Volume XI, Issue III Spring 2008

Official Publication of the
State Bar of Michigan Children's Law Section



# The Michigan Child Welfare Law Journal

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Published by: MSU Chance at Childhood Program ● MSU School of Social Work ● MSU College of Law
with funding from the Governor's Task Force on Children's Justice and the Children's Law Section of the State Bar of Michigan

# Editor's Note—Spring 2008

This issue of the *Michigan Child Welfare Law Journal* covers a variety of diverse issues.

In "Keeping Families Together: Exploring Placement of Children with Severe Emotional Disturbances in the Child Welfare and Juvenile Justice Systems" (Day & Sosulski) the authors describe how children often enter the foster care or juvenile justice systems due to behavior stemming from a mental disorder. Many Michigan parents voluntarily relinquish custody of their children and place them into the court system in order to obtain treatment for their children. The authors discuss some of the trends regarding this issue and also provide an initial socio-economic picture of this phenomenon in Michigan.

In "A Critical Evaluation of Presumptions in Favor of Joint Custody: Why Michigan Should Not Follow the Trend" (Dangl) the author discusses pending legislation to create a legal presumption of joint custody in contested child custody matters. The author discusses the advantages and disadvantages of such a presumption. Ultimately, the author concludes that such a presumption should not be adopted in Michigan because it would limit the court's individualized analysis of very complex cases.

In "Improving Educational Outcomes for Foster Children Through Comprehensive Legislation" (Newlin) the author describes the obstacles foster children face in obtaining an education. The educational instability resulting from placement changes and other upheavals in a foster child's life makes it difficult for that child to succeed in school. Placement in foster care makes a child twice as likely to drop out of school, and then less likely to obtain a GED after dropping out. The author recommends a combined legislative and regulatory solution based in part on models adopted in Oregon, California, and New York.

In "Uncharted Waters: Does Michigan Rule of Evidence 404(b) Apply to a Child Protection Matter, or Doesn't It?" (Scott) the author recalls how he was called upon in a child protection case to respond to a motion to strike pleadings regarding a respondent father's long criminal record. The father's attorney argued that evidence of the father's criminal record and multiple arrests should have been suppressed pursuant to MRE 404(b). The author describes his difficulty in addressing this question given that virtually all of the case-law on the subject of 404(b) evidence is discussed in the context of a criminal proceeding. The author urges the appellate courts or the legislature to provide guidance on this issue.

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 Journal* is of value to you. ◎

# Message from the Chair

No matter what your opinion is about the controversy surrounding illegal immigration at this time in our country, it affects the children immensely, and it affects our section. The affect on our children can be profound. When children are removed from their biological homes, if they are illegal, among other things, they are denied dental and medical care through Medicaid. They are ineligible for the tuition incentive program like other youth after two years in foster care. Likewise, they are ineligible for privileges of youth like a driving permit. The issue of illegal children is occurring more and more frequently, and as a section,we need to know how to deal with it.

Regardless of your opinion of adults entering the United States, the resulting process just doesn't seem right when it comes to the children brought along with them who have no control over what happens. Having practiced in a small, rural county, I thought all the problems would be taken care of on a child's adoption by a United States citizen. After all, his/her birth certificate would certainly be corrected and the world would be hers. How foolish I was.

For those of you who are still pleasantly unaware and happy in your naiveté, I will attempt to briefly describe what I have learned about the United States Citizen and Immigration Service. Nearing the adoption of a sibling group of six, and having realized that the adoption would not cure future problems for two of the four children, the adoption worker filed two I-485 petitions on behalf of the children along with fees of $370 per child. These fees have now drastically increased. The adoption was completed on November 21, 2006, Michigan's Adoption Day.

After a lengthy period of time, all the paperwork was returned due to an overpayment on one of the children. Couldn't the overpayment have just been returned? The paperwork was re-sent, and eventually we received a Notice of Action to appear for "biometrics" for the 13-year-old girl. It specifically stated to bring a passport or photo ID issued from the child's country, a state ID, driver's license or military ID. None of these is available to an illegal child.

We made our four-hour trip on a school day to a dirty strip mall, security guard, and young man taking identification "with disgusting, really long, yellow nails," according to my daughter. Nowhere on the paperwork did it say exactly what biometrics would entail. I held my breath as he examined her only identification, a very old student ID card. I filled the required paperwork out for her and was told she had to hand it to him, not me. When she was called into the next room, I was told I could not go with her. I made my way as close as I could toward the entry door so I could peer into the room. I was told to sit down. What if the student ID had not been okay, and why couldn't I go with a child? She had fingerprints done and a photo taken.

I then received the Notice of Action to appear for "biometrics" for my son, 12 years old at the time and learning disabled. At least we knew what to expect. Again we found an old school ID, made the four-hour trip. I filled the paperwork out and had him present it. Couldn't they have arranged for siblings on the same day?

In order to proceed, physicals had to be completed at a USCIS approved facility, I-693 Medical Examination. I was so pleased to discover that the Michigan State University Clinic was one of those sites. How wonderful it would be to be in home territory with friendly faces. That was not to be the case. The appointment began with an unfriendly lady informing me that they would not be accepting checks or insurance. The physicals were $247 and $237. What if I had not had a credit card? And the card could only be processed downstairs. Then they wanted to see the children's ID, either a driver's license or state ID. I could not restrain myself from asking how she expected a 12 and 14 year old to have driver's licenses or a state ID when they had been brought into the country illegally. I thought they were going to refuse to do the physical, although paid for, when they finally indicated that the school IDs (which were misspelled and proved nothing) would be acceptable. The children were, as my daughter said, "for some unknown reason," asked to strip naked for the exams, and scared to death. It was totally unnecessary. The exam included an ear, nose and throat check and TB test. We made the return trip to the clinic, all during school hours,

for the TB check. Only then did I receive the coveted, sealed envelope containing the secret medical results to be taken to the interview in Detroit.

We received appointment letters for both children at the same time at the USCIS. Now the three of us traveled to the USCIS Office, made our way through security, and waited. My son, 12, bored and very proficient at origami, made a paper ball and was scolded by the guard for rolling it on the floor. He eventually gave it to a little Asian boy, who was delighted. When they were finally called, the lady looked at me, shocked, and asked who I was. When I told her I was their mother and was expecting to accompany them, she asked to speak with me alone. My daughter was very upset that I was questioned. The lady eventually explained that we needed to file a new petition since the adoption had already been completed, and of course, submit new fees.

While we were there, the lady did agree to speak to the children to save yet another trip. She informed me that my son hadn't even needed to have his biometrics taken since he was 12. When the children were called into her office, she asked the 14-year-old basic information and made inquiry about what organizations she belonged to. Having no idea why the lady was asking, my daughter answered "cheerleading, track, cross-country." She was asked if she was in any organizations where they talked about overthrowing the government. The lady then turned to my son, who cannot remember any dates, and asked him for his date of birth and his address. Somehow he got them out with long pauses. Then he was asked if he had watched the *Spy Kids* movies and whether he did things like those kids.

I filed the I-130 Petitions for Alien Relative, with $380 for each child, wondering how on earth the money could be justified for these two children. Of course, included were the required, notarized translations of the birth certificates, done at the cost of $80. I subsequently returned to Detroit for the new appointment with realms of necessary paperwork to accompany the petitions. Although the appointment went more smoothly, I needed more copies to leave on file for each of the children with the USCIS and was directed to a nearby copier, where I spent the rest of the afternoon copying and collating two files outlining history of the children, proof of their time in the Unites States, case reports and orders, along with my information.

I have since requested the Proof of Citizenship Certificate, form N-600, for an additional cost of $840. We have waited patiently for over six months, the time the USCIS says not to ask the status of the case. No phone number is included in paperwork to even ask questions. My daughter has now finished her drivers' education class and would like to obtain her practice permit, which she cannot do without the certificate.

We need to educate ourselves, and then caseworkers and parents, about what can and should be done on behalf of illegal children in our state. And we need to start the process as soon as we become aware there is a problem. The fees are expensive, the process time-consuming and aggravating, but the steps need to be followed to protect children before they become adults. And the trips to Mexicantown after the USCIS are priceless. ◎

# Keeping Families Together?

## Exploring placement of children with severe emotional disturbances in the child welfare and juvenile justice systems

by Angelique Day, MSW and Marya Sosulski, PhD, LMSW, Michigan State University

Abstract

*Introduction*

Mona, a parent of five children all diagnosed with several emotional disturbances (SED), describes the moment she made the decision to place her daughter (age 16) into the juvenile justice system:

> **"…**her behaviors were so bad she was assaultive to her younger siblings…in order to protect them and to make sure that her medical needs were met, because she was eloping at the time. I had to take her to court, um, file charges against her…"

Mona's name is a pseudonym, but her story is real. In this study, parents describe the circumstances preceding their decisions to voluntarily relinquish custody of their children and place them into the child welfare or juvenile justice system. This paper introduces some of the trends and an initial socio-economic picture of this phenomenon in Michigan. Parents' perspectives on the circumstances that led them to relinquish custody are shared, as well as their suggestions for support that might have prevented them from having to make this difficult decision.

*Prevalence*

Mental health problems among children and youth are increasing at an alarming rate. The Surgeon General's Report on Children's Mental Health (2001) shows that in the U.S., one in ten children and adolescents suffer from severe emotional disturbance; yet, in any given year, only about one in five of these children receive mental health services. Increasingly, parents are facing extreme difficulty accessing mental health services for children who have SED (GAO, 2003; Giliberti & Schulzinger, 2000). In the absence of financial support for medical services, some families have turned to the child welfare and juvenile justice systems for help, because children are more likely to be eligible for and receive needed mental health treatment while residing in out-of-home placements (GAO, 2003; Burrell, no date).

The literature strongly supports the position that the majority of youth involved in the foster care and juvenile justice system have mental health disorders (Skowyra & Cocozza, 2006). Thirty to forty percent of foster children suffer from a diagnosable physical disabilities, mental illness, substance abuse or emotional problems (Folman & Anderson, 2004; Garland & Besinger, 1997); 65 to 70 percent of youth in the juvenile justice system meet criteria for a diagnosable mental health disorder (Skowyra & Cocozza, 2006).

U.S. government agencies reported that in 2001 that over 12,700 children from 19 states were identified as having been placed in out-of-home care in order to be provided with necessary mental health treatment (CMS, 2006; GAO, 2003). Of these children, 3,700 entered the child welfare system, and approximately 9,000 entered the juvenile justice system (GAO, 2003; Waxman & Collins, 2004). Evidence suggests that these children were not placed as a result of abuse or neglect petitions, nor were they found to have committed delinquent acts (GAO, 2003; Skowyra & Cocozza, 2006). A 2004 report issued by Congress documents the inappropriate use of detention for youth with mental health needs, citing that 33 states in 2001 reported holding youth in detention with no charges—they were simply awaiting mental health services.

In 2001, Michigan identified 400 youth in Wayne County alone who were placed in the juvenile justice system solely to obtain mental health services (GAO, 2003). However, no formal or comprehensive federal or state tracking of such placements occurs. More data must be collected to accurately document the number of children in Michigan who have been placed strictly

to gain access to mental health services (Hanley, K., MDHS, 2007, personal communication). There is little information regarding service utilization and outcomes for children in out-of-home placements, and none differentiates between placements resulting from abuse or neglect and those children and youth voluntarily placed by their families to access necessary mental health services.

*Economic context and consequences*

Health care financing may be an important reason why this phenomenon may be more widespread than previously realized. Middle-class families who cannot secure adequate private health insurance may be affected. For poor families, there is no option besides coverage through public financing (e.g., Medicaid and SCHIP). African American, Latino, and American Indian children are more likely than White children to be uninsured and without access to mental health care (Michigan's Children, 2006); consequently, children of color are disproportionately affected by these kinds of placement decisions (MDHS, 2006; Russell & Jones, 2005). Funding for the MI Child program, which provides health insurance to children in low-income working families in Michigan, dropped 19 percent from 2006 to 2007, while monthly family premiums doubled (Michigan's Children, 2006), leaving gaps for state child welfare and juvenile justice systems to fill.

Current child welfare policies and practices favor out-of-home placements—which are very costly to taxpayers, with Michigan spending $200 million annually on foster care and $48.5 million annually on juvenile justice placements—rather than prevention services such as in-home supports. These interventions are not necessarily more effective than home and community-based care. In fact, the recidivism rates for juveniles receiving in-home and community-based interventions are equivalent if not better than those for high risk juveniles placed in expensive, restrictive residential programs (Burrell, no date). When the mental health needs of these children are not addressed in an integrated way, the return on the investment is poor, especially for children who are sent away from their homes and communities and for the system and the public that must pay for expensive out-of-home placements. Funding for preventive services has been severely cut in Michigan, reduced from $25 million to less than $10 million between 2000 and 2006 (Michigan's Children, 2006). With reduced resources for prevention, the child welfare and juvenile justice systems may increasingly bear responsibility for mental health care for children living with severe emotional disturbances.

Options for health care coverage are circumscribed by family income and economic circumstances, but the service gaps in coverage for children with SED affect both middle and low-income families. Many employer-paid, private insurance plans and public S-CHIP plans offer only limited coverage for traditional or clinical treatments such as psychotherapy, and do not cover residential treatment placements (GAO, 2003). Youth in states with S-CHIP plans, like Michigan, often have very limited mental health benefits because they are taken from a benchmark private health plan. Typical private plans limit outpatient visits to 20 or fewer and inpatient stays to 30 or fewer (Brazelon Center for Mental Health Law, 2005).

Changes in Medicaid rules may significantly affect placement rates. Low Medicaid reimbursement rates often restrict mental health providers' participation; and children placed in foster care or juvenile detention receive preference, particularly when services are court ordered (Giliberti & Schulzinger, 2000). For example, a study examining mental health service use in California found that children in foster care accounted for 41 percent of all public service users, while representing only 4 percent of eligible children (Garland & Besinger, 1997). These policies appear to be in direct conflict with other federal and state child welfare policies that emphasize family preservation.

There is little information regarding service utilization and outcomes for children and youth who are placed in the child welfare and juvenile justice system, and much of the information that is available does not differentiate between youth who have been placed as a result of an abuse or neglect petition and those who have been voluntarily placed by their families as a result of needing mental health services. A better understanding is needed of the impact placement has on the families of youth who are placed in the foster care or juvenile justice systems solely to obtain mental health care services.

