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Editor's Note—Winter 2014

As Christine Piatkowski notes in her Message from the Chair, there is never a shortage of new information to keep abreast of in order to be an effective practitioner with families and children. On the other hand, we always (understandably) feel there is a shortage of time available to dedicate to our "continuing education," especially in a state where continuing education is not required for members of the bar. This issue of the *Journal* presents a wealth of information to help inform best practices. While you may not have the time to read every page of these materials, if you take the time to see what is contained in this issue the materials will likely serve as a handy reference in the future when the need arises.

On a separate note, I would like to thank Frank Vandervort for his many years of commitment to and work on this journal. Frank has served on the editorial and review board since its inception over ten years ago. Prior to that, Frank was essentially single-handedly responsible for the journal's production on behalf the of Children's Law Section. Anyone who has had the good fortune to work with Frank (and I have had the privilege in a number of capacities) knows that his commitment and service to Michigan's children is without equal. On behalf of the editorial board and the journal's readers, thank you Frank! .

—Joseph Kozakiewicz

Editorial and Review Board

Message from the Chair

State Focus on Quality Legal Representation, a Time for Reminders

There are many changes that are occurring in the legal profession. A renewed emphasis is being placed on the quality of legal services that attorneys deliver to their clients. In this edition, you will find a Lawyer Guardian Ad Litem Protocol and a Parent Attorney Protocol for your review. These documents outline the responsibilities that attorneys are expected to honor when representing clients in juvenile cases. As the State explores ways to deliver quality legal representation to indigent clients, it is important for attorneys and others to be mindful of the undertakings and commitments agreed to when accepting cases in this specialized field. The Children's Law Section will do its best to keep you informed of future developments from the many task forces and committees that are being assembled to make recommendations for the indigent defense system.

Along these same lines, it is critical for the legal community and the public to view attorneys in a positive light. This can only be done if people are given information about the exceptional things that attorneys do on a daily basis. In a new column, "Attorneys Making a Difference", the Children's Law Section will be honoring attorneys that are accomplishing significant achievements in the areas of child welfare and juvenile justice. We hope that you will help us to spread the word about these remarkable lawyers. We also trust that you will let us know about all of the wonderful things that you and your peers are doing so that we may include you and your colleagues in future journal editions.

In order to assist attorneys with their law practice, the *Child Welfare Journal* is adding a new featured section focusing on case law updates. We hope that you will find this material beneficial. We also anticipate that it will serve as a nice complement to the Legislative Update recently designed and included to meet your needs.

The Children's Law Section wants to provide attorneys and others with information to improve the areas of child welfare and juvenile justice. Several new subcommittees have been formed to address court rules, new initiatives, agency rules and regulations, networking opportunities and trainings. The subcommittees are beginning to work on a variety of topics and issues. If you have an interest, please join us in whatever capacity works best for you. I would also like your thoughts and ideas to continue the goals of the section. I can be reached at *piatkowski.law@chartermi.net*. Your input is very important and I will do my best to address items brought to my attention. Thank you for the great work that you do. It is appreciated.

Best wishes,

Christine Piatkowski

Children's Protective Services Investigations of "Unsafe Sleep" Deaths

by Tobin Miller, Investigator, Office of Children's Ombudsman

Introduction

A mother feeds her two-month-old infant at 5:00 a.m. before putting the baby back to sleep in its crib. The mother lays the baby on her back in a crib that contains several blankets and a pillow. Two hours later, the mother returns to find that the infant has rolled over and is unresponsive. The infant's father calls 911, and emergency medical personnel transport the infant to a local hospital, where she is pronounced dead.

A new mother feeds her two-month-old infant at 5:00 a.m. The baby falls asleep, and the mother places the child next to her in bed. When the mother awakens two hours later, she discovers that she has rolled over on top of the infant, who is unresponsive. The infant's mother calls 911, and emergency medical personnel transport the infant to a local hospital, where he is pronounced dead.

In both of these cases, the infant's mother has violated the "tenets of infant safe sleep," recommendations from health authorities intended to prevent infant deaths. The "tenets of infant safe sleep" are not legally mandated, however.

In the scenarios sketched above and in similar situations, emergency responders and hospital personnel often make a Children's Protective Services (CPS) complaint that alleges only the violation of safe-sleep principles. Complaint allegations may only state that an infant was found unresponsive. In some instances, the complaint explicitly states that child abuse or neglect is not suspected.[1] Should CPS investigate complaints alleging solely a violation of the "tenets of infant safe sleep"? Does the failure to follow the "tenets of infant safe sleep" constitute "child abuse" or "child neglect"? Even if it doesn't constitute "child abuse" or "child neglect," is there a legitimate policy reason for permitting a CPS investigation?

In this article, I briefly describe the "tenets of infant safe sleep" and review the law and CPS policy dealing with infant "unsafe sleep" deaths. I conclude that current law does not support CPS policy requiring investigations of complaints alleging only parental failure to follow the "tenets of infant safe sleep" and suggest that the Michigan Department of Human Services (MDHS) seek an amendment of the Child Protection Law (CPL) to support its policy. I suggest that the amendment to the CPL include the factors that CPS policy currently directs workers to evaluate when investigating these deaths: parental substance abuse, parental supervision of the child, and any hazards in the child's environment that may have contributed to the death.

The "Tenets of Infant Safe Sleep"

According to MDHS, "[e]ach year in Michigan, nearly 150 infants die as a result of unsafe sleep environments."[2] As stated above, the "tenets of infant safe sleep" are practices recommended by health authorities to lower the risk of infant death. Although not legally mandated, following the "tenets of infant safe sleep" appears to reduce the risk of sudden infant deaths.[3] According to MDHS, those tenets are:

- Baby should sleep alone in a crib, portable crib or bassinet.
- Always put baby on back to sleep even when he/she can roll over.
- No pillows, blankets, comforters, stuffed animals or other soft things should be in the sleep area.
- Keep baby's face uncovered during sleep for easy breathing. Use a sleeper instead of a blanket.

- Don't allow anyone to smoke around the baby.
- Don't overheat the baby. Dress the baby in as much or as little clothing as you are wearing.
- Use a firm mattress with a tightly fitted sheet.
- Place baby in the same sleep position every time.[4]

As part of an overall strategy to reduce infant mortality in Michigan, MDHS and the Michigan Department of Community Health (MDCH) conduct a public education campaign aimed at reducing deaths resulting from "unsafe sleep practices." In addition to this public education campaign, CPS workers are required to document an infant's sleeping conditions during all open CPS investigations and services cases, regardless of the complaint allegations or the basis for the services case. At these times, CPS workers instruct parents on the listed safe-sleep techniques and assist families in providing safe-sleep environments for their infants.[5]

CPS Investigates All "Unsafe Sleep" Deaths

CPS policy PSM 712-6, p. 13 requires centralized intake to assign for field investigation all complaints "where an unsafe sleep environment may have been a factor in a child's death." This policy requires assignment of complaints involving a child's death and alleging only a possible failure to follow safe-sleep practices. This policy does not require an allegation of "child abuse" or "child neglect" before CPS conducts an investigation.[6]

In all other cases, centralized intake requires an allegation of "child abuse" or "child neglect" as those terms are defined by the CPL. CPS policy PSM 711-3, p. 1 states that the CPL requires all of the following circumstances to be present before a case may be assigned for a field investigation:

- Harm or threatened harm.
- To a child's health or welfare.
- By a parent, legal guardian, or any other person responsible for the child's health or welfare.
- That occurs through non-accidental physical or mental injury, sexual abuse or exploitation, maltreatment, negligent treatment, or failure to protect.[7]

Another CPS policy, PSM 713-1, p. 2, explicitly states that the failure to follow "the tenets of infant safe sleep" does not alone constitute "child abuse" or "child neglect." Thus, even though there are no allegations of "child abuse" or "child neglect," centralized intake assigns the complaint to a local office, which must conduct a CPS investigation.

CPS Policy requires CPS workers to evaluate other factors involved in the death when conducting that investigation and deciding whether abuse or neglect has occurred. PSM 713-1, p. 2 requires a CPS worker to evaluate the following factors to determine whether a parent or caretaker has committed an act of "child abuse" or "child neglect":

Substance abuse. The parent/caregiver was under the influence of alcohol or drugs and there was evidence that his/her behavior or judgement [sic] was impaired and/or adversely affected his/her ability to safely care for the infant.

Supervision. The parent/caretaker did not check on the infant at a reasonable frequency consistent with the infant's age and medical or developmental needs, or the parent left the infant with a person he/she knew or should have known was incapable of safely caring for the infant.

Hazardous environment. The environmental conditions in the home were hazardous or unsanitary and adversely affected the safety of the infant.

To some in the Michigan child welfare law community, it may seem harmless to allow CPS to investigate these complaints. After all, an infant has died unexpectedly, law enforcement is already involved, and there may be concern about the safety of the infant's surviving siblings. However, permitting a CPS investigation when there has been no allegation of "child abuse" or "child neglect" expands CPS authority beyond that set forth in the CPL. It also entails the following practical issues:

- It permits an additional intrusion into family life at a time when parents are typically very emotionally distraught.[8] A CPS worker typically questions parents in the home or hospital within hours of a child's death.
- CPS workers often ask parents to "voluntarily" place surviving siblings in a relative's or friend's care and have no contact with their children pending completion of the CPS investigation.[9] Where there is no allegation of "child abuse" or "child neglect," and where the request is made soon after the infant's

death, these requests seem to be over-reaching and inherently coercive. Violations of these "safety plans" may result in a request for court-ordered removal of the surviving siblings from parental custody.

- Without an allegation of "child abuse" or "child neglect," CPS' role is unclear. CPS workers are not required to use the Child Death Investigation Checklist, which is modeled on the protocol used by law enforcement and medical examiner personnel.
- CPS investigations of these complaints often take months to complete because CPS is simply waiting for autopsy results or a law enforcement report. When the family has been separated by a safety plan described above, extended investigations are particularly damaging.
- If the worker—rightly or wrongly—finds a parent responsible for "child neglect" resulting in a child's death, CPS must place the perpetrator on the central registry and file a petition as required by MCL 722.637.[10]

CPL Definitions of "Child Abuse" and "Child Neglect"

In addition to the practical issues described above, there is the purely legal issue of whether CPS has the authority to conduct an investigation where there is no allegation of "child abuse" or "child neglect." The language of the CPL suggests that CPS may only commence an investigation if a complaint alleges that a child has been abused or neglected. MCL 722.628(1) ("Within 24 hours after receiving a report made under this act, the department . . . shall commence an investigation of the child *suspected of being abused or neglected*"). (Emphasis added.) The purpose of a CPS investigation is to "determine if the child is abused or neglected." MCL 722.628(2).

MCL 722.622(f) and (j) define "child abuse" and "child neglect" as follows:

> (f) 'Child abuse' means harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment . . . .
>
> (j) 'Child neglect' means harm or threatened harm to a child's health or welfare . . . that occurs through either of the following:
>
> (i) Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care.
>
> (ii) Placing a child at an unreasonable risk to the child's health or welfare by failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk.

The CPL is a remedial statute that "attempts to protect the public health and general welfare [and] should be liberally construed."[11] This suggests that CPS has broad authority to investigate alleged violations of public health norms, such as the "tenets of infant safe sleep." However, the Michigan Court of Appeals has held that the definitions in the CPL should be construed to exclude harms not expressly listed in them. *Michigan Ass'n of Intermediate Special Ed Administrators v DSS,* 207 Mich App 491, 497-498 (1994). In that case, special-education administrators sought a declaratory judgment that a parent's "failure to act in conformity with [their] opinions regarding the children's educational needs constitutes abuse or neglect."[12] The Court of Appeals refused to give the term "mental injury" in the definition of "child abuse" an expansive reading to include educational abuse or neglect. Similarly, parental failure to follow the "tenets of infant safe sleep" does not constitute "child abuse" or "child neglect," and the CPL's definitions of those terms should not be expanded to include a failure to follow those tenets.

Admittedly, MCL 722.622(j)(*ii*) includes "[p]lacing a child at an unreasonable risk . . ." in its definition of "child neglect." However, as explained above, CPS policy explicitly states that a parent's failure to follow the "tenets of infant safe sleep" does not, by itself, constitute "child abuse" or "child neglect" and is not, therefore, "unreasonable." Moreover, the unreasonableness of the risk of violating the "tenets of infant safe sleep" should be supported by statistical evidence or otherwise before those violations are deemed neglectful. To show this, one would have to establish how many children are placed in "unsafe

sleep" environments and how many of those children die. The unreasonableness of the risk cannot be established merely by pointing to the raw number of children who die in "unsafe sleep" environments. Infant mortality rates for children whose mothers received inadequate prenatal care are three times as high as for children whose mothers received adequate prenatal care, yet we do not deem the risk of infant death from this behavior unreasonable or conduct CPS investigations of all cases involving mothers who did not receive adequate prenatal care.[13]

Conclusion

The sudden and initially unexplained death of an infant devastates the parents and community. Following safe-sleep practices seems to decrease the risk of sudden infant deaths, and MDHS and MDCH public outreach and education efforts to increase the use of these practices are laudable and effective. However, because safe-sleep practices are not mandated by law, and because CPS investigations constitute an additional intrusion into family life at a critical time, the policy decision to subject families to a CPS investigation based solely on an alleged failure to follow those practices should be made by the Michigan Legislature, not by MDHS. This would allow the general public input into the decision. An amendment to the CPL concerning "unsafe sleep" deaths could include the factors that CPS policy currently directs workers to evaluate when investigating these deaths: parental substance abuse, parental supervision of the child, and any hazards in the child's environment that may have contributed to the death. Rather than rely on its interpretation of the CPL, MDHS should seek an amendment to the CPL giving it clear authority to investigate parental failure to follow the "tenets of safe sleep."

Endnotes

1 As an Investigator for the Office of Children's Ombudsman, I review child-death cases sent to the OCO pursuant to MCL 722.627k. See also MCL 722.926.

2 MDHS, Safe Sleep. *http://www.michigan.gov/dhs/0,4562,7-124-5453_7124_57836---,00.html*. The Michigan Department of Community Health (MDCH) reported that in 2012, "141 infants in Michigan died due to being put to sleep in an unsafe environment." "Michigan Holds Safe Sleep Summit to Address Preventable Infant Deaths," October 8, 2013, available at *http://www.michigan.gov/mdch/0,4612,7-132-2939-314046--,00.html*.

3 MDCH, Infant Mortality Reduction Plan, Appendix H, August 2012, p. 30. Available at *http://www.michigan.gov/documents/mdch/MichiganIMReductionPlan_UPDATED_395151_7.pdf?20140127135547*.

4 MDHS, Safe Sleep. *http://www.michigan.gov/dhs/0,4562,7-124-5453_7124_57836---,00.html*.

5 PSM 713-1, pp. 2-3.

6 It should be noted that CPS policy does not have the force of law because it is not promulgated under the Administrative Procedures Act. *Catalina Marketing Sales Corp v Dep't of Treasury,* 470 Mich 13 (2004). Nonetheless, CPS conducts the investigations described here.

7 This policy summarizes the definitions of "child abuse" and "child neglect" contained in MCL 722.622(f) and (j), quoted below.

8 PSM 713-8, p. 14 acknowledges this *("Investigation of a child death is a complicated and emotionally charged event").*

9 This procedure is also based on CPS policy. PSM 713-1, pp. 19-20.

10 See PSM 713-11, p. 4 (mandatory override of the Risk Assessment score in case involving death). MDHS interprets the phrase "severely physically injured" in MCL 722.637 to include "abuse or neglect that results in the death of the child." PSM 715-3, p. 4.

11 *Williams v Coleman,* 194 Mich App 606, 612 (1992).

12 *Michigan Ass'n of Intermediate Special Ed Administrators, supra,* at 493.

13 MDCH, Michigan Infant Death Statistics, January 1 through December 31, 2011, p. 1. Available at *http://www.mdch.state.mi.us/pha/osr/annuals/Infant%20Deaths%202011.pdf*.

Long Term Planning for a Special Needs Child

by Christine Piatkowski

Most attorneys advise their clients to prepare for the day when they will need a will to address their financial and other affairs. Extraordinary care should be taken to inform clients that have children with special needs to timely participate in long term planning. It is extremely important that parents and caregivers plan in advance for children that cannot plan for themselves.

Once a child turns 18, parental rights to know, advocate, monitor and intercede on behalf of a child may be limited or prohibited without the child's consent or valid legal authorization. It is usually during a time of crisis that many parents will seek out guardianships, conservatorships, trustees and executors. A probate attorney, a tax attorney, and an attorney that assists persons with special needs can be indispensable. A financial planner and an insurance agent are also professionals that parents should consider hiring to assist with their long term plans. It is best practice for the services of these professionals to be involved long before a need or a crisis presents itself.

