAIR AND VIOLATED HER STATUTORY AND PROCEDURAL DUE PROCESS RIGHTS.

Standard of Review

The trial court’s actions violated Ms. Morgan’s statutory and constitutional rights. Unpreserved constitutional and statutory challenges are reviewed to determine whether plain error exists that affects substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Reversal is required where the trial court’s errors “seriously affected the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 763.

Argument

Child protective proceedings are considered a “single continuous hearing” in

which evidence admitted at all dispositional and review hearings is considered by the trial court when determining whether to terminate a parent's rights. *In re LaFlure*, 48 Mich. App 377, 390-391; 210 NW2d 482 (1973). In this important respect, the "hearing" to terminate parental rights actually begins at the first dispositional hearing since evidence admitted at that hearing and all subsequent hearings is part of the record reviewed by the court when adjudicating a TPR petition. Thus, errors made by the trial court at earlier proceedings can taint the entire process and can cast serious doubt on the integrity of the final decision to terminate parental rights, since the evidence relied upon may be flawed due to prior procedural errors. This is precisely what happened in this case where the trial court deprived Ms. Morgan of her right to a court-appointed attorney until two weeks prior to the final court hearing at which her rights were terminated and relied on an invalid plea, entered into by Ms. Morgan without the assistance of counsel, to reduce the Department's evidentiary burden to terminate her rights. These mistakes tainted the entire proceeding and deprived her of a "fundamentally fair" hearing. See, e.g., *In re SLH*, 277 Mich App 662, 664; 747 NW2d 547 (2008) (reversing trial court's decision to terminate parental rights because the "proceedings were so replete with error.").

A. The Trial Court Violated Ms. Morgan's Right To Counsel

Due process applies to the adjudication of fundamental rights and imposes constraints on governmental decisions which deprive individuals of liberty interests within the meaning of the Due Process Clause of the Fourteenth Amendment. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993). Due process, which requires fundamental fairness, is flexible and calls for such procedural protections as the particular situation demands. *Id.* Generally, in order to determine what is required by due process,

courts will consider (1) the private interest at stake, (2) the risk of an erroneous deprivation through the procedures used and the value of additional safeguards, and (3) the government's interests including the functions involved and the fiscal and administrative burdens that would be entailed. *Mathews v Eldridge*, 424 US 319, 332, 334; 96 S Ct 893; 47 L Ed 2d 18 (1976).

No doubt exists of the sanctity of the private right at stake in TPR proceedings – a parent's right to direct the upbringing of her child – which has been labeled as one of the oldest and most sacred fundamental rights protected by the Constitution. *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed. 2d 49 (2000). In order to extinguish this right, the Constitution requires clear and convincing evidence of parental unfitness. *Santosky, supra* at 769. The United States Supreme Court has also held that the importance in protecting this right mandates the appointment of counsel in some TPR cases, depending on the complexity of the matter. *Lassiter v Dep't of Social Services*, 452 US 18, 31; 101 S Ct 2153; 68 L Ed 2d 640 (1981). Appellate courts in Michigan have gone beyond this floor and have steadfastly held that the right to counsel in TPR cases is constitutionally based. *In re Powers*, 244 Mich App 111; 624 NW 2d 472 (2000); *In re Cobb*, 130 Mich App 598; 344 NW 2d 12 (1983).

In addition to appellate decisions holding that a parent's right to counsel is constitutionally based, the Michigan legislature has recognized the importance of counsel in order to prevent the erroneous deprivation of a parent's rights. The Juvenile Code explicitly guarantees an indigent parent the right to a court-appointed lawyer at his or her first court appearance and at all subsequent hearings. The trial court must advise parents of this right, which the parent can waive. MCR 3.965(B)(3). The court rules also permit

the trial court to adjourn hearings to secure the appearance of an attorney, MCR 3.965(B)(1), which only underscores the important role that attorneys play in the fact finding process.

Here, the trial court deprived Ms. Morgan of her statutory and constitutional right to counsel. At the preliminary hearing, the trial court advised Ms. Morgan and Mr. Morgan of the right to court-appointed counsel. After a quick exchange with the parties, the court concluded, “I will have you fill out a financial form, each of you needs to fill this out and then if you can’t afford an attorney, it will be provided at county costs.” (Appendix 145a) (emphasis added). At that point, the hearing should have stopped, a determination should have been made as to whether Ms. Morgan qualified for court-appointed counsel and a finding should have been issued as to whether court-appointed counsel was required. Based on the fact that Ms. Morgan was not working at the time of the preliminary hearing, she certainly would have qualified for an attorney.

