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Editor’s Note—Spring 2007

This issue of the Michigan Child Welfare Law Journal focuses on practice in child protection cases. Many child welfare practitioners consider this field of practice the most important area of practice with children because of the focus on children’s immediate safety and well being.

The articles in this issue cover a variety of topics. In “Permanency Planning Mediation Pilot Program: The Michigan Experience” (Eaton, Whalen, and Anderson), the authors present the results of a study evaluating the use of mediation to resolve child protection cases in Michigan. The authors make a number of key findings and reach a number of interesting conclusions regarding the implementation of this pilot program.

In “When the Rules Shift: A Review of the Indian Child Welfare Act, MCR 2.615 and Tribal Court Jurisdiction in Michigan Family Law Cases” (Fort) the author reviews the relevance of ICWA and related law to practice in this field. ICWA is a complex statute with important implications for practice in this field and this article clarifies a number of key statutory provisions.

In “Identifying and Reporting Child Abuse and Neglect” Dr. Vincent J. Palusci, MD, MS, Medical Director of the Child Protection Center at Children's Hospital of Michigan, presents detailed information regarding the specific medical signs of abuse and neglect.

In “Relative Placement In Abuse Cases, Or Maybe Not: An Analysis of MCL 712A.13a(5) of the Juvenile Code” (Scott), the author describes the use of relative placements as an alternative to placing a child in foster care. The author stresses the importance of focusing on the child's needs when considering a relative placement.

Following this article is a description of the Kinship Care Resource Center. This center serves as a resource center for the many families in Michigan currently providing kinship care to children removed from their parents. Anyone working with families providing kinship care should be aware of this center’s existence.

In “Lost And Alone On Some Forgotten Highway: ASFA, Binsfeld, and the Law of Unintended Consequences” (Tacoma) the author discusses a variety of consequences of the Binsfeld legislation. Judge Tacoma argues that the Binsfeld legislation requires certain actions that may not always be in the children’s best interest. This article has served as an impetus to new legislation being considered by the legislature to address some of the circumstances Judge Tacoma describes.

In “The Road Goes on Forever And the Party Never Ends: A Response to Judge Tacoma's Prescription for a Return to Foster Care Limbo and Drift” (Vandervort), the author presents a counterpoint to some of the arguments Judge Tacoma makes, ensuring a healthy discussion of these complex issues.

I hope you find this issue interesting and useful. As always, the editorial board welcomes your feedback on this and future issues to ensure that The Child Welfare Law Journal is of value to you.
Message from the Chair

I’ll admit it. I have a legislative phobia. Put me in front of three to seven judges, and I’m a happy camper. But make me talk to legislators . . . well . . . I’d rather have a root canal.

I recently had the opportunity to meet United States Senator Debbie Stabenow (D. Michigan) at the celebration of 30 years of the University of Michigan’s Child Advocacy Law Clinic. Before her address, I foolishly told her of my phobia. I say foolishly because her address to those attending the dinner exhorted us to get involved with our legislators. She challenged us all to advocate our positions to our legislators. Needless to say, I wanted to crawl under the table.

This is why I’m so thankful for the Children’s Law Section’s Legislative Committee. Its members are not legislatively challenged. In fact, they enjoy advancing the section’s positions with the legislature. And they’re working hard at it.

Which brings me to the real point of this rambling. I’m issuing my own challenge: get involved in one of our section’s committees. We have an Education Committee, a Legislative Committee, and an Amicus Committee. Our Education Committee plans our annual training, the Legislative Committee evaluates proposed legislation on children’s issues, and the Amicus Committee writes amicus briefs in our appellate courts. From time to time, the council creates ad-hoc committees to explore current issues.

So if you have a flair for writing, a yearning to explore current legislation, or a teacher in you waiting to get out, contact the section council, and we’ll find a place for you.

Finally, if you have issues that need raising with the courts or with the legislature, let us know—you may find yourself chairing an ad-hoc committee.

Evelyn C. Tombers, Chair
State Bar of Michigan Children’s Law Section
Permanency Planning Mediation Pilot Program: The Michigan Experience

by Monaca Eaton, MSW; Peg Whalen, MSW, PhD; and Gary Anderson, MSW, PhD

Abstract

This article provides a retrospective look at the first three years of Michigan’s Permanency Planning Mediation Pilot (PPMP) Program (child protection mediation) in seven Michigan pilot program sites. Michigan’s federally funded Court Improvement Program supported the pilot program.

We conclude that mediation for child protection cases has been successfully implemented in Michigan. Reports on referrals to mediation from 19 courts throughout the state revealed 338 cases were decided between 1999 and 2001. Forty-nine of these cases were withdrawn or participants did not show up for scheduled mediations, resulting in 289 referred cases (85.5%) that ultimately were mediated. Pilot program sites still receiving funding for child protection mediation in 2004 served the 207 cases considered in this evaluation.

Introduction

In 1993, the United States Department of Health and Human Services funded initiatives in each state to support family preservation, child maltreatment prevention, and services to families at risk of maltreatment and subsequent out-of-home placements of children. This federal initiative, called the Court Improvement Program (CIP), was reauthorized in 1997 as part of the Adoption and Safe Families Act (ASFA). The Court Improvement Program in Michigan is administered by the State Court Administrative Office (SCAO). Based on an assessment of Michigan’s laws, policies, and procedures affecting timely and effective case decisions, a number of recommendations were made for improvement. These recommendations included strengthening Michigan’s legal and service response to child maltreatment. Based on initial assessment and on information later acquired about best practices in child welfare, the Michigan CIP initiated the Permanency Planning Mediation Pilot Program.

The statewide assessment recommended that mediation be implemented at various points in time in child protection proceedings. Mediation is defined as the process in which a neutral third party facilitates communication between two or more contending parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable agreement. Mediation was identified as potentially helpful at many stages, including pre-adjudication, post-adjudication, permanency planning, and post-termination.

In 1998, Michigan project pilot sites were embedded in SCAO-supported local Community Dispute Resolution Program Centers. The PPMP pilot was introduced through 11 CDRP centers serving courts in 1998.

This article examines the experience of seven sites covering over 14 counties. The PPMP pilot sites offered mediation services to families and agencies before contested hearings, to negotiate case plans, to resolve a range of case difficulties, and to address permanency concerns.

Permanency Planning and Mediation Goals

Permanency planning mediation in Michigan involved the intervention of two highly trained and supervised volunteer mediators to assist families and the child protection/welfare system (child protective caseworkers, agency attorneys, and prosecuting attorneys) reach a mutually acceptable agreement designed to ensure the child’s safety and promote permanency for children.

Permanency planning is the “systematic process of carrying out, within a limited period, a set of goal-directed activities designed to help children and youths live in families that offer continuity of relationships with nurturing parents or caretakers, and the oppor-
tunity to offer lifetime relationships.” (Maluccio and Fein, 1983, p. 197). Permanency-planning mediation was designed to identify, carry out, and expedite achieving case goals that would result in a safe, permanent home for children in a timely manner. Goals included the safe preservation of the family unit (if possible), timely reunification with one’s parents, guardianship with alternative caregivers such as relatives, or termination of parental rights followed by a timely adoption. These goals of permanency planning were delineated at the federal level in the Adoption Assistance and Child Welfare Act of 1980.

Mediation is intended to provide benefits for the children, the family, the child welfare agency, attorneys, and the court. These advantages include providing opportunities to understand and meet the family's needs in a timely manner, to reduce unproductive time in court, to increase opportunities for full participation by all parties, and to reduce the amount and extent of adversarial litigation. The goals of the mediation process are to assist all parties to reach a settlement that:
- is informed, timely and dignified;
- is consistent with public policy;
- is judicially acceptable;
- ensures the safety and well-being of children; and
- maximizes the family's integrity and functioning.

The best interests of children are the primary consideration of the mediation process and outcome.

**Permanency Planning Mediation Procedure**

In broad terms, the stages of permanency planning mediation include:
- Referral to permanency planning mediation by a judge/referee or other stakeholder, such as a case worker, attorney, or family member;
- Preparation for the mediation session, including reviewing selected court documents, identifying and inviting relevant family members and professionals, analyzing the case, and reviewing for domestic violence issues. This preparation for the mediation session includes contacting relevant parties, and through an intake process with family members, providing information about the nature and process of mediation;
- Mediators meeting with professionals and family members to inform about mediation, to promote expression of viewpoints and listening to each other, to help parties to feel understood, to encourage positive relationships, and to address settlement details; and
- Mediation program follow-up on compliance with mediation agreement within 60 to 90 days after mediation session.

Each dispute resolution center or PPMP pilot site followed similar procedures. Referrals to mediation came from the court (58%), other stakeholders (16%), child protective agencies (13%), family or prosecuting attorneys (8%), GALs (4%), or the family (1%). PPMP pilot procedures included a pre-mediation intake process to gather information, inform participants about the process, determine who should attend the mediation, clarify questions or concerns, and screen for domestic violence. Mediation participants included family members, child protective service or other appropriate child welfare agency staff, relevant attorneys (including prosecutors), and other stakeholders identified at intake as having a significant interest in the case.

Mediation sessions were typically facilitated by two mediators who were most frequently volunteers. Mediators were recruited and extensively trained for permanency planning mediation by the dispute resolution centers. On occasion, a paid staff member of a dispute resolution center would serve as a mediator. The result of a mediation session was a written agreement of activities or assistance to be implemented by the family and/or other designated participants to ensure the safety, well-being, and permanency of the child or children.

**Evaluation Context: A Review of What Was Known About Permanency Planning Mediation**

Although a few states had begun mediation projects, Michigan was one of the pioneers in permanency planning mediation. When PPMP pilot began in Michigan in 1998, it was a relatively new practice. There was, and continues to be, limited professional literature describing mediation in child protection proceedings. What follows is a review of the literature regarding mediation in child protection cases. The review identifies several experiences with mediation that informed Michigan’s program, as well as some common themes in mediation. This should place this
Michigan evaluation in the context of other studies and advance knowledge about this unique mediation strategy.

As mediation is a relatively new approach in child protection cases, much of the professional literature describes programs (Firestone 1997, Giovannucci 1997, Giovannucci 1999, Thoennes 1991, Thoennes 1994), the role of mediators and participants (Baron 1997), and identifies issues and controversies in mediation (Leonard and Baron 1995, Thoennes 1991). Relatively few formal evaluations exist, with the primary ones in Connecticut, California, Colorado, Iowa, Ohio, Oregon, and Wisconsin, as noted above (Thoennes 1995, Barsky 1997).

The literature does address a number of themes in addition to site-specific programs.

The Value of Mediation
In an in-depth analysis, Allan Barsky reported a study of five child protection cases in which participants were interviewed, and suggested that mediation has an empowering effect on family members because the participants develop options, have an equal opportunity to participate in the process, are responsible for the decisions made, and power is balanced. (Barsky 1996).

Choosing to Use Mediation
Noting that utilization rates for mediation services remained below expectations, one study investigated why clients chose to participate in mediation. This study, based in a Toronto, Ontario, Canada mediation center, examined five cases; study investigators interviewed sixteen individuals involved in the mediation cases (five Children’s Protective Services (CPS) workers, four mothers, one father, one uncle, and five mediators). The study found that family members preferred to avoid court and that CPS workers preferred to work collaboratively with the family. CPS workers and family members had different perspectives and different concerns, with family members worried about how well the arrangements met their needs and CPS workers concerned about whether an agreement met the best interests of the involved children. (Barsky 1997).

Description and Qualifications of Mediators
Based on interviews with child protection workers, mediators, parents, and other family members who participated in mediation, Barsky reported that mediation required a broad range of facilitation and problem solving skills, careful attention to maintaining a neutral position, and the ability to develop a constructive alliance with all parties. (Barsky 1998).

Point of Mediation
Across programs, practices differed from state to state and sometimes from court to court as to when a child protective case was appropriate for mediation with regard to timing in the court process. For example, in the study of three California counties, only one county (Los Angeles) negotiated the wording of petitions in mediation. (Thoennes 1991). Some programs almost exclusively negotiated voluntary termination of parental rights and open adoption arrangements (Oregon, Etter, 1993, 1998) or primarily focused on these areas of service (Idaho, Washington). Other programs focused on a full continuum of intervention points (Connecticut). Some projects built in a diversion goal for their mediation projects (Iowa).

Fashioning Agreements in Mediation
Across studies, relatively high agreement rates are reported, with Thoennes and Pearson reporting over 70% of the cases coming to partial and complete agreements in five California counties. In her study of three California counties, Thoennes found that 600 of 800 cases were settled in mediation (75%). In Florida, 86% of cases resulted in agreements (Schultz, Press and Mann 1996).

Parental Compliance
One Colorado doctoral dissertation, looking at the impact of mediation on parent compliance, selected 39 cases. Twenty-two cases were assigned to the experimental group and assigned mediation. Seventeen cases were in the comparison group. Parents were given a 17-statement questionnaire. Parents who were offered mediation felt less coerced and felt a greater commitment to the value of the intervention for them and their children. Mediation did not affect compliance patterns. Mediation did result in a decrease in parental alienation toward protective services intervention (Mayer 1988). In a Center for Dispute Resolution project in Colorado, in reviewing 187 child protection cases, at six months, 75% of cases were in full compliance with mediated agreements.
A review of the literature demonstrates that the application of mediation to child protection cases is still a relatively new strategy. Apart from Connecticut and California, most programs have been introduced on a modest scale. Benefits of mediation are often described in terms of participant satisfaction, high parental compliance with agreements, and cost savings for courts. The reduction of time to permanency is less frequently examined and oftentimes altogether missing. This may be due to multiple challenges, including the inability to follow cases for a number of years. Primary exceptions are the Oregon cases that negotiate voluntary relinquishments and open adoptions in cases in which the child is already in a pre-adoptive or long-term foster care home.

Programs across the United States and Canada share many similarities with Michigan’s program model, including stages of the process; use of mediation over the continuum of court timelines; and positive findings with regard to participant satisfaction, agreement, and compliance rates. There are also some significant differences. Michigan uses primarily volunteer mediators; most other programs have paid professional mediators. In addition, Michigan uses two mediators per session and aims to have all parties in the room at the same time (as opposed to shuttle mediation). The number of cases examined in the Michigan study places it among the highest number of cases examined in child protection mediation.

Methodology

Michigan’s PPMP program evaluation used a descriptive research design. The evaluation was a retrospective, longitudinal investigation, including both process and outcome measures. The formative aspects of the PPMP pilot were assessed through interviews with PPMP pilot coordinators or the dispute resolution center directors regarding the introduction of child protection mediation in affiliated communities. Evaluation interviews revealed community-specific experiences around the establishment of PPMP pilot as an additional component of community child welfare systems and court intervention. Assessment of relationships among community child welfare stakeholders—i.e., courts, prosecutor offices, public child welfare systems, attorneys, and community dispute resolution centers—provided a description of the current nature of local child welfare systems.

Evaluation Strengths and Limitations

This study has a number of strengths. A relatively high number of mediated cases were included in the evaluation. This sample size reduces the likelihood that a few cases could significantly bias the findings reported in this study. The breadth of the study enhances the reliability and generalizability of the information gained (seven pilot sites across the state in rural and urban communities). The use of multiple data sources and multiple perspectives provide rich, detailed descriptions that craft a coherent and consistent picture of the program in Michigan. Finally, the level of detail on each case provides useful process information for program improvement and replication.

A variety of limitations also exist. The study design addresses some of these concerns. Portions of the data—such as participant ratings of the mediation session—are self-reported and consequently are
subject to the traditional concerns about this method of data collection. For example, obtaining information immediately following the mediation reduces distortions due to memory; and the risk of providing socially acceptable, positive answers is reduced due to the anonymity of the participant forms. The nature of the findings demonstrates variability in responses so that it seems less likely that participants were thoughtlessly providing feedback. Multiple data sources, both quantitative and qualitative, provide some consistency and congruence. There is some risk that participants might provide a different assessment of mediation at later dates. But the nature of a later revised assessment (positive or negative) cannot be determined. The possibility of subsequent opinion change must be weighed against the opportunity to get a higher response rate from participants.

This evaluation does not contain a control group or experimental design. This aspect of the evaluation design reduces the ability to make definitive statements about the effectiveness of mediation as opposed to other forms of intervention. It is possible to describe mediation, and the findings are significantly positive, so that the value of mediation seems quite clear. Its superiority can most strongly be demonstrated through an experimental design. But there are also limitations to the use of an experimental design and control group. For example, the ability to create matched groups of families is very difficult, and this would heighten the need for large sample sizes.

Based on previous studies, sufficient grounds exist to conclude that mediation is helpful, so withholding this intervention from some families (while providing it for others) may be practically and politically difficult. The ability to make some very modest comparisons is not entirely impossible in this study. Although satisfaction data is not routinely collected for court services, the data gained through the mediation can be compared to other Michigan programs and mediation in other states. Other comparisons can be made with Michigan data about times to permanency.

The nature of the mediation program poses a number of challenges for the evaluation. Specifically, the intervention at a variety of points in the court process makes it difficult to firmly establish time lines and reduces the ability to compare and aggregate cases. For example, the time to permanency differs dramatically at any one site depending on when the case is mediated—pre-adjudication, at a dispositional or permanency planning hearing, or at the time of termination of parental rights, for example. Also the number of variables that affect permanency, and therefore the outcome of a case in mediation, are many and often-times outside of the control and knowledge of court professionals. The nature of the cases referred to mediation may in itself introduce a bias—particularly if these are cases that have been particularly troublesome in the court or have resisted other forms of intervention and are therefore referred to this new service.

Any intervention must be examined with some degree of modesty and appreciation for what can and cannot be accomplished. As one of the judges with experience with mediation reported, “mediation may not work in all cases, nor is it the cure for all of the ills of the child welfare system.” Consequently, this retrospective evaluation has posed a number of key questions and has attempted to answer them and advance the knowledge about the use of mediation in child protective cases.

Summary of Key Findings

Implementation and Program Statistics

The PPMP pilot was used at a variety of points in the child protection and legal process from pre-adjudication through competing petitions to adopt. Although Michigan’s legal system includes a hearing called the permanency planning hearing, the PPMP pilot addresses cases at all stages of the legal process, not just at the permanency planning hearing.

The PPMP pilot was successfully implemented using two mediators at each session. Mediators were most often community volunteers with extensive training and supervision, demonstrating the high level of skill needed, but also revealing the effective use of talented volunteers. Mediator effectiveness was rated highly by all types of participants.

Mediation agreements were finalized in the great majority of cases (85.5%). In several cases where a signed agreement was not obtained, agreement was partially or fully achieved, but parties objected to signing a document. With or without a final agreement, participants reported high rates of satisfaction. Based on pilot program reports, 338 cases have been disposed from 1999-2001. Forty-nine of these cases were withdrawn or participants did not show for mediation, resulting in 289 mediated cases.
Cases were referred but not mediated for a variety of reasons. The case may have been assessed as not amenable for mediation, often because of current domestic violence. The most commonly noted reason for no mediation was a conciliation that resolved the issues without a formal mediation. Conciliations with and without an agreement were distinguished from referrals not mediated. Additional reasons include either the initiator or respondent refused to mediate, or the initiator or respondent failed to show. The initiator may have dismissed the case after referral was made, or the mediation coordinator or mediators may have been unable to contact or schedule the mediation.

There was a large increase in the number of cases disposed from 1999 to 2000 (up from 75 to 129) and a slight increase from 2000-2001 (129 to 134). Figures for 2002 show continued growth, with 158 cases disposed. Disposed cases in 2003 dropped to 148. Agreements were reached in 82% of cases mediated in 2001, 83% in 2000, and 76% in 1999. These rates are comparable or superior to rates from child protection mediation projects in other states. Favorable agreement rates continued in 2002 (87%) and 2003 (82%).

Mediation agreements covered a broad range of actions, reflecting the effective use of mediation with all types of child maltreatment and at all stages in the legal process. These agreements included creative solutions for family problems, with multiple services for families and detailed action items. The most frequently addressed challenge was visitation. Visitations is a crucial consideration for child well being and for the facilitation of timely permanency decision-making. Other frequent issues included child placement decisions, service plans, plea and petition language, and parental counseling.

Permanency outcomes
The time to permanency, of any type, was challenging to evaluate, given the range of stages at which mediation occurs in the child protection legal process. For all cases referred for mediation, regardless of referral point, the time from petition to any type of permanency averaged 17 months. This figure compares favorably with AFCARS statistics—analogous federally compiled statewide indicators of lengths of time to permanency as reported by the State of Michigan Family Independence Agency.

For all cases referred for mediation, the average time from mediation referral to any form of permanency averaged just over 13 months. Following referral to mediation, family reunification was achieved on average in 11 months, and adoptions were finalized on average in 15 months. Referral points for each form of permanency did not differ significantly from each other; adoption cases were not referred any later in the case than either cases eventually reunified or in which guardianship was the final resolution.

Comparison of these averages for time to permanency to statewide statistics from Michigan’s federally reported AFCARS data suggests that permanency is achieved in a more timely manner in adoption cases, with some modest time savings in foster care cases resulting in reunification.

A significantly greater proportion of mediated cases had reached a permanency outcome of some type, as compared to non-mediated cases. Comparison of cases referred to mediation and mediated revealed a statistically significant and substantially larger proportion (chi-sq=16.6, p < .001) of cases achieving permanency (85.2%) than was observed for cases that were referred but did not reach mediation (51.7%).