Parents that have children with disabilities and mental health needs often have experts and other service providers already in place. They may even be involved with support groups. It is important for parents to begin making arrangements for transition planning to adulthood while children are still juveniles. There are more services and resources available for minors than there are for adults. Existing service providers can frequently offer helpful information and guidance in planning for a child's future.

Parents should be made aware of their rights and the rights of their children prior to exiting juvenile services. Sometimes providers suggest "closing out" services merely because they are told a child is "aging out". If parents improperly agree to exit their child from certain programs and services, they could be signing away rights to benefits, programs and services that the child is entitled to receive beyond the age of 18.

Parents are encouraged to integrate their children into the community to the extent possible. Vocational planning can be initiated well before a child's 18th birthday. Extra-curricular activities and social situations that the child enjoys may be able to continue as the child enters adulthood. If there are fees and/or specific directions for these events, a document included with other legal papers that details the parent's expectations can be useful if an alternate caregiver is required. It is also helpful to include a document detailing information that is more specific about the child. This paperwork can note the minor's likes/dislikes, medical history, school history, daily routine, recreational activities, medications, doctors, service providers, etc. Information should be routinely updated as circumstances require.

Some children may be able to live independently and/or live independently with support services. For children that need more attention, a family home environment, group home, residential facility, and other placement options may be considered. When parents plan in advance, they can identify the type of housing arrangement that their child will live in versus having the State or other individuals making those decisions. Parents will want to inquire about the type of assistance and services available in these settings. They may also be able to take tours of identified housing resources.

As discussed, clients may approach attorneys to address their own legal and financial affairs. Consideration should also be given to putting legal plans in place for the child. A Will, General Durable Power of Attorney for Financial Affairs and a Durable Medical Power of Attorney can be useful for a child that lacks the ability to make informed decisions.

Financial plans are very complex and beyond the scope of this article. Suffice it to say that financial plans should be reviewed by the appropriate professionals. If done incorrectly, improper plans may

jeopardize governmental and other benefits that the child receives or may receive in the future.

As attorneys, we can assist families with making important decisions for children with disabilities as they transition from childhood to adulthood. An early start ensures that expertise, time and energy are available to create individualized plans and legal documents that will benefit children with disabilities and their families.

CHRISTINE PIATKOWSKI *is the current chairperson of the State Bar of Michigan Children's Law Section. She is licensed to practice law in Michigan and in Illinois. Ms. Piatkowski has her own general practice law firm that includes particular concentration in the areas of juvenile law, family law, school law, and disability matters. She is also involved with a number of private and public agencies and committees devoted to children's law.*

Attorneys Making a Difference

Featuring: Ina O'Briant

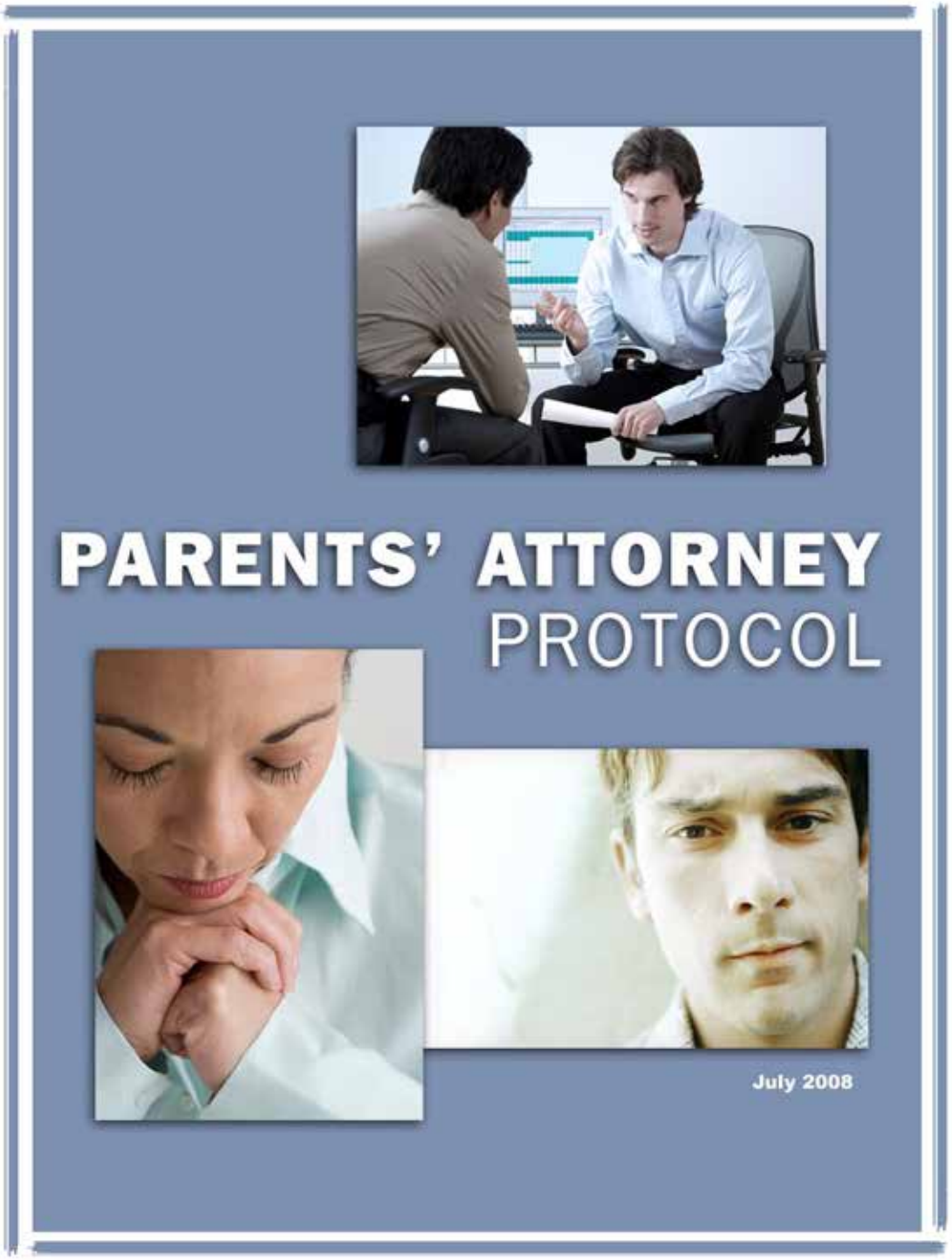
by Stephanie Cardenas

If you think that one case doesn't make a difference, think again. As an attorney, the effect that you have on a client may often be readily seen. The impact that your actions have on the juvenile system may not be as obvious. Ina O'Briant is an attorney that is experiencing her influence on the world of child welfare in a major way. Ms. O'Briant's advocacy has provided the path to the Michigan Supreme Court. She has done this in the case of In re Sanders, a case that is anticipated to clarify the use of the One Parent Doctrine in the State of Michigan.

Ms. O'Briant is very proud to be part of a case of such importance to all juvenile practitioners and jurists. Ms. O'Briant is the trial attorney that represents Lance Laird, the respondent in the Supreme Court case. Her passion, diligence and hard work has set the path for issues to be preserved for the Supreme Court's consideration in addressing the question of whether the One-Parent Doctrine violates the due process and equal protection rights of un-adjudicated parents. Ms. O'Briant feels that the case is "the epitomy of what is wrong with the system". She believes that the system needs to be changed to place the focus of the law on protecting the sanctity of the family unit. "There are often more safeguards to protect someone from losing their home than from losing their children."

As an attorney that has practiced law for approximately 13 years, Ms. O'Briant focuses her general practice on family law, juvenile law and criminal law issues. She enjoys standing up for those that need a champion in their corner. It is her personal goal to specifically help and protect families in need. When she is not serving in an advocacy role, Ms. O'Briant is involved in numerous associations, to which she is an active member. Some of the organizations that she is affiliated with are the Eaton County Bar Association; Women's Lawyers Association of Michigan; Criminal Law Section; and the Children's Law Section of the State Bar. Additionally, Ms. O'Briant is a proud alumni of Michigan State University and Thomas Cooley Law School. In her spare time, she enjoys spending time with her family and engaging in volunteer activities sponsored by her church.

The Children's Law Section wishes to honor attorneys that are making a difference in the area of child welfare and juvenile justice in this regular feature. If you know of an attorney that you feel deserves special recognition, please let us know by contacting scardenaslaw@gmail.com.


PARENTS' ATTORNEY
PROTOCOL
July 2008

Parents' Attorney Protocol

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EDITORIAL ADVISORY COMMITTEE

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***STATUTES AND RULES CITED ARE ACCURATE AS OF DATE OF PUBLICATION.**

Preface

This protocol is intended to guide attorneys through the strategic decisions they will need to make while representing parents in child protective cases. The protocol does not provide a comprehensive action-step checklist. Parents' attorneys can find that kind of guidance in other resources, including the "How-To-Kit: Representing Parents in Child Protective Proceedings" by the Institute of Continuing Legal Education; "Guidelines for Achieving Permanency in Child Protection Proceedings" by Children's Charter of the Courts of Michigan; and the American Bar Association's "Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases."[1] For its part, this protocol delves more substantively and subjectively into the choices that will confront attorneys and their parent-clients. We hope that the protocol will provide a useful decision-making framework for parents' attorneys who must grapple with the host of complexities inevitably present in child protective cases.

The authors thank the Governor's Task Force on Children's Justice and the State Court Administrative Office for their generous support of this project. The authors also thank the Editorial Advisory Committee for their invaluable comments and insight, and for their years of service on behalf of foster children and their families.

[1] The ABA standards are available online. American Bar Association, *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases* <http://www.abanet.org/child/clp/ParentStds.pdf> (accessed June 25, 2008).

Protocol For Attorneys Representing Parents In Child Protective Proceedings

Introduction

A parent's constitutional right to raise his or her child is one of the most venerated liberty interests safeguarded by the Constitution and the courts.[2] The law presumes parents to be fit, and it establishes that they do not need to be model parents to retain custody of their children.[3] If the state seeks to interfere with the parent-child relationship, the Constitution mandates: (1) that the state prove parental unfitness, a standard defined by state laws, and (2) that the state follow certain procedures protecting the parents' due process rights. The constitutional framework for child protective proceedings is premised upon the belief that the welfare of children is best served when they are in their parents' custody. For that reason, the state's evidence of parental unfitness must satisfy a high burden of proof before the state may interfere with or permanently sever the parent-child relationship.

Attorneys who represent parents in child protective proceedings play a crucial role in safeguarding these liberty interests. This role manifests itself in many ways. Similar to defense lawyers in criminal cases, parents' attorneys prevent the state from overreaching to unjustly remove children from their homes. In situations where *temporary* removal may be warranted, advocacy by parents' counsel can expedite the safe reunification of the family by ensuring the prompt delivery of appropriate services to the

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[2] *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000) ("[T]he interest of parents in the care, custody and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court."). *Michael H v Gerald D*, 491 US 110, 123-124; 109 S Ct 2333; 105 L Ed 2d 91 (1989) (The Supreme Court's decisions "establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.").

[3] *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.").

family and by counseling parents about the ramifications of the choices they must make. If the parent-client simply cannot care for the child properly, a parent's lawyer can serve the client by arranging for another temporary or permanent legal placement, such as a guardianship or an adoption, that will advance the entire family's interests. In these and other situations, strong advocacy on behalf of parents almost always furthers the best interests of the children and improves outcomes for both the children and their families.[4]

Yet, the challenges confronting parents' attorneys are daunting. Parents involved in child protective cases confront a host of seemingly insurmountable problems, including poverty, substance abuse, mental illness, and domestic violence. Those problems can make it difficult for an attorney to earn the client's trust and develop a successful litigation strategy. The attorney must master the complex federal and state child-welfare laws and become familiar with related laws in areas such as adoption, guardianship, and special education. Next, the attorney must engage in cooperative, informal problem-solving with the child-protection authorities and the child's lawyer-guardian *ad litem* (L-GAL).[5] But the attorney must always hold the client's interests paramount, which may necessitate formal and assertive courtroom advocacy. Often, parents' attorneys must do all of this while receiving low compensation, handling high caseloads, and enduring criticism that their advocacy for their parent-clients actually harms their clients' children.[6] These and other challenges make representing parents among the most difficult and important areas in which to practice law.

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[4] See, e.g., Bridge & Moore, *Implementing Equal Justice for Parents in Washington: A Dual Approach*, 53 Juv & Fam Ct J 31 (2002) (finding that strengthening parents' counsel increased family reunifications by fifty percent. The article also stated that "the enhancement of parents' representation has the potential to save . . . millions in state funding on an annualized basis.").

[5] The role and responsibilities of the lawyer-guardian *ad litem* are defined in MCL 712A.17d.

[6] These challenges are documented in a 2005 Court Improvement Program Report issued by the Muskie School of Public Service and the American Bar Association. The Report is available online. Muskie School of Public Service & American Bar Association, *2005 Michigan Court Improvement Program Reassessment* <http://www.courts.michigan.gov/scao/resources/publications/reports/CIPReassessmentReport090605.pdf> (accessed June 25, 2008).

Special Terms Used in this Protocol

Many attorneys who read this protocol will never have represented clients in a child protection case. Others will have only very limited experience. Here are two term-of-art definitions that will help newcomers understand the material presented in this protocol.

The term "agency" usually means the Michigan Department of Human Services (DHS) or its Children's Protective Services unit (CPS), but sometimes the term will refer to a private entity that performs services under a contract with DHS. See MCL 712A.13a(1)(a). This protocol will use the generic term "agency" unless the circumstances require identifying the specific actor.

The term "services" encompasses the full array of educational and therapeutic programs designed to help parents improve their parenting skills. The agency provides most of these services either directly or through contractors, but parents sometimes also receive services from specialized private providers.

The Role of Parent's Counsel

In many ways, the role of the parent's attorney is no different than that of any attorney representing a client. The Michigan Rules of Professional Conduct ("MRPC") establish the basic parameters of the attorney-client relationship. An attorney must zealously advocate on behalf of his or her clients and maintain an undivided loyalty to the client's interests, regardless of the attorney's personal beliefs.[7] The attorney must act with "reasonable diligence and promptness in representing a client"[8] and must not "knowingly reveal a confidence or secret of a client" except in

[7] See MRPC 1.7 cmt. ("Loyalty is an essential element in the lawyer's relationship to a client . . . . Loyalty to a client is . . . impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests.").

[8] MRPC 1.3.

narrowly defined circumstances.[9] The MRPC require joint decision-making by the attorney and the client. While the client has the ultimate authority to determine the goals of the representation, the attorney typically decides how best to accomplish those goals after consulting with the client.[10] Since "[a] clear distinction between objectives and means sometimes cannot be drawn, … in many cases the client-lawyer relationship partakes of a joint undertaking."[11] These and other requirements define the relationship between a parent's attorney and the parent. The requirements remain the same regardless of whether the attorney is appointed by the court or retained, and regardless of how much the attorney is paid. The interests and wishes of the client always remain paramount. Any attorney engaging in this work must read and understand the MRPC.

While having the same ethical obligations as all other lawyers, parents' attorneys confront unique challenges in developing relationships with their clients. Those challenges are discussed in the next several pages.

Trust

Establishing mutual trust is crucial to any good attorney-client relationship. Trust allows clients to honestly discuss the facts of their cases, and it enables attorneys to render candid advice. Yet, parents' attorneys often find it difficult to develop a trusting relationship with their clients. That takes time, so it rarely can be achieved in the initial meeting. Most of the parents caught up in child protective cases are poor, and a disproportionate number come from traditionally disadvantaged populations.[12] Additionally,

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[9] MRPC 1.6.

[10] MRPC 1.2.

[11] See MRPC 1.2 cmt.

[12] Statistics reveal that most families affected by the child welfare system are poor. According to the Third National Incidence Study of Child Abuse and Neglect (NIS-3), poor children were over 20 times more likely to be maltreated and over 40 times more likely to be neglected. Sedlak & Broadhurst, United States Department of Health and Human Services, *The Third National Incidence Study of Child Abuse and Neglect* 5-4 (1996). Additionally, African-American children are disproportionately affected by the foster care system even though no evidence exists that African-American parents are any more likely to abuse or neglect their children. Despite only comprising 12 percent of the population, according to the 2000 Adoption and Foster Care Analysis and Reporting System

parents accused of child maltreatment may be frightened and may appear hostile and confrontational. Responding to the petition and, in many cases, the actual removal of their children by Children's Protective Services, parents may distrust all of the child welfare system's authority figures, including their own attorneys. In all likelihood, the attorney who claims to represent them was appointed (and will be paid) by the same court that authorized the children's removal.[13] In the parent's mind, the attorney appears as just another member of the establishment responsible for the child's removal from the home. The parent's attorney must recognize that the barriers created by these and other factors may make it difficult to earn the client's trust.

