Volume XII, Issue II Winter 2009

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

The Michigan Child Welfare Law Journal

Table of Contents

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—Winter 2009

This issue of the *Michigan Child Welfare Law Journal* focuses on juvenile justice issues. In "Sex Offender Registration is Not the Answer for Juvenile Sex Offenders With or Without Disabilities" (D'Orio, Rogers, R. Kernsmith & P. Kernsmith) the authors describe how Michigan's sex offender registry applies to juveniles. Focusing on children with disabilities, the authors consider the sexual development of children and examine how rehabilitation, treatment and the removal of these children from the registry provides the best result for society, the family and the child.

In "Michigan Juvenile Delinquency Cases and the Indian Child Welfare Act" (Fraser, Myers & Allen) the authors discuss how ICWA and related court rules are triggered in juvenile justice cases. The authors describe the special procedures that courts must follow and consider how ICWA encourages strong advocacy for Indian families and tribes in juvenile delinquency cases.

In "A Miscarriage of Juvenile Justice: A Modern-Day Parable of the Unintended Results of Bad Lawmaking" (Vorenberg) the author writes that throughout American history public opinion and the actions of our lawmakers have been swayed by tragic or sensational stories. The author applies this premise to demonstrate the counter-productive and perhaps damaging nature of this approach to governance in the field of juvenile justice.

Finally, this issue includes a number of pieces not specifically related to the area of juvenile justice. Judge Jon A. Van Allsburg of the 20th Circuit Court thoughtfully considers a topic that all practitioners in the family division have had to address in the aptly titled "Fathers' Perception of Bias in Michigan's Family Courts." Also, reprinted from a recent issue of the Family Law Journal are two articles by Kent L. Weichmann and Carlo J. Martina, co-chairs of the Family Support Committee. These authors summarize recent changes to Michigan's child support formula.

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

I would like to thank everyone that has answered my call and gotten involved in the Children's Law Section. Numerous members have volunteered in ways that fit into their own schedules and interests and I greatly appreciate the time you are spending out there on behalf of the Children's Law Section. We have had several members participate in other section meetings to discuss children's topics; we have several members now serving on workgroups with other sections and coming up in March our education committee will be participating in the "Law School for Legislator's". Additionally, our amicus committee has been very busy answering the request to participate in several important issues currently in front of the Supreme Court. I am proud to be a part of such a dedicated section. Thank you all for your hard work and commitment to the children and families of Michigan. We are making a difference.

Several people have been asking questions about subsidized guardianships. Just to give an update of what I know. DHS is working on the policy to implement the subsidized guardianship program that was authorized by the federal Foster Connections Act of 2008. At this time, the plan appears to have a policy similar to that of an adoption subsidy, which will mean that no subsidy will be allowed if the guardianship is in place prior to the approval of the subsidy. DHS is working with the federal authorities that monitor our Title IV-E funds to make sure the policy will be in compliance with the federal regulations. Once these details are approved, DHS will roll out the subsidized guardianships program. Currently, we are not sure when that will be. I do know that DHS is working very hard at accomplishing this. They would like this program available as much as we would.

Another update, forms for juvenile guardianships are in the works at SCAO and should be available no later than September 2009. The committee is working extra hard to try and get them out as quickly as possible. Details, details… but everything is coming together to get the 2008 legislative changes fully implemented.

The education committee has recently sent out the agenda and registration for our annual training to be held on May 8, 2009 in Frankenmuth. The agenda is fantastic and the location is perfect to bring your family for some pre-summer fun at the water park – Splash Village. I am looking forward to meeting several of our members at the annual training. Please contact the State Bar of Michigan to register. If you have any questions about the annual training, please feel free to contact me at *pettibonej@courts.mi.gov.*

If you have any comments or suggestions for our section, please feel free to share your ideas with me. I look forward to continuing to serve our section.

Sincerely

Jenifer Pettibone

Sex Offender Registration is Not the Answer for Juvenile Sex Offenders with or without Disabilities

by Lynn B. D'Orio, Juvenile and Adult Criminal Defense Attorney, Ann Arbor, Criminal Defense Attorneys of Michigan Board Member, Washtenaw County; Susan Rogers, LMSW, School Social Worker, Birmingham Public Schools, Developed and Implemented Health and Sexual Education Curriculum for Students with Special Needs, Oakland County; Dr. Roger Kernsmith Ph.D., Researcher and Professor of Criminology, Eastern Michigan University; andDr. Poco Kernsmith, MSW, Ph.D., Researcher and Associate Professor of Family and Sexual Violence, Wayne State University School of Social Work; Wayne County

Introduction

The treatment of minors by the criminal and juvenile justice systems has come full circle. Once children were treated just like adults and they received the same procedural due process and punishment of adults. Due process was later abandoned in order to provide children treatment and rehabilitation. Slowly, juvenile offenders have gained back the protections of due process, but they are once again treated more like adults with automatic waivers to adult court and mandatory registration as sex offenders.

With a focus on children with disabilities, this article looks at how Michigan's Sex Offender Registry applies to juveniles, the sexual development of children and how rehabilitation, treatment and their removal from SOR provides the best result for society, the family and the child.

Children with Disabilities

Everyone has heard the term *mental illness*, but few know what it actually means. *Mental illness* refers collectively to all diagnosable mental disorders. Mental disorders are health conditions that are characterized by alterations in thinking, mood, or behavior (or some combination thereof) associated with distress and/or impaired functioning.[1] *Serious mental illness,* as defined by federal regulations, generally applies to mental disorders that interfere with some area of social functioning.[2] A person with a developmental disability, on the other hand, has a severe, chronic condition that manifested before he or she was 22 years of age and will likely continue indefinitely. The severe, chronic condition is attributable to a mental or physical impairment or a combination of mental and physical impairments that result in substantial functional limitations in at least three major life activities, such as self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living and/or economic self-sufficiency.[3]

These children are subject to the criminal law in the same way as children without developmental disabilities. Both groups of children are subjected to treatment under the Michigan Sex Offender Registry that should be reserved for adults that are truly predatory.

Juveniles and Michigan's SOR

Despite Michigan residents significantly lower approval of juveniles being on SOR when compared to the approval rates for adults[4] there are as many as 2,793 juveniles on Michigan's Sex Offender Registry.[5] Juvenile offenders not tried as adults must register.[6] While the child is still under 18 years of age, juvenile registration and included materials and information, are exempt from disclosure under the Freedom of Information Act.[7] In other words, they are exempt from the *public notification* requirements.[8]

However, *public* registration is required when the child becomes 18 and his or her adjudication was for First or Second Degree Criminal Sexual Conduct

and for all juvenile offenders convicted as adults under "automatic" or "traditional" waivers or by "case designation" methods.[9] To subject juveniles to the stigma of being on the Sex Offender Registry ignores the science of child development, increases the likelihood of recidivism and ignores the high success rate of treatment.

Sexual Development of Juveniles with Disabilities

Beyond developmental considerations, the mental health of juvenile offenders is often not considered when they are placed on the SOR. The decision-making abilities of many adolescents are very similar to those of adult offenders found lacking competence to stand trial.[10] This is due to the fact that the process of brain development is not yet complete for adolescents.[11] It should not be surprising that researchers estimate that 20 percent of youths in the juvenile justice system have serious mental health disorders, while 70 percent to 90 percent meet official criteria for at least one psychiatric diagnosis.[12]

A case in point is the Sexuality Clinic at York Central Hospital in Richmond Hill, Ontario, Canada. It has seen a spiraling increase of referrals for teenagers who have made what it refers to as "sexual mistakes."[13] "Many of these teens live in homes with their families, attend local schools and participate in community events. In 1981, the first year of service delivery, the Sexuality Clinic had a referral of only one teenager. Almost twenty years later, a full 25 percent of all clinic referrals are for teenagers with developmental disabilities."[14] To understand the reasons for this it is important to consider the social-sexual development of children with disabilities.

Children with any disability have a lifelong sexual development process similar to that of children without disabilities. They have a need to recognize the similarities in their sexual awareness and feelings. They have to recognize their bodily sensations, feelings and urges over their lifetime as "normal." They must understand the sexual functions and relationships of people and they must understand reasonable, appropriate and healthy sexual experimentation as they grow to become adults.

They must also deal with the emotional impact their disability has on their ability to function at an adult level of sexuality and recognize the obligation, responsibility and societal norms involved in sexual relationships. Children with disabilities need to receive assistance in forming relationships with their peers, and be encouraged to perceive of themselves as sexual beings throughout their lives. It is also the responsibility of parents/caregivers to provide or identify resources that may provide this lifelong information to people with disabilities.[15]

One of the inherent problems that occur with people with disabilities is that their parents unwittingly neglect to focus on the above identified necessary information. A parent may state that their child will never engage in sexual intercourse, therefore does not need to know about sex. Another parent may view their adolescent child as being at the developmental level of a six year old or younger child and therefore does not recognize the need to teach the child about sexual information. However, all children, regardless of their developmental level, need to learn about appropriate behaviors, risk factors, public/private places and boundaries. All children are sexual beings and all children communicate. It is the responsibility of parents, caregivers and educators to identify how the child communicates, and teach him or her in the manner at which he or she may understand even the most basic of these necessary concepts.

Children With Learning Disabilities

Children with learning disabilities often display impulsive behavior and poor judgment. Indeed, conduct disorder is one of the most common disorders found in all children entering the juvenile justice system.[16] Social relationships for children with other disabilities are often impaired or non-existent. A youngster who has minimal opportunities to engage in reciprocal social relationships may demonstrate inappropriate behavior in wanting to express feelings toward another person. Expressing feelings of liking someone or finding a person attractive may be interpreted as grabbing, groping and being sexually exploitative. People with disabilities may be perceived as being dangerous, especially if they have difficulty with communication. Unfortunately, it is too often that a young person with a disability may be apprehended by a police officer for looking suspicious. A person who has severe sensory needs may disrobe and run out of their home, even gaining entry into another home. People who are on the autism spectrum may be dressed inappropriately for the weather conditions,

wearing minimal clothing in cold weather, or bundled up in multiple layers in warm conditions.

Children with Silent Disabilities

Another segment of the population that is at an extremely high risk of being charged with an offense is persons with "silent disabilities"- the disabilities that are not immediately or easily recognized. A person with this type disability may have a mild to moderate cognitive impairment, may be on the autism spectrum, may be learning disabled or may have incurred a traumatic brain injury. Again, proper judgment and behavior will often be impeded due to the disability but because the disability is not as observable, the consequences may be greater and harsher. There is a tremendous segment of the population that is considered weird, strange or identified with other derogatory terms when a disability is present. Often teenagers and young adults are undiagnosed with impairment such as a learning disability. Self-esteem, relationships, education and employment may suffer at the hands of an undiagnosed disability and a person may be in peril of being part of the criminal justice system due to an untreated disability.

Juveniles with Disabilities and Michigan's SOR

So how does the Michigan Sex Offender Registry fit into this paradigm? The registry is designed to make the public aware of any sex offenders that live in its neighborhoods thereby allowing the public to take appropriate precautions and to deter others from committing a sexual assault.[17] Singling out juvenile sex offenders to register as sexual offenders does not protect the public from potential sexual predators. Rather, it stigmatizes and marginalizes them from society.

This process of stigmatization and marginalization is contrary to the factors that studies have found to actually prevent any type of re-offending.[18] Many factors are predictive of future criminal activity and re-offending by juveniles: The age at first adjudication; a prior criminal record (a combined measure of the number and severity of priors); the number of prior commitments to juvenile facilities; drug/chemical abuse; alcohol abuse; family relationships (parental control); school problems, and peer relationships.[19] Placing a person on the sex offender registry negatively strains three of these elements: family relationships, school and peer relationships. The stress arises because "placing youth on … public registries creates both direct stigmatization and can set in motion a series of cascading policy effects resulting in social exclusion and marginalization. … For example, in jurisdictions where broad sex offender registration and strict residency restriction policies exist and are linked, there are reports of growing numbers of individuals pressed into lives of homelessness and segregation into sex offender "colonies," including those labeled as sex offenders on the basis of behavior committed earlier as young teens."[20]

The claim that the public is protected when juvenile offenders are required to register is contradicted by several studies. Research indicates that less than half of Michigan residents surveyed indicated they had utilized the registry.[21] Only about one-quarter of residents were aware of an offender living in their community, despite the fact that registered offenders reside in all but 0.5 percent of Michigan zip codes. This indicates that the Michigan Sex Offender Registry is not effective in its goal of increasing awareness of offenders. Therefore, the costs to the community, registrants and their families may not be worth the minimal benefit.

Failures of the SOR as a Public Policy

An increase in usage of SOR by the public would have both positive and negative consequences. There is potential for registry users to become more informed about offenders in their community and, therefore, take appropriate steps to protect themselves and their families. This may be driven, at least in part, by an increase in the level of fear among the public.[22] Conversely, researchers suggest that the registry also provides a false sense of security, because it can't include information on unidentified perpetrators and those who have not yet been convicted which may, in fact, represent the majority of predatory sexual offenders.[23]

Indeed, research indicates that approximately 90 percent of abuse perpetrators are known to the victim.[24] A study of urban college students[25] noted that of those experiencing abuse, 89.4 percent were abused by a known perpetrator. In 2000, the Bureau of Justice Statistics determined that 34 percent of child sexual abuse cases in police reports were perpetrated by a family member, and 59 percent of the cases were by an acquaintance[26] although some evidence suggests

that police reports may under-represent intra-familial crimes. Therefore, it is likely that offenders on the registry were most likely not strangers to the victims, but in most cases someone the victim and family knew and trusted.

Research indicates that registration and community notification do not result in a significant decrease in sexual offenses.[27] Quasi-experimental research[28] examined the impact of community notification on recidivism. This study compared 155 level-three offenders, those considered the highest risk to the community, with 155 level-one and level-two offenders, who were not subject to notification because they were in lower-risk categories. A third control group included 125 retrospectively assigned level-three offenders who were released before the community notification laws were in place. Results showed that, when controlling for mediating factors (e.g. prior criminal history and risk assessment) offenders subject to community notification significantly re-offended more quickly.

Recently a multi-state examination of first-time offenders and recidivism rates was conducted.[29] This research resulted in a more complicated picture of the impact of community notification. The study found that in communities with a small number of registered offenders, such as those that include only the highest-risk offenders, notification was effective in reducing recidivism. Registries that included a larger number of offenders (like Michigan's registry) actually resulted in increases in recidivism. Despite widespread support for the policies, only 10 percent of individuals surveyed thought that community notification or registration was effective in decreasing sexual abuse.[30]

The public scrutiny, shaming and ostracism of those on the sex offender list are seen as a means of encouraging convicted offenders to avoid recidivism.[31] The hope is that the threat of public awareness of the offender's crime will also serve to deter those who have not yet committed a sexual crime. Unfortunately, ostracizing these offenders may have the impact of decreasing social support, which has been identified as a risk factor for recidivism.[32] Concerns have also been raised that the registry may have other important unintended consequences, such as making offenders afraid to seek treatment and victims hesitant to report crimes, particularly when the offender is a family member.[33] Additionally, reports of harassment and other crimes against registrants have been increasing. Estimates about negative consequences, such as threats or vandalism toward registered sex offenders vary from as little as 4 percent[34], to as many as half of those registered.[35] Research also shows that these negative effects of registration may actually contribute to higher rates of recidivism.

Considering Risk of Re-offending as a Criteria for SOR Inclusion

What about recidivism? Most people would say zero recidivism is acceptable, but that is not realistic. "A recidivism standard of 30 percent has been established among researchers as the cutting point between a successful probation program and an unsuccessful one. Programs with recidivism rates of 30 percent or less are considered successful, while those programs with recidivism rates of 30 percent or higher recidivism are not particularly successful. … No program presently has zero percent recidivism."[36] Thus no one should realistically expect sex offender registration to result in zero percent recidivism. However, children who receive sex offender treatment have recidivism rates a fraction of the standard "acceptable" recidivism rate.

Children with sexual behavior problems, as a group, pose *low* long-term risk for future child sexual abuse perpetration and sex crimes. The same can be said about teenage sex offenders as a group. For teenage sex offenders, the low risk news is not new – decades of U.S. studies "report long-term future sex offense rates in the range of 5 percent-15 percent (the lower end of this range more often characterizing those who complete some sort of treatment program, and the higher end more often characterizes those who don't.) The sole long-term follow up study of preteen children with sexual behavior problems found even lower long-term [recidivism] rates (2 percent-10 percent at 10-year follow-up depending on type treatment received.)"[37]

"Data are available from numerous studies that have followed these [sex offender] children and youth for long periods of time – a decade or longer – using multiple data sources. The recidivism hazard rates observed in these studies decline quickly over time, and have dropped close to zero after two to four years."[38]

The highly successful 10-year old program used by the 17th Circuit Court, Family Division, Kent County boasts an excellent success rate as well. Prosecutors, judges, court administrators, treatment providers, and

defense attorneys support this model in Kent County. An integral part of this model is the Adolescent Sexual Offender Treatment Program (ASOTP). In a recent 5-year study, 96.3 percent of juveniles that successfully completed treatment with the ASOTP program had no further offenses that were sexual in nature.