Yet, the record contains no evidence that the court took any of these steps. No evidence exists that financial forms were provided to Ms. Morgan; instead the court simply ignored the issue. It continued with the proceeding, in which all of the other parties were represented, questioned the unrepresented parents and eventually persuaded them to enter into a plea for jurisdiction without the assistance of counsel. And, as will be more fully discussed below, the court, when taking the plea, never advised Ms. Morgan, as required by the court rules, of the possibility that the plea could be used against her at a subsequent TPR hearing. Instead, the entire process was characterized by the trial court as being purely benevolent. (Appendix 2b). All of this occurred after the trial court concluded that Ms. Morgan had invoked her right to counsel. At no point

during the preliminary hearing did Ms. Morgan explicitly waive her right to a court-appointed attorney.

The trial court did not appoint an attorney to represent Ms. Morgan for nearly two years, and it did so two weeks prior to the final court hearing after most of the evidence relevant to the TPR decision had already been admitted into evidence. (Appendix 88b-89b). Between the preliminary hearing in 2005 and the final termination hearing in 2007, the court had convened ten hearings in the case. At each hearing, evidence was introduced, some of which based on the opinions of experts, testimony was adduced and findings were made. All of this evidence automatically became part of the complete record in the case on which the trial court ultimately based its decision to terminate Ms. Morgan's parental rights. See *In re LaFlure, supra*. And at every hearing, both the Department of Human Services and the children were represented by attorneys. Ms. Morgan was not and she largely remained silent. In none of those ten hearings were any witnesses called or documents introduced on her behalf. Her story largely remained untold.

By the time that the trial court appointed her an attorney, it was too late to remedy the harm. An entire record had already been created over numerous hearings at which Ms. Morgan was unrepresented. Her attorney spent under four hours preparing for a case that had lasted over two years (Appendix 109b) and possessed no procedural means to challenge facts already admitted into evidence at prior hearings. For example, during the final hearing, Ms. Morgan's counsel objected to hearsay testimony of the case worker about a dated psychological evaluation of Ms. Morgan that was discussed at a prior hearing. Counsel stated that he was not present at the earlier hearings and that there was

no foundation for introducing the report into evidence. (Appendix 210a). The trial court, however, overruled the objection stating that MCR 3.977(G)(2), which does not require the application of the rules of evidence, was controlling and that since “these are one continuous proceedings,” “this information has been incorporated into earlier hearings.” (Appendix 210a). Because he was not present at the previous hearings, Ms. Morgan’s attorney could not challenge the admissibility of the psychological evaluation and other evidence that was previously admitted into the record.

Ms. Morgan’s attorney also did not have the ability to challenge judgments already made by the trial court, which laid the foundation for the termination of her parental rights. For example, the trial court ordered the removal of the children from the home despite findings that the home was appropriate, that there was “[n]o risk to children as to condition,” that the parents were “cooperative,” that the children were “doing well” and that alternatives to removal were available. (Appendix 21b). Additionally, her attorney had no opportunity to challenge the trial court’s orders requiring the Department to file the very petition it was adjudicating.

Simply put, appointing an attorney on the last day of an eleven day trial to question some final witnesses and deliver closing arguments after much of the evidence has already been introduced does not remedy the court’s failure to appoint a lawyer for the first ten days. The trial court’s error not only violated Ms. Morgan’s right to a court-appointed attorney but also raises serious concerns regarding the integrity of the entire proceeding. This denial was tantamount to a *de facto* denial of the right to counsel which appellate courts have deemed to be the type of structural error which necessitates automatic reversal. *See Powers, supra* (remanding case to determine whether parent was

denied right to counsel at TPR hearing); *In re Keifer*, 159 Mich App 288, 406 NW 2d 217 (1987) (reversing TPR decision because trial court failed to advise parent of right to court-appointed counsel); *Cobb, supra* (reversing TPR decision because the trial court denied parent's request for appointed counsel); see also *In re Hodges*, unpublished per curiam opinion of the Court of Appeals, issued on May 2, 2000 (Docket No. 211745) (Appendix 110b-111b) (reversing TPR decision because parent not represented by counsel at TPR hearing).

B. The Trial Court Failed To Properly Advise Ms. Morgan Of The Consequences Of Entering Into A Plea For Jurisdiction And Improperly Relied On The Invalid Plea To Reduce The Department's Evidentiary Burden

The trial court also violated Ms. Morgan's rights by failing to advise her of the consequences of entering into a plea for jurisdiction and by using the invalid plea to reduce the Department's evidentiary burden. Michigan Court Rule 3.971(B) requires the trial court to advise a parent of a number of rights prior to accepting a plea. Among other things, the court must advise a parent "of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent." MCR 3.971(B)(4).