This qualitative study attempts to better understand the ramifications of such placements on families in both urban and rural areas of Michigan from the perspective of parents who have had to voluntarily make this difficult decision. Parents also offered recommendations for future policy and practice.

*Methods*

Data was drawn from two studies of families with children living with severe physical or mental disabilities: the Pulling It All Together (PIAT) Project and the Keeping Families Together (KFT) Project. PIAT, or "Pulling it all together: Medicaid participation, work and income packaging for families living with chronic illness and disability" is a mixed-methods study that compares the economic and social strategies that low-income families use to make ends meet using various sources of cash and in-kind benefits. Interpretive data from focus groups are combined with administrative and survey data to examine trends in the use of cash, participation in social programs like Medicaid and Temporary Assistance for Needy Families (TANF), and social networks to increase social capital and achieve economic self-sufficiency. The focus groups were conducted in mid- and southeast Michigan, in rural and urban settings, respectively. Participants in the PIAT study were recruited through agencies that serve Medicaid recipients and other individuals and families with serious health problems. The semi-structured research instrument included both quantitative demographic measures and open-ended questions focusing on the participants' descriptions of their economic and social needs (including health care); and how well these needs were met using earnings work, income from social programs, and contributions from people in their social networks. Each focus group was designed to last 1½ to 2 hours. The focus groups were audiotaped and transcribed verbatim. Data collected through the focus groups were analyzed using thematic narrative analysis techniques. For this article, data from two focus groups with parents of children with SED were analyzed—one in rural mid-Michigan and one in urban area in the southeast part of the state—in which parents introduced and discussed at length the idea that they and other parents in their situations faced the decision to relinquish custody of their children to the state so that the children could access mental health services.

The second, related study, Keeping Families Together (KFT), builds on what is being learned through the PIAT focus group data. Keeping Families Together is a qualitative study of the circumstances of the families and the parents' perspectives on decisions to relinquish their children with SED to the foster care or juvenile justice systems, and social strategies that parents use to find and maintain health care and social support for their children living with SED. Data for the KFT Study are being collected throughout the state of Michigan, through in-depth interviews and brief demographic surveys of the families. The first interview in KFT was conducted with a parent from southwest Michigan who had voluntarily placed her child in the juvenile justice system. The individual interview discussion took place for 3.5 hours. The interview was audiotaped and supplemented with the interviewer's extensive field notes. The interview protocol included open-ended questions about the parents' circumstances and those specifically surrounding the supports available to the family before, during, and after the decision to relinquish custody of the child with SED. In addition to the regular protocol, the parent in this case study also provided the researcher with extensive legal documentation of her child's history as a recipient of juvenile detention services. The data for this article were analyzed using narrative methods to explore themes that arose first in the Pulling It All Together Project focus groups and were elaborated on in the Keeping Families Together case study of a parent's experiences navigating the juvenile justice system to gain access to necessary mental health services for her child.

*Findings*

Preliminary findings from this study and the PIAT study indicate that Medicaid-eligible families have limited access to necessary Medicaid-covered benefits, citing this as a reason for child welfare placement or juvenile detention. Two working poor parents who participated in the Mid-Michigan focus group speak directly to the financial difficulty that led them to the decision to relinquish custody, as well as describe the consequences this decision had on their families:

> C: Ok, respite…, [the subsidy is] $1500 a year per family. Now that's not much. What, do they want *you* to pay for that? We got families that got children with really serious disabilities and several of them in one family 'cause of their heredity, and they only get $1500 a year in respite. When parents get desperate, that child ends up in the foster care system.
>
> --D: And that is why my nephew is in a treatment center and will be there for another two

years because he's not able to access enough services for his care in our home. *We were not able to get support to be able to keep him at home.* So now the State is having to pay for him to be in a treatment center….so he's costing the State three times more than if he was living with us."[1]

C: I had to give up custody of my son so that he could get the necessary care that he needed for his mental illness because my insurance would not cover for him to be hospitalized while he was suicidal. They would only pay 50%, yeah I got a letter that I wrote to the senators. I had a bill for $40,000-that was my portion of the hospital stay. And I couldn't qualify for Medicaid, I made a $100 too much a week or a month and they wouldn't allow me to have Medicaid.

A third parent stated that she chose to relinquish custody of her child to the juvenile justice system because her child was a danger to herself and her siblings.

M: I had to do that with my second to oldest child, because her behaviors were so bad she was assaultive to her younger siblings…in order to protect them and to make sure that her medical needs were met, because she was eloping at the time. I had to take her to court, file charges against her and also requested a temporary foster care placement and ended up having to give custody to my brother in order to be able to ensure the safety of my … of her younger siblings. … My only other choice was I had to turn her over to foster care to DHS and they would file abuse and neglect charges against me and I would be at risk of losing my other four children.

One of the parents who participated in the focus group in southeast Michigan made the following comments about how her child was involved with the juvenile justice system:

CH: Yeah, the whole 3rd precinct know who I am, I could be walking down the street, Hey, [CH]… how ya' doin'. Because that's the way we have to do it. I mean have to involve them, you know to come and do something. I call the police, not sometimes, all the time… I have the cops over my house all the time to check on me.[2]

A second parent from the same urban focus group in southeast Michigan commented,

P: …But one of the hardest thing you could do, mother calling on your own kid…Because what they have to do when you have to call them, they treat em' just like they're a regular criminal, they put handcuffs on em'. You know if they have to tackle em' they will tackle em'. You know they will … they will do all these things.

Children and youth with mental health challenges and their families have been affected by the stigma surrounding mental health and are often isolated. Police arriving at their door likely means more negative attention from the community, fear of losing control of their family's situation, and even more distrust and anger directed at the systems that have failed them.

A third parent from the urban group, traumatized by her experience of calling the police on her child, commented:

N: I don't call the police anymore, because my youngest the one that is the most impaired, um, had an accident with the police…they [the police] beat him up and they maced him and everything but he's a big boy. And they thought he was an adult… . When they grabbed him, he just went out of control, you can't put your hands on him-that's number one, I don't even do it. I guess they tried to turn him around to talk to him and they … it just went out of control… all the neighborhood took pictures and videotapes and everything. I mean I didn't sue because my son did swing on the officer, but I was angry that they maced him more than four times. You know…he's a minor.

Parents who chose not to place their children in formal out-of-home care settings may contemplate ideas that include knowingly placing their children in dangerous situations to ensure access to public health insurance. One parent described a situation where she knowingly put her child in danger to obtain needed health care resources: "… I even thought about giving up custody of my son and giving him to my husband who is an alcoholic, who is eligible for Medicaid because he isn't working." Parents believed that if they were offered services such as additional respite hours and intensive, in-home support services, these would have prevented them from placing their children out-

of-home. Parents also believed that these in-home, community based service options would be less costly than the out-of-home placements.

> "…Because rather than getting respite…mental health…and-um [the state opts for] high level foster care, which crosses out of county, across the state, so it's like quadrupled the amount of money…and either that or they are in, uh, really secured residential facilities, it's costing, you know thirty thousand dollars a month or something."
>
> --"they [parents] need the support in the home."
>
> --"…need somebody to be able to come into the home, help with the parenting skills, um, modeling,…"
>
> --…"yup, just like in school, they have one on one aides, …need a one on one aide in the home."

*Discussion and Summary*

Many youth end up in the foster care or juvenile justice systems for behavior brought on by or associated with their mental illness. As communicated by the parents in this study, youth with mental health needs should be diverted into effective community treatment. Families need to be in the forefront and fully involved with the treatment and rehabilitation of their children. Parents are the most reliable resources a child has through the implementation of preventive, home and community-based services. When more formal and restrictive treatments are necessary, parents should also be actively engaged with law enforcement, child protective services and the courts in the development and implementation of formal treatment plans on behalf of their children.

As shared by parents who have had police involvement with their children, it is imperative that law enforcement professionals are trained on crisis de-escalation techniques for children and youth, to understand and appropriately interact with children living with SED. Law enforcement officers are generally trained to be action oriented, aimed at solving problems quickly-a practice that is not conducive to serving children with SED. Police responses have significant implications in determining treatment plans. Upon an encounter with a youth who appears to have a mental health concern, law enforcement officials need to connect the youth with emergency mental health services or refer the youth for mental health screening and assessments.

The court process plays a significant role in referring children in foster care and juvenile detention to mental health and other services. Services may be offered or ordered for children at many different points in the court process and may range from optional or voluntary services to services required by the court as part of the treatment plan. It is of critical importance that judges have sufficient information about a youth's mental condition and treatment history to understand how a youth's mental health disorder may have contributed to their entry into the foster care or juvenile justice system. Input from families is essential. This knowledge should be at the forefront as judges make dispositional decisions.

Parents have the best information about the needs of their children. It is vital that parents attend every court proceeding and provide the attorney representing the child or youth with information about the youth's mental health history so that it can be included in reports and plans. The best outcomes for youth with SED arise when parents, other family members, and all relevant care providers (i.e. foster care workers, probation officers, therapists, etc.) develop a partnership that will ensure an appropriate and comprehensive treatment plan is created, implemented and sustained.

Essential to effective system/service delivery is the ability of families to access appropriate health care and health care coverage. Public policy alternatives do exist that can help families with the difficult choice of giving up custody to the state or seeing their child go without needed care. The federal government gives states the option to participate in the Tax Equity and Fiscal Responsibility Act or TEFRA (also known as the Katie Beckett Act), a Medicaid option that allows states to cover home and community based services for children with disabilities living at home with their families. If the child meets all eligibility criteria for TEFRA, the child receives a Medicaid card and is viewed as a family of one for the purpose of medical treatment. A child can qualify without regard to family income (Burrell, no date).

In addition to creating more public awareness about TEFRA, other legislation has been introduced

at the federal level that could be supported by these findings. Of particular interest are the Keeping Families Together Act of 2007, which directly addresses out-of-home placements of children with mental health needs; the Juvenile Justice Delinquency Prevention Act of 1974, enacted to address the over-representation of youth of color who have been detained in the juvenile justice system; and the Mental Health Parity Act of 2007. All of this legislation is under current consideration for enactment or reauthorization, and faces likely changes that will reduce or eliminate funding for programs and services for Michigan families. Concern about this issue is emerging in several states, including Michigan.

There is interest across the county in addressing the issue of placing children in out of home care solely for the obtainment of mental health care (Congressman Ramstad, [R-MN] 2006; personal communication), but additional research is needed to determine the actual scope and impact of the problem. ◎

## About the Authors

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## Endnotes

1 Emphasis added. During the interview, the parent explained that this 15 year old had a long history of suspensions and expulsions from school due to physical confrontations with peers at school. This child also has a history of assaulting adults in positions of authority.

2 This parent explained that she is the biological grandparent of her 14 year old grandson whom she took into her home after a substantiated child protective service investigation.

# A Critical Evaluation of Presumptions in Favor of Joint Custody:

## Why Michigan Should Not Follow the Trend

by Lindsay Dangl

### Introduction: The Dilemma

A judge returns to her chambers after a long day of testimony. It has been an agonizing review. The mother alleging that the father is unfit to parent while the father makes the same allegation about the mother. Back and forth the parents' attorneys argue over finances, moral character, and every other aspect of this family's life. Yet, all of the evidence shows that both of these parents are not only fit to parent but want to parent their child. After all, this is why each parent is petitioning for sole custody. Each cares about the child and wants to have the ability to make decisions for the child's welfare. The judge, being diligent in her pursuit, looks at the guiding "best interest factors" one by one, but struggles to come to a conclusion. According to one judge, "[a]warding custody of children has been acknowledged as the most difficult decision a judge must make, and this decision becomes even more difficult where the law views both parents as equally fit."[1] Custody is a heavily weighted determination because it will have an impact on the direction and content of a child's entire life. In addition, it is based on predictions. What is presented at the hearing is concrete evidence, but the actual decision must be based on the prediction of which parent will be the best parent in the future. How easy would it be for this judge if instead there was a presumption of joint custody, no grueling in depth analysis of these factors leading to an ultimate decision. Instead, unless the parents can prove otherwise, the child spends an equal amount of time with each parent and each parent has an equal share in the decisionmaking. It would certainly be more efficient. "Joint custody offers an easy out. As one judge has observed, 'Joint custody is an appealing concept. It permits the court to escape an agonizing choice, to keep from wounding the self-esteem of either parent and to avoid the appearance of discrimination between the sexes.'"[2] A few states have recently enacted statutes with a preference for joint custody.[3] This is exactly what Michigan has proposed to do.

The proposed legislation, House Bill 4564, would eliminate an individualized consideration of custody and create a presumptive starting point of equal time and decisionmaking for each parent. This paper will show that the presumption would not correct the social problems and conflicts associated with custody disputes and may instead lead to more undesirable effects. Each child deserves an individualized consideration of his or her best interests. Under the proposed legislation this consideration would be foregone in favor of efficiency and predictability. Efficiency should never outweigh the important determination of an individual child's best interests.

### Background: The Current Law and the Drastic Proposed Change

The Child Custody Act of 1970 is the current law in Michigan. MCL 722.26a is the provision pertinent to joint custody. " 'Joint custody' as used in the Child Custody Act, means an order of the court which specifies that the child is to reside alternately for specific periods with each of the parents, or that the parents are to share decision-making authority as to the important decisions affecting the welfare of the child, or both."[4] Every award of child custody is split into two categories: legal and physical. "Legal custody

is 'the right to make long range decisions on matters of major significance concerning the child's life and welfare' "[5] and that the "parties shall be entitled to equal access to the educational, medical, religious and other pertinent records of the children."[6] "Physical custody, in contrast, is the right and duty 'to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody.'"[7] The joint custody terminology used in the Child Custody Act includes both joint physical and joint legal custody, either separately or in conjunction. In addition, the current Act often uses the term custody without clarifying whether or not it is speaking of legal or physical custody or both.