In Kent County a juvenile sex offender pleads to a lesser, non-registerable offense.[39] The original (or adjusted offense) is held in abeyances/under advisement, until sex offender specific assessment, treatment, and probation has successfully been completed. At case closure, and often on the record, the charge that was held in abeyance or taken under advisement is dismissed, with agreement from the judge, prosecutor, and defense attorney.

In determining risk assessment and treatment options for individuals on the sex offender registry, counsel must consider the definition of the word "risk". It is necessary to consider the evidence-based practiced evaluations that are in place to assess risk. Successful completion of treatment and risk to re-offend assessments need to be specifically designed to prevent bias and subjectivity of the evaluator. A person may be considered at high risk to re-offend based on not following the protocol of the registration process. However, the detailed and often ambiguous process may be difficult to interpret, especially by people with disabilities. Reading, following directions and following through with tasks are often the areas that suffer for a person with a disability.

Counsel should seek an assessment provider who uses recognized assessment tools with the proper protocol. The following assessments are approved by the State of Ohio for the treatment of juvenile sex offenders:[40]

Assessments of sex offender risk and needs

- Child and Adolescent Needs and Strengths – Sexually Development (CANS-SD)
- Juvenile Sex Offender Assessment Protocol (J-SOAP-II)
- Estimate of Risk of Adolescent Sexual Offense Recidivism – ERASOR
- Risk Assessment/Interviewing Protocol for Adolescent Sex Offenders (RAIP)

Assessments of general delinquency risk and needs

- Youth Level of Service/Case Management Inventory (YLS/CMI)
- SAVRY—Structured Assessment of Violence Risk in Youth—Randy Borum, Patrick Bartel and Adelle Forth. And the updated version of "The Youth Level of Service/Case Management Inventory" -- Robert D. Hoge & D.A. Andrews
- Psychopathy Checklist – Youth Version (PCL-YV)
- Psychopathy Checklist Screening Version (PCL-SV)
- Massachusetts Youth Screening Instrument, Second Version (MAYSI-2)

Assessments of sexually attitudes, interests and adjustment

- Adolescent Cognitions Scale (Hunter, Becker, Kapland & Goodwin, 1991)
- MOLEST and RAPE scales (Bumby, 1996)
- Adolescent Sexually Interest Card Sort (Becker & Kaplan, 1988)
- Multiphasic Sex Inventory – Juvenile Version (Nichols & Molinder, 2001)
- Wilson Sex Fantasy Questionnaire (Wilson, 1998)
- AASI-2 – Abel Assessment for Sexual Interest / Gene Abel, M.D.
- Juvenile Sex Offender Self-Report, from Adolescent Sexual Offender Assessment Packet/ Allison Stickrod Gray, M.S., N.C.C. and Randy Wallace, B.A.

Assessments of mental health and cognitive functioning

- WAIS-III
- WRAT-III
- Kaufman IQ Test
- Wechsler memory Scale
- WISC-IV
- MMPI-A
- MACI
- Beck Depression Inventory
- Woodcock-Johnson Series
- Achenbach System of Empirically Based Assessment
- BASC: Behavior Assessment Scale for Children

Assessments of Drug and alcohol use:

- SASSI
- JASAE

Assessments of Stability of functioning:

Family

- FES: Family Environment Scale
- DAS: Dyadic Adjustment Scale

Social Skills

- HIT: How I Think

Credentials, qualifications, experience and standards need to be required when providing assessments in determining risk factors in an individual. The same factors apply to those providing treatment to people on the registry. The Ohio Comprehensive Assessment Protocol[41] addresses areas necessary to treatment programs. As detailed in the protocol, assessment, treatment and transition need to be addressed in a program. A detailed history of the person entering treatment must be documented. Even with these tools, it is necessary to again consider if a disability is present with a person charged with a sexual offense, and accommodations need to be put into place with the risk assessment instruments and treatment.

Sex offender specific or general treatment of juvenile sex offenders will provide the public with more safety than any registry which stigmatizes these offenders because "[c]rime is more likely to occur when bonds with mainstream society are weakened."[42] Indeed, "the long-term sex crime risk of appropriately treated children with sexual behavior problems was no different from that of children for whom we would never consider extraordinary and burdensome community protection measures."[43] "Similar findings have been reported among teenagers."[44] Only seven percent (7 percent) of the adjudicated teen sex offenders had a subsequent sex offense as compared to 6 percent of the adjudicated *non-sexual* delinquents.[45]

An attorney representing a juvenile client should be aware not only of developmental immaturity and its potential impact on client competency, but also of the potential impact of mental illness or mental retardation combined with a client's developmental immaturity and how these combined factors affect the competency of the juvenile.[46] Counsel should routinely request competency evaluations. When the charge is sex abuse, counsel should also identify qualified sex offender treatment and risk assessment providers in the area.

If the juvenile is in detention, counsel should argue that the Fourteenth Amendment entitles incarcerated youth to adequate mental health care and the policy of the juvenile system is to rehabilitate, not punish, in order to obtain the proper treatment for the child.[47] Counsel can also rely on the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973[48], as the basis for juvenile detention facilities to make their programs, services, and activities readily accessible to juveniles suffering disabilities.[49]

Removal from SOR

If adjudicated and required to register, all is not lost. The labeling of juveniles as "sex offenders", results in great stigma. Many additional requirements are imposed on someone with such a label as well. "In almost all cases, this negatively affects the individual's ability to not only be successful, but also to obtain life's most basics needs – a home, job, safety, family, and healthy relationships. For this reason, a label such as "sex offender" which is so commonly used synonymously with violence, viciousness, predation and pedophilia, must not be placed on a juvenile in a rote manner. It is important that such labels are determined only after evaluating a juvenile's success and response to treatment; and for those already on the registry, the discontinuation of such labeling should be determined after evaluating success in treatment and/or subsequent risk assessments."[50]

A small bright spot came in 2004 when the Michigan Legislature amended the SOR so that certain juveniles may petition the court for exemption from the registration requirements.[51] If the petition is granted and the individual was adjudicated of an offense listed in MCL 28.728c(15)(a)-(b)[52], the individual would be immediately removed from the registry. If the individual's case was handled under the Holmes Youthful Trainee Act[53], that individual would be required to register and report for 10 years from the date of the initial registration or 10 years from the date of release from incarceration, whichever was longer.[54] Persons subject to the Holmes Youthful Trainee Act whose petitions are granted will be on the nonpublic data base only after registering for the mandatory 10 years.[55]

For juveniles under a disposition order entered on or after October 1, 2004, the petition must be filed after his or her 17th birthday and before his or her 20th birthday.[56] Once filed, the court must hold a hearing on a proper petition.[57] Preparation is paramount because a petitioner has one and only one chance to convince the court of two things by clear and convinc-

ing evidence: The individual deserves to be removed from the registry and he or she is not likely to commit a listed offense.[58]

Your client may have favorable assessments and evaluations and a great school and community record, but there exist many situations where relief cannot be granted. First, if your client was previously convicted of a listed offense for which registration is required there will be no relief.[59] This could easily happen to an under-age boyfriend and girlfriend. If they did not stop having sex after a first adjudication, a second could happen to one or both teens. It does not matter if at the time the petition for removal from SOR is filed the petitioner is employed, a decorated war hero and married to the former "victim". Secondly, the court must deny a petition if the offense involved any of the factors listed in MCL 750.520b(1)(b) to (h); MCL 750.520c(1)(b) to (l); MCL 750.520d(1)(b) to (e); or MCL 750.520e(1)(b) to (f).[60] Also, if your juvenile client was sentenced as an adult for the offense, he or she will not even be allowed to file for relief.[61]

In the petition, counsel must present the facts of the offense including the ages of the victim and offender; their levels of maturity at the time of the offense; and the nature and severity of the offense.[62] Counsel must disclose the petitioner's prior juvenile and/or criminal history and with the help of valid assessments and evaluations, demonstrate there is little likelihood of the petitioner committing a sexual offense in the future.[63] Any other relevant evidence may be presented, too.[64] The court will also get to review any victim impact statement submitted under the Crime Victim's Rights Act.[65]

Armed with a risk assessment and a treatment plan, counsel can fight to keep his or her client from being adjudicated and kept off of the registry thereby avoiding years of ostracism for the client. ◎

Lynn B. D'Orio is an attorney based in Ann Arbor. She specializes in criminal defense, delinquency and child welfare law. She is a board member to the Criminal Defense Attorneys of Michigan and is a member of the Professional Advisory Board to the Michigan Coalition for a Useful Registry. She has been an adjunct faculty member at Baker College in Flint where she taught classes in juvenile and adult corrections.

Susan H. Rogers, LMSW, ACSW is a graduate of Wayne State University Graduate School of Social Work, Detroit. She is a Michigan licensed masters social worker with more than 25 years of experience in special education working with children and adolescents who have disabilities. She is the director of Parare Consulting, PLC, an educational and counseling firm designed to assist individuals and families in transitional stages of life, when a disability is present. Ms. Rogers has been an adjunct faculty member in the graduate program of Wayne State University School of Social Work.

Dr. Poco D. Kernsmith is an assistant professor in the School of Social Work at Wayne State University. Her primary research interests include violence in families and relationships. In particular, her interests include policies impacting convicted offenders, gender differences in perpetration, interventions with perpetrators and victims, and possible long-term effects on victimized children.

Dr. Roger M. Kernsmith is an associate professor in the department of Sociology, Anthropology and Criminology at Eastern Michigan University. His research interests include deviance and violence. He is vice president for the professional advisory board to the Michigan Coalition for a Useful Registry.

Endnotes

1 U.S. Department of Health and Human Services. *Mental Health: A Report of the Surgeon General*. Rockville, MD: U.S. Department of Health and Human Services, Substance Abuse andMental Health Services Administration, Center for Mental Health Services, National Institutes of Health, National Institute of Mental Health, 1999, p 5 (hereinafter, Report of the Surgeon General)

2 Report of the Surgeon General, note __, supra, at p 46.

3 MCL 330.1100a(21)

4 Kernsmith, Foster & Craun (in press)

5 43,510 on SOR – 40,717 on PSOR = 2,793 *Sex Offender Registry Backgrounder*, September 2, 2008.

6 MCL 28.730(1)

7 MCL 15.243. *Id*.

8 See MCL 28.728(2) and *In re Ayres*, 239 Mich App 8, 12 (1999).

9 MCL 28.728

10 Katner, David, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems*, 32 Am. J. L. and Med. 503, 507 (Citing Thomas Grisso, Lawrence Steinberg, Jennifer Woolard, Elizabeth Cuffman, Eliza-

beth Scott, Sandra Graham, Fran Lexcen, N. Dickon Repucci & Robert Schwartz, *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003) [hereinafter *MacArthur Study*]).

11 *Katner, supra* at 507 (Citing Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationship During Postadolescent Brain Maturation*, 21 J. NEUROSCI. 8819 (2001); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCI. 859 (1999)).

12 *Katner, supra* at 509 n. 34 (Citing Philip D. Nordness et al., *Screening the Mental Health Needs of Youths in Juvenile Detention*, 53 JUV. & FAM. CT. J. 43, 43-44 (2002)).

13 Hingsburger, David *et al*, "But I thought…Sexuality and Teens with Developmental Disabilities", Special Education Service Agency News, Spring 2002

14 Id.

15 Su Nottingham, Sexuality Educator, presentation to Bay-Arenac Intermediate Scholl District, Frankenmuth, Michigan

16 *Katner, supra* at 509 n. 34 (Citing Philip D. Nordness et al., *Screening the Mental Health Needs of Youths in Juvenile Detention*, 53 JUV. & FAM. CT. J. 43, 43-44 (2002)).

17 Freeman-Longo, 1996, Malesky & Keim, 2001, Farkas & Stichman, 2002

18 Braithwaite, John, 1989, *Crime Shame and Reintegration*, Oxford University Press

19 Champion, John Dean, *The Juvenile Justice System, Delinquency, Processing and the Law*, 4th Edition at 427 (Citing Baird 1985, 36)

20 Chaffin, Mark, "Our Minds are Made up – Don't Confuse Us With the Facts: Commentary on Policies Concerning Children with Sexual Behavior Problems and Juvenile Sex Offenders" Child Maltreatment – The Journal of the American Professional Society of the Abuse of Children, Vol. 13, No. 2 p 110-121, May 2008. Citing (Thompson, 2007

21 Kernsmith, Comartin, Craun & Kernsmith, in press

22 Zevitz, 2004

23 Trivits & Reppucci, 2002; Levenson et. al., 2007

24 Finkelhor, 1994; Ullman, 2007; Vogeltanz, et al. 1999

25 Ullman (2007)

26 Snyder, 2007

27 Caputo & Brodsky, 2004; Pawson, 2002; Prescott & Rockoff, 2008

28 Done by Duwe & Donnay (2008)

29 Prescott & Rockoff (2008)

30 Brannon, Levenson, Fortney & Baker, 2007

31 McAlinden, 2005; Phillips, 1998

32 Cesaroni, 2001; Guitierrez-Lobos et al., 2001

33 Edwards & Hensley, 2001

34 Welchans, 2005

35 Human Rights Watch, 2007; Levenson & Cotter, 2005; Tewksbury, 2005

36 Champion, supra.

37 Chaffin, supra (Citations omitted.)

38 Chaffin, supra

39 It is very clear that Kent County does not apply the "catch-all" provision of SORA in these cases. See, MCL 28.722(e)(x), which defines a reportable offense as "any other violation of a law of this state or a local ordinance of a municipality that *by its nature* constitutes a sexual offense against an individual who is less than 18 years of age." (Emphasis added.) See, also, *People v Meyers*, 250 Mich App 237 (2002).

40 See, Ohio Comprehensive Assessment Protocol (June 2008) for Juvenile Sex Offender Treatment, Appendix A pages 10-11. It can be found at: http://www.oacbha.org/includes/downloads/applicationocap608.doc?PHPSESSID=74867fdeffdfe2ba83371fdc76f6a93f

41 Id.

42 Chaffin, supra (Citing Sampson & Laub, 2005)

43 Chaffin, supra (Citing Carpentier et al, 2006)

44 Id. (Citing Caldwell 2007)

45 Chaffin, supra (Emphasis in original)

46 See, *In re Blackshear*, 262 Mich App 101, 686 NW2d 280 (2004); and *In re Carey*, 241 Mich App 222, 233-234; 615 NW2d 742 (2000) Michigan does not currently have a competency statute for juveniles. The cases above instruct the court and counsel to use the adult competency statute, MCL 330.2026(1), for guidance.

47 *Kanter, supra* at 569 (Citing Shawna L. Parks, *Innocence Lost: Mental Health Care and the California Youth Authority*, 30 HUM. RTS. 14, 14 (2003)); See also, A.J. v. Kierst, 56 F.3d 849 (8th Cir. 1995)

48 *Kanter, supra* at 570 (Citing Mark C. Weber, *Home and Community-Based Services, Olmstead, and Positive Rights: A Preliminary Discussion*, 39 WAKE FOREST L. REV. 269, 284-87 (2004) (discussing the affirmative rights that the ADA and section 504 of the Rehabilitation Act of 1973 guarantee to individuals with developmental disabilities)).

49 *Kanter, supra* (The author notes: For a general discussion of the limited rights of mental patients to community-based services under the Supreme Court's 1999 decision in *Olmstead v. Zimring*, see John Stark, Casenote, *A New Mandate for the Expansion of the Rights*

of the Mentally Ill: Olmstead v. Zimring *and Its Further Exposition of the Americans With Disabilities Act*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 83 (2000)).

50 Recommendation for a Juvenile Provision to the Michigan Sex Offender Registration Act by the Professional Advisory Board to the Coalition for a Useful Registry, Michigan

51 MCL 28.728c

52 MCL 28.728c(15)(a) & (b) provide:

The right to petition under this section applies to all of the following individuals:

(a) An individual who is convicted as a juvenile under section 520b, 520c, or 520d of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520c, and 750.520d, of committing, attempting to commit, or conspiring to commit a violation solely described in section 520b(1)(a), 520c(1)(a), or 520d(1)(a) of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520c, and 750.520d, if either of the following applies:

(i) The individual was under 13 years of age when he or she committed the offense and is not more than 5 years older than the victim.