Time from petition to permanency was shorter for mediated cases, compared to non-mediated cases referred to mediation. For cases that had reached permanency, comparison was made between cases that had been mediated (n=106) and those that had not (n=11). Despite the large discrepancy in sample sizes, significant differences between these two groups were found for average length of time between referral to mediation and permanency. Differences were such that mediated cases had an average time from petition to permanency of 12 ½ months and cases referred but not mediated reached permanency, on average, within 20 ½ months of being referred to mediation. The difference is statistically significant and substantial given the 8-month difference in achieving permanency (t = 2.59, p < .01).

Cost and Benefits
With regard to costs associated with the PPMP pilot, the expense of the program is related to the time expended in preparing for, conducting, and following up the mediation. The average amount of time expended to prepare for, conduct, and follow up on a mediation from initiation to end was 11 hours. The average length of
time for the mediation session itself was three hours.
The use of volunteer mediators reduced the expenses associated with mediation.

Legal costs and social service expenses related to mediation or traditional court work varied from county to county. However, the costs of a PPMP pilot staffed with trained volunteers logically presents a cost-effective alternative to traditional court action. A relatively low-cost mediation program, with unpaid mediators providing a service that potentially reduces the need for multiple court hearings, or court expenses associated with hearings and trials, has the potential for substantial savings.

Additional cost savings may be realized for cases in which mediation results in higher rates of parental compliance with service plans, court orders, and mediation agreements than would otherwise occur. Better compliance in turn may reduce time in costly out-of-home care or in negotiating visitation and living arrangements that may promote stability for children and fewer complications for child welfare workers.

In addition to financial implications, child protection mediation also enhances Michigan’s attainment of federal Child and Family Services Review requirements regarding family involvement, thereby protecting federal support for child welfare in the state. A non-monetary benefit for children and families, and the agencies that serve them, accrues to the program because it promotes family responsibility and cooperation in a manner that reduces conflict and delay.

Parental Compliance

In the great majority of cases in which a mediation agreement was finalized, there were high rates of parental compliance with the terms of the agreement. This is not to say that mediation is related to increased compliance, only that observed compliance was high overall. Adequate comparison data for non-mediated cases was not available for analysis.

Michigan permanency planning mediation led to parents and other family members reporting they had been included in case planning and had their viewpoints considered during that process.

Benefits and challenges for permanency planning mediation programs in Michigan

The preponderance of feedback from mediation participants, mediators, and judges spoke to the value of a highly interactive process, in a less formal and less adversarial environment, with time dedicated to reaching an acceptable plan. With a clearer understanding of issues and viewpoints, and with more information introduced than what is available in a traditional court hearing, an effective focus on problem solving could be maintained. This clarity ultimately saved time and promoted permanency.

Mediation faced a number of challenges. For example:

- Disagreement and conflict occurred during a mediation.
- Some participants—both family members and professionals—could be obstinate and unwilling to negotiate.
- Relationships between participants did not always improve through the mediation process.

To attain the benefits and appropriately manage the challenges, mediators need to be skilled and well trained.

Participant Satisfaction Outcomes

The positive outcomes and participant experiences with mediation support the use of this approach to ensuring safety and permanency for children. The majority of judges experienced with PPMP pilot reported very positive perspectives on mediation; some noted that mediation is not a panacea for all problems, that careful planning is required, and that work with stakeholders before the program begins is very important for program success.

Attorney satisfaction ratings, overall, were quite high. Lawyer guardians ad litem, prosecuting attorneys, and other attorneys who attended the mediation sessions rated the experience and outcome at least as positively as child welfare professionals did.

Child welfare professionals reported even higher rates of positive assessments of the mediators, the professionals’ experience in mediation, and overall satisfaction. Eighty-three percent judged the mediation outcome to be fair, 91% of FIA caseworkers reported they would use mediation again, and 92% stated they would recommend mediation to other child welfare professionals.

Family members reported that mediators treated everyone fairly, were neutral, listened carefully to them, were informative, and were organized. A majority of family members reported that other participants listened to them, they talked about the issues that were important to them, they increased their understanding
of other viewpoints, they were treated with respect, and they reported fully participating in the mediation. A majority of family members indicated that the mediation was helpful, the outcome was fair, and stated that they would use mediation again and would recommend mediation to others.

Although relatively small in number, mediation participants who were comparatively less satisfied with their experience and the outcome were other family members (other than parents and grandparents), children, DHS professionals (other than caseworkers), foster parents, and attorneys for fathers (although the great majority reported satisfaction).

Evaluation Conclusions

This exploratory study of Michigan’s PPMP pilot has found that:

- Written agreements in mediation were reached at a high rate.
- Family compliance with agreements occurred at a high rate.
- A large majority of mediation participants evaluated their mediation experience positively.
- Stakeholders evaluated mediation as a positive experience.
- Permanency outcomes for referred cases were better for mediated cases than non-mediated cases.
- Cost savings can be presumed due to the use of volunteer mediators and time saved through mediation in place of longer, more costly traditional court processes.
- Mediation achieved results in a broad range of potentially time consuming cases.

Conditions that contributed to the success of mediation included:

- support from the courts and child welfare system;
- the presence of both parents during mediation; and
- experienced mediators.

The conditions valued during mediation included:

- broader participation;
- a less adversarial process; and
- time devoted to problem solving.

The PPMP pilot experience in Michigan supports the National Council of Juvenile and Family Court Judges’ recommendation that “all juvenile and family court systems should have alternative dispute resolution processes available to the parties. These include… mediation and settlement conferences.” (NCJFCJ, 1999).

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Endnotes

1 The 82 cases served during the evaluation timeframe but not included in the evaluation were cases served by programs no longer funded to offer permanency planning mediation and for which Community Dispute Resolution Program case files and related case information would not be accessible in a timely manner. Although the omission of 82 cases could be considered a limitation, the effect was such that only cases from established programs were studied, thereby removing a potential contamination from sites that did not survive the pilot period.
When the Rules Shift:  
**A Review of the Indian Child Welfare Act, M.C.R. 2.615, and Tribal Court Jurisdiction in Michigan Family Law Cases**

by Kathryn Fort, staff attorney and adjunct instructor  
Indigenous Law and Policy Center, Michigan State University College of Law

**Introduction**

A woman comes to court with a tribal custody order, seeking to modify its provisions. A child is removed from her home, and her mother is a tribal citizen. A couple seeks a divorce; both are tribal citizens. When these cases appear in front of a state court, practitioners need to know how family law and Indian law intersect and how the law differs from the majority of family law cases in Michigan state courts. Because family law is such a large portion of the civil docket, it is easy for certain procedures to become routine, but some cases involving tribal citizens require the application of different laws and different standards, which are hardly routine. The intersection of family law and Indian law may account for a small number of cases, but particularly in Michigan, with its 12 federally recognized tribes, all state court practitioners must have a basic understanding of the issues involved in these cases.

The appearance of a tribal citizen or tribal court order in state court may cause confusion. Judges and lawyers may try to handle the case under the family laws with which they are already familiar; however, there are specific federal and state laws that govern many of these situations. These include the Indian Child Welfare Act, the Violence Against Women Act, the Full Faith and Credit for Child Support Order Act (M.C. R. 2.615), and the Uniform Child Custody Jurisdiction and Enforcement Act. Understanding which one applies in which case requires a complete and thorough understanding of the factual situation of the case. In addition, issues surrounding full faith and credit, comity, and tribal court jurisdiction may also arise in these cases.

**The Indian Child Welfare Act**

The Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, is likely the most familiar of the laws governing Indian family law cases in state court. Passed in 1978, the Indian Child Welfare Act (ICWA) is a federal statute governing the removal of an “Indian child” from the home, the termination of parental rights, and pre-adoption and adoption placement procedures. The goal of this statute was to preserve Indian families and keep children connected to their tribe against an onslaught of state agency attempts to break up these families and place the children with non-Indian families. For example, from 1971 to 1972, Indian children were adopted at eight times the rate of non-Indian children, and virtually all of these children were placed in non-Indian homes. Because the very existence of a tribe is based in its children, this misplacement of children strikes at the heart of tribal sovereignty and tribal existence. Understanding that ICWA’s goal is to protect both the child and the tribe is the first step in understanding the various provisions of the law.

ICWA changes the rules of traditional family law practice by requiring different standards based on a child’s tribal status. ICWA is unique because while it is a federal law, its enforcement rests entirely in the state courts. While ICWA singles out a specific group for different treatment, such as higher standards of proof for terminating parental rights, or requiring more effort by the state in maintaining the family ties, this federal law is not unconstitutional. ICWA is based on the relationship between the federal government and Indian tribes and the political status of tribal members. The federal government has long recognized
a “trust relationship” with tribes, based on treaties, statutes, and court cases. The trust relationship is also traced to the commerce clause and treaty clause of the Constitution. U.S. Const. art. I, §8, cl. 3; art. II, §2, cl. 2. As stated in the Handbook of Federal Indian Law, “[t]he commerce clause has become the linchpin in the more general power over Indian affairs recognized by Congress and the courts.” The commerce clause, therefore, “anticipat[es] and affirm[s] federal law singl[ing] out Indian nations and their members for separate treatment.” The Supreme Court also provides a basis for the trust relationship in various decisions as early as 1831.

The trust relationship now covers a broad range of federal legislation designed to provide services to tribes and tribal members, and it is often cited by Congress when passing legislation designed for tribes or tribal citizens. In ICWA, Congress started the findings section by “recognizing the special relationship between the United States and the Indian tribes and their members and the federal responsibility to Indian people . . . .” Because of this special relationship, the Supreme Court has held that Congress has the power to “legislate on behalf of federally recognized Indian tribes.” Morton v. Mancari, 417 U.S. 535, 551 (1974). This singling out is also based on tribal members’ political status as citizens of their own tribes. Id. at 554.

As citizens, or potential citizens, of a tribe, a child is due both the benefits of the trust relationship and the benefits and responsibilities of a tribal member. In removing a child from a tribe, not only does a tribe lose one of its citizens, the child loses her tribe.

For these reasons, ICWA is a particularly important statute. While ICWA is not a long or complex statute, practitioners should be aware of a number of provisions of note. ICWA applies to specific “child custody proceedings.” These proceedings are usually non-voluntary, such as foster care placement where the child “cannot be returned upon demand” of the parent, or permanent, such as termination of parental rights, pre-adoption, and adoption placement procedures. For example, while deciding to allow a child to be adopted may be a voluntary act by the parent, it is a permanent severance of the child from the parent, and likewise the tribe, and therefore falls under the ICWA. ICWA does not apply in custody disputes stemming from a divorce case. However, as discussed below, laws other than ICWA or state divorce laws may govern in those cases.

For ICWA to apply in these situations, the child must be considered an “Indian child.” The state agency bringing the action falling under ICWA has the affirmative duty to determine whether the child might be a tribal member or eligible for tribal citizenship. In Michigan, the Department of Human Services must follow the notice requirements of ICWA. The Michigan Appeals Court agreed with a Vermont Supreme Court case that “it is preferable to err on the side of giving notice and examining thoroughly whether the juvenile is an Indian child.” The court also has a role in determining whether the tribe qualifies under ICWA, which requires federal recognition of the tribe. Interestingly, the Department of Human Services, in its Childrens Foster Care Manual, encourages Michigan state courts to apply ICWA to “members of non-federally recognized tribes” and to tribes in Canada. The Manual is not binding on courts, though, and in 2005, the Michigan Appeals Court maintained ICWA’s narrower definition, holding that ICWA does not apply when the “minor child is claimed to be an Indian child from an Indian tribe that is not recognized as eligible for services provided to Indians by the Secretary of the Interior.”

The tribe in question in In re Fried was neither a non-federally recognized tribe located in Michigan nor a Canadian tribe. Whether the court would consider those under ICWA standards is questionable.

While the court must determine if the child is potentially an “Indian child,” it is not ever the state court’s role to determine if the child is eligible for tribal membership. That is a decision of the tribe, and implicates a key area of tribal sovereignty. The Supreme Court, in Santa Clara Pueblo v. Martinez, stated, “A tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.” 436 U.S. 49, 72 n.32 (1978). In 2001, the Michigan Court of Appeals affirmed this in In re N.E.G.P., holding that the tribe must determine whether the child is a member, or eligible for membership. 626 N.W.2d 921, 924 (Mich. Ct. App. 2001).

After determining if ICWA applies to the case, a second important provision is the notice provision. The state is required to notify the tribe, the parent, the “Indian custodian,” or the regional BIA office of the proceedings as soon as the state has any knowledge the case might fall under ICWA. The agency making the petition has the duty to make the notification
and make it properly. Lack of notice at the start of a case can be an incurable flaw later in the case. For example, the Michigan Court of Appeals has held that “failure to comply with the requirements of the ICWA may render invalid a proceeding terminating a parent’s rights.” Without notice, the tribe is unable to exercise its right of intervention and petition for removal. No notice means ICWA cannot be properly applied to the rest of the proceeding, since the tribe may have no way of knowing the case even exists. This notice is of particular importance given the jurisdictional aspects of ICWA.

Initially, ICWA shifts jurisdiction slightly from the general civil tribal jurisdiction discussed below. In an ICWA case, if the Indian child resides off of the reservation, the state and tribe have concurrent jurisdiction. If the child resides on the reservation, the tribe has exclusive jurisdiction. This does not need to be evaluated under principles of civil tribal jurisdiction; ICWA clearly provides for the jurisdictional boundaries in these cases. If the state is exercising its concurrent jurisdiction, the tribe, or Indian custodian, has the right to intervene in the case. The tribe also has the right to petition for transfer of the case to tribal court. Absent “good cause to the contrary,” the state court “shall” transfer the case to the tribal court.

Some of the most litigated ICWA issues include the intervention and transfer of cases to tribal court. “Good cause” is a difficult standard to quantify, and each state has determined for itself what “good cause” may be. There are no reported cases in Michigan defining “good cause,” though one case, *Gray v. Pann*, does support the tribal right of intervention. 513 N.W.2d 154, 156 (Mich. Ct. App. 1994). The Bureau of Indian Affairs has published the *Guidelines for State Courts: Indian Child Custody Proceedings*, 44 Fed. Reg. 67584 (Nov. 26, 1979). While the *Guidelines* provide different factors involved for determining “good cause,” including the timeliness of the petition for transfer, the court is not to consider the best interests of the child standard. Because the best interests standard is used by many family law courts, including those in Michigan, there have been some cases where courts have incorrectly applied the best interests standard. In South Dakota, for example, the supreme court overturned a decision by the trial court to deny a transfer to tribal court based on an evaluation of the best interests of the child. The court held “that a substitute parent might provide a child with good care or even better care than its natural parent is not appropriate standard for determining the best interests of the child in the context of a ICWA transfer decision.” As an appellate court in Illinois pointed out, the best interests test was “relevant not to determine jurisdiction but to ascertain placement.”

“Good cause,” however, is also an exception to the ICWA placement preferences, where some state courts have inserted the best interests test. Since the goal of ICWA is to keep Indian children within their family and the tribe, ICWA provides a list of preferences when an Indian child has to be removed from her immediate family. This list, which differs slightly between foster care and adoption placements, prefers placement with extended family, then with tribal members, and then with tribal members from other tribes. If the child’s tribe has a preference order, the court must follow that order over either ICWA or any state standards. For a court to deviate from this order, it must provide “good cause to the contrary.” Again, the BIA Guidelines provide some guidance as to what “good cause” can be, but specifically does not list a best interests standard for a court to weigh. ICWA assumes the best interests of the Indian child are served by following the placement preferences. Using the best interests standard of the state court to undermine the placement preferences ignores congressional intent and fails to acknowledge the reasons ICWA had to be passed in the first place.

Finally, some courts have used the existing Indian family exception to avoid using ICWA’s placement preferences or applying ICWA at all. Courts created the existing Indian family exception for children and families the court determines have no contact with the tribe. In some ways, this parallels the more traditional personal jurisdiction sufficient contacts inquiry. However, this exception is not in ICWA, which defines an Indian child regardless of his actual contacts with a tribe. Michigan has rejected the existing Indian family exception, in *In re Elliot*. The Michigan Court of Appeals held that “application of the exception undercuts the plain import of the ICWA and fails to consider adequately the interests of the Indian tribes themselves, especially in involuntary proceedings.” 544 N.W.2d. 32, 36 (Mich Ct. App. 1996). A more recent case, *In re Dougherty*, does not overrule Elliot. In Dougherty, a non-Indian father’s parental rights were terminated. In his appeal, he tried to claim the protections of ICWA, specifically that the state did not do enough to
prevent the breakup on an Indian family. But his wife was the tribal member, she retained custody of her children, and she was the parent with ties to her tribe. The court found that the termination of the father’s parental rights did not break up an Indian family. 599 N.W.2d 722, 775 (Mich. Ct. App. 1999).

*Dougherty* also demonstrates the different standards of proof in non-ICWA and ICWA cases. Under ICWA, removal of an Indian child from the home requires clear and convincing evidence, and testimony by qualified experts, that leaving the child in the home will lead to “serious emotional or physical damage to the child.” Under ICWA, termination of parental rights requires evidence beyond a reasonable doubt, and testimony by qualified experts, that the child will suffer “serious emotional or physical damage.” In Michigan, both the federal and state levels of evidence must be met; therefore, to terminate the parental rights of a parent to an Indian child, the court must prove the ICWA standard, and also “find clear and convincing evidence that one or more enumerated statutory grounds for termination exist.” *Id.* at 776.

ICWA also provides rules for the enforcement of any tribal court orders a state court might encounter in an ICWA case. Under ICWA, the state court must enforce tribal court judgments without any question into the nature of the tribal court or previous tribal court proceedings. In other words, in ICWA cases, tribal court orders, tribal laws, and judicial proceedings are granted full faith and credit by the state courts. Other federal statutes such as the Violence Against Women Act and the Child Support Order Act also include this provision. When these statutes apply, the state court does not invoke a state statute, rule, or comity when enforcing the judgment. Enforcement of the judgment should be automatic under these federal statutes. But when faced with a tribal court decision that does not fall under ICWA or the other federal court proceedings, there can be confusion distinguishing between full faith and credit, comity, and the Mich. Ct. R. 2.615.

**Full Faith and Credit and Indian Tribes**

Article IV of the United States Constitution guarantees full faith and credit to ensure the sister states give full force to the judicial proceedings in other states. When faced with an order from another state, its implementation and enforcement ought to be automatic. There are no discussions of due process standards or otherwise going behind the order itself. A federal statute, 28 USC §1738, expanded the full faith and credit clause to territories and possessions of the United States. The statute does not explicitly include tribes; however, two states, Idaho and New Mexico, interpret the statute to include tribes.

These states conclude the tribes are equivalent territories, and therefore grant full faith and credit to tribal court judgments. The vast majority of states, however, do not interpret that statute or the Constitution to ensure full faith and credit for Indian tribes.

**Comity and Indian Tribes**

When faced with a foreign court order, a state or federal court will invoke principles of “comity.” Comity is an amorphous concept, based on the respect of another sovereign. The Supreme Court, in *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), stated that comity was “neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation . . .” The Court has cited *Hilton* approvingly in later cases.

Enforcing a foreign court order is not guaranteed or required. Comity requires a discussion of a number of factors, including due process concerns and public policy issues. Indeed, it has been noted that the use of comity may even bring up concerns of separation of powers and political question issues, because only Congress and the executive branch have the power to deal with foreign nations. The granting, or not granting, of comity to a foreign court may have the potential to cause larger foreign policy problems.

**The Michigan Court Rule, Mich. Ct. R. 2.615**

All states, when enforcing tribal court judgments not governed by federally mandated full faith and credit laws, still use principles of comity to determine the enforcement of the judgment. Some states, however, have passed a statute or court rule to provide guidance for state courts when enforcing a tribal court
judgment. In Michigan, Mich. Ct. R. 2.615 governs the enforcement of tribal court judgments when there is no other state or federal law dictating otherwise. Mich. Ct. R. 2.615 is not quite full faith and credit, but is a higher standard than comity, and is a reciprocal rule. For a tribe to have its orders enforced in a Michigan state court, the tribe must pass a law or rule ensuring that the tribe’s courts enforce state court judgments. The tribe must notify the State Court Administrators Office (SCAO) of its rule. The SCAO maintains a list of which tribes qualify under Mich. Ct. R. 2.615. In addition, Mich. Ct. R. 2.615 does not limit reciprocity to tribes located in Michigan. Any federally recognized tribe can file with the SCAO, provided the tribe has passed the rule regarding the enforcement of Michigan state court judgments in its court.

Under Mich. Ct. R. 2.615, a tribal court judgment is presumed valid. The party challenging the order must prove otherwise. This is a distinct difference from comity, where the burden of proof is on the party seeking to enforce the foreign order. A tribal court judgment is presumed valid by the court, therefore, unless challenged, and when challenged, the challenging party must demonstrate that one of five factors applies to the order. Four of the factors are types of evaluations the state courts do elsewhere, and include obtaining through fraud or duress, without notice or hearing, the order is “repugnant” to public policy, or is not final. The fifth factor is a lack of personal or subject matter jurisdiction, a determination that requires an understanding of civil tribal jurisdiction.