To remove those barriers, the attorney must, immediately upon appointment, clearly explain to the parent that the attorney's job is to represent the parent's interests, and that the attorney's loyalty lies completely with the parent, not with the court or the agency. Words alone will not engender trust, however. The attorney must be mindful of how the client perceives the attorney's actions. Taking some visible action on behalf of the client very early in the representation--for example, making positive statements about the parent to the caseworker or the court--may help to establish a trusting relationship. In court, the attorney must never make any disparaging comments about the client; in addition to being unethical, it will undermine the client's still-tentative confidence in counsel. Even counsel's casual conversations outside the courtroom with caseworkers, opposing counsel, or court staff may be *interpreted* by parents as signs that the attorney is working against their interests. In the early stages of the relationship, even the *appearance* of divided loyalties may irreparably impair the client's trust.

(AFCARS) report, African-American children constituted 29 percent of children who had open cases and 40 percent of children in foster care. Children's Bureau, United States Department of Health and Human Services, *The AFCARS Report: Interim FY 2000 Estimates as of August 2002*, No. 7, at 2 (2002). A recent report in Michigan confirmed these findings. Michigan Advisory Committee on the Overrepresentation of Children of Color in Child Welfare, *Equity: Moving Toward Better Outcomes for All of Michigan's Children* <http://www.michigan.gov/documents/DHS-Child-Equity-Report_153952_7.pdf> (accessed June 25, 2008).

[13] Under Michigan law, parents accused of child abuse or neglect have the "right to a court-appointed attorney if . . . [they are] financially unable to employ an attorney." MCL 712A.17c(4)(b). See also MCR 3.915(B)(1).

At the outset of the relationship, the attorney must listen patiently to the client's full story and avoid prejudging the parent based on the agency's allegations. Instead, the attorney should empathize with the client and, if appropriate, validate the client's emotional reaction to the situation. This will help to establish rapport with the client, which is the first goal of the initial interview. Counsel should then use broad, open-ended questions to elicit information from the parent. Reserve more specific questions about the case until after the client has had a full opportunity to tell his or her story. The attorney should close the first interview by reviewing the information obtained and outlining the next steps to be taken by both the parent and counsel. Throughout this process, counsel must reassure the client that, subject only to a few very limited disclosure exceptions, all conversations with the attorney are confidential.[14]

Meeting with the client on multiple occasions, especially at locations away from the courthouse, can be crucial to the trust-building process. Attorneys should consider meeting with the client in places that are comfortable to the client, including the client's home, or public buildings with private rooms, such as a library. Letting the client choose the meeting location may help empower the client and reduce tension early in the relationship.

Once earned, the parent's trust must be maintained. The attorney must stay in close contact with the client, which requires making and returning phone calls, scheduling regular meetings outside of court, and sending the client letters and copies of court orders.[15] During each conversation, the attorney must carefully listen to the client's concerns before recommending the course of action that will best serve the client's interests. By taking these steps, the attorney will show that the parent's wishes and needs are paramount, and that open and honest communication will enhance the quality of the attorney's representation.

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[14] MRPC 1.6.

[15] Rule 1.4 of the Michigan Rules of Professional Conduct mandates that attorneys "keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains."

Defining the Client's Goals

Soon after the case begins, parents' attorneys must help their clients define and clarify their goals. The typical overarching goal--reunifying the family--may be obvious, but the attorney must also identify the client's numerous short- and long-term goals on issues such as placement, parenting time, and services. Despite denying the state's allegations, will the client agree to participate in services such as parenting-skills programs? If the children cannot be returned home immediately, where should they live while the case proceeds? What type of parenting time should occur? What frequency of sibling visits does the parent prefer?

The parent's attorney must help the client establish *realistic* goals for the representation. To that end, the attorney should provide objective feedback about the client's stated goals, and guide the client toward goals that can be achieved. For example, where the evidence clearly shows that the parent seriously abused the child, the parent should not expect immediate reunification. Most parents want their attorney to analyze the likelihood of achieving their short- and long-term goals. Therefore, parents' attorneys must provide objective, carefully considered advice.

The attorney must also ascertain whether the client wants the case to focus on the past or the future. This decision will significantly affect how the attorney handles the case. If the case is about the past--that is, about the veracity of the agency's allegations against the parent--then the pre-jurisdictional stage of the child protective case may resemble a criminal proceeding. The parent's attorney will act like defense counsel, trying to *exonerate* the client with the hope of obtaining a dismissal or at least a finding that the court does not have jurisdiction. In that situation, an attorney may take a more adversarial approach to the case, focusing on the traditional aspects of civil litigation such as formal discovery, depositions, and the trial in front of a referee, judge, or jury.

On the other hand, many clients will decide that they do not want to focus on the past, preferring instead that the case be about the future. If so, then the parent's *improvement* becomes the goal and the attorney will try at every opportunity to demonstrate to the court and the agency that the parent has made progress and now can care for the child. Rather than pursuing the more adversarial techniques discussed above, this litigation

strategy may acknowledge the court's jurisdiction and move on immediately to cooperative problem-solving and the parent's participation in services.

In other words, exonerating a parent requires a different legal strategy than improving the parent. For both, the goal is to reunify the family, but the attorney's strategy and tactics will differ markedly. In the abstract, one cannot determine which approach will be best for a client. A parent may even elect to incorporate elements of both. But the one indispensable step is that the attorney start by meeting with the client to establish that parent's individualized goals and priorities.

Regardless of the client's specific litigation goals, the parent's attorney should try to foster a healthy relationship between the client and the caseworker. That will benefit even those parents who disagree with the agency's actions and decide to challenge the factual and legal bases for the court taking jurisdiction over the child. A strong, working relationship with the caseworker will make it easier to resolve disputes regarding placement, parenting time, and agency services to the family; the courts often cannot resolve those issues quickly unless the parties have already agreed on how to resolve them. The attorney must explain that the parent should cooperate with the caseworker despite their disagreements on some specific issues. The parent's attorney should model this cooperative behavior when interacting with the worker. That will help the client to understand that hostility and unnecessary confrontation will only undermine the client's position.

Defining the Scope of Representation

Defining the scope of the legal representation presents another challenge for parents' attorneys. Typically, the court has appointed the parent's attorney. The appointment order will authorize legal advocacy both inside and outside the courtroom -- provided that the advocacy relates directly to the child protection case. Yet, attorneys who do this work recognize that resolving collateral legal disputes and related issues can significantly affect the child protection case. For example, a parent may also need an attorney to file for custody or establish paternity, to pursue expunging the parent's name from the child protection central registry, or to advocate for both the child and the parent in special education hearings.

Without legal assistance on these collateral issues, the parent may not be able to take the necessary steps to move the child protection case forward. Unfortunately, in many jurisdictions, court-appointed parents' attorneys do not get paid for assisting clients in these separate-but-related matters. Consequently, court-appointed parents' attorneys often confront the question, "How much more should I do for my client?"

Beyond representing the parent in the child protection proceeding, which the appointment order mandates, each attorney must determine the scope of the representation and explain to the client exactly which other activities the attorney can and will undertake. Sometimes just a little uncompensated work by counsel can make a huge difference in the child protection case. Some examples include helping the client fill out standard court forms or merely advising a client on how to proceed in a related matter. If the attorney cannot directly assist the parent in the collateral matter, then the attorney should attempt to locate another lawyer to help the client. At a minimum, try to provide the client with sufficient direction to enable the client to address the collateral legal issue without an attorney's assistance. Parents' attorneys must think broadly about their client's goals and act creatively to achieve those goals, even if that entails advising the client to pursue other legal avenues such as custody, adoption, or guardianship. These small counseling steps, taken when the attorney cannot do more, may help resolve the child protection case.

Institutional pressures

Parents' attorneys often face enormous institutional pressures to undermine their own client's interests. For example, low compensation discourages active advocacy. Some jurisdictions pay attorneys based solely on how many times they appear at hearings, as opposed to paying an hourly fee for the attorneys' actual work. That compensation arrangement provides no incentive to work on the case outside the courtroom. Due to a court's docket backlog, parents' attorneys may face pressures to convince their clients to enter a plea giving the court jurisdiction rather than take a case to a jurisdiction trial. This pressure may be compounded by a perceived need to please the judge, who will control the attorney's appointments in future cases. Even worse, parents' attorneys who press their clients' arguments

aggressively may be chastised by the other parties or even outside observers who believe that the parent's goals conflict with the child's best interests.

Regardless of these pressures, parents' attorneys must remember that their paramount obligation, under the Michigan Rules of Professional Conduct, is to zealously advocate on behalf of their client. This responsibility remains despite external constraints such as low fees or pressure from third parties.[16] If an attorney feels unable to fulfill his or her ethical responsibilities to the client, the attorney must immediately request permission to withdraw from the case.[17] Under no circumstances do the MRPC permit an attorney to deviate from the basic requirements set forth in those rules.

Representing Non-Offending Parents

For the most part, this protocol speaks to attorneys who will represent parents who stand accused of abusing or neglecting their children. But attorneys who practice child-protection law sometimes will represent "the other parent," the parent who has done nothing wrong – or perhaps done nothing worse than failing to report the abusive parent to the authorities. This section of the protocol will discuss some issues that are unique to that context. Keep in mind, however, that much of the information presented elsewhere in the protocol will apply to these cases, too.

Representing non-respondent[18] or non-offending parents poses additional and different challenges. Under Michigan law, to obtain jurisdiction, the judge or jury needs to find only that the acts or omissions of *either* parent amounted to abuse or neglect of the child as defined in MCL

[16] MRPC 1.7 makes clear that "a lawyer shall not represent a client if the representation of that client . . . may be materially limited by the lawyer's responsibilities . . . to a third person, or by the lawyer's own interests."

[17] See MRPC 1.16 (requiring withdrawal where the representation would result in violation of the Rules of Professional Conduct).

[18] The court rules define a "respondent" as a "parent, guardian, legal custodian, or nonparent adult who is alleged to have committed an offense against a child." MCR 3.903(C)(10).

712A.2(b).[19] The agency does *not* have to prove allegations against *both* parents in order for the court to obtain jurisdiction over the child. Once the court obtains jurisdiction, it then may issue orders that it determines to be in the child's best interests. Such orders sometimes deny the non-respondent parent custody, despite the absence of a finding of neglect or abuse by that parent. The orders also may require the non-respondent parent to comply with court-ordered services.[20] The state may even move to terminate the parental rights of the non-respondent parent despite the lack of an abuse or neglect adjudication against that parent.[21] Indeed, as a matter of strategy, the state often will proceed initially against only one parent (the one against whom the state has the strongest evidence), but later move to terminate the parental rights of both parents.

When representing the non-respondent parent in these situations, counsel should consider both constitutional and practical arguments. If the state seeks to deprive the non-respondent parent of custody and to place the child in foster care, counsel should argue that the Constitution requires a finding of unfitness against the non-respondent parent before the custody deprivation can occur.[22] Any attempt to strip the parent of his or her parental rights without such a finding of unfitness contravenes the Due Process Clause.[23] Attorneys raising this argument should file a written motion and stand ready to appeal immediately if the trial court denies the

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[19] See *In re CR*, 250 Mich App 185, 205; 646 NW2d 506 (2001) ("[T]he court rules simply do not place a burden on a petitioner like the FIA to file a petition and sustain the burden of proof at an adjudication with respect to every parent of the children involved in a protective proceeding before the family court can act in its dispositional capacity.").

[20] See MCL 712A.6 ("The court has jurisdiction over adults . . . and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile . . . under its jurisdiction.").

[21] See *In re CR*, n 19 *supra* at 205 ("The family court's jurisdiction is tied to the children, making it possible to terminate parental rights even of a parent who, for one reason or another, has not participated in the protective proceeding under proper circumstances.").

[22] See *Stanley v Illinois*, 405 US 645, 649; 92 S Ct 1208; 31 L Ed 2d 551 (1972) ("[A]s a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him.").

[23] See Sankaran, *But I Didn't Do Anything Wrong: Revisiting The Rights Of Non-Offending Parents In Child Protection Proceedings*, 85 Mich B J 22 (2006) for more information about this argument.

non-respondent parent's right to an evidentiary hearing or refuses to return custody to the non-offending parent.

In addition to constitutional principles, practical arguments must also be considered. When the state proceeds on allegations against only one parent, the other parent's attorney should counsel the client about how to persuade the court to return the child to the non-respondent parent. The client can strengthen that argument by demonstrating to the court and the caseworker that he or she is willing to place the child's interest ahead of the relationship with the abusive parent. For example, the attorney should caution the client against trying to persuade the child to recant the child's previous allegations of abuse by the other parent. There will be negative consequences if the non-respondent parent openly disbelieves the child or tries to influence the child's testimony.

But the attorney and the non-respondent parent should consider some tactical maneuvers that may help the non-respondent parent reunite with his or her child. For example, if the parents have been living together, then the attorney should advise the client that separating from the respondent parent, either temporarily or permanently, may expedite the child's return to the non-respondent parent's home. Or, if the client agrees, counsel might ask the court to issue an order requiring the abusive parent to leave the home. If the parents are legally married, then the attorney should discuss whether obtaining a divorce is in the client's interest. The appropriateness of these "separation" options often will depend on the severity of the abuse. Michigan law affords few rights to non-respondent parents; therefore, these options must be considered.

The Preliminary Hearing

At the preliminary hearing, the court decides whether to authorize the agency's petition and whether to approve the child's removal from the family home, if the agency has requested removal. This hearing bears some similarity to the arraignment and preliminary examination stages of a criminal case. If the court finds probable cause to believe the petition's allegations of abuse or neglect, then the court will authorize the petition,

which may result in a later full-scale trial to determine whether the court has jurisdiction over the child.

In most counties, parents' attorneys will meet their clients for the first time just before the preliminary hearing. Typically, this meeting will take place in the hallway outside the courtroom. The attorney will have very little time before the hearing to discuss the case with the new client, but many decisions of great consequence are made during the preliminary hearing. Studies reveal that a natural bias toward preserving the custodial status quo makes courts reluctant to quickly return children to their parents once the court has ordered the child's removal.[24] After a removal, the barriers to reunification increase and courts may be unwilling to reunify the family until every element of a service plan has been met. In many cases, due to a perceived emergency need for protection, the child will have been removed from the parent's home even before the preliminary hearing. If so, the preliminary hearing represents the first opportunity to remedy an erroneous removal decision. Regardless of a particular case's initiating events, what happens during the preliminary hearing may dictate where the child lives for many months. Therefore, strong, zealous advocacy by parents' attorneys is essential from the outset.

Eliciting information

Knowledge about the case empowers an attorney to represent a client effectively. Therefore, a parent's attorney must make the most out of the brief initial interview with a new client. Counsel should acquire basic factual information about the case and advise the client on the decisions that the client must make immediately. The attorney should also obtain the client's personal information (e.g., date of birth, address, phone number, or Native American heritage[25]), the client's version of how the family became involved

[24] See Cooper, Davis & Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U Chi L Sch Roundtable 139, 139-155 (1995) (observing a "sequentiality effect" in child protective decisions where decision-makers tend to favor the status quo once a child is removed from his or her home).

[25] If the client has Native American heritage, counsel should carefully review the provisions of the Indian Child Welfare Act to determine whether special procedures must be applied in the case. See 25 USC 1901 *et seq*.; MCR 3.980.

with Children's Protective Services, any previous family involvement with the courts or the agency, whether the family currently receives services, whether the child has special needs, and the nature of outside resources available to the family, including alternative placement options if the court orders removal. To elicit this information, the attorney should use open-ended questions calling for narrative answers. More focused, clarifying questions should follow. At the end of the interview, the attorney should retell the story in the attorney's own words to verify an understanding of the client's version of the facts.

Also during the limited time available before the preliminary hearing, the attorney must obtain information from other people who are present for the hearing. These may include the Children's Protective Services worker, family members, and attorneys representing other parties. At a minimum, the attorney must obtain and review a copy of the petition, which usually will have been prepared and filed by a DHS/CPS worker. A thorough reading of the petition will help the parent's attorney avoid surprises during the hearing. It also will allow the attorney to negotiate with the other parties to see if any agreements can be reached before the preliminary hearing.

Client counseling

In addition to gathering information, the parent's attorney should use the initial client interview to explain the two main decisions that the court will make at the preliminary hearing. First, the court will decide whether to authorize the petition, which is a finding that the petitioner has shown probable cause to believe that the facts in the petition are true and that the case comes within the court's statutorily defined jurisdiction. Second, if the court does authorize the petition, the jurist then will decide where the child will live while the case proceeds.

The parent must decide whether to contest the petition's authorization. Unless the parent waives all objections, the court must determine whether the agency has shown probable cause to believe that one or more of the allegations in the petition are true and are among the grounds for jurisdiction listed MCL 712A.2(b). [26] Instead of ruling immediately during

[26] MCL 712A.13a(2).

the preliminary hearing, the judge may grant an adjournment of up to 14 days to secure the attendance of additional witnesses or for other good cause.[27] If the petition ultimately is *not* authorized, the court may either dismiss the petition or refer the matter for alternate services.[28]

To help the parent-client decide whether to contest the petition's authorization, the attorney must explain that the preliminary hearing is not a full-fledged trial. Even if the parent waives all objections to authorization, the parent will still have the right to contest the petition's allegations later, during a jurisdiction trial before a referee, judge, or jury.[29] Authorizing the petition only allows the case to go forward; it does not confirm the allegations against the parent.