(ii) The individual was 13 years of age or older but less than 17 years of age when he or she committed the offense and is not more than 3 years older than the victim.

(b) An individual who was charged under section 520b, 520c, or 520d of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520c, and 750.520d, with committing, attempting to commit, or conspiring to commit a violation solely described in section 520b(1)(a), 520c(1)(a), or 520d(1)(a) of the Michigan penal code, 1931 PA 328, MCL 750.520b, 750.520c, and 750.520d, and is convicted as a juvenile of violating, attempting to violate, or conspiring to violate section 520e or 520g of the Michigan penal code, 1931 PA 328, MCL 750.520e and 750.520g, if either of the following applies:

(i) The individual was under 13 years of age when he or she committed the offense and is not more than 5 years older than the victim.

(ii) The individual was 13 years of age or older but less than 17 years of age when he or she committed the offense and is not more than 3 years older than the victim.

53 MCL 762.11 *et seq*

54 MCL 28.728d(1)(b)

55 MCL 28.728d(3)

56 MCL 28.728c(4). The 2004 amendment allowed a 3-year window, from October 1, 2004 (when the act went into effect) to October 1, 2007, for individuals with prior adjudications to petition the court for relief. If an individual was on probation during that period of time, s/he had three years from the date of discharge to file a petition. Id.

57 MCL 28.728c(10)

58 MCL 28.728(4) & (14)(b)

59 MCL 28.728c(14)(a)

60 MCL 28.728c(14)(c)(i)-(iv)

61 MCL 28.728(14)(e)

62 MCL 28.728c(12)(a)-(d)

63 MCL 28.728(12)(e) & (f)

64 MCL 28.728(12)(h)

65 MCL 28.728(12)(g)

Michigan Juvenile Delinquency Cases and the Indian Child Welfare Act

by Cami Fraser, Tom Myers, and Aaron Allen

The Indian Child Welfare Act ("ICWA") is best known as a federal law that applies in state court child protection cases involving Indian children. ICWA governs how courts must handle child welfare cases involving "Indian children" and sets out minimum federal requirements. ICWA, however, also applies in juvenile delinquency cases. This article will discuss the less well known legal protections for Indian children, their parents, and Native American tribes in juvenile delinquency cases under ICWA and Michigan Court Rules.[1]

Congress enacted ICWA in 1978 in response to its finding that the "Indian child welfare crisis is of massive proportions."[2] The U.S. Supreme Court has consistently noted that the United States has a unique responsibility to tribal nations and Indian people, and that the U.S. Congress has plenary authority over Indian affairs.[3] Congress, thus, has the authority and duty to pass legislation in "fulfillment of Congress' unique obligation toward the Indians."[4] From 1974 to 1977, Congress conducted extensive hearings and received detailed studies about the treatment of Indian child custody matters in several states. This inquiry revealed that between 25 and 35 percent of all Indian children had been removed from their families and placed with foster parents, adoptive homes, or institutions—at least five time greater than that of non-Indian children.[5] More specifically, Congress found

> that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in nonIndian foster and adoptive homes and institutions; and . . . that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.[6]

Of those Indian children removed, approximately 90 were placed with non-Indian families.[7] Congress similarly found overwhelming evidence that states were systematically encroaching on the jurisdiction of Indian tribes.[8]

Congress determined that it was necessary to legislate additional legal protections for Indian children, the parents of Indian children, and Native American tribes in order to keep Indian children with Indian families.[9] During state court proceedings, ICWA imposes higher standards to remove a child from a parent's home and terminate parental rights. ICWA also gives the child's tribe and family an opportunity to be involved in decisions affecting the child. If a child is removed, ICWA defines placement preferences. When ICWA applies to a child's case, a tribe or parent can petition to transfer jurisdiction of the case to a tribal court.[10] In 1988, the Michigan courts adopted court rules that implement the requirements of ICWA, although the protections afforded do vary slightly. This article will discuss when ICWA and the related court rules are triggered and discuss the special procedures that courts must follow. Understanding this aspect of the Act's coverage will encourage strong advocacy for Indian families and tribes in juvenile delinquency cases.

When does ICWA Apply to Juvenile Delinquency Proceedings?

ICWA applies whenever Indian children are involved in state child custody proceedings. An Indian child is defined by the Act as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[11] ICWA defines "child custody proceeding" as any court action regarding foster care

placement, termination of parental rights, preadoptive placement, and adoptive placement except, as relevant here, those "term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime..."[12]

Whether juvenile delinquency proceedings are covered by the Act is determined by the placement of the children and the conduct of the parents. The legislative history explains:

> The definition of "child placement" is intended to include proceedings against juveniles which may lead to foster care and proceedings against status offenders, i.e., juveniles who have not committed any act which would be a criminal act if they were adults, such as truancy. It shall also include juveniles charged with minor misdemeanant behavior who would be covered by the prohibitions against incarceration in secure facilities by the Juvenile Justice and Delinquent Prevention Act of 1974 (Public Law 93-415, 41 USC 5601 et. seq.). It is not intended that the definition of "child placement" in this subsection apply to juveniles who have committed serious offenses which are a threat to the public.[13]

In 1979, one year after passage of ICWA, the Bureau of Indian Affairs published "Guidelines for State Courts; Indian Child Custody" in the Federal Register.[14] Regarding delinquency proceedings, the Guidelines allow:

> Although most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses, such as truancy and incorrigibility, which can only be committed by children, and to any juvenile delinquency proceeding that results in the termination of a parental relationship.[15]

The Commentary further explains:

> The entire legislative history makes it clear that the Act is directed primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child—whether on a permanent or temporary basis. Although there is some overlap, juvenile delinquency proceedings are primarily designed for other purposes. Where the child is taken out of the home for committing a crime it is usually to protect society from further offenses by the child and to punish the child in order to persuade that child and others not to commit other offenses.
>
> Placement based on status offenses (actions that are not a crime when committed by an adult), however, are usually premised on the conclusion that the present custodian of the child is not providing adequate care or supervision. To the extent that a status offense poses any immediate danger to society it is usually also punishable as an offense which would be a crime if committed by an adult. For that reason, status offenses are treated the same as dependency proceedings and are covered by the Act and these guidelines, while other juvenile delinquency placements are excluded.
>
> While the Act excludes placements based on an act which would be a crime if committed by an adult, it does cover terminations of parental rights even where they are based on an act which would be a crime if committed by an adult. Such terminations are not intended as punishment and do not prevent the child from committing further offenses. They are based on the conclusion that someone other than the present custodian of the child should be raising the child. Congress has concluded that courts shall make such judgments only on the basis of evidence that serious physical or emotional harm to the child is likely to result unless the child is removed.[16]

Accordingly, the Act creates two exceptions to the general rule that ICWA does not apply to juvenile delinquency proceedings. The first exception is when an Indian child is charged with "status crimes" such as truancy or runaway and is placed outside the home.[17] The second exception is when an Indian child is placed out of the home, not as punishment, but for his or her protection from alleged abuse or neglect in the home. ICWA's purposes are implicated when proceedings involve an Indian child that result in the removal of that child because of alleged deficiencies with the parents or Indian custodian.[18] In contrast, ICWA does not apply when a child has been placed in detention for committing what would otherwise be considered an adult crime.[19]

When is ICWA Triggered in Michigan Juvenile Delinquency Cases?

When a Michigan court has found that a youth is within its jurisdiction, it may enter orders for warning and dismissal, probation, foster care, private institution or agency placement, public institution commitment, mandatory detention, restitution, and sexual offender registration and DNA profiling. The court may place the child on probation in his or her home or in the home of a relative. The court has wide discretion to order terms and conditions for probation, both for the child and for the parent, guardian, or custodian.[20] Placement in a foster care home or a public institution or county facility are dispositional options available in delinquency cases.[21] Such out-of-home placements turn a delinquency proceeding into a "child custody proceeding" within the meaning of ICWA.

Both situations that trigger ICWA require an out-of-home placement ordered within the juvenile delinquency proceeding.[22] This does not hold true under the Michigan Court Rules.[23] At the time of any preliminary hearing where a juvenile is charged with a violation of MCL 712A.2(a)(2)-(4) or (d), the Michigan Court Rules require an inquiry as to whether the juvenile or parent is a member of an American Indian tribe:

> If the charge is a violation of MCL 712A.2(a)(2)-(4) or (d), the court must inquire if the juvenile or a parent is a member of any American Indian tribe or band. If the juvenile is a member, or if a parent is a tribal member and the juvenile is eligible for membership in the tribe, the court must determine the identity of the tribe or band and follow the procedures set forth in MCR 3.980.[24]

MCL 712A.2(a)(2)-(4) or (d) involve acts such as truancy or incorrigibility, status crimes, or acts that can only be committed by juveniles. As a result, the protections provided to Indian children, their parents, and their tribe under the Michigan Court Rules are triggered at the beginning of a case, by mandating compliance with MCR 3.980, which is not necessarily the case for the protections provided for by ICWA itself.[25]

What Additional Protections Are Triggered?

Although the exact protections provided to Indian families and tribes vary slightly between ICWA and Michigan Court Rules, the goal is the same: to avoid the unnecessary breakup of an Indian family.[26] Listed below, although not an exhaustive list, are some of the more important protections provided.

Protections for Parents

In addition to parents being entitled to the appointment of counsel,[27] ICWA provides additional protections for parents and Indian custodians in child welfare matters. Under the Act, a "parent" is defined as any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom.[28] An "Indian custodian" is defined as any Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control have been transferred by the parent of such child.[29]

Prior to any foster care placement, the party seeking foster care placement or termination must show that he/she tried to keep the Indian family together. According to ICWA:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.[30]

The BIA Guidelines also state:

> These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social services agencies and individual Indian care givers.[31]

These findings must be made by a Michigan court before an out-of-home placement can be made,[32] although the Court Rules provide an exception for emergency removals.[33]

In addition to requiring that active efforts be shown prior to the removal of an Indian child, ICWA also requires the showing of additional evidence of potential harm to the child. ICWA provides:

No foster care placement may be ordered in

> such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[34]

The Michigan Court Rules echo this provision:

> An Indian child must not be removed from a parent of Indian custodian, or, for an Indian child removed under subrules (B)(1) or (2), remain removed from a parent or Indian custodian pending further proceedings, without clear and convincing evidence, including the testimony of at least one expert witness who has knowledge about the child-rearing practices of the Indian child's tribe, that services designed to prevent the break up of the Indian family have been furnished to the family and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical injury to the child.[35]

The BIA Guidelines address the clear and convincing evidence standard:

> Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or nonconforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result.[36]

Michigan courts have articulated who constitutes a qualified expert witness. *In re Kreft* recognized the phrase "qualified expert witness" requires something beyond normal social worker qualifications.[37] Despite the statutory language, only one qualified expert witness need testify in an ICWA case.[38] The court determined at least two of the witnesses in that case constituted qualified expert witnesses: the supervisor of mental health social workers at a tribe and a psychologist.[39] Even where the mother and child have no involvement with Indian culture, it is error for a court to act without the testimony of a qualified expert witness.[40] In such a case, however, where cultural bias is not implicated, a qualified expert witness need not have special knowledge of Indian life.[41]

Accordingly, before a court may remove an Indian child from his/her home within a juvenile delinquency proceeding, there are additional legal requirements regarding the child's parents that must be met, thus, limiting removal to only those situations where it is truly necessary to protect the child.

Protections for Tribes

Under ICWA and the Michigan Court Rules, an Indian child's tribe is entitled to notice of the proceedings.[42] If the tribe is not known, the secretary of the interior is to be notified.[43] In Michigan, substantial compliance with the Act's notice requirements may be sufficient to satisfy ICWA, at least where actual notice can be demonstrated.[44] Furthermore, notice must be provided to a tribe no matter how late in the proceedings a child's possible Indian heritage comes to light.[45] Under ICWA, an Indian child's tribe can intervene in the proceedings as a matter of right.[46] Where proper notice has been provided and a tribe fails to respond or intervene, the burden shifts to the parties to show that ICWA still applies.[47]

Tribal court jurisdiction is not limited to situations in which the Indian child lives on the reservation. Where an Indian child is not residing or domiciled on the reservation, tribal courts have concurrent, though presumptive, jurisdiction over foster care placements and termination of parental rights proceedings. Either parent, an Indian custodian, or the tribe may petition the state court for such transfer.[48] The Michigan court is required to transfer the case unless there is good cause to the contrary or either parent objects.[49] The BIA Guidelines contain an explanation of the term "good cause." According to the Guidelines, good cause not to transfer to tribal court exists where: (1) the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred; (2) the proceeding was at an advanced stage when the petition to transfer was received, and the petitioner did not file the petition promptly after receiving notice of the hearing; (3) the Indian child is over 12 years of age and objects to the transfer; (4)

the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or witnesses; and (5) the parents of a child over five years of age are not available, and the child has had little or no contact with his/her tribe or members of the his/her tribe. The BIA Guidelines also state that the socio-economic conditions and perceived adequacy of tribal or BIA social services or judicial systems may not be considered in a determination that good cause exists. In other words, a state court judge's opinion that a tribal court is somehow lacking does not provide that judge with good cause to retain the case. Finally, the BIA Guidelines state that the party opposing transfer has the burden of establishing good cause.[50] The Michigan Court Rules explicitly state that "a perceived inadequacy of the tribal court or tribal services" is not good cause to deny transfer.[51]

Placement Preferences

If an Indian child is removed from the home during a "child custody proceeding," ICWA provides preferences for placement. Regarding temporary placement, ICWA provides:

> Any child accepted for *foster care or preadoptive placement* shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with:(i) a member of the Indian child's extended family;
>
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
>
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.[52]

However, the Act does provide that "if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child."[53] The Michigan Court Rules provide similar requirements for placement, but do make provision for tribes that create their own preferences.[54] As a result of ICWA placement preferences, if an Indian child is removed from his/her home pursuant to a juvenile delinquency case, the child is in a better position to maintain a relationship with his/her tribal community.

Conclusion

ICWA and the corresponding Michigan Court Rules serve an important purpose: they help keep Indian children in their families, and help stop the erosion of tribal communities. To that end, Congress included juvenile delinquency proceedings in limited circumstances within the Act's protections. Understanding this aspect of the Act's coverage will encourage strong advocacy for Indian families and tribes in juvenile delinquency cases, as well as traditional child welfare matters. ◎

Cami Fraser, Thomas R. Myers, and Aaron Allen are staff attorneys with Michigan Indian Legal Services, which provides civil legal services to lowincome AmericanIndian individuals and tribes to further selfsufficiency, overcome discrimination, assist tribal governments, and preserve AmericanIndian families. Ms. Fraser is admitted to practice in Alaska, Michigan, and Washington State, and is a 2000 graduate of the University of Michigan Law School. Mr. Myers is licensed to practice in Michigan and Montana, and is a 1992 graduate of the University of Montana School of Law. Mr. Allen is a member of the State Bar of Michigan, and is a 2005 graduate of Michigan State University College of Law.

Endnotes

1 Indian Child Welfare Act of 1978, 25 USCA 1901 et seq; MCR 3.935(B)(5); MCR 3.980.

2 H.R. Rep. No. 1386, 95th Cong., 2d Sess. 9 at p 9, reprinted in 1978 U.S CODE CONG. & AD. NEWS 7530.

3 See, e.g., *United States v. Lara*, 541 U.S. 193 (2004); U.S. Const. Art. IV, Clause 2, and Art. I, Section 8, Clause 3.

4 *Morton v. Mancari*, 417 U.S. 525, 555 (1974).

5 See H.R. Rep. No. 95-1386 at 9 (1978), reprinted in 1978 U.S CODE CONG. & AD. NEWS 7530.

6 25 USC 1901(4)(5).

7 *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36-37 (1989).

8 See Mary Roberts, *The Indian Child Welfare Act: Implications for Culturally Competent Service Providers*, 2 Mich Child Welfare L. J. 7-10 (Spring 1998).

9 25 USC 1902.

10 See generally B.J. Jones, *The Indian Child Welfare Act Handbook* (1995); Native American Rights Fund, *A Practical Guide to the Indian Child Welfare Act* (2007).

11 25 USC 1903(4); *In re IEM*, 233 Mich.App. 438, 447 (Mich. Ct. App. 1999) (courts are to defer to tribes in determining the eligibility for membership of a given individual); see also *In re Alejandro A*, 160 Cal. App. 4th 1343 (Cal. Ct. App. March 4, 2008).

12 25 USC 1903(1).

13 November 3, 1977, Senate Report: Indian Child Welfare Act of 1977, Committee on Indian Affairs, Select. Senate Report, S. Rpt. 95597, Nov. 3, 1977, 58 p. 16.