There is a current trend across the country toward encouraging joint legal and physical custody at the outset of a custody dispute.[8] Almost every state allows joint custody as an option for parents in a custody battle, with the exception South Carolina.[9] "[A]n increasing number of statutes establish a legislative preference for joint custody or a presumption that joint custody is in the best interests of the children." Some states have gone further and adopted a presumption in favor of joint custody. Those states include: Florida, Idaho, Iowa, Louisiana, Mississippi, Montana, Nevada, New Hampshire, and New Mexico.[10] At least in other states, "[t]his presumption exists for several reasons, but primarily, because states have declared, through public policy mandates, that children be afforded the opportunity to have meaningful contact with both parents."[11]

Michigan is following suit. There is a bill in the House of Representatives that would change how child custody is decided in Michigan. House Bill 4564 was proposed by Representative Glenn Steil on April 5, 2007. The Bill is currently in the Committee on Families and Children's Services. The language in the current statute, MCL 722.26a, reads:

> (1) In custody disputes between parents, the parents *shall be advised of joint custody*. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. In other cases *joint custody may be considered* by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:
>
> (a) The factors enumerated in section 3
> (b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.
>
> (2) *If the parents agree on joint custody, the court shall award joint custody* unless the court determines on the record, based upon clear and convincing evidence, that joint custody is not in the best interests of the child.
>
> (3) If the court awards joint custody, the court may include in its award a statement regarding when the child shall reside with each parent, or may provide that physical custody be shared by the parents in a manner to assure the child continuing contact with both parents.
>
> (4) During the time a child resides with a parent, that parent shall decide all routine matters concerning the child.
>
> (5) If there is a dispute regarding residency, the court shall state the basis for a residency award on the record or in writing.
>
> (6) Joint custody shall not eliminate the responsibility for child support. Each parent shall be responsible for child support based on the needs of the child and the actual resources of each parent. If a parent would otherwise be unable to maintain adequate housing for the child and the other parent has sufficient resources, the court may order modified support payments for a portion of housing expenses even during a period when the child is not residing in the home of the parent receiving support. An order of joint custody, in and of itself, shall not constitute grounds for modifying a support order.
> (7) As used in this section, "joint custody" means an order of the court in which 1 or both of the following is specified:
>
> (a) That the child shall reside alternately for specific periods with each of the parents.
>
> (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.[12]

The Bill would change the language of the law to state:

> (1) In a custody dispute between parents, *the court shall order joint custody unless* either of the

following applies:

(a) *The court determines by clear and convincing evidence that a parent is unfit,*

*unwilling, or unable to care for the child*.

(b) A parent moves his or her residence outside the school district that the child

attended during the 1-year period preceding the initiation of the action and is unable to maintain the child's school schedule without interruption. If a parent is unable to maintain the child's school schedule, the court shall order that the parents submit the dispute to mediation to determine a custody agreement that maximizes both parents' ability to participate equally in a relationship with the child while accommodating the child's school schedule. A parent may restore joint custody by demonstrating the ability to maintain the child's school schedule.

(2) If subsection (1) does not apply in a custody dispute between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. In other cases, joint custody may be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:

(a) The factors enumerated in section 3.

(b) Whether the parents will be able to maintain the child's schedule and

generally agree concerning important decisions affecting the welfare of the child.

(3) If the parents agree in writing to a custody arrangement, the court shall grant that custody arrangement.

(4) If the court awards joint custody, the court shall include in its award a statement regarding when the child resides with each parent and shall provide that physical custody is shared by the parents alternately for specific and substantially equal periods of time.

(5) During the time a child resides with a parent, that parent shall decide all routine matters concerning the child.

(6) If there is a dispute regarding residency, the court shall state the basis for a residency award on the record or in writing.

(7) Joint custody does not eliminate the responsibility for child support. Each parent is responsible for child support based on the needs of the child and the actual resources of each parent. If a parent would otherwise be unable to maintain adequate housing for the child and the other parent has sufficient resources, the court may order modified support payments for a portion of housing expenses even during a period when the child is not residing in the home of the parent receiving support. An order of joint custody, in and of itself, does not constitute grounds for modifying a support order.

(8) As used in this section, 'joint custody' means an order of the court in which both of the following are specified:

(a) That the child resides alternately for specific and substantially equal periods of time with each parent.
(b) That the parents share decision-making authority as to all of the important decisions affecting the child, including, but not limited to, the child's education, religious training, and medical treatment.[13]

The proposed legislation would change the current law from *considering* an award of joint custody to requiring a court to order it except where proved by *clear and convincing evidence* a parent was proved unfit or unwilling to parent the child. This is a heavy, rigorous burden for the parent petitioning for sole custody to carry. In addition, there is no explicit provision for homes of domestic violence or situations where joint custody clearly is not in the child's best interest due to conflict or inconvenience. "In fairness to all concerned, one of the empirical questions that should be asked before equal joint custody is presumed is whether it can be shown to be in the child's best interest."[14] Moreover, the proposed legislation would change the entire definition of custody. The current act defines joint custody as one where *one or both*, either joint legal or joint physical custody, are ordered. The proposed legislation would change the defini-

tion to where *both* are ordered. This would require a change in our entire vocabulary of custody.

Some argue this presumptive joint custody would give more guidance to courts and judges and more predictability to decisions, resulting in less litigation. In addition, there are numerous arguments about how a joint custody presumption would alleviate some social problems associated with custody disputes. In contrast, this paper will show the presumption would not correct the social problems and legal conflicts associated with child custody battles and could lead to even more undesirable effects. Each child is due a proper individualized consideration of his or her best interests and under the proposed legislation this consideration would be lost to efficiency and predictability. This will do great injustice to the children of Michigan.

## Does Michigan Really Need a Presumption?: Why a Joint Custody Presumption Would Harm Michigan Children

Many different people, advancing many distinct arguments, argue in favor of joint custody presumptions, especially as social research continues to increase, diversify, and become generally more accepted. Some social scientists argue that it is beneficial for children while other studies show just the opposite. Judges surveyed about different custodial arrangements disfavored joint custody. "The most frequently cited reasons included poor cooperation (30.5 percent), instability created by shifting from home to home (29.8 percent), distance between homes (25.5 percent), and acrimony and revenge between the parents (19.1 percent).[15] These are all legitimate concerns. Yet, "social science research related to child custody issues is now richer and more varied than it was in the past."[16]

### *Joint Custody And Forced Relationships With Both Parents*

One argument advanced for a presumption of joint custody is that it allows children, traumatized by divorce, to maintain and build relationships with both parents unless a parent is proven unfit, unwilling, or unable to care for the children. "Most children want to maintain contact with both parents."[17] In addition, "[u]sually both parents are strongly attached to the children, strongly committed to their welfare, and have a clear record of having been responsible, fit parents before the separation."[18] Many social science "[s]tudies have shown that substantial contact with both parents after a divorce has a positive effect on children. Correlated with this principle, studies have also consistently shown a negative impact on children if there is an absence of contact with noncustodial parents after a divorce."[19] Joint physical custody allows the bonds with both parents after divorce to strengthen because the child would live with each parent for a significant amount of time.[20] It is argued that this minimizes the impact of divorce on children[21] because they are still able to maintain steady contact, access, advice, love and affection from each parent. Research also demonstrates a "correlation between a lack of contact and increased rates of 'teen suicide, substance abuse, crime, runaways,' and other afflictions."[22] While the parents are not together, this arrangement most closely resembles an in-tact family, which is argued to minimize the impact of divorce on children. Yet, "joint custody requires parents to create a façade that their broken relationship still exists."[23] In some circumstances, this cannot be healthy for either the child or the parents. This requires an individualized determination to find whether or not this would indeed be in the best interest of the child.

"While it seems clear that children often benefit from a continuing relationship with both parents after divorce, the research has not established the amount of contact necessary to maintain a close relationship."[24] Therefore any social research basis that joint custody is the only way to further meaningful relationships with both parents is misguided. "[J]oint custody proponents make an unjustified leap from the common sense proposition that children do better after divorce if they maintain frequent contact with both parents to the startling conclusion that joint custody is the only way to ensure such contact."[25] Yet, "[q]uality interaction with children can, of course, occur within the framework of traditional visitation."[26] A study showed that it is more important to children what they do with their parent than the amount of time they spend with that parent.[27] Therefore a traditional visitation schedule may provide better parent-child interaction for some families. This requires an individualized determination.

In addition, recent social scientists have "argued that custodial arrangements that mimic the two-parent family are the most desirable because they produce

stability over time in providing continuing contact with both parents."[28] Yet, unless the parents can learn to cooperate and peacefully co-parent, then a joint custody arrangement may have a negative impact on the child.[29] If the arrangement was not decided by the parents but rather forced upon the family by a judge, more conflict may ensue. In this situation, at best, court-imposed cooperation is illusory. "It creates the illusion of equality and Solomonic wisdom and improperly allows a judge to avoid making a difficult-but often necessary-choice between two seemingly fit parents."[30] An individualized determination is necessary to determine the parenting relationship between the parents in relation to the child.

*Joint Custody and Forced Relationships Between the Parents*

Post-divorce "[m]any parents would prefer not having to deal with the other, and mothers and fathers with sole residence both indicate that in some ways it is easier for them, now that they are separated, to raise the children according to their own values, with less need to consider those of the other parent."[31] In the event of a high conflict divorce, the further contact between the two parents, caused by a joint custody arrangement can cause increased stress on the child because the fighting would continue and could get worse.[32] In fact, social research has shown "about a quarter of our families remained conflicted at the end of three and a half years."[33] One judge stated, "[r]arely, if ever, should joint legal custody be awarded in the absence of a record of mature conduct on the part of the parents evidencing an ability to effectively communicate with each other concerning the best interest of the child, and then only when it is possible to make a finding of a strong potential for such conduct in the future."[34] The conflict that arises at divorce usually started during the marriage.[35] Instead of moving on after divorce, post-separation "[c]onflict about commitment, parenting competency, motivation, values, and even style of care and discipline are predictable in this situation."[36] Added to the original tensions of the marriage, the "tensions of separation and litigation will sometimes produce bitterness and lack of ability to cooperate or agree."[37] "A court battle hardens the lines drawn earlier in the couple's pre-divorce conflicts, and these lines may remain hardened indefinitely, especially if there is a child custody arrangement that is abrasive and unsatisfactory to either ex-spouse."[38] While some argue that the courts should require parents to set aside their problems to better their children's welfare,[39] this is impossible to expect in all situations. This requires an individualized determination b/c "the trial judge will have to evaluate whether this is a temporary condition, very likely to abate upon resolution of the issues, or whether it is more permanent in nature."[40] While it is "[t]rue, some intensely hostile parents manage not to draw the children into their conflict[, ] many do."[41] Custody requires an individualized determination to evaluate the level of conflict between the parents and whether or not maintaining the simulation of a pre-divorce family is really in the child's best interest.

In addition to conflict itself, "[f]lexibility of living arrangements [in joint physical custody arrangements] enhances the child's ability to manipulate the parents." Considering there are two different sets of rules and boundaries, children may get away with more troublesome behavior at one parent's house because "Dad doesn't make me do that." Either out of fear for what the other parent would do or in fear of a change in custody, a parent could give into a child's request because of a statement like this alone. Additionally, children can manipulate the tensions between the parents, either by saying one parent does something they shouldn't or said something to offend the other parent. This teaches children poor morals and behaviors and this should be disciplined, but instead children learn to use it for their own purposes. Consequently an individualized determination is essential to properly consider the personality of each child.

*Joint Custody And Practical Difficulties*

In addition to increased parental conflict and impact on the child, the child could face additional psychological stress just from the nature of the situation. The child is tossed between two homes, with two different sets of rules, two different routines, two different bedrooms; essentially two different lives. In a joint physical custody arrangement, "[t]he children typically shuttle back and forth from one parental residence to the other."[42] This double life can lead to issues of identity. One psychologist found it was harmful to the child to be moved between the two households because the child was emotional over the divorce.[43]

Studies have shown "[s]tability in the human factors affecting a child's emotional life and development

is essential, and it may be argued that [ ] stability can best be attained with such an undivided custody as will prevent the child from being shunted back and forth between homes."[44] It is true that to some degree a child is shifted between homes in a traditional parenting time situation, where one parent has a greater amount of time with the child. But, joint custody mandated under the proposed legislation could further exacerbate the problem because the children would be required to spend more closely equal time with each parent. While some children may adjust well or even flourish in this situation, this could cause major identity and boundary problems for other children. Therefore, again an individualized determination is necessary to determine how a child would react to the situation and how much transferring back and forth between homes would be beneficial for each individual child. "The child's characteristics at the time of divorce have been shown to have a relationship to his or her postdivorce adjustment."[45] If Michigan's goal is the best interests of the child, Michigan children deserve better than a presumption.

*Joint Custody And Child Support*

Another argument in support of a presumption of joint custody is that it would lessen arguments over child support payments. The proposed legislation does indicate that, "Joint custody [would] not eliminate the responsibility for child support."[46] Yet, according to the Michigan Child Support Guidelines,

> "When children share substantial amounts of time with both parents, child support should consider the costs and savings associated with parenting/custodial time. When a parent cares for a child overnight, that parent will cover many of the child's unduplicated costs. Conversely, the other parent will not be expending food or utility costs for the child. This calculation presumes that as parents spend more time with their children they directly contribute toward a greater share of all expenses."[47]

Therefore, child support, if any were awarded to a parent, would likely be less than he or she would receive if joint physical custody were not awarded. But, since neither parent alone bears the brunt of the day to day expenses, this probably would not be cause many problems. While problems can still arise over what is appropriate to spend on the child, each parent could spend their money how they deemed proper while the child was in their physical custody. Currently, if a parent thinks that the other parent is not providing adequate support, they can bring the matter before the court. "The important point here is that lower child support payments do not necessarily mean lower support for the child."[48] Except in the situation where one parent does not make enough money without child support to provide a home for the child and the other parent barely makes enough money to do so him- or herself. "Joint custody advocates rarely discuss [these] financial concerns."[49] "Seriously shared physical custody requires two units large enough to house parent and child on a permanent basis-along with lots of childrearing accoutrements…which must be present in both units."[50] This is sometimes difficult when parents are low income. The "[f]inancial, organizational, and emotional stresses directly related to orchestrating joint custody anticipate commitment and resources. It is shortsighted to presume that poor families have the resources and that broken families possess the commitment."[51] This is why there must be an individualized determination in each situation as to the parents' financial and housing situations before joint custody were ordered to ensure it truly served the child's best interests.