Challenging the authorization, however, may have negative consequences for the client. The "probable cause" showing required of the petitioner at the preliminary hearing is a very low standard of proof. Black's Law Dictionary defines "probable cause" as "a reasonable ground for belief in certain alleged facts."[30] Further, at a preliminary hearing, the petitioner can use hearsay evidence to satisfy that burden of proof. The Michigan Rules of Evidence do not apply at a preliminary hearing.[31] Typically, the testimony of the Children's Protective Services worker will suffice to meet the probable cause standard. Only rarely can a parent convince the court that a petition should not be authorized.

Furthermore, if a parent does contest the authorization decision, that parent may later have difficulty convincing the court or the agency to side with the parent on issues involving placement and parenting time. Much of the testimony and argument at a *contested* preliminary hearing will be devoted to the petition's factual allegations. That will keep the court focused on the alleged abusive or neglectful acts by the parent, which the agency will recount using hearsay evidence that typically would not be admissible at a later jurisdiction trial. If the court hears that evidence during a

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[27] MCR 3.965(B)(10).

[28] MCR 3.965(B)(4).

[29] MCR 3.965 (B)(6) (requiring the court to advise the respondent of the right to trial on the allegations in the petition before a referee, judge, or jury).

[30] Black's Law Dictionary 1201 (6th ed).

[31] MCR 3.965(B)(11).

preliminary hearing, the court may think less favorably of the parent at all subsequent stages.

Given those possible adverse consequences and the low likelihood of success, contesting probable cause may not be worth the risk. If, however, the allegations in the petition, even if true, seemingly fail to set forth a prima facie case of abuse or neglect, it may make sense for the parent to contest the petition's authorization for that reason. The argument then will hinge on the petition's *legal* sufficiency, not its *factual* accuracy. Framing the challenge in legal terms avoids prematurely exposing the court to all the factual details. To determine whether the alleged facts, if proven, are sufficient for the court to assert jurisdiction, the parent's attorney must know the legal standards for the court taking jurisdiction over a child. See MCL 712A.2(b) in the Juvenile Code.

But even if the attorney thinks that the agency's legal theory for jurisdiction looks weak, the preliminary hearing still may not be the appropriate time to challenge it. Again, the parent and attorney should consider that there will be a later and better courtroom opportunity to present their complete theory about why the court should not intervene in the family's life.

The child's placement pending trial is the second main decision that the court makes during the preliminary hearing. The client must understand the distinction between a court's decision to authorize the petition and the separate decision about where to place the child. The court rules explicitly state that, "[I]f the court authorizes the filing of the petition, the court may release the child to a parent . . . and may order such reasonable terms and conditions believed necessary to protect the physical health or mental well-being of the child."[32] In other words, even if the court authorizes the petition, it may also decide that the child should remain in the parent's home.

Therefore, before the hearing, the attorney must ascertain whether the parent wants the child back in the home and, if so, whether the parent is willing to accept conditions on the placement. For example, in order to keep the child at home, will the parent agree to random drug testing or accept

[32] MCR 3.975(B)(12)(a). See also MCL 712A.13a(3) (permitting the court to release the child to his or her parent "under reasonable terms and conditions necessary for either the child's physical health or mental well-being").

agency services such as in-home reunification assistance or parenting classes? If the client-parent is not the alleged abuser, will he or she help enforce a court order requiring the abuser to leave the home? Is the parent willing to take the children to services such as counseling and medical appointments? The attorney must convey to the client that flexibility when it comes to conditions like those listed above will increase the likelihood that the court will let the child return home. Remember that accepting agency services does not indicate that the parent admits the allegations in the petition. Regardless of whether the client accepts services, he or she will have a right to a full evidentiary hearing if the case proceeds as far as a jurisdiction trial.

The attorney and parent-client should also discuss the parent's options if the court does not immediately return the child to the parent's custody. They should explore other placement possibilities that the parent considers more acceptable than foster care. For example, the statute requires that the court consider placing the child with relatives,[33] which may allow the parent to see the child more frequently and in a more relaxed setting. The attorney and parent should identify relatives, friends, and others who could care for the child temporarily. When considering this type of placement, the court will look at factors such as the proposed caregiver's prior criminal or child protective history, the family's resources, and the proposed caregiver's previous involvement in this child's life. The attorney and parent should discuss those factors before the preliminary hearing in order to assess the feasibility of these alternative placement options.

In addition to possible placements, the attorney should discuss parenting time issues with the client.[34] What type of parenting time would the client like? Where should the visits take place? How frequently should they occur? If parenting time must be supervised, does the client know someone who is willing to supervise the visits and can pass the agency's background checks? When evaluating all of these possibilities, the attorney

[33] MCL 722.954(2) (foster care agency must identify, locate, and consult with relatives).

[34] Unless the facts demonstrate that parenting time would be harmful to the child, "the court shall permit the parent to have frequent parenting time with the child." MCL 712A.13a(11). See also MCR 3.965(C)(6). If parenting time may be harmful to the child, the court "shall order the child to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time." MCL 712A.13a(11).

should view the client as a valuable collaborator who can help develop creative solutions to the various issues.

Unless the attorney can persuade the court to order a more creative solution, parenting time likely will occur only once a week, and then only at the offices of the agency that is supervising the child's court-ordered placement. If the parenting time must be *supervised*, the attorney should at least try to arrange more frequent parenting time in a more family-friendly setting.

Negotiating

Before the preliminary hearing, in addition to information gathering and client counseling, the parent's attorney should begin negotiating with the other parties and their attorneys. The Children's Protective Services worker and the child's L-GAL will always attend the preliminary hearing. In some jurisdictions, attorneys representing the caseworker[35] and the child's other parent may also appear.[36] After ascertaining the client's goals, the parent's attorney should work with the other attorneys and the caseworker to resolve differences, identify agreements, and try to reach a consensus on how the case should proceed.[37] Stipulations on issues such as authorization, placement, parenting time, and services will give the client a greater sense of control over the process. If agreements cannot be reached, having conversations with opposing parties will at least provide essential information about each party's position and reasoning. This knowledge will

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[35] See MCL 712A.17(5) ("upon request of the family independence agency . . . the prosecuting attorney shall serve as a legal consultant to the family independence agency or its agent at all stages of the proceeding."); MCR 3.914 ("[o]n request of the court, the prosecuting attorney shall review the petition for legal sufficiency and shall appear at any child protective proceeding."). Even if an attorney has filed an appearance on behalf of the DHS, a parent's attorney can speak directly with the caseworker without violating the MRPC. See RI-316 (December 13, 1999).

[36] The juvenile court rules provide that, "[t]he court shall appoint an attorney to represent the respondent at any hearing conducted pursuant to these rules if (i) the respondent requests appointment of an attorney, and (ii) it appears to the court, following an examination of the record, through written financial statements, or otherwise, that the respondent is financially unable to retain an attorney." MCR 3.915(1)(b).

[37] In situations in which the law requires the agency to file a mandatory petition for termination, DHS may not be willing to negotiate a plea agreement. *DHS Children's Protective Services Manual* 715-3.

help the parent's attorney decide what strategy to use at the preliminary hearing.

To summarize the last several sections, the attorney's three primary tasks *before* the preliminary hearing are: information gathering, client counseling, and negotiating. Although the time for these activities may be limited, even brief conversations can help the attorney achieve the client's objectives. The next section focuses on advocacy *during* the preliminary hearing.

Courtroom Advocacy

The goals articulated by the parent during the first attorney-client meeting will guide the attorney's advocacy at the preliminary hearing. Under no circumstances should the attorney attempt to advocate on behalf of the client without first having discussed the case with the client and ascertained the client's position on the major issues. If there has not yet been sufficient time to consult with the client, the attorney should request that the case be "passed" until later that day (to preserve the possibility of the child's immediate return home) or until a later date (if only a longer adjournment will allow time for proper preparation). If the attorney does need more time, the court rules permit the court to adjourn the preliminary hearing for up to two weeks for the "attendance of witnesses or for other good cause shown."[38]

The preliminary hearing is the attorney's first chance to introduce the court to the parent and the parent's story. The court, the L-GAL, and the agency caseworker will watch the parent's courtroom actions closely to determine whether the parent seems inclined to respond positively to the judicial intervention and whether the parent will put the children's interests ahead of the parent's or any other person's. The attorney must caution the parent that the parent's behavior and attitude will be scrutinized closely during the hearing. Behaviors such as hostility toward the caseworker or the judge may delay reunification. The parent's instinctively hostile reactions may be understandable or even justifiable, but they will not further the parent's goal of having the children returned. Thoroughly explaining

[38] MCR 3.965(B)(10).

beforehand what will occur during the preliminary hearing will help to prepare and calm the client. The parent's attorney then should model appropriate courtroom etiquette for the client by maintaining a professional and calm demeanor while asserting the client's rights. Additionally, the attorney can provide the client with appropriate opportunities to participate in the court hearing. For example, having a client *write* down objections to statements made by other parties may minimize the client's *vocal* outbursts during other parties' arguments.

The major issues addressed at the preliminary hearing are: (1) whether to authorize the petition, (2) the child's pretrial placement, (3) parenting time, and (4) services for the family. Due to busy dockets, the preliminary hearing may last for only a few minutes, but the decisions made will lay the foundation for the rest of the case. Parents' attorneys must ensure that they have opportunities to address each of those major issues, and that the court considers each issue fully and separately.

The attorney may need to slow the pace of the hearing to ensure that everyone hears the client's full story. Judges try to use their bench time efficiently, and that may cause them to conflate the discussion of whether to authorize the petition with what should be the completely separate discussion of where to place the child if they do authorize the petition. Many judges assume that if they authorize the petition, they almost certainly will place the child in foster care. As explained above, that assumption is incorrect. After authorizing the petition, the court must then make a separate determination about where the child will be placed pending trial. The court has the authority to place the child with one or both parents.[39] If the parent wants the child to remain at home or to live with a relative, the parent's attorney must ensure that the court considers the placement issue fully, separately, and in its proper sequence.[40]

The court rules specifically allow parents the "opportunity to cross-examine witnesses, to subpoena witnesses, and to offer proofs to counter the admitted evidence."[41] Assuming that the court has authorized the petition, then, before removing the child from the home, and only after

[39] MCL 712A.13a(3); MCR 3.965(B)(12).

[40] The court may also place the child with the parents of the putative father. MCL 712A.13a(1)(j).

[41] MCR 3.965(C)(1).

considering all the relevant evidence, the court must make a separate decision on whether continuing the child's residence in the home is "contrary to the welfare of the child."[42] Furthermore, even if removal is necessary, the court must order the child placed in the "most family-like setting available consistent with the child's needs."[43] Evidence such as report cards, medical records, and statements from teachers, therapists, religious leaders, friends, neighbors, and family members may help the court make those decisions.

Additionally, to assuage the court's concerns about the child returning to a parent's home, the parent's attorney may want to suggest "reasonable terms and conditions" for a home placement. For example, courts may permit a child to remain in the home if the parents are willing to accept services such as intensive in-home reunification programs, parenting classes, and counseling. Each jurisdiction has different service programs that may assist a family in danger of being separated. Parents' attorneys should become familiar with the local community's various programs for in-home and preventive services. They should consider all the programs available in the county -- not just those typically utilized by the agency. For example, in some counties, the Association for Retarded Citizens (ARC) has particularly helpful programs for developmentally-delayed parents. Local colleges may have programs to train aspiring social work students; and those programs may offer services such as student-intern supervision of parenting time. Knowledge of these programs will enable the attorney to expand the court's placement options at the preliminary hearing.

Always keep in mind that the law requires the agency to make "reasonable efforts" to prevent the removal of the child from the home except in the most extreme circumstances. This obligation requires accessing community resources that might avoid the need to place the child in foster care.[44] The agency's failure to make those mandatory "reasonable

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[42] MCR 3.965(C)(2). "Contrary to the welfare of the child" is defined in MCR 3.903(C)(3) to include "situations in which the child's life, physical health, or mental well-being is unreasonably placed at risk."

[43] MCR 3.965(C)(2).

[44] Before a court removes a child from the custodial parent, the court "must determine whether the agency has made reasonable efforts to prevent the removal of the child." MCR 3.965(D)(1). Reasonable efforts are not required in certain situations enumerated in the statute and the court rules. MCL 712A.19a(2); MCR 3.965(D)(2).

efforts" prior to seeking court authorization for a child's removal constitutes a valid argument against removal. In the right cases, parents' attorneys should advance that argument at the preliminary hearing.[45]

The attorney also should explore placement alternatives to the typical foster care placement. For example, the court may order a home placement if a trusted family member has offered to move into the parent's home or to allow the client and the client's children to move into that relative's home. If the parent-client was not the wrongdoer, the attorney may request that the court order the actual abuser to leave the home.[46]

The attorney must explain to the client that accepting community services or agreeing to special living arrangements does *not* represent an admission of wrongdoing or waive the right to a jurisdiction trial. At the same time, the attorney must emphasize the importance of complying with the court's orders because, in many situations, the only way to keep the child at home will be to identify the court's concerns and address those concerns by making some concessions.

If the court does order an out-of-home placement, then counsel should advocate for frequent and family-friendly parenting time. As with placement issues, the attorney's role regarding parenting time is to expand the court's options. In most child protective cases, the standard procedure allows parents only an hour of supervised visitation per week, with the visits occurring at the agency's office. This standard practice, however, may not suit a particular family's needs. Having the agency supervise visitation may not be necessary. Many child protective proceedings arise out of poverty-based neglect; in those cases, the issues that led to the child's removal may be related to the condition of the home, not the parent's conduct or

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[45] The DHS Children's Protective Services Manual describes the types of reasonable efforts the agency should make. "The services offered . . . may include but are not limited to 24 hour emergency caretaker, homemaker, day care, crisis or family counseling, emergency shelter, emergency financial assistance, respite care, parent-aide services, home-based family services, self-help groups, services to unmarried parents, mental health services, drug and alcohol abuse counseling, and vocational training." *DHS Children's Protective Services Manual* 714-2.

[46] See MCL 712A.6b (permitting the court to issue an order removing a nonparent adult from the home). Additionally, the court may condition a child's return to the home on the removal of the abuser from the home. MCL 712A.13a(3).

culpability. In such situations, short day visits, with restrictions on where the parent may take the child, may suffice to protect the child.

Even if the parenting time must be supervised, the attorney should advocate for options that are more family-friendly and less restrictive than the common arrangement under which the parent and child see each other only at the agency office. For example, relatives, friends, clergy, community members, or foster parents may be willing to supervise the visits. Visits can also take place at nonagency sites such as a library, church, school, or even the client's home.

The court must also determine the frequency of parenting time. Studies have shown that frequent parenting time significantly increases the likelihood that reunification will occur.[47] Parents afforded the opportunity to see their children regularly have an added incentive to comply with the service plan. They also receive reassurance that their children are doing well in foster care. Regular parenting time also preserves the parent-child bond, which, especially for younger children, has important developmental consequences.[48]

Parents' attorneys must ensure that parenting time orders are tailored to the client's needs. Michigan statutes and DHS policies support that approach. The Juvenile Code mandates that the parent have "frequent parenting time"[49] and requires that the caseworker "monitor and assess in-

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[47] See Fanshel & Shinn, *Children in Foster Care: A Longitudinal Investigation* (1978) (finding that more frequent visitation increased the emotional well-being and developmental progress of foster children and resulted in a higher likelihood that children were reunified with their parents). Research has also shown that frequent visitation prior to reunification increases the likelihood that the reunification will succeed. See Farmer, *Family Reunification with High Risk Children: Lessons From Research*, 18 Child & Youth Serv Rev 287 (1996).

[48] John Bowlby, a developmental psychologist and a leader in the field of attachment, described the effect of separating a young child from his or her parent. He wrote, "Whenever a young child who has had an opportunity to develop an attachment to a mother-figure is separated from her unwillingly, he shows distress; and should he also be placed in a strange environment and cared for by a succession of strange people, such distress is likely to be intense." Bowlby, *Attachment and Loss: Vol II. Separation: Anxiety and Anger* 26 (1973). From the child's perspective, placement in foster care is typically an unwilling separation from a person to whom a child is attached. Visitation is one way to ameliorate the child's distress.

[49] MCL 712A.13a(11).

home visitation between the child and his or her parents."[50] The parenting time schedule must be flexible enough "to provide a number of hours outside the traditional workday to accommodate the schedules of the individuals involved."[51]

DHS policy reinforces those statutory provisions. That agency's foster care policies mandate that "[p]arenting time must occur in a child and family-friendly setting conducive to normal interaction between the child and parent." Weekly parenting time is the *minimum*. For younger children, parenting time should be more frequent.[52] If reunification remains the goal, the DHS policies also require increasing the length of parenting time as the case continues.[53] Attorneys should buttress their arguments regarding parenting time by citing these statutes and DHS policies. That will ensure an individualized decision that is best for the family.