14 44 Fed. Reg. 67,584 (Nov. 1979). The Guidelines were intended to be the Department of Interior's non-binding interpretation of the provisions of ICWA. Some provisions of the Guidelines have become binding in Michigan through case law or adoption of court rules substantially mirroring the Guidelines.

15 44 Fed.Reg. 67,587 (1979), Sec. B.3(a) (Nov. 1979).

16 *Id.* at 67, 587-67, 588.

17 See MCR 3.935(B)(5); see, e.g., *In re Enrique O,* 137 Cal. App. 4th 728, 734 ft.nt. 3 (Cal. Ct. App. March 13, 2006); *In re Patrick N*, 2006 Cal. App. Unpub. Lexis 8706 (Cal. Ct. App. Sept. 29, 2006).

18 *In re X.C.*, Case No. 94-146-DL (Mason County Probate Ct. Sept. 25, 1995) (copy on file with authors). (Michigan probate court ordered the return of an Indian child to the custodial parent and found that ICWA applied because of an out-of-home placement in a juvenile delinquency proceeding).

19 See, e.g., *In re Enrique O,* 137 Cal. App. 4th 728 (Cal. Ct. App. March 13, 2006); *In re A.M.F.-G.*, 2004 Minn App. LEXIS 632 (June 8, 2004); *In re T.D.C.*, 748 P.2d 201 (Utah Ct. App. January 5, 1988).

20 MCL 712A.18(1)(b).

21 MCL 712A.18(1)(c).

22 See, e.g., *In re Patrick N*, 2006 Cal. App. Unpub. Lexis 8706 (Cal. Ct. App. Sept. 29, 2006).

23 MCR 3.935(B)(5).

24 MCR 3.935(B)(5).

25 The Michigan Court Rules provide for similar up-front protections in child welfare matters pursuant to MCR 3.965(B)(9).

26 25 USC 1902.

27 25 USC 1912(b).

28 25 USC 1903(9).

29 25 USC 1903(6).

30 25 USC 1912(d).

31 44 Fed.Reg. 67,584 (1979), Sec. D.2.

32 See, e.g., *EmpsonLaviolette v. Crago,*280 Mich. App. 620 (Mich. Ct. App. Sept. 11, 2008); see also *In re Roe*, 281 Mich. App. 88 (Mich. Ct. App. Sept. 25, 2008).

33 MCR 3.980(B)(2).

34 25 USCA 1912(e).

35 MCR 3.980(C)(3).

36 44 Fed. Reg. 67,584, 67,593 D.2 (Nov. 1979)

37 *In re Kreft,* 148 Mich. App. 682, 689 (Mich. Ct. App. 1986); see also *In re Elliott*, 218 Mich.App. 196, 207 (1996).

38 *Kreft,* 148 Mich. App at. at 690.

39 *Id.*

40 *In re Elliott*, 218 Mich.App. 196, 207 (1996).

41 *Id.*

42 25 USC1912 (a); MCR 3.980 (A).

43 25USC 1912 (a); MCR 3.980 (A).

44 *In re T.M.*, 245 Mich.App. 181, 191 (Mich. Ct. App. 2001); *In re N.E.G.P.*, 245 Mich.App. 126 (Mich. Ct. App. 2001); *In re I.E.M.,* 233 Mich. App. 438 (Mich. Ct. App. 1999); *In re Johanson*, 156 Mich.App. 608 (Mich. Ct. App. 1986).

45 *In re T.M.*, 245 Mich.App. 181, 188 (Mich. Ct. App. 2001).

46 25 USC 1911 (c).

47 *In re T.M.*, 245 Mich.App. 181, 187 (Mich. Ct. App. 2001).

48 25 USC 1911 (b).

49 25 USC 1911 (b); MCR 3.980(A)(3).

50 44 Fed. Reg. 67,584 C.3 (Nov. 1979).

51 MCR 3.980(A)(3).

52 25 USC 1915(b).

53 25 USC 1915(c).

54 MCR 3.980(C)(5).

A Miscarriage of Juvenile Justice: A Modern-day Parable of the Unintended Results of Bad Lawmaking[1]

by Amy Vorenberg, Franklin Pierce Law School

"A story is only half told if only one side has been presented."

- Icelandic Proverb

The Problem of Media-driven Policy-making

Throughout American history, public opinion and the actions of our lawmakers have been swayed by tragic or sensational stories. At times, these actions have been well reasoned and proportional to the need for public safety and social control such as the workplace safety legislation passed in the wake of the 1911 Triangle Shirtwaist Factory fire in New York City in which 146 trapped garment workers perished. While legislative changes based on large scale tragedies are often warranted, politicians have also been known to capitalize on singular events to advance their agendas or demonize their opponents. This strategy was a key component of George H. W. Bush's successful presidential campaign of 1988 when he relentlessly criticized Massachusetts Governor Michael Dukakis for condoning a program that allowed the weekend furlough of Willie Horton—a lone case of a convicted murderer who escaped from the furlough program and later assaulted and raped a woman in Maryland.[2]

These sensationalized cases, due to the impact of 24-hour cable TV news coverage, increasingly create the context for public policy discussion. Stories about violent crime are a common feature of the local evening news, and their emotional nature can often create the hook politicians need to showcase their "tough on crime" agendas. Often anecdotal and lurid, stories of criminal misdeeds are widely used to convince the public of a need to create or change laws.

A Sea Change in Juvenile Justice Policy

A case in point is the public discussion of juvenile justice in the late 1980s and early 1990s. Articles from that time concerning juvenile justice policy almost always begin with a shocking story of a crime committed by a juvenile. Other stories published in the early 1990s warned of the rise of violent, depraved "superpredator" youths and sparked a nationwide wave of increasingly punitive laws aimed at juvenile crime.[3] There has been scant media coverage, however, of the many juveniles who got caught in the wider net cast by this new legislation. There is little public discussion or thoughtful analysis in the mainstream media of the efficacy of these new "tough on crime" policies. Although their cases were minor and would have been settled quickly and confidentially in juvenile court, many juvenile offenders found themselves in the adult system. There they entered a kind of no-man's land where they were considered too old to be treated as children but were completely unprepared to fend for themselves in the adult penal system and ineligible for adult social programs, like housing assistance, upon release.

In this article, I examine the impact of a 1995 change in New Hampshire state law that lowered the age that a youth could be charged as an adult from 18 to 17. The law was passed in the wake of two isolated but brutal juvenile murders with little examination of the empirical data. This article, therefore, points out the perils of making law by extrapolating from a few random, albeit attention-grabbing, events.

Although New Hampshire is the focal point of this article, other states' stories are similar. The Michigan legislature responded to public attention on juvenile crime by amending its state juvenile code in 1996 and in so doing instituted one of the more punitive approaches to juvenile law.[4] These changes were made despite the fact that violent crime, including juvenile violent crime, was on the decrease[5]

To demonstrate the counter-productive and perhaps damaging nature of this approach to governance, I will review juvenile crime rate statistics for the period in question, but it is my view that the impact of the data alone can be significantly enhanced by examining specific instances of the law's effect. If media stories are used to justify legislative actions, then the stories of those affected by the actions should similarly be useful in deciding if the change was warranted. I will go beyond the data and recount the story of Justin B., a young man whose arrest for simple underage drinking began a Kafka-esque descent into legal limbo and incarceration. This article will show that in New Hampshire, as in states all over the country, the statutory change was an overreaction prompted by sensationalized and anecdotal evidence. By looking at the events and influences that inspired New Hampshire's legislative changes, the consequences of the new law, and the effects it had on Justin B.'s life, I will show that the law not only fell far short of its intended goals, but possibly made the citizens of New Hampshire less safe and at great cost.

As one of the offenders who entered the adult system at 17, Justin B. got caught in the no-man's land I have described and consequently was pulled more deeply into a life of petty crime and substance abuse.

"I was 17 when I went to jail for the first time. Before I went to jail, I wasn't a violent person; I didn't fight. But I had to fight in jail. After I got out of jail, I'd flip out on people who gave me attitude, where before I would've ignored them."

The New Hampshire Approach–All Emotion, No Reason

Before we look more closely at the street-level impact of a delinquency age of 17, let's review how this legislation came to be changed in New Hampshire. Criminal defendants are charged either as juveniles or adults.[6] In most states youths are considered adults once they turn 18, but there are a number of states that set the cutoff at a younger age.[7] Many states, including New Hampshire, have a legal process by which children under the delinquency age charged with certain enumerated violent crimes can be certified as adults and charged as adults.[8] Before 1995, children age 18 or under were prosecuted as juveniles in New Hampshire. [9] In 1995, the NH legislature passed a law that changed the definition of a "minor" from a person under the age of 18 to a person under the age of 17.[10]

What prompted this change? In late 1987, a 14-year-old boy murdered a 9-year old boy in the small town of Pittsfield, New Hampshire by shooting him in the head. The two children knew each other, and the body was discovered when the 14-year old agreed to show the police where he left the body. The gruesome crime was the subject of numerous stories in the media. Despite the shocking nature of the crime, the New Hampshire Attorney General's Office could not prosecute the case because the boy was too young to be considered for certification as an adult under the statute at the time.[11]

Ultimately, the perpetrator was prosecuted in juvenile court and received the maximum sentence of roughly three years at a youth detention facility—the number of years remaining until he turned 18, when the juvenile system no longer had jurisdiction. There was no option to transfer him to adult court.[12]

New Hampshire has one of the lowest rates of homicide in the country,[13] but, coincidentally, later the same year a 15-year-old was involved in the murder of a 5-year-old.[14]

In the aftermath of these two terrible incidents, the New Hampshire legislature took up the cause of juvenile law reform. The State's attorney general, Stephen Merrill, had handled the prosecution of both murders. Frustrated that he was powerless to prosecute the teen defendants in adult court, Merrill championed a new law to lower to 13 the age at which juveniles accused of serious crimes could be certified by a court and treated as adults. The measure was adopted by the legislature in 1988 but limited to cases of murder, rape, and kidnapping.[15] At the time, there were rumors that Attorney General Merrill proposed the change and took a public position on the matter to further his own political aspirations.[16] Merrill denied the rumors, but eight months later, Merrill said that he would "not

rule out" political office.[17] In 1992, Merrill ran for governor and won. When Merrill began his reelection campaign two years later (the term of office in New Hampshire is two years), he made juvenile crime a focal point of his campaign.[18] Following a "tough on crime" campaign strategy common in American politics, Merrill proposed a further change in the law, namely, to lower the age of delinquency for *all* crimes, not just violent crimes, from 18 to 17. [19]

Merrill and his allies in the legislature cited two reasons to support this change. First, they claimed there had been an increase in violent juvenile crime in New Hampshire.[20] Second, they asserted that police officers were witnessing a rise in the number of illegal drug sales in the populous southern part of the state adjacent to the neighboring state of Massachusetts. The age of delinquency was 18 in New Hampshire versus 17 in Massachusetts, and so police representatives believed that juveniles were crossing the border specifically to undertake illicit drug transactions because they were safe in the knowledge that, if caught, they would face lighter penalties in juvenile court.[21]

The Myth of Rising Juvenile Crime

Although state and national statistics were readily available, proponents of the delinquency changes made little reference to them during legislative hearings on the new bill. Witnesses testified that there had been an increase in violent juvenile crime. [22] Had the legislature studied the available data, however, they would have found that juvenile violent crime in New Hampshire had leveled off or even started to decline. (Figure 1). In fact, the total number of violent crimes committed by juveniles fell 26 percent in 1994, from a peak in 1993. The total number of violent crimes committed by 17-year-olds, those that the new law was trying to impact, did rise from 1992 to 1994 but returned in 1995 to the same level seen in 1990. The total number of violent crimes committed by 17-year-olds peaked at only 32, a small sample with which to make statistical assertions.

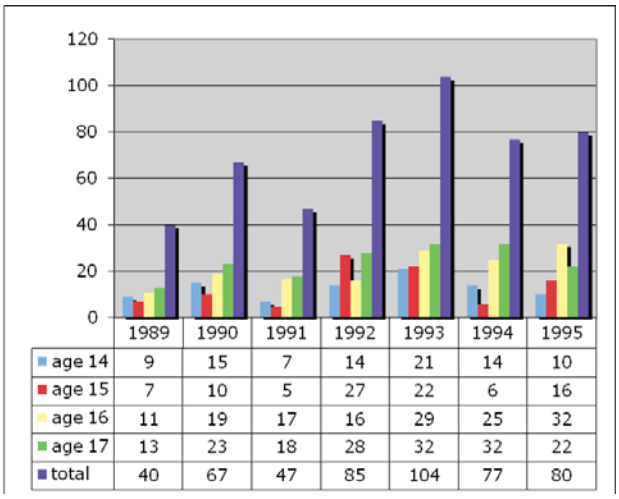
In short, one cannot draw a firm conclusion from the data concerning any trend toward higher crime rates; the variation in the numbers could just as easily be due to coincidence. The significant increase was among 15- and 16-year-olds, neither of which would have been affected by the new law.

Support for the legislation rested largely on anecdotal information. Several chiefs of police and other law enforcement officers testified or wrote letters in support of lowering the age of delinquency.[24] One police chief appearing on behalf of the New Hampshire Chiefs Association testified that "the increase in the incidence of violent crime committed by young adults in our society is a trend which is unacceptable. And demands new thinking."[25]

The governor stressed the need to distinguish between the juvenile who makes a "stupid mistake" and the young person who is "in fact a career criminal."[26] Other witnesses who testified in support of the bill assured concerned legislators that the new law was meant for the serious offenders and that discretion on the part of judges and prosecutors would protect 17-year-olds accused of minor offenses.[27]

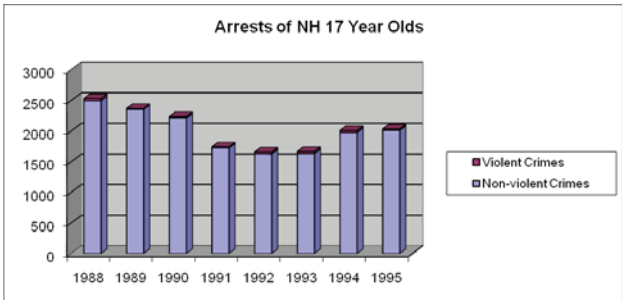
The new law was proposed specifically to address the upsurge of violent crime by 17-year-olds by designating them as adults. However, there was no upsurge in this particular category. In fact, the overall rate of arrests of 17-year-olds was trending down. (Figure 2). The data

Figure 1: NH Arrests for Violent Crime by Juveniles[23]



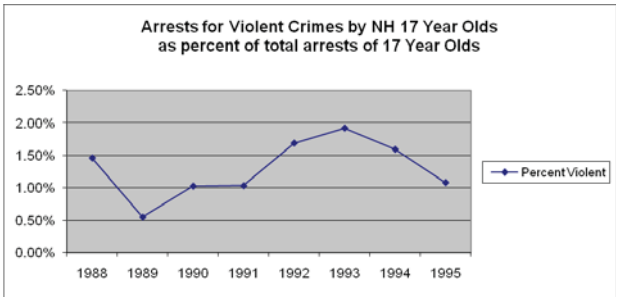
	1989	1990	1991	1992	1993	1994	1995
age 14	9	15	7	14	21	14	10
age 15	7	10	5	27	22	6	16
age 16	11	19	17	16	29	25	32
age 17	13	23	18	28	32	32	22
total	40	67	47	85	104	77	80

Figure 2: Total Arrests of New Hampshire 17-Year-Olds[29]



show that the number of arrests declined from 1988 to 1992, and the increased numbers of 1993 and 1994 did not reflect a significant upward trend. Indeed, total arrests during that period never approached those seen in 1988, long before the supposed spike in juvenile crime. [28]

Figure 3[30]



Perhaps even more significant, the rate of violent crime among 17-year-olds was decreasing. (Figure 3)

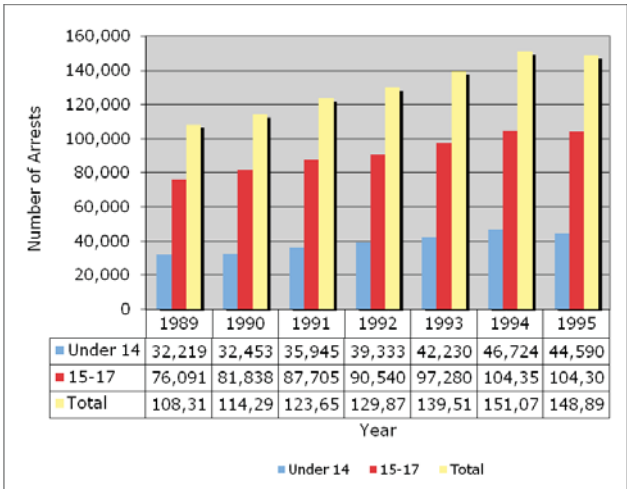
The national data also did not demonstrate a spike in violent youth crime. Although there was an increase in the rate of arrests for youth violent crime, the increase occurred throughout all age brackets. Notably, the increase in arrests for violent crime occurred equally in the juvenile age bracket (13 to 17) and in the young adult bracket (18 to 24). [31] Between 1992 and 2000, there was a significant decline in violent crime nationally, and this was largely due to a decrease in arrests of juveniles for violent crime.[32]

The increase in juvenile violent crime in the late 80s and early 90s mirrored a general increase in violent crime nationwide. [33] The overall violent crime rate continued on an uphill rise until 1993 and then gradually declined until it leveled off in 2000.[34]

The notion that there was a spike in juvenile violent crime in the late 1980s may have been as much a response to fear, driven both by media and politicians, as it was based on an actual rate of violent crime.[35] Indeed, the public's perceptions that juvenile crime was on the rise continued even as the juvenile crime rate declined.[36] Although the dire predictions about teenage "super-predators" were never realized, between 1992 and 1997 47 states and the District of Columbia made their juvenile justice systems more punitive.[37] As states shifted their laws to make juveniles more accountable in order to decrease crime, the very juveniles affected by the laws were responsible for a substantial shift downward in the crime rate, due to forces largely unrelated to any legislative initiative. Theories abound about the cause of the downward decline of juvenile crime in the mid-1990s and include a more robust job market, the growth of community policing, market and policy changes dealing with illegal drugs and firearms, and even the legalization of abortion 20 years earlier.[38] The cause and effect of the more punitive laws do not appear to be a leading factor in the decline, as the shift in the law came after the crime rate had already stabilized and begun a downward trend.