Moreover, it is argued that when one parent is ordered child support, either because the joint custody is not split 50-50 or some other reason, specifically fathers are more likely to pay their child support if they are allowed to maintain relationships with their children. Even though the terms of statutes are gender-neutralized, the facts remain that often mothers are awarded more time with their children and fathers are often required to pay child support.[52] Studies found that the more fathers were able to see their children, the more often they were up to date on their child support.[53] "Increased frequency in child support payments is in a child's best interests [because it] raises the child's standard of living."[54] In addition, "[r]eliable child support payments also provide stability for the child."[55] As a result, fathers should be allowed to see their children more often because if they are more likely to pay their child support, that would be in the child's best interest. But, there is no way to determine if an individual father is more or less likely to pay his child support if allowed to spend more time with his child. The court should not presume joint custody because a father might pay his child support on time.

Child support is only tangential. The real inquiry should be focused on whether or not a developing relationship with the non-custodial parent would benefit the child.

Some argue that joint custody would turn into an argument about money rather than time with the children. "[C]ourts may be using joint custody to justify inappropriately low child support awards. Courts awarded no child support in more than half of the cases designated as 'joint residential custody.'"[56] So although the proposed legislation seems like it would keep the child custody guidelines as is, the logical consequence is that it won't. "Labeling an arrangement 'joint custody' [ ] significantly reduced the amount of child support ordered."[57] The problem with this argument is that the evidentiary standard proposed by the Bill could be high enough that judge would be able to dismiss an ill motivated financial argument. The only problem with the proposed legislation on this point is that the judge needs a lot of discretion to make sure each child will be financially taken care of. Since judges currently do not usually award any child support in a true joint physical custody arrangement, due to most state court guidelines (as long as their incomes are close enough), the not having child support may cause increased litigation on a greedy parent's financial unfitness just to try to meet the proposed evidentiary standard and receive a grant of child support. Therefore, if the proposed legislation was passed, the Michigan support guidelines would have to be reexamined to prevent inequitable financial situations that are not beneficial to the child. This could best be done by individual alterations.

*Joint Custody And A Win-Win Mentality*

Many in favor of a presumption of joint custody argue that it undercuts the adversarial atmosphere of child custody battles in favor of a "win-win" mentality. One of the biggest critiques of the current best interest factors is that it fosters animosity during the custody battle between the parents who are required to cooperate post-judgment.[58] "Because the relationship between parents must continue after the final judgment, it seems illogical that custodial responsibilities are decided by a process resulting in parents pointing out each other's faults."[59] Currently, "[t]he law assumes that people can and will behave reasonably, which includes abiding by the legal rules established by society as well obeying the orders of judges."[60] Of course, this is not true in all situations, especially a custody battle. It is an oddity in the law that people who benefit from pointing out the other's flaws at one point in time, will have to at some other point, cooperate for the best interest of the child if placed in some form of joint custody arrangement. In addition, "adversary positions… forces exaggeration and mistruth."[61] It "discourages mature compromise and encourages competition for control and struggles for power."[62] Increased cooperation between parents would be beneficial to the child. The more minimized the conflict the better for the child. Some parents are able to handle the high conflict atmosphere of court litigation and then post-judgment learn to live with the judgment the court decides.[63] "Families differ, of course, and we have seen that there is an enormous variety of ways in which parents allocate responsibility for children after divorce."[64] This again, is why there needs to be an independent determination in every situation because some parents can handle the stressful situation and have a positive outcome, while others cannot.

As a consequence of preventing conflict, some argue a presumption of joint custody is that joint custody would help prevent parental alienation. "Parental alienation is the process whereby a child's relationship with one parent becomes damaged by the other parent's conscious or unconscious efforts."[65] It is one of the goals of joint custody "that both parents maintain their parental role, as opposed to one being a custodial parent and the other being a visitor."[66] Then parents feel a more worth-while part of their child's life.[67] Therefore, the argument follows that if joint custody were presumed, there would be less chance for a parent to alienate the other because both parents would be equal parents. Under the current custody determination, the courts still heavily award primary custody do mothers.[68] A study found that if primary custody was awarded to the father, mothers tended to increase their visitation over time, however, if primary custody was awarded to the mother, fathers tended to decrease visitation over time.[69] Yet, a joint custody presumption will not alleviate this problem for two reasons. First, when one parent is consciously undermining the other, it would count against the parent under the current best interest factors analysis in Michigan. Therefore, the courts in Michigan are already addressing this issue without a presumption, and a presumption is unnecessary. Second, joint custody cannot eliminate one parent's bad faith or bad

intentions toward another parent. If a parent wants to undermine the reputation of the other parent to the child, he or she will. In addition, joint custody ordered in every situation could escalate the problem by increasing interactions between parents with ill will toward one another and increasing the possibility of manipulation of children when they spend time with the other parent. In this situation a parent may even work harder to create the alienation in order to feel like the favorite parent. Therefore a presumption of joint custody could cause escalating problems with one of the problems it is attempting to remedy. Yet, not every parent will alienate the other. This needs to be factored into the totality of the circumstances for each family.

*Joint Custody and Inevitable Change*

Like all custody arrangements, a presumption of joint custody is that it would apply joint custody to situations where parents are currently able to cooperate, but things can change. "One inescapable consequence of joint custody is that two people who are no longer married to each other must concur in most major decisions affecting a child's life."[70] Any modification of a custody order is difficult, even more difficult than an initial order. Circumstances change over time for better and for worse. "Although the court cautioned against awarding joint custody on a 'blind hope that it will be successful,' that certainly remains a very real possibility."[71] Therefore a joint custody award that makes sense, or is required at the time, may change and no longer make sense, yet not fulfill the "change in circumstances" test to alter the custody arrangement. "The general rule is that the existing court-ordered custodial arrangement presumptively serves the child's best interests; and the party seeking modification bears the burden of showing a substantial change in circumstances before a court will revisit the award."[72] This is a heavy burden to carry.

It is often easy to have rotating schedules for a child who is not yet school aged. Yet, that child will soon become school aged. Complying with the current "change in circumstances" rule, the child simply growing older is not enough to tip the scales for a change in custody. A parent would have to move to the extent he or she would not be able to accommodate the child's schedule. In addition, as children reach their teen years, their peer group becomes more important in their eyes, and as part of their social development, than their parents. Therefore as they begin to assert their independence, having a set joint physical custody arrangement between two households will become hard to deal with. Therefore, the presumption in favor of joint custody could have lasting consequences that are no longer in the child's best interest without meeting the threshold for a change in circumstances.

Furthermore, often over time one or the other parent will move. "Approximately six percent of the U.S. population moves each year."[73] While joint custody may make sense while the parents live close together, yet if one or the other parent moves, it may no longer make sense. "A study shows that many families change the residential living arrangements and visitation patterns during the first several years following the separation. This is especially true for families with dual residence or father residence."[74] A study found that "when a residential move of either the mother or the father triggered a change in the children's residence, they almost always moved into the mother's household rather than the fathers."[75] Under the proposed legislation, the only reason for a modification based on a move would be if the parent moved out of the school district *and* was unable to maintain the child's school schedule. The only good outcome is that any proposed move by a parent does have to be approved by the court, unless the parent is moving less than 100 miles (in Michigan, other states have different rules). Even a move of less than 100 miles can put a lot of strain on a family relationship, especially if the family is operating in a joint physical custody situation. Any move could result in further litigation and further stress on this family. Therefore in all circumstances joint custody may not be appropriate, for example when a parent is anticipating a move soon in the future.

In addition, statistically the parents will remarry. A study showed that "[w]omen, who generally leave marriage with fewer assets and earning ability than their husbands, have strong economic as well as personal reasons for remarriage."[76] In addition the study showed that indeed, "most women [did] remarry after divorce."[77] As for the effects of this remarriage, a different study found that "[r]emarriage of the mother has a slight effect [on the custodial situation of the child in that it] tends to diminish the amount of time children spend with their father."[78] Therefore, remarriage may increase tensions and increase stress between the parents and the child, lending to an outcome not in the child's best interest. Yet, there is no direction

in the proposed legislation on how to handle this situation. While no one should be discouraged from remarriage, there should be adequate provisions for the other parent to ask the court to change custody if the new step-parent is not in the child's best interest. Therefore, discretion should stay with the judge.

*Joint Custody's Effect on the Battle of Child's Rights Versus Parents' Rights*

One of the strongest arguments against a presumption is that a presumption of joint custody focuses more on the rights of the parents than on the best interests of the child(ren). "The principal goal of custody law is to further the best interest of the child."[79] It takes the consideration of the best interest of the child almost out of the equation instead focusing on the right of the parents to parent equally. The joint custody presumption "may reflect the current emphasis on joint custody as a parental (particularly a paternal) 'right,' rather than as a means of securing the child's best interests after divorce."[80] It creates an illusion of fairness when in reality, this may not be best for the children. According to Michigan's goal of the best interest of the child, "[p]hysical care issues are not to be resolved based upon perceived fairness to the *spouses*, but primarily upon what is best for the *child*."[81] Rather, "[t]he objective of a physical care determination is to leave the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity."[82] While parents do have rights to parent their children, the court still must maintain the ability to decide if what those parents are doing is in the child's best interest in order to protect Michigan's children and ensure they have a healthy environment.

*Joint Custody and Benefits to Parents*

Moreover, it is argued that joint custody arrangements are in the parents' best interest as well as the child's. A joint custody arrangement would allow parents to have their own lives and careers in addition to being full parents. Parents continue to benefit from the support of a marital structure. For parents, "it offers relief from the overwhelming burdens associated with raising a child alone."[83] In particular, "[j]oint custody affords women greater opportunities to pursue goals outside the realm of wife, homemaker, and mother, which may include attending college or pursuing different career paths. As a result, the women's job qualifications and financial position may improve."[84] It is argued that a presumption is the best way to help single mothers because "joint custody, by removing the burdens and expenses placed on mothers with sole custody, would help rid society of the single mother underclass that presently exists under the sole maternal custody regime."[85] Joint custody "reduces the financial strain women experience as sole custody parents and permits them more autonomy."[86] In particular, "[m]others who choose joint custody get to share the burdens of everyday parenting and avoid unnecessary battles."[87] Yet, a study showed that "[t]he dual residence arrangement, although it offers parents some benefits in terms of time off from parental duties, is nevertheless particularly demanding – the need to negotiate with the other parent over schedules arises frequently, more trips must be made to take children back and forth."[88] Therefore, it would need to be determined if this is really beneficial to the parents in an individual situation. Because it is arguably true that if a parent is better off, it will lead to a better life for the child.

*Joint Custody And An Increase In Certainty And Predictability*

Proponents also argue that a joint custody presumption would provide greater certainty and predictability in an equitable area of the law where judges are allocated too much subjectivity. Currently in Michigan, there is no legislative guidance for courts as to which factors to weigh more heavily. In addition, the last factor (factor L) allows courts to consider "[a]ny other factor considered by the court to be relevant."[89] Therefore the court has the opportunity to insert its own bias into the custody determination. "Many family law academics are loath to delegate too much to judges, particularly in the custody area. That is because the parties themselves have more information and know their parenting capabilities better than the courts are likely to know."[90] This is a valid concern. "Statutory versions of the best interest standard are either simply a reiteration of the policy objective… [t]hus a court resolving a custody dispute is free to consider anything that seems relevant … and to weigh the evidence as the judge sees fit."[91] When courts have too much discretion, they overstep their constitutional bounds.[92] With the individual nature of each family and the individual situation of each child, however, the court needs more discretion than a presumption

would provide. "[P]ersonal bias may exert subtle influences."[93] Yet, a study found that "in deciding custody disputes, judges attach greater significance to evidence from impartial sources, the parents themselves, and desires of older children."[94] In addition the study found "[t]here was marked consistency as it related to those factors the judges thought to be the most or least important."[95] Therefore, possibly the fact that the courts have great discretion in this area is more of a benefit and not as much a problem, especially because not a lot of inconsistency occurs.

*Joint Custody and Permanency for the Family*

Proponents also argue joint custody would lead to more permanency in the family unit. An individual determination would lead to more permanency. "In considering whether to award joint physical care where there are two suitable parents, stability and continuity of caregiving have traditionally been primary factors."[96] With a presumption, the court may start off with a joint custody arrangement only to have to reconsider it again upon every change. "Joint custody, unlike sole custody, legitimizes those applications and then expects our judiciary to take on the role of parent."[97] A better circumstance is an individualized determination for each family so that the most stable, beneficial environment for the child could be established the first time. "Structure … is important to children, but 'structure may be shaken by a joint custody decree.'"[98]

A joint custody presumption would lead to less permanence because whenever the parents cannot decide on how to raise the child in a joint custody situation, they have to come back to court to decide every issue.[99] "Joint custody often leaves the issue of structure continually on the table, with location or decision-making constantly in flux."[100] Additionally, "the court is usually ill-equipped to fully comprehend and act with regard to the varied everyday needs of a child in these circumstances, because it is somewhat of a stranger to both the child and the parents in a marital dissolution proceeding."[101]

There is some evidence that when both parents *agreed* to joint custody they did litigate less.[102] Yet, when "joint custody was awarded *without* the consent of both parents, relitigation rates were the same as when exclusive custody was awarded."[103] The argument is that since relitigation is "painful, costly, and time-consuming," any chance at reduction should be taken.[104] The reduction in overall litigation cannot happen with a presumption of joint custody. In reality it may increase the problem because co-parent decisionmaking will have to be overseen by a judge at every step.

*Joint Custody Would Reflect the Modern Situation of Society*

Over the decades, parenting roles have changed. Proponents of a presumption argue that "[b]ecause it recognizes the legal authority of fathers as well as mothers after divorce, joint legal custody both literally and symbolically reflects a widely shared norm about the relationship of fathers to their children that is subverted in conventional placement under the best interests standard."[105] The reality remains that "[m]ost mothers and fathers, however, are not co-primary parents, and thus the case for joint physical custody cannot be made on the ground that this arrangement reflects the typical allocation of parental roles in a contemporary marriage."[106] Even for the families that truly do co-parent, there is no guarantee that this equality would persist after a joint custody decree.[107] In fact, there is "evidence that many joint custody arrangements actually mirror sole custody and visitation might suggest that established parenting patterns tend to persist despite legal reordering or family relationships."[108] Therefore while parenting roles have changed for some families, tradition persists. While the court should change with the times, not enough change has occurred in parenting roles at this time.

