

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from Michigan Court of Appeals

Hon. Murray, C.J., and Sawyer and Gleicher, JJ.

Thomas J. O'Brien, Jr.

Supreme Court No. 161335

Plaintiff/Appellee

Court of Appeals No. 347830

-v-

Ann Marie D'Annunzio

Defendant/Appellant

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**AMICUS CURIAE BRIEF FOR THE MAJORITY OF THE FAMILY LAW SECTION OF
THE STATE BAR OF MICHIGAN IN SUPPORT OF DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

This brief reflects the position of the majority of the Family Law Section of the State Bar of Michigan, taken in accordance with its bylaws regarding the following identified matters. The position taken does not necessarily represent the policy position of the State Bar of Michigan. These matters are within the jurisdiction of the Family Law Section.

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STATEMENT OF QUESTIONS PRESENTED

1. Is a parent's right to an evidentiary hearing satisfied if there is a year between an ex parte order and an evidentiary hearing?

Trial court answered:	Yes
Court of Appeals answered:	No, but harmless
Appellant-Mother answers:	No
Appellee-Father answers:	Yes
Amicus Curiae answers:	No

2. Can a trial court's decision be upheld as proper where the trial court refused discovery of relevant information and permitted consideration of evidence not properly admitted, and relied upon out-of-court statements where the parties and their attorneys were not present?

Trial court answered:	Yes
Court of Appeals answered:	Yes
Appellant-Mother answers:	No
Appellee-Father answers:	Yes
Amicus Curiae answers:	No

3. Can a trial court terminate a parent's contact with a child without a process for meaningful review?

Trial court answered:	Yes
Court of Appeals answered:	Yes
Appellant-Mother answers:	No
Appellee-Father answers:	Yes
Amicus Curiae answers:	No

INTRODUCTION

The Family Law Council of the State Bar of Michigan believes that this Court should grant leave to emphatically order that trial courts must receive evidence before issuing orders changing child custody. Moreover, upon an emergency appeal, the Court of Appeals must quickly vacate any orders entered without evidence. This is essential to end the trend in the trial courts and the Court of Appeals of issuing and affirming decisions without taking evidence, which violates both fundamental due process and Michigan's Child Custody Act, undermining its policy of ensuring stability of children's custody orders. This case epitomizes a trend in family law cases in the lower courts, a trend in which a trial court will issue and the Court of Appeals will affirm decisions without taking any evidence. The resulting decisions lack fundamental due process.

In the instant case, the trial court issued an order changing custody without taking evidence, instead basing its decision on Appellee's motion for ex parte relief and private discussions between the judge the FOC counselor, as discussed *infra*. The Court of Appeals *did find that the trial court committed clear legal error* in changing custody without taking evidence, and also found error in the trial court's reliance on *ex parte* communications and inadmissible evidence, as discussed *infra*. But the Court of Appeals refused to vacate the improperly entered orders, finding those errors to be harmless.

Those clear legal errors are not harmless; as discussed below, they injure Appellant and the children in this case, and, further, they harm the entire jurisprudential system by eliminating the very core of our judicial system — decisions based solely on evidence offered in open court. Appellant and the children were injured by the two-year existence of a custody order that was not based on any evidence, but which egregiously

affected the children, their relationship with their mother, and their established custodial environment. Moreover, the effect of this decision — along with the similar trend of prior decisions in the appellate courts (discussed *infra*) is to decimate, at least in family law cases,¹ the rule that judicial decisions are not *ad hominem*, or based on feelings or prejudices, but are based on evidence received in the record, evidence which is subject to the adversary process, including cross examination.²

Instead of allowing the trial court's misuse of the judicial system, specifically due process and the rule of law, the Court of Appeals should have acted quickly and decisively to put a stop to such improper orders by summarily vacating the November 2017 orders and returning the case to the *status quo*, i.e., the prior custody order. In light of the increasing trend in the lower courts to issue and affirm these improper orders, it has become imperative that this Court grant leave to address this issue.

Importantly, this is a unique case because both parties were represented by counsel. In Michigan divorce cases, nearly half of litigants are self-represented. Kerry Sheldon, *Michigan Legal Help Evaluation Report* (January 2015), available at <https://www.srln.org/system/files/attachments/michigan-legal-help-evaluation-report-1-15.pdf>. Imagine the possibilities if Appellant in this matter had not been represented by learned counsel – how the errors in the case would have compounded, and whether Appellant-mother would have had an evidentiary hearing at all. The Family Law Section

¹ It is also possible that the destruction of due process in family law cases will spread out into all other civil actions.

² Although in a different context, Justice Viviano, concurring, recently stated: "It is incumbent on the courts to ensure decisions are made according to the rule of law, not hysteria." Order, *DHHS v Manke*, Docket No. 151394 (Jun. 5, 2020).

needs this Court to consider this case, to affirm the importance of fundamental due process as it relates to the Constitutional right of Michiganders to the custody and care of their children.

STATEMENT OF BASIS OF JURISDICTION

The State Bar of Michigan, Family Law Section adopts the Statement of the Basis of Jurisdiction found in Defendant-Appellant's Brief on Appeal, page ix.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Family Law Council ("The Council") is the governing body of the Family Law Section of the State Bar of Michigan. The Section is comprised of over 3,400 lawyers in Michigan practicing in the area of family law, and it is the section membership which elects 21 representative members to the Family Law Council.

The Council provides services to its membership in the form of educational seminars, monthly Family Law Journals (an academic and practical publication reporting new cases and analyzing decisions and trends in family law), advocating and commenting on proposed legislation relating to family law topics, and filing Amicus Curiae briefs in selected cases in the Michigan Courts.

The Council, because of its active and exclusive involvement in the field of family law, and as part of the State Bar of Michigan, has an interest in the development of sound legal principles in the area of family law.

The instant case involves a change in custody and procedural errors made by the trial court. The Family Law Section presents its position on the issues to support Appellant's request that leave be granted by the Michigan Supreme Court to hear these important issues.

STATEMENT OF FACTS

Due to the complexity of the facts specific to this particular appeal, an entire recitation is not necessary, and instead Amicus curiae relies on the facts and procedure as set out in the Court of Appeals' Opinion and the parties' respective briefs. However, the following is a brief summary of the key facts which are relevant to issues discussed by Amicus curiae.

A. Prior Order

Under the prior April 27, 2005 Order (Appellant's Exhibit E), Appellant-Mother had "sole physical custody of the parties' minor children." Appellee-Father was granted parenting time (Appellant's Exhibit E), which was expanded under a 2007 modification (Appellee's Exhibit C) to consist of alternating weekends and some weekday day-time care. That 2007 order has remained the operative parenting time order.

B. Ex Parte Modification

On August 20, 2017, Appellee-Father filed a motion seeking an *ex parte* order changing custody (Appellant's Exhibit G). The trial court denied *ex parte* relief, and Father scheduled his motion for hearing on September 13, 2017. At that hearing, the trial court ordered specific parenting time and required the parties to select a therapist to work with the parties and children (Appellant's Exhibit K).

On November 6, 2017, Father filed another *ex parte* motion seeking suspension of Mother's parenting time (Appellant's Exhibit L). That day, the trial court granted Father "temporary full parenting time of the children" and prohibited the children having any contact with Mother (Appellant's Exhibit M).

C. Motion Hearing

At the subsequent motion hearing on November 15, 2017, the trial court acknowledged it had had out-of-court communications with the FOC counselor, Mrs. Doan (Tr. 11/15/2017, p 6, ln.19-22) (Appellant's Appendix N). Mrs. Doan opined on the record that Mother's parenting time should be suspended (*id*, p 10 ln. 6-22). Mrs. Doan did not discuss or address the children's established custodial environment, the best interest factors, or the parenting time factors. The court did not take testimony from the parties, and did not make any of the required findings.

At the conclusion of the motions hearing, the court entered a November 15, 2017 Order that

"suspend[ed] Mother's parenting time . . . until further order of the court. Father shall continue to have the children full-time and Mother is prohibited from appearing at the children's school and may not initiate contact with them in any fashion." (Appellant's Appendix O).

The trial court also entered an Order that required Mother to submit to a psychological assessment (Appellant's Appendix P). The court did not schedule an evidentiary hearing at that time.

D. Mother's Attempt to Seek Review

On January 10, 2018, Mother filed a motion to set aside the order changing custody because it was entered without any evidence or findings. (Appellant's Appendix Q). At a January 17, 2018 motion hearing, the trial court set an evidentiary hearing date, but

continued to deny contact between Mother and children. (Appellant's Appendix R, p 7, ln.18-25; p 8 ln.1-23).³

In March 2018, Appellant filed a delayed application in the Court of Appeals from the November 15, 2017 order, but the court denied the application as interlocutory (Order, Docket No. 343115, May 29, 2018) (denying for failure to persuade the Court of the need for immediate appellate review).

E. Evidentiary Hearing

The trial court began an evidentiary hearing on March 20, 2018 and continued for eight hearings held over seven months, through October 25, 2018. During that period and until the January 2019 decision, the November, 2017 custody orders (entered without an evidentiary hearing) remained in effect, and the trial court continued to deny Mother's requests for contact with the children. (Appellant's Application, p 17). Also during that time, the trial court entered two additional orders without hearings: On August 14, 2018, the court did not rule on Mother's August 6, 2018 Motion for Order to Show Cause regarding Father's additional violations of the parenting time order (Appellant's Appendix RR), but issued an order that the FOC should communicate with the children's counselor, but those communications were not to be disclosed to the parties or counsel (Order, Appellant's Appendix UU). On December 7, 2018, after Mother sought holiday parenting time (after the evidentiary hearing while waiting months for the judge to issue a decision),

³ Pending the evidentiary hearing, the parties attempted settlement of some matters, and attempted to stipulate to the children having some contact with Mother, but the trial court would not accept that stipulation (as discussed in Appellant's Application, pp 11-12; see Appellant's Appendix S, Jan. 26, 2018 Stipulated Order).

the court issued an Order that permitted the children to choose whether or not they wanted to participate in parenting time. (Appellant's Appendix XX). On December 19, 2018, the court denied Mother's motion, 13 months after the *ex parte* orders were entered and 11 months after Mother requested a hearing on the *ex parte* orders.