Moreover, in New Hampshire, the law lowering the age for juveniles was essentially duplicative. Violent juvenile offenders could already be treated as adults if they were so certified by a court.[39] Certification required a prosecutor to demonstrate through a multifactor test that the offender warranted adult treatment.[40]

Figure 4: National Arrests For Youth Violent Crime 1989-1995



The Evidence That Juveniles Were Coming into NH to Sell Drugs

Proponents of the new law took the position that juveniles from Massachusetts were coming over the border to sell drugs, safe in the knowledge that they could only be tried as a juvenile if they were caught. Statistics provided to the House Committee showed that indeed there had been an increase in arrests of juveniles selling drugs between 1990 and 1995.[41] These statistics showed that in 1993 and 1994, over half of the juveniles arrested for drug sales in New Hampshire were from outside the state. These youths were

primarily from Lawrence, Massachusetts, an industrial city just south of the New Hampshire border.[42] However, the increase in drug arrests occurred in Massachusetts as well, and in Lawrence in particular.[43] Lawrence was one of two New England distribution points for the heroin trade in the 1990s, and the city saw a significant increase in drug usage between 1993 and 1999.[44] The increase in arrests of out-of-state juveniles in 1993 and 1994 was quite possibly due to the surge in heroin usage just below the border and did not necessarily have anything to do with the age at which a juvenile could be arrested in New Hampshire.

Thus, the data about juvenile crime did not support the particular change that ultimately passed the New Hampshire legislature. What resulted were reforms in a system that was not necessarily "broken." The reforms have nevertheless endured, and there are indications that they have created more problems than they have fixed.

Justin B

Justin B.[45] is a tall, dark-haired, well-spoken 21-year-old. He is well put together, clean-shaven, neatly dressed, and healthy. The only mark of his repeated incarcerations were two missing teeth lost in a fight. He spoke clearly and thoughtfully about his past. Justin went to jail for the first time when he was seventeen. He was charged with underage drinking, and because of a change in New Hampshire's law that lowered the age of delinquency from 18 to 17,[46] Justin was charged as an adult. Ironically, Justin was too young to drink alcohol legally, but old enough to handle an adult correctional facility. This was Justin's first time in the criminal justice system. When he went in front of the judge to have his bail set, Justin was released on the condition that he "obey his parents."

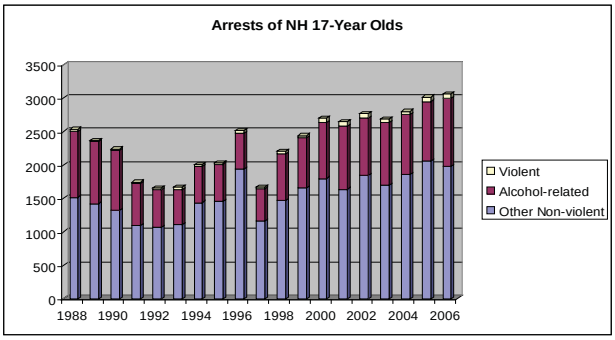
Justin's path into the "no-man's land" between the juvenile and the adult system started with just the sort of "stupid mistake"—underage drinking—that proponents of the bill had said would not be covered by the bill.

Justin grew up in a trailer park with his brother, sister, mother, and father. He describes himself as a quiet child, "a mother's boy" who got into trouble for small things like not cleaning his room. He had a difficult relationship with his father, who had little tolerance for any misbehavior, and would punish Justin by making him stand in a corner facing the wall for 12 hours at a time. Justin describes his relationship with his mother as close, and she apparently often protected Justin from his father's anger.

His two siblings were popular, while Justin was more of a loner. In his early teens, Justin's aunt and uncle died, and Justin's mother took in their young children. Over the next few years, Justin's home life unraveled. His mother began using drugs and went to rehab. His father kicked Justin out of the house, and he went to stay with relatives.

At age 16, Justin discovered alcohol and remembers that he "loved it." The feeling he got when he drank allowed him to "be someone he couldn't be before." When he was drinking, he felt socially connected. At 17, Justin left his aunt and uncle and moved back home. Eventually he and his father began to argue again, and he was again asked to leave. With nowhere to live—he was too young to go to a shelter but too old to be treated as a juvenile—Justin started living in his car. It was there that his sister spotted him drinking one night and called the police. The police arrested Justin for underage drinking. At his bail hearing, the judge allowed him to be free but required that he live with his parents and "obey them."

Figure 5



What Happened in New Hampshire after the Bill Passed

The lower age at which a child could be treated as an adult came into effect in January 1996. The claim that the law would somehow curb violent crime committed by 17-year-olds has not turned out to be the case. As Figure 5 demonstrates, there was no significant change in the number of violent crime arrests for 17-year-olds. These teenagers continued to com-

mit violent crime at roughly the same rate, the only difference being that they were now treated as adults instead of juveniles. In fact, between 1996 and 2005, there has been a steady climb in the number of violent crime arrests of 17-year-olds (Figure 5).[47]

Even more significant are the large number of arrests for non-violent crimes, in particular alcohol-related arrests.[48] All of these lesser offenders have been processed through the adult court, where their access to treatment, school support, and counseling programs is limited if not non-existent. In juvenile court, judges have the ability to bring in social workers, school representatives, and even parents. Thus, the overall upshot of lowering the age to 17 has been that many youths who have committed "stupid mistakes," such as underage drinking, end up in the stigmatizing and more punitive adult system—a system where they lose their privacy and quite probably access to treatment that would divert them out of the system at an early age.

In 2002, the NH legislature took up a proposal to raise the age back to 18.[49] Legislators acknowledged that the original goals of the bill had not been accomplished and that the claims supporting the bill had been overblown or exaggerated.[50] Lowering the age to 17 had, it turned out, many unintended or collateral negative consequences. For example, incarcerated 17-year-olds in need of medical care had to get their parents' permission to receive treatment. Seventeen-year-olds discharged from a juvenile facility without a place to live ended up homeless, and shelters could not legally take them in. They were unable to obtain food stamps, sign leases, or go on welfare. [51] Recent developments in science and brain imaging strongly suggest that the adolescent brain's inability to make adult-like decisions presents mitigating factors that should impact policy on consequences and punishment for crimes.[52]

In addition to the many other negative consequences of the bill, it is likely that, as Figure 5 above shows, lowering the age to 17 caused more crime then it deterred. Although there are no specific studies in New Hampshire, there have been numerous studies in other jurisdictions.[53] The overall conclusion of these studies is that processing juveniles in the adult system increases rates of violence among the young offenders.[54] Moreover, the type or length of sentence does not seem to make a difference; the fact that juveniles are processed in adult versus juvenile court increases the likelihood of reoffending.[55] Explanations for this are numerous. The prevailing view is that punitive consequences instead of rehabilitative treatment end up influencing youthful offenders to commit more, rather then less, crime. In the midst of their "formative" years, these adolescents are easily swayed by their environment. [56]

In general, all of the studies done to date indicate that transferring a juvenile to adult court increases the chances of recidivism.[57] This is true even when juveniles are not incarcerated, but go on probation.[58] Moreover, in at least one study, the recidivism rate for juveniles who commit violent crimes is high—24 percent of transferred juveniles, compared with 16 percent of retained juveniles.[59]

Youths who exhibit delinquent behavior likely have social deficiencies and lack healthy human bonds and structure in their environment. Putting 17-year-olds through the adult process ultimately exposes malleable and easily influenced young people to more powerful, often seductive forces. Youths in adult versus juvenile facilities are left to their own devices where they congregate with other inmates as opposed to a juvenile facility where staff is more involved with residents.[60] This was certainly the experience Justin had.

Justin

Justin went to jail for the first time when he was 17. After his initial arrest for alcohol possession, Justin returned home. He had a few more run-ins with police over alcohol possession. He was arrested for possession of marijuana at school. Initially, he received a summons for the possession, but when his parents found out about the charge, they fought, and ultimately had Justin's bail revoked. Still only 17, he stayed in a county correctional jail for three months. The place was loud and scary, he recalls. As soon as he fell asleep, other inmates threw wet toilet paper at him. Although the correctional officers ignored him, an older inmate, who said that Justin reminded him of his own son, took Justin under his wing and from then on, the other inmates left him alone. He was offered no treatment and no education. He remembers that it was during this time that he first felt depressed. He had been lonely before, but never depressed.

After his release, Justin went back to live with his parents. He took two full-time jobs and tried to "do the right thing," at least for two months. Before long,

he started to argue with his parents again, and they called his probation officer. More rules were instituted, but eventually, his parents kicked him out, his probation officer violated him, and he returned to jail. Justin recalls that this time he felt more comfortable in jail. He was released the day before his 18th birthday, so he was able to go into a homeless shelter this time. He worked at night and went to school during the day.

This time, Justin's undoing started when he connected with some friends he had made while in jail. They were a little older than he and into drinking. It was an incident with "friends" from jail that led to Justin's broken front tooth. At 18, some of these "friends" jumped Justin, robbed him, tied him up, and locked him in the trunk of a car. He was able to escape because the car was equipped with a child safety lock.

For the next couple of years, Justin went in and out of jail. He went into an alcohol treatment program, but he did not take the treatment "seriously." He started using heroin before his 20th birthday, and at that point he "stopped caring." Drinking and doing heroin helped him cope with feeling alone. His friends from jail, for the most part, provided his only social connection.

By his 21st birthday, Justin had been arrested more than 40 times and convicted at least 10 times. All of the offenses were related to his drinking—just the kinds of "stupid mistakes" that the original proponents of the bill promised it would not cover. Justin spent his 21st birthday in jail. At the very least, he said, when he got out he would no longer be arrested for underage drinking.

The Economics

Transferring juveniles to the adult system shifts financial responsibility. Whether it is more or less expensive to treat 17-year-olds as adults is a subject of debate. On the one hand, rehabilitative and community services for adolescents can be very costly. Treating 18-year-olds as adults is costly if they are in jail, but if they are not in jail, the overall costs go down because the probation services offered are not as extensive as they would be if rehabilitative services were offered. However, the long-term costs of treating juveniles as adults can end up costing much more because of all the residual effects of failing to provide services and support during a formative period of a child's development, incarceration and the overall stigma take an emotional toll on a youth.[61] Because juvenile cases are more carefully managed and individualized they are more expensive, but it is those same reasons that likely lead to fewer juveniles coming back into the system.

In New Hampshire, proponents of raising the age when a juvenile goes into the adult system back to 18 have tried and failed to get a bill passed almost yearly since 1995. In 2006, the legislative committee considering the change heard testimony that the state juvenile detention facility was under capacity, but that because of fixed costs, the facility was essentially losing money. [62] States such as New York and Wisconsin are considering raising the age back based largely on the increased costs (both fiscal and societal); Connecticut recently passed legislation raising the age back to 18.[63]

Treating juveniles more punitively was, essentially, an over-reaction led by politicians and lawmakers who were pandering to voters' media-driven fears about juvenile crime. The passage of time and a closer look at the real data demonstrate that the fears were not justified, and that juvenile crime was not surging. Public opinion on the issue has shifted and now leans towards treating juveniles as juveniles.[64] Indeed, according to one poll, public opinion supports the notion of rehabilitation and treatment of juveniles as a means to save tax dollars.[65] Similarly, the public seems to recognize that incarcerating youths leads to more, not less, crime.[66]

Justin's story is a powerful illustration of the failure of the law—as powerful as the anecdotes used by the proponents to get the bill passed. More powerful perhaps because unlike the few violent crimes that led legislators to change the law, the stories of youths like Justin are numerous. One need only look at the number of youths charged as an adult with crimes like alcohol possession (Figure 5) to get a sense of how many were affected by the law.

Justin Today—at 21

After being released from the county correctional facility, Justin is homeless. He is staying at a homeless shelter, eating at a soup kitchen, and looking for work. Without a cell phone or an address, giving prospective employers contact information is impossible. He goes to AA meetings and tries to stay away from the people he knows will get him back into drugs and alcohol. He has no real job skills and a very meager support system. Nevertheless, he is optimistic. He feels as though he can do it this time. He wants to go to college (he got his GED in jail) and become a drug and alcohol counselor. ◎

Professor Amy Vorenberg teaches legal skills and criminal law at Franklin Pierce Law School in Concord, New Hampshire. Before becoming a professor, she was a prosecutor in New York City and in New Hampshire. In 1993, she left prosecution and started the Criminal Practice Clinic at Franklin Pierce. The clinic provides legal assistance to indigent criminal defendants. She directed the clinic until 1997;since leaving the clinic, she has been teaching at Franklin Pierce.

Endnotes

1 I extend my thanks to Roger Wellington, Professor Kimberly Kirkland, Eliza Vorenberg and Elizabeth Vorenberg for their input, support and editing. I am deeply appreciative of the time Justin took to share his experiences with me. Finally, to my research assistant, Caroline Schleh, my sincere thanks for the many hours, the enthusiasm and the interest in this project.

2 Another example is the case of Terry Schiavo, a comatose Florida woman whose husband battled with his in-laws to remove his wife's feeding tube. After widespread publicity, the case lead to the passage of legislation in the U.S. congress called "The Palm Sunday Compromise" that allowed the matter to be transferred to federal court.

3 James T. Campbell, *Teen crime wave on rise; Recent slayings offshoot of increase in violence,* The Houston Chronicle, Sept. 20, 1991, at A1.; David A. Avila, *Juvenile Crime Rising Sharply,* Los Angeles Times, Aug 25, 1992 at B1; Fred Robinson, *Combating Youth Crime; Getting Tough is Necessary but it's Not Enough,* The Atlanta Journal and Constitution, July 29, 1994 at A14. The term "super-predator" was promoted by John Dilulio, Jr., a criminologist who warned of a surge in juvenile violence. *The Coming of the Super Predators, The Weekly Standard, November 27, 1996 at 23.*

4 Mich.Comp.Laws.Ann .Sec. 712A.2; Frank E. Vandercourt, William E. Ladd, *The Worst of all Possible Worlds: Michigan's Juvenile Justice System and International Standards for the Treatment of Children,* 78 U. of Detroit Mercy L. Rev. 203, 227 (2001).

5 Michigan State Police Uniform Crime Reports, 1997.

6 Treating juveniles in a separate but parallel system dates back to 1899, when Illinois developed the first Juvenile Court.

7 *State Statutes Define Who is Under the Jurisdiction of Juvenile Court*, Juvenile Offenders and Victims: 2006 National Report (DOJ, Office of Juvenile Justice and Delinquency Prevention) at 103.

8 N.H. Rev. Stat. § 628:1(2002) (Children age 13 or older may be charged for certain offenses including murder, rape and kidnapping).

9 § 169-B:2.

10 § 169-B:2.

11 *Id.*

12 § 169.

13 http://www.disastercenter.com/crime/nhcrime.htm.

14 *N.H. Judge Rules on Youth's Trial*, Bos. Globe May 19, 1988, at 30.