Here, the trial court accepted a plea from Ms. Morgan at the preliminary hearing after it had determined that Ms. Morgan should receive a court-appointed counsel but years before it actually provided her with legal representation. At that hearing, the court failed to advise Ms. Morgan of the ramifications of the plea. Specifically, the trial court never discussed the possibility that the plea could be used as evidence in a later proceeding to terminate her rights nor did the court mention that the termination of her parental rights was even a possibility. It instead characterized the proceedings in a purely

benign fashion. The court stated that entering into a plea would permit the family to “begin services” and characterized the proceedings in the following way:

“If I take jurisdiction that doesn’t mean the kids leave the house. Sometimes it’s – I have to remove kids but there are times that I don’t have to remove kids. We can still provide services and work with you but the kids don’t have to be put in foster care or with a relative. So if you look at this and say you know, we can admit certain things here – and I take jurisdiction we don’t have to remove the children just because that happens.” (Appendix 2b).

Again, as required in the court rule and as noted by the Court of Appeals (Appendix 18a), at no point did the trial court advise Ms. Morgan of the consequences of her plea as it related to the subsequent termination of her parental rights. The court clearly erred by failing to do so thereby rendering the plea invalid; it should not have been accepted by the court.

The trial court’s acceptance of the invalid plea seriously affected Ms. Morgan’s rights and infected the entire termination proceeding. See, e.g., *In re Blocker*, unpublished per curiam opinion of the Court of Appeals, issued on January 17, 2008 (No. 279581) (Appendix, 112b-115b) (reversing termination of parental rights decision because trial court failed to advise parent that his plea to jurisdiction could be used as evidence against him at the termination of parental rights hearing). Michigan court rules permit the use of hearsay evidence to prove statutory grounds for termination only in situations where the respondent parent entered into a plea for jurisdiction or had a trial on the petition allegations. MCR 3.977(G)(2). Thus, as a direct consequence of Ms. Morgan’s plea, the Department’s evidentiary burden in the TPR proceedings was significantly relaxed as it was permitted to prove its case using hearsay evidence.

Throughout the two year case, much of its evidence at the various hearings was proven through hearsay. Evidence introduced at each dispositional review hearing, which became part of the record on which the trial court based its termination decision, was replete with hearsay. This included evidence of alleged drug use by Ms. Morgan, which she contested on numerous occasions, the speculated relationship between Ms. Morgan and Mr. Morgan, and the mental health of Ms. Morgan and her children.¹¹ These concerns, all of which played a major role in the trial court's decision, were never proven with competent evidence.

The pervasive use of hearsay continued into the final TPR hearing. At that hearing, case worker Scott Campau testified about statements supposedly made to him by a variety of people including Ms. Morgan's therapist (Appendix 216a-217a; 98b), the children's therapists (Appendix 220a), and the psychologist who evaluated the family. (Appendix 209a-211a). None of these people testified at trial. Additionally, much of protective service worker's testimony was hearsay as well. For example, she testified about prior reports made on the family before she began working on the case (Appendix 194a), and drug test results which she did not personally administer or observe (Appendix 197a-198a, 201a, 202a). In short, if Ms. Morgan had not entered into the invalid plea, the use of hearsay testimony against her would have been impermissible and would have constituted clear error. See *In re Gilliam*, 241 Mich App 133, 137; 613 NW 2d 748 (2000) (reversing TPR because trial court improperly relied on hearsay evidence). The combination of these two errors – denying Ms. Morgan the right to counsel and using an invalid plea to reduce the Department's evidentiary burden – rendered the entire

¹¹ Neither the psychologist who evaluated the family in 2005, Ms. Morgan's therapist or the children's therapist ever testified at any proceeding in this case.

proceeding “fundamentally unfair” and significantly increased the likelihood of an erroneous deprivation of Ms. Morgan’s parental rights. The trial court’s failure to adhere to the strict procedures set forth by case law, statutes and court rules resulted in a decision that “seriously affected the fairness, integrity or public reputation” of the judicial proceeding, *Carines, supra*, and constituted plain error.

CONCLUSION

For the foregoing reasons, Respondent-Moether-Appellee Melanie Morgan respectfully requests that this Court affirm the decision by the Court of Appeals reversing the trial's order terminating her parental rights.

Respectfully submitted,

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