F. Trial Court Decision

The trial court issued its decision on January 31, 2019 (Appellant's Appendix B), granting Father sole legal and physical custody and suspending Mother's parenting time.

G. Court of Appeals Decision

On February 27, 2020, the Court of Appeals issued its decision, finding, *inter alia*, that the trial court did commit error in November 2017, when it effectively changed custody⁴ to Father without complying with the procedural requirements of the Child Custody Act — but the court found that that error was harmless. (Appellant's Appendix A, p 3; p 4; p 5, ¶¶ 2 & 3; p 5, last ¶; see also p 5-7). The Court of Appeals also found error in the trial court's reliance on *ex parte* communications and inadmissible evidence (*id*, p 8-9), but found those errors harmless (*id*, p 7, last ¶; p 8, ¶ 3; p 9, ¶ 1). As discussed in more detail in Section 2, *infra*, the Court of Appeals' reasoning on these harmless error rulings addresses tangential issues but wholly failed to address the basic due process requirement that trial judges must base decisions on evidence in the record.

⁴ The court found that, even though the trial court framed its November 2017 orders in terms of parenting time, the "complete suspension of [Mother's] parenting time had the effect of modifying physical custody" (COA decision, p 4, last ¶. (Appellant's Appendix A).

STANDARD OF REVIEW

Amicus curiae agrees with and adopts the Standard of Review set forth in Defendant-Appellant's Brief on Appeal (pp 27-28, p 43).

ARGUMENT

I. A Prompt Evidentiary Hearing Must Be Conducted When Changing Custody

A. Decisions Must Be Based on Evidence

Litigation, including family law litigation, may be resolved either by a stipulation of the parties, or by a decision of the judge which must be based on evidence in the record. A court may not simply issue orders from the bench after reading the pleadings in the file, or after listening to attorneys state their parties' positions. See, e.g., *Foskett v Foskett*, 247 Mich App 1, 7, 634 NW2d 363 (2001) ("First, we note that by its own admission, the trial court merely formed an 'impression' regarding the alleged problems in the mother's home. This Court is unable to discern [from the evidence] whence the trial court's 'impression' came"); *Adams v Adams*, 100 Mich App 1, 14, 298 NW2d 871 (1980) (error where findings based on speculation, mere conclusions, and improper consideration of visitation problems). Rather, judgments and orders must be based on evidence received at trial (in the absence of an agreement of the parties). There is no middle ground in which a court can, without receiving evidence, enter a judgment or order simply by reading the file and/or listening to argument of counsel.

Instead, a court must base its decision on evidence. In *Jones v Jones*, 132 Mich App 497, 502, 347 NW2d 756 (1984), the Court of Appeals explained the necessity for an evidentiary hearing before the trial court makes a decision:

"When the trial court concluded that it could not enter a judgment in accordance with the proposed settlement, defendant had to be given the opportunity to present his case and to cross-examine plaintiff and her witnesses."

This law equally applies in child custody cases: a court cannot modify orders unless the court first holds an evidentiary hearing. See, e.g., *Mann v Mann*, 190 Mich App 526, 530, 532-533, 476 NW2d 439 (1991) (court must make findings from admissible evidence at hearing).⁵ See also *Grew v Knox*, 265 Mich App 333, 336, 694 NW2d 772 (2005) ("An evidentiary hearing is mandated before custody can be modified, even on a temporary basis[.]"); *Schlender v Schlender*, 235 Mich App 230, 233, 596 NW2d 643 (1999) ("[I]t is improper for a trial judge to decide the issue of custody on the pleadings and the report of the friend of the court when no evidentiary hearing was held. . . . A hearing is required before custody can be changed on even a temporary basis[.]"); *Mauro v Mauro*, 196 Mich App 1, 2, 492 NW2d 758 (1992) (noting that in an earlier unpublished opinion in the same case, the court had reversed an order changing custody without a proper hearing).

⁵ In *Mann* the Court of Appeals specifically found it clear legal error to — as was done here — enter an "interim" post-judgment order changing physical custody pending a de novo hearing, stating:

"Therefore, the question is whether the trial court may do by a postjudgment interim order temporarily changing custody that which it cannot do by a final order changing custody. We hold that it cannot." 190 Mich App at 529-530.

"Moreover, we conclude that in determining whether a temporary change is appropriate or necessary, a hearing must be conducted. Without considering admissible evidence--live testimony, affidavits, documents, or other admissible evidence--a court cannot properly make the determination or make the findings of fact necessary to support its action under § 7(1) of the Child Custody Act." *Id.* at 532 (emphasis added).

This clear rule requiring an evidentiary hearing is based on the very core of our judicial system: due process. See *Hisaw v Hayes*, 133 Mich App 639, 644, 350 NW2d 302 (1984):

"Due process requires that a litigant be afforded a fair trial of the issues involved in the controversy and a determination of disputed questions of fact *on the basis of evidence*." (Emphasis added).

See also *Mudge v Macomb County*, 458 Mich 87, 98 & 101, 580 NW2d 845 (1998) ("[T]he touchstone of procedural due process is the fundamental requirement that an individual be given the opportunity to be heard 'in a meaningful manner'"). See US Const Amend 14; Const 1963, Art. 1, § 17.

This Court has recently emphasized the fundamental rule that courts may not enter orders without following the procedural requirements and basic due process. In *Ludwig v Ludwig*, 322 Mich App 266, 911 NW2d 213 (2017), the Court of Appeals had agreed with the trial court that the order re-commencing contact between parent and children did not have to comply with the Child Custody Act requirements (thereby denying the appellant of an evidentiary hearing) because the order at issue was not a parenting time order but only an order for family therapy. This Court summarily reversed and remanded for an evidentiary hearing, *Ludwig v Ludwig*, 501 Mich 1075, 911 NW2d 462 (2018). See also *Daly v Ward*, 501 Mich 897, 901 NW2d 897 (2017) ("[I]t is critical that trial courts, in the *first* instance, carefully and fully comply with the requirements of MCL 722.27(1) (c) before entering an order that alters a child's established custodial environment") (emphasis in original).

B. A Disturbing Trend Toward Disregard of the Law

Decades ago, the Court of Appeals would act quickly to enforce those fundamental rules. In Common Trial court Errors in Child Custody and Visitation Cases, 69 Mich BJ 140 (Feb. 1990) (attached as Attachment A) Scott Bassett discussed the Court of Appeals' prior expeditious corrections of that fundamental legal error, pointing out that, at that time, "the Court of Appeals has exhibited a willingness to act quickly in reversing modifications of custody and visitation ordered absent a full evidentiary hearing," and that "[i]t is unfortunate that such orders are not published for the benefit of the bench and bar."⁶

But in more recent years — perhaps because those peremptory orders are not readily available to researchers — the Court of Appeals has not followed that policy of quickly vacating "decisions" made without evidence. Rather, the Court of Appeals has taken various actions which do not quickly and decisively enforce the rules, statutes, and

⁶ Mr. Bassett cited three unpublished orders and noted that one order "is illustrative of the court's reasoning in these cases," *Porteny (Sobel) v Sobel*, Mich Ct App Docket No. 111968 (Jan. 31, 1989) (peremptorily reversing custody modification order denominated as "extending visitation"):

"The circuit court erred in modifying defendant's visitation rights in a manner tantamount to awarding a change of custody *without* clear and convincing *evidence*, supported by findings of fact and conclusion of law, that the change would be in the best interests of the child." (Emphasis added).

The Court of Appeals' quick actions to correct that fundamental error by peremptory order continued for some time. See, e.g., Order, *Ketchum v Ketchum (Deline)*, Docket No. 168571 (Oct. 14, 1993); *Barlach v Forrest*, Mich Ct App Docket No 156942 (unpublished, Jan. 7, 1994); *Phillips v Ross*, Mich Ct App Docket No. 186384 (unpublished, July 26, 1996) (reversing custody modification order denominated as temporarily "extending visitation"); Order, *Carroll (Mayfield) v Carroll*, Docket No. 206645 (Nov. 5, 1997) (peremptorily vacating order denominated as "stay", which effectively changed custody); Order, *Stonisch v Murtagh*, Mich Ct App Docket No. 228608 (Jul. 25, 2000); Order, *Polito v Polito*, Mich Ct App Docket No. 227786 (unpublished, Nov. 3, 2000); Order, *Nicholas v Nicholas*, Mich Ct App Docket No. 234994 (Jun. 22, 2001). See also *Spranger v Spranger*, Mich Ct App Docket No. 231265 (unpublished, Jun. 29, 2001) (finding temporary order clear error, and admonishing that that order not affect established custodial environment); *Phillips v Ross*, Mich Ct App Docket No. 186384, p 2 (unpublished, July 26, 1996) (after judgment, reversing "interim" custody order entered without evidence that "created a situation which ultimately favored plaintiff in the court's subsequent determination of custody").

constitutional provisions requiring decisions to be based on evidence; instead they often deny relief or leave the improper order in place while purporting to grant some form of relief.⁷ It appears that this failure to immediately, peremptorily, vacate such orders has led to an increase, in recent years, in trial courts issuing orders without taking evidence.⁸

⁷ Examples of such orders are:

- In July, 2003, the Court of Appeals denied peremptory reversal (and stay) of a June 13, 2003 order changing custody despite the lack of evidentiary hearing, ordering only that the trial court hold an evidentiary hearing within 21 days [with the improper order remaining in effect until the November, 2003 order after evidentiary hearing]. Order, *Bizek v Bizek*, Mich Ct App Docket No. 249393 (Jul. 10, 2003).
- In March, 2005, the court refused to peremptorily vacate a February 4, 2005 custody order, but remanded, directing the circuit court to hold an evidentiary hearing within six weeks. Order, *Czewski v Durkee*, Mich Ct App Docket No. 261184 (Mar. 31, 2005).
- In July 2017, the court denied peremptory reversal of an order changing custody despite the lack of evidence and findings — but on full review vacated and remanded based on those omissions. *Espinoza v Espinoza*, Mich Ct App Docket No. 338145 (unpublished, Oct. 12, 2017).
- In January, 2018, the Court of Appeals denied peremptory reversal (and stay) of a November 29, 2017 order entered without an evidentiary hearing [after which after this Court granted a stay (docket no. 157300, Mar. 21, 2018)], and then on full consideration the Court of Appeals vacated the November, 2017 order for, *inter alia*, lack of evidence). *Lanker v Lanker*, Mich Ct App Docket No. 341530, slip op at 3 (unpublished, May 22, 2018).
- In December, 2018, the Court of Appeals granted immediate consideration of an emergency application based on a December 12, 2018 order changing custody without evidence; but the court left that improper order in place and remanded for an evidentiary hearing within 14 days; the trial court did not issue its decision until March 8, 2019 — leaving the improper custody change order in effect for fifteen months after the remand order. See Order, *Ploski v Wisz*, Mich Ct App Docket No. 346828 (Dec. 21, 2018).