15 N.H. Rev. Stat. § 628:1.

16 Norma Love, *N.H. Foes Question How Juvenile Law to be Carried Out*, Bos. Globe, May 13, 1988, at 21 (Merrill accused of "stirring up lawmakers' emotions to attract publicity for an eventual political career. Merrill denies he plans to run for office.").

17 *Id.*; Laura Kiernan, *Attorney General in N.H. Quits, Merrill Prepares to Open a Private Law Firm*, Bos. Globe, Jan. 11, 1989 at 17. ("Merrill, who now lives in Manchester, yesterday did not rule out a political future.").

18 Jordan Rau, *Reform is on the Way, But Will it Work*? Conc. Mon., Feb 15, 1995 at A-1. ("As [Governor Merrill] campaigned for re-election last year, he said, he became convinced that young people do not respect the juvenile system.").

19 In New York State's 1978 race for governor, Hugh Carey proposed similar changes in juvenile law. At the time, he was facing a close race for reelection and he had been accused of being soft on crime. In response he proposed the most punitive delinquency laws in the country. *The Changing Borders of Juvenile Justice*, Fagan et al page 354; Proposition 21, the California initiative that expanded criminal jurisdiction of juveniles was widely believed to be the result of Governor Pete Wilson's ambition to become a Republican presidential candidate. Elizabeth Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 103 (Harvard University Press 2008).

20 *Changing the Age for Application of the Delinquency Provisions from 18 to 17: Hearing on HB 52 Before the H. Comm. on Corrections and Criminal Justice*, 1995 Leg. Sess. (N.H. 1995). (Testimony of Governor's Counsel, Tina Nadeau).

21 *Changing the Age for Application of the Delinquency Provisions from 18 to 17: Hearing on HB 52 Before the H. Comm. on Corrections and Criminal Justice*, 1995 Leg. Sess. (N.H. 1995). (Rep. Donna Sytek).

22 *Id.* (Statement of William Lyons, Attorney General's Office).

23 State of NH Dept. of Safety – Uniform Crime Reporting.

24 *Changing the Age for Application of the Delinquency Provisions from 18 to 17: Hearing on H.B. 52-FN-L, Before the H. Comm. on Corrections and Criminal Justice* 1995, Leg. Sess. (Minutes).

25 *H.B. 52-FN-L* (Testimony of Chief Stephen Monier, Chief of Goffstown, NH police Department).

26 Public Hearing on HB 52 March 7 1995, Minutes (Testimony of NH Gov. Stephen Merrill).

27 *Id.* (Testimony of William Lyons, NH Asst. Atty. Gen'l).

28 As the bill to lower the age left the House committee on its way to a vote, the minority report, supported by 7 members of the 21- member committee was filed. Questioning the governor's stated intent to crack down on juvenile violent offenders, the report noted that only 2.4 percent of juvenile offenders were violent. *Changing the Age for Application of the Delinquency Provisions from 18 to 17: Committee Report on H.B. 52-FN-L, Before the H. Comm. on Corrections and Criminal Justice*, 1995 Leg. Sess.

29 New Hampshire Uniform Crime Reports.

30 *Id.*

31 A 1999 article posted by the Urban Institute noted that the public outcry about the increase in violent juvenile crime in the late 1980s and early 1990s was based on misperceptions. The data reflect an increase in arrests for both juveniles *and* youth adults (ages 18 to 23). "This is clear if we examine actual increases in the number of murder arrests rather than the rate of murder arrests. The entire increase in murder arrests between 1980 and 1994 was due to growth in arrests among young people, but adults (ages 18–23) and juveniles (ages 13–17) were equally responsible for the increase. www.urban.org/publications/410402.html#anim2_return (May 1999).

32 Jeffrey Butts and Jeremy Travis, Urban Institute Justice Policy Center Research Report, *The Rise and Fall of American Youth Violence 1980-2000* p. 3 (2002).

33 US. Dept. Just., FBI, *Crime in the United States* (Sept. 2007). Retrieved (Dec. 2008) from http//www.fbi.gov/ucr/cius2006/.

34 *Id.*

35 Elizabeth Scott and Laurence Steinberg suggest that the juvenile crime policy of the early 1990s was driven by a perceived threat that was reinforced by politicians, the media, and the public resulting in an exaggerated response. Elizabeth Scott, Jeffrey Butts, *Rethinking Juvenile Justice*, p. 10.

36 Mark Solar, *Public Opinion on Youth, Crime and Race: A Guide for Advocates*. Building Blocks for Youth. http://www.buildingblocksforyouth.org/advocacyguide.pdf., (2001) p. 12.

37 *Id.* at 13.

38 Jeffrey Butts and Jeremy Travis, Urban Institute Justice Policy Center Research Report, *The Rise and Fall of American Youth Violence 1980-2000* p. 3 (2002); Steven Levitt, Stephen Dubner, *Freakonomics*, 4 (William Morrow ed., Harper Collins (2005). (Suggesting that the legalization of abortion in 1973 led to fewer births of children born into adverse circumstances who would be more likely to grow up and engage in criminal behavior).

39 § 169

40 *Id.*

41 *Changing the Age for Application of Delinquency Provisions From 18 to 17*: *Hearing on HB-52-FN-LOCAL Before The Senate Committee on Judiciary*, 1995 Leg. Sess. NH 1995). Statement of Asst. Atty. Gen'l William Lyons-Attachment #2.

42 *Id.*

43 http://www.usdoj.gov/ndic/index.htm at 8.

44 *Id.* at 1.

45 Not his real name.

46 *Delinquent Children*, 12 N.H. Rev. Stat. Ann. § 169-B:2 (2002).

47 NH UCR.

48 "Alcohol related" arrests include arrests for Driving Under the Influence, Drunkenness and Liquor Law Violations.

49 *Relative to raising the age of minority for purposes of juvenile delinquency proceedings from 17 to 18 years of age. Hearing on HB -179-FN Before The House Finance Committee*, 2002 Leg. Sess. NH 2002). The bill was ultimately defeated. Similar legislation failed to pass almost every year since.

50 *Id*. Testimony of State Representative David Bickford.

51 *Relative to raising the age of minority for purposes of juvenile delinquency proceedings from 17 to 18 years of age. Hearing on HB 179 Before House Finance Committee*, 2002 Leg. Sess. NH 2002). (Statement of Cynthia Herman representing Child and Family Services).

52 See Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences, and Juvenile Justice,* 2005 Utah L. Rev. 695 (2005).

53 Angela McGowan et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System: A Systematic Review,* 32 Am J Prev. Med Issue 4 S7-S28 (April 2007) (compiling and evaluating data from studies based on New York City, Minnesota, Florida, Pennsylvania and Washington).

54 *Id.*

55 Donna Bishop & Charles Frazier, *Consequences of Transfer* in *The Changing Borders of Juvenile Justice; Transfer of Adolescents to the Criminal Court,* 260-261 (Jeffrey Fagan, Franklin E. Zimmer, eds., U. Chicago Press 2000).

56 *Id*. at 263 (Bishop and Frazier's comprehensive review of the data regarding effects of juvenile transfer to adult court includes interviews with offenders who were prosecuted in adult court. The youths experienced the court process "not so much as a condemnation of their behavior as a condemnation of them").

57 Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* OJJDP Juv. Jus. Bulletin Aug. 2008 at 6. This article provides a thorough summary of the studies done to date on recidivism rates among juveniles who have been transferred to adult court.

58 *Id.*

59 *Id.*

60 Donna Bishop & Charles Frazier, *Consequences of Transfer*, *supra* at 257.

61 See Scott& Steinberg, *Rethinking Juvenile Justice, supra note 20 at* 219-220.

62 *Including Persons 17 Years Old in the Juvenile Justice System: Hearing on HB 627-FN Before the H. Comm. On Finance*, 2006 Leg. Sess. (N.H. 2006) (Rep. David Bickford).

63 C.G.S.A. § 46b-120 (2007).

64 Barry Krisberg, Susan Marchionna, *Attitudes of U.S. Voters toward Youth Crime and the Justice System*, Nat'l. Council on Crime and Delinquency, Feb. 2007. (Reporting on a Zogby International poll about American attitudes toward our nation's response to youth crime).

65 *Id.* at 3 (Over 80 percent of respondents believe that spending on enhanced rehabilitation services for youth in the juvenile justice system will save tax dollars in the long run. In comparison, only 1 in 7 (14 percent) disagrees).

66 *Id.* at 4.

The Michigan Child Welfare Law Journal Call for Papers

The Michigan Child Welfare Law Journal
Call for Papers

The editorial board of *The Michigan Child Welfare Law Journal* invites manuscripts for a special issue regarding current issues in the field of child custody. 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 April 15, 2009. Manuscripts should be submitted electronically to *kozakiew@msu.edu*. Inquiries should be directed to:

Joseph Kozakiewicz, Editor
The Michigan Child Welfare Journal
School of Social Work
238 Baker Hall
Michigan State University
East Lansing, MI 48823
kozakiew@msu.edu
(517) 432-8406

Fathers' Perception of Bias in Michigan's Family Courts

Some thoughts arising out of the 13th Annual Batterer's Intervention Services Coalition of Michigan, and the 1st Annual Michigan Fatherhood Policy Forum

by Hon. Jon A. Van Allsburg, 20th Circuit Court[1]

Are Michigan's family courts biased in favor of mothers? Many who work in the justice system would say "no," pointing to Michigan's gender-neutral laws that focus on the "best interests of the child," the right of every child to have "a close and continuing relationship with both of his or her parents," and the legal presumption that parents should be awarded joint custody of their children.[2]

It's also a fact that mothers most often receive physical custody of their children after a divorce or separation because of the parents' own agreement, not the decision of a judge, referee, or Friend of the Court caseworker. Most divorce and custody cases—as is true with civil cases in general—are settled by the parties before trial. In Ottawa County, many divorce actions begin with an agreement for a temporary custody order, reached at a "coordination conference" mediated by a Friend of the Court representative with both parents present, before any court hearing is ever held. This fact, however, doesn't resolve the concern over bias—some settlements are reached when one party simply concedes, believing that a better result is unobtainable.

The perception of bias was brought home to this judge at the Michigan Fatherhood Policy Forum, held on September 19, 2008. This conference was the first of its kind in Michigan, and was jointly sponsored by a number of state, federal, and private agencies and organizations.[3] The 150 or so attendees consisted of 4 state lawmakers, 19 judges, clergy members, service providers, and representatives of the state, federal, and private sponsoring agencies, as well as many fathers who related their sometimes harrowing stories of family dysfunction, made longer and more difficult by their biased treatment in the judicial system.

Sources of Perceived Systemic Bias

While many examples of actual bias were reported, let's look at examples of unintentional, systemic bias. We should first acknowledge that some of the unequal treatment of fathers is biological, and unavoidable. Children are born to mothers, who are always present at the birth, and who are therefore (almost always) known. Fathers may not even know that they are fathers, and even those who know and are looking forward to the birth of a child do not have the right to be present at the birth. Between unmarried parents, the father (whom we call the "putative" father) has no rights until his paternity has been legally established. If an Acknowledgement of Parentage is not signed by both parents voluntarily, a paternity case is required, and if the mother is uncooperative, the process of establishing paternity can take months.[4] Until paternity is established by court order, the putative father has no rights of parenting time.

The majority of paternity cases and family support cases[5] are filed after the mother applies for State benefits for the child, such as Medicaid, Food Stamps, or childcare assistance. This triggers a requirement that she cooperate in establishing the father's child support obligation.[6] Paternity and family support cases start with the mother's referral to the prosecutor's office, which then files the paternity or family support action. The father is served with the complaint, and is given notice of a referee hearing. Here's his typical experience:

- At the first court hearing, in front of a referee, the putative father finds the child's mother sitting with the prosecuting attorney. He has no attorney there unless he retained one at

his own expense. However, since an indigent paternity defendant is entitled to a court-appointed attorney, the hearing is adjourned if he wants one, and the appointed attorney will be present with him at the next (second) hearing.

- If he waives an attorney (or at the next hearing), he will be asked if he admits that he's the father of the child. If he doesn't know, denies it, or asks for a paternity test, then genetic testing is scheduled. If he admits that he's the father, no test is ordered, and none may ever be done.
- Once paternity is established, either by Acknowledgement of Parentage, by admission in court, or by testing, the referee then continues the hearing[7] for the purpose of setting child support. Both parents are asked to produce paystubs, W-2 forms, and tax returns, and support is set using the Child Support Formula.
- If the father asks for joint physical custody, or even joint legal custody, he's generally told that he'll have to file a separate Petition for Custody, pay the $100 filing fee,[8] and ask the judge to order a custody investigation and recommendation by the Friend of the Court. This can take anywhere from two months (in Ottawa County) to two years, depending on the court's caseload and other factors. Nearly all initial orders in paternity and family support cases grant legal and physical custody of the minor child to the mother.
- If the father asks for parenting time, he'll be directed to the "standard" paragraph in the paternity order, which states that he has "reasonable rights of parenting time as the parties mutually agree." If they don't agree, either party may ask the Friend of the Court to mediate the dispute and recommend a parenting time schedule. However, the recommendation isn't binding, and if the dispute continues, the father must then file a Motion for Parenting Time, pay the $100 filing fee, and schedule a hearing in front of the judge. Again, depending on the caseload of the particular court, this can take two weeks to two months, and the length of time allocated for the hearing may be a half-hour, or five minutes.
- By the time a father's paternity has been established, and he files a motion for custody, the child has often been in the mother's exclusive care for long enough to create an "established custodial environment," which means that the "preponderance of the evidence" burden of proof no longer applies. He'll then have to prove that a custody change is in the child's best interests by "clear and convincing evidence," which is a difficult standard to meet, particularly in the case of a father of a young child who hasn't been given much time or opportunity to establish a strong bond with the child.
- If the father is unable to exercise parenting time because of conflict with the child's mother, he may conclude that the court and the Friend of the Court are far more interested in collecting support from him than in enforcing his parenting time. He will not be surprised to learn that federal law provides for reimbursement of Friend of the Court operating expenses based upon its success in collecting child support, but doesn't even track parenting time enforcement. He will also quickly see that the Michigan Child Support and Parenting Time Enforcement Act provides equal penalties of up to 90 days in jail for violating a child support or parenting time order,[9] yet there are dozens, if not hundreds, of payers in jail for non-payment of child support for every one parent sent to jail for violation of a parenting time order.

It's no wonder that one father in the Forum said that the Friend of the Court reminded him more of the "friend of his ex-wife." It has also become apparent that, in spite of good intentions, there remain plenty of examples of unintended bias in the system, as well as delays that work to the disadvantage of fathers who want to be involved in the lives of their children. At the same time, there are multiple studies supporting the proposition that children with two involved parents are less likely to be involved with the law, less likely to commit suicide, less likely to drop out of school, and less likely to suffer from depression or mental illness.

Domestic Violence–the Elephant in the Living Room

The elephant in the living room—the factor that explains some of the dichotomy between the recognized need for fathers in children's lives and the perceived failure of the judicial system to accommodate this need—is domestic violence. Domestic violence is all too common,[10] and where it is present, the consideration of what is in the best interests of the child is rightly replaced by a "safety first" approach. Michigan law, however, does not permit a "safety *only*" approach, even where domestic violence has occurred. Judges are required to "accommodate" existing custody and parenting time orders when issuing a personal protection order.[11] Further, judges may not deny parenting time unless there is "clear and convincing evidence" that it will cause physical, mental, or emotional harm to the child (but may impose conditions upon parenting time, such as supervision, etc.).[12] Unfortunately, at least four out of five domestic violence perpetrators are men, and the majority of fathers who are not violent sometimes have to deal with the suspicion or the allegation that they fall within the violent minority.

This tension has been apparent in the previous lack of communication between domestic violence prevention organizations and fatherhood organizations. Domestic violence prevention and batterer's intervention programs date back 30 years or more, and have made hard-won gains in recognition as well as in federal and state funding for their efforts. They have been loathe to share those gains with fatherhood organizations.