Services for the family are the fourth issue (after authorization, placement, and parenting time) that may be discussed at the preliminary hearing. If the parent will accept services immediately, the attorney usually should request that the court order the agency to begin providing those services by a specified date. Because the first permanency planning hearing must be held within 12 months of a child's removal,[54] parents should try to begin their participation in services immediately. That will maximize the services provided within the first 12 months, and thus maximize the parents' opportunity to regain custody of the child. Some clients may hesitate to accept services prior to the jurisdiction trial because they fear that information revealed during services such as a parenting class or a counseling session could be used against them at trial. If this concern exists, counsel should consider requesting a protective order that limits the disclosure of that sensitive information until the dispositional stage of the case -- if the case proceeds that far. Such an order will encourage the client to begin participating in services immediately.

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[50] MCL 722.954b(3).

[51] MCL 722.954b(3).

[52] *DHS Children's Foster Care Manual* 722-6.

[53] *Id.*

[54] MCL 712A.19a.

This protocol has taken many pages to summarize the preliminary hearing decisions regarding authorization, placement, parenting time, and services. In the real world and in real time, the court may make all of those decisions in a matter of minutes, but their import for the future course of the child protective case and the child's life cannot be overstated.

Although parents' attorneys often request a summary dismissal at the preliminary hearing, courts seldom dismiss cases outright at that point. More often, the case next enters the pretrial phase. This protocol's next section discusses the strategic issues that arise during that phase.

The Pretrial Proceedings

Pretrial Counseling

During the pretrial phase, the attorney should focus first on the client's immediate needs, on issues such as placement, parenting time, and services. After that, the focus will shift to resolving the allegations in the petition and preparing for a trial on jurisdiction if the parties cannot resolve the case without a trial.

If the court authorizes the child's removal at the preliminary hearing, then the period immediately following that hearing is crucial. The parent may feel alienated, disempowered, and frustrated. The loss of control often makes parents want to disengage from the process completely. The parent's attorney can counter these understandable but self-defeating tendencies by ensuring that the agency keeps the parent involved in the child's life. As a first step, the attorney must explain the importance of the client attending each scheduled parenting time visit with the child. If the parent has to miss a visit, the parent must notify the caseworker as soon as possible so the child will not be transported to the visitation site and then be disappointed when the parent fails to appear. If scheduling difficulties arise frequently, then the attorney and the parent must discuss those issues with the agency supervising the case. For its part, the agency has an obligation to ensure that transportation difficulties do not impede a parent's efforts to visit the child. The agency should offer transportation assistance when necessary.[55]

[55] *DHS Children's Foster Care Manual*, 722-6.

The attorney can help to preserve the parent's involvement in other ways. Even after a child is removed from a parent's home, the parent still retains important parental decision-making rights. For example, parental consent is necessary for any nonroutine or elective medical treatment of the child, including surgery.[56] Similarly, parents retain the right to make major educational decisions for a child. They may attend all educational planning meetings. And they retain the right to decide whether the child will receive special education services,[57] be home schooled, or attend a private school.[58] The parent's attorney should encourage the parent to attend school meetings, doctor's appointments, and therapy sessions (unless the court order prohibits such involvement). At a minimum, the attorney should make sure that the parent continues to receive updated information about the child from the service providers. Keeping the parent involved in the child's life will show the court that the parent remains concerned about the child's well-being and wants the child to return home even though the child has been temporarily placed elsewhere.

Maximizing the Parent's Opportunity to Receive Agency Services

Making sure that the agency complies with all court orders, statutes, and departmental policies will help keep the parent invested in the process.[59] Therefore, the parent's attorney must actively monitor and help to enforce the court's orders related to placement, parenting time, and services. The attorney should encourage the client to call immediately if any problems arise. If the agency fails to implement court orders in a timely manner despite requests from the parent and attorney, then the attorney should file a motion requesting that the court hold the agency in contempt of

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[56] MCL 722.124a(1). See *In re AMB*, 248 Mich App 144, 178-183, 640 NW2d 262 (2001).

[57] See 34 CFR 300.519 (stating that a surrogate parent is needed only when a foster child is made a "ward of the State.").

[58] *DHS Children's Foster Care Manual*, 722-2.

[59] The DHS policy manuals for protective services, foster care and adoptions are available online. Department of Human Services, *Policy and Procedure Manuals* <www.mfia.state.mi.us/olmweb/ex/html> (accessed June 25, 2008).

court.[60] Depending on the date of the next scheduled court hearing, the attorney may ask the court to hear the contempt motion even earlier, at a specially scheduled hearing.

In all cases, the Juvenile Code requires that the agency do certain things within specified intervals after the child's removal or the preliminary hearing. Within 30 days of removal, the agency must prepare an initial service plan specifying the services that the agency will recommend that the parent complete before the child can be returned home.[61] The agency must encourage the parent to "actively participate in developing" the service plan. If the parents do not participate, the plan that the agency submits must document the reasons for a parent's nonparticipation.[62] Any delay in providing services to parents jeopardizes reunification. Therefore, if the agency does not prepare the plan within the time allowed, or if the parent is not sufficiently involved in the planning process, the parent's attorney should follow up with the caseworker and the caseworker's supervisor. If necessary, the court rules explicitly permit parties to request, by motion, that the court review a placement order or the initial services plan and "modify those orders and plan if [modification] is in the best interest of the child."[63]

Exploring Settlement Possibilities

Attempting an informal resolution of the petition's allegations constitutes the attorney's second major task during the pretrial phase. The attorney should first consider whether some resolution short of the court assuming jurisdiction is possible and appropriate. The alternatives include dismissing the case with a voluntary agreement that the parent will participate in services, or holding the petition in abeyance while the parent complies with services.

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[60] Contempt is an appropriate remedy when a person "willfully violates, neglects, or refuses to obey and perform any order or process the court has made or issued to enforce this chapter." MCL 712A.26. Contempt proceedings are governed by MCL 600.1701 to 600.1745.

[61] MCL 712A.13a(8)(a).

[62] *DHS Children's Foster Care Manual*, 722-6.

[63] MCR 3.966(A)(1).

If it appears likely that a jurisdiction trial will lead to the court assuming jurisdiction over the child, then the attorney should ask whether the parent will consider ceding parental rights to another caregiver, either temporarily or permanently. If so, then the attorney should consider arrangements like a limited or full guardianship,[64] a direct consent adoption,[65] or a voluntary relinquishment of parental rights.[66] But those options can have major collateral consequences that the parent must consider. For example, if the parent agrees to voluntarily relinquish parental rights to one child, he or she must understand that doing so can be grounds for the court later terminating that parent's rights to a future child.[67] Regardless, all options must be explored and the attorney must negotiate with the other parties to ascertain whether a mutually agreeable resolution can be reached without a jurisdiction trial.

The attorney and client should also discuss the possibility of entering a plea that allows the court to take jurisdiction over the child.[68] The attorney should first have assessed the strength of the agency's case and estimated the parent's chances of prevailing at trial on the jurisdictional issue. A plea that allows the court to take jurisdiction may be appropriate when the facts alleged in the petition are undisputed and clearly establish a statutory basis for jurisdiction. Or, the client may prefer that the child remain out of the home temporarily while services are provided. Entering a plea that allows the court to take jurisdiction may create positive strategic momentum for the parent by causing the other parties and the court to view the parent as cooperative.

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[64] Guardianship proceedings are governed by MCL 700.1101 *et seq.*

[65] See MCL 710.23a (describing procedures for a direct placement adoption). Although a parent must possess physical and legal custody to effectuate a direct placement adoption, MCL 710.23a(1), a court in a child protective case may be willing to temporarily cede that authority back to the parent for the purpose of finalizing the adoption and resolving the child protective proceeding.

[66] See MCL 710.28 and MCL 710.29 (setting forth the process by which a parent may release parental rights to a child).

[67] See MCL 712A.19b(3)(m) (empowering the court to terminate parental rights if the "parent's rights to another child were voluntarily terminated following the initiation of proceedings under section 2(b) of this chapter or a similar law of another state.").

[68] Pleas in child protective cases are governed by MCR 3.971.

Additionally, the plea will avoid a jurisdiction trial, which often carries negative consequences for the parent. During a trial, the agency may present detailed evidence of abuse or neglect by the parent. That will inevitably focus everyone's attention on the parent's past mistakes. A trial may also exacerbate hostilities between the parent and the caseworker, service providers, and any family members who testify about the parent's past conduct. Furthermore, after a hotly contested trial, if the court finds that grounds for jurisdiction exist, the parent may never be able to develop rapport and trust with those offering services to the family. Entering a plea that allows the court to take jurisdiction may avoid some of these consequences because the plea will allow the case to move directly to the dispositional phase, when everyone's goal will likely be to reunify the family.

Despite those possible advantages of entering a jurisdictional plea, attorneys must also advise their clients about some possible negative consequences. By entering a plea, the parent waives, among other things, the right to a jurisdiction trial in front of a referee, judge, or jury.[69] Many parents will view this trial as their first real opportunity to tell their story, and they will want to exercise that right regardless of the possible negative consequences. Also, if the parent waives the right to a jurisdiction trial by entering a plea, the court's power over the family increases significantly. All future decisions regarding placement, parenting time, or closure of the case will then rest in the court's discretion. The court may also use the parent's jurisdictional plea as evidence in a later proceeding to terminate parental rights.[70]

Ultimately, after being advised by his or her attorney, it will be the parent-client who must decide whether to settle the jurisdiction issue or proceed to trial. Under no circumstances should anyone, including the attorney, try to force the parent to enter a plea.

If the client will at least consider entering a jurisdictional plea, the attorney should negotiate the plea's details with the prosecutor and the other parties. The parent can either admit or plead "no contest" to the allegations in either the original petition or a petition that the agency has

[69] MCR 3.971(B)(3).

[70] MCR 3.971(B)(4).

amended after negotiations with the parent's attorney.[71] The attorney should review these options with the client and then propose to the agency's lawyer the plea language that the client finds acceptable. Before reviewing the options with the client, counsel must determine the consequences of the plea, including both those noted above and others determined by local practices. For example, in some – but not all – jurisdictions, a no contest plea is treated as a finding by the court that the petition's allegations are true. In those jurisdictions, the agency and the court then can use those not-contested "facts" against the parent at a later termination of parental rights hearing.

Other judges will expect a parent who has pled no contest on the jurisdictional issue to (later) make explicit admissions during the dispositional phase. These judges view the belated admissions as evidence that the parent now fully appreciates the wrongfulness of the previous conduct, which indicates to these judges that the parent has made real progress in treatment. Understanding these differing local practices will allow the attorney to better evaluate the possible plea deals discussed during negotiations.

Regardless of local practices, only those allegations that appeared in the petition and were acknowledged by the parent's jurisdictional plea may be treated as proven by the plea. If the agency later amends the petition and seeks a termination of parental rights, the agency must then prove any *additional* factual allegations by legally admissible evidence.[72]

Ultimately, the court must decide whether to accept a negotiated plea that concedes the court's jurisdiction.[73] With a no contest plea, the parent will not explicitly admit the petition's allegations; therefore, in order to accept the plea and take jurisdiction over the child, the court first must obtain evidentiary support -- from a source other than the parent -- for finding one or more of the statutory jurisdictional grounds alleged in the petition.[74] The court must also state why a plea of no contest (as

[71] MCR 3.971(A).

[72] MCR 3.977(F)(1)(b).

[73] MCR 3.971(A).

[74] MCR 3.971(C)(2).

distinguished from a plea that admits jurisdiction) is appropriate.[75] The reasons most commonly cited include the potential civil or criminal liability that could result from a plea that includes explicit factual admissions by the parent.[76]

Preparing for a Jurisdiction Trial

If the parent wishes to proceed to a jurisdiction trial, much of the pretrial phase will be consumed by trial preparation similar to that in any civil case. The attorney should thoroughly investigate the matter by interviewing potential witnesses and reviewing relevant documents. There may be alternate explanations for the alleged abuse or neglect. To obtain information from non-parties, attorneys can use the limited subpoena power granted by MCR 3.920(D) and MCR 2.506. Also, Michigan law permits parents to access their child protective files.[77] Armed with a subpoena and a release signed by the client, a parent's attorney can obtain copies of this information. If the agency will not open its files, the parent's attorney should first seek to resolve that issue with the attorney representing the agency. If negotiating fails, counsel should then request a court order compelling disclosure.

Attorneys should also use formal discovery procedures to uncover the details of other parties' case so that no information unknown to the parent's attorney will be presented at trial. Discovery in child protective cases is governed by MCR 3.922, which specifies the categories of information that must be disclosed if requested.[78] In child protective cases, any additional

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[75] *Id.*

[76] See *People v Hill*, 86 Mich App 706, 713-716; 273 NW2d 532 (1978) (discussing reasons why litigants are permitted to enter into no contest pleas).

[77] MCL 722.627(2)(f).

[78] Under MCR 3.922(A)(1), if timely requested, as a matter of right, the attorney is entitled to information from the other parties including "(a) all written or recorded statements and notes of statements made by the juvenile or respondent that are in possession or control of petitioner or a law enforcement agency, including oral statements if they have been reduced to writing; (b) all written or recorded nonconfidential statements made by any person with knowledge of the events in possession or control of petitioner or a law enforcement agency, including police reports; (c) the names of prospective witnesses; (d) a list of all prospective exhibits; (e) a list of all physical or tangible

compelled discovery, specifically including depositions, requires a court order.[79]

The parent's attorney must also counsel the client about whether the trial should take place in front of a referee, judge, or jury. The attorney must then inform the court of the client's choice within 14 days after (a) the court gives notice of the procedural right or (b) the attorney files an appearance, whichever is later, but always at least 21 days before trial.[80]

Choosing between a jurist (whether referee or judge) or a jury involves both subjective and objective factors. Most trial lawyers prefer juries for cases with favorable, compelling facts, but choose referees or judges for cases that hinge on questions of law. Cases that involve especially gruesome allegations of abuse almost always should be litigated before a jurist because jurors will react more emotionally to the evidence of abuse. The attorney must also consider the client's privacy interests. Many clients will feel shamed by standing accused of child abuse in front of a jury whose members live in the parent's own community. Finally, in the right cases, requesting a jury trial may give the parent's attorney more leverage to negotiate a favorable plea deal. Sometimes, the other parties will have reasons for not wanting the case to be tried by a jury.

A parent who does not request a jury may then be required to choose between a referee and a judge. The parent's attorney should consult experienced local practitioners, especially those who have practiced before the same judge. Consenting to a trial before a referee provides an additional level of appellate review in child protective cases because the parent has the right to have the referee's recommendation reviewed by the trial court judge.[81] [A judge's review of a referee's decision may then be

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objects that are prospective evidence that are in the possession or control of petitioner or a law enforcement agency; and (f) the results of all scientific, medical, or other expert tests or experiments, including the reports or findings of all experts, that are relevant to the subject matter of the petition."

[79] MCR 3.922(A)(2), (3).

[80] MCR 3.911 (jury); MCR 3.912 (judge); MCR 3.913 (referee).

[81] Under MCR 3.991, "[b]efore signing an order based on a referee's recommended findings and conclusions, a judge of the court shall review the recommendations if requested by a party." The party must request a review of a referee's recommendation in writing within seven days after the conclusion of the hearing or within seven days after the issuance of the referee's written recommendations, whichever is later. MCR 3.991(B).

appealed to the Michigan Court of Appeals.[82]] On the other hand, the referee often will have presided at the preliminary hearing, and thus the judge will not previously have heard any of the evidence or made any decisions in the matter. That circumstance can weigh in favor of foregoing the extra layer of judicial review and asking the judge to preside over the jurisdiction trial. That might be especially true if the parent has made significant progress since the preliminary hearing. A judge with no previous exposure to the case's facts will not start out with any unfavorable preconceptions of the parent. Ultimately, the client must make the choice of referee or judge. The attorney should merely explain the factors summarized above and offer a recommendation.

The Pretrial Hearing

The pretrial hearing presents another opportunity for the parent's attorney to resolve issues concerning placement, parenting time, and services. These issues may be addressed at *any* hearing in a child protective case. Updated information regarding the parent, including compliance with services, changes in employment and living situation, or successful parenting time may cause the court to revisit orders entered at the preliminary hearing. At every hearing, demonstrating the parent's continued progress is crucial to creating and maintaining positive momentum.