This list is illustrative, but not exhaustive, of 2000-2020 appellate orders dealing with trial court orders entered without evidence.

⁸ Indeed, the instant circuit court judge has written an article which seems to suggest that, in some situations, judges should be able to change custody first and then take evidence at a later date (suggesting a workgroup to address the issue). Langton, We Need More Tools in Our Toolbox, Laches

It is true that there are some more recent [than those listed in footnote n. 7, p 13, *supra*] Court of Appeals decisions which recognize and quickly apply due process requirements.⁹ But, compared to the strong, consistent position taken in the 1990s and earlier, in the last twenty years, the Court of Appeals has issued varying, sometimes contradictory, rulings that usually leave improper orders in effect, and trial courts seem to be increasingly issuing orders without taking evidence — despite this Court's rulings in *Daly v Ward, supra* and *Ludwig, supra*. This trend makes it imperative that this Court make a strong statement, once and for all, in a published decision, that, even in family law cases, *courts may not ignore due process and the requirement that judicial decisions be based on evidence in the record.*

C. Systematic Disregard of the Law Is Inherently Harmful

As discussed in the Statement of Facts, on November 6, 2017, the trial court entered an order which granted ex parte relief pursuant to Father's November 5, 2017 Motion (Order, Appellant's Exhibit M). At the subsequent motion hearing on November

(Oakl. County Bar Assn J), p 32 (May 2019) (attached as Attachment B). See also p14, n. 8, *infra*, regarding additional thoughts on the issue.

Judge Langton was also the judge in two recent cases addressing the issue of decisions made without evidence, *Sigler v Safran*, Mich Ct App Docket No. 346992 (Order issued Mar. 15, 2019) (discussed *infra*, p 14, n. 9); *Jacob v Jacob*, Mich Ct App Docket No. 344580 (unpublished, Mar. 3, 2020), *app pending*, S.Ct. Docket No. 161203.

⁹ See, e.g., Order, *Picerno v Strimpel*, Mich Ct App Docket No. 311619 (Aug. 28, 2012) (vacating with immediate effect, and in lieu of granting leave, a July 13, 2012 custody change order entered without an evidentiary hearing)). In *Sigler v Safran*, the Court of Appeals granted peremptory reversal and vacated the portion of a December 2018 order changing custody, reasoning "a trial court cannot change custody, even temporarily, without holding a hearing and making findings." Order, *Sigler v Safran*, Mich Ct App Docket No. 346992 (Mar. 15, 2019). Even so, the Court of Appeals subsequently had to force the trial judge to vacate the improper order. Order, *Sigler v Safran*, Mich Ct App Docket No. 346992 (Apr. 11, 2019).

15, 2017, the trial court acknowledged it had had out-of-court communications with the FOC counselor, Mrs. Doan. The court did not take testimony from the parties, and did not make any findings on the children's established custodial environment or the best interests factors or the parenting time factors. The trial court issued additional orders without taking evidence.

The trial court's November 2017 "temporary" Orders modified the prior child custody order despite the fact that there was *no evidence* in the record to support a modification. For the trial court to modify a child custody order after argument of counsel, and apparently after discussions with an FOC counselor, but without receiving evidence, contravenes the foundational principles of basic due process law, violates black-letter rules of law contained in the Child Custody Act, and prevents any effective appellate review of the lower court's decision.

Harm is caused by decisions without evidence. The Court of Appeals found that the trial court did commit error in November, 2017 in changing custody without complying with the procedural requirements, including taking evidence on which to base its decision, and found error in the trial court's reliance on *ex parte* communications and subsequently inadmissible evidence (Appellant's Appendix A, p 3, 4, 8-9). But the Court of Appeals found those errors harmless, reasoning:

- any effect of the "procedural error[s]" on the children's established custodial environment was harmless because the trial court applied the higher clear and convincing evidence burden of proof in reaching its decision (*id* at p 5, ¶ 2);

- the November 2017 change of custody did not taint the 2018-2019 evidentiary hearing and decision because “the trial court followed the appropriate framework for modifying custody in its opinion, albeit well after it first granted physical custody on a temporary basis” (*Id.* at p 5, ¶ 3);¹⁰
- the trial court’s emphasis on best interests factor findings (a), (j), and (l) “would still have been supported around the time plaintiff originally sought suspension of defendant’s parenting time” (*Id.* at p 5, last ¶; see also *id* at pp 5-7);
- although the trial court did resolve some ancillary matters by relying primarily on the referee’s recommendation,¹¹ those issues did not require findings regarding proper cause, the established custodial environment or the best interests factors (*Id.* at p 7, last ¶); and
- the Court of Appeals distinguished the discussion with FOC counselor Doan [and her discussion with the children’s counselor] as not within the technical meaning of “*ex parte* communication,” and also reasoned that the trial courts may “consider” an FOC report, and may utilize community resources, MCL §722.27(1) (d), and may “take any other action considered to be necessary in

¹⁰ The Court of Appeals also found it need not address the issue after finding Appellant failed to expand upon this “conclusory argument” (Appellant’s Appendix A, p 5, 3rd parag).

¹¹ The referee’s recommendation was not made after an evidentiary hearing, but after a meeting with the parties’ attorneys which the parties were not permitted to attend (*id.*, p 7, 2nd parag).

particular child custody dispute," MCL 722.27(1)(e) (*Id.* p 8, ¶ 3; p 9, 1st full ¶)

(this latter statute is briefly addressed in 19, 26, *infra*).¹²

The most glaring omission in the Court of Appeals' discussion of "harmless error" is that the court did not even address the failure of the trial court to take evidence before making a decision. Instead, the court's reasoning focused on the Child Custody Act requirements that address how a trial court is to consider the evidence in the record, for example, discussing the clear and convincing evidence burden of proof at a later hearing. But discussing the burden of proof and the technical meaning of "*ex parte* communication" does not address the fact that the trial court had *no evidence on which to base the November 2017 decisions*.

Likewise, the issues that the Court of Appeals dismissed as "ancillary" were issues that required evidence in the record. Applying a higher burden of proof in January 2019, does not remedy the effect, on the children's established custodial environment, of the November 2017 order changing custody. Following the appropriate framework for modifying custody "well after it first granted physical custody on a temporary basis," does not do anything to dispel the effect, or taint, the improper temporary order had on the final order over a year later. Reasoning that the trial court could have made some of the January 2019 best interest findings in November 2017 if there had been an evidentiary hearing, evades, rather than addresses, the issue of the orders entered with no evidence. This after-the-fact "harmless error" discussion totally emasculates the evidentiary hearing

¹² The court also found that the dangers inherent in *ex parte* communications are not present in this case (*id.* p 9, 1st & 2nd full parag).

requirement and annihilates the due process rule requiring that judges base decisions on evidence.

D. Harm Results from Orders Entered Without Evidence

This Court has recognized the harm inherent in orders entered without evidence.

In an Order in *Daly v Ward supra*, 501 Mich at 897, this Court stated:

[I]t is critical that trial courts, in the *first* instance, carefully and fully comply with the requirements of MCL 722.27(1) (c) before entering an order that alters a child's established custodial environment. **Any error in this regard may have lasting consequences yet effectively be irreversible.** (Italics in original; bold added).

The Court of Appeals long ago also recognized the harm. Judge Doctoroff, in *Wilson v Gauck*, 167 Mich App 90, 98, 421 NW2d 582 (1988), noted that such an order could result in a change in the child's custodial environment by the mere passage of time.¹³

Most importantly, these orders entered without evidence result in a violation of the paramount purpose of the Child Custody Act, MCL 722.21 *et seq.*, which promotes the

¹³ Judge Doctoroff stated:

"I write separately because I am troubled by the unfairness to the defendant of her possibly having to meet a more difficult burden on remand than she would have had the matter been properly handled below.

"Although the trial court initially determined that no established custodial environment had been created in the plaintiff's home, it is possible that a determination will be made on remand that an established custodial environment has been created there during the pendency of this appeal. If such is the case, the burden of proof will shift to the defendant, [Citation omitted]

"This potential placement of the burden of proof on the defendant is patently unfair. Nonetheless, because the statements of policy in the Child Custody Act, MCLA 722.21 *et seq.*; MSA 25.312(1) *et seq.*, are considered to be 'superior to the symmetry of common law appellate remedies and even to the rights of the plaintiff who has prevailed on appeal,' [citation omitted], I must, with great reluctance, concur."

best interests of the child by ensuring a stable environment free of unnecessary and disruptive custodial modifications. See *Baker v Baker*, 411 Mich 567, 576-577, 309 NW2d 532 (1981).¹⁴ An order soundly based in evidence is a stable order. An order entered without evidence is inherently unstable, leaving children in an unstable environment, subject to further change, either when evidence is ultimately presented in court, or when new allegations are made and another change unsubstantiated by evidence is permitted.