## Why Michigan Should Continue an Individualized Determination

Michigan has stated its goal for child custody is to further the best interest of the child. As referenced earlier, there is a great deal of sociological studies that show that contact with both parents post-divorce usually helps children to better adjust. This is why "[a] joint custody presumption is attractive[, ] it seeks to reconstruct, or construct, … [the] ideal of the nuclear family out of a relationship that has failed, or in many cases never existed."[109] While this may be in the best interest of some children, this paper has shown that a joint custody presumption could impose joint custody on families where it is not in the best interest of the child.

House Bill 4564 should be defeated because it

would take any individualized analysis out of the equation unless a parent is unfit, unwilling, or unable to care for the child. It is not to say that joint physical and legal custody would never be appropriate, but that the custody determination and the family structure post-divorce should be determined on an individual basis not by a legislative presumption. There is too much uncertainty at the time of divorce about the future of the individual family to have an overriding presumption which states that the same outcome would be best for everyone.

This presumption would effectively be forcing a post-divorce family into the same family structure they had pre-divorce. There are few traditional nuclear families in our modern society – families are structured in many different shapes both pre- and post-divorce. There is no reason why the state should assume that the same post-divorce remedy will be in the best interest of every child regardless of that family's situation. It would not be right for me to argue for sole custody or any other option. The state has many options open to both how to negotiate custody and what that custody arrangement should be. This should be determined on an individual basis between the family members and a judge.

A legislative presumption would only create an illusion of equality that would lead courts and individuals away from dealing with the real circumstances facing families today. The best interest standard, though flawed, still "provides the flexibility necessary to consider unique custody issues on a case-by-case basis"[110] Michigan children desrve at least this much.

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# Improving Educational Outcomes for Foster Children through Comprehensive Legislation

by Alice S. Newlin

## Introduction

Foster children face a panoply of obstacles to success. Beginning with the factors that led to their placement in care, such as abuse, neglect, parental substance abuse or abandonment, a foster child goes on to experience an increased risk of sexual abuse, death and arrest once she enters the foster system.[1] Placement in foster care makes a child twice as likely to drop out of school, and then less likely to obtain a GED after dropping out.[2] In recent years, Congress has acted to ensure better permanency planning for foster children, recognizing that "foster care is a temporary setting and not the place for children to grow up,"[3] but many children still experience long periods of uncertainty and multiple foster care placements with no permanent outcome until they age out of care.[4]

Most former foster children simply do not have the tools they need to succeed and lead productive lives after they leave care.[5] Many of these children become homeless or depend on welfare, and large numbers end up in prison.[6] One large factor contributing to these dismal outcomes is the education gap experienced by many foster children. Placing a child in foster care and the related separation from the family can cause emotional trauma that that negatively impacts a child's school performance and their interactions with teachers and peers.[7] It is easy to imagine that a period of such upheaval in a young child's life would make it difficult to focus on schoolwork.[8] Beyond the initial trauma, foster children experience a greater degree of instability, where multiple foster placements require enrollment in a series of schools.[9] The educational instability resulting from placement changes and other upheavals in a foster child's life makes it incredibly difficult for that child to succeed.

Foster children also face setbacks attendant with each school transfer that may further delay educational progress. Every time a child transfers schools, she experiences an academic impediment which may hinder her progress by up to six months.[10] In many states and school districts, a transferring student must provide prior academic records, immunization records, health certificates, disciplinary records and other documents.[11] Without these documents, a foster child may be unable to enroll in school for several days, several weeks, and in extreme cases, several months. "In one study, forty-two percent of the foster children surveyed indicated that they had experienced delays in school enrollment while in foster care."[12] Delays in enrollment are not the only barrier foster children with delayed or missing records face; many children are not able to transfer all their academic credits and must repeat grades or classes already taken.[13] Additionally, some children in need of special education services may not stay at a school long enough to complete an Individualized Education Plan (IEP), or may not be able to provide the necessary records to a new school to implement a previous IEP.[14]

Children in foster care in the United States are systematically disadvantaged in education. While this paper does not offer a panacea solution to the many problems foster children face in care and after leaving it, this piece does seek to provide a means for foster children to achieve better educational outcomes. There is no excuse for a foster system that presents so many barriers to learning. The first step towards a solution is to reduce or eliminate school transfers for foster

children. Remaining in the same school adds stability, increases odds of graduation and reduces the administrative burden on schools and child welfare system. However, a good solution must also acknowledge that remaining in the same school is not always an option. Foster children should be kept in their original school unless that placement is inadequate or presents an unreasonable burden on the foster family, child welfare agency or the child herself. If a foster child must transfer schools, states and agencies must adopt laws and regulations to ensure that where possible, school transfers happen between semesters or between school years, that all necessary records are transferred in a timely fashion, that enrollment is not delayed because of missing documents, and that special education services are not affected by the move.

This piece will recommend a combination legislative and regulatory solution, based in part on action taken by Oregon, California and New York. Part One will discuss the details of the educational disadvantages in foster care, focusing on educational outcomes and barriers to success. Part Two will present the legislative solutions adopted by several states and discuss the benefits of each, and then will summarize the elements necessary for a significant improvement in educational access and outcomes for foster children.

## Foster Children in school: How Does Foster Care Affect Education?

Research on children in foster care has consistently shown that children in care do not perform as well as other children in school.[15] Foster children repeat grades more often, score lower on standardized tests, and are absent or truant more often than other children.[16] However, research also shows that foster children have high educational aspirations, aspirations they rarely achieve.[17] Foster children want to succeed, but they aren't able to. They are at a disadvantage in virtually every category of educational success. Acknowledging that foster children suffer from these disadvantages does not necessarily mean that schools, agencies and legislators understand the sources of the disadvantage, however, or that they know how to overcome them. There are many factors that contribute to the problems foster children experience in school, and in order to create a comprehensive solution it is important to examine each factor.

### *Educational Experiences of Foster Children*

Primarily, foster children experience education differently from many other children. Foster children and foster parents have noted that schools do not understand the demands of simply being a part of the child welfare system.[18] Foster parents have complained that schools are not always willing to accommodate a foster child's required court appearances, court-ordered counseling or treatment and other attendant demands that the child welfare system places on a student in care.[19] One journal article on the subject detailed the experience of a foster child who was failing several classes because he missed tests to attend doctor's appointments.[20] Foster children often don't have the opportunity to make up missed work, but also have no control over when their appointments and hearings are scheduled.[21] Their school experience includes a conflict between the demands and requirements of the child welfare system and the school schedule.

Some of the disadvantages attendant with multiple child welfare-related absences could be mitigated by a strong adult advocate. Children in foster care often do not have access to a knowledgeable adult who can contact teachers and administrators and request make-up assignments, provide written excuses for absences and schedule appointments and hearings with the student's school obligations in mind.[22] One survey found that parents want to be involved in decision-making about their child's schooling, and want to be able to talk more effectively with agency staff about services for their children in school, but that these parents need help getting information and a chance to participate.[23] This indicates that in some cases, a birth parent may wish to step into a more active advocacy role and does not have the skills to do so effectively. Further, foster parents may wish to more actively step into this role but may lack the authority to make educational decisions for children, or may be unnecessarily excluded from special education plans.[24] Foster children experience school with more conflicts and less assistance and guidance than many other children.

Finally, primary and secondary education are part of the social and cultural development nearly all children experience in American society. Even when Child Welfare agencies appropriately enroll children and balance school needs against other demands, a significant dimension of the educational experience may be miss-

ing. For example, many foster children do not have the money to purchase a cap and gown in order to participate their high school graduation ceremonies.[25] Foster children may be excluded from other important ceremonial or customary celebrations because of their foster status, such as year-book signings, school dances and other events.[26] One particularly egregious example occurred in Florida when the Department of Children and Families Miami-Dade agency promised that all graduating high school seniors in foster care would be provided with caps and gowns for their graduation ceremonies, and then suddenly withdrew its offer.[27] Many foster children who had managed to overcome educational disadvantages and qualify for graduation were de-legitimized by this decision.

Children in foster care experience their education not only as a struggle through which they have no guidance and advocacy, but as a pale shadow of the experiences of kids all around them. In order to improve educational outcomes for these children, some attention must be paid to the social and cultural needs of children in school: participation in important ceremonies social experiences. Also, children must have a capable adult advocate with the responsibility and authority to make decisions and direct particular outcomes. And, schools need to recognize that foster children do not always have such strong advocacy or the means to participate in all aspects of school life and take steps to assist the foster child and her caseworker so that her educational experience is less fraught with conflict and exclusion.

### *Barriers to Success: Placement Changes, Enrollment and Documentation*

For many foster children, the all-too-common changes in placement become changes in school or school district, too.[28] In some states, foster children are twice as likely as other children to change schools during the school year,[29] and one study found nearly two thirds of children entering care for the first time must change schools.[30] Each school change requires adjusting to a new teacher and peer group, and may also require adjusting to a change in curriculum, standards and schedule. But the adjustments a child must make after enrollment are not the only problems with school transfer. There are often many difficulties in simply enrolling a child in a new school or school district, and placing the child in an appropriate class once she enrolls in the new school.

For example, in New York, a school requires proof of age, proof of immunization, health certification, proof of residency and prior school records before a new student can be admitted.[31] Though required by law to do so, many caseworkers in New York fail to collect and keep up the school records of the foster children on their caseload, and this failure can have a profound impact on the students.[32] Though New York State will allow students to attend school on a temporary basis if some of the required documents are missing, without the necessary records, it is likely that a foster child may end up in a class that is not appropriate to her level, or may not receive educational services to which she is entitled.[33] Most states have requirements similar to New York's, and though many have taken active steps to reduce the burden on foster children and caseworkers, these requirements still present many difficulties for foster children.[34]

One study of foster children asked the students themselves to discuss the difficulties they faced when changing schools because of placement changes.[35] Their stories are characteristic of the range of difficulties faced by foster children. One student complained that her transcripts were delayed by three months when she had to change schools, and the delay meant she had to go to summer school.[36] Another child said that because she attended a court-ordered visit with her mother, she missed enrollment day and did not attend school for one month.[37] Another child said that a new school attendance policy that required a student to be present the first two weeks of school and at least ninety percent of the remaining time resulted in her losing a semester of credits.[38] One foster child had to stay in school an extra year in order to graduate, because transferring placements over several counties lost all her ninth grade credits.[39] Though these are merely anecdotal incidents, they reflect the series of frustrations and barriers that foster children can face with every new placement.[40]

Success in school can also be greatly affected by educational quality factors that are harder to measure, and by learning capacities of the children themselves. Foster children who wish to participate in sports programs, music and art, drama and other extracurricular activities may be prevented from doing so by cost concerns or by placement shifts.[41] Also, foster children may be at a disadvantage even before entering care

and experiencing school transfers. Foster children have been shown to have lower academic performance, and some of that is attributable to what one study claims is lower average cognitive abilities.[42] It is important for caseworkers, advocates and legislators to address the range of educational disadvantages that can result from placement in foster care and to address the existing disadvantages that may be exacerbated by the foster system.

## State Law and Agency Regulations Improving Education For Foster Kids

Many states have begun to take steps to increase stability for foster children and improve educational outcomes. Two states in particular stand out, having recently adopted solutions to the problem. Oregon has responded to concerns about educational stability by providing a judicial procedure through which foster children may obtain an order to remain in the same school.[43] California has adopted for complex and comprehensive legislative schemes dealing with education of foster children and the child welfare system in general.[44] These approaches, though different and not without drawbacks, are positive progressive steps toward change. Other states have started to address the problem through agency regulations or by attempting to classify more foster children as "homeless" so that they may be entitled to protections offered by existing federal law.[45] These approaches, though they may be effective at addressing some of the educational challenges of some foster children, are not likely to be long-term solutions that address the full range of educational problems foster children face. State legislatures, by adopting an approach based on Oregon and California's legislation, can take a firm policy stand, tailor an approach to the needs of their state, and address the plight of foster children directly.

### *Oregon: A Doorway to School Stability*

Oregon's law providing for school stability for foster children was drafted by advocates at the Juvenile Rights Project, a Portland agency engaged in advocacy for a wide range of juvenile law issues.[46] Perhaps because of its origins, the law is simple, straightforward and effective. The main provision amended Oregon's public school residency requirement, creating an exception for some children in care.[47] If the juvenile court determines that it is in the child's best interest to attend the school she was enrolled in before placement in foster care, then the child "will be considered a resident for school purposes in the school district in which the child resided prior to placement; and may continue to attend the school the child attended prior to placement through the highest grade level of the school."[48] Significantly, this provision also places the obligation on the public agency that placed the child in care to provide transportation to the school if the need for transportation resulted from the child's placement in care.[49] These two provisions together ensure that a child may stay in the school she attended prior to entering the foster system if that is in her best interests, and that getting her to that school will not unduly burden her foster family, because the placement agency is required to provide transport. Oregon's Department of Human Services (DHS) has set aside funds to meet this requirement.[50]

Additionally, the bill amended the guides DHS uses to choose foster placements, requiring DHS to consider the placement's ability to meet the ward's need to continue in the same school.[51] This provision gives DHS more flexibility in assigning placements so that it may not exhaust its available funds for transporting foster children to schools that are a great distance from their foster placements. This legislation is tailored to address the issues of consistency and stability for foster children, and will hopefully reduce the number of school transfers and improve grades for the children who are able to take advantage of it.

The bill addresses one other issue related to school transfers: the enrollment barrier. In Oregon, school districts are already required to request records for a transferring student within ten days, and to respond to such requests within ten days of receiving them.[52] The 2005 bill reduces timelines to only five days each when the records are those of a child in substitute care.[53] This last provision is designed to reduce enrollment delays and ensure that the child will be placed in an appropriate educational environment.