The pretrial hearing also allows the jurist and the attorneys to anticipate and resolve issues that may arise during the jurisdiction trial. Pretrial hearing practice is governed by MCR 3.922 and MCR 2.401. The parent's attorney should inform the court whether the parent is willing to enter into a plea admitting jurisdiction or, if the client wants a trial, whether it will be before a judge, referee, or jury. At the pretrial hearing, attorneys may file trial-related motions or enter stipulations regarding particular pieces of evidence. For example, if the agency has failed to respond to a discovery request, the pretrial hearing affords a good opportunity to raise that issue with the jurist and, if necessary, file a motion to compel discovery.[83] If the

[82] MCR 3.993(A) (listing orders of disposition placing a minor under the court's supervision and removing the minor from the home as ones that are appealable as of right to the Court of Appeals).

[83] Motion practice in child protective cases is governed by MCR 3.922(C) and MCR 2.119.

petition contains factual allegations that have no relevance to the jurisdiction determination, the attorney should request that the agency amend the petition by striking the irrelevant allegations. The pretrial hearing may also resolve motions *in limine* on issues such as the admissibility of specific pieces of evidence or the manner in which children's testimony or out-of-court statements will be presented at trial, e.g., by invoking the tender years hearsay exception[84] or by allowing support persons to sit next to child witnesses while they testify.[85]

At the pretrial hearing, the parent's attorney should give the court an estimate of how many witnesses will testify and what exhibits will be introduced. A thorough pretrial investigation and discovery effort will have prepared the attorney to provide that information. The attorney should also request that the court's pretrial order include deadlines for exchanging witness and exhibit lists and for filing any remaining motions. At the end of the pretrial hearing, the court will set a trial date, if it has not already done so.

Other Pretrial Matters

If a child has been removed from the family home, the court must hold the jurisdiction trial as soon as possible, and no later than 63 days after the court placed the child outside the parent's home. The only acceptable reasons for a longer delay are: (1) because all the parties stipulate to allowing more time; (2) because service of process could not be completed;

[84] See MCR 3.972(C)(2).

[85] If the prosecutor seeks to use supports for the child witness or admit statements made by the child through the residual exception to the hearsay rule, notice must be given to the parties. See MCL 712A.17b; MCR 3.923(E) and (F) (listing different supports available to child witnesses including the use of a support person or an impartial questioner of the child); MRE 803(24) ("Statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.").

or (3) because the court needs to hear testimony from a witness who is presently unavailable.[86]

If the jurisdiction trial does not begin within the allowed time, no recognized reason for the delay is shown, and the parent wants the child to return home, then, citing the unjustified trial delay, the parent's attorney should file a motion requesting the child's immediate return. In those circumstances, the court rules allow the court to release the child to the parent "… unless the court finds that releasing the child to the custody of the parent . . . will likely result in physical harm or serious emotional damage to the child." Notice that, for the agency, this is a much more stringent standard than the one for initially removing the child from the home.[87]

One additional issue that the parent's attorney should always consider during the pretrial stage is the child's possible "Indian" heritage.[88] A child who has Native American ancestors may qualify as an "Indian child" within the meaning of the Indian Child Welfare Act (ICWA). That federal law requires the agency to provide notice to the child's tribe (if tribal affiliation is known) or to the Secretary of the Interior (if the child's tribal affiliation is unclear).[89] All parents' attorneys should check for possible ICWA issues. The law may require the state court to transfer jurisdiction to a tribal court, or permit the child's tribe to intervene as a party to the case. Changing the venue to a tribal court often will help parents who want to regain custody of their children.

Through zealous advocacy at the pretrial stage, the parent's attorney can achieve or advance the client's goals by facilitating a mutually agreeable plea bargain or assembling a strong case for trial. If the allegations cannot be resolved completely during the pretrial phase, then a trial regarding

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[86] MCR 3.972(A). See also MCL 712A.17(1) (requiring written motion for adjournment 14 days before the hearing and limiting the length of the adjournment to 28 days unless "the court states on the record the specific reasons why a longer adjournment or continuance is necessary."). If the child remains in the custody of either parent, then the trial must commence within six months. MCR 3.972(A).

[87] MCR 3.972(A).

[88] See 25 USC 1901 *et seq;* MCR 3.980. Note that the terms 'Indian' and 'Indian Child' are terms of art under the ICWA and that they do not include all persons with Native American heritage.

[89] 25 USC 1912; *In re IEM*, 233 Mich App 438; 599 NW2d 751 (1999).

jurisdiction will be necessary. The next section addresses the issues that may arise at a jurisdiction trial.

The Jurisdiction Trial

The role of the parent's attorney during the jurisdiction trial resembles that of a defense attorney in a criminal case. The agency bears the burden of proving the petition's allegations by a preponderance of evidence. And the agency must also persuade the court that the proven allegations establish legal grounds for the court to take jurisdiction of the child. See MCL 712A.2(b).[90] The parent's attorney usually will offer an alternate case theory to dispute the agency's allegations. As appropriate, counsel should call witnesses, cross-examine the agency's witnesses, and introduce exhibits that support the client's position. Ultimately, the referee, judge, or jury will determine whether the agency has proven that the court has jurisdiction of the child. [If the court does assume jurisdiction, the case then will proceed to its dispositional phase, which this protocol discusses in a later section.]

A comprehensive guide to jurisdiction-trial practice is beyond the scope of this protocol. To prepare for trial, parents' attorneys may wish to review a trial practice manual to familiarize themselves with such basics as delivering opening statements and closing arguments, asking direct and cross-examination questions, and introducing documents into evidence. [91] Parent's counsel should also inquire about a county's local practices. Try to ascertain the presiding judge's preferences on procedural matters such as marking exhibits, submitting witness and exhibit lists, and entering stipulations. For all jury trials, the parent's attorney should carefully review Michigan's model jury instructions.[92]

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[90] MCR 3.972(C)(1).

[91] See Steven Lubet, *Modern Trial Advocacy* (2004); Thomas Mauet, *Trial Techniques* (2002). For further information on trial advocacy directly related to child welfare, see Ventrell & Duquette, *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases* 493-644 (2005).

[92] See M Civ JI 97.01 *et seq.*

In all jurisdiction trials, the parent's attorney has two overarching tasks: (1) develop a coherent theory of the case, and (2) preserve trial errors for later appellate review.

Theory of the Case

To tell the client's "story" effectively at trial, the parent's attorney must develop a coherent theory of the case that adapts the client's story to the case's legal issues. A successful theory speaks directly to the case's legal issues and is logical, simple, and easy to believe. In Modern Trial Advocacy, Steven Lubet suggests three questions for attorneys to ask when developing and expressing their case theory: What happened? Why did it happen? Why does that mean the client should win?

An ideal case theory can be expressed in a single paragraph. For example, if the agency alleges that a mother left her ten–year-old child unsupervised for several hours while she was at work, the mother's case theory could be: "Being poor does not make one a neglectful parent. Ms. Smith is a hardworking, single parent who was forced by emergency circumstances to leave her child alone. Court supervision, however, is not needed to protect this child."

The attorney can formulate a solid case theory only after conducting a thorough investigation that has uncovered the facts -- both the good facts and the bad facts. The theory must then address both the positive and negative aspects of the case. Attorneys preparing for trial will often draft several case theories before settling on the one that best explains their client's actions.

A coherent theory of the case will guide the attorney's tactical decisions at trial. Should a specific witness be called? What types of cross-examination questions should the attorney ask? Should a document be introduced into evidence? Should the attorney object to a particular line of questioning? The parent's attorney can make better trial decisions by always considering which actions best support the prepared theory of the case.

Preserving Issues for Appeal

The need to preserve issues for appeal also will determine some of the attorney's actions at trial. If the parent loses the jurisdiction trial, and the court then enters a dispositional order, the court rules give the parent 21 days to appeal the order.[93] A parent who wishes to appeal the trial court's assumption of jurisdiction must act quickly. Inexperienced parents' attorneys often make the mistake of waiting until the client's parental rights have been terminated (a much later phase of *some* child protective cases) before challenging the court's initial decision to take jurisdiction. The Michigan Supreme Court has held that the decision to exercise jurisdiction may not be collaterally attacked in a subsequent appeal of an order terminating parental rights.[94] Thus, unless parents appeal the court's jurisdiction decision within 21 days, they will have effectively waived the right to appeal that all-important decision.

For the parent to have any chance of prevailing on appeal, the parent's trial attorney must have preserved the appeal issues during the trial. An attorney can preserve issues for appeal by clearly presenting them to the trial court and requesting rulings *during* the trial. The attorney usually should raise the issue with a timely objection or a motion *in limine*. That gives the trial court the first opportunity to decide the issue, something that the appellate courts almost always insist upon before they will rule on an issue.[95] This general rule applies to both procedural and evidentiary rulings.[96] The Court of Appeals almost always declines to consider unpreserved issues. It will depart from that policy only if it concludes that the trial judge committed a "plain error" that affected the party's "substantial rights." In practice, that is a nearly insurmountable appellate standard.[97] Therefore, trial attorneys must take care to preserve all potential appellate issues with timely objections or motions.

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[93] MCR 7.204(A)(1)(a).

[94] *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993).

[95] *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237, 713 NW2d 269 (2005).

[96] See *People v Fleming*, 185 Mich App 270, 279; 460 NW2d 602 (1990); MRE 103(a)(1).

[97] Violations of ICWA notice requirements are jurisdictional and can be appealed post-termination.

As a practical matter, the steps required to preserve an issue for appeal are straightforward. If the parent's attorney disagrees with an *evidentiary* ruling, the attorney need only present a timely objection or motion to strike that states the specific ground for the objection.[98] If the objection involves admitting or excluding a particular piece of evidence that the court has not yet heard or seen, the attorney must also ensure that the court knows the substance of the evidence.[99] Once the court makes a definitive ruling on the record either admitting or excluding evidence, the attorney does not need to object repeatedly or make a formal offer of proof in order to preserve the question for appeal.[100]

Similarly, for a *procedural* ruling, such as one involving service of process, or how to present testimony by a child witness, the attorney need only state the objection, ensure that the court understands the basis for the objection, and request a ruling on the issue.

To create the clearest possible record for the appellate court, the best practice often will be to file a written motion *in limine* before the issue actually arises, or a written motion for reconsideration if the court has already ruled. Filing written motions will eliminate any uncertainty as to whether the issue has been properly preserved for appeal. [The same considerations about preserving issues for appeal apply at termination of parental rights hearings, which are discussed later in this protocol.]

Through zealous advocacy at the jurisdiction trial, parent's counsel will further the interests of both the parent and the child by ensuring that the court intervenes only in appropriate cases. Winning a dismissal at the conclusion of the jurisdiction trial will end the attorney's involvement in the case. If, however, the court decides to assume jurisdiction over the child, then the case will proceed to the dispositional phase, where different tactical considerations arise. These are discussed below.

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[98] MRE 103(a)(1).

[99] MRE 103(a)(2).

[100] MRE 103(a).

Dispositional Proceedings

If the court finds (based on either the parent's plea or the agency's trial evidence) that a child comes within the jurisdictional provisions of the Juvenile Code, the case then moves into the dispositional phase.[101] The initial dispositional hearing will "determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult, once the court has determined following trial, plea of admission, or plea of no contest that one or more of the statutory grounds in the petition [are] true."[102] The dispositional phase of a child protection proceeding consists of three and sometimes four distinct stages: (1) the initial disposition hearing; (2) periodic review hearings; (3) the permanency planning hearing; and (4) if reunification cannot be achieved, the termination of parental rights hearing. Before considering these distinct stages, several issues that transcend each hearing in this phase of the process will be addressed.

Continuous Proceedings

Child protective proceedings are continuous in nature.[103] That means that the various hearings conducted during the case's several phases are not isolated events. Rather, "evidence admitted at any one hearing is to be considered evidence in all subsequent hearings."[104] While the client works toward reunification with the child, counsel must always think along dual tracks. That requires advocating for the family's reunification while simultaneously preparing to defend against a petition to terminate the client's parental rights. At each dispositional hearing, the attorney should make a clear record of the parent's progress by calling witnesses and, when

[101] See MCL 712A.18; MCL 712A.18f; MCL 712A.19.

[102] MCR 3.973(A).

[103] *In re Gillispie*, 197 Mich App 440; 496 NW2d 309 (1992); *In re King*, 186 Mich App 458; 465 NW2d 1 (1990); *In re Perry*, 148 Mich App 601; 385 NW2d 287 (1986); *In re LaFlure,* 48 Mich App 377; 210 NW2d 482 (1973).

[104] *In re LaFlure*, n 103 *supra* at 391.

appropriate, presenting documentary evidence.[105] The parent's attorney also should point out any failures by the agency to provide timely, appropriate services that could help the client regain custody of the child. If the court ultimately must decide whether to terminate parental rights, the jurist will look at the case's *entire* record to discern the child's best interests.[106] Therefore, at each dispositional review hearing, the parent's attorney should make a best-interests record for later reference by the court. At a minimum, this should include evidence regarding parenting time, the quality of the parent-child relationship, and the child's expressed wishes regarding that relationship. At each hearing, the attorney should ask the court to make specific findings about those factual issues.

Reports

After the court has assumed jurisdiction, if the agency servicing the case recommends against placing the child in the parent's custody while the case proceeds, then the agency must submit a written report to the court.[107] Recall that what transpires at one hearing may be relied upon by the court at subsequent hearings. Therefore, the parent's attorney must ensure the accuracy of the oral and written record at every stage. This can be difficult when it comes to an agency's written reports, which often contain statements that the client disputes. The attorney should obtain all agency reports well in advance of each hearing, read them carefully, and then review them with the client. The agency's reports and treatment plans should detail both the services provided or planned for the parent and the behavioral changes that the agency expects to result from the parent's participation in those services.

Where the client believes that the agency report includes inaccurate information, the attorney should explain the disagreement to the court and request an explicit finding as to which version is true. If the court finds that

[105] At the initial dispositional hearing and each review hearing, the court must consider all oral or written information provided by any party. MCR 3.973(D)(2) (initial disposition); MCR 3.975(E) (dispositional review hearings); MCR 3.976(D)(2) (permanency planning hearing).

[106] *In re Trejo*, 462 Mich 341, 353; 612 NW2d 407 (2000).

[107] MCL 712A.18f(1).

a statement made in a written report is inaccurate, the parent's attorney should request that the report be amended. A failure to take those steps will allow the inaccurate information to become part of the court's continuing record that, as explained earlier, the court may rely upon at later stages in the proceeding.

Michigan law permits parents (usually through their attorneys) to submit their own written reports that summarize their views regarding their participation in services, the benefits derived from that participation, the child's best interests, and other relevant matters.[108] For example, a report filed by the parent's attorney should include information regarding the parent's efforts to comply with and benefit from the following components of the court-ordered service plan: parenting time with the child, participation in counseling, substance abuse treatment, parenting programs, and other services. The parent's report also should call the court's attention to any difficulties the parent has encountered in accessing agency services or contacting the caseworker. Finally, the report may also include the attorney's requests that the court order additional or different services. If the parent's attorney does submit a written progress report, the court must consider it.[109] That can do much to counterbalance inaccurate or incomplete information in the agency's report. It also serves to balance the entire written record of the case, which could be vitally important if the court reviews its file in a subsequent termination proceeding.

Investigation

To ascertain the client's needs or evaluate the client's performance, the parent's attorney should not rely solely on the information provided by the agency's caseworker. Rather, the attorney should conduct an independent investigation of the client's circumstances at each stage. At a minimum, this should include regularly discussing the case with the client and asking the client to sign releases so the attorney can obtain additional

[108] MCR 3.973(E)(2).

[109] MCR 3.973(E)(2) ("The court shall consider the case service plan and any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom the child is placed.").

information from service providers. The parent's attorney also should obtain the service providers' written documentation of the client's progress. Throughout the dispositional phase of the proceedings, the parent's attorney should communicate regularly with anyone who may possess information that will help the attorney advocate for the client. That list includes the caseworker, the child's L-GAL, and (if the court has appointed one) the child's court-appointed special advocate (CASA).[110]

During this investigation it may become apparent that the client has needs which are not being met. For example, the attorney may learn that the client is developmentally delayed or has a previously undisclosed substance abuse problem. In such circumstances, the parent's attorney must meet with the client and explain that additional evaluations and services may identify deficits that have impaired the client's ability to parent. But the attorney also must explain that coming forward with such information may further delay reunification or make it less likely. Parents' attorneys should counsel their clients carefully about the risks and advantages that accompany each course of action.

The parent's attorney should obtain and save official documentation showing that the client has complied with or completed services. In addition, the attorney should advise clients to document their own efforts. For example, the attorney may suggest that the parent keep a calendar record of: (1) interactions with the caseworker or other professionals, (2) dates and times when phone calls were made or attempted, and (3) dates and times when the client attended or attempted to attend services. Any documentation that the parent has benefited from services will be especially helpful. Examples of that include certificates from parenting classes, residence leases (to show the parent has obtained proper housing), and sign-in sheets for substance abuse treatment programs. Counsel should present copies of these documents to the court at the initial dispositional hearing and at subsequent dispositional review hearings.

[110] See MCR 3.917 for more information about the role of a CASA in a child protective case.