E. An Emergency Order Must Ultimately Be Supported by Evidence

While the court does have the authority to issue an ex parte emergency order (see MCR 3.207(B)), for that order to stand, it must ultimately be supported by evidence. This issue was discussed, in part, in the documents filed in this Court in *Ludwig*, supra [where the lower courts attempted to use MCL 722.27(1)(e) as a way of avoiding the right to an evidentiary hearing], and which the Court of Appeals mentioned in the instant decision, noting that MCL 722.27(1)(e) allows a trial court to "take any other action considered to be necessary in a particular child custody dispute." (Slip op at 8, ¶ 3). See also the discussion at p 13-14, n.8, supra, regarding Judge Langton's discussion of the issue.

It appears that MCL 722.27(1)(e), which has been claimed to justify emergency authority [to dispense with basic due process], as well as to grant generally broad authority as in *Ludwig*, supra, has not been construed in any published decision [other than *Ludwig*, which this Court reversed], and has been addressed only in two appellate

¹⁴ This Court stated:

"In adopting sec. 7(c) of the act, the Legislature intended to *minimize the prospect of unwarranted and disruptive change of custody orders* and to erect a barrier against removal of a child from an 'established custodial environment,' *except in the most compelling circumstances*." (Emphasis added).

decisions, which held that even when the trial court acts under MCL 722.27(1)(e), the fundamental procedural requirements are mandatory before the court enters an order under MCL 722.27(1)(e), even in an emergency. See *Eljahmi v Elgarmi*, Mich Ct App Docket No. 270848, slip op at 4, last ¶ (unpublished, Nov. 30, 2006); *Bargerstock v Bargerstock*, Mich Ct App Docket No. 263740, slip op at 4-5 (unpublished, Apr. 25, 2006). If leave is granted, the parties and amici can expound further on issues of the intersection of the due process evidentiary hearing requirement with both the broad, "catch-all" provision of the Child Custody Act and appropriate methods of handling "emergency" custody situations.

II. A Cascade of Stacking Evidentiary and Discovery Errors Constitutes Harmful Error

The trial court made multiple errors relating to the presentation, admissibility, and discovery of evidence in this matter. This Court should grant leave so that this Court to determine at what point it is impermissible to deem these errors harmless.

A. Ex Parte Communications and Non-Record Evidence Constitutes Error

While a trial court cannot change custody without an evidentiary hearing, any change made must be based on *record evidence*. *Redding v Redding*, 214 Mich App 639, 645, 543 NW2d 75 (1995); *Adams v Adams*, 100 Mich App 1, 14, 298 NW2d 871 (1980). In her appeal, Appellant raised several arguments wherein the trial court erroneously relied on non-record evidence in its initial decision, and final decision, to change custody.

The Court of Appeals in this matter found, as Appellant argued, that the trial court erred by basing its decision on ex parte communication and inadmissible evidence on

several of these points. However, the Court of Appeals further held that while this was error, the error was “harmless”. Additionally, the Court of Appeals also found that it was error for the trial court to make a ruling considering the Friend of the Court report without first giving the parties the opportunity to object. Again, despite finding a clear legal error, the Court of Appeals again found the error to be harmless. The Family Law Section takes specific note of several of these examples of consideration of ex parte communication and non-record evidence.

1. Ex Parte Communications Between the Court and the FOC Investigator

(a) Ex Parte Communications Defined

First, the Court of Appeals held that the initial communication with Doan did not constitute ex parte communication for the reason that they defined *ex parte communication* as “[a] communication between counsel or a party and the court when opposing counsel or party is not present.” *Black’s Law Dictionary* (11th ed). Doan was not a party or an attorney in this matter, despite the fact that the “recommendations” that she made to the court, in chambers without the parties or attorneys being present, were also based on her meetings held with the parties, which were neither on the record, nor based on record evidence, and were made without the parties’ respective attorneys being present.

This is not a technically correct definition of ex parte communication; the full Black Law Dictionary definition, goes on to state that “such communications are ordinarily prohibited.” Likely, the Black Law Dictionary’s Definition refers to the issue of whether or not it is ethical for a Judge to have such one-sided communication with a party or attorney

in a matter, which is an ethical violation pursuant to MRPC 3.5(b), which is not the subject matter at issue here. Either way, in other cases in Michigan, where “ex parte communication” was analyzed, the communication involved that between a judge (or any court officer) and a jury; a judge and a child’s therapist; and a judge with a witness in the case, among others. *People v France*, 436 Mich 138, 461 NW2d 621 (1990); *People v Conklin*, Docket No. 286270, 2010 WL 2384876 (Mich Ct App June 15, 2010); *Churchill v Grinstead*, Docket No. 283004, 2008 WL 4148946 (Mich Ct App Sept. 9, 2008); *In re McCree*, 495 Mich 51, 845 NW2d 458 (2014).

(b) Types of Ex Parte Communications

The *People v France* case, in determining whether or not the ex parte communication required reversal, further analyzed the gravity of ex parte communication by separating the type of communication into three categories, as follows:

- Substantive: instruction on the law (this court states that it is between a judge and jury) – presumption of prejudice in favor of the aggrieved party
- Administrative: for example, communication regarding the availability of a piece of evidence – no presumption of prejudice
- Housekeeping: between a jury and court officers – presumption of no prejudice

While the communication between Doan and the trial court judge in the instant case is not communication between a judge and a jury, such an analysis clearly rejects the majority's narrow definition of ex parte communication as only being between a Judge and a party or attorney in the case. The communication further included issues (custody and parenting time of the minor children) that were clearly substantive in nature given that Doan was making a recommendation to the court regarding her perceptions of the parties

during their meetings and her recommendation as to what custody and parenting time should be.

(c) Substantive Ex Parte Contact

Judge Gleicher noted in her dissent in this case, referring to the holding in the *In re HRC*, 286 Mich App 444, 451; 781 NW2d 105 (2009) case, that “[a]n in camera interview is an ex parte communication that occurs off the record in a judge’s chambers and in the absence of the other interested parties and their attorneys.” The context of such communication in the *In re HRC* case is quite similar to what happened here. Doan, the family counselor, based her recommendations in this matter on communications that she had with the parties off the record. She then met with the judge privately, presumably to discuss her informal recommendation with the judge. The judge, in turn, made it apparent that she relied on these off the record statements in making her decisions in the initial hearings in this case, including the ruling to suspend Appellant’s parenting time with the minor children. Such communication by Doan with the Judge is not record evidence.

The majority in this case dismisses the acknowledged error here by indicating that the trial court did not change custody at this time. While it is true that the court made no specific findings as to the established custodial environment, or the child custody or parenting time factors, the trial court did make a ruling to completely suspend Appellant’s parenting time, who prior to this was the joint custodian¹⁵, by granting Appellee “temporary full parenting time of the children” and ordered that “[m]other is prohibited from appearing at the children’s school and may not initiate contact with the children in any fashion.”

¹⁵ And for many years was the primary custodian of the minor children.

(d) Reliance on Ex Parte Communications in Decision-Making

Despite the error in applying the concept of ex parte communication, the majority further opined that “the dangers inherent in ex parte communications bear consideration”. *Cheesman v Williams*, 311 Mich App 147, 162; 874 NW2d 385 (2015). In *Grievance Administrator v Lopatin*, 462 Mich 235, 262-263; 612 NW2d 120 (2000), this Court discussed the danger of ex parte communications:

“Ex parte communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. Ex parte conversations or correspondence can be misleading; the information given to the judge ‘may be incomplete or inaccurate, the problem can be incorrectly stated.’ At the very least, participation in ex parte communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, ex parte communication is an invitation to improper influence if not outright corruption.” (Quoting Shaman, *Lubet & Alfini, Judicial Conduct and Ethics* (3d ed), § 5.01, pp 159-160.)

The Family Law Section agrees that there is significant harm in engaging in and relying on ex parte communications and that it deprives the litigants their absolute constitutional right to due process. The majority's finding that the errors made were not harmless is without any merit as the trial court then went on to completely suspend Appellant's parenting time with no record evidence. The orders suspending Appellant's parenting time and prohibiting her from even communicating with the children or their school deprives a parent of her constitutional right to even parent her children. MCR 2.613(A) provides the following with regard to harmless errors: “[A]n error or defect in anything done or omitted by the court ... is not ground for ... vacating, modifying, or otherwise disturbing a judgment or order, *unless refusal to take this action appears to the court inconsistent with substantial justice.*” *Cheesman v Williams*, 311 Mich App 147, 163; 874 NW2d 385, 394 (2015) (emphasis added). A trial court's error is not harmless if it is

decisive to the outcome in a case. *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 529; 730 NW2d 481 (2007).

As noted by Judge Gleicher, there can be no question that the trial court in this matter relied "upon impressions gleaned from information imparted off the record." *O'Brien*, Judge Gleicher, dissenting, at 3. "In making its decision, the trial court relied heavily on information provided off the record by Kathleen Doan, whom the court identified as "my family counselor." *Id.* at 8.

"Basic due process principles require hearings in open court and eschews hearsay-driven decision making." *Id.* The order prohibited Appellant from having any contact with her children, including any involvement in their educational environment, despite that she was also a joint legal custodian, or any say in their day to day lives. By completely suspending all of Appellant's parenting time and denying her any right to contact the children or otherwise be involved in not only the day-to-day routine decisions of their lives, but the major decisions affecting their welfare, the court's rulings on these initial motions before any testimony was even taken, denied Appellant all rights to parent her children. "Due process requires that a litigant be afforded a fair trial of the issues involved in the controversy and a determination of disputed questions of fact *on the basis of evidence.*" *Hisaw v Hisaw*, 133 Mich App 639, 644, 350 NW2d 302 (1984) (emphasis added). Appellant was denied that right when the court relied primarily on ex parte communications and non-record evidence in suspending all of the Appellant's parenting time.