Civil tribal jurisdiction requires a complex analysis and complete understanding of the parties’ tribal citizenship and residence. As a sovereign entity, a tribe has inherent jurisdiction over its own citizens residing on the reservation. If the tribal citizens are not domiciled on the reservation, the state and tribe may have concurrent jurisdiction, depending on the tribe’s code. In some instances, the tribe has jurisdiction over non-Indians as well. If a dispute occurs between a tribal citizen and a non-Indian on the reservation, the tribe has jurisdiction, but if the same dispute arises off the reservation, the state has jurisdiction. Of course, a non-Indian can consent to tribal jurisdiction, and in some cases the tribal code extends jurisdiction to non-Indians living on the reservation.

Therefore, if a party is challenging a tribal court order under Mich. Ct. R. 2.615 by arguing that the tribe did not have jurisdiction, the party must be able to demonstrate that the tribe’s jurisdiction did not reach him. This would most often be the case if the party is a non-Indian living off the reservation with no tribal interests implicated. In a family law case, however, if a tribal court custody agreement or divorce decree exists, the likelihood is high that the tribe has jurisdiction over the case.

The Uniform Child Custody and Jurisdiction Enforcement Act and Indian Tribes

Finally, most practitioners are already aware that Michigan has adopted the Uniform Child Custody and Jurisdiction Enforcement Act. Under the UCJEA, tribes are treated as states, not as foreign nations, and tribal custody orders are given full enforcement. If the tribal court had proper jurisdiction over the custody proceeding, then the state cannot later exercise jurisdiction other than to enforce the custody order. Since the UCJEA is used every day by family court practitioners, treating tribes as states does not require a difficult analysis. The same rules apply to a tribal court order as to a state court order. Of course, if the case falls under ICWA, the UCJEA does not enter into consideration.

Conclusion

The interplay of these laws can be confusing, particularly if the practitioner is not familiar with their language or application. Family law cases are already emotionally difficult, with multiple parties trying to achieve what they believe will be the best conclusion for a child. When the family court routine shifts with the introduction of these different laws, it is clear how confusion and miscommunication can occur. An understanding of these laws and why they apply makes it easier for all involved parties. Misapplying these laws early will only lead to extended litigation of already difficult cases.

Endnotes
A recent 9th Circuit case, Doe v. Mann, 1038 F.3d 1038 (9th Cir. 2005) found a basis for federal review in Public Law 280, which does not apply in Michigan, and the reasoning has generally not been followed elsewhere.


Id., §14.03[2][b][i].


Id. at 757 (quoting In re M.C.P., 571 A.2d 627 (Vt. 1989)).


25 U.S.C §1911.

In re J.C.D., 686 N.W.2d 647, 650 (S.D. 2004).


For a more detailed discussion of tribal civil jurisdiction, see Cohen’s Handbook of Federal Indian Law 7 (Nell Jessup Newton et al. eds 2005).
Identifying and Reporting Child Abuse and Neglect

by Vincent J. Palusci, MD, MS,
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Abstract

This article summarizes our understanding of key elements of medical practice as they apply to the care of maltreated children and adolescents. Pediatricians and other medical providers often viewed child abuse and neglect as a social rather than medical problem until the mid-twentieth century, when several landmark articles were published in the medical literature and the medical specialty of child abuse pediatrics was developed. (Block & Palusci, 2006). Mandated reporters play a pivotal role in the identification and treatment of the health consequences of such victimization and should understand how to identify and report medical issues in suspected maltreatment. This article first reviews introductory information about what we know about child abuse and neglect epidemiology and then describes the process of its medical diagnosis, including key elements of the history, physical examination, and laboratory testing. This article concludes with potential schemes to assist in the identification and reporting of suspected child abuse and neglect.

Epidemiology of Child Maltreatment and the Role of the Physician

The victimization of children through abuse and neglect remains an all-too-common occurrence (Anne E. Casey Foundation, 2001; Migley, Wiese, & Salmon-Cox, 1996). In 2002, 12.3 per 1,000 children were victimized, and young children and infants had the highest rates (Sirotnak, 2004). While some trends suggest decreasing incidence, the United States child abuse and neglect reporting system continues to document over 900,000 substantiated victims of child maltreatment annually, with over 1,400 deaths (Finkelhor & Jones, 2006; Pratt & Greydanus, 2003; U.S. Department of Health and Human Services, Children’s Bureau, 2005).

Injuries overall place a heavy burden on children, and inflicted injuries affect far too many as well (Spady, 2004; Gessner, 2004). Health care costs for inflicted injuries are difficult to estimate, but estimates place the total costs associated with abuse as over $9 billion annually in the U.S. (U.S. Department of Health and Human Services, 2005).

Maltreated children suffer from a variety of behavior problems and mental injuries in addition to physical maladies (Cahill, Kaminer and Johnson, 1999; Kaplan, Labruna, Pelcovitz, et al, 1999; Kairys and the AAP, 2002), and the Adverse Childhood Experiences study has noted the powerful relationship between adverse childhood experiences and several conditions of adulthood, including risk and attempted suicide, alcoholism, depression, illicit drug use, and other lifestyle changes that have direct and indirect costs (Dube, Anda, Fellitti, et al, 2001). While the exact pathways are still being explored, childhood abuse is thought to affect adult health by putting people at risk for depression and post-traumatic stress disorders, causing them to participate in harmful activities, have difficulties in relationships, and have negative beliefs and attitudes toward others (Kendall-Tackett, 2002; Davis & Siegel, 2000).

Physicians have historically had an important role in the assessment and reporting of suspected child abuse and neglect, while treatment and prevention activities have relied on mental health professionals and community and governmental services (Briere, Berliner, Bulkley, Jenny, & Reid, 1996; Palusci, 2004). In a recent survey, two-thirds of pediatricians reported treating injuries from child abuse, two-thirds had treated injuries from other community violence, and one-half treated injuries related to domestic violence; those receiving recent education on abuse were more confident in their ability to identify and manage it (Flaherty et al, 2004; Flaherty et al, 2006).
Physicians assist the community response to child abuse and neglect by collaborating with community agencies (such as child advocacy centers and social services agencies) and governmental entities (such as police and child protective services) that have the resources, responsibility, and authority to protect and improve the lives of child victims (Briere, 1996). Pediatricians have also developed increasing knowledge and expertise, justifying the creation of the sub-board certification in Child Abuse Pediatrics (Block & Palusci, 2006).

In the past 40 years since the publication of Dr. C. Henry Kempe’s landmark article, “The Battered Child Syndrome” (Kempe et al, 1962), the subject of child maltreatment has become a universal topic, not restricted to one community in its incidence or to one type of professional for its identification. As the field has grown, child welfare professionals have had to broaden their intellectual and personal perspectives to not only identify and report maltreatment but also to provide interventions to prevent further abuse. This article will serve as an overview of the manifestations and reporting to assist mandated reporters, regardless of their individual interests and fields of expertise, for accurately identifying and reporting suspected child abuse and neglect.

Identification of Injuries

Several physical findings have been noted in child abuse and neglect. A comprehensive medical assessment includes a well-documented history as to how any injury occurred, physical characteristics of a witnessed traumatic event, the role of the caretaker, any symptoms present, and what medical care was sought (Sirotnak, 2004). Specific statements by the family and child should also be copied into the medical chart for potential use later in the legal system.

Medical history should be reviewed to identify previous trauma, injury, chronic illness, and medications. A developmental history should document the child’s best level of functioning and abilities, and social history should include who routinely supervises the child, who has been with the child associated with any recent events, and discipline practices or other stressors in the home.

A physical examination should note the presence of any bruises, burns, or other skin lesions, and requires complete undressing of the child and comprehensive assessment of multiple organ systems. Particular emphasis is placed on the anogenital examination if sexual abuse is suspected. It is important to identify whether any identified findings are specific (strong causal link to abuse or neglect) or non-specific (associated with a variety of causes, including maltreatment).

For skin lesions, lesions may be documented using notes, hand-drawn diagrams, or photographs, although law enforcement and child protection workers often have resources to assure high quality photodocumentation. Even if photographs are taken, the physician should also contemporaneously document any skin injuries identified (Ricci, 2002).

Suspicion of internal injury requires medical imaging, with computerized tomography (CT) generally used for abdomen, chest, and acute head trauma, and magnetic resonance imaging (MR) indicated for less acute or chronic head and soft tissue imaging. Plain radiographs continue to be important to identify fractures and can be ordered contemporaneously with CT or MR (Kleinman, 1998; Jenny et al, 2006). Protocols have been developed to direct the physician and radiologist as to the numbers, types, and repetition of dedicated x-ray images required for such radiographic assessments for suspected child abuse (Kleinman, 1995).

Abnormalities in serologic tests for liver function have been correlated with inflicted abdominal trauma, and experimental serologic markers are being identified for traumatic brain injury (Berger, 2006). Tests for sexually transmitted infections vary by disease and can be obtained as blood tests for serology or swabs for cultures on non-culture tests (KELLOGG and the AAP, 2005). Tests for potential underlying medical conditions take a variety of forms and are used as indicated in the differential diagnosis for specific potentially abusive conditions.

Physical abuse

Physicians have noted specific injuries as stemming from abuse and neglect through the years, with early identification of maltreatment as a disease in the medical literature by John Caffey and others (Caffey, 1946, 1972, 1974). In the 1950s, Paul Woolley and William Evans in Detroit noted the presence of significant injuries that were inconsistent with parental explanations (Woolley & Evans, 1955; Helfer, Kemp, & Krugman, 1997). Discussions of diagnoses in the medical literature began to remark on the types of injuries from physical abuse, with Silverman’s iden-
tification of fractures (Silverman, 1953, 1972) and Henry Kempe’s landmark article naming the “Battered Child Syndrome” (Kempe, Silverman, Steele, Droegemueller, & Silver, 1962) prominent among them. Since that time, articles in the medical literature on maltreatment, escalating steadily in number, have concentrated on physical abuse in the 1960s and 1970s, and later sexual abuse, domestic violence, and neglect (AAP, 1966, 1998a; 1998b; Cupoli & Sewell, 1988; Dubowitz, 2002; Duhaime, Alario, Lewander et al., 1992; Finkelhor, 1979; Ommaya, Fass, & Yarnell, 1968; Rimsza & Niggemann, 1982; Ewing-Cobbs, 1998; Woodling & Heger, 1986; Herr & Fallat, 2006). A better understanding of these threats to child health and development led to clearer definitions of victimization, which were later adopted by the World Health Organization (World Health Organization, 1999).

The leading cause of abusive mortality and morbidity is inflicted traumatic brain injury (Hennes, Kini, Palusci, 2003). With mortality rates of 10-50% and more than 90% of survivors having significant handicap, physical abuse to the head has been noted to have patterns of injuries that are distinct from accidental or medical causes. At least 1,400 cases of abusive head trauma occur annually in the United States, and there is growing sophistication in our ability to differentiate these fatalities from those caused by non-abusive causes (Newton, 2006).

The evaluation of abusive head trauma and other injuries has been greatly enhanced by the development of specialized imaging and diagnostic techniques. This has allowed us to better understand the wide range of injuries from child abuse and neglect (American Medical Association [AMA] Council on Scientific Affairs, 1985). New diagnostic technologies developed in the last century, from the x-ray to sophisticated computer-assisted imaging techniques such as CT or CAT scans and medical resonance imaging (MR), have proved invaluable in visualizing internal bleeding and injury (Kini & Lazoritz, 1998; AAP, 1991). In one study, infants and children under 3 years with interhemispheric subdural hemorrhage were noted to have greater than 99% probability of intentional trauma (Wells, 2002).

Several physical injuries are specific for abuse (Table 1). The most common physical injury from abuse affects the skin by bruising or burning. Any skin lesion beyond temporary reddening should be considered as potential physical abuse when (1) the injury is inflicted and non-accidental, (2) the pattern of injury fits biomechanical model of abusive trauma, (3) the pattern corresponds to infliction with an instrument that would not occur through play or in the environment, (4) the history provided is not in keeping with the child’s development, or (5) the history does not explain the injury (AAP, 2002).

Location, pattern, size and color are important to assess the specificity of skin lesions. The aging of bruises in children has received considerable attention, and current guidelines are severely limited in their ability to precisely time when an injury occurred.

Similar assessments of burns and other electrical and radiation injuries have also been identified to aid in their assessment, and pattern, depth (degree), and healing of burns helps in determining their specificity for maltreatment. Burns and other injuries are generally compared to any proffered history of accident and/or the developmental abilities of the child to assist in determining potential mechanisms of injury and their consistency with the medical history. Some children as young as 10 months of age, for example, have been shown to have the developmental capability to climb into bathtubs, suggesting that non-specific burn patterns could be attributed to actions by the child rather than the parent in some cases (Allasio & Fischer, 2005).

Specific patterns of fracture have been associated with physical abuse, with posterior rib fractures, certain fractures of unusually injured bones, and long bone fractures in non-ambulatory children being specific for abuse. (Kleinman, 1998).

There is also a growing body of knowledge of abdominal and chest trauma available to identify these often “silent” injuries with potentially devastating consequences and differentiate abuse from accidental trauma. Abdominal injuries, while comprising less than 10% of child abuse fatalities, are difficult to assess, given their occult nature, relative lack of bruising, and potential for significant delay in symptoms after injury. Recent studies suggest abdominal CT imaging and/or liver function and pancreatic testing in all abusive head trauma victims to identify occult abdominal trauma given that 25% or more of even fatal abdominal trauma cases can have few or no visible external bruises (Herr & Fallat, 2006).
Table 1—Physical findings after child physical abuse*

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<thead>
<tr>
<th><strong>Skin:</strong></th>
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<tr>
<td></td>
<td>Pattern bruises or scars</td>
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<td></td>
<td>Symmetric immersion burns, especially with well-demarcated edges</td>
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<td></td>
<td>Pattern contact burns</td>
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<td></td>
<td>Any bruises or burns in a non-ambulating infant</td>
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<td></td>
<td>Multiple injuries in differing stages of healing/Battered Child Syndrome</td>
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<tr>
<td><strong>Less specificity:</strong></td>
<td>Non-pattern bruises of the abdomen, thorax, or soft tissues of the extremities</td>
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<tr>
<td><strong>Head, Eyes, Ears, Mouth, and Neck:</strong></td>
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<tr>
<td></td>
<td>Bruises on the earlobes</td>
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<td></td>
<td>Perforated tympanic membranes without middle ear infection</td>
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<td></td>
<td>Retinal hemorrhages, especially multiple layers and not limited to the posterior pole</td>
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<td></td>
<td>Soft tissue swelling of the scalp</td>
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<td></td>
<td>Intra-oral bruising</td>
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<td>Torn labial frenulum</td>
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<td></td>
<td>Circumferential or ligature bruises or scars on neck</td>
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<tr>
<td></td>
<td>Subdural hemorrhage, especially interhemispheric</td>
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<td><strong>Thorax/Abdomen/Anogenital:</strong></td>
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<td></td>
<td>Duodenal hematoma</td>
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<td>Liver laceration</td>
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<td>Kidney laceration</td>
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<td>Pancreatic injury</td>
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<td>Anus/Genitals (see Table 2)</td>
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<tr>
<td><strong>Bones</strong> <strong>:</strong></td>
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<td><strong>High specificity:</strong></td>
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<td></td>
<td>Classic metaphyseal lesions</td>
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<td>Posterior rib fractures</td>
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<td>Scapular fractures</td>
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<td>Spinous process fractures</td>
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<td>Sternal fractures</td>
</tr>
<tr>
<td><strong>Moderate specificity:</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Multiple fractures, especially bilateral</td>
</tr>
<tr>
<td></td>
<td>Fractures of different ages</td>
</tr>
<tr>
<td></td>
<td>Epiphyseal separations</td>
</tr>
<tr>
<td></td>
<td>Vertebral body fractures and subluxations</td>
</tr>
<tr>
<td></td>
<td>Digit fractures</td>
</tr>
<tr>
<td></td>
<td>Complex skull fractures</td>
</tr>
<tr>
<td><strong>Common but low specificity:</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Subperiosteal new bone formation</td>
</tr>
<tr>
<td></td>
<td>Clavicular fractures</td>
</tr>
<tr>
<td></td>
<td>Long bone shaft fractures</td>
</tr>
<tr>
<td></td>
<td>Linear skull fractures</td>
</tr>
</tbody>
</table>

*In the absence of specific non-abusive history of trauma or specific underlying medical condition

Sexual abuse

Sexual abuse has been defined as sexual contacts or exploitation of children by adults, to which children cannot give consent, and which violate social laws or taboos. Sexual assault is a comprehensive term encompassing several types of forced sexual activity, while the term molestation means non-coital sexual activity between a child and an adolescent or adult. Rape is defined as forced sexual intercourse with vaginal, oral, or anal penetration by the offender, with acquaintance or date rape applying when the assailant and victim know each other. Statutory rape involves sexual penetration of a minor by an adult as defined in state law, regardless of assent (AAP, 2001b).

The prime injury of sexual abuse is usually emotional. While most young children with proven sexual abuse have few physical injuries, patterns of anogenital injury and sexually transmitted diseases have been identified (Adams, 1994; Adams, 2005). Assessing sexual abuse requires detailed knowledge of anogenital anatomy and sexually transmitted infections (STIs) in children, both of which have important differences from adults, and specialized skills and examination techniques have had to be developed for proper assessment (AAP, 1998b; APSAC, 1996; Centers for Disease Control and Prevention [CDC], 2002; Giedinghagen, Hoff, & Biery, 1992; Hammerschlag, 1998; Ingram, Everett, Flick, Russell, & White-Sims, 1997; Ingram, Everett, Lyna, White, & Rockwell, 1992; Robinson, Watkeys, & Ridgway, 1998; Shapiro, Schubert, & Siegel, 1999; Sicolori, Losek, Hudlett, & Smith, 1995; Siegel, Schubert, Myers, 1995; Palusci & Reeves, 2003; Muram & Jones, 1993).

It has become apparent that many physicians have little knowledge about prepubertal genital anatomy and cannot identify key landmarks when abusive injury occurs (Gordon & Palusci, 1991; Palusci & McHugh, 1995; Reiniger et al, 1995). This is compounded by our changing interpretation of key findings over time in the few studies published. When confronted with concerns of potential sexual abuse, the pediatrician should obtain key elements of the history, such as type, frequency, and timing of contact, and physically assess the child for gross injuries or infection (Kellogg and the AAP, 2005). Definitive assessment and treatment is increasingly handled by referral to physicians with specialized experience in testing, interpretation, and documentation of anogenital findings. The development of a subspecialty of pediatrics called child abuse pediatrics has added additional expertise in areas of clinical diagnostics such as the performance of forensic interviewing, colposcopy, and videocolposcopy (Runyon, 2001; Starling, 2000; Palusci & Cyrus, 2001; Block & Palusci, 2006).

Pediatricians caring for sexual abuse victims should be trained in the procedures required for documentation and collection of evidence and in how to protect the child from further victimization (AAP, 2001b; Bechtel & Podrazik, 1999; Palusci et al, 2006). The examination begins with a comprehensive general examination followed by detailed visualization of the genital, anal, and oral cavities (Greydanus, 1987; Adams, 2004). New procedures such as colposcopy and videocolposcopy offer ways to better document and record findings, allow the child to be more relaxed and cooperative during examination, and begin the process of emotional healing (Palusci & Cyrus, 2001). While it is beyond the scope of this article to detail all of the findings associated with sexual abuse, recent research suggests that only limited findings, such as lacerations and transections of the hymen and bruising and other injury to the anus and genitals have high specificity. Sexualized behaviors, which can suggest sexual knowledge inappropriate to the child based on age and development, are often non-specific (Drach et al, 2001). Several physical findings which were once thought to indicate trauma are now considered non-specific, accidentally acquired, or congenital variations (Table 2) (Sugar et al, 2006; Adams, 2005).