Client Counseling

As during the other phases of a child protective proceeding, client counseling is crucial during the dispositional phase. The parent's attorney should encourage the parent to cooperate with the agency's efforts to provide services directed at reunification, and should explain the consequences of failing to cooperate. The parent's attorney should also advise the client that, although reunification will not occur unless the parent complies with the agency's recommendations, compliance alone will not ensure reunification. The parent must also demonstrate that he or she has benefited from the services.[111] The parent's attorney should explore with the client ways to convince the court that the client has benefited. For example, the attorney should try to attend and observe a visit between the parent and the children at the agency. That will help prepare the attorney to present evidence about the quality of those visits.

Some parents may have the idea that the services offered by the agency are merely "hoops" that they must jump through before they can regain custody of their children. Parents' attorneys should take care not to characterize the service plan in such a manner. The client must take the service requirements seriously, and the attorney must convey that strategic necessity to the client. Any attorney who explicitly or implicitly suggests that the services demanded by the agency are not to be taken seriously will undermine the client's goal of regaining custody of the child and increase the likelihood that the agency will eventually file a termination petition. On the other hand, the attorney also should stand ready to provide immediate assistance if the client encounters problems with agency personnel regarding issues such as scheduling the services, obtaining transportation to and from services, or getting information from the agency in a timely manner.

Additionally, the attorney should counsel the parent about alternative dispositional options that could resolve the case. For example, if the child has been placed temporarily with a relative, the attorney might discuss trying to resolve the case by "direct placement adoption"[112] or by asking the

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[111] *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005).

[112] See MCL 710.23a. In order for a parent to effectuate a direct placement adoption, the parent must have legal and physical custody of the child. When the child is removed from the parent's custody and placed in foster care under

court to appoint the relative as the child's guardian.[113] In some cases, a change of custody to the child's other parent can resolve a child protective proceeding.[114] Finally, if the attorney concludes that the parent *never* will take the steps necessary to regain custody of her child, the attorney should consider counseling the parent about releasing his or her parental rights so that the child will be eligible for adoption.[115]

Advocate for Appropriate Services

Parents' attorneys should advocate for the services that best suit the client's individual needs. In order to do this effectively, an attorney should learn everything possible about the local community's service providers. Regardless of the client's apparent capacity to parent, if reunification is the articulated goal, the agency has a statutory duty to make reasonable efforts to provide services that address the parent's deficits.[116] This means that the services must address the primary barriers to reunification in the particular case.[117] That may require more than the agency's favored boilerplate services, which often will not address a particular client's identified parenting deficits.

The agency must offer services of sufficient quality, duration, and intensity to allow a parent who complies with the service plan a fair chance to demonstrate that he or she has made the needed changes. When services do not address the parent's needs, are not of sufficient quality, do

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DHS supervision, the parent has neither legal nor physical custody of the child. Some courts, however, will return custody to a parent in a child protective proceeding for the parent to complete a direct placement adoption.

[113] See MCL 700.1101, *et seq*.

[114] MCL 722.21 *et seq*.

[115] MCL 710.29.

[116] See generally MCL 712A.18f(1). See also *DHS Children's Foster Care Manual*, 722-6.

[117] The *DHS Children's Foster Care Manual* states that "[c]asework services are directed toward resolving the presenting problem or conditions which resulted in a child's removal from his/her home." 722-6. It goes on to state that "[o]ccasionally there will be cases which have additional serious problems underlying the initial presenting problem. If the new problem is determined to be serious enough to prevent returning the child home, steps must be taken to petition the court, or amend the current petition to enable the court to address the problems and ensure the parent's due process." *Id.*

not last long enough, or are not sufficiently intense, parents' attorneys should argue that the agency has failed to make the statutorily required reasonable efforts.

Some clients' parenting deficits result from conditions covered by the Americans With Disabilities Act (ADA).[118] If so, the agency must provide services that go beyond the general "reasonable efforts" requirement. The ADA additionally requires the agency to make "reasonable accommodations" to address that parent's specific disability.[119] For example, a developmentally-delayed parent should attend parenting classes that are hands-on rather than classes that use a lecture format. To give developmentally delayed parents a fair opportunity to learn and integrate the necessary parenting information, they usually need to attend more class sessions over a longer period of time. The parent's attorney should track the agency's compliance with the ADA throughout the dispositional process.

Parents who have two or more co-existing problems (e.g., substance abuse and a mental illness) may be required to engage in multiple services. That will require substantial time commitments, and can be especially difficult for parents who work. Those competing demands may cause conflicts or transportation difficulties. Therefore, counsel may have to ask the agency (or the court if the agency refuses) to prioritize the services schedule in a way that gives the parent a fair chance to comply. "Parenting time" aims to maintain the parent-child attachment, which is crucial to a child's development. The parenting time schedule must be tailored to the individual needs of the child. Particularly for infants and young children, weekly, supervised one-hour visits at the agency's office will not suffice to maintain the parent-child relationship.[120] The parent's attorney should

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[118] See *In re Terry*, 240 Mich App 14; 610 NW2d 563 (2000); 42 USC 12101 *et seq*. *Terry* held that while the agency providing services must accommodate ADA disabilities, the ADA does not provide a defense to a termination of parental rights petition. The parent's attorney should advocate for appropriate services *prior* to the filing of a supplemental termination of parental rights petition.

[119] *Id.* at 25.

[120] See generally *National Council of Juvenile and Family Court Judges, Child Development: A Judge's Reference Guide* 22-24 (1993) (discussing attachment and bonding and noting that a primary ingredient of healthy development is time with the parent).

advocate for maximum parenting time in order to develop, preserve, or enhance the natural bonding between parent and child.

The parent's attorney must consider two additional issues concerning services. First, Michigan law explicitly provides that some services must be made available to parents at times outside traditional office hours.[121] This means that agencies sometimes must accommodate the parent's or child's need for services in the evenings and on weekends. Second, the service location may present problems because many parents do not have ready access to reliable transportation. The attorney should know the local community's public transportation options and advocate for services in convenient locations, or for special transportation services that will allow the parent to travel to and from the service providers.

Post-Hearing Advocacy

After the court has concluded a dispositional review hearing, the parent's attorney should obtain and carefully review the dispositional order to ensure that it accurately reflects the hearing's outcome. The attorney should review the order with the client, answer the client's questions, and (if the order contains inaccuracies) immediately ask the court to amend the order.

Intervals Between Dispositional Review Hearings

Agency personnel often make critically important decisions during the intervals between court hearings. For example, before making any change in the child's placement between hearings, the DHS should hold a Team Decision Making (TDM) meeting that includes the parent.[122] In addition to

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[121] MCL 722.954b(3).

[122] The Team Decision Making strategy has already been implemented in most Michigan counties as part of the state's Family to Family foster care reform initiative. The TDM process should be implemented statewide by October 2008. The Annie E. Casey Foundation promotes Family to Family nationally as a child welfare agency framework that improves outcomes for children and families. For more information about the program, see The Annie E. Casey Foundation, <www.aecf.org/MajorInitiatives/Family%20to%20Family.aspx> (accessed June 25, 2008).

the caseworkers, the L-GAL may participate in the TDM. Members of the extended family may also attend a TDM, but their participation requires the parent's consent, so they will be excluded if the parent does not attend. Because critical decisions are made at these meetings, and because there will be an inherent power imbalance if a parent attends alone, the parent's attorney should try to attend TDMs. Even when the parent's attorney cannot attend the TDM, the attorney should encourage the parent to attend and to work cooperatively with the team members to ensure that the parent's voice is heard.

As with the TDM's described above, parents and their attorneys should provide input to the Foster Care Review Board when it reviews the full case or a specific issue regarding the child's foster care placement. The Foster Care Review Board program uses panels of local citizen volunteers to periodically review individual foster care cases, monitor the agency's performance in those cases, and make recommendations for changes in Michigan foster care law.[123]

These administrative meetings provide additional opportunities for parents to stay involved in their children's lives. If newly emerged facts warrant a child's immediate return home, Michigan law permits the court to order that a child be returned to the parent at any time -- even between review hearings.[124] The statute permits the court to return a child to the parent after the agency has given seven days notice to all the parties and the L-GAL.[125] When a client has demonstrated substantial recent progress while receiving services, counsel should consider asking the court to exercise this option.

Permanency Planning

The law requires the court to hold a permanency planning hearing (PPH) within 12 months after the child's removal from the home.[126] The permanency planning process and each formal PPH will start with a

[123] See MCL 722.131, et seq.

[124] MCL 712A.19(10).

[125] *Id.*

presumption that the child and parent should reunite.[127] The court must return the child to the parent's custody unless the court finds that returning the child would cause a substantial risk of harm to the child's health or well-being.[128]

Parents' attorneys should begin thinking about the permanency plan as soon as they enter the case. A parent's failure to "substantially comply" with the court-ordered service plan is prima facie evidence that the child will be at risk if returned to the parent's custody.[129] Conversely, where a parent has substantially complied with the ordered services, the law presumes that the risk of harm has been reduced or eliminated.[130] Neither presumption is conclusive.[131]

To prepare for a PPH, the parent's attorney should consider how best to demonstrate that returning the child home would not subject the child to a substantial risk of harm -- even if the parent has not completed all treatment services. If possible, counsel should informally lobby the caseworker to recommend a return home or, at least a continued temporary wardship that will allow more time for the parent to complete the court-ordered services.

Before a PPH, the attorney should interview all the service providers to assess the client's compliance with and benefit from services. If the providers offer helpful information, the parent's attorney should subpoena them to testify at the hearing.

The service providers often can clarify a parent's issues in ways that caseworkers cannot or will not do. If sympathetic providers cannot testify in person at a PPH, the attorney should solicit their letters or affidavits to help the court understand the parent's progress in the treatment program. The Michigan Rules of Evidence do not apply at the hearing.

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[126] MCL 712A.19a(1).

[127] MCL 712A.19a(5).

[128] *Id*.

[129] *Id*.

[130] *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003) ("[T]he parent's compliance with the parent-agency agreement is evidence of her ability to provide proper care and custody.").

[131] *In re Gazella*, n 111 *supra* (parent must demonstrate benefit from services rather than just compliance).

Just as evidence provided by those working directly with the *parent* can impact the court's permanency planning determination, the views of the L-GAL, who works directly with the *child*, also will carry considerable influence. Before a PPH, the parent's attorney should consult with the L-GAL regarding the permanency recommendation. Try to persuade the L-GAL to support the child's return home or, at least, continued efforts to reunify the family. This conversation also should include a realistic assessment of other permanency options and their likely effects on the child. Questions to ask the L-GAL include the following: What is the long term permanency goal? Is adoption likely? If so, has the L-GAL already identified a viable adoptive placement? Does the child have special needs that would make adoption difficult to arrange? If the plan is for the child to transition to adulthood from foster care, how will termination further the child's best interests?

In addition to advocating for the client when meeting with the L-GAL, the parent's attorney should consider allowing the L-GAL to meet with the parent so the L-GAL can independently assess the parent's progress.[132] Counsel may want to be present if such a meeting occurs.

Also before most permanency planning hearings, the parent's attorney should counsel the client regarding three common alternatives to a termination of parental rights. First, a child may be placed *permanently* with a fit and willing relative.[133] Second, for children who are 14 or older, the court may order *permanent* placement with a nonrelative foster parent under "permanent foster family agreement."[134] Third, the court may appoint a legal guardian for the child.[135] All of these options achieve permanency for the child without terminating the parent's rights.

At the PPH, the parent's attorney should frame the issues and evidence by emphasizing the statutory preference for returning the child to the parent. Even where the parent has only partially complied with the court-ordered services, the attorney often can argue plausibly that the

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[132] Michigan's L-GAL statute specifically requires the L-GAL "to determine the facts of the case by conducting an independent investigation including . . . interviewing . . . family members." MCL 712A.17d(1)(c).

[133] MCR 3.976(4).

[134] *Id.* See MCL 712A.13a(1)(i) (defining permanent foster family agreement).

[135] MCL 712.19a(7)(c).

problems that led to the court's assumption of jurisdiction have been addressed at least to the extent that the child is no longer at "substantial risk of harm."

The child's "best interests" are crucially important during the case's permanency planning phase. Therefore, the attorney's theory of the case for the PPH should address both the statutory best-interests standard and that case's unique facts. This will enable counsel to present a cogent argument that the parent should regain custody or, alternatively, have more time to complete the required services.

Termination of Parental Rights

At a permanency planning hearing, the court (often acting on the agency's recommendation) may order the agency to file a petition to terminate the parent's rights.[136] If the child has been in foster care for 15 of the most recent 22 months, the court must order the agency to file a petition unless certain exceptions apply, including the placement of the child with a relative or the failure of the state to provide appropriate services to the family.[137] As detailed in the next several sections, a termination petition (whether filed by the agency or someone else) will require the parent's attorney to confront a new series of difficult legal and strategic challenges. Counsel must carefully identify the issues presented in the individual case and address each issue in turn.

Standing

First, counsel must determine whether the petitioner has standing to request termination. Under Michigan law, *any* person may petition the court to initiate a child protective proceeding,[138] and a petition may request the termination of parental rights at the initial dispositional hearing.[139]

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[136] MCL 712A.19a(6).

[137] MCL 712A.19a(6). Other exceptions to a mandatory petition include the fact that adoption is not the appropriate permanency goal for the child or compelling reasons existing that termination is not in the child's best interest.

[138] MCL 712A.11(1); *People v Gates*, 434 Mich 146, 161; 452 NW2d 627 (1990).

[139] MCL 712A.19b(4).

Presumably, then, *any* person has standing to seek termination at the initial dispositional hearing, although this remains an open question that the parent's attorney should analyze carefully.[140] If a child has been in foster care, Michigan law *expressly* grants standing to file a petition to terminate parental rights to only the prosecuting attorney, the child, the child's legal guardian or custodian, the agency, the state's children's ombudsman or a "concerned person."[141] Thus, the parent's attorney should first determine whether the petitioner has standing to file a petition that seeks a termination of parental rights.

Notice

In a termination proceeding, the petitioner must serve the parent-respondent with a summons and a copy of the termination petition.[142] Generally, the petitioner must serve the parent personally, i.e., someone must hand the documents directly to the parent.[143] If the parent cannot be personally served, the court may authorize substituted service.[144] But if a parent who has not received proper notice nonetheless appears at the termination hearing, that physical appearance waives all notice defects unless the parent promptly voices a specific objection to the service defects.[145] Thus, counsel should carefully consider whether the client has received proper notice of the termination petition and act accordingly.

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[140] *In re Huisman*, 230 Mich App 372; 584 NW2d 349 (1998), overruled on other grounds *In re Trejo*, n 106 *supra* (custodial parent has standing to bring initial petition for termination of noncustodial parent's rights).

[141] MCL 712A.19b(1). "Concerned person" is defined in MCL 712A.19b(6) ("[A] 'concerned person' means a foster parent with whom the child is living or has lived who has specific knowledge of behavior by the parent constituting grounds for termination under subsection (3)(b) or (g) and who has contacted the [DHS], the prosecuting attorney, the child's attorney, and the child's guardian ad litem, if any, and is satisfied that none of these persons intend to file a petition under this section.").

[142] MCR 3.920.

[143] MCR 3.920(B)(4).

[144] *Id.* See *In re Zaherniak*, 262 Mich App 560; 686 NW2d 520 (2004) (considering the interaction of MCR 3.920 and MCL 712A.13); *In re BAD,* 264 Mich App 66; 690 NW2d 287 (2004) (once parent has received summons, notices of subsequent continued hearing dates may be served on parent's lawyer).

[145] MCR 3.920(G).

Parenting Time

If a petition to terminate parental rights is filed, the court may terminate parenting time for a parent who is the subject of the petition.[146] The parent's attorney must be prepared to address this issue immediately. The attorney should review any reports submitted for prior hearings to identify evidence regarding the quality of parenting time and its benefits for the child. Counsel should present evidence and frame arguments in terms of the child's needs, arguing that the child will not suffer any harm if the court allows continued parenting time until the court actually rules on the petition to terminate all the parent's rights. One potentially compelling argument is that, instead of preventing harm, the abrupt discontinuation of parenting time will traumatize the child.

Petitions to Terminate at the Initial Disposition Hearing

Although significant efforts to reunite the family typically precede any thought of terminating parental rights, the agency occasionally requests termination as early as the initial disposition hearing.[147] In especially severe cases, the law requires the agency to seek termination of parental rights at the initial disposition.[148] When the agency files a petition to terminate parental rights at the initial disposition hearing, the law establishes a three-step process for addressing that request.[149]

First, as in all child protection cases, the petitioner must prove by legally admissible evidence that there is a basis under MCL 712A.2(b) for the court to assert jurisdiction. The parent is entitled to a jury trial to determine whether the court has jurisdiction. In the earlier section regarding jurisdiction trials, this protocol discussed several tactical factors that counsel should consider when deciding whether a jury trial will serve the client's interests. When jurisdiction and immediate termination are at issue

[146] MCL 712A.19b(4).