The improvement in communication made evident at the first Fatherhood Forum stems from mutual recognition and acknowledgement. Dr. Oliver Williams presented his analysis of the rough distinctions among the fatherhood organizations that have arisen over the past 10 to 15 years:

- "Father's Rights" Organizations—these organizations focus on fighting the perceived bias in the judicial system. These organizations tend to be more militant, less likely to acknowledge the impact or incidence of domestic violence, and use concepts of "parental alienation" in custody and parenting time disputes. At best, these organizations may simply be marketing tools for attorneys seeking to recruit male divorce clients; at worst, they are shields and excuses for abusive men seeking custody and parenting time.
- "Father Involvement" groups—the poster child for this category is PromiseKeepers, the Christian men's organization that seeks to turn the hearts of men toward their wives and children. Domestic violence advocates look on these groups with suspicion, focusing on that part of the Bible that calls for wives to "submit" to their husbands, and husbands to be "the head of the wife."[13] However, as Dr. Williams advised, "Read the rest of the chapter." The passage goes on to state that husbands should love their wives as themselves, and give themselves up for their wives as Christ gave himself up for the church[14]—a call for servant leadership, not command and control.
- "Responsible fatherhood" groups—these groups were promoted at the Fatherhood Forum as groups that work to improve men's parenting skills. Recommended curricula from these groups include "Proud Fathers—Proud Parents," which is being used in multiple locations across the state, including Kent County. These groups are also government-sponsored, through sites such as the National Responsible Fatherhood Clearinghouse (www.fatherhood.gov).

Some Suggestions for Improving Perceptions and Outcomes

Many proposals for improving performance and perceptions were discussed at the conference, including:

- "Proud Fathers—Proud Parents" and other programs include domestic violence awareness components, and also help to improve fathers' parenting skills.
- The Michigan Department of Corrections (MDOC) promoted the organization "Fathers Behind Bars," on behalf of thousands of incarcerated fathers who will be re-entering Michigan communities over the next several years. MDOC also promotes increased parenting time for incarcerated fathers.
- MDOC is promoting a change in federal law to deal with support arrearages that become unmanageable during incarceration, and

become barriers to successful prisoner re-entry after release. State law (MCL 552.517(1)(b)) requires the FOC to review support if a party is incarcerated and sentenced to a term of more than one year. This provision does not require suspension of child support. However, this is frequently the result of the FOC review, because the court of appeals has held that where a noncustodial parent is imprisoned for a crime other than nonsupport, that parent should not be liable for child support while imprisoned unless it is affirmatively shown that he or she has the income or assets to make such payments. Ottawa and Muskegon counties' method of dealing with this, by pro-actively inserting an automatic suspension provision in all support orders, was well-received by MDOC representatives in attendance. MDOC also proposed sharing with FOC its prisoner information as to bank accounts or other assets available to pay support in those cases where it exists.

- It was suggested that judges and referees should be pro-active in addressing custody and parenting time issues from the bench, during the initial hearing, rather than just rubber-stamping an initial order that enshrines a "one-parent-friendly," rather than a "two-parent friendly," order.
- Many of the fathers present at the conference argued that improved enforcement of parenting time orders would improve collection of child support payments, as their incentive to pay child support declines significantly when their parenting time is subject to repeated denial or interference. ◎

Endnotes

1 The issues discussed here represent the issues raised and views expressed at these conferences, and do not necessarily reflect the views of the author or the 20th Circuit Court.

2 Ottawa County, specifically, points to its record in custody disputes over the past two calendar years. Court records show that, of those custody cases not settled by the parties before trial, the Friend of the Court recommended joint legal and joint physical custody in about one-third of the total cases, recommended primary custody to fathers in another one-third of those cases, and recommended primary custody to mothers in the remaining one-third of those cases.

3 The federal Department of Health and Human Services, the Michigan Department of Human Services, the Office of the Governor, the Governor's Office of Community and Faith-Based Initiatives, the Michigan Department of Corrections, the Batterer Intervention Services Coalition of Michigan, the Michigan Domestic Violence Prevention & Treatment Board, Michigan Action for Youth and Families, the Michigan Fatherhood Coalition, and the Midwest Center on Workforce and Family Development Inc.

4 If the putative father is uncooperative, the process doesn't take long. If the putative father avoids personal service of notice of the complaint, the prosecutor will request and the court will often grant an order for "substituted service," allowing the father to be served by mail, or even by legal notice in the newspaper. If the father fails to show up for the hearing, or fails to show up for scheduled genetic testing, he'll be found to be the father by default, and a paternity/support order will be entered, finding him to be the legal father.

5 In Ottawa County in 2007, there were 163 new paternity cases filed, and 300 family support actions.

6 Where State benefits are being paid, the first $50 per month in child support goes to the mother, and the rest goes back to the State to reimburse the taxpayers for the benefits being provided.

7 This may be the second or third hearing, depending upon whether prior hearings have been adjourned to obtain legal counsel or genetic testing.

8 Any court filing fee can be waived if the filer is indigent, with approval of the judge, by filling out and filing an "Affidavit and Order for Suspension of Fees" form, available from the Court Clerk.

9 Penalties for violation of a support or parenting time order can include fines, costs, make-up parenting time, and incarceration for up to 45 days on a first offense, or up to 90 days on a second or later offense.

10 In Ottawa County in 2007, there were 494 new divorce actions filed involving minor children, and there were 465 domestic personal protection orders requested. Available data does not indicate the extent to which these categories overlap.

11 MCR 3.706(C)(2).

12 MCL 722.27a.

13 Ephesians 5:22-24.

14 Ephesians 5:25-33.

An Overview of the 2008 Child Support Formual

by Kent L. Weichmann

Background

On December 23, 2003, the Michigan Supreme Court issued Administrative Order 2003-22, directing the State Court Administrative Office to implement the 2004 Michigan Child Support Formula. On the same date, Chief Justice Corrigan sent a public letter to the governor and both houses of the legislature stating that the revision of the Child Support Formula was an inappropriate task for the Court. She asked that the statutes placing that duty in the Court be revised to place the duty in the legislative or executive branch. The Court then disbanded the State Court Administrative Office's Child Support Formula Subcommittee and awaited action by the legislature.

The Family Law Section felt that there were many problems that were not resolved in the 2004 MCSF, and proposed legislation to create a child support review commission. Unfortunately, the legislation was not even introduced until the closing weeks of the 2006 session, leaving no realistic opportunity for passage. The SCAO, recognizing that the duty was still statutorily with their office and fearing federal funding sanctions if the quadrennial review was not performed, undertook the review on a fairly tight schedule. The SCAO brought together representatives from the Friend of the Court, the Family Law Section, prosecuting attorney offices, Office of Child Support, the Referee Association of Michigan, and MICSES. The review focused on correcting known problems with the formula, simplifying the manual, easing case administration, and making the provisions more consistent.

The working committee was able to reach consensus on a broad range of issues, and the result was forwarded to the Supreme Court for review. In late November 2007, the 2008 MCSF was approved for publication, with an effective date of October 1, 2008. The new formula manual and supplement are available at http://courts.michigan.gov/scao/resources/publications/manuals/focb/2008MCSFmanual.pdf and http://courts.michigan.gov/scao/resources/publications/manuals/focb/2008MCSFsupplement.pdf .

What's new?

The manual has been reorganized.

The 2008 MCSF explicitly separates the manual portion, which contains policies and methodologies, from the supplement, which contains the tables of figures. This should allow the supplement to be updated (e.g., indexed for inflation) without requiring a review of the entire MCSF.

The 2008 manual eliminates some sections of the 2004 MCSF, and includes them in more general rules. For example, 2004 MCSF 2.11, Special Considerations in Determining Income, is now subsections (D) and (E) of 2008 MCSF 2.01, Income. The 2008 manual recognized that some sections detailing exceptions to general rules were more properly viewed as deviation criteria. 2004 MCSF 2.16, dealing with stepchildren, becomes a deviation factor in 2008 MCSF 1.04(E)(12); 2004 MCSF 2.03(c) (children's income) becomes 2008 MCSF 1.04(E)(13), etc. Other parts of the 2004 manual were eliminated due to changes in policy. There is no section on parenting time abatements, 2004 MCSF 3.06, because parenting time abatements are eliminated in the 2008 manual.

The 2008 MCSF manual includes a page listing major changes in the manual, but it doesn't provide a comprehensive cross-reference of 2004 sections to the 2008 manual. Finding the new location of old provisions (or discovering that they have been eliminated) may require using a search engine on the downloaded pdf file.

No more shared economic formula "cliff," no more parenting time abatements

One of the disappointments of the 2004 MCSF was that it retained the SERF cliff, the sharp drop-off in support from 127 annual overnights of parenting time (which did not qualify for SER), and 128 annual

overnights, which did qualify for the SER calculation. In many instances, support could drop by more than 30 percent for one additional overnight.

2008 MCSF 3.03 applies a new shared economic responsibility formula "parental time offset" to all cases, eliminating the drop-off of support that occurred at the threshold. All cases will now have parental time offsets built in to the support amounts, so no parenting time abatements will apply. This will relieve the Friend of the Court of the work of applying parenting time abatements, but it will require more work in calculating child support orders, because the annual parenting time is part of the calculation. This is especially true because 2008 MCSF 3.03(C) looks to the "number of overnights that each parent is likely to provide"; i.e., the amount provided in the order is not necessarily the amount used in the calculation.

2008 MCSF 3.03(B) provides that the parental time offset should be applied to all determinations of child support, whether or not previously given. This explicitly overrules *Gehrke v Gehrke,* 266 Mich App 391 (2005).

The anomaly for children in different custody arrangements is fixed.

The 2004 MCSF, and its predecessors, mandated an inappropriate method for calculating support where children were in different custody arrangements. The manual required an independent calculation of support for each custody arrangement, and totaled the support obligations. A parent paying support for two children in the other parent's exclusive custody could find that child support increased if one child started living with the paying parent part-time.

This problem would occur more frequently under the 2008 MCSF, because SERF applies to all cases. Thus, a child spending 52 overnights per year with a parent is in a different custody arrangement from a child spending 90 overnights with that parent. (Under the 2004 MCSF, both children would be deemed to be in the other parent's sole custody.)

Fortunately, the 2008 MCSF applies an easy and sensible method to these cases. The parenting time days for all children are averaged, and the support for all children is calculated based on that average. For example, if Child 1 spends 200 overnights with Parent A, and Child 2 spends 120 overnights with that parent, support would be calculated for two children spending 160 overnights. This is a much easier calculation, and provides rational results.

The calculation for obligations to other children is radically simplified.

The 2004 MCSF treated legal obligations to other children differently, depending on whether there was a child support order, in which case it was deducted from income, 2004 MCSF 2.13, or if the children were living with the parent, in which case a percentage was deducted from the parent's income, based on half of the normal support percentage, 2004 MCSF 2.15. If there were multiple children in and out of the parent's household, multiple calculations would need to be made. There was also an advantage in being the earliest child support case to be considered, because there would be more net income available before other support orders were entered or adjusted.

The 2008 MCSF does not distinguish between other children living in the parent's household and children under another support order. Nor does it consider the amount of support ordered for other children. Under 2008 MCSF 2.08, a standard percentage is deducted from the parent's income based on the total number of other children, regardless of where the children are living or the actual ordered amount of support for those children.

This will be beneficial to parents whose support orders for other children are well below the formula amounts, because they will get credit for a standard amount of support. It will also help parents whose other children are living in their household, because the percentage deducted from their income is based on the full support amounts, rather than only half of that amount. The new method will disfavor parents whose other children live in multiple households, and who are paying full formula support. This method will make income adjustments much easier for the Court, and it will eliminate the advantage to being the earliest order under review.

Miscellaneous changes

Imputation—change in emphasis. Imputation is a necessary but controversial part of the formula. 2008 MCSF 2.01(G) refers to "potential income," emphasizing that the party must actually be able to earn the attributed income. The restrictions of 2004 MCSF 2.10(F), preventing imputation for persons receiving means tested income and requiring a significant drop in income, have been eliminated. 2004 MCSF 1.06, which required dual recommendations in imputation cases, has been dropped as well.

Poverty adjustment phase-in. For payers earning less than the federal poverty guideline, support amounts are reduced to 10 percent of that party's income. In previous formulas, 100 percent of any income over the poverty level was applied to child support until support reached normal levels. This removed the incentive for poverty level payers to increase their earnings. 2008 MCSF 3.02(D) phases in full support more gradually, so that the payer retains some of his earnings over the poverty level.

Child care—duty to notify of changes, standard end date. 2008 MCSF 3.06(D) establishes a presumption that child care will end at the end of summer break (August 31) following the child's 12th birthday. 2008 MCSF 3.06(E) requires the parties to notify each other of changes in child care costs, and to notify the Friend of the Court if the expenses cease.

For a comprehensive section-by-section analysis of the new formula, read Carlo Martina's "Review of Manual Changes." ◎

Overview of the Child Support Formula Manual Revisions Effective October 1, 2008

by Carlo J. Martina

After a seven-year effort, the Michigan Child Support Manual finally underwent some long-overdue changes. The purpose of this article is to address all of the changes made in the Child Support Formula Manual, as they appear. Not all of the structural changes in the Income section are dealt with in this article. Structural changes within the Income section of the manual were not meant to be substantive. Those changes in the income section that are substantive in nature are dealt with in this article.

1.04(E) Deviation Factors

While retaining all 11 of the previous deviation factors, the 2008 manual adds the following:

12. A parent provides substantially all of the support for a stepchild, and the stepchild's parents earn no income and are unable to earn income.

- This was taken from the 2004 manual's Section 2.16(B), which provided a table to be utilized to adjust net income. That, along with the table for "other minor children," was replaced by a single table to deal with additional children. (See discussion below).

13. A child earns an extraordinary income.

- This was also taken from the '04 manual, Section 2.03 "Children's Income."
- This issue is referenced in the '08 manual again, at Section 2.03(A), where it indicates: "A child's income should not ordinarily be considered in calculating child support."

The court orders a parent to pay taxes, mortgage installments, home insurance premiums, telephone or utility bills, etc., before entry of a final judgment or order.

- This was taken from the '04 manual, Section 2.14, "Ex Parte and Temporary Orders"; the difference, however, is that in the '04 manual, it indicates that such expenses "should be subtracted from that parent's net income." The '08 manual gives the court greater flexibility on how to consider those obligations, vis-à-vis child support obligations.

15. A parent must pay significant amounts of restitution, fines, fees, or costs associated with that parent's conviction or incarceration for a crime other than those related to failing to support children, or a crime against the child in the current case, or that child's sibling, other parent, or custodian.

- This is an entirely new section found in the '08 manual. A parent on probation who is forced to pay child support despite his income, in part being already redirected by another court's order, should not face felony non-support penalties, re-incarceration, and a further inability to be a productive child support payer, because the formula sets child support at an unattainable level.

16. A parent makes payments to a bankruptcy plan, or has debt discharged, when either significantly impacts the monies that parent has available to pay child support.

- This is also a completely new factor, which takes into consideration another court's order. Note: this factor cuts both ways, and presumably would allow a deviation up, where a parent's debts have been eliminated.

17. A parent provides a substantial amount of a child's daytime care and directly contributes toward significantly greater share of the child's costs than those reflected by the overnights used to calculate the offsets for parental time.

- This is also new in '08. If one parent merely provides a place for a child to sleep, while the other bears the bulwark of the work and

expense, the mere number of overnights should not be the dominant factor in determining an appropriate child support amount.

18. Any other factor the court deems relevant to the best interest of the child.

- A similar sentiment was found in the original '04 manual, in the prefacing sentence to the Deviation Factors, "In exercising the discretion set forth in this Section, the court may consider any or all of the following factors, as well as any additional factors that it determines to be relevant to the best interest of the child:" By isolating this as a separate factor, it makes clear to the court that 1-17 are not exclusive reasons for deviation.

2.01 Income:

The issues regarding determining income, 2.01 through 2.07, will be dealt with by James Harrington.

2.08 Additional Children from Other Relationships

The 2004 manual treats "other" children in a parent's household different from those for whom a parent pays support and provides a special adjustment table for children living in his household.

In an effort to simplify the formula and utilize a single method to consider the effect of other children, whether under a support order or already in a parent's household, a single adjustment multiplier would apply if there are additional minor children, whether biological or adopted. This helps equalize the percentage of income per child, and eliminates most of the disparity between support obligations in multiple cases.

Under 2.08(A), additional minor children include:

- Those from a relationship with someone other than the other parent in the case under consideration, or
- Those in common with the other parent in this case who live in a third party's custody, when determining support for children living with either parent, or
- Those in common with the other parent in this case who live with either parent, when determining support for other children in common who live in a third party's custody.

2.08(B):

When a parent has additional minor children (whether living in that parent's household or for whom the parent pays child support), net income for calculating support in the present case does not include the portion of that parent's income reserved for supporting those additional children calculated according to both of the following steps:

Deduct from a parent's income dollar for dollar the portion of that parent's health insurance premiums used to cover qualifying additional children. Calculate the premium deduction by dividing the premium by the number of individuals covered (including the parent) and multiply by the number of qualifying additional children covered.

The consideration of the cost of health insurance was also amended in '08.

After subtracting qualifying additional children's health care coverage costs, multiply that parent's remaining net income by the Additional Children's table's Adjustment Multiplier to determine net income to use for the present case.