While all STIs should raise the suspicion of sexual contact, infections with Neisseria gonorrhoea and Treponema pallidum are most specific for mucosal sexual contact and must generally be reported (CDC, 2002; Palusci & Reeves, 2003). The presence of STIs needs to be evaluated on a case-by-case basis, and the possibility of non-sexual or vertical transmission considered. Other infections to be considered include chlamydia trachomatis, trichomonas species, human immunodeficiency virus, and hepatitis B virus (CDC, 2002). The pediatrician should be knowledgeable about the potential sources of infection, body sites, types of contact, and testing strategies and should complete testing before treatment eradicates microbiologic evidence. Physicians need to carefully consider the types and timing of any prophylaxis for STI or pregnancy based on the age and development of the child, the type and timing of contact, and risk factors for disease in the alleged perpetrator (AAP, 2001b; Kellogg and the AAP, 2005; CDC, 2002).
Psychological Maltreatment

Psychological maltreatment (PM) is commonly associated with other forms of abuse but may also occur in isolation in a small number of cases. By definition, PM is a repeated pattern of interaction between a parent and child that harms the child’s emotional well-being. Spurning, belittling, degrading, ridiculing, or shaming can psychologically harm children (Kairys, Johnson and the AAP, 2002). Terrorizing and otherwise exploiting the child increases the harm further. The sheer denial of emotional closeness leads to physical and developmental delays in young children and failure to thrive in infants. Rejecting the child, isolating her, and being inconsistent in parenting styles leads the child to not feel secure in her home and relationships. An emerging form of PM includes the

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**Table 2—Physical findings after child sexual abuse***

<table>
<thead>
<tr>
<th>I. <strong>Findings documented in newborns or commonly seen in non-abused children.</strong> The presence of these findings generally neither confirms nor discounts a child’s clear disclosure of sexual abuse:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Periurethral of vestibular bands</td>
</tr>
<tr>
<td>• Longitudinal intravaginal ridges or columns</td>
</tr>
<tr>
<td>• Hymenal tags</td>
</tr>
<tr>
<td>• Mounds, bumps on hymenal rim</td>
</tr>
<tr>
<td>• Linea vestibularis</td>
</tr>
<tr>
<td>• Notch or clefts in superior half of hymen (3-9 o’clock, patient supine)</td>
</tr>
<tr>
<td>• Superficial notch or cleft in inferior rim</td>
</tr>
<tr>
<td>• External hymenal ridges</td>
</tr>
<tr>
<td>• Congenital variations in hymenal opening shape, including septate and others</td>
</tr>
<tr>
<td>• Failure of midline fusion (perineal groove)</td>
</tr>
<tr>
<td>• Diastasis ani</td>
</tr>
<tr>
<td>• Perianal skin tag</td>
</tr>
<tr>
<td>• Increased labial or perianal pigmentation</td>
</tr>
<tr>
<td>• Dilation of urethral opening</td>
</tr>
<tr>
<td>• Thickened hymen</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>II. <strong>Indeterminate: Insufficient or conflicting data from research studies.</strong> These findings support a disclosure of sexual abuse if one is given, and are highly suggestive of abuse even in the absence of a disclosure, unless a clear, timely, plausible description of accidental injury is provided by the child or caretaker:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Acute laceration or extensive bruising of labia, penis, scrotum, perianal tissues or perineum</td>
</tr>
<tr>
<td>• Fresh laceration of the posterior fourchette</td>
</tr>
<tr>
<td>• Scar of posterior fourchette or perianal tissues (difficult to assess without seeing prior injury)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>III. <strong>Specific findings that are diagnostic of trauma or sexual contact</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Laceration of the hymen (acute)</td>
</tr>
<tr>
<td>• Ecchymosis of the hymen</td>
</tr>
<tr>
<td>• Perianal lacerations extending deep to the external sphincter</td>
</tr>
<tr>
<td>• Hymenal transection (healed)</td>
</tr>
<tr>
<td>• Missing segment of hymenal tissue</td>
</tr>
<tr>
<td>• Confirmed gonorrhea, syphilis, trichomoniasis, chlamydia, HIV (without congenital or transfusion transmission)</td>
</tr>
<tr>
<td>• Pregnancy</td>
</tr>
<tr>
<td>• Sperm on child’s body</td>
</tr>
</tbody>
</table>

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child’s witnessing violence in the home, be it between the parent and spouse, within the community, or even on television or movies (Cahill & Sherman, 2006; Kairys, Johnson and the AAP, 2002).

Increasingly, behavioral problems, depression, post-traumatic stress, and other problems are being identified after PM. The true prevalence is not known, but fewer than 10% of reports in the United States specifically include PM. PM may first lead to post-traumatic stress disorder and later lead to juvenile delinquency, depression, or mental illness in adolescence or during adulthood (Davis & Siegel, 2000). Parental factors contributing to PM include poor parenting skills, inappropriate expectations, substance abuse, mental illness, psychological problems, poor social skills, lack of empathy, social stress, domestic violence, and other family dysfunction. Children at increased risk are those in families with divorce or separation, from an unwanted pregnancy, with behavior problems or physical or emotional delays, or who are socially isolated or emotionally handicapped (Ammerman, Hersen, VanHasselt, 1989; Kairys, Johnson and the AAP, 2002). Psychological neglect has been significantly associated with behavior problems and poor cognitive development even while controlling for poverty (Dubowitz, Papas et al, 2002; Liu et al, 2003).

The psychological effects specific to maltreatment may be very difficult to recognize in the medical office. Sometimes the poor parent-child relationship is seen and the verbal stigmata of PM exposed, but often there are little or no physical findings demonstrating the emotional harm, other than weight loss, excessive weight gain, or family discord. The quiet, depressed child is not often identified as a victim of neglect as readily as is the hyperactive, aggressive child (Helfer, 1990). The pediatrician needs to evaluate the harm or potential harm to the child’s mental health, while realizing that it may take several years for sufficient harm to become apparent that can be specific for maltreatment. Documentation must be objective, with appropriate use of psychological tests and mental health referrals for the evaluation. In the young child, behavioral changes such as sleep problems, eating problems, and school problems are early but non-specific events, and any assessment should include multiple domains, including function at home, at school, and at play. These effects are further modified by the intensity of exposure in type, frequency, and severity as well as the developmental stage and resiliency of the child (Kairys, Johnson and the AAP, 2002).

Neglect

Child neglect is the most common form of child maltreatment, affecting 50% or more of children reported annually to Child Protective Services (US DHHS, 2005). Dr. Ray Helfer rightly reminded pediatricians about the significant harms caused by the “litany of smoldering neglect” and the de-emphasis on neglect, which has caused mandated reporters to have second thoughts about reporting neglect because little, if anything, could supposedly be done by overwhelmed, understaffed child protective services agencies. (Helfer, 1990).

Neglect is the omission or lack of a minimal level of care by the parents or caretakers that results in actual or potential harm to the child (US DHHS, 2005). Neglect is often associated with poverty, but poor families are not necessarily neglectful (Sedlak, 1996).

Many subtypes of neglect often occur concurrently, but our understanding of its outcome is often aided by identifying subtypes that can direct potential interventions. Physical neglect is the lack of food, clothing, or shelter; emotional neglect is a form of psychological maltreatment; and educational neglect refers to the lack of proper educational resources. Pediatricians are most likely to identify and treat medical care neglect and failure to thrive resulting in illness (Dubowitz, 2000).

The morbidity and mortality associated with neglect are substantial. Although poorly identified on death certificates, child death review teams consistently identify supervisinal and medical neglect as causing as many, or more, deaths as physical abuse. (Michigan Child Death Review, 2001).

Physical conditions caused by neglect include “accidental” injuries, ingestions, inadequately treated illnesses, dental problems, malnutrition, and neurological and developmental deficits. Manifestations in neglectful families include noncompliance or non-adherence to medical recommendations, delay or failure in seeking appropriate health care, hunger, failure to thrive and unmanaged morbid obesity, poor hygiene, and physical and medical conditions contributing to poor cognitive and educational achievement (Dubowitz, 2000).

Poor supervision is less well defined, but has been broken down into broad categories of not watching the child closely enough, inadequate substitute child
care, failure to protect from third parties, knowingly allowing the child to participate in harmful activities, and driving recklessly or while intoxicated (Coohey, 2003; Hymel and the AAP, 2006).

A comprehensive response requires that the physician address the actual or potential harms that have occurred in the child and requires that the physician make appropriate referrals to a myriad of community services to address what is usually a variety of social and economic issues in the family. Important screening questions that can elicit further avenues of intervention include inquiring as to the family’s access to food, their access to appropriate medical and dental services and medicines, substance abuse during and after pregnancy, homelessness, housing and environmental safety, depression, domestic violence, and degree of supervision (Dubowitz, 2000).

Failure to thrive, otherwise known as the lack of normal physiological development associated with malnutrition in infancy, is a non-specific sign of maltreatment and has historically been grouped into organic, non-organic (NOFTT), and mixed varieties (Block, Krebs and the AAP, 2005). NOFTT is more realistically called malnutrition due to neglect. To the extent that many cases fall into the mixed category, such divisions are less important. While a full discussion of the evaluation of NOFTT is beyond the scope of this article, it is important to emphasize that the findings on a comprehensive history and physical examination should guide management and initial laboratory testing. In the face of normal basic metabolic measurements, a careful observation of parental feeding practices and the child’s intake and output is often illuminating. Height and weight need to be precisely measured over multiple visits and compared to currently accepted norms, some of which are modified by race, prematurity, or other medical conditions. With acceptable weight gain under direct supervision and lack of significant medical cause for malnutrition, a presumptive diagnosis of NOFTT can be made.

Medical Diagnosis and Reporting

**Diagnosis**

The physician should be able to recognize and report potential child maltreatment, using standard methods of obtaining history, physical examination, and selected laboratory and imaging tests. They must also be cognizant that multiple forms of maltreatment may co-exist, understand the importance of certain risk factors, assist in choosing the appropriate location and timing of evaluation, and appropriately refer children and families to specialized medical and social services. In health care, a clinical assessment of child victimization begins with a medical encounter that usually follows a predictable pattern of information-gathering, physical assessment, testing, and clinical diagnosis followed by treatment and/or referral (AAP, 1993; Kellogg and the AAP, 2005; AMA, 1985; Bays & Chadwick, 1993; Johnson, 1999; Palusci, Cox, Cyrus, Heartwell, Vandervort, & Pott, 1999; Shapiro, 2000; Zitelli & Davis, 1987).

Medical history, a cornerstone of medical diagnosis in general, still plays the most important part in the diagnosis of child abuse and neglect. It is that history, taken with physical examination findings and other studies in the context of the family, that offers a sound basis for diagnosis and treatment recommendations (AAP 1998; Kellogg and the AAP, 2005). First, the main reason for the medical encounter or “chief complaint” is recorded from the child or family, followed by delineation of appropriate elements of the medical history. Inquiring about and recording the specific complaints and disclosures of maltreatment by the child and parent, if any, in their own words is vitally important to the ultimate protection of the child. Behavioral and emotional issues are important in this assessment. Certain non-specific behaviors, developmental delays, and history of abuse should be recorded as part of the medical history, aiding in assessing harm and planning for appropriate treatment (Gushurst, 2003). A simple set of screening questions for the general pediatric encounter has yet to be widely implemented (Palusci & Palusci, 2006).

The health care professional then examines the child using a variety of techniques and procedures that, while gleaned from adult medicine, have been specifically adapted to meet the special needs of children (Muram, 1993). In cases of child victimization, the content and methods used to obtain the patient’s history and the techniques used for physical examination are further specialized into centers to concentrate on areas of increased risk and the types of suspected maltreatment (Blythe & Orr, 1995; Brewster et al., 1998; Bureau of Communicable Disease Epidemiology, 1989; Dubowitz, Black, & Harrington, 1992; Hager, Emans & Muram, 2000; Hobbs & Wynne, 1996; Kadish, 1998; New York City Health & Hospitals Corporation, 1991).
The examining physician then arrives at an assessment or diagnosis using standard diagnostic categories, such as the International Classification of Disease (U.S. Department of Health and Human Services, CDC, & National Center for Health Statistics, 1998) or a specialized diagnostic scheme for certain types of abuse (Adams, 2005). Medical diagnosis of child abuse and neglect follows commonly accepted practices for other medical diagnosis. While the use of such coding does not guarantee reimbursement, it highlights the standard approach to maltreatment as a concern of the health care provider and allows collection of population data (DHHS, 1998). Unique to child maltreatment diagnosis is a determination of certainty, with only a low level or possible certainty required to meet general standards of a “reasonable cause to suspect” that maltreatment has occurred for mandated reporting (Table 3). When maltreatment is suspected, the practitioner can request additional diagnostic tests for the child, such as x-rays, blood work, or microbiologic identification (AAP, 2001b; Adams, 1994). Furthermore, the practitioner can begin treatment of any acute injury, ensure protection of the child from further harm, and arrange referrals to appropriate physical or mental health specialists for further evaluation and treatment (Council of the American Academy of Child and Adolescent Psychiatry, 1997; AMA, 1985).

Significant differences exist between standards for medical diagnosis and those for legal adjudication. Medical diagnosis is defined as “the act of distinguishing one disease from another” or “the determination of the nature of a case of disease.” (Dorland’s Illustrated Medical Dictionary, 1974). A constellation of the patient’s history, physical examination, and laboratory findings may result in multiple potential diagnoses, leading the practitioner to a treatment plan without 100 percent or even probable certainty of the diagnosis.

These criteria differ significantly from legal standards, by which a level of certainty must be carefully crafted to include “credible” evidence, a “preponderance” of the evidence, “clear and convincing” evidence, or evidence “beyond a reasonable doubt.” These standards of evidence in the legal system are defined by a state’s case law or statute and are distinct from those in medical practice. As one might imagine, differences in interpretation of certainty can lead to difficulties in communication between legal and medical practitioners.

### Table 3—Relationship among medical findings, diagnostic certainty, and need for reporting

<table>
<thead>
<tr>
<th>History of maltreatment</th>
<th>Disclosure by child or report by third party</th>
<th>Inconsistent or non-specific</th>
<th>None</th>
<th>Plausible, consistent alternative cause</th>
</tr>
</thead>
<tbody>
<tr>
<td>None or any</td>
<td>Normal or non-specific</td>
<td>Normal or non-specific</td>
<td>Normal or non-specific</td>
<td>Normal or non-specific</td>
</tr>
<tr>
<td>Specific</td>
<td>Specific</td>
<td></td>
<td>None</td>
<td>Plausible, consistent alternative cause</td>
</tr>
<tr>
<td>Specificity of examination or laboratory findings for maltreatment</td>
<td>Specific</td>
<td></td>
<td>None</td>
<td>Plausible, consistent alternative cause</td>
</tr>
<tr>
<td>Diagnostic Certainty</td>
<td>Definitive</td>
<td>Likely or probable</td>
<td>Possible</td>
<td>No basis for concern</td>
</tr>
<tr>
<td>Reporting</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

*This is for guidance only; all cases require assessment of the need for reporting and are affected by other factors, such as delay in seeking care, inconsistency over time or development, seriousness of injury, prior injury, or other CM.
counselors, law enforcement officers, and mental health professionals working in hospitals, in addition to a variety of other licensed professionals who include teachers, counselors, law enforcement officers, and mental health professionals. Specific protections are usually given for reports made “in good faith,” and certain penalties are listed for the failure to report when child maltreatment would “reasonably” have been suspected.

Requirements vary from state to state, and no national criteria exist for determining whether to report suspected abuse or neglect based on medical indications (U.S. DHHS, 2005). General guidelines have been suggested, which include the patient’s meeting the definition of being a child, the act or omission having been committed by the parent or caretaker, the history being inconsistent with the injury, or that other features of an reported episode fulfill other criteria for abuse or neglect. Multiple missed medical appointments, unreasonable delay in seeking medical treatment, abandonment, illnesses that could be prevented by routine medical care, and inadequate care have been identified as potential minimal criteria for a neglect report. (Paradise et al, 1995). Statements made by the child or parent disclosing potential maltreatment, physical injuries, or death inconsistent with accident or medical disease, or sexually transmitted infections or pregnancy are generally accepted as a basis for suspected maltreatment reports.

It is important to note that child abuse reporting is one of the few instances in which health care professionals are required to contact a governmental agency in the routine course of their practice. While disease reporting has traditionally existed within public health (particularly when a contagious infection may pose a hazard to community health), reporting actions that are deemed to be “crimes” has historically been less accepted by the medical community. Less clear statutory requirements have been enacted in the United States for reporting victimization of elderly, vulnerable adults and of domestic violence. Recent federal legislation specifically allows state-mandated child abuse reporting and exempts such state reporting laws from HIPAA requirements.

Physicians have historically underreported suspected maltreatment (Johnson, 1993; Ladson, 1997). Several reasons have been identified for this failure, such as fear of losing patients, distaste for the legal system, and liability concerns (Morris, 1985; Palusci & Marshall, 2003). Penalties for not reporting range from fines in some states to criminal charges in others, but also include civil penalties so that the child or the child’s family may litigate to redress financial losses sustained because of maltreatment that was not reported.

Conclusions

Physicians and other mandated reporters play a vital role in the identification, reporting, and treatment of child victims of abuse and neglect. Physicians, nurses, and other health professionals have improved their identification of the physical injuries associated with victimization and have developed increasingly sophisticated techniques for diagnosing and documenting physical abuse, sexual abuse, psychological maltreatment, and neglect. They have integrated physical and laboratory findings with referral to specialized services to provide improved diagnosis for children and families. Using current information about the specificity of historical information and physical findings, they can accurately identify and report suspected maltreatment, fulfilling their roles both as mandated reporters and as important members of the crew of the “lifeboat” needed to save children in the sometimes turbulent “ocean of life.” (Myers, 2002). ©

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**About the Author**

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Relative Placement in Abuse Cases, or Maybe Not

An Analysis of MCL 712A.13a(5) of the Juvenile Code

by Eric G. Scott, assistant prosecutor, Sanilac County

Under Michigan’s Juvenile Code, children subject to the jurisdiction of the juvenile court are subject to removal from the familial home for placement into foster care. Under the juvenile code, the family court may either release a juvenile found to come under the jurisdiction of the court to the custody of his or her parent under conditions necessary for the juvenile’s health or mental well-being, or the court may place the child in foster care. Mich. Comp. Laws § 712A.13a(3). Additionally, the Michigan Court Rules allow for out-of-home placement of a child into foster care in the course of a child protection proceeding when it is contrary to the welfare of the child to return to the familial home. Mich. Ct. R. 3.965(c)(1)-(2). By statute, the definition of foster care includes a whole plethora of placements, which includes relative placement.

In child protection proceedings, a generalized preference for relative placement of children who have been removed from the home and placed into foster care exists. But this preference for relative placement must be considered in light of Mich. Comp. Laws § 712A.13a(5) which states that:

If a petition alleges abuse by a person described in subsection (4), regardless of whether the court orders the abuser to leave the child’s home under subsection (4), the court shall not leave the child in or return the child to the child’s home or place the child with a person not licensed under 1973 PA 116, MCL 722.111 to 722.128 unless the court finds that the conditions of custody at the placement and with the individual with whom the child is placed are adequate to safeguard the child from the risk of harm to the child’s life, physical health, or mental well-being.

This section of the juvenile code applies only to those cases where abuse has been alleged. What’s important to note here is that the definition of abuse is not specifically defined; the statute leaves the interpretation of what is abuse to the courts. What is clear, however, is that section 13a(5) does clearly apply to cases where either sexual or physical abuse has been alleged. It is also clear from the section’s plain language that relative placement in all cases in which abuse has been alleged is disfavored unless the court makes certain findings. For a definition of relatives, the court is to consider Mich. Comp. Laws § 722.111(1)(o), which states that relatives are parents, grandparents, siblings, stepparents or step-siblings, aunts and uncles, cousins, great aunts or uncles, or step-grandparents.

As a practical matter, the definition of a relative includes the non-custodial parent. What that means in the context of a child protection proceeding in which abuse has been alleged is that under Mich. Comp. Laws § 712A.13a(5) the Department of Human Services and the family court are prohibited from placing the minor children in the home of the non-culpable, non-custodial parent because such a person falls under the definition of relative placement.

Perhaps you’re out there shaking your heads saying how can this possibly be, but return to the plain language of Mich. Comp. Laws § 712A.13a(5), which very clearly prohibits non-licensed foster care in all cases in which abuse has been alleged, unless the court makes certain findings. Non-culpable, non-custodial parents fall under the definition of relatives, and can see their child placed in foster care without having done anything wrong. In all cases in which abuse is alleged, the language of section 13a(5) mandates a prohibition against relative placement, including placement with the non-custodial parent. That prohibition remains in effect until the court finds, on the record, that relative placement is adequate to safeguard the minor child from a continued risk of harm to his or her health, safety, or welfare. These are very specific findings the court must make before the relative placement can be permitted.
Regarding the mandate of 13a(5) as it relates to relative placement, I should clarify a point about relative placements and placement with non-custodial parents. These types of placements fall under the heading of unlicensed foster care, and remain preferential to out-of-home placements. Along those lines, section 13a(5) does not say that the department can never place a child in an unlicensed foster care setting; it only says that the department cannot make that placement where abuse has been alleged until the court removes the prohibition imposed on these placements. The department is still mandated to consider relative placement, including placement with the non-custodial parent. But to lift the prohibition on the relative placements that section 13a(5) imposes, the department must do additional investigative work to allow the court to make the required findings.

The purpose of section 13a(5) appears to be a response to Mich. Comp. Laws § 722.637. That statute requires the Department of Human Services to file a petition within 24 hours of determining that a child has been abused. In these cases, the DHS is required to bring the abuse to the court’s attention before completing its investigation. This means that at the time the DHS brings this mandated petition, the identity of the abuser may not yet be known. Considering section 13a(5) in the context of protecting the child from the abuser, the statute makes sense because the child is placed outside of all relative care until DHS and the court can determine who is safe and who will protect the child from further harm. In a case where DHS has only determined that the child was abused, but the name of the abuser is not known, it is imperative to place the child outside the family until all, or more, facts are known.

Another purpose section 13a(5) serves is to foster what some may refer to as the “team approach” to child protection proceedings. Under the “team approach,” parents, along with their allies (usually other family members), use the child protection proceedings as a means of waging their custody wars. In this type of case, the respective parents and their family members may use the protective proceedings as a staging ground for allegations and cross-allegations of abuse. Here section 13a(5) works to neutralize the custody fight by removing the child from all of the family members, placing the child in a neutral, licensed foster care setting, in cases in which abuse is alleged.

Some prosecutors have actually used section 13a(5) to neutralize a custody war. It is especially useful in cases in which each of the parents, and the respective family members, have engaged in continually barraging the DHS with false allegations of abuse by the opposing parent. In one instance, over a three-year period, over 24 cross-complaints of abuse were made by either faction. Using section 13a(5), prosecutors and DHS were able to remove the child and place her in foster care, where a more neutral assessment of the abuse allegations could be obtained. This also eliminated the cross-complaints and neutralized the custody fight for the duration of the child protection proceeding. This is a case where section 13a(5) served its legislative purpose.