Taken together, the measures adopted in 2005 in Oregon are simple and should effectively address several of the most pressing educational difficulties foster children experience in school, such as frequent transfers, instability and enrollment delays. However, the law falls short of an ideal solution because it fails to address several of the significant barriers discussed in Part One, and because it places an unfortunate

burden on the foster child or her caseworker. The most concerning drawback of the school residency provisions is that a child must obtain a hearing and a court order to remain in her school of origin.[54] One of the most important things that foster children lack is a knowledgeable adult advocate, someone to ensure that they are able receive all the benefits to which they are entitled.[55] In order to remain in her school of origin under this law, a child must have a caseworker or other advocate who is knowledgeable and willing to assist her in obtaining a hearing and convincing the court she should remain at her school. A caseworker may be reluctant to go through the extra court process and then have to make changes in placement choices or arrange additional transportation for the child.[56] Adding more judicial procedures may also increase the trauma associated with placement in care or delay educational decision-making.

There is significant evidence that multiple school transfers harm educational outcomes and set a student back significantly.[57] Research shows that educational stability is a good for foster children, and the Oregon Legislature recognized this when passing the law. Therefore, it seems illogical that a caseworker or foster child should have to prove to a court that it is in her best interests to remain in her familiar school. Given the evidence about the harm of school transfers for children in care, the burden should be on the agency to show that it would *not* be in a child's best interests to remain in her original school. A well-drafted law could shift the burden to the party wanting to transfer a child, and provide a list of circumstances where that might be appropriate.

Ideally, a legislative solution relating to school residency would presume that a child entering care remained a "resident" of the school district she lived in before entering care, and would allow her to be enrolled in a different school only if the court found it would be in her best interests. For example, a court might find that no appropriate placement could be found within a reasonable distance of her original school, that transportation would unduly burden her foster family or placement agency, that it would be unsafe for her to remain in a school where abusive parents or others could find her, or another school could better serve her special educational needs. These are the types of factors that would justify transferring a foster child to another school. States drafting their own legislative solutions to school stability should consider placing the burden on the agency seeking to a transfer a child to a new school, and giving the court examples of appropriate factors to consider before approving the transfer.

Also, the Oregon solution does not address the need for a knowledgeable adult advocate and the need to participate in the cultural and ceremonial aspects of school. Oregon schools may still choose not to allow foster children to make up class time or assignments missed due to court appearances or court-ordered appointments. Foster students who transfer schools may still lose significant numbers of credits or experience short enrollment delays. And, those foster students who graduate may not be guaranteed they can participate in graduation ceremonies or year-book signing. These issues are less significant than the overarching burden multiple transfers can put on a foster student's academic progress, but they are issues that other states should consider in drafting their own legislation.

### *California: A Comprehensive and Complex Legislative Scheme*

California's approach to the education crisis among foster children is both more complex and more comprehensive than Oregon's, and addresses a few of the significant issues that Oregon's law does not. California Assembly Bill 490 amended many provisions of the education code and the welfare code.[58] The text of the bill is long and intricate, not as simple or straightforward as Oregon's law, and therefore somewhat harder to implement. But, the essential provisions are relatively straightforward. The key sections include a mandate that all educational and placement decisions be made "in the best interests of the child."[59] Additionally, foster children have the right to remain in the school they were attending at the time they were placed in care, at least until the end of the school year, so long as remaining at that school is in the child's best interest.[60] And, like the Oregon bill, California's AB 490 added proximity to the school to the list of criteria the placing agency should consider when placing a child in care.[61] These provisions directly address the issue of educational stability, but they do so by granting a child the affirmative right to remain in the school of origin, a strong articulation of policy.

Throughout the new law, the legislature has clearly articulated its policies and created firm obligations and rights. A key provision of the law protects children from enrollment delays by mandating that a

new school *immediately* enroll a child, even if that child cannot produce the documentation, clothing or records normally required for enrollment.[62] By placing an affirmative obligation on the school to accept the child immediately, the statute also provides the school with an incentive to acquire the necessary documentation and assist the child in obtaining records, because the school cannot delay attendance and it is easier for the school to educate the child with complete documentation. The language of the statute also provides a clear mandate that the local education agency must transfer records within two business days if a foster child is transferring to a school in another county.[63] By combining clear mandates regarding enrollment and records, and by providing schools with incentives to acquire or assist student to acquire needed records, this legislation should thoroughly address enrollment delays and concomitant educational setbacks related to school transfers.

Additionally, the California law includes specific provisions to tackle some of the key problems transfer students face in their new schools, and some of the setbacks foster children without advocate's experience, as well.[64] One subsection of the law requires that a new school accept credits for full or *partial* coursework the student completed at her previous educational placement.[65] This provision should address the lost credits and credit transfer problems experienced by foster children with multiple school placements and allow those children to make better progress and complete school in a timely fashion. Just as significantly, the law also recognizes the burden the child welfare system places on a student, and prohibits schools from lowering a student's grade due to absences related to foster placement, court appearances or other court-ordered activities.[66]

Finally, the California law partially addresses the need for knowledgeable adult advocacy on behalf of foster children. The law requires that every local education agency have a foster care liaison.[67] The liaison must assist the child with obtaining proper placement; enrollment and check out from school, and has the affirmative duty to ensure that placement and enrollment are proper.[68] Also, the liaison must assist foster children with transferring records and grades to a new school and ensure that the child receives proper credit for prior coursework.[69] Importantly, the liaison is also responsible for contacting the child's prior school and obtaining records within two business days after a transfer, and is responsible for responding to requests from new schools within the same timeline.[70] The position of foster care liaison will play a key role in implementing the other provisions of the law and ensuring that the affirmative duties of the schools are met and the new rights and privileges granted to the foster child are not lost.

California's approach to educational stability and success for foster children seeks to address a wide range of educational issues for children in care. It addresses school preference, consistency, and enrollment barriers and delays. It seeks to minimize the impact foster care placement will have on a child's education, and it recognizes the burdens of being in the child welfare system. It protects children from loss of credits and grades due to foster care placement changes and court appearances. It provides an advocate with affirmative duties to ensure smoother transitions and appropriate placement. A state drafting its own legislative solution should consider adopting provisions similar to California's. However, of the 500,000 children in foster care, approximately 80,000 reside in California, or roughly 16% of the nation's foster youth.[71] The comprehensive solutions adopted by California are costly and complex, and may not be the best solution for other states. A smaller state with only a few thousand foster children may not have need for a foster liaison in every school district or be able to fund such a position, for example. While these solutions provide good models, they are not necessarily applicable to the foster system or educational system in every state.

### *Picking and Choosing: Adapting the Models of Oregon and California to Craft Appropriate State Solutions*

All states should adopt some form of solution to the foster child education crisis. Both the Oregon and the California laws provide good models for such legislation. Probably the most significant step a state can take to promote educational stability and improve educational outcomes for foster children would be to maintain original school placement. Because the trauma of transferring schools and attendant placement and credit issues can be mitigated by reducing transfers, a state can significantly affect education of foster children simply by keeping them in the same school.[72] States should allow school transfers only when the placement agency can show that it would be

in the child's best interests to move. Once a state has increased stability, other measures can be adopted to reduce the damaging impact of the few transfers that are still necessary.

Ensuring that children are able to remain in the same school will not protect them from all the effects that entering the child welfare system can have.[73] States should take steps to require that schools allow foster children to recover from classes and tests missed for court appearances and court-ordered activities, either by requiring the placement agency to notify the school of such events or by appointing an advocate or liaison to assist the child. California's model incorporates grade-protection and appointment of an advocate, but in some states that might not be necessary. However, states must enact some protection for foster children, even those who remain in existing school placement, because even if a child remains in a familiar school, entrance into the foster system will mean changes in home life and obligations that schools should accommodate.

Also, placement agencies and schools should strive for full participation in education for all foster students, and devote additional resources as necessary to achieve this. Foster children should not be excluded from valuable experiences because of lack of funds and support. At a minimum, foster children who complete all the requirements of graduation should be provided with funds to ensure they can participate in the graduation ceremony. Foster children undergoing the trauma of separation from their families and struggling to overcome the circumstances that led to placement, such as abuse and neglect, will likely still struggle to maintain academic progress. But, by adopting legislation that keeps children in a consistent school environment and provides them with needed assistance, states can reduce the number of foster children who never graduate from high school or acquire needed life skills.

## Conclusion

Foster children are systematically disadvantaged in school, and therefore disadvantaged in life after school. States must do more to ensure that becoming a foster child does not hinder a student's progress and development. By simply allowing students to remain in the same school after entering foster care, states could significantly affect educational outcomes for children in their child welfare systems. By taking additional measures to protect students who do transfer and to assist foster children with the burdens of out-of-home care, states could radically change the experience of a foster child in school from an endless series of barriers to a positive and supportive journey. Foster children want to succeed, and states should clear the obstacles that lie in their path. ◎

## Endnotes

1 "Most concerning, however, is the fact that children in foster care are physically abused at a much greater rate than children in the general population." Sharon Balmer, *From Poverty to Abuse and Back Again: The Failure of the Legal and Social Services Communities to Protect Foster Chiildren,* 32 Fordham Urb. L.J. 935, 937-938 (2005); "[f]oster children are sixty-seven times more likely to be arrested than children who did not grow up in foster care." *Id.* at 937; "In 1999, the Department of Health and Human Services reported that the rate of child maltreatment in foster care was more than seventy-five percent higher than in the general population, and the mortality rate amongst foster children resulting from maltreatment was almost 350 percent higher than among children in the general population." *Id.* at 938.

2 Judith Gerber and Sheryl Dicker, *Children Adrift: Addressing the Educational Needs of New York's Foster Children,* 69 Alb. L. Rev. 5, note 10 (2005).

3 U.S. Department Of Health And Human Services Administration for Children, Youth and Families, Program Instruction on the Adoption and Safe Families Act of 1997; ASFA, Public Law 105-89.

4 One foster child described in an article in therapeutic jurisprudence had been placed in 40 foster homes since entering the foster system, and did not receive any permanent placement before turning eighteen. Bernard Perlmutter, *George's Story: Voice and Transformation Through The Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic,* 17 St. Thomas L. Rev. 561, 564 (2005).

5 "A study of Wisconsin youth one year to eighteen months after exiting care conveys the dismal reality: of those surveyed, twelve percent had been homeless and thirty-two percent had received public assistance." *Supra,* note 2, at 64; Some children's advocates contend that forty percent of foster children end up on welfare or in prison. Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. Rev. L. & Soc. Change 1, 8 (1999).

6 Chaifetz, *supra* note 5.

7 Brandy Miller, *Falling Between the Cracks: Why Foster Chilidren are not Receiving Appropriate Special Educatiion Services,* 5 Whittier J. Child & Fam. Advoc.

566-7 (2006)(noting that foster children may be so preoccupied with seeking out safety that they are not able to participate in social or intellectual learning, and that foster children exhibit other symptoms of trauma that can interfere with learning, such as anti-social behavior, depression, self-harming behavior and suicidal thoughts).

8 *Id.*

9 *See* Permutter, *supra* note 4, at 564 (describing the experience of George C., a foster child who was enrolled in over 25 schools during his time in care.); "In California, where 100,000 children are in care, foster children attend an average of 9 schools before age 18." Miller, *supra* note 7, at 562.

10 "With each school move, children are academically set back an average of four to six months." Sarah Hudson-Plush, *Improving Educational Outcomes for Children in Foster Care: Reading the McKinney-Vento Act's "Awaiting Foster Care Placement Provision to Include Children in Interim Foster Care Placements,* 13 Cardozo J.L. & Gender 83, 104 (2006) (noting that many of the detriments children in foster care experience in terms of access to services would be avoided if children were kept in the same school after entering care).

11 *See supra,* note 2, at 23.

12 Hudson-Plush, *supra* note 10 at 106.

13 Miller, *supra* note 7 at 563 (noting that a majority of studies agree that foster children are negatively affected by school placement changes because of many factors, including adjustment trauma, enrollment delays, lack of credit transfer and delay in special education evaluation and services.)

14 *Id.*

15 "Numerous studies have confirmed that foster children do significantly worse in school than do children in the general population." Steve Christian, *Educating Children in Foster Care,* National Conference of State Legislatures Children's Policy Initiative 1 (Dec. 2003).

16 *Id.*

17 *Educating Children in Foster Care: The McKinney-Vento and No Child Left Behind Acts,* Casey Family Programs, *available at:* http://www.casey.org/Resources/Publications/McKinney-Vento_NCLB.htm; C. McMillan, *Educational Experiences and Aspirations for Older Youth in Foster Care,* 82 Child Welfare 475-95 (2001).

18 Miller, *supra* note 7 at 558 (noting that court visits, required counseling and other obligations affect attendance).

19 *Id.*

20 *Id.*

21 *Id.*

22 *See* Christian, *supra* note 15 at 2 (noting that knowledgeable adult advocates are often lacking because placement changes disrupt foster parent authority and so many caseworkers and service providers may be associated with a case that responsibility for outcomes is diluted).

23 *Educational Needs of Children in Foster Care: The Need for System Reform,* The Center Without Walls Final Report to the Child Welfare Fund, Nov. 6, 1998 at 2.

24 *Id.;* Though the IDEA allows foster parents to participate in the formation of an IEP, some foster parents report being excluded from the process. Miller, *supra* note 7 at 558.

25 Permutter, *supra* note 4 at 608 (describing George C., a foster child who managed to graduate despite struggling with school stability and disciplinary problems, and who would not have been able to participate in the ceremony or own a yearbook had counselors from his legal clinic not advocated for him).

26 *Id.*

27 *Id.* (noting that a Judge in George C.'s case ordered the child welfare agency to show cause why it should not be held in criminal contempt for refusing to help foster children participate in graduation after it had promised to do so).

28 Youth in foster care average 3-4 placements before leaving care, and youth stay in foster care an average of 31 months, nationally. The AFCARS Report, U.S. Department of Health, Administration for Children and Families, available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report10.htm.

29 Burley and Halpern, *Educational Attainment of Foster Youth: Achievement and Graduation Outcomes for Children in State Care,* Washington State Institute for Public Policy (2001) (finding that Washington state foster children changes school placements about twice as often as general population students).

30 Smithgall, et al, *Educational Experiences of Children in Out of Home Care,* Chapin Hall Center for Center for Children (2001) (finding that children entering foster care in Chicago must change schools about 66% of the time).

31 *See supra* note 2 at 18.

32 *Id.* at 22-23.