Additional Children	
No. of Children	Adjustment Mulitplier
1	85%
2	77%
3	72%
4	69%
5	66%

Calculating Each Parent's Obligation Like the '04 Manual, a parent's child support obligation consists of:

1. A base support obligation (Section 3.02) *adjusted for parenting time* (Section 3.03) [the underlined portion being added in '08]
2. Medical support obligations that include ordinary and extraordinary medical expenses (Section 3.04), health care coverage and division of premiums (Section 3.05), and
3. Child Care Expenses (3.06)

Determining Base Support Obligations

As with the '04 Manual, the '08 Manual provides tables to determine the general/base child support for one, two, three, four, or five or more additional

children (adjusted using the August 2007 Consumer Price Index (CPI-Detroit)), by applying the same base percentage, and marginal percentages, to the net family income.

In order to fix the economies of scale disparity that existed between the different custodial arrangements to equalize obligations across multiple cases, to give essentially the same result in terms of child support, whether the children are in one or multiple cases, and to more easily spread increases in low income cases over all of the existing cases, the '08 manual gives a new directive.

3.02(A) provides:

"To even out support amounts for children of the same parents, whether ordered in one case or multiple cases, calculate base support using the total number of children in common."

3.02 (1) If less than all of the children in common are included, then the present case's base support and the parental time offset (Section 3.03) are its children's per capita share of what the amount would be if all of the children in common were included on one case.

(2) When some of the children in common are in a third party's custody, calculate the base support for the children in a parent's custody separately from the base support for those who live with a third party. Section 2.08 and Section 4.01.

3.02(C) Low Income Equation

At the outset, the low income threshold was changed. That change is found in the 2008 Michigan Child Support Formula Supplement, Section 2.01(A), which sets the low income threshold at $851, based upon the 2007 United States HHS Poverty Guideline. The 2004 formula utilized 2004 data, with the threshold being $776.

Under the '08 formula, where a parent's monthly net income does not exceed the low income threshold, the parent's base support obligation is 10 percent of that parent's income.

3.02(D) Low Income Transition Equation

In the past, there was a dollar-for-dollar increase in child support, where an individual exceeded the low income threshold. This provided no incentive for the individual to find work that paid more money, because every cent he earned would go to the custodial parent. For this reason, a low-income transition equation was arrived at as follows:

(1) Where a parent's net income exceeds the low-income threshold, that parent's base support obligation will generally be determined using the general care equation. However, if the following equation's result is lower than the amount calculated using the general care equation, a parent's base support obligation is the amount determined by applying this equation:

$$(H \times 10\%) + [(I - H) \times P] = T$$

H = Low income threshold (Sec 2.09(A))

10% = Percentage for income below the threshold (Sec 3.02(C)(1))

I = Parent's monthly net income

P = Percentage multiplier for the appropriate number of children from the Transition Adjustment table

T = Base support obligation using the Low Income Transition Equation

Transition Adjustment	
Number of Children in Common	**Percentage Multiplier**
1	50%
2	55%
3	60%
4	65%
5	70%

This allows the parent who is in this transition phase of earning income, to retain some of the additional income that he has earned.

3.03 Adjusting Base Obligation with the Parental Time Offset

This eliminates the shared economic responsibility cliff effect of 128 overnights, and results in a single formula for all cases. There will no longer be two separate calculations, one utilizing a base support and then a 50 percent abatement for six or more consecutive overnights, versus support based upon the shared economic responsibility formula.

This avoids the anomalous result of giving a non-primary custodial parent absolutely no consideration for exercising 127 overnights, while causing a dramat-

ic reduction in child support to the primary custodial parent at 129 overnights. The cliff had to go. It wasn't fair to either party. Years ago, Kent Weichmann devised a variant of the current formula, which cubed instead of squared the number of overnights. His suggestion died, as did many other proposed changes, four years ago. This time his formula was accepted by the court. As a result, the cliff becomes a slope, which provides some meaningful reduction in child support, starting at about 95-100 overnights, while providing substantially more child support at 129 overnights than that dictated by the cliff effect of SERF.

This changed the equation used to determine child support from:

$$(A_o)^{2.}\,(B_s) - (B_o)^{2.}\,(A_s)$$

$$(A_o)^2 + (B_o)^2$$

to

$$(A_o)^{3.}\,(B_s) - (B_o)^{3.}\,(A_s)$$

$$(A_o)^3 + (B_o)^3$$

A_o = Approximate annual number of overnights the children will likely spend with parent A

B_o = Approximate annual number of overnights the children will likely spend with parent B

A_s = Parent A's base support obligation

B_s = Parent B's base support obligation

***Note**: A negative result means that parent A pays, and a positive result means parent B pays.*

3.03(B)

An offset for parental time generally applies to every support determination whether in an initial determination or subsequent modification, whether or not previously given.

3.03(C)

Apply the parental time offset to adjust a base support obligation whenever the approximate annual number of overnights that each parent will likely provide care for the children in common can be determined. When possible, determine the approximate number based on past practice.

Using all the children in common fixes the different custodial arrangement economy of scale problems that previously existed. As you can see also, absolute precision is not necessary in determining the number based on past practice, because a few days one way or the other will not make a significant difference.

1. When different children spend different numbers of overnights with the parents, use the average of the children's overnights.
2. Absent credible evidence of changed practices, presume the same approximate number that was used in determining the most recent support order.
   - It is up to the parties now to show evidence of a change. Otherwise, the Friend of the Court will use the existing number of overnights.
3. In cases without a past determination or other credible evidence, presume the approximate number of overnights granted in the terms of the current custody or parenting time order.
   - Credit a parent for overnights a child lawfully and actually spends with that parent including those exercised outside the terms of the currently effective order. This may happen by agreement, or when one parent voluntarily foregoes time granted in the order. Do not consider overnights exercised in violation of an order.
4. The use of the words "lawfully and actually spends" is making it clear that it would apply only to circumstances that happen either by agreement, or by one party simply voluntarily foregoing time. It excludes from consideration parenting time that was forced on the other parent, in violation of an order, being utilized to recalculate the child support amount.
   - If a parent produces credible evidence that the approximate number exercised differs from the number granted by the custody or parenting time order, credit the number according to the evidence without requiring someone to formally petition to modify the custody or parenting time order.
   - When the most recent support order deviated based on an agreement to use a number of overnights that differed from actual practice, absent some other change warranting modification, credible evidence of changed practices only includes an order

changing the custody or parenting time schedule.

3.03(D)

If a substantial difference occurs in the number of overnights used to set the order and those actually exercised (at least 21 overnights or a number that causes a change of circumstances exceeding the modification threshold (Section 4.04)), *either parent or a support recipient* may seek adjustment by filing a motion to modify the order.

- Besides shifting responsibility from the Friend of the Court to the parties to remedy a problem with the offset, and keeping battles based on small differences in overnights from occurring, the threshold to file a petition to modify has been increased. The '04 manual, Section 1.07(B) had the threshold set at 10 percent or $25, whichever is less. In order to discourage wasteful, repetitive requests to modify, the new threshold found in Section 4.04 is 10 percent or $50, whichever is greater.

3.05(C) Health Care Premium Allocation

Because the cost of health care premiums needed to be considered, problems arose under the old formula, both in circumstances where the Friend of the Court was analyzing in pro per cases, as well as those where parties were represented by counsel. It often became difficult, if not impossible, to get current, accurate information on what portion of a particular premium an individual was paying for health insurance coverage was attributable to that employee, his current spouse or soon to be former spouse, and the children in question. Numbers were oftentimes either unavailable, dated, or simply wrong. Now, the court will simply look at the whole premium as follows:

1. Allocate the children's net health care premiums between the parents according to the following steps.
    - Determine each parent's monthly health care premium attributable to the children by dividing the premium by the number of individuals covered (including the parent) and multiply by the number of children covered in this case.
    - Prorate each parent's monthly health care premium attributable to the children by multiplying it and the other parent's percentage of family income.
    - Offset the prorated premiums attributable to the children by subtracting the support recipient's share of the support payer's premium from the payer's share of the recipient's premium, and round to the nearest cent. (Note: A positive net result means an additional amount must be paid to cover the payer's share of the support recipient's premium, while a negative result means a reduction in base support to offset the support recipient's share of the payer's premium).

3.06 Child Care Support Obligations

The '04 MCSFM provided that "child care shall be recommended to the start of the school year immediately following the 12th birthday of the child, but only to the extent thereafter that the health and safety needs of the child require continued child care." Because of the significant difference that exists as to when classes commence, in order to avoid unnecessary disputes, a fixed date was provided, specifically, ". . . August 31st following the child's 12th birthday." As with the 2004 formula, the court still has the right to do otherwise. That right was preserved, but clarified: "At the court's discretion, the child care support obligations may continue beyond that date as the child's health or safety needs require."

4.01 Third-Party Custodians

At the outset, the '08 manual makes clear that both parties have a responsibility for all medical expenses, health care coverage premiums, and child care costs incurred by a third party who has custody of their child, the manual indicating:

4.01(B)

Parents are responsible for all medical expenses, health care coverage premiums, and child care expenses. When possible, apportion them between the parents.

There is, however, a difference in terms of how each parent's support obligation is to be determined. Previously, in the '04 manual, Section 4.01(B), the determination was based upon the combined family net income. An individual's child support obligation was then calculated based upon his percentage of the net family

income. That has changed. The new method, found in Section 4.01(D), is as follows:

1. Determine each parent's net income.
2. Calculate each parent's base support obligation separately by treating the other parent's income as zero.
3. Calculate medical expense and child care support obligations and require payment from only the parents. When possible, divide them between the parents based on each parent's percentage share of family income.
4. Total a parent's base support, ordinary medical expense, and child care obligations to determine that parent's total support obligation payable to the third party.
5. Do not reduce a parent's base support obligation paid to a third party for health care coverage premiums paid by a parent. Allocation of parent-paid premiums between the parents should be handled separately. If the third-party custodian purchases health care coverage for the children, then add each parent's share of the children's net determinable portion of the premiums paid by the third party to that parent's support payment.

4.02(B) Arrearage Payment Calculation

There has been increasing concern, since the current, serious economic crisis befell Michigan, that the '04 manual's repayment schedule was unreasonable. For this reason, subject to either subsection 6 or 8, dealt with below, the monthly repayment amount has been changed from 4.35 percent to 2 percent of the total support arrearage at the time of the review, but not less than $50 (reduced from the previous $80 amount), nor more than half of the current support amount. This latter portion was also changed, inasmuch as the maximum *was* the *total* of the current support amount.

The qualifiers to this are as follows:

6. In order to repay arrearages as quickly as possible, the "total payment amount" (defined in Section 4.02(E)(4)) used for determining the repayment amount for collection must be the higher of: the most recent total payment amount, or the total payment amount presently figured using the arrearage payment calculation and current support charge.

   a) If the support charge is reduced because of a reduction in payer's income, always refigure the repayment amount using the arrearage payment calculation. (Section 4.02(B)(3)) and the current support charge).

7. If the most recent total payment amount is the payment amount chosen, the aggregate amount remains the same, but consists of a reduced support and an increased repayment amount (Section 4.02(B)(8)).
8. **Adjustment of Payments When Current Support Obligations Terminate**
   - If arrearages exist when a current support obligation terminates or is reduced for reasons other than a reduction in the payer's income, there shall be no automatic reduction in the total payment amount unless ordered by the court.
   - The reductions in the current support amount are added to the repayment amount and automatically become the new repayment amount.
   - The total payment amount remains in effect until the arrearage has been paid in full or until modified or adjusted by the court or Friend of the Court.

4.02(C) Guideline Deviation and Exceptions

The '04 manual, at Section 4.03(A)(6), stated: "The arrearage guideline is not intended to interfere with judicial discretion in setting fair and equitable payment amounts that deviate from the guideline. Each case is decided on its own merits.

The '08 manual gives clearer insight to its recognition of the economic realities.

1. When application of this guideline creates an unjust or inappropriate result, a deviation may occur, and an alternate repayment amount may be established.
2. The Friend of the Court office may deviate from the guideline to increase the repayment amount if:
   - There has been no other significant change

in circumstances (e.g., different source of income, higher income, etc.);

- The payer has made all of the payments for the entire period since the repayment amount was set; and
- The arrearage has nevertheless increased by an amount greater than one month's current support obligation solely because surcharge has periodically added to the arrearage.

4.03 Agreements Related to Property

Although an existing obligation under current case law, the following section was added:

4.03(A) When parents reach an agreement that the court should deviate from the formula and connect a property settlement with the child support obligation, the complete agreement must be clearly stated in the judgment of divorce to be given continued effect. MCL 552.605 requires that any property award that is in lieu of child support required under the formula be recorded as a deviation from the formula.

4.04 Minimum Threshold for Modification. Again, as expressed previously, consistent with the change made for arrearage payment calculations, where the '04 manual at Section 1.07(B) was 10 percent or $25 per month, whichever was less, the minimum threshold for modification now is 10 percent of the currently ordered support payment, or $50 per month, whichever is greater.

Child Support Formula Manual Supplement Changes

Besides the fact that the child support payment schedules look dramatically different from those utilized previously, the Child Support Formula Supplement contains only two significant changes from the '04 manual.

- Section 2.01(A) changes the low income threshold to $851.
- Section 2.02 Ordinary Expense Amounts changes the average per child ordinary medical expense amount from the current $289 for one child to $345 for one child.; for two, it went from $578 to $690; for three, it went from $867 to $1,034; for four, it went from $1,156 to $1,379; for five or more, it went from $1,445 to $1,724.

The '08 manual also continued to permit the court to add additional amounts to cover higher expenses. Reference is then made back to '08 manual Section 3.04(B)(2) which states, in pertinent part:

> ". . . Amounts may be added to the table amounts to compensate for additional uninsured expenses that can be predicted in advance (e.g., orthodontia, special medical needs, or ongoing treatment)."

To download a PDF copy of the 2008 manual and supplement, go to: *www.courts.mi.gov/scao/services/focb/mcsf.htm*

National Association of Counsel for Children

Protecting Children and Promoting Their Well-being Through Excellence in Legal Advocacy

The NACC is a nonprofit child advocacy and professional membership association dedicated to representation and protection of children in the legal system. Founded in 1977, the NACC is the only national association of its kind. The NACC provides training and technical assistance to child advocates and works to improve the child welfare and juvenile justice systems. If you work with children as an attorney, judge, administrator, care provider, physician, therapist, social worker, teacher, law enforcement officer, or are simply a concerned citizen and want to improve your effectiveness while improving the system, the NACC is your organization. *Join us today!*

Member Benefits

- Toll-free and internet access to NACC Child Advocacy Resource Center
- Subscription to the NACC's quarterly publication, *The Guardian*
- Discounts on publications include *The Children's Legal Rights Journal*, NACC annual *Children's Law Manuals* and *Child Welfare Law and Practice*
- Access to the NACC Listserv information exchange
- Public policy and legislation updates
- Discounts on conferences and trainings

Your Dues Also Support

- **Amicus Curiae**
- **Speakers/Training Bureau**
- **Public Policy Advocacy**
- **Standards of Practice**
- **Youth Empowerment**
- **Outstanding Legal Advocacy Award**
- **Student Essay Competition**
- **Children's Attorney Certification**
- **National Children's Law Office Project**

NACC – Membership Application

I wish to become a member.

INDIVIDUAL MEMBERSHIPS:

☐ Regular $80 ☐ Supporting $100* ☐ Patron $250*
☐ Student $40 ☐ Sustaining $150* ☐ Lifetime $2500*

*Includes special thank you listing in The Guardian.

☐ I would like $10 of my membership dues to support my local NACC affiliate.

GROUP MEMBERSHIPS:

Group memberships are available at a significant discount. Please contact the NACC for more information.

☐ **Please send information on establishing an affiliate.**

Make Check Payable to: NACC

Mail to: National Association of Counsel for Children
1825 Marion Street, Suite 242
Denver, CO 80218

Telephone: Office: 303-864-5320 • Fax: 303-864-5351

Federal Tax ID#: 84-0743810

All but $80 of your membership fee is tax-deductible.

NAME _____

FIRM OR AGENCY _____

ADDRESS _____

CITY / STATE / ZIP _____

PHONE _____ FAX _____

E-MAIL _____

OCCUPATION _____

ETHNICITY (OPT.) _____

☐ **Enclosed is my check in the amount of $** _____

☐ **Please charge my** ☐ VISA ☐ MasterCard

NAME ON CARD (PLEASE PRINT) _____

CARD NUMBER _____

SIGNATURE _____ EXP. DATE _____

SBM
State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

www.michbar.org

NON-PROFIT
U.S. POSTAGE PAID
LANSING, MI
PERMIT NO. 191