In theory, and generally speaking, Mich. Comp. Laws § 712A.13a(5) is effective, when applied, and is a good law. In practice, however, courts may overlook section 13a(5) or interpret it differently. Some courts, the Sanilac County Court, for example, apply the plain language of the statute. When abuse is alleged and the child is removed from the home, the child is placed in licensed foster care until someone demonstrates to the court that a particular relative placement is adequate to safeguard the child from further risk of harm to the child’s life, health, or mental well-being.

Other courts may ignore Mich. Comp. Laws §712A.13a(5) altogether, or may interpret relatives to be everyone else but the non-custodial parent. In these courts, the child may simply be placed with the non-custodial parent or another relative without the court’s making the additional and required finding that relative placement is adequate to safeguard the child from a continued risk of harm.

Under Michigan case law, the courts are required to apply the plain language of the statute unless the language is ambiguous or unclear. *Pohutski v. City of Allen Park*, 641 N.W.2d 219, 226 (Mich. 2005).

When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature’s intent as expressed in the words of the statute. *DiBenedetto v West Shore Hosp*, 461 Mich. 394, 402; 605 N.W.2d 300 (2000); *Massey v Mandell*, 462 Mich. 375, 379-380; 614 N.W.2d 70 (2000). We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature’s intent only if the statutory language is

*Id.*

The plain language of Mich. Comp. Laws § 712A.13a(5) gives the court a clear directive: placement of the child in a non-licensed home is prohibited in all child protective cases in which abuse has been alleged unless the court finds that the conditions of custody are adequate to safeguard the child from a continued risk of harm to his or her life, physical health, or mental well-being. As a matter of uniformity and consistency, our Michigan courts should be applying the statute’s plain language; that is, every Michigan court should be prohibiting relative placement of abused children until the appropriate findings are made on the record.

Not applying section 13a(5) as written creates a two-fold problem. First, by not applying MCL 712A.13a(5) as written, the court runs the risk of placing a child in an inappropriate or dangerous relative placement. Second, the court and DHS run the risk of becoming players in an ongoing custody war. Consider the case in which the DHS is mandated to file a petition before figuring out who the perpetrator of the abuse is. In that case, the statute becomes a tool for the court to assess who potential perpetrators are, and it allows the DHS time to assess which family members are a risk and which are not. Abuse cases are by their very nature cases that require prompt attention by the courts. The courts and the DHS must act quickly to protect the child. But once the court becomes involved and the child is removed and placed in licensed foster care, the emergency is effectively dealt with, and the agency and the court can begin the process of determining which relatives will protect the child. Before a thorough investigation of those relatives in cases of abuse, everyone but the licensed foster home can be, and often is, a suspect. Section 13a(5) allows the DHS to rule out those suspects and allows the court to hear testimony about which relatives are appropriate and why they are appropriate. In this instance, using section 13a(5) as written gives the court the necessary information it needs to make an informed decision as to how best to protect a child.

The second problem we create by not applying the statute as written goes back to the scenario in which the child protection proceeding is being used to wage a custody war. In this scenario, it isn’t uncommon for parents to be alleging abuse against each other. When the court takes a position allowing placement of a child in the home of the non-custodial parent without following the statute’s mandates, the court unintentionally takes a position in that custody fight and may actually be allowing the child to be placed at a greater risk of harm.

For example, assume that the parents are making cross-complaints of abuse with the fact of the abuse being true, but the identity of the abuser unclear. In this case simply placing the child with the non-custodial parent may be the claim of abuse could be placing the child in the home of the abusive parent before the DHS or the court is able to ferret out the facts of the case. The goal is protection of the child; if we simply allow relative placement without knowing all the facts, we fail in our goal of protecting the child.

Furthermore, by design, domestic proceedings and child protection proceedings are kept separate. The sole purpose of the child protection proceeding is the welfare of the child. The domestic proceedings consider several other issues, some of which have to do with the welfare of the child, but these proceedings are superceded by the child protection law because the protection of the child is paramount. If the court allows placement of the child with the non-custodial parent without further analysis of the facts, the mandate of the court in protecting the welfare of the child fails. Ideally, the statute is a tool to assist the court in carrying out its statutory mandate, and it should be a tool for the court to use in ensuring that each of the respective parties adheres to that mandate as well.

A better approach for the courts and the DHS to take is to use the statute as the tool it was intended to be. What this entails from a practice standpoint is taking additional testimony from the DHS caseworkers at the preliminary hearing about the appropriateness of any relative that steps forward requesting placement. This also entails additional investigative
work on the part of the DHS caseworkers to ascertain whether potential relatives, including a non-custodial parent, will adequately safeguard the children from further harm. Once the court hears that additional testimony, the court can then remove the prohibition against relative placement that the statute imposes.

While application of the statute as written is a valuable tool, its application is not totally problem free. One of those problems has to do with who has the burden of demonstrating that the proposed relatives will be adequate to safeguard the child. Nowhere in the statute or the court rules is there a clarification as to who bears the burden of showing, or how the court is to make the finding, that a particular relative placement is adequate to safeguard the minor child from further harm. Is it the DHS caseworker, or the parents, or do we apply the continuous record approach where the court is to consider the record before it in determining whether relative placement should be permitted? Here the statute and court rules are silent.

The statute also does not give guidance as to what standard of proof the court is to apply when determining that a relative placement will be adequate to safeguard the minor child from further harm. Is the standard a preponderance, clear and convincing, beyond a reasonable doubt, or is it some other subjective standard imposed by the court? The statute and the court rules are utterly silent on this point.

In practice, some prosecutors in these cases have placed the burden on DHS to demonstrate that a particular relative is appropriate for placement consideration. When the DHS brings a petition for filing and that petition involves abuse, the prosecutor should plan ahead to take testimony regarding any investigation into relative placements. This allows the prosecutor to know what relatives have come forward, what the caseworker is considering in terms of placement, and how to best proceed when the court inquires about the issue of relative placement. This may seem burdensome or time-consuming, but in reality it is nothing more than asking few short, direct questions about the relatives that have come forward.

Typically the questioning goes as follows:

- Have you had an opportunity to investigate the appropriateness of relative placement?
- Which relatives have you investigated?
- Is he or she a relative who can adequately safeguard the minor children from a continued risk of harm to their life, health, or mental well-being?
- What do you base that conclusion on?

By taking the time to ask these few questions, the court can comply with the statute's mandates and can make the appropriate findings on the record. Once the court has sufficient information to lift the prohibition against relative placement, the court then can state the reasons on the record for lifting the prohibition and can incorporate those findings into its orders.

From the petitioner's perspective, the statute can also work a significant strategic advantage. For example, when the parents are making excessive cross-complaints of abuse, the statute can be used to remove the child from that environment. Once removed, the DHS can interview the child regarding allegations of abuse in a setting in which neither parent has the ability to influence the child's answers. With both parents and the respective relatives taken out of the mix, a better and more thorough interview of the child can be accomplished. In this example, the court ultimately took jurisdiction over the child based on a theory of mental abuse, but the removal of the child from the family as a whole allowed a better understanding of the issues and the family dynamics in the case.

Additionally, the statute allows the DHS to address the issue of the absent parent. In these cases, one parent, usually, but not exclusively, the father, has been out of the child's life for many years. This type of parent will often surface after receiving notice of the proceedings and will demand to have the child placed with him or her. Here the DHS has not had an opportunity to conduct any investigation of the previously absent parent, and nothing is known about the absent parent's ability to safeguard the child.

What the statute does, in cases of abuse, is prohibit placement with that absent parent until more is known about his or her circumstances. The DHS can then place the child in licensed foster care and conduct an investigation into the non-custodial, formerly absent parent's circumstances. This is perhaps a cautious approach; however, if the issue is protection of children, it is far better to err on the side of caution and conduct the investigation into the absent parent's circumstances than it is to blindly allow placement of
the child into that parent’s home without knowing why he or she has been absent for so long. Sometimes a parent is just absent; however, there’s more often a reason why a parent has been absent for many years. Many times that reason has less to do with being absent than it does with being a risk to the child.

In conclusion, each of us practicing in the area of child protection has an obligation to the child. In keeping with that obligation, we each must apply the subtle nuances of the child protection law to the best of our abilities. It is a highly specialized area of the law and requires considerable dedication. Whether our practice deals exclusively with juvenile cases or whether it is just a small percentage of the work we do, each of us has an obligation to learn those specialized nuances of the law.

About the Author

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The Michigan State University
Kinship Care Resource Center

by Ama Agyemag, MSW, program coordinator, MSU Kinship Care Resource Center

The phenomenon of kinship care is a practice that spans all cultures, generations, and geographical locations. According to the Child Welfare League of America, kinship care can be defined as the provision of full-time nurturing and protection of children by adults other than parents who have a family relationship bond with the children. Examples of kinship providers include grandparents raising grandchildren, siblings raising siblings, aunts and uncles raising nieces and nephews, and a neighbor raising a close friend’s child. The 2000 Supplementary Survey Data documented that there were over 70,000 grandparents raising grandchildren in Michigan. Kinship care keeps children in their natural family environment and helps them cultivate a sense of identity and belonging. A safe kinship care arrangement can provide stability for children and help to avoid emotional problems associated with non-relative placement, e.g., separation anxiety, adjustment reactions, attachment disorders, and conduct disorders. Kinship care families also save the state and child welfare systems millions of dollars by keeping children out of institutional placements like foster care.

The Michigan State University Kinship Care Resource Center was established in 2002 to meet the physical, emotional, and general well-being needs of kinship families in the state of Michigan. The late Dr. Robert Little created the center as a result of a series of research projects conducted in 1999 on the policies and programs affecting kinship families.

Dr. Robert Little was an instructor at the MSU School of Social Work and an expert in kinship care issues. In the 1960s he served as the director of the Children’s Center in Washington D.C., and in the 1970s, he was the deputy director for the State of Michigan Department of Human Services for Wayne County. Dr. Little was a passionate advocate for family preservation programs and kinship care.
The center’s main direct service is a toll-free telephone warm line that serves caregivers throughout the state of Michigan. Caregivers use the warm line to gain information about community resources and needs. The center collaborates with the Chance at Childhood Program to provide free legal counseling and advice for kinship caregivers.

With a recent appropriation from the State of Michigan through the Department of Human Services, the center will soon be offering a statewide direct assistance program for kinship caregivers. This program will allow kinship caregivers to apply for assistance with needs such as utility bills, rent, guardianship fees, school expenses, foster care licensure requirements, and other identified needs. The center’s statewide approach allows families to locate services and helps to defragment kinship services within the state.

As caregivers contact the center, they become permanently connected to agencies in their county. This often encourages the caregivers in their search for resources and empowers them to become their own advocates. Through these interactions, the center is also able to remain connected to the community of kinship families and can monitor the current needs and issues. The priorities of the center evolve in response to these needs.

The MSU Kinship Care Resource Center continues to provide statewide kinship picnics, conferences, and educational workshops for kinship caregivers and social service representatives. Some of these workshops include grant writing, kinship legal and mediation presentations, and kinship advocacy training. The center is also currently conducting a statewide research on the present status and issues of kinship caregivers in Michigan as well as the overall well-being of children raised in kinship families.

Legislative advocacy is another focus of the MSU Kinship Care Resource Center. In 2000, the center created the Kinship Legislative Task Force. This group consists of social service representatives and kinship caregivers who work together to help influence appropriate bills and polices affecting the kinship community. The Legislative Task Force has worked to write a kinship guardianship assistance bill for the State of Michigan. The bill would provide financial assistance for kinship caregivers who have guardianship of the children in their care. The center will continue to advocate for this bill and provide informative meetings to educate the public on how to become effective advocates for bills affecting kinship care.

Finally, the center produces a statewide newsletter that gives information about upcoming events, social gatherings, and legislative developments. By advertising activities, kinship families are informed of opportunities to have social interaction with others participating in kinship care.

Since the establishment of the MSU Kinship Care Resource Center, many kinship care families have become empowered to be advocates for themselves. Kinship caregivers have become aware of how to locate and create resources that they need. These individuals then teach the same skills to others, increasing the social power of the group. Many groups have also become involved in the legislative process by calling, sending letters, and meeting with their representatives. Kinship families have begun and continued kinship programs, including support groups and respite care activities. As a statewide agency, the center has kept the kinship care community and agencies connected to focus on common goals and aspirations.

The MSU Kinship Care Resource Center believes that increasing the awareness of kinship care and advocating for an increase in resources will leave a lasting impact on the community. It takes a village to raise a child, but more importantly, it takes resources, dedication, and support to ensure the successful development of our children's future. As communities, agencies, and lawmakers are made aware of the kinship population, resources can be developed to support their physical, emotional, social, and cultural well-being.

For more information about the MSU Kinship Care Resource Center, please call us at 1-800-535-1218 or e-mail kinship@msu.edu. MSU Kinship Care Resource Center, 6810 S. Cedar Ste. 6, Lansing, MI 48911.
Lost and Alone on Some Forgotten Highway:

**ASFA, Binsfeld, and the Law of Unintended Consequences**

by Honorable Kenneth L. Tacoma, chief judge, Wexford County Probate Court

There is a disadvantaged people-group in our society that is expanding rapidly. It is comprised of children and young people who have never known the ties and support that come from having a reliable family. I have seen the faces and studied the cases of some of these young people, and the loneliness and alienation that I have seen is heartbreaking. These people are the new generation of state-created orphans.¹

Between the late 1980s and mid-1990s, there was a growing awareness of the problems facing children in foster care placement. The system itself failed to serve many of the needs of the children who were frequently shifted from one foster home to another and left in limbo for unreasonable lengths of time with no finality in their legal status. The harm to children from these problems and the perceived need for stability and permanence led the Michigan legislature to attempt to address these issues by changes to the Michigan Juvenile Code.² Substantial changes were first enacted in 1988,³ and in 1996 massive amendments were made to both the juvenile code and related statutes dealing with child protection following the recommendations of the Binsfeld Commission; these changes became commonly known as the Binsfeld amendments.⁴

At the federal level, the Adoption and Safe Families Act of 1997 (ASFA) also added substantive requirements to state laws by making provisions to expedite litigation, promote resolution, and effect permanency in child abuse and neglect cases a condition of federal funding.⁵ The evidence now appears clear that an unintended result of these laudable legislative efforts has been an unprecedented increase in involuntary termination of parental rights by the state, with a secondary consequence that we now have more rootless children, children without any legal family ties, than we had in the entire child protection system before these laws.⁶

The following graph using data from the Michigan Department of Human Services (DHS) shows the trends in numbers and situations of children who have been made wards of the state.⁷

Using the data from this graph, we can derive the number of state wards who have been made orphans and are either unadoptable or are available for adoption, but without identified prospects.⁸

Finally, we can use these numbers to show directly the increase of state-created orphans in Michigan who are left without any family ties.
TABLE 2

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<td>Total Unplaced Wards (A-C)</td>
<td>782</td>
<td>765</td>
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<td>1005</td>
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<td>1381</td>
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<tr>
<td>Unplaced Adoption Goal Wards (B-C)</td>
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<td>149</td>
<td>155</td>
<td>337</td>
<td>440</td>
<td>656</td>
<td>610</td>
<td>101</td>
<td>294</td>
<td>896</td>
<td>839</td>
<td>680</td>
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<td>1782</td>
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<td>1818</td>
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<tr>
<td>Unadoptable Wards (A-B)</td>
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<td>616</td>
<td>654</td>
<td>668</td>
<td>672</td>
<td>725</td>
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<td>904</td>
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<td>1159</td>
<td>1448</td>
<td>1583</td>
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A few observations on these statistics are in order:

- Perspective is important - over the past two decades the birthrate in Michigan has actually been falling - from 137,626 live births in 1986 to 130,850 live births in 2003—approximately a 5% decrease. The overall downward trend in birthrates means that the number of children to whom parental rights have been terminated as a percentage of all children in the state has gone up even more dramatically than it initially appears.

- In 1986 there were 105 unplaced adoption-goal wards; in 2003 and 2004 there were 1,942 and 1,818, respectively—a staggering increase of approximately 1,750%.

- The number of unadopted plus unadoptable wards in 2004 (3,543) is over twice the number of total state wards who were in the system in 1986 (1,716).

- The most disturbing of these statistics is the number of unadoptable wards, that is, wards where adoption is not even perceived as a viable goal.

In 1986 there were 677 such unadoptable wards, by 2004 the number was over 22 times higher, at 1,725. It is also noteworthy that this number had been quite stable historically, staying in the range between 600 and 800 during the decade between 1986 and 1996.

- As distressing as these statistics are, these numbers seriously understate the problem in at least three ways:
  1. These statistics do not include children who have aged out of the system. As time goes on, more and more children age out of the system by reaching adulthood and are no longer counted as part of the Total State Wards group. According to its Office of Communications, DHS only began to track these numbers recently, but they report reliable data that in 2002, 2003, and 2004 respectively, 465, 362, and 484 youth aged out of the system; this would add over 1,300 young people to the total number of unadopted/unadoptable wards. Emancipation does not change the fact that they are state-created orphans—they just no longer have any formal ties or associations at all—not even the occasional visit by a DHS foster care worker. The short line on the State Orphans graph illustrates the result when these aged out young people are added cumulatively to the wards who are still under the state’s jurisdiction.
  2. These statistics do not include children who are not made state wards after termination of parental rights. There are children over whom the court retains jurisdiction in cases where parental rights are terminated. These Court Wards are not included in the state data, although in 2004, for example, 124 wards would be included in this group.
3. These statistics do not include the children who, although initially adopted, return to the jurisdiction of the court and are placed in foster care or institutional placement because of failed adoptions.” They usually return as delinquent wards, so the parental rights of the adoptive parents may well be left in place. Again, these young people are not reflected in the state data, and I was unable to find any statistics showing the size of this group. The numbers may well be much larger than one might initially suspect, however, as in the last year alone I have had four such young people in my relatively low-volume court. The heartbreak and distress to both the return-to-the-system wards and to the adoptive parents who had struggled valiantly to raise these damaged children is palpable.

Although the cumulative provisions of the Michigan and federal legislation certainly must be considered when assessing the cause of these trends, I believe three particular provisions contained in the amendments to the Michigan Juvenile Code post-1988 have lead to this surge in permanent state wards, based on my experience and anecdotal evidence I have gathered from other Family Division judges. All three are the result of statutory mandates that strip discretion from DHS decision-makers and the court and replace that discretion with arbitrary statutory rules.

The first provision is the one-year rule contained in MCL 712A.19a. The practical result of this statute is to make termination of parental rights not only the default option, but also the mandated case plan if a child remains in foster care for one year after initial placement. Only an affirmative showing that it is clearly not in the child’s best interests can stave off a termination proceeding - a nearly impossible task for the parents, child or DHS. This provision forces many cases into a termination mode even if other options (such as continued work with the parent(s) on a case service plan, long-term foster care, or long-term relative placement) might be available for consideration.

The second mandate driving these termination cases is the provision in favor of termination of parental rights found in MCL 712A.19b(5), which requires the court to terminate parental rights if statutory grounds are proven unless the court finds termination of parental rights to the child is clearly not in the child’s best interests. Once again, this is nearly an impossible standard for the parent(s), child or DHS to rebut. It is noteworthy that several appellate cases have confirmed this statutory scheme against constitutional challenge and that the Michigan Supreme Court has held that so long as the court is able to consider the entire record for facts to consider in the best interests findings, the statutory provision requiring termination must stand. Having presided in many trials of this nature, I can say with assurance that very little, if any, evidence is typically introduced in a systematic way on the best interests issue, and that in the absence of such evidence, I have been forced by the legal standard to terminate parental rights, even when it could be reasonably assumed that the child(ren) would probably not be adopted.

The third provision driving the surge in termination cases is the expansion of situations in which a mandatory termination of parental rights petition must be filed. Section 18 of the Child Protection Law requires the DHS to file a petition and include a request for termination of parental rights in several factual situations. While certainly in most cases the presence of the kinds of abuse or neglect enumerated in the statute justifies and should require termination of parental rights, the removal of discretion from professionals continues the pressure for more termination cases to be filed and results in more permanent state wards.

The number of children made orphans by these provisions requires the conclusion that this is a problem that should be revisited, and as a basis for discussion, I suggest the following changes be made in the law.

First, the mandatory one-year rule should be statutorily modified, or better, eliminated. Often the rule is implicated in cases in which the children are the subject of neglect (such as a parent’s persistent, treatment-resistant drug abuse or instability from transient meretricious relationships by a young mother so typical in these cases), rather than active abuse, in which the long-term likelihood of building a successful family should be considered on a case-by-case basis. As it is now, all players must approach the case as one-year and out.”

Second, the current presumption insisting on termination if the statutory grounds are proven should be reversed. Whatever reasons and arguments led to this draconian presumption being legislatively adopted, in view of what has happened, I can see no reason that the state should not be held to the same
burden of proving by clear and convincing evidence that it affirmatively is in a child’s best interests to terminate rather than shift the burden to the parents (or child(ren)) to prove that it is NOT in the child(ren)’s best interests to terminate. Requiring the state to prove both statutory grounds and child(ren)’s best interests by this high standard would put the issue of best interests front and center in the litigation and lead to a better examination of the child(ren)’s overall life circumstances.

Third, we need to expand alternatives to the litigation of these cases to termination of parental rights. In some pilot programs, alternative dispute resolution in the form of Permanency Planning Mediation has been shown to expedite the processing of abuse and neglect cases and generally produce more favorable outcomes.