2. Refusal to Allow Access to the Friend of the Court Report

In addition to the error of allowing the ex parte communication of Doan, the Court of Appeals in this matter also held that it was clear legal error for the trial court to deny the parties the opportunity to review and file objections to the Friend of the Court report before the decision was made by the trial court. The Court of Appeals further indicated that it was "more problematic" for the trial court to prohibit Doan and the child therapist from "discussing or disclosing the content of their communications to counsel or the parties." Even so, the Court of Appeals held that these errors were "harmless". While MCR 3.210(C)(6) directs the trial court to give the parties an opportunity to review and file objections to a report submitted by the FOC before a decision is made, the court did not do so. The Court of Appeals reasoned that a trial court may consider an FOC report "as an aid to understanding the issues to be resolved." *Harvey v Harvey*, 257 Mich App 278, 292; 668 NW2d 187 (2003). The Court of Appeals further reasoned that the Child Custody Act permits the court to "[u]tilize community resources in behavioral sciences and other professions in the investigation and study of custody disputes and consider their recommendations for the resolution of the disputes," MCL 722.27(1)(d), and "[t]ake any other action considered to be necessary in a particular child custody dispute," MCL 722.27(1)(e). Relying in part on these statutes, the Court of Appeals concluded that even though error was committed, it was again harmless error.

Once again, the parties were denied their rights to due process by being deprived of their right to review the underlying information gleaned to make up the report and their right to object to the report and take testimony from the underlying witnesses involved in developing the report. To hold that such a denial of due process is harmless error is

sending all courts the message that the entire framework behind the evidentiary standards mandated in a child custody case does not have to be followed.

3. Text Messages Attached to Motion Without Admission into Evidence

Appellant in this matter also challenges the trial court's reliance on certain evidence in its final opinion and order, namely, text messages that were referenced in the final opinion. The text messages that Appellant challenges were included in a motion filed by Appellee after the evidentiary hearings concluded. The Court of Appeals dismissed this argument, merely because they disagreed that the trial court's reference to these messages in its opinion gave proof that the trial court "'extensively relied' on the messages to reach its decision regarding custody and parenting time."

It is not clear how the Court of Appeals ascertained whether the trial court extensively relied on these text messages, as the text messages are not record evidence. Attachments to a motion are not record evidence, but rather akin to an offer of proof. It is inappropriate for the trial court to rely on mere offers of proof, which is effectively what the Trial Court did here when it issued its ex parte order, as discussed throughout this brief. Thus, it is inappropriate for the trial court to rely on the text messages whatsoever, and the same is reversible error.

B. The Refusal to Allow a Party Access to Information Relied Upon by the Court is Harmful Error

The trial court made further errors when it denied Appellant's requests to compel evidence that otherwise would have been discoverable. This Court should grant leave so that it can emphatically order that these errors were not harmless.

1. Litigants Have Broad Rights of Discovery

Michigan's broad discovery policy permits discovery of any relevant subject matter that is not privileged. *Augustine v Allstate Ins Co*, 2929 Mich App 408, 419; 807 NW2d 77 (2011). This is further detailed in former MCR 2.302(B)(1) (Jan 1, 2015) which permits parties discovery:

"regarding any matter, not privileged, with is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things, or electronically stored information, and the identity and location of persons having knowledge of a discoverable matter."¹⁶

The broad nature of this rule is particularly relevant in child custody disputes, where the statute indicates that *any factor* that a court considered to be relevant to the dispute can be considered by the Court. MCL 722.23(l). As a result, it is a well-known maxim of the practice of child custody law that any litigant must be prepared to subject their lives to deep scrutiny, as it is impossible to know what a court might consider "any other factor" relevant to the child's custody dispute, until after the evidence has been taken. Thus, the

¹⁶ The above quoted version of MCR 2.302(B)(1) was the operative version in effect at the time of the trial court's decision. The current version of MCR 2.302(B)(1), effective January 1, 2020, provides:

"Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. Information within the scope of discovery need not be admissible in evidence to be discoverable."

The new rule was intended to inject some proportionality to the discovery process, so that discovery time and expenses did not outpace the amount in controversy. Although the new discovery rules are narrower, the items the court did not permit to be discovered should be discoverable even under these new rules.

trial court is challenged in determining whether any particular discovery request is outside the bounds of relevance, knowing that the parameters of relevance are quite broad. In the instant case, although the Court of Appeals determined that the trial court erred in obstructing requested discovery from Appellant, it determined that such obstructions were, effectively, simply sprinkles on top of a cake of harmless errors baked by the trial court. Such a result defies notions of fair play and justice, in particular when this Court examines the particular types of evidence that were kept from Appellant.

2. Appellant Was Denied Discovery of Relevant Information

(a) Social Media Accounts

Appellant argued to the Court of Appeals that the trial court erred by denying her requests to compel production of Appellee's social media posts and the children's social media user names and passwords. The Court of Appeals disagreed that the trial court's actions in this instance were error, see slip op at 11; whereas, Judge Gleicher's dissent vehemently disagreed. Most concerning to the Family Law Section, the Court of Appeals appears to baldly uphold the trial court's decisions on these points of evidence, even though the trial court made no written or oral opinion as to why it was denying Appellant discovery on these pieces. The Court of Appeals stated: "Although the trial court did not articulate its reason for denying defendant's request, we cannot conclude that the trial court's ruling amounted to an abuse of discretion because there was evidence that defendant had abused similar access [to social media] in the recent past." Slip op at 11. The evidence that the Court of Appeals relied upon was borne out in evidentiary hearings that occurred *after* the request for production was made. The Court of Appeals, here, is engaging in the same revisionist history that the trial court did.

One of Appellant's defenses to the allegations made in Appellee's first ex parte request to terminate custody and parenting time to Appellant regarded their differing parenting styles related to Appellant's belief that the children's social media usage was inappropriate. (See Appendix I to Appellant's Application for leave to Appeal). As a portion of Appellant's initial and critical defense, the social media evidence was imperative to Appellant's preparation of her defense in this matter. The trial court's refusal to permit Appellant access to the social media evidence she sought would be akin to refusing to permit a criminal defendant access to potentially exculpatory evidence or potential evidence of bias or a motive to testify. See, e.g., MCR 6.201; *Brady v Maryland*, 373 US 83, 87 (1963). Indeed, the United States Supreme Court has noted that a "jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v Illinois*, 360 US 264, 269 (1959). When the trial court is the finder of fact, it is doubly important to have evidence of motive or bias on hand so the court can weigh the evidence in context.

Had this matter concerned a termination of Appellant's parental rights, it is without doubt that the social media evidence would have been produced. Yet, in practical effect, Appellant's rights to her children were terminated by the trial court, and the Court of Appeals, despite pointing out numerous errors of the trial court, found no harm. The right to the care, custody, and companionship of one's children is among the most precious constitutional rights. *In re Sanders*, 495 Mich 394, 409-410 (2014). As this Court declared, the constitutional right to one's children is "so deeply rooted that 'the fundamental liberty interest of natural parents in the care, custody, and management of

their child does not evaporate simply because they have not been model parents.” *Id.* at 410 (quoting *Santosky v Kramer*, 455 US 745, 753 (1982)). Thus, it is without reason that a private litigant should be permitted to use the judiciary as a vehicle to deprive another person of those rights without regard for the rules of evidence and procedures that have been created to protect those Constitutional rights, where the government cannot do the same. It is of no accord whether the caption reads that the action is brought by the People of the State of Michigan or a private party. In either case, the parent is entitled to due process, including the opportunity to present a full and fair defense. The trial court prevented that outcome here, and this Court cannot permit this error to be sustained.

(b) Raw Data Utilized by the Friend of the Court

The trial court in this matter ordered Appellant to a psychological evaluation by a Friend of Court Psychologist. While the psychological report of the psychologist was made available to the parties, the raw data that supported the findings in the report was not made available to the parties. When Appellant objected and sought discovery of the data under MCR 3.218, the trial court denied that request without explanation. When Appellant’s counsel sought to glean information concerning the raw data upon cross-examination at the time of the hearing, the trial court denied Appellant from asking such questions. The Court of Appeals, while agreeing that the refusal of the trial court to produce the raw data was an error, yet again determined that the error was harmless. Slip op at 12-13.

The Friend of Court is bound by court rule to provide access to non-confidential records to a party and attorney of record. MCR 3.218(B). However, the Court of Appeals

permitted the trial court to eschew the court rules in this case. Prior to, and at the time of, the evidentiary hearing in this matter, there was no way for Appellant to know how much weight the trial court might assign to her psychological evaluation, but it was quite clear that Appellant's mental health was a dispositive issue.

MCR 3.218(A)(3) defines "confidential information" as including "any information for which a privilege could be claimed" MCR 3.218(A)(3)(g). Although a privilege could be asserted over medical records, privilege cannot be asserted where a party has placed the subject matter of the privilege at issue. Given the allegations in this case, the mental health of the parties was at issue in this custody dispute. Accordingly, once a party has placed his or her mental health at issue, anything related to that party's mental health is discoverable. This would include any information relied upon by the Friend of the Court in assessing that party's mental health. Accordingly, the privilege can no longer be asserted, and such information is no longer considered confidential under MCR 3.218.

Notions of fair play and logic eschew that the recommendations of a court-appointed professional were considered admissible, but that the evidence taken by that professional to support those opinions was not even considered discoverable by the trial court in this case. The same can be analogized to the Pre-Sentence Investigation Report (hereafter "PSI Report") provided in advance of sentencing hearings following a criminal plea agreement or guilty verdict. Importantly, it is presumed that in order to protect the due process rights of criminal defendants, the PSI Report must be provided to counsel at least two business days in advance of sentencing, unless the criminal defendant waives their right to the same. MCR 6.425(B). The PSI Report cannot simply state the sentencing score, but rather, must have lengthy contents, as detailed in MCR 6.425. The

PSI Report is prepared by the probation department, which, much like the Friend of Court, is an arm of the state that supports the judiciary.