33 *Id.*

34 See, e.g., Ill. Dep't of Children & Family Servs., 314.30(a) (detailing the Illinois policy requiring caseworker intervention if a child is not enrolled in school within two days and additional procedures thereafter); Vt. Dep't for Children & Families, Social Services Policy Manual (2004), available at http://www.state.vt.us./srs/manual/casework/151.html (describing a Vermont policy designating social workers responsible to immediately enroll children in school following any change in placement and not permitting social workers to delegate responsibility to others); 22 Pa. Code 11.11(b)- (c)

(2005) (requiring schools to normally enroll children, including children living in facilities, institutions, or foster homes, the next business day after application, provided that the person enrolling the child supplies proof of age, residence, and immunization).

35 *See Generally,* Sue Burrell, *Getting Out of the Red Zone: Youth From Juvenile Justice and Child Welfare Systems Speak Out About the Obstacles to Completing Their Education, and What Could Help* (2003) available at www.youthlawcenter.com.

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 One study of foster children found that they attributed their poor grades and lack of school success almost exclusively to factors other than multiple placements and enrollment delays. Marni Finkelstein, Mark Wamsley & Doreen Miranda, *What Keeps Children in Foster Care From Succeeding in School? Views of Early Adolescents and the Adults in Their Lives,* Vera Institute of Justice (2002) (noting that foster children interviewed for the study reported that they are doing poorly in school because they are distracted or don't do their homework, but also noting that many of these children weren't aware of their current grades or significantly overestimated their scores).

41 "Multiple changes in school placements are also frustrating for children who want to participate in extracurricular school activities. For example, a child may want to play on a high school sports team but may end up missing either all or part of the season because of a new placement." *Supra* note 10 at 105.

42 Miller, *supra* note 7 at 565.

43 Oregon passed HB 3075-A in 2005, amending ORS 339.133, the state's school residency statute so that a child could be considered a resident of her original school district if a juvenile court finds it is in her best interests to remain in her pre-placement school.

44 California's AB 490 amended sections of the education code and other codes to create a right to remain in the school of origin, creates a position of Foster Care Liaison in every local education agency in the state, and mandates that records transfer and credit transfer for foster children, among other benefits. *AB 490 Overview,* Children's Law Center of Los Angeles, available at http://www.youthlaw.org/fileadmin/ncyl/youthlaw/events_trainings/ab490/AB490_Overview.pdf.

45 *See, e.g., supra* note 2 at 16-17, The Illinois child welfare system is one that has used regulations for the benefit of educational stability for foster children. The Illinois Department of Children and Family Services (DCFS) "provides funding for private agencies … to employ educational liaisons, whose mission includes … developing an educational infrastructure within the state to service children in foster care." *Id.*; In contrast, Connecticut has opted to pursue the protections offered by the Mckinney-Vento Act, federal legislation that can be used to provide educational access and consistency for homeless children. "In February of 2005, the Connecticut commissioners of the Department of Children and Families ("DCF") and the Department of Education … explained that all foster children in DCF custody who are placed in "emergency or transitional shelter placements" are entitled to, and will be afforded, the protections provided by McKinney-Vento." Hudson-Plush, *supra* note 11 at 93.

46 *Oregon Legislature Passes HB 3075-A; Bill Aimed at Promoting School Stability for Children in Foster Care,* 2 Juvenile Law Reader 1 (June, 2005).

47 *Id.*

48 Or. Rev. Stat. § 339.133 (2006).

49 *Id.*

50 *Supra* note 45 at 1.

51 *Id.*; Or. Rev. Stat. § 419B.192(2)(c) (2006).

52 Or. Rev. Stat. § 326.575 (2006).

53 *Id.*

54 *See supra* note 47 and accompanying text.

55 *See supra* notes 21-23 and accompanying text.

56 *See supra* notes 46-50 and accompanying text.

57 *See supra* Part I.

58 *See* supra note 43.

59 "In fulfilling their responsibilities to these pupils, educators, county placing agencies, care providers, advocates, and the juvenile courts shall work together to maintain stable school placements…. In all instances, educational and school placement decisions must be based on the best interests of the child." Cal. Educ. Code § 48850(a) (2006); Cal. Educ. Code § 48853(g) (2006).

60 Cal. Educ. Code § 48853.3(d)(1) (2006).

61 Cal. Welf. & Inst. Code § 16502.1 (2006) (promoting educational stability by requiring consideration of proximity to the school at the time of the first removal from family of origin or the time of a new placement).

62 Cal. Educ. Code § 48853.5(d)(4)(B) (2006).

63 Cal. Educ. Code § 49069.5(d)-(e) (2006); Cal. Educ. Code § 48853.5(d)(4)(C) (2006).

64 *See supra* notes 34-38 and accompanying text.

65 "Each public school district and county office of education shall accept for credit full or partial coursework satisfactorily completed by a pupil while attending a public school, juvenile court school, or nonpublic, nonsectarian school or agency. The coursework shall be transferred by means of the standard state transcript."

Cal. Educ. Code § 48645.5 (2006).

66 "The local educational agency shall ensure that if the pupil in foster care is absent from school due to a decision to change the placement of a pupil made by a court or placing agency, the grades and credits of the pupil will be calculated as of the date the pupil left school, and no lowering of grades will occur as a result of the absence of the pupil under these circumstances." Cal. Educ. Code § 49069.5(g) (2006); "The local educational agency shall ensure that if the pupil in foster care is absent from school due to a verified court appearance or related court ordered activity, no lowering of his or her grades will occur as a result of the absence of the pupil under these circumstances." Cal. Educ. Code § 49069.5(h) (2006).

67 Cal. Educ. Code § 48853.5(b)(1) (2006).

68 *Id.*

69 Cal. Educ. Code § 48853.5(b)(2) (2006).

70 Cal. Educ. Code § 48853.3(d)(4)(C) (2006).

71 *See* http://www.kidsdata.org/topictables.jsp?csid=0&t=2&i=6&ra=3_132.

72 *See supra* Part I.

73 *See* Part I for a discussion of the need for knowledgeable advocates and recognition of the burden court proceedings have on school attendance, also *see* Part I for a discussion of the importance full participation in school for social and cultural events of significance.

# Uncharted Waters:

## Does Michigan Rule of Evidence 404(b) Apply to a Child Protection Matter, or Doesn't It?

by Eric G. Scott, Assistant Prosecutor for Sanilac County

Recently I was called upon to respond to a Motion to Strike Pleadings, and Suppress evidence of a respondent father's illustrious criminal record in one of my child protection matters before the Sanilac County Court. The general premise of the respondent father's motion was that evidence of his criminal record, and his multiple arrests should be suppressed at the trial in the child protection case pursuant to MRE 404(b). As I was researching this particular issue, I came to an interesting revelation; that being none of the existing case-law actually addresses the issue of whether one's criminal record should be suppressed in the context of a child protection matter. Virtually all of the case-law on the subject of 404(b) evidence is discussed in the context of a criminal proceeding. So this got me thinking, does MRE 404(b) even apply in a child protection matter? The answer to that question left me in uncharted waters.

Now before I proceed further, I do want to acknowledge that some of the credit in this article goes to Frank Vandervort, with whom I consulted with regarding this very question. It was actually Mr. Vandervort's suggestion that I argue that MRE 404(b) does not apply in a child protection matter that got me started on my research path.

To give you a better framework as to why the MRE 404(b) issue was so pertinent in my recent case, you will need a few facts about the case. In this case the petition brought by the Department of Human Services (DHS) was one in which the respondent father was accused of a horrific domestic assault upon his girlfriend and her son. While this assault was allegedly occurring the respondent father's own children were hiding in a closet fearing for their own safety. This father was not accused of actually hurting his own children, instead the primary concern was the entire environment created by the respondent father's conduct and the impact it had on the children. As DHS investigated further, it was learned that the respondent father had multiple arrests for domestic violence, assault, stalking, and an assortment of other crimes. He also had six convictions over the past ten years. When we filed the petition, the primary basis upon which court jurisdiction was being sought was under the criminality aspect of MCL 712A.2(b)(ii) in conjunction with *In re MU,* 264 Mich. App. 270 (2004) (AKA as *In re Unger*); which defines criminality as "the state of being criminal."

In order for one to prove criminality in a child protection matter, an essential element of such a petition is defining exactly what criminality means. To do that, it is necessary to look at criminal convictions as well as criminal conduct. It is here that there is a conflict in the law as it relates to protective proceedings. Under MRE 404(b) the admissibility of other acts evidence is addressed. MRE 404(b) states that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." In other words, you can't bring in a person's prior bad acts and say that because they've been bad in the past it must mean they've committed this offense now. At the forefront of this analysis of MRE 404(b) is an application of *People v Vandervliet*, 444 Mich 52 (1993), which gives a four part test regarding the admissibility of MRE 404(b) evidence. *Vandervliet* makes a great analysis of when MRE 404(b) evidence is admissible, and gives a functional test with which to make that determination. What *Vandervliet* does not do is consider the MRE 404(b) issue in the context of a child protection matter.

In order to embark on our journey in regarding MRE 404(b) in the context of a child protection matter, it is necessary to consider *In the Matter of Dittrick Infant,* 80 Mich App 219 (1977) which says that how

a parent treats one child in his care is evidence of how he will treat another child in his care. This is known as the Doctrine of Anticipatory Neglect. Basically, what the *Dittrick* case says is that you can use a person's prior conduct in caring for a child in the past to show that they have acted in conformity with that conduct in caring for the current child. *Dittrick* actually allows a court to do exactly what MRE 404(b) says that you cannot do. Following *Dittrich*, and actually expanding the *Dittrich* Doctrine, is *In re Gazella*, 264 Mich App 668 (2005), which gives us the Doctrine of Anticipatory Abuse. Again, *Gazella* allows a court to use a person's prior abuse of a child, to show that they will abuse a child in the future. It would seem that both *Gazella* and *Dittrich* would fly in the face of *Vandervliet* for the reason that *Gazella* and *Dittrich* would allow a court to do exactly what *Vandervliet* and MRE 404(b) say you cannot do. Does that then mean that MRE 404(b) is not intended to apply to child protection proceedings? I believe that to be the case when one considers the additional statutes and case-law that follow the *Dittrick* decision and ultimately lead up to the *Gazella* decision.

A significant development after the *Dittrick* opinion is the development of the Binsfield legislation in 1998 and 1999. In part, the Binsfield legislation codifies the *Dittrick* opinion. For example, consider MCL 722.638(b)(i & ii). Both of those subsections direct the DHS to file a petition seeking termination of parental rights if a current investigation into a family is substantiated and there has been a prior termination of a subject parent's parental rights in the course of a child protection proceeding, regardless of whether the termination was voluntary or involuntary. The clear language of MCL 722.638(b)(i & ii) is such that one's prior bad act is by itself a reason to seek the Family Court's jurisdiction over a family. This is consistent with the *Gazella* Court's ruling which says that a child may come within the jurisdiction of the court solely on the basis of a parent's treatment of another child. *Id* at 680.

Look also at MCL 712A.19b(3)(l) & (m). Both of those subsections of the statute clearly state that the mere fact of a prior termination of parental rights, regardless of the voluntariness of such a termination, is grounds to terminate parental rights on a future child. Again, the mere fact of the prior bad act of having one's parental rights terminated in a child protection matter can be used to establish grounds to terminate on a future child. Likewise, MCL 712A.19b(3)(k) allows for termination of parental rights if a child or a sibling of the child has been abused as defined in one of the several subsections contained in MCL 712A.19b(3)(k). It should be noted that the rules of evidence only apply in those termination cases where termination is being sought at the initial disposition as enunciated in MCR 3.977(E), or where there are different circumstances alleged other than those which resulted in adjudication as enunciated in MCR 3.977(F); cases brought pursuant to MCR 3.977(G) would not be subject to the rules of evidence. In considering the plain language of MCL 712A.19b(3) subsections (k), (l), and (m), it seems apparent that as it relates to termination of parental rights, MRE 404(b) would have no bearing since all one would need to do to prove the statutory grounds supporting termination would be to introduce a certified copy of the prior termination order; or in the case of MCL 712A.19b(3)(k) prove that the parent abused a sibling of the child in question. Were MRE 404(b) to apply here, there would be no way to prove the prior termination of parental rights or the abuse of the sibling since the evidence of either circumstance would be suppressed by operation of MRE 404(b); and such an application seems inconsistent with the intent of the legislation which enacted the above statutes.

Additional support for the argument that MRE 404(b) does not apply to child protection proceedings can be found in MCL 722.638(a) and its various subparts. MCL 722.638(a) states that the DHS shall submit a petition to the family court if upon investigation, the DHS determines that a parent, guardian, or custodian, or a person who is 18 years of age or older residing in the home has abused the child, or a sibling of the child and the abuse included one of the types of abuse enumerated in Subsections i through vi. The operative language impacting upon MRE 404(b) evidence is that which allows for the abuse to have occurred to the child in question, or to a sibling of the child in question. As stated, it's possible, under MCL 722.638(a) to seek court jurisdiction over a child that has not been abused by a parent, if a sibling of that child has been abused by a parent. The impact of the wording of MCL 722.638(a) is that of a codification of the *Dittrich* Doctrine of Anticipatory Neglect. Under that line of reasoning, DHS can use a parent's prior abuse of an older, or simply a different sibling than the one in question to prove abuse of the child in

question. Such a course of action is permissible under MCL 722.638, but would not be allowable under MRE 404(b). So which is correct, the statute or MRE 404(b)? An application of logic would dictate that the legislature in enacting MCL 722.638 would not have done so if the very evidence which would prove the offense would be excluded by the rules of evidence.

A fair assessment of the current statutes seems to suggest a strong conflict between MRE 404(b) and the existing Child Protection Law. What I would suggest however, is that there really is no conflict, but an actual abrogation of MRE 404(b) as it might relate to a child protection proceeding. MRE 404(b) just doesn't apply in child protection matters since what the court is actually called upon to address in such matters, is the actual conduct of the parents. For example, in my case involving the criminality of the respondent father, the issue of criminality is one that encompasses a parent's behavior, environment, and character. All are necessarily intertwined, and it isn't possible to look at criminality just in the context of actual convictions; one must also look at a parent's conduct to define criminality. Consider the definition of criminality provided to us by the *Unger* Court. *Unger* defined criminality as the "state of being criminal."