These programs encouraging mediated solutions should continue to be studied, and if they continue to show favorable results, aggressively pursued.

Fourth, we need to develop, either legislatively or by informed judicial accretion, a set of factors to measure best interests in these circumstances; the best interest factors in the Child Custody Act of 1970 simply are not appropriate because those factors presuppose a choice between fit and adequate parents.

In my opinion, the factors that should be considered in a termination case are quite different and should include at a minimum the following:

**The age of the child.** Michigan law already recognizes the right of a minor who is 14 years or older to participate in adoption and guardianship decisions by requiring consent of the minor at that age.

**The attitude of the child toward the termination.** This is related to, but analytically distinct from, the issue raised above. Even at a very young age, children recognize the parental relationship and for some it is very important, even in the face of objectively unacceptable abuse or neglect. Indeed, many children ultimately return to their biological roots, even in successful adoptions, demonstrating the importance of considering this issue.

In one of my recent termination cases involving a boy, (seven years old when proceeding were initiated and eight at the termination stage of proceedings), the child has refused to accept the termination, essentially making adoption impossible and vowing to go back to his parents as soon as he grows up. This refusal to accept adoption as a possibility in some cases should be taken into account.

**The type and extent of the neglect and abuse that lead to court jurisdiction.** Some forms of child abuse (severe sexual abuse, for example) are so devastating that virtually nothing can be done to restore the child, and termination of parental rights is required not only for permanent protection of the child, but also as society’s statement of opprobrium toward the perpetrator. At the other extreme, we see cases in which a young, hapless mother either is unable to maintain a adequate, clean home or lacks the emotional strength to divest herself of a pernicious boyfriend. After a year of struggle to change the situation, termination proceedings are required by law to be initiated.

**The strength and nature of the parent-child bond.** Another related but distinct consideration is the bonding between the child and parent in the particular case. Some parent-child bonds are weak, some strong. Some are unhealthy, but others may be appropriate, despite the parent's deficiencies in other parenting areas.

The court should consider expert evaluation on this point, giving increasing consideration to preserving a parent-child relationship as the bonding is shown to be stronger and more appropriate as we move along the continuum. We must come to the point where we accept the idea that we can adequately protect children even when we have no intention of returning the child to the care of a deficient parent, and it may be better in some circumstances to leave the parent-child bond in place. Permanent foster care arrangements or guardianships may be more desirable than adoption in a larger class of cases than we have been willing to accept in the naivete we held when we thought that termination would automatically lead to adoption.

**The probability that the child will be adopted.** In some cases, it is quite apparent even at the time of the
termination trial, that the child will be unadoptable absent a set of extraordinary fortunate circumstances for the child. At the other extreme, it may be clear that a prospective adoptive home is just waiting for the child to be free for adoption. The law clearly and rightly prohibits the comparison of prospective homes when determining whether jurisdiction over the child should be taken. Those reasons are not present when jurisdiction is already asserted, the grounds for termination are proven, and the issue has been reduced to the child’s best interest. We should not only permit but also solicit evidence on the likely landscape of the child’s life if termination is ordered. The risks associated with comparison-shopping are eliminated once an objective determination of statutory neglect and abuse has been made and we have reduced the decision to the least-harmful option, which is really what all these cases involve.

The economic factors. Termination of parental rights, as a practical matter, removes the parents’ legal duty to support, and the child’s legal right to inherit or receive governmental entitlement benefits derived from the parent. It may sound crass to raise this as a factor to consider; economic best interests are a reality, and I see no principled reason they should not be considered in the mix. In one case I had a few years ago, the father of children to whom rights had been terminated was killed in a car crash a few months after termination. The wrongful death benefits were paid over to siblings of the decedent, to the exclusion of the children since rights had been terminated. While it is not appropriate or possible to speculate that such a possible economic benefit might occur in many cases, more predictable and settled economic rights can and should properly be considered.

The rush to termination of parental rights embodied in the legislation of the past two decades has proven to be the wrong answer to very important initial questions of how to best protect children, both from abuse and neglect and from an unstable foster care system. The decision to make termination of parental rights the default response came because policymakers underestimated or overlooked several realities:

1. Children can be protected from abuse and neglect by removing them from the situation —termination of parental rights within a defined period adds nothing to their physical or emotional protection without looking at what lies ahead in their lives beyond termination.

2. Termination of parental rights does nothing to protect children from the problem of shifting and unstable foster placements when adoption cannot be achieved. If a foster care placement collapses for an unadopted/unadoptable child, he or she will still be passed along to another foster home or residential placement (which in my experience are even less stable than foster home placements). All that has changed is that one possible placement, the biological parents, has been completely eliminated.

3. We need more and better information from the social and medical sciences on the innate strength of the natural parent-child bond, even in unhealthy situations. There seems to be something which attaches early, and very strongly, in human relationships. I have observed this in other human relationships as well, and refer to it as the jerk syndrome—He may be a jerk, but he’s MY jerk. These relationships appear irrational and impossible to understand from the outside—and often prove to be dangerous—but we make a mistake to ignore or deny them, as it seems to spring from some primordial human need to belong.

4. It was a totally unrealistic assumption to believe that the supply of adoptive families could absorb the numbers of new wards available for adoption, particularly when the additional children come from the child protection system. In spite of tax incentives, adoption subsidies, promotion programs, post-adoption support services, and other tools to try to place these children, the numbers show that it won’t be done, and our group of state-created orphans will continue to grow.

Unfortunately, as things stand now, we are witnessing one of the great ironies in the legislative world of good intentions gone bad. The number of rootless and alienated permanent state wards has exploded, and these children and young people are still caught in the foster care system from which they were to be rescued. We have made things worse, not better.

Endnotes

2 Mich. Comp. Laws § 712A.1 et seq.
3 1988 PA 224.
4 1997 PA 163 through 1997 PA 172.
5 PL 105-89; 42 USC 620 - 679.
6 This issue is also beginning to receive general media attention; see, for example, Barbara White Stack, Federal Adoption Law Spurs Rise in Legal Orphans - Legislation Intended to Increase Adoptions Led to Increase in Kids With No Parents at All (Pittsburg Post-Gazette, December 26, 2004). The author claims that, as of the date the article was written, 117,395 children nationwide have been made state-created orphans since ASFA was passed.
7 The data is taken from DHS information that can be found on their website at www.michigan.gov/dhs, Adoption Reports and Statistics.
8 Note that these statistics include only children who have been made State Wards as a result of termination proceedings. Although this is by far the most common result in litigation terminating parental rights, as discussed infra, some children are made direct wards of the court.
9 Michigan Department of Community Health, Records and Health Data Development Section, Table 1.17, Live Births by Plurality. Birthrates in the period between 1986 and 2003 (the last year reported) vary significantly from year-to-year, from a high of 153,080 in 1990 to a low of 129,518 in 2002. Overall, however, there is a clear downward trend in birthrates in Michigan.
10 Jurisdiction is not necessarily terminated when a person reaches 18 years of age. Pursuant to Mich. Comp. Laws § 712A.2a(1), jurisdiction of the court may continue for two additional years for wards properly found within the jurisdiction of the court before reaching the age of 18.
11 Michigan Department of Human Services, December 2004 Foster Care Fact Sheet.
12 There is a similar arbitrary time requirement in ASFA. Pursuant to 42 U.S.C. ‘675(5)(E), if a child has been in foster care for 15 of the most recent 22 months, the state must pursue termination of parental rights. As in the case of defining “aggravated circumstances,” discussed infra, Michigan’s law is slightly more aggressive than the federal law; this, of course, ensures that the federal mandate is met, but also arguably makes the erroneous social policy choice even worse.
13 The corresponding court rules that govern procedure in termination of parental rights cases contain substantially the same provisions at Mich. Ct. R. 3.977.
14 See In re Trejo Minors, 612 N.W.2d 407 (Mich. 2000) and cases cited therein. Trejo rejected the analysis in some Court of Appeals cases that had held that the statute created a rebuttable evidentiary presumption in favor of termination and placed the burden on the parents to produce evidence on the best interests issue.

The majority in Trejo held that court should consider all evidence on best interests, regardless of its source, thus saving the statute from a potentially unconstitutional flaw. We hold that subsection 19b(5) mandates termination once a petitioner establishes at least one statutory ground for termination under subsection 19b(3), unless the court finds that termination is clearly not in the child’s best interest. This interpretation of subsection 19b(5) imposes no additional burden of production upon a respondent-parent and is constitutional. Trejo, 612 N.W.2d at 418-19.
15 Mich. Comp. Laws § 722.638. The types of abuse in which mandatory termination petitions must be filed tracks the definition of aggravated circumstances set out in ASFA where reasonable efforts for family reunification are not required, but as noted earlier in the context of the one-year rule, when carefully compared, Michigan’s standard is slightly stricter than federal law requires. See 42 U.S.C. 671(15)(D) to compare the ASFA provisions with Mich. Comp. Laws § 722.638.
20 Again, dealing on the anecdotal level, I have seen many cases in which this has occurred, often to the heartbreak of both the adoptee and adopting parents. Also, the regular traffic from adult-adoptees seeking information about their biological family pursuant to Mich. Comp. Laws § 710.68 et seq. shows the draw of this human impulse. In 2004, for example, SCAO statistics show 843 requests filed for Release of Adoption Information and 283 Petitions for Appointment of a Confidential Intermediary. Michigan Supreme Court, 2004 Annual Report, Circuit Court Statistical Supplement, 2004 Court Caseload Report, Proceedings Under Adoption Code.
21 The following quotation appears consistently in the quarterly foster care reports in the case, which may be more a reflection of the inertia produced by modern word processing data storage than the actual continuing attitude of the child, but it does nicely illustrate the point: “N*** was very upset and angry with his parent’s (sic) rights being terminated. He said he was going to get a gun and shoot the judge and slit his throat.” He said he was not going to let anyone adopt him or his siblings. He was going to live with the M***’s (foster parents) until he was 18 and then go back and live with his parents.” In re TR, ER, VR, CR, NR, CR, BR, and AR, Wexford County Circuit Court No. 01-15868-NA.
It is beyond the scope of this article to explore in depth the strength of parent-child bonding, but the following excerpt from the testimony of a very experienced and well-credentialed Ph.D. child psychologist in one of the termination trials I handled is instructive: “I would have to say at this stage out of the thousands and thousands of kids that I have evaluated in my career, I used to say not more than a handful, I could easily say now not more than two handfuls have ever wanted anything other than to go home. And I’ve seen kids that have been burned half to death that wanted to go back to the people that burned them . . . .” In re CS, IS, and DH, Wexford County Circuit file NA-14360-99.

23 In Fritts v. Krugh, 92 N.W.2d 604, 613 (Mich. 1958), this oft-quoted standard appears: “It is totally inappropriate to weigh the advantages of a foster home against the home of the natural and legal parents. Their fitness as parents and the question of neglect of their children must be measured by statutory standards without reference to any particular alternative home which may be offered the children.” This must certainly be the rule for obtaining jurisdiction; any rule that admits of choosing between homes would place every citizen at risk of losing his or her children at the caprice of the state because, by comparison, there would always be a better possible home. No parent could withstand the scrutiny of such invidious comparisons—a fact that I, like most parents, had pointed out to me by my own children in their younger years when I denied them some benefit that other parents “always” conferred upon their children.

Arguably the holding of In re Evink, 542 N.W.2d 328 (Mich. Ct. App. 1995), lv. den. 453 Mich. 874 (1996), could be extended to require that child support continue to be charged and collected against the biological parent(s) in cases in which the child is not adopted; as a practical matter I think most, if not all, Family Division judges allow child support orders to terminate upon involuntary termination of parental rights if rights are terminated as to both parents. It seems a bit unfair to allow the state to sever the legal rights of parents while continuing to insist on enforcing the legal responsibilities.

Indeed, termination of parental rights may actually provide less protection than continued wardship since after termination, the court loses jurisdiction to enter orders against the biological parents. In some cases in which the biological parent(s) continue to show up around the child(ren)—such as sporting events, school functions, etc.—the foster or adoptive parents are forced to resort to the cumbersome and inappropriate remedy of the anti-stalking personal protection order.

"The Road Goes on Forever And the Party Never Ends": A Response to Judge Tacoma’s Prescription for a Return to Foster Care “Limbo” and “Drift”

by Frank E. Vandervort, JD

Wexford County Probate Judge Kenneth Tacoma has written a thought-provoking article that brings attention to a very real problem: the excessive number of youth who are permanent wards but who have no realistic hope for adoption or other permanent plan. We should all thank him for encouraging a serious discussion about what to do about this problem. But the Judge’s prescription for addressing this important consequence of current child welfare law is ultimately unconvincing. If his suggestions are followed—and it appears that they have been taken seriously by the Michigan Supreme Court, which quietly convened a task force to look into making recommendations for policy changes as a result of Judge Tacoma’s concerns—Michigan would most likely return to the days of foster care “limbo” and foster care “drift.”

We haven’t heard those terms much for the past two decades, but it would be wise for our policy mak-
ers to investigate and ensure that they fully understand them and their implications before forging ahead with Judge Tacoma's proposals. Judge Tacoma mentions, in passing, the concept of “limbo” but does not describe the very real problem it presented to children stuck in a foster care system that would not make a decision. He fails to even mention the problem of “drift,” which was closely associated with the idea of “limbo.” Much discussed in the 1970s, foster care “limbo” described the temporary status of foster children in the days before the enactment of the Adoption Assistance and Child Welfare Act of 1980, the federal government’s first legislative effort to reform the nation’s foster care system. “Drift,” was used to describe the phenomenon of children moving from foster home to foster home or “drifting” through the system. Cleary, these phenomena still exist, but if Judge Tacoma’s recommendations become law, they will be the official policy of the state of Michigan.

This article responds to Judge Tacoma’s suggested changes in Michigan law. It begins with a very brief history of child welfare legislation at the federal and state levels. Next, it points out a number of errors in Judge Tacoma’s understanding of the current state of Michigan's child welfare law. It is necessary to point out these errors because it seems that his misstatements of the law form the foundation for his recommended reforms. Then it will respond point-by-point to many of Judge Tacoma’s recommendations. Finally, I will offer several suggestions for addressing the problem of legal orphans that do not require legislative or policy changes, but would require that we make significant changes in the way child welfare law is practiced in this state.

A Brief History

Child welfare is an area of the law that seems to have been particularly vulnerable to pendulum swings as policymakers have tried to develop a set of rules to address an infinite variety of exceedingly complex problems of human functioning. Before 1980, children entered the foster care system and very often there they stayed. Stayed, that is, until they were someday released from foster care on their own. Perhaps at some point they were returned to the custody of their natural parents, but there was no requirement that they were to be returned or that an alternative permanent plan be made for them, and state law differed widely on these issues. Children routinely spent their entire childhoods in “temporary” foster care. For example, in 1977 the United States Supreme Court decided *Smith v Organization for Foster Families for Equality and Reform,* in which it was called on to delineate the constitutional rights of foster parents who had parented foster children for many years. The children at issue in that case had lived with their foster parents for as long as 10 years. Similarly, *Santosky v Kramer,* in which the Supreme Court addressed the standard of evidence required by the constitution before a parent’s rights could be terminated, involved three children. One entered foster care in November 1973, the other two in about September 1974. The state moved to terminate parental rights for the first time in September 1976, but the trial court rejected the state’s effort. The state again sought termination of parental rights in October 1978. Such long stays in “temporary” foster care were not at all unusual in those days.

If these long stays in foster care were not bad enough, children were frequently moved from foster home to foster home. Our current child welfare system still struggles with stability. But in those days, before the federal government stepped in with financial incentives to stop the practice, many states moved children as a matter of policy whenever they grew emotionally close to their foster parents.

In response to children’s long stays in the uncertainty of temporary foster care, the federal government enacted the Adoption Assistance and Child Welfare Act of 1980 (AACWA). The AACWA established a funding scheme that sought to achieve three main goals: 1) reducing the numbers of children entering foster care by mandating that “reasonable efforts” be made to prevent the removal of children from their natural parents’ custody; 2) the expediting of children’s movement through the foster care system by, among other things, requiring states to make “reasonable efforts” to reunify children with their natural parents and establishing a requirement of permanency planning hearings after the child had been in care for 18 months; and 3) providing federal funding assistance to encourage adoption of those children who could not be returned home.

In response to the AACWA, in 1988 Michigan overhauled its Juvenile Code. Those revisions were based on the findings of the Coleman Commission, which was chaired by then Supreme Court Justice...
Mary Coleman, and were commonly referred to as the Stabenow legislation for then-State Senator Debbie Stabenow, the primary sponsor of the reform legislation. Among other things, the Stabenow reforms required “reasonable efforts” before children could be removed from their homes and, once removed, before the court could terminate parental rights. That legislation led Michigan to establish Families First and similar programs in an effort to preserve families and stem the tide of children entering the foster care system.

The Stabenow reforms—as was the federal law—were widely misunderstood. It became the typical interpretation that every conceivable effort to prevent foster placement or to reunify a family had to be made. As a result, many children were harmed by the reluctance to remove them from abusive and neglectful parents. On the national level, the case of Joshua DeShaney, a 4-year-old boy who was severely beaten and brain damaged at the hands of his father while the state’s child welfare workers took notes, is but one example of the way family preservation programs were misused.5 Some children died.6

Many more children remained stuck in foster care “limbo” despite efforts to move them through the foster care system and either back home to their parents or on to alternative permanent homes. In 1998, in In re Sherman,7 a panel of the Michigan Court of Appeals expressed its exasperation with the slowness of child welfare proceedings in this way:

[The basic facts and procedural history of this matter are part and parcel of the sadly familiar litany of parental neglect and failure, substance abuse, behavioral problems, and tortuous and prolonged legal proceedings that so often characterize parental rights termination cases. At the outset of such cases, one may well wonder whether the state is justified in proposing the ominously final step of terminating parental rights; at the conclusion, one can only wonder what took so long.]

Because it believed its intent in enacting the AACWA was misunderstood, in 1997 Congress enacted the Adoption and Safe Families Act (ASFA). Broadly speaking, ASFA had the same three goals as the AACWA: to reduce the number of children entering foster care, to move children who are in the system into permanent homes in a timeframe that is consistent with children’s developmental needs, and to promote the adoption of children from the foster care system. Additionally, Congress sought to clarify its intention with regard to the application of the “reasonable efforts” requirement making explicit that the interests of children in safety and permanency are the system’s paramount considerations.8 ASFA was signed into law in late 1997, and the first wave of the Binsfeld legislation was signed into law in December of that year; a second package of bills was signed into law by the governor in December of 1998. With Binsfeld, Michigan met or, in some cases, accelerated the ASFA timelines.

With only minor variations, this is where our law stands today.

Misunderstanding the Law

Before turning to the policy recommendations Judge Tacoma suggests, it is necessary to address the misunderstandings of the law reflected in his article. In a very fundamental way, his article communicates a misunderstanding of Michigan law as it relates to termination of parental rights, which leads to faulty conclusions about how to address the problem of legal orphans.

Permanency Planning Hearings After One Year

Judge Tacoma first asserts that the “one-year rule” contained in Mich. Comp. Laws § 712A.19a contributes to the excessive use of termination of parental rights. The operative provision of Section 19a is subparagraph 5. He argues that this provision of the law makes termination of parental rights “the default option” and “the mandated case plan if a child remains in foster care for one year after initial placement.”9

But a careful analysis of the most salient portions of that provision demonstrates that this is not the case at all. The first sentence of subsection (5) reads: “If parental rights to the child have not been terminated and the court determines at a permanency planning hearing that the return of the child to his or her parent would not cause a substantial risk of harm to the child’s life, physical health, or mental well-being, the court shall order the child returned to his or her parent.” Clearly, then, the preference articulated in the statute is not a default to termination, but the precise opposite, a default for return of the child to the parent’s custody unless the court finds a “substantial risk of harm” exists.
In a child protection case that reaches the stage that 19b(5) applies, the parent will have been shown to have abused or neglected the child. He or she will have been given as much as a year to engage in services aimed at assisting the parent to regain custody. Yet despite these efforts, the court must still find that the child would be at a “substantial risk of harm” before the court may take any action other than returning the child to parental custody. So, after having been at least once victimized by the parent and forced to uproot his or her life to live with relatives or strangers and waiting around for a period of time that might be his or her entire life, at the end of one year, the child shoulders the risk of harm unless that risk is deemed “substantial” by the court. This seems a more than fair effort to balance the interests of parents with those of their children.10

The statute goes on in an effort to level this shouldering of the burden. It provides: “In determining whether the return of the child would cause a substantial risk of harm to the child, the court shall view the failure of the parent to substantially comply with the terms and conditions of the case service plan . . . as evidence that return of the child to his or her parent would cause a substantial risk of harm to the child’s life, physical health, or mental well-being.” That is, unless the parent has made real and consistent efforts to improve his or her parenting capacity—which was previously found to be below the minimum acceptable level after the application of full due process procedures—the law will assume that the parent continues to be unfit. Where the parent has “substantially complied,” he or she has produced evidence that she is no longer unfit to parent the child.11 This assumption that a parent who has not complied with the ordered services continues to be unfit seems more than reasonable given the large amount of assistance offered to the parent in the form of various treatment programs and casework services.

It is unfortunately true that some parents—perhaps many more than we are willing to admit—are simply incapable of being helped, regardless of how much assistance they are provided, in anything like a reasonable time when we take into consideration the needs of their children.12 Anyone who has done child welfare work for any length of time has likely been involved in a case in which a parent with long-standing mental health problems (which may include numerous psychiatric hospitalizations), or a serious substance abuse problem, insists on residing with a partner who abuses both her and her children.