Furthermore, although a criminal defendant no longer has a Constitutional right to confrontation at the time of a sentencing, due process requires that the criminal defendant may challenge any inaccurate information in the PSI Report. *People v Uphaus (on remand)*, 278 Mich App 174, 748 NW2d 899 (2008). Although the trial court may not take proofs on every challenge to facts within the PSI Report, it must respond to a challenge to the accuracy or relevancy of information in the report. *People v Hoyt*, 185 Mich App 531, 462 NW2d 793 (1990). This is far more consideration than the trial court gave Appellant in regard to her own data underpinning the professional report ordered by the court to assist it in consideration of stripping her of her constitutional right to the care, custody, and companionship of her children. Such a result is violative of due process and is certainly not harmless.

This Court should allow leave to clearly state that Appellant was denied access to key information relevant to her case, including social media account information and raw information gathered by and relied upon by the Friend of the Court, which inherently harmed her case.

III. The Lack of an Evidentiary Hearing Before Terminating Parenting Time Undermines the Child's Right to Preserve the Parent-Child Relationship

This Court should grant leave and determine whether a court may effectively terminate a parent's right to the care and custody, and even the contact, with their children and whether a periodic review, for which there is no statutory provision and no requirement for frequency or content, saves such a right from being impinged. The position of the Family Law Section is that such an order by a trial court undermines the

statutory framework of the Child Custody Act and its purpose, to preserve the parent-child relationship "except in the most compelling cases" (*Baker v Baker*, 411 Mich 567, 309 NW2d 532 (1981)), and denies parents due process they would receive in similar custody proceedings under different but comparable statutes.

MCL 722.27a requires that parenting time be granted in "accordance with the best interests of the child." It goes on to create a statutory presumption that it is in the child's best interest to have a strong relationship with both parents, and therefore, "parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote" that strong relationship only upon a showing by the highest civil standard, clear and convincing evidence, that parenting time "would endanger the child's physical, mental, or emotional health" should parenting time be suspended. However, the majority opinion of the Court of Appeals puts much stock in this, because a suspension under MCL 722.27a(3) is not permanent. It is not akin to a termination of parental rights under 712A.19b because, as the Court of Appeals held, such a termination is permanent whereas this suspension may be modified. The Court of Appeals recently addressed this issue in *Luna v Regnier*, 326 Mich App 173 (2018). In noting that the trial court should have included periodic reviews for the disenfranchised parent, however, they acknowledge that, "[w]ithout a mechanism for further review, defendant's parental rights are effectively nonexistent." *Id.* at 184. One problem, however, is that there are no provisions for the trial court to order and conduct these "reviews," other than continuing jurisdiction and a duty to act in the best interests of the children and, in fact, doing so runs contrary to other provisions and case law. There are no indications for how frequent the review period should be, nor the content nor form. In the present case, the burden to

initiate the review is even on the Appellant, the parent whose rights have been deprived. If she even succeeds in meeting the only statutory requirements the court can properly look to, as will be discussed *infra*, there is a built-in veto to the court's own decision the children may exercise.

Because one of the hallmarks of the Family Court is to maintain stability for the children under its jurisdiction, the court has, over time, developed the "thresholds" that a moving party must meet in order for it to consider a change in parenting time or custody. MCL 722.27(1)(c) requires "proper cause" or "change in circumstances" and various cases have interpreted the interplay between those situations and the "established custodial environment" of the children. See *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003); *Hunter v Hunter*, 484 Mich 247; 771 NW2d 694 (2009); *Unthank v Barnett*, 483 Mich 964; 763 NW2d 924 (2009); *Shade v Wright*, 291 Mich App 17; 805 NW2d 1 (2010). *Shade v Wright*, for example, would provide a lower hurdle for the Mother in the instant case because she might begin by seeking a change in just parenting time. But with no parenting time at all, the trial court could easily find that any addition of parenting time might change the children's established custodial environment. She could, therefore, be subject to the more exacting burden under *Vodvarka*. This framework is structured to provide the least amount of disruption to the children's custodial situation. Yet in this case, if the framework is properly adhered to, a parent may not disrupt the children's established custodial environment with her mere presence, according to the law.

There is also no provision for how frequent a trial court should schedule the purported "review hearing" nor what form they should take. Generally, the Family Courts

do not schedule additional hearings after a final decision has been made, and they are not required to do so even in a case where a parent's contact has been cut off completely. If, as the Court of Appeals has indicated, doing so would make this effective termination somehow less permanent, is one time per year sufficient? Every other year? Every month? If parental rights were suspended in the context of a guardianship of a minor, under MCL 700.5207, the court's responsibility to conduct a review hearing is indicated, and required annually when the child is under 6 years of age. Likewise, in an actual termination of parental rights under MCL 712A.19b, the court must conduct review hearings and their frequency and content are governed by MCR 3.978. Children, even those under 6 years of age, whose parents' rights are equally suspended under MCL 722.27, have no such guarantee at what frequency the trial court will ensure it continues to be in their best interest to have no contact with their parent.

In the case of either a guardianship of a minor or a termination, a parenting plan or reunification plan is put in place by the court or the agency to which it has delegated this power. A parent whose contact with their child has been severed under the Child Custody Act, usually upon request of a former spouse or partner, is not required to be given a plan or benchmarks, which, if met, the trial court would consider lifting the restrictions. Because of the previously discussed nebulousness surrounding the concept of a review hearing under the Child Custody Act, the lack of definite goals can make it impossible for a parent to re-establish parenting time once it has been severed. Child custody proceedings rarely result in a court order neatly laying out the findings upon which the court has made its custody determinations. A parent is left to combat the allegations made by the other parent, which they likely disagreed with, and may have limited power

to address without having actual contact with their children. Trial courts, presently, are not required to create a plan under which a disenfranchised parent might be reunited with their children. Arguably, doing so in the context of a custody case is contrary to the statutory framework discussed *supra*.

The Family Law Section's position is that the ruling of the Court of Appeals in this case puts oil on an already slippery slope. The Court of Appeals had already recognized in *Luna* that a parent whose contact with their children was suspended was "effectively terminated" without review hearings, but the present case puts inappropriate faith in these extra-statutorial hearings, for which there is no structure and the concept of which grates against the spirit of the Child Custody Act to preserve stability and continuity for children. This Court should examine the reasoning and find that an order terminating a parent's contact with their children under the Child Custody Act is equivalent to an order terminating a parent's contact with their children under a child welfare proceeding. This Court should clarify that due process requires periodic review hearings in all situations where the right to parent-child has been severed.

CONCLUSION

In summary, it is a violation of basic due process of law, as well as of long-standing case law, to issue a decision without taking evidence as the basis of the decision. This fundamental rule is even more crucial in child custody cases, where the Legislature has made stability the paramount touchstone of the Child Custody Act, and has prohibited changes of custody orders except in the most compelling circumstances. The increasing tendency of some trial courts to issue orders changing custody without first taking

evidence is a trend that must be stopped, which apparently will only happen by a strong ruling from this Court emphasizing the requirement of receiving evidence before issuing orders, and mandating that, upon an emergency appeal, the Court of Appeals quickly vacate any orders entered without evidence. When there is a complete absence of taking any evidence, that error alone should justify immediate review and reversal by the appellate court. When error upon error are compiled atop one another, the aggregate of those errors warrants reversal, even if each individual error taken alone could potentially be viewed as harmless. This is especially true when addressing a fundamental right such as the right of a parent and child to have contact with one another.

The errors in this case preceded the trial court's ultimate decision to strip Appellant-Mother of legal and physical custody and parenting time with the children. Although there is a lengthy record here and lengthy facts to be considered by the Court, that is the only fact that is of primary concern to the Family Law Section. We implore this Court to look at this case, not because of, but in spite of the highly specific fact pattern, because the illegitimate procedures employed by the trial court in this case are *not unique*. Had the experience of this particular litigant been unique, the Family Law Section would not have taken up the request to support this petition, due to the fact specific nature of the case. Instead, the Family Law Section voted to support the Application to this Court to highlight a problem faced by litigants in the Family Courts of this State which is pervasive yet nearly impossible to track, i.e., Family Court judges *routinely* make ex parte decisions that block parents from custody of or parenting time with their children, despite clear and numerous appellate decisions identifying this as clear legal error.

Given the fundamental importance and constitutional rights inherent in the parent-child relationship, this Court should not allow a parent's right to contact a child to be deprived without an expeditious review process.

REQUESTED RELIEF

The Family Law Section requests that this Court grant leave to consider the arguments detailed herein and ultimately issue an opinion which holds that custody cannot be changed absent an evidentiary hearing, with both parties having the right the full evidence available to the trier of fact.

Respectfully Submitted,

/s/ Judith A. Curtis

/s/ Gail M. Towne

/s/ Rachel Gruetzner

/s/ Kristen Wolfram

/s/ Melissa Kelleigh

Dated: July 24, 2020

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ATTACHMENT A

Common Trial Court Errors in Child Custody and Visitation Cases

By Scott Bassett

Custody and visitation disputes are among the most difficult cases for a circuit judge to decide. Although we have statutory standards for both types of disputes, those standards necessarily leave much room for judicial discretion. That discretion is not, however, unlimited. There are certain rules a circuit judge must follow in ruling upon any custody or visitation matter. When these rules are broken, the errors tend to fall into a few major categories.

This article will examine the most common trial court errors in custody and visitation cases, and thereby help both judge and attorney prevent them. Prevention of error at the trial court level is especially crucial in these cases since an appeal can take a year or more. The impact on a child of reversal after that span of time can be devastating.