A "state of being" necessarily includes elements of conduct as well as character. The "state of one's being" is something tied to the whole person, not just certain events. In the context of an abusive parent we are talking about the totality of the circumstances as it relates to that parent; we have to look at the whole package, not just a triggering event which sparks the filing of the petition. The question asked by MCL 712A.2(b)(ii) is what is it about the home or environment provided by the parent that makes it unfit for the child to reside in? It is the criminality, drunkenness, depravity, cruelty, or neglect occurring in the home that makes the home unfit for the children.

Significant in this analysis is that there is no need for culpability on the part of the parent for the home to be unfit; all that is required is proof of neglect, or cruelty, or in my case, criminality occurring in the home. For example, a parent can act cruelly without actually doing something cruel to the child. A parent could behave in a depraved manner, such as having child pornography in the home, which would render the home unfit, without having done anything to the child in question. This is because we are considering the whole environment under MCL 712A.2(b)(ii), not just one single event. In order to meet one's statutory burden of proving the unfitness of the home, it actually is necessary and permissible under MCL 712A.2(b)(ii) to consider the entire home environment. With regard to criminality, that would necessarily include considering evidence which would otherwise be inadmissible under MRE 404(b).

Additionally, consider the other basis upon which jurisdiction can be taken under MCL 712A.2(b)(ii). Drunkenness for example is not defined in the statute. So what is drunkenness? Is it one act of being drunk, or is it more? The answer to that question lies in the language employed in MCL 712A.2(b)(ii) which ties the drunkenness, just as it ties criminality, to the home or environment in which the children are residing. The same analysis holds true for neglect, depravity, or cruelty. Because the legislature tied drunkenness, neglect, criminality, depravity, and cruelty to the environment in the home, not to the parent, the statute tells us to look at the totality of the circumstances giving rise to the court's jurisdiction. In the context of drunkenness, much like criminality, it is the drunken conduct occurring in the home that makes the residence unfit for the children, not just the drunken conduct of a parent on one occasion.

Using the same line of reasoning employed by the *Unger* Court it might be said that drunkenness is the state of being drunk. Again, if it is a state of being then necessarily included in one's state of being are conduct, capacity, knowledge, skill level, and one's own individual character makeup. You cannot isolate portions of the person to just the triggering act of being drunk because the problem is the environment that is created, not just the act of being drunk; it is a much larger problem. In order to prove drunkenness the petitioner would need to introduce acts of drunken conduct occurring in the home. This evidence would necessarily include current drunken conduct as well as prior drunken conduct. But if MRE 404(b) were to apply then such acts would be inadmissible, and no petitioner would be able to prove drunkenness because the very evidence needed to prove it would be suppressed. The end result would be a statute with very little meaning since no one would be able to enforce it.

What I would suggest, is that the legislature actually intended for prior acts evidence, MRE 404(b) evidence, to be considered in a child protection proceeding. Unlike a criminal proceeding where there is a risk

of a wrongful conviction solely on the basis of prior bad acts, child protection proceedings have no such risk. The end result of a child protection matter is not a conviction, but instead is the protection of an at-risk child. No one is going to go to jail at the conclusion of child protection proceedings since by their very nature, child protection proceedings are civil proceedings and the parties are little more than civil litigants in such proceedings pursuant to *In re Adair,* 191 Mich App 710 (1991). That being the case, the end result of a court taking jurisdiction is one of a rehabilitative effort to resolve the problems arising in the home which place the children at risk.

In a typical protective proceeding, what follows the adjudication hearing is a disposition hearing in which the court adopts a plan to address the problems in the home. Under *In re CR,* 250 Mich App 185 (2002) the Family Court can address any issue touching upon the welfare of a child. As such, what typically happens with a disposition order is that the parents are sent to various forms of counseling and parenting programs to address deficits in their parenting abilities. At the base levels what counselors and parenting coaches are actually addressing are behavioral and character issues which impact negatively upon a parent's ability to provide care to their child. The moment a court enters its dispositional orders, the court is embarking upon a path designed to address character deficits in parents. Certainly after the court has jurisdiction, MRE 404(b) evidence is not excluded for the reason that the parent's character and conduct are the problems which typically impact upon their ability to parent. Why else would we be sending parents to counseling if not to effect changes in their personalities and conduct? So it would therefore stand to reason that in order to address parenting deficits, which are tied to the whole person, not just an isolated section of the person, the court needs to have the full picture pertaining to a parent's conduct and character. In fact, In *re Laflure,* 48 Mich App 377 (1973) tells the courts that evidence introduced at one hearing is evidence for all hearings and that child protection matters are to be considered one continuous proceeding.

Here again there is evidence that the current child protection laws, intend for the courts to consider what would normally be inadmissible MRE 404(b) evidence. Why else would the courts be directed to employ the social sciences to such a rehabilitative level if not to effect change in a parent's conduct that creates an unsafe environment in which the children reside? It doesn't seem to make much sense to restrict a petitioner from presenting prior acts evidence at the trial only to then allow such issues to be considered post adjudication. A more plausible explanation, and a more applicable course to chart, is to consider the other acts evidence in the course of the trial as allowed by *Dittrich, Gazella*, and the statutes which make up the Binsfield Legislation.

In concluding I would point out that much of what I've suggested in this article is virtually uncharted water. As I noted at the beginning, all of the case-law that even considers the issue of MRE 404(b) does so only in the context of a criminal proceeding. In those criminal matters, because of the stakes involved, and the potential for a significant loss of liberty based on one's prior conduct, it makes sense to disallow MRE 404(b) evidence unless it meets the *Vandervliet* test for admissibility. However, in the context of a child protection matter, where the primary issue is a parent's conduct and the impact it has on their ability to parent, little is gained by disallowing the very evidence that would prove the unfitness of the environment. For that reason, it would seem that MRE 404(b) is not intended to apply to child protection matters. That is the appearance given from the current statutes and the current case-law pertaining to such matters. In the future what would prove to be helpful to those of us practicing in this area of the law, would be to have the Appellate Courts or the legislature provide some guidance on this issue in the form of a definitive opinion regarding the admissibility of MRE 404(b) evidence in a child protection proceeding. Until such time as that happens however, we as practitioners will need to continue to chart these uncharted waters. ◎

*For any questions, comments, or criticisms I am available at* escott@sanilaccounty.net.

# *The Michigan Child Welfare Law Journal*
## Call for Papers

The editorial board of *The Michigan Child Welfare Journal* invites manuscripts for an issue regarding current issues/developments in child welfare practice. *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. All submissions must include a discussion of practice implications for legal practitioners.

The main text of the manuscripts must not exceed 20 double-spaced pages (approximately 5000 words). The deadline for submission is October 15, 2008. Manuscripts should be submitted electronically to to *kozakiew@msu.edu*. Inquiries should be directed to:

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# Upcoming Training and Conferences

## SCAO Family Services Child Welfare Services Training Schedule 2007-2009—as of 10/10/07

| 2008 TRAININGS | | | | |
|---|---|---|---|---|
| **Training Date** | **Title** (Bold font indicates that Child Welfare Services [CWS] is the administrator of the training) | **Location** | **Sponsor/contact** | **Eligible Participants** |
| ***Thursday Luncheon Webcast Series:*** | | | | |
| **January 24** | **Children Missing From Care: AWOLP Update** | Webcast only, no on-site audience<br><br>Registration: MJI webcast website at: *http://webcast.you-niversity.com/youtools/companies/default.asp?affiliateId=43* | Sponsor: SCAO Family Services Division—CWS professionals<br>For questions contact: Joy Thelen 517-373-5322<br><br>Identified cosponsors: DHS | Judges; referees and other court staff; attorneys; children's protective services, DHS, and private agency foster care and adoptions workers; tribes; CASAs; legislators and policy-makers; and related child welfare |
| **February 21** | **CFSR Issues for Courts** | | | |
| **March 27** | **Youth Self-Injurious Behaviors** | | | |
| **April 24** | **Reducing Trauma to Children During Removal and Placement** | | | |
| **May 29** | **Working with Lesbian, Gay, Bisexual, Transgender, Questioning Youth** | | | |
| **June 19** | **Title IV-E update** | | | |
| | | | | |
| **TBA** | Effective Petition Drafting | TBA | Sponsor: DHS- Office of Training & Staff Development - Child Welfare Institute<br>Contact: Dawn Brown 517-335-6216<br><br>*Identified co-sponsors: SCAO Family Services Division—CWS; University of Michigan Child Advocacy Law Clinic* | DHS and tribal children's protective services workers; DHS, private agency, and tribal foster care and adoptions workers |

| Training Date | Title (Bold font indicates that Child Welfare Services [CWS] is the administrator of the training) | Location | Sponsor/contact | Eligible Participants |
|---|---|---|---|---|
| **February 12-13** | Michigan Association of Drug Court Professionals: 8th Annual Conference Continuing to Change the Face of Michigan Justice | Lansing Center Lansing | Sponsor: Michigan Association of Drug Court Professionals; SCAO; Michigan Judicial Institute<br>Contact: Cathy Weitzel, MJI<br>517-373-7510<br>*Identified co-sponsors: SCAO- Family Services Division—CWS* | |
| ***Yellow Book Regional Trainings:*** | | | | |
| Guidelines for Achieving Permanency in Child Protective Proceedings: Regional Trainings on the "Yellow Book" | | | Sponsor: SCAO Family Services—CWS<br>Contact: Rose Homa, Michigan Federation for Children and Families<br>517-485-8552<br><br>*Identified co-sponsors: Michigan Federation for Children and Families, Children's Charter of the Courts, MSU School of Social Work, and Chance at Childhood Program* | DHS and private agency workers |
| *Date* | *Location* | | | |
| ***March 13*** | Bethany Christian Services-Grand Rapids | | | |
| ***April 17*** | Lansing—Hall of Justice | | | |
| ***May 2*** | University Center-Gaylord | | | |
| ***May 27*** | Schoolcraft VisTaTech Center—Livonia | | | |
| | | | | |
| **April 9-10** | **Addressing Domestic Violence Issues in Child Welfare Conference** | **Kellogg Center East Lansing** | **Sponsor: SCAO Family Services Division—CWS<br>Contact: Deborah Jensen, Children's Charter of the Courts<br>517-482-7533**<br><br>*Identified co-sponsors: DHS, GTF, OCO, Children's Charter of the Courts; Prosecuting Attorneys Association of Michigan* | **Judges and referees; attorneys; children's protective services, DHS, and private agency foster care and adoptions workers; tribes; CASAs; legislators and policy makers; DV treatment providers; and related child welfare professionals** |

| Training Date | Title (Bold font indicates that Child Welfare Services [CWS] is the administrator of the training) | Location | Sponsor/contact | Eligible Participants |
|---|---|---|---|---|
| May 14 | **Protective Proceedings** | Lansing | Division—CWS Contact: Joy Thelen517-373-5322Identified co-sponsors: University of Michigan (U of M) Child Advocacy Law Clinic | |
| ***Summer Series on Enhancing Parental Involvement in Child Protective Proceedings:*** | | | | |
| **June 3** | **Legal Issues Regarding Fathers' Involvement** | **Holiday Inn-South Lansing** | **Sponsor: SCAO Family Services Division—CWS Contact: Joy Thelen 517-373-5322**<br>*Identified co-sponsors: DHS, GTF* | Judges; referees and other court staff; attorneys; children's protective services, DHS, and private agency foster care and adoptions workers; tribes; CASAs; legislators and policy makers; and related child welfare professionals |
| **July 15** | **Dealing with Absent Parents: Implementing the Absent Parent Protocol and What to do About Incarcerated Parents** | | | |
| **August 12** | **Engaging Fathers: Resources and Programs for Full Engagement** | | | |
| | | | | |
| Sept. 10 | **Post-Termination Proceedings: Post-Termination Reviews and Adoption Proceedings (Specialized Legal Training)** | **Hall of Justice Lansing** | **Sponsor: SCAO Family Services—CWS Contact: Joy Thelen 517-373-5322**<br>*Identified co-sponsors: DHS, GTF,OCO* | Judges, referees, and other court staff; attorneys |
| October TBA | Indian Child Welfare Act (ICWA) Training | TBA | Sponsor: SCAO Family Services Division—CWS Contact: Jennifer Doer at Prosecuting Attorneys Association of Michigan (PAAM) 517-334-6060<br>*Identified cosponsors: Tribal/State Partnership; Prosecuting Attorneys Association of Michigan* | TBA |

| **Training Date** | **Title** (Bold font indicates that Child Welfare Services [CWS] is the administrator of the training) | **Location** | **Sponsor/contact** | **Eligible Participants** |
|---|---|---|---|---|
| **Oct. 20-21** | U of M Medical School Child Abuse and Neglect Conference | TBA | Sponsor: University of Michigan Medical School<br>Contact: Registrar<br>800-800-0666 or<br>734-763-1400<br><br>*Identified co-sponsors: SCAO Family Services Division—CWS* | Doctors and other medical personnel; law enforcement; judges; attorneys; children's protective services, DHS, tribal, and private agency foster care and adoptions workers; CASAs; and related child welfare professionals |
| **Nov. 6 & 7** | Foster Care Review Board Annual Training | Four Points by Sheraton<br>Ann Arbor | Sponsor: SCAO Family Services—FCRB<br>Contact: Kathy Falconello<br>313-972-3288 | TBA |
| **Handling the Child Welfare Case: "Applying the Law to Practice"** | | | | |
| **TBA 2008** | 2 trainings annually for L-GALs and parents' attorneys | TBA | Sponsor: SCAO Family Services—CWS<br>Contact: Deborah Jensen, Children's Charter of the Courts<br>517-482-7533<br><br>*Identified co-sponsors: DHS, GTF, Children's Charter of the Courts of Michigan* | Judges, referees and attorneys |
| **TBA 2008** | 1 training annually for prosecutors and assistant attorneys general | | | |
| | | TBA | Sponsor: SCAO- Family Services- CWS<br>Contact: Jennifer Doer at Prosecuting Attorneys Association of Michigan (PAAM)<br>517-334-6060<br><br>*Identified co-sponsors: DHS, GTF, PAAM* | Prosecutors and assistant attorneys general |

# National Association of Counsel for Children

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