These cases are often complicated by the presence of poverty. And this co-morbidity is routinely encountered in child welfare practice. How can we possibly untangle such a knot in a year—or two or three years for that matter? And what should we do with the children of these families while their parents struggle with their problems? We cannot simply place children into a state of suspended animation. They grow; they develop attachments to other adults; to ensure their well-being, children need a stable primary attachment figure and a sense of long-term stability. While our child welfare system too often falls short of our goal that children have a stable family life within a reasonable time, taking into consideration the particular child’s developmental needs, enacting many of Judge Tacoma’s suggestions into law would make these unfortunate outcomes the official policy of the state, a policy that has been tried and that demonstrably does not serve the interests of children.

Of course, the application of the “one-year rule” doesn’t really mean that children must wait only a year for permanency or that parents are offered only one year of services in an effort to regain custody of their children. If we assume that the child has been in care for one year and the court holds the required permanency planning hearing at that time, neither the child’s hunt for permanency nor the obligation to provide services to the parent is done. The child welfare road is long, and the child has only just begun his journey.

The Trejo case provides a convenient example for understanding how the system actually works. In Trejo, after the parent rejected the agency’s efforts to preserve her family, the agency filed a petition and the trial court held a preliminary hearing on May 2, 1995. The court authorized the petition and ordered the children removed from parental custody. Later that month, the parents entered a plea. The children were initially placed with relatives and were replaced into foster homes in October 1995. The court held various review hearings. A permanency planning hearing (PPH) was held June 12, 1996, more than 13 months after they were removed from parental custody. It took another month, until July 12, 1996, for the agency to actually file the termination petition, this was actually expeditious because under the law the agency has 42 days to file if ordered to do so at the PPH.13 The court
held numerous days of hearings on the petition, but not until December 2, 1996, did the court enter its order actually terminating parental rights.

These timeframes are not at all atypical, particularly in our more urban jurisdictions where the vast majority of this state’s child welfare cases are heard. As this case demonstrates, the so-called “one-year rule” can regularly stretch to 18 months or two years. The Trejo children’s search for a permanent home wasn’t, of course, over at that point. The appeals began. In Trejo, the Michigan Court of Appeals issued its opinion affirming the termination of parental rights on June 12, 1998, a year-and-a-half after the termination. Fortunately, due to steps to expedite these cases, it currently takes about a year for a child welfare case to be decided by the Michigan Court of Appeals. The kids remain in “limbo” while this process takes place. The Michigan Supreme Court issued its opinion in Trejo on July 5, 2000, some five years and two months after the Trejo children’s saga of “temporary” foster care placement began.

Clearly the “one year rule” doesn’t mean a year for the children involved. It most often means substantially more, and it may mean their entire lifetime!

Judge Tacoma laments that the “one-year rule” requires a movement in the direction of termination “even if other options (such as continued work with the parent(s) on a case service plan, long-term foster care or long-term relative placement) might be available for consideration.” I will address each of these three options in turn.

First, the mere fact that the statute may require in some cases that the agency pursue termination after one year from the child’s entry into the system, does not mean that services stop at that point. Indeed, Michigan law seems to require that services continue until the court actually terminates parental rights. The Juvenile Code requires the court to put in place a treatment plan as part of the dispositional order. The statute also presumes that those services will be provided until the court actually terminates parental rights. So, “continued work with the parent(s)” after the filing of the termination petition is built into the current scheme for termination of parental rights.

Second, regarding long-term foster care, Judge Tacoma expresses concern that the court has too few options for using this means as an alternative to termination of parental rights. I disagree.

The Juvenile Code specifically grants the court substantial authority to extend foster care placement when doing so will serve a child’s interests:

If the court determines that it is in the child’s best interests based upon compelling reasons, the child’s placement in foster care may continue on a long-term basis.

This language is designed to comport with the language of the Adoption and Safe Families Act (ASFA). ASFA generally requires the state to pursue termination of parental rights when a child has been in foster care for 15 of the most recent 22 months. The federal statute, however, provides three broad exceptions to this requirement: 1) where the child is being cared for by a relative, 2) where a “compelling reason” has been documented that filing a petition to terminate parental rights “would not be in the best interests of the child,” and 3) where the state has not provided adequate services to meet the reasonable efforts requirement. Moreover, ASFA specifically grants state courts broad authority to take whatever action would serve the child’s interests in individual cases, without suffering any negative federal funding consequences, even if the state’s child welfare agency does not agree with the action. Thus, 42 U.S.C. § 678 provides:

Nothing in this part [Title IV-E of the social security act] shall be construed as precluding the State courts from exercising their discretion to protect the health and safety of children in individual cases, including cases other than those described in section 671(a)(15)(D).

Moreover, Michigan’s Juvenile Code specifically provides for permanent foster family placement when that placement would serve the interests of a child who is 14 years of age or older. A child who is placed pursuant to a permanent foster family agreement remains under the court’s jurisdiction, and the court must conduct review hearings at six-month intervals. Plainly, the permanent foster family agreement provision establishes, for some children, that foster care is a permanent placement. Used wisely, these various provisions of law provide the court with broad discretion to maintain a child in a foster home or other non-relative foster care placement.

Judge Tacoma’s third concern has to do with inadequate statutory authorization to use long-term relative placement when doing so would serve the child’s interests. Again, I disagree.

As already noted, if the child is placed with a relative, ASFA does not mandate that the Depart-
ment of Human Services file a termination petition, even where the child has been in foster care for 15 of the most recent 22 months, and it grants the court broad decision-making authority with regard to the child's placement. So there is no federal funding prohibition against the extension of “temporary” placement with a relative.

Michigan law is consistent with the federal law. The Juvenile Code, court rules, and Department of Human Services policy all strongly favor relative placement. Moreover, the legislature has recently expanded the definition of a “relative” to open additional placement resources for children. In the appropriate case, the court has the authority to grant legal guardianship to a relative or to another adult whom the court determines can provide adequately for the child. To ensure maximum flexibility in ensuring the child's safety, the statute specifically permits the court to dismiss the child protection proceeding when guardianship has been granted or to keep the child protection proceeding open.

Even if a case is not resolved by granting a guardianship to a relative, the Juvenile Code contemplates that relative placement under the court's supervision may constitute a permanent placement. Thus, the statute provides: “If a child is under the care and supervision of the agency and is placed with a relative and the placement is intended to be permanent . . . the court shall hold a review hearing not more than” every six months.

Taken together with the court's broad authority to amend or supplement its orders “within the authority granted to the court in section 18” of the Juvenile Code, the court has a great deal of flexibility to craft a dispositional order that will both provide permanency to each child and consider the special circumstances of his or her particular case. In those cases in which none of these options are suitable, the court may need to proceed to hearing on a termination of parental rights petition. But, again, Judge Tacoma seems to misunderstand the law's requirements.

Section 19b(5) and Trejo

Judge Tacoma's second major misstatement of the law involves his understanding of the purpose and methods of Mich. Comp. Laws § 712A.19b(5) and the Michigan Supreme Court's Trejo decision. His article repeatedly refers to these sources of law as creating a “statutory presumption requiring termination.” This is simply wrong. The court in Trejo repeatedly rejected the argument that subsection 19b(5) establishes a presumption in favor of termination. The majority explained:

reading subsection 19b(5) in its entirety, we conclude that subsection 19b(5) preserves to the court the opportunity to find that termination is “clearly not in the child's best interests” despite the establishment of one or more grounds for termination.

We reject Hall-Smith's characterization of subsection 19b(5) as creating a rebuttable presumption.

Rather than create a presumption as Judge Tacoma asserts, the court elaborated on the purpose of subsection 19b(5), explaining that it “attempts to strike the difficult balance between the policy favoring the preservation of the family unit and that of protecting a child's right and need for security and permanency.” Later in its opinion the court reiterated its conclusion that subsection 19b(5) creates no presumption:

We conclude that . . . the subsection 19b(5)'s best interest provision, in fact, provides an opportunity for the court to find that termination is clearly not in the child's best interest, despite the establishment of one or more grounds for termination.

A careful reading of the Trejo case demonstrates that while courts have less discretion today in determining not to terminate parental rights than they had before the 1994 addition of subsection 19b(5), they retain considerable discretion in making the final decision whether to terminate parental rights. It must, of course, be remembered that before the enactment of subsection 19b(5), judges had the very sort of broad discretion for which Judge Tacoma again advocates. It was their failure to exercise that discretion wisely—which led to vast numbers of children lingering in the impermanency of “temporary” foster care for years—that caused the legislature to rein in their discretion.

The judge relies on a related misunderstanding regarding subsection 19b(5). He asserts that the law currently shifts the burden to prove the child's best interest to the parents or to the children who are the subject of a request for termination of parental rights. This, again, is a misreading of subsection 19b(5) as
interpreted by the court in Trejo. Indeed, the court explicitly rejected the suggestion that subsection 19b(5) shifts the burden of proof to the parent or, by implication, to the child. The majority wrote:

we hold that under subsection 19b(5), the court may consider evidence introduced by any party when determining whether termination is clearly not in the child's best interest . . . Thus, we expressly reject the dicta of In re Boursaw, 239 Mich. App. 161, 180 . . . (2000), that, “if the parent does not put forth any evidence addressing the issue [of the child's best interests], termination is automatic.”

Later in its opinion, the court reemphasized this point: “Rather than imposing an impermissible burden on respondent, the best interest provision of subsection 19b(5) actually provides an opportunity to avoid termination, despite the establishment of one or more grounds for termination.”

**Mandatory Petitions to Terminate Parental Rights**

Judge Tacoma asserts that a third provision of the law contributes to the excessive use of termination of parental rights, the mandatory filing provisions contained in the Child Protection Law. While he recognizes that “in most cases the presence of the kinds of abuse or neglect enumerated in the statute justifies and should require termination of parental rights,” he objects to the legislature's removal of discretion “from professionals.” I will make two points in regard to this argument.

First, the law does not remove discretion from “professionals.” Rather, it shifts discretion from child welfare professionals employed by the executive branch of government to the judicial branch. Nothing in the Child Protection Law or the Juvenile Code requires the court to terminate parental rights in response to a mandatory petition. Indeed, nothing in the law requires that the court even authorize such a petition or approve the request for termination of parental rights at the initial disposition. In many cases in which a mandatory termination petition is filed, the protective services worker states at the preliminary hearing that he or she would not have made the request for termination but for the statutory mandate, and the court simply proceeds on the petition as though it requested temporary custody.

Secondly, it is critical to recall why our Child Protection Law requires the state child welfare agency to file these mandatory petitions to terminate parental rights. The Binsfeld Commission's report articulated numerous reasons why legislation mandating petitions requesting termination of parental rights at the first disposition was necessary. Among those were the lack of any mechanism within the agency to identify cases to which the reasonable efforts were not necessary, the agency routinely misapplied the reasonable efforts required so that children were endangered, a lack of access to legal counsel on the part of agency workers; a lack of training for both agency workers and prosecutors regarding when termination at an initial dispositional hearing is appropriate, and poor coordination between prosecutors and social workers resulted in improper preparation and presentation of cases.

As a matter of public policy, it makes little sense to expend our very limited resources attempting to rehabilitate parents who rape, batter, torture, kill, or attempt to kill their children, for this is the very group of parents least likely to meaningfully benefit from the application of human services. In those rare cases of this sort in which the parent may benefit from those services, the court retains discretion to refrain from terminating parental rights.

Having addressed the three provisions of the law that Judge Tacoma expresses concern about, I will next consider his suggested remedies.

**Suggestions for Change**

Judge Tacoma makes a number of suggestions for changes to the law to address what he has identified as disconcerting. I agree with some of his suggestions; others are unwise. I will first make a few general observations and will then address a number of the specific recommendations.

It is important to recognize that no statute, policy, or practice will solve all the problems presented by child welfare practice. Even the seemingly simplest child welfare case is infinitely complex because human emotions and relations, as the Judge suggests, are infinitely complex. But it is important to recognize that every change will have consequences that we do not intend or that are predictable but undesirable. The admittedly excessive number of legal orphans in Michigan's foster care system is one predictable but undesirable consequence. So we must make our policy choices wisely, understanding that there will always be cases that do not turn out as we would hope.

Unlike Judge Tacoma, I believe that the statutory structure of our child welfare system currently
provides sufficient discretion to judges to address this problem. Conversely, adopting the reforms Judge Tacoma advocates would predictably result in even larger numbers of children stuck in an unending “limbo” of the foster care system, “drifting” from placement to placement, rootless and with no hope of ever having a family connection.

In his article, the judge relates a number of anecdotes to illustrate his concerns. In each case, he suggests that termination of parental rights was not the answer. Perhaps he is correct in some of those specific cases; he certainly knows those cases much better than I. But in none of those cases does he suggest an outcome that would actually improve the child’s chance for a permanent family, that would ensure reunification with a parent who is even minimally fit to care for the child, or a standard that would result in an alternative permanent home for the child. In each illustration, the result of what he advocates would be a child stuck in the “limbo” of “temporary” foster care. Let me now comment on a number of the judge’s specific recommendations.

The “One-Year Rule”

I have already addressed how the “one-year rule” really isn’t, but is instead a much longer period of time during which the child must wait for permanency and the parent must be provided services. I am deeply troubled by Judge Tacoma’s rationale for eliminating the rule. He writes:

Often the rule is implicated in cases where the child(ren) are the subject of neglect (such as a parent’s persistent, treatment resistant drug abuse or instability from transient meretricious relationships by a young mother so typical in these cases) rather than active abuse, in which the long term likelihood of building a successful family should be considered on a case-by-case basis.47

There are two major flaws in the judge’s reasoning. First, as a technical matter, nothing in the current law prohibits the court from considering those circumstances in a given case, so a change in the law is unnecessary. Indeed, at both the permanency planning hearing and at a termination of parental rights hearing these may be legitimate considerations.

Second, and more concerning on a policy level, an utter lack of a statutory ending date for the application of services aimed at reunification is a prescription for a return to the days of unending foster care “limbo.” I find particularly concerning the two categories of cases the judge suggests illustrate the need for a policy change: recalcitrant substance abuse and parental immaturity. The first of these may very well be a lifelong struggle for the parent, and if the problem is so severe that the state has stepped in to remove the parent’s children, it will almost always take years for the parent to establish sobriety and stability. The only prescription for the second is waiting while the parent matures and is able to function psychologically as a responsible adult, which, of course, may never happen. But as I’ve already said, children don’t wait in a state of suspended animation. They grow and develop. For an adult, a year seems a short time, but a child’s sense of time is very different, and a year may feel like an eternity to him or her.

Beyond these concerns, Judge Tacoma makes a mistake that lawyers and judges often make—the attitude that “it’s just neglect” so we should give parents more time. Legal professionals almost routinely discount the impact of neglect on children.48 But neglect is very often the most difficult form of child maltreatment to respond to. As the judge’s examples make clear, many different parenting problems fall under the “neglect” rubric. A parent who is developmentally delayed, mentally ill, substance addicted, and has lived in a series of violent relationships and who cannot care for his or her child as a result is said to have “neglected” his or her child.49 Obviously, co-morbidity of this sort, which is very often present in cases of neglect, presents extreme challenges for treatment providers.50 Moreover, because most parents who neglect their children were themselves neglected as children, they disproportionately consume limited public resources.51

More important than the difficulty of responding adequately to a parent who “neglects” her child is the impact of parental neglect on children. What we label “neglect” may have devastating consequences for children. First, more children die each year as a result of neglect than die as a result of abuse.52 Even when it doesn’t result in death, neglect may have devastating impacts on children’s development.53 For example, neglect may negatively impact a child’s brain development and may cause delays in “cognitive, language and academic skills.”54

Changing the 19b(5) “Presumption”

Judge Tacoma asserts that “the current presumption insisting on termination if the statutory grounds
are proven should be reversed.” Because, in my view, the court retains the necessary authority to decline to terminate parental rights, I do not see a need to change the current statutory scheme as it was interpreted in *Trejo*. If the lawyers are doing their jobs properly—that is, zealously representing their clients—the court will be fully informed regarding the relevant issues in the case.

In analyzing whether we should change subsection 19b(5), it is important to understand what a child in such a case will have experienced by the time the case reaches this point in the proceeding. A child who sits on the threshold of termination of parental rights has already suffered abuse, or, more likely, long-term, serious neglect at the hands of his or her parent. That parent and child should typically have received in-home services in the form of Family First, or a related program, to preserve the family before a petition is filed with the court. After a petition is filed, the parent will have admitted or the court will have found, through the application of procedures meeting due process standards, that the parent was in fact abusive or neglectful. The court and agencies will have expended at least a year attempting to redress the issues that brought the child to the court’s attention.

At this posture in the case, when parental unfitness has been demonstrated and parental inability or unwillingness to engage in a serious way in services aimed at rehabilitation, adding an affirmative best interest element to the petitioner’s burden will not improve the quality of judicial decision-making for the child. Moreover, such an added element, without regard to whatever specific best interest factors the legislature or appellate courts might require be examined, will ultimately not remove the subjective nature of the decision. As *Trejo* makes clear—and as is equally clear under the Child Custody Act best interest scheme—the final decision on best interests will be subjective. Giving judges the ability to postpone the crucial decisions to be made will end up hurting more children than it helps.

What we should glean from our experience in child welfare over the past three decades is that 1) it is difficult for people to change, and 2) the Department of Human Services and courts make poor parents. At the same time, children need stability and, to the extent possible, a single set of caregivers. Thus, children will generally be best served if their parents are provided a time-limited opportunity to regain custody of them, and when that time expires, a judge is required to make a series of very difficult decisions about that child’s future. Changing the law so that judges can delay making these very difficult decisions will take the pressure off judges. But it will not serve the interests of the largest number of children who are in the foster care system. Adding an affirmative best-interest element to the burden on the petitioner will predictably result in many more children spending years marking time in the foster care system while their parents continue to be incapable of caring for them. Many of the children so afflicted will become unadoptable or ineligible for another permanent resolution of their situation because they’ve waited too long for permanency.

**Expand Alternatives**

By this point, it should be obvious that Judge Tacoma and I view these matters very differently, so it is gratifying to find common ground. I wholeheartedly agree that we should constantly endeavor to find programs and processes that produce better outcomes for children and families. The Permanency Planning Mediation Pilot program is one such program. Other helpful programs include family-group decision-making, and team decision-making meetings now employed by the Department of Human Services. Additionally, a bill currently pending before the legislature could establish another useful option in that it would provide for financial assistance to a relative who becomes a child’s guardian. Illinois has, for several years pursuant to a Title IV-E waiver, provided for permanent, subsidized guardianship for a child in the foster care system for whom the court has determined that adoption is not an available option.

**Best Interest Factors**

Judge Tacoma asserts the need for a listing of best interest factors similar to those applicable under the Child Custody Act and to guardianship proceedings. He would prefer that the legislature or appellate courts instruct the judges of this state what factors are relevant to the best interest determination; I believe the determination of what is relevant to the child’s best interests in a particular case should be left to the individual judge and made on a case-by-case basis. Lawyers and judges should receive training regarding the complexity of the best interest determination in the context of child protective proceedings. That train-
ing should include, at a minimum, information about the normal course of child development and a child’s various needs at each stage in the process, information about the confounding and counterintuitive nature of children’s behavior in the child welfare context, and information about the need for interdisciplinary collaboration in determining what legal outcomes would best serve a particular child’s interests. In addition to this overarching criticism of the need for a set of articulated best interest factors, I have both general and specific concerns about the use of best interest factors in child protection cases.

In general, I do not see the need for a list of factors to be established by either the legislature or appellate courts when a trial court may look to the “whole record” in determining what will best serve a particular child. One concern is that if a judge fails to articulate a rationale regarding one such factor, appellate courts will reverse or remand cases to the trial court to give them the opportunity to address the factor. While the Child Custody Act has contained a list of best interest factors for decades, trial courts from time-to-time still simply fail to address the factors. In a child protection case in which the child resides in temporary care with no viable parent, such an outcome would further delay the child’s search for a permanent and stable family and would be seriously damaging to the child. Moreover, having a set of factors that trial courts must address does nothing to ensure that judges will actually exercise their discretion wisely.

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Ph.D., leading researchers on the impact of trauma on children have recently explained:

Modeling occurs when children who grow up in abusive or violent homes and communities have many opportunities to observe and learn maladaptive behaviors and coping strategies. They may also see those behaviors being rewarded repeatedly. For example, a child who experiences physical abuse and domestic violence may erroneously conclude that anger and abuse are accepted ways of coping with frustration. 67

Similarly, the fact that a child has a strong attachment to an abusive parent does not mean that that attachment is healthy or that termination of parental rights would not serve the child’s long-term interests. Again, Drs. Cohen and Mannarino explain:

Traumatic bonding involves both modeling of inappropriate behaviors and maladaptive attachment dynamics. It also involves acceptance of inaccurate explanations for inappropriate behaviors. It has been described in the psychoanalytic literature as identification with the aggressor and in law enforcement as the Stockholm syndrome. . . . Such children may bond with the violent parent out of self-preservation. To manage the guilt and cognitive dissonance associated with turning against the victimized parent, these children may adopt the violent parent’s views, attitudes, and behaviors toward the victimized parent and become abusive or violent themselves. 68

Obviously, I am not a mental health professional and no credible mental health professional would suggest that these dynamics are at work in the case the judge uses to illustrate his point without a comprehensive evaluation. My point is this: children’s reactions to those who step in to help them overcome the damage done by their abusive and neglectful life experiences can be difficult to understand and counterintuitive. Lawyers and judges should always seek the advice of competent mental health professionals when seeking to understand children’s behavior and statements in context.