FAILURE TO HOLD AN EVIDENTIARY HEARING BEFORE DETERMINING OR MODIFYING CUSTODY OR VISITATION

Michigan law is unequivocal on the basic principles for determining and

modifying child custody and visitation orders. Custody and visitation cannot be decided or modified, absent an agreement of the parties, unless the court first holds an evidentiary hearing. *Stringer v Vincent*, 161 Mich App 429, 411 NW2d 474 (1987); *Adams v Adams*, 100 Mich App 1, 298 NW2d 871 (1980); *Pluta v Pluta*, 165 Mich App 55, 418 NW2d 400 (1979). It is not enough, absent agreement of the parties, for the court to rely on testimony from a hearing before a Friend of the Court referee. *Crampton v Crampton*, 178 Mich App 362, 443 NW2d 419 (1989); *Truitt v Truitt*, 172 Mich App 38, 431 NW2d 454 (1988). The court must hold its own evidentiary hearing.

Recently the Court of Appeals has exhibited a willingness to act quickly in reversing modifications of custody and visitation ordered absent a full evidentiary hearing. Because these reversals were by order of the court upon motions for peremptory reversal under MCR 7.211(C)(4), we do not have a series of published opinions making clear the court's willingness to correct this error on a peremptory basis.

It is unfortunate that such orders are not published for the benefit of the bench and bar. Peremptory reversal or-

ders were recently entered in *Fessler v Fessler*, Docket No. 115195, decided March 22, 1989; *Porteny (Sobel) v Sobel*, Docket No. 111968, decided January 31, 1989; and *Sanborn v Thompson (Sanborn)*, Docket No. 109375, decided July 8, 1988. The text of the *Sobel* order is illustrative of the court's reasoning in these cases and is reprinted as an appendix to this article.

FAILURE TO CONSIDER AND SEPARATELY STATE A CONCLUSION AS TO EACH OF THE FACTORS IN SECTION 3 OF THE CHILD CUSTODY ACT

Before determining or modifying a child custody order, the circuit court must evaluate and state a conclusion as to each factor in MCL 722.23, thereby determining the best interests of the child. *MCR 2.517(A)*; *Bednarski v Bednarski*, 141 Mich App 15, 366 NW2d 69 (1985); *Arndt v Kasem*, 135 Mich App 252, 353 NW2d 497 (1984); *Petrey v Petrey*, 127 Mich App 577, 229 NW2d 266 (1983); *Williamson v Williamson*, 122 Mich App 667, 336 NW2d 6 (1982); *Wolfe v Howatt*, 119 Mich App 109, 326 NW2d 442 (1988). Failure of the court to make specific findings and conclusions on each factor is reversible error. *Daniels v Daniels*, 165

Mich App 726, 418 NW2d 924 (1988); *Currey v Currey*, 109 Mich App 111, 310 NW2d 913 (1981); *Lewis v Lewis*, 73 Mich 563, 252 NW2d 237 (1977); *Zawisa v Zawisa*, 61 Mich App 1, 232 NW2d 275 (1975); and *Parrott v Parrott*, 53 Mich App 629, 220 NW2d 176 (1974).

Despite the abundant case law mandating findings of fact and conclusions of law on each of the "best interests" factors of the Child Custody Act, a court will occasionally violate this requirement. Clearly, if the court has failed to conduct an evidentiary hearing there will be no evidence from which findings and conclusions can be made. More than a decade ago, the Court of Appeals was obviously distressed by the number of cases it was forced to remand due to violation of this rule:

Numerous cases involving child custody have been remanded by this Court because of inadequate findings of fact on the trial record.

We are unable to discern why such action should be so frequently necessary. The Child Custody Act of 1970 has been in effect since 1971 and provides a checklist of required factual findings to be made by the trial court. Observance of the statute is required. Barnes v Barnes, 77 Mich App 112, 258 NW2d 65, at 66 (1977).

Now, 13 years after the Court of Appeals expressed its frustration in *Barnes*, we can hope that this error is not so frequently committed.

FAILURE TO DETERMINE THE EXISTENCE OF AN ESTABLISHED CUSTODIAL ENVIRONMENT

The failure of the circuit court to determine whether or not the child's custodial environment has become established with the current custodian constitutes reversible error. *Stringer, supra*; *Arndt, supra*. It is not enough for the court to base this determination upon either a stipulation of the par-

The failure of the circuit court to determine whether or not the child's custodial environment has become established with the current custodian constitutes reversible error.

ties or by reference to a custody order. *Wilson v Gauck*, 167 Mich App 90, 421 NW2d 582 (1988); *Wealton v Wealton*, 120 Mich App 406, 327 NW2d 483 (1982).

Whether or not an established custodial environment exists is a question of fact to be determined by reference to the statute, which states that such an environment becomes established "if over an appreciable time the child naturally looks to the custodian



in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). It does not matter if that environment was created with a court order, without a court order, in violation of a court order, or pursuant to a court order later reversed on appeal. *Blaskowski v Blaskowski*, 115 Mich App 10, 320 NW2d 268 (1982). An established custodial environment may even exist in the homes of both parents by virtue of a joint physical custody arrangement. *Duperon v Duperon*, 175 Mich App 61, 437 NW2d 296 (1989).

FAILURE TO DETERMINE THE PROPER BURDEN OF PROOF

Where no established custodial environment exists, the proper burden of proof is a preponderance of the evidence. *VanderMolen v VanderMolen*, 164 Mich App 448, 418 NW2d 108 (1987); *Hoke v Hoke*, 162 Mich App 201, 412 NW2d 694 (1987). However, if it has been determined that an established custodial environment exists, the party requesting that the environment be disrupted must carry a clear and convincing evidence burden. *Sedlar v Sedlar*, 165 Mich App 71, 419 NW2d 18 (1987); *Schwiesow v Schwiesow*, 159 Mich App 548, 406 NW2d 878 (1987); *Bednarski, supra*; *Adams, supra*; *Hilbert v Hilbert*, 57 Mich App 247, 225 NW2d 697 (1974). Where a party is attempting to disrupt an established joint physical custody environment, the burden is also clear and convincing evidence. *Nielsen v Nielsen*, 163 Mich App 430, 415 NW2d 6 (1987); *Duperon, supra*.

STRICTLY ENFORCING A STIPULATION AS TO CUSTODY WITHOUT INDEPENDENTLY DETERMINING THE CHILD'S BEST INTERESTS

Although it is generally true that courts should uphold stipulations by the parties, a parent may not bargain

away a child's rights by agreement with a former spouse. *Sayre v Sayre*, 129 Mich App 249, 341 NW2d 491 (1983) (agreement as to child support not binding). In *Napora v Napora*, 159 Mich App 251, 406 NW2d 201 (1986), the Court of Appeals reversed a circuit court order which bound the parties to a stipulation on the issue of custody. The Court of Appeals held:

Despite any agreement which the parties may reach in regard to the custody of their child, where a custodial environment is found to exist, physical custody should not be changed absent clear and convincing evidence that the change is in the best interests of the child. [Citations omitted.] Accordingly, we find it necessary to remand to the trial court for consideration of whether an established custodial environment exists and, if so, whether changing custody would be in the best interests of [the child] as that term is defined by MCL 722.23; MSA 25.312(3). Id., at 406 NW2d 199. See also Moser v Moser, 130 Mich App 97, 343 NW2d 248 (1983).

In *Schwiesow, supra*, the Court of Appeals reversed a circuit judge's refusal to find an established custodial environment with the father after the parties stipulated that the father would retain physical custody for a fixed period of time, then transfer custody to the mother. As stated in *Schwiesow*:

Our concern is not with the reasons behind the custodial environment, but with the existence of such an environment.

Unless the trial court is presented with clear and convincing evidence to warrant a contrary finding, the court shall enter a custody order after the hearing on remand in favor of preserving the established custodial environment. Id., at 406 NW2d 881-882.

It should be acknowledged that there is a line of cases suggesting that a custody agreement between the parties should be dispositive. These cases generally deal with the situation where

Often this violation occurs in response to allegations of child sexual abuse made by the custodial parent against the non-custodial parent.

a party voluntarily surrenders custody in the best interests of the child, then, after a period of time, requests that custody be restored to him/her. See *Pluta, supra*; *Theroux v Doerr*, 137 Mich App 147, 357 NW2d 327 (1984); *Speers v Speers*, 108 Mich App 543, 310 NW2d 455 (1981); *Dowd v Dowd*, 97 Mich App 276, 293 NW2d 797 (1980); and *Miller v Miller*, 23 Mich App 430, 178 NW2d 822 (1970). However, these cases appear to run afoul of the clear public policy adopted by the Michigan Legislature in enacting MCL 722.27(1)(C). As stated in *Lyons v Lyons*, 125 Mich App 626, 336 NW2d 844 at 847 (1983):

In adopting the Child Custody Act, the Legislature intended to minimize the prospect of unwarranted and disruptive changes of custody and, therefore, erected a barrier against removal of children from an established custodial environment, except in the most compelling cases.

FAILURE TO COMPLY WITH THE 21-DAY AUTOMATIC STAY

Absent a specific exception provided by statute or court rule, no court order or judgment, including one which determines or modifies custody or visitation, may be enforced until the expiration of 21 days after its entry. MCR 2.614(A)(1). MCR 2.614(A)(2)(e) provides that temporary orders in domestic relations actions are exempt from the 21-day automatic stay. However, there is no exemption, by either court rule or statute, for custody or visitation orders included in

divorce judgments or post-judgment modification orders. As stated in a widely-used text on the Michigan Court Rules:

Counsel is asked to note that the rule only exempts interim orders of the court from its provisions. A permanent child support, child custody, or alimony order is subject to the automatic stay provisions. Martin, Dean & Webster, Michigan Court Rules Practice, West, 3rd Edition, 1986, page 639, note 2.

In *Lyons, supra*, the Court of Appeals made it clear that the automatic stay provisions of GCR 1963, 530.1 (now MCR 2.614) apply to orders modifying child custody. See also *Marshall v Beal*, 158 Mich App 582, 405 NW2d 101, at 105-6 (1986).

The existence of the automatic stay court rule is to provide some protection to parties and children from ill-advised or illegal custody and visitation modifications. During this 21-day period, the aggrieved party will have an opportunity to seek a stay order from either the trial court or the Court of Appeals, or to file motions for peremptory reversal and immediate consideration with the Court of Appeals. When the circuit court fails to abide by the 21-day automatic stay rule, it is effectively preempting any decision which might later be made by the Court of Appeals to reverse its order. This is not in the best interests of the child involved.

FAILURE TO COMPLY WITH VISITATION REQUIREMENTS

It may be a little unfair to cite this as one of the "most common" court errors since the statute has been in effect only since March 30, 1988. However, the pattern of judicial disregard for the visitation rights of the non-custodial parent is long established. MCL 722.27a(1) serves as a strong public policy statement favoring maximized visitation between the child and the non-custodial parent:

Visitation shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of the child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, visitation shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted visitation.

The statute then adopts a very child-oriented approach to the visitation question:

A child shall have a right to visitation with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health. MCL 722.27a(3).

It is subsection 3, above, that is most often violated by our circuit judges. Visitation is often restricted, or suspended entirely, without the required evidentiary hearing and a showing on the record by clear and convincing evidence of harm to the child. Most family law practitioners have witnessed many occasions where a non-custodial parent's visitation rights have been modified, restricted, or suspended at a motion hearing, merely upon argument from the custodial parent's attorney, without taking any testimony whatsoever or placing the required evidentiary burden on the custodial parent. Often this violation occurs in response to allegations of child sexual abuse made by the custodial parent against the non-custodial parent. Those allegations should always be taken seriously, but the law of this state makes it clear that it is the custodial parent's burden to prove those allegations by clear and convincing evidence before visitation can be suspended.

What of emergency situations? Since the circuit court is not very well equipped to deal with such emergencies, and because jurisdiction over child abuse and neglect properly rests

with the juvenile division of probate court, which is geared to handle emergencies, these types of issues should best be left out of circuit court proceedings until the juvenile division proceedings have reached adjudication. If the juvenile court determines that it has jurisdiction and that contact between the parent and child should be restricted, that order will supersede the circuit court's visitation or custody order until the juvenile case is dismissed. MCL 712A.2; *Matter of Brown*, 171 Mich App 674, 430 NW2d 746 (1988).

In listing these common errors, it is not my intent to offend the judiciary, but to help both bench and bar avoid some of these common and obvious errors which detrimentally affect the children of divorce. From my own practice, I know that dozens of children could have been spared the agony of disruption of their established custodial environment if only there were more strict adherence to the rule that evidentiary hearings be held before deciding or modifying custody. Violation of many of the other rules cited above also results in considerable trauma to the children involved. Together, the bench and bar can help prevent these errors and, hopefully, spare the Court of Appeals the difficult task of reversing a trial court's custody or visitation determination. ■



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ATTACHMENT B



WE NEED MORE TOOLS IN OUR TOOLBOX

by Hon. Lisa Langton
Sixth Circuit Court, Family Division

As I sat in my courtroom one Wednesday morning and watched as a case before me went from bad to worse, I realized that what I was witnessing was not an isolated incident. I'm one of many judges who sit and watch as children on contentious domestic cases spiral downward with little hope of relief. We desperately need another tool in our judicial toolbox when it comes to the complicated, important and emotionally draining issues surrounding changes of custody – the ability to remove a child from one homelife environment and place them in another.

Those of you who practice in this area know that once a judgment is entered, a trial judge cannot make a temporary change in custody without first conducting a hearing. I support the current statute that requires these hearings. They allow a measured approach to resolve emotional and impactful issues through fair, mindful and meaningful hearings. They also assure that we minimize unwarranted and disruptive changes of custody.

However, there are many post-judgment matters that scream for a temporary order – where there is clearly a level of distress and dysfunction that demands our attention. Sadly, too many judges have witnessed these types of cases and have been frustrated by our lack of ability to relieve the pain and angst of these children and their families. Courts do have the *limited* ability to grant *ex parte* temporary orders for immediate change of custody where there is a clear finding of “irreparable injury, loss, or damage.” However, those circumstances are rare and case law suggests that even temporary orders should only be for a “few days” or until the immediate issue can be resolved. That, in my opinion, is not much of a solution.

A real solution would give judges, in limited circumstances, the ability to issue a temporary custody order where the best interest of the child demands it.

I am suggesting that much like an emergency *ex parte* order, before entry of a temporary order (and after the req-

uisite findings of change of circumstance or proper cause), the judge would be required to specify the reasons for issuing the temporary order and would further be required to base it on affidavits and/or verified pleadings, and even elicit testimony on a limited basis where possible. There might even be the need to agree that under these limited circumstances, the court can take the issuance of the temporary court order into consideration with respect to the required analysis regarding established custodial environments. That would ensure there would be no prejudice to the former custodial parent.

At the very least, the court needs the discretion to enter a temporary order to remove children from an emotionally harmful or destructive custodial environment **before** the situation escalates to one where “irreparable injury, loss or damage” occurs. These cases scream for respite on behalf of the children and time IS of the essence.

Currently, when judges identify these cases, we have two options: We can set a hearing date as soon as our docket permits, while these children remain in their difficult situation. In a perfect world we should be able to conduct these hearings within a few weeks or perhaps a month. Unfortunately, given the number of other cases on our dockets, this is rarely possible. In the meantime, these children's lives, along with their mental and emotional well-being, are put on hold. It's a shameful situation that should not be tolerated.

The second choice is not much better. We can conduct a hearing either on a motion call day or within a few days, while recognizing that the parties won't have adequate time to prepare or have the benefit of presenting all witnesses, records, experts or the extensive testimony necessary to allow us to make a thoughtful and meaningful decision. This quick turnaround might allow us to make perfunctory findings that “satisfy” the statute, but is this how we want our courts to make these delicate and compelling decisions? Of course not! We must and can do better.

(continued on page 37)



Hon. Fred M. Mester (Ret.) has been recognized by Honor Community Health for advancing the success of the organization by using his network and knowledge of the Pontiac community to restructure HCH's board when the organization was struggling to fulfill its mission. Since that restructuring, HCH has expanded rapidly, raising nearly \$6 million in federal, state and local funding, which has enabled HCH to grow from a single health center serving 4,000 patients to 11 health centers serving 30,000 patients.



Kemp Klein Law Firm is pleased to welcome **George W. Gregory** to the firm as a shareholder. Mr. Gregory brings more than 30 years experience in the areas of estate planning, tax and business law to the firm. Prior to practicing law, Mr. Gregory was a revenue agent with the IRS. He is a certified public accountant, and has taught tax courses at both the undergraduate and graduate level at Wayne State University School of Business Administration, from where Mr. Gregory earned his MBA himself.



Beth S. Gotthelf of **Butzel Long** received an honorary doctorate in humanities from her alma mater, Oakland University, during a recent commencement ceremony. Ms. Gotthelf is Butzel Long's Director of Innovation and External Relations, and she has enjoyed many successes in connecting companies to create business opportunities and helping her clients reach their business goals.



Secrest Wardle is pleased to announce that **Javon L. Williams** has been promoted to the position of executive partner. He is a member of the firm's General Negligence, Motor Vehicle Litigation and Premises Liability practice groups. Mr. Williams has been with the firm since 2009, and has been named to the list of Michigan Rising Stars in *Super Lawyers* magazine since 2013.



Secrest Wardle is pleased to announce the promotion of **Renee T. Townsend** to the position of executive partner. Ms. Townsend practices in amusement and leisure, general negligence, insurance coverage, first and third party motor vehicle litigation and premises liability. She serves as chair of the firm's Motor Vehicle Litigation practice group, and was recognized by *Super Lawyers* in 2018.

Adkison, Need, Allen & Rentrop, PLLC proudly announces that **Katherine A. Tomasik** has joined the firm as Of Counsel and will be a member of the firm's litigation and municipal practice groups. Ms. Tomasik has extensive litigation and transactional experience in the areas of real estate, mortgage banking, foreclosures, evictions, insurance defense, title insurance, taxes, small business, and commercial matters. She is licensed to practice in Michigan, the U.S. District Court of both the Eastern and Western districts of Michigan, and the Saginaw Chippewa Tribal Court.

IN THE CIRCUIT

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If we truly care about the best interests of our children, we absolutely need a measured approach that allows the court to issue a temporary order, set a hearing and allow the parties a reasonable amount of time to prepare and provide the court with the sort of meaningful assistance the court needs to make difficult decisions. To deny this ability to exacerbate the already unfortunate circumstance in which these children find themselves.

The Family Division in the state of Michigan was created, in great part, to provide families and children with experts and judges who gain knowledge of their cases and come experts in the area of family law. After all, we are ones who see these cases week after week, month after month. In just about every instance, we are in the best position to gauge the temperature of the case and assess the needs of the children. That's our job, and it's a job we take seriously. Based on our training and background, we are often in the best position to assume the responsibility

of protecting these children when their parents are unable or unwilling to recognize the destructive path they're on. I recognize that judges aren't perfect. We make mistakes. But there are built-in checks and balances to guide our hand as we strive to improve.

Knowing this, when we see an area of our practice that falls short or does not allow us to adequately protect families or children, we must take appropriate measures to remedy it.

That's why, with the support of my colleagues on the Family Division bench, I'm establishing a task force – a collection of dedicated of attorneys – to lead the charge to improve our local practice and champion these issues of statewide importance. Ours will be that clarion call.

If you are an attorney who is interested in being part of the solution, please contact my chambers at 248-858-1704. Help us get more tools in our toolbox that will allow our kids to have more of a voice.

STATE OF MICHIGAN

MI Supreme Court

Proof of Service**Case Title:**

THOMAS J O'BRIEN JR V ANN MARIE D'ANNUNZIO

Case Number:

161335

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