The Type and Extent of Abuse or Neglect

Obviously, this should be considered. Again, nothing in current law prohibits the court from considering it as part of “the whole record.” 69 The case that Judge Tacoma posits to illustrate the need to ensconce this factor into law involves a young mother who cannot maintain a home that is physically minimally suitable or who lacks the ability to leave a “pernicious” companion. That is, he laments the need to terminate parental rights where a parent is merely neglectful. As I have discussed earlier, in such a case, the mother would have already been provided both in-home services to prevent the need for removal and a year’s worth of services to address her problems in functioning after the child entered foster care. I have already addressed the devastating consequences that can flow from this sort of neglect. Reasonable questions would be, “If this mother cannot maintain a clean house or leave an abusive boyfriend, how is she going to be even minimally successful at raising this child in a reasonably healthy way? If she can’t do it now, when will she be able to? How long must her children wait for her to become more responsible? Will she ever?”

Probability that the Child Will Be Adopted

The clinic in which I work was recently involved in a termination case, filed because the court ordered the petition at the conclusion of the permanency planning hearing, in which the children were 14 and 15 years old. The 14-year-old girl had behavioral problems that resulted in her placement in a residential treatment facility. Similarly, her 15-year-old brother was residing in a residential sex offender treatment program. The only viable parent was a father who had been mostly absent for the children’s entire lives but expressed an interest in continuing to work toward regaining custody of his children. The girl had repeatedly indicated she did not want to see her father, but a mental health expert explained that she had been abandoned by everyone who should have loved and cared for her, and her rejection of her father before he could fully reject her was a means of protecting herself from the pain of yet another outright rejection. After hearing the evidence, the judge wisely determined that termination was clearly not in the children’s best interests, in part because the children had no viable hope for adoption.

I fully believe the court made the correct decision in this case. Obviously, the court did so under the current regime governed by subsection 19b(5) and Trejo. In such a case, it is critical for the lawyers to do their jobs: investigate the case fully, develop a coherent theory of the case, present testimony to support
the theory of the case, and make the most compelling argument for the position taken. But when the court is not satisfied that the lawyers have done so, family court judges should not hesitate to use their extraordinary authority to fully develop the facts of the case to make a fully informed decision.70

Economic Factors

While the case Judge Tacoma uses to illustrate his perceived need for this factor is an aberration, I don’t necessarily disagree with his suggestion that economic impacts of termination on the children should be considered. Current law permits this. I would caution practitioners to consider this factor very carefully for two reasons. First, in the vast majority of cases, children will be better off financially if their natural parents’ rights are terminated and they are adopted. We should not ignore the fact that in most situations, the children we remove come from poor families and are placed with middle-class families. Also, most children who are adopted from the foster care system are eligible for an adoption subsidy. A related question is, “Who pays?” When a child is adopted and receives both a support and medical subsidy, it is still cheaper for the state than maintaining a child in temporary foster care, so the state will typically benefit economically when a parent’s rights are terminated and the child adopted. These factors taken together may suggest a financial reason to favor termination.

My second concern has to do with the potential distorting impact of economic considerations on judicial decision-making. Some years ago, before the existence of subsection 19b(5), while working for a legal aid office in Detroit, I was involved in a case in which I represented a 10-year-old girl. The girl’s mother suffered from long-standing and severe mental health problems that were exacerbated by an addiction to drugs. The girl’s grandfather had established a $30,000 trust fund for her that became effective upon his death. The court refused to terminate the mother’s rights—the girl had no legal father—despite the passage of nearly three years and the filing of two termination petitions. When I left the job with legal aid, the child was still a temporary ward with no realistic hope to return to her mother, no hope of a new, permanent family, not because she was unadoptable (her foster parents wished to adopt), but because the court would not terminate parental rights and extinguish the child’s rights to the trust fund. I don’t know if or how the case was resolved. I do know this: that $30,000, if she ever got it, cost that child a lot.

Some Recommendations

Having disagreed with Judge Tacoma’s general thesis and many of his specific recommendations, I feel constrained to offer some suggestions that I think may address the problem of legal orphans, which, as I have said, I agree with Judge Tacoma, is a very real problem. While none of the suggestions I offer require changes in policy or statute, they do require substantial changes in practice.

First, we lawyers and judges handling child protection cases must educate ourselves in the very complex medical and social welfare issues that are presented by these cases. Throughout this article, I have attempted to point out that these cases present complicated human reactions to very unusual circumstances. We must try to understand these issues so that we do not jump to conclusions that make common sense, but that are in fact wrong and potentially very damaging.

Specifically, we must focus on the impact of complex trauma on children’s development. Most of the children entering the child welfare system have experienced more than a single traumatic event and more than one type of trauma (e.g., abuse, neglect, parental substance abuse, exposure to domestic violence between adults in the home), and we must try to understand the effects these multiple traumas have on the individual child.71 By educating ourselves as much as possible about these allied fields, we can learn to ask the right questions and to know when we should bring in other professionals to assist us in our decision-making.

No matter how hard we work to understand the intricate nature of the harm done to children by abuse and neglect, we cannot hope to know in depth all the medical and social welfare issues that even a relatively straightforward case of child maltreatment presents. So, my second suggestion is that communities develop and use trauma-informed multidisciplinary teams (MDTs) to assess cases of child maltreatment.72 Michigan’s Child Protection Law has long required the use of MDTs by the Department of Human Services, but they are rarely used in practice.73 For this reason, courts should take the lead in their communities in developing these teams and insisting on their use. MDTs bring together professionals from a num-
ber of disciplines—e.g., medicine, law, social work, psychology, psychiatry, education, and occupational therapy—into a single body, which provides a multitude of perspectives on a particular case. Their use can insulate decision-making from bias or prejudice and can suggest new or different service needs presented by a particular case. MDTs can assist courts in case decision-making. MDTs should be used early in the handling of cases (before the court becomes involved or immediately upon the filing of a petition) and at crucial decision-making points such as permanency planning hearings. A recent study—conducted at the Family Assessment Clinic at the University of Michigan School of Social Work—of the use of an MDT as soon as protective services got involved in cases provides encouraging evidence that early application of MDT services can keep children safely in their homes longer and can help with expediting return of children to their homes when removal is necessary.

My third recommendation dovetails with my second, and is not inconsistent with my next two recommendations, although on first impression that may seem to be the case. When any petition is filed, all dispositional options should be on the table. If we have conducted the sort of comprehensive evaluations I have advocated for in recommendation number 2, and conducted them early in CPS’s contact with the family, the result should be a greater application of services to the family before the case is brought to the court, and more effort to maintain the family unit.

Once a petition is filed, we should seriously question the parents’ ability and willingness to use services and to benefit from them. I firmly believe that some parents—many more than we are probably willing to admit—simply cannot be habilitated or rehabilitated in anything like a timeframe to meet the needs of their children. But their children are our paramount concern. Thus, in some substantial number of cases, if we have comprehensive, early, multidisciplinary evaluations, we will learn that regardless of what services we offer, we will not see the change necessary to safely reunify the family. In those cases, we should focus exclusively on the needs of the children for permanency and should use the provisions of Michigan law that allow termination of parental rights (or other permanency options) at the first dispositional hearing.

Too often we engage in a year(s)-long, empty exercise of offering services to families that, if we were honest with ourselves, we would recognize either cannot or will not benefit from those services. This wastes our very limited resources and deprives families that could benefit from more intensive application of professional attention. This helps nobody and actively hurts some children. While we go through the steps of providing services to parents we can reasonably predict will not benefit from them, their children grow older, develop more problems from the instability of foster care, and too many become unadoptable in the process.

Fourth, the time to think seriously about the consequences of subsection 19b(5), Trejo, and the one-year permanency planning rule is not at the time of the permanency planning hearing or the time the termination petition is filed, but at the time the petition seeking temporary jurisdiction is filed, and at every hearing following the filing.

Preliminary hearings have too often become pro forma proceedings the results of which are a foregone conclusion. They are too often seen as an opportunity to see that the correct boxes on a form order are checked to ensure that federal dollars continue to flow into our child welfare system. This is not their purpose. At the preliminary hearing, we should be thinking very carefully about the case before the court. The court should be demanding at these hearings that the agency filing the petition be able to explain what “reasonable efforts” were made to prevent the removal of the children from the home. We should think carefully about whether removal from the parent’s home is really necessary, and should also take more seriously the question whether custody of the child by the parent is truly “contrary to the welfare” of the child. “What is the permanency plan for the children who are the subject of the petition?” is a question we—and the court—should ask at every preliminary hearing. When reunification is the articulated goal, the court should carefully scrutinize the treatment plan and reject the sort of boilerplate treatment plans that are so prevalent. Are there services that could keep the child safely in the home? Can the court render the child’s home safe by ordering the offending person from the home? In short, courts should focus more closely on whether reasonable efforts have in fact been made before determining that children should be removed.

Finally, courts should consider whether asserting jurisdiction over children but maintaining them in their family home subject to “reasonable terms and conditions” is the best option in a particular case. Similarly, in some cases it may make sense to return
children to their parents’ custody knowing that the family will continue under court supervision for an extended period of time. In short, lawyers, courts, caseworkers, and agencies must get more creative at crafting dispositions that will keep children safe, will nurture their well-being, and which will seek to rely less reflexively on out-of-home care.

Conclusion

Judge Kenneth Tacoma has identified a real problem of current child welfare practice in Michigan. The excessive number of legal orphans. His prescription, however, runs the very real risk of causing even more severe problems for a larger number of children in the foster care system, a return to the never-ending road of foster care “limbo” and foster care “drift.” While our current statutory structure is far from perfect, every change in it will inevitably have unexpected consequences and predictable but unfortunate consequences for the young people it is designed to serve. Although imperfect, Michigan’s current law provides practicing judges and lawyers enough flexibility to craft a response to each case that can meet the needs of the children who come to the court’s attention. Developing such case-specific planning will require leadership by courts and a refocusing of the use of our resources. To best serve children and families, we must use all of the tools afforded us in the relevant statutes and court rules, and we must train lawyers and judges to use the right tool at the right time.

Endnotes

1 I want to thank Donald N. Duquette and Vivek Sankaran for their helpful comments on an earlier draft of this article.

Robert Earl Keen, Jr., The Road Goes on Forever and the Party Never Ends, on NO. 2 LIVE DINNER, (Sugar Hill Records, 1996).


5 See DeShaney v Winnebago County Department of Social Services, 489 U.S. 189 (1989).

6 See generally, Richard Gelles, The Book Of David: How Preserving Families Can Cost Children’s Lives (Basic Books 1997). Gelles was an early proponent of the family preservation movement. But after more than a decade of misuse of family preservation programs, the death of numerous children, and empirical evidence demonstrating that the efficacy of family preservation programs had been overrated, he spoke out against their misuse.


10 See In re Trejo, 612 N.W.2d 407, 414 (Mich. 2000)(“Subsection 19b(5) attempts to strike the difficult balance between the policy favoring the preservation of the family unit and that of protecting a child’s right and need for security and permanency.”).

11 See generally, In re JK, 661 N.W.2d 216, 223 (Mich. 2003)(“the parent’s compliance with the parent-agency agreement is evidence of her ability to provide proper care and custody”); see also In re Gazella, 692 N.W.2d 708 (Mich. Ct. App. 2005)(parent must benefit from services and not merely comply).

12 See David P.H. Jones, The Untreatable Family, 11 Child Abuse & Neglect 409 (1987)(discussing in depth the substantial numbers of parents in child protection cases that cannot benefit from treatment); Anne Harris Cohn & Deborah Daro, Is Treatment Too Late: What Ten Years of Evaluative Research Tells Us, 11 Child Abuse & Neglect 433 (1987)(noting that one-third of parents in treatment for child abuse reabuse their children while in treatment and that “over one-half of the families served continued to be judged likely to mistreat their children following termination [of treatment]”).


14 See In re JK, 661 N.W.2d 216 (Mich. 2003)(prohibiting agencies and courts from proceeding with adoption proceedings after termination of parental rights until appeals are exhausted).


16 Mich. Comp. Laws § 712A.19b(5) provides: “If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made. . . .”


19 Id.

20 Id.
21 The cases excepted from application of this provision, those addressed in 42 U.S.C. § 671(a)(15)(D), is that narrow group of cases in which the ASFA mandates that the state make no efforts to reunify the family and instead immediately pursue termination of parental rights.

22 Permanent foster family agreements are defined in Mich. Comp. Laws § 712A.13a(1)(i).


26 E.g., the juvenile court rules require that the court inquire at the preliminary hearing whether relatives are available to take placement of a child whom the court orders removed. Mich. Ct. R. 3.965(B)(13). See also Mich. Comp. Laws § 954a(2)(a provision of the Foster Care and Adoption Services Act which requires the state or its contract agencies to identify and evaluate relatives for placement within 30 days of the child’s placement).

27 See CFF 722-3 at p. 5; available at: www.mfia.state.mi.us/olmwed/ex/cff/722-3.pdf


30 Id.


33 I note a minor error in Judge Tacoma’s article which, I think, illustrates a broader misunderstanding of the history of child welfare law in Michigan. He implies by the subtitle of his article, “ASFA, Binsfeld, and the Law of Unintended Consequences,” that the provisions of Mich. Comp. Laws § 712A.19b(5) to which he objects were part of Michigan’s Binsfeld legislation and a part of the response to federal Adoption and Safe Families Act (ASFA). The ASFA was signed into law in November 1997. Most of the Binsfeld provisions were enacted in two waves, the first in December 1997 and the second in December 1998. Section 19b(5), however, was enacted in 1994 in response to different pressures.

34 In re Trejo, 612 N.W.2d 407 (Mich. 2000).


36 Trejo at 414.

37 Id.

38 Id.

39 Id. at 413.

40 Id. at 415.


42 Tacoma, supra.


44 Michigan law has long provided that any petition in a child protection proceeding can request termination of parental rights at the first dispositional hearing. Mich. Comp. Laws § 712A.19b(4).

45 The DeShaney case is but one example of how the “reasonable efforts” requirement was distorted in the 1980s and much of the 1990s. In practice, “reasonable efforts” was interpreted as “every conceivable effort.” In one case handled by the Legal Aid and Defender Association of Detroit in the early 1990s, the agency refused to remove the children from the home so the court ordered “in home” services. Those “in home” services were actually being provided at a local fast food restaurant because the agency determined that the family home was too dangerous for its workers to enter. But they insisted it was not too dangerous for the toddlers who were the subjects of the case to be left in.

46 See Jones, The Untreatable Family, supra note 12.

47 Tacoma supra.


49 For a brief but helpful discussion of the challenge of co-morbidity in child welfare practice, see Department Of Health And Human Services, Blending Perspectives And Building Common Ground: A Report To Congress On Substance Abuse And Child Protection 59-62 (1999) (discussing the high rates of co-morbidity of parental substance abuse, mental illness and domestic violence); see also, Carol T. Mowbray, et al, Women With Severe Mental Disorders: Issues and Service Needs, in Women’s Mental Health Services: A Public Health Perspective 175 (Bruce Lobutskey Levin, Andrea K. Blanche & Ann Jennings, Eds., 1998) (discussing numerous social problems that are often co-morbid with mental illness).

50 Id.


52 Id. at 347 (“It must be emphasized that more children in the United States die from neglect than from physical abuse.”); see also Michigan Child Death State Advisory Team Fifth Annual Report, Child Deaths in Michigan 2005 142 (“In 2002, NCANDS reported that child maltreatment fatalities were most often the result of neglect (38%) followed by physical abuse (30%) and then a combination of maltreatment types (29%)”).
See, e.g., Michael D. DeBellis, The Psychobiology of Neglect, 10 Child Maltreatment 150 (2005) (“neglected children may suffer from various subtypes of neglect and many other adversities, which may contribute to adverse brain development and compromised neuropsychological and psychosocial outcomes”).


Tacoma, supra. I have already discussed the judge’s assertion that subsection 19b(5) creates a presumption and will not repeat that argument in the body of the text here.

It is, of course, the court’s responsibility to ensure that “reasonable efforts” to preserve the family have been made in most cases. Mich. Ct. R. 3.965(D)(1).


See Senate Bill 170. Available at www.michiganlegislatu.org.

705 ILCS 405/2-27.

See discussion infra.

See Arndt v Kasem, 353 N.W.2d 497 (Mich. Ct. App. 1984) (“It is well settled that when deciding a custody matter the trial court must evaluate each of the factors contained in the Child Custody Act . . . and state a conclusion on each, thereby determining the best interests of the child. The failure to make such specific findings is reversible error.”)(citations omitted).

See, e.g., Harvey v Harvey, 680 N.W.2d 835 (Mich. 2004)(where the parties agreed to binding arbitration regarding a child custody dispute and the court, pursuant to the arbitration, entered a custody order, the case was remanded for finding regarding the child custody factors).

See, e.g., Foskett v Foskett, 634 N.W.2d 363 (Mich. Ct. App. 2001)(where the court made custody decision based on mere allegations that were not supported by evidence and which was later reversed by the appellate court).


Of course, the minor’s lawyer-guardian ad litem is generally required to communicate to the court the child’s expressed wishes. Mich. Comp. Laws § 712A.17d(1)(i). Also, the court may appoint an “attorney” to represent the child’s expressed wishes when they conflict with the lawyer-guardian ad litem’s understanding of what would best serve the child’s interests. Mich. Comp. Laws § 712A.17d(2).

See Judge Tacoma’s article, footnote 21 and accompanying text.


Id at 10.

Trejo, 612 N.W.2d at 415.

Mich. Ct. R. 3.923(A) permits the court to question witnesses, call witnesses, or adjourn a case to subpoena additional witnesses or for the purposes of producing evidence (e.g., additional evaluations of the children or parents).


The editorial board of The Michigan Child Welfare Law Journal invites manuscripts regarding children placed in foster care. The Journal takes an interdisciplinary approach to child welfare, as broadly defined to encompass those areas of law that directly affect the interests of children. The editorial board’s goal is to ensure that the Journal is of interest and value to all professionals working in the field of child welfare, including social workers, attorneys, psychologists, and medical professionals. The Journal’s content focuses on practice issues, and the editorial board especially encourages contributions from active practitioners in the field of child welfare.

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### Upcoming Training and Conferences

#### SCAO Family Services 2007 Child Welfare Training Schedule

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<td>Summer Series: Youth Transitioning From Foster Care (Education, Employment, and Housing Issues-tentative)</td>
<td>Kellogg Center East Lansing</td>
<td>Judges, attorneys, Children’s Protective Services, DHS and private agency foster care and adoptions workers, tribes, CASAs, policy makers, and related child welfare professionals</td>
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<td><strong>June 18-19</strong></td>
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<td><strong>July 10</strong></td>
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<td>Kellogg Center East Lansing</td>
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<td><strong>July 25</strong></td>
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<tr>
<td><strong>October 22-23</strong></td>
<td>U of M Medical School Child Abuse and Neglect Conference (SCAO-FS is cosponsor)</td>
<td>Plymouth</td>
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<td><strong>November</strong></td>
<td>Poverty Issues Training and possible second day of “training the trainers” (tentative)</td>
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<td>Judges, attorneys, Children’s Protective Services, DHS and private agency foster care and adoptions workers, tribes, CASAs, and related child welfare professionals</td>
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<td><strong>December</strong></td>
<td>Testifying in Court full day or 1/2 day with 1/2 day on Effective Petition Drafting and Report Writing (tentative)</td>
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* Group discounts are available starting at five attendees. Please contact the NACC with your group size for your exact discount. (303) 864-5359. Additional information can be found at [http://www.naccchildlaw.org/training/conference.html](http://www.naccchildlaw.org/training/conference.html)

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Editor’s Note—Spring 2007

This issue of the Michigan Child Welfare Law Journal focuses on practice in child protection cases. Many child welfare practitioners consider this field of practice the most important area of practice with children due to the focus on children’s immediate safety and well-being.

The articles in this issue cover a variety of topics. In “Relative Placement In Abuse Cases, Or Maybe Not: An Analysis of MCL 712A.13a(5) of the Juvenile Code” (Scott) the author describes the use of relative placements as an alternative to placing a child in foster care. The author stresses the importance of focusing on the child’s needs when considering a relative placement.

Following this article is a description of the Kinship Care Resource Center. This Center serves as a resource center for the many families in Michigan currently providing kinship care to children removed from their parents. Anyone working with families providing kinship care should be aware of this center’s existence.

In ““Lost And Alone On Some Forgotten Highway: ASFA, Binsfeld and the Law of Unintended Consequences” (Tacoma) the author discusses a variety of consequences of the Binsfeld legislation. Judge Tacoma argues that the Binsfeld legislation requires certain actions that may not always be in the children’s best interest. This article has served as an impetus to new legislation being considered by the legislature to address some of the circumstances Judge Tacoma describes.

In “The Road Goes on Forever And the Party Never Ends: A Response to Judge Tacoma’s Prescription for a Return to Foster Care Limbo and Drift” (Vandervort) the author presents a counterpoint to some of the arguments Judge Tacoma makes, ensuring a healthy discussion of these complex issues.

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