[147] MCL 712A.19b(4).

[148] MCL 722.638(2).

[149] MCR 3.977(E).

simultaneously, then, in addition to the considerations discussed previously, the attorney may want to ask the court to bifurcate the trial. In a bifurcated trial, a jury will decide the jurisdictional issue even though, if jurisdiction is found, the judge will make the decision regarding immediate termination. Bifurcation will ensure that the jury does not hear evidence that is relevant only to the termination issue, such as information regarding the child's best interests.

Second, if the court takes jurisdiction, the court must next decide whether "clear and convincing" legally admissible evidence proves a statutory basis for terminating parental rights under MCL 712A.19b(3). Third, even if the evidence otherwise justifies termination, the court may order termination only if it also finds that termination is in the child's best interests.[150]

One important issue in cases involving the possible termination of parental rights at the initial disposition hearing is whether the agency must provide services to the parents while the court considers the termination petition. Generally, when a child is removed from the parent's home, the agency must make reasonable efforts to reunify the family, unless the court determines for reasons specified in the Juvenile Code that reasonable efforts are not required.[151] Thus, the statute at least suggests that the agency must provide services even when the initial petition seeks the termination of parental rights.[152] The parent's attorney should advocate for providing appropriate services until the court makes a final termination decision. Receiving interim services may allow the parent to demonstrate that the petitioner has failed to prove a statutory basis for termination.

When making the required "best interests" determination, the court generally will benefit from having psychological evaluations, substance

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[150] MCR 712A.19b(5).

[151] MCL 712A.19a(2).

[152] Both MCR 3.977(E) ("The court shall order termination of the parental rights of a respondent . . . and shall order that additional efforts for reunification of the child with the respondent shall not be made . . . .") and MCL 712A.19b(5) ("If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made . . . .") provide support for the argument that services aimed at reunification must be provided until the court has actually adjudicated the issue of termination and has found that there is a basis to terminate parental rights.

abuse assessments, and similar information from the service providers. For instance, the agency may have alleged that the parent has a substance abuse problem and is not likely to benefit from treatment. In such a case, a substance abuse assessment and some actual treatment may provide the court with invaluable information about the severity of the substance abuse problem, whether the problem is treatable, and whether the parent is motivated to participate in treatment. This information could, for instance, rebut an agency assertion under MCL 712A.19b(3)(g) that the court should terminate parental rights immediately because, given the child's age, the parent is unlikely to be able to provide a fit home for the child within a reasonable time.

Although the law requires that the agency file a termination petition immediately if it can prove certain forms of child maltreatment, the law also allows the agency to amend the petition in light of subsequent developments.[153] Even when the agency files a mandated petition for termination, it may ultimately settle the case short of an actual termination.[154] For example, the agency may agree to withdraw the request to terminate if the parent admits that the court has jurisdiction over the child and agrees to work on a treatment plan. The parent's lawyer should explore these settlement possibilities with the caseworker and the other attorneys. Here, filing a demand for a jury trial (on the jurisdiction issue) may give the parent's attorney some negotiating leverage because the agency, the prosecutor, or the child's L-GAL may prefer not to risk submitting the case to a jury.

Termination Based Upon Changed Circumstances

The second major category of termination petitions consists of petitions to terminate based upon changed circumstances.[155] In this type of

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[153] The statute merely requires that the agency *file* the petition seeking termination at the initial dispositional hearing. MCL 722.638.

[154] See, however, *DHS Children's Protective Services Manual* n 37 *supra* (indicating limits on the agency's ability to negotiate when a mandatory termination petition is filed.).

[155] See MCR 3.977(F); *In re Snyder*, 223 Mich App 85; 566 NW2d 18 (1997); *In re Gilliam*, 241 Mich App 133; 613 NW2d 748 (2000); *In re CR*, n 19 *supra*.

case, the children typically will have entered foster care based upon one type of alleged maltreatment (e.g., neglect), and the agency subsequently has learned about other maltreatment, such as sexual or physical abuse. In these situations, rather than provide additional services to address the newly discovered form of maltreatment, the agency may file a petition to terminate the parent's rights.

The prior alleged neglect or abuse will already have been proven by legally admissible evidence or the parent's plea, but the law requires that the agency prove the *new* neglect or abuse allegations by legally admissible evidence.[156] In such a case, the agency may also allege that the parent failed to comply with or benefit from the services intended to address the original problems. If so, the termination petition's multiple allegations will be subject to differing evidence rules and standards of proof. The agency can prove noncompliance regarding the original neglect by "any relevant evidence," meaning that the MRE do not apply so the court may consider hearsay evidence. But, as stated above, the agency must prove the new neglect or abuse allegations by "legally admissible evidence."[157]

Turning now to the required burden of proof, each allegation that could justify termination must be proven by "clear and convincing evidence,"[158] which is defined as evidence that "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." [159]

Because these supplemental or "changed circumstances" petitions to terminate parental rights may include both previously proven and never-proven allegations, a parent's attorney must carefully separate the bases for the court's original jurisdiction from any new allegations. Again, issues related to the original allegations may be proven by "any relevant evidence," while the new allegations must be proven by "legally admissible evidence."

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[156] MCR 3.977(F); *In re Snyder*, n 156 *supra*.

[157] See, e.g., *In re CR*, n 19 *supra*.

[158] MCR 3.977; *Santosky*, n 3 *supra*.

[159] *Martin v Martin (In re Martin)*, 450 Mich 204, 227; 538 NW2d 399 (1995).

Counsel will need to develop a trial strategy that addresses each allegation and determines which set of evidence rules applies to each allegation.

Termination Based Upon Failure To Comply With The Service Plan

This third type of termination petition is neither an original petition nor one premised upon changed circumstances. These petitions almost always involve the parents' failure to adequately address the problems that led to the court's assumption of jurisdiction. These petitions, termed "Other" in the court rule, are governed by MCR 3.977(G). The parent will already have admitted, or the agency will have proven, the basis for the court's jurisdiction. The termination petition typically will allege either that the parent failed to comply with the service plan or that the parent failed to benefit from the services. The MRE do not apply here, meaning that the agency can prove these allegations by "any relevant evidence."[160] But remember that the court may terminate the parent's rights only if the evidence for termination is "clear and convincing."

The parent's attorney must carefully prepare for the termination hearing by determining as to each factual allegation whether the agency asserts: (1) that the parent did not comply sufficiently with the service plan, or (2) that the parent complied but did not benefit.

Regardless of the basis for the termination request, the parent's attorney should ensure during the termination hearing that all evidentiary and procedural objections are preserved for appeal. The need to preserve possible appellate issues was covered more fully in the earlier section on jurisdiction trials.

Voluntary Release of Parental Rights

Whenever the agency files a petition to terminate parental rights, the parent's attorney should advise the client that under the Adoption Code, a parent has the option to release parental rights voluntarily rather than fight

[160] MCR 3.977(G)(2).

the agency's petition to terminate.[161] When considering this option, the attorney and parent should weigh three basic factors. First, how likely is it that the parent would prevail at a termination hearing? In most cases, the parent will have had a year or more to utilize agency services. By then, the parent's attorney, if not the parent, should have some sense of how the court will respond to the petition for termination. Second, even if successful at the termination hearing, will the client then finally take the steps necessary to regain custody of the child? Third, a voluntary release of parental rights after the initiation of a child protective case may have negative consequences in the future. Under MCL 712A.19b(3)(m), a prior release of parental rights to one child can serve as statutory grounds for the subsequent termination of parental rights as to another child. In contrast, proceeding with the termination hearing may not have that additional negative consequence for the client – if he or she prevails.

Where the client has made no real effort to utilize the services offered, or has been wholly unable to benefit from the services, the parent's attorney should consider recommending that the parent release parental rights rather than contest the termination petition. Conversely, where a parent has made at least some progress, the attorney usually should try to negotiate a settlement under which the agency will provide the parent with additional services. For example, where a parent has made progress in drug treatment, but then relapsed, the parent's attorney might point out that relapse is part of the recovery process,[162] that a relapse should have been expected, and that the parent remains motivated to continue in or re-engage in treatment. In this situation, there may well be realistic hope that the child can be reunified with the parent within a reasonable time.

Address Every Alleged Basis for Terminating Parental Rights

The court may terminate parental rights if it finds that one or more of the bases for termination listed in MCL 712A.19b(3) have been proven by clear and convincing evidence. Because even a single basis constitutes a

[161] See MCL 710.29.

[162] See United States Department of Health and Human Services, *Blending Perspectives and Building Common Ground* <http://www.aspe.hhs.gov/HSP/subabuse99/chap2.htm> (accessed on June 25, 2008).

sufficient reason to terminate, counsel must carefully address each and every basis alleged in the termination petition. Some bases for termination have specific, technical requirements; e.g., MCL 712A.19b(3)(c) requires, among other things, that 182 days have elapsed since the issuance of the initial dispositional order. Other bases for termination grant broad discretion to the trial court judge. See, e.g., MCL 712A.19b(3)(g). The parent's attorney should look carefully at the law, investigate and analyze the case's facts, and develop a cogent argument as to each basis on which termination is requested.

Preparing for a Termination Hearing

When the agency files a termination petition, the parent's attorney should meet with the client to review each *factual* allegation and the corresponding *legal* basis for termination cited in the petition and listed in MCL 712A.19b(3). After hearing the client's response to each factual and legal allegation, the attorney should then work with the client to develop a list of potential witnesses. For example, the client's mental health evaluator, substance abuse counselor, or therapist might provide important testimony that will challenge the termination petition's factual or legal allegations.

After developing the list of potential witnesses, the attorney should contact and interview each one. To interview some witnesses (e.g., therapists), the attorney will first need to have the client sign a release that authorizes the witness to reveal confidential information to the attorney. Counsel will need the L-GAL's permission to interview the client's children. After interviewing the potential witnesses, the parent's attorney will need to decide which witnesses' testimony will bolster the parent's theory of the case. The attorney should subpoena those witnesses and develop direct-examination questions that will elicit the information that the court needs to understand the parent's theory of the case.

The parent's attorney should also obtain the witness and exhibit lists prepared by the agency and the child's L-GAL. The attorney should interview those potential adverse witnesses and obtain copies of all documents that the other parties will seek to introduce into evidence. This advance preparation will allow the parents' attorney to develop a theory as to each adverse witness and a strategy for cross-examining that witness.

The parent's attorney should also gather documentary evidence that supports the parent's case. As part of that effort, the attorney should request (and subpoena if necessary) the caseworker's file. Review the file's contents and make copies of important documents. If the agency resists discovery, the parent's attorney should file a discovery motion seeking access to the information. The discovery rules in MCR 3.922(A) were more fully discussed in the earlier section on jurisdiction trials.

Theory of the Case

As with the jurisdiction trial, the parent's attorney must develop a coherent theory of the parent's case. The theory should present a short and logical summary of the case's facts and the parent's legal position. An ideal theory distills both the client's story and the applicable law. For example, a parent's theory of the case for a termination hearing might assert: "This is a case about a young mother who has not received adequate services or had sufficient time and a fair opportunity to address the issues that brought her children to the court's attention. The agency has rushed to terminate her parental rights without giving the mother a real chance to regain custody of her children; therefore, the court should reject the termination request." Developing a coherent and comprehensive theory helps the attorney organize the facts and provides a framework for determining which witnesses to call, what evidence to present, and what questions to ask. To make sure that the judge understands the theory and sees how the evidence supports it, the attorney should outline the theory during both the opening statement and the closing argument.

Prehearing Motions and Notices

Counsel may need to file prehearing requests for information and discovery motions to obtain a more specific statement of the agency's reasons for seeking the termination of parental rights. These motions should be filed well before the termination hearing date. The court may have to conduct special motion hearings to address the discovery issues and other motions.

Attorneys must familiarize themselves with MCR 3.972(C)(2) and MRE 803(24),[163] which provide separate hearsay exceptions for certain statements made by children. The parent's attorney must be aware of both how to defend attempts by other parties to introduce hearsay and how these rules may be used to admit hearsay helpful to the parent's case. These provisions each require that the party seeking to introduce the hearsay statements file a pretrial motion or a notice that informs the other parties and asks the court to admit the child's earlier statements.[164] Take note, however, that when the agency files a supplemental petition asserting that the parent has failed to comply with or benefit from services, the MRE do not apply.[165] [As explained earlier, a mixed bag of evidence rules apply during the hearing on a changed-circumstances petition to terminate. There, the MRE will apply to any *new* allegations, but not to the allegations that caused the court to take jurisdiction in the first place.]

Petitioner's Burden of Proof

In a termination of parental rights proceeding, the petitioner has the burden of proving, by clear and convincing evidence, at least one statutory basis for termination and that termination is in the child's best interests.[166]

Because the court must find that termination of parental rights is in the child's best interests, the parent's attorney should prepare to demonstrate that termination would harm the child.[167] In this phase of the termination process, the court may consider any issue that impacts the child's best interests. While every case has unique issues, the attorney should generally prepare to address concerns such as the likelihood of the child being adopted or otherwise *permanently* placed in a new home within a

[163] See generally *People v Katt*, 468 Mich 272; 662 NW2d 12 (2003).

[164] See MCR 3.922(E).

[165] MCR 3.977(G)(2).

[166] MCL 712A.19b(5).

[167] MCL 712A.19b(5)

reasonable time,[168] the likelihood that the child instead will simply "age out" of the foster care system,[169] the child's special needs (which may complicate permanent placement), the child's age, the child's wishes regarding termination and permanent placement, the type and extent of abuse or neglect the child suffered, the residual effects of that maltreatment on the child's functioning, and the quality of the child's relationship with the parent. Additionally, to the extent that they are helpful, the court may consider the best interest factors set out in the Child Custody Act.[170]

Appeals

As soon as the court enters an order terminating parental rights, the court must advise the parent of the right to appeal and the right to be represented by court-appointed appellate counsel.[171] The parent's attorney, too, should personally and carefully advise the client about the right to appeal and the appellate process generally.[172] Appeals are governed by MCR 3.993 and MCR 7.200 *et seq.* The State Court Administrative Office has a standard form that litigants can use to assert their right to appeal and to request that the trial court appoint appellate counsel.[173] In most counties, when trial counsel was court appointed, the court will appoint a different attorney to pursue the appeal.

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[168] There are approximately 6,000 foster children in Michigan whose parental rights have been terminated but for whom there is no viable permanent placement plan. See Tacoma, *ASFA, Binsfeld, and the Law of Unintended Consequences*, 10 Mich Child Welfare L J 37, 38 (2007).

[169] Studies strongly suggest that children who "age out" of foster care are at high risk of negative outcomes such as homelessness, unemployment, incarceration, and teen pregnancy. See Stangler & Shirk, *On Their Own: What Happens to Kids When They Age Out of the Foster Care System* (2006).

[170] *In re EP*, 234 Mich App 582, 594; 595 NW2d 167 (1999); see MCL 722.23 *et seq.*

[171] MCR 3.977(I).

[172] As noted earlier, issues from the initial adjudication must be appealed following the adjudication and cannot be appealed after a termination of parental rights on a supplemental petition. *In re Hatcher*, n 94 *supra.*

[173] See JC 84 <http://courts.michigan.gov/scao/courtforms/juvenile/jc84.pdf> (accessed on June 25, 2008).

Review of Referee Recommendations

As noted earlier, Michigan law permits referees to preside at both jurisdiction trials and termination hearings.[174] In most counties, termination hearings take place before a judge, but some counties do use referees even for termination hearings. Referees do not enter orders; they may only make recommendations to judges, and the referee's recommendation becomes an order of the court only after it has been reviewed and signed by the judge.[175] If a referee rather than a judge presides, the parent's attorney should consult with the client regarding the right to have the trial court judge review the referee's rulings and recommendation.[176] A petition for judicial review of a referee's recommendation must be filed within seven days after the referee files the recommendation. However, if the judge signs the referee's recommended order before the parent files a petition for review, then the parent loses the right to have the trial judge review the referee's recommendation even if the seven days allowed by rule have not yet elapsed. The parent must then either file a motion for rehearing by the trial court judge or take other appellate action.[177] Obviously then, the decision whether to seek review of the referee's recommendation must be made quickly.

Appealable Orders

The appellate courts expedite all appeals in child protection proceedings compared to standard civil proceedings. Any order issued in a child protection proceeding may be appealed to the Michigan Court of Appeals. But with most *non-final* orders, the appellant may only apply for *leave* to appeal, and the Court of Appeals grants comparatively few of those applications. Those discretionary appeals from non-final orders usually end with the Court of Appeals issuing a summary order denying the application for leave to appeal.

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[174] MCR 3.913(A).

[175] See *In re AMB*, n 56 *supra*.

[176] MCR 3.991.

[177] See MCR 3.991(A)(2)-(4).

Certain orders, however, may be appealed "by right," meaning that the Court of Appeals must afford plenary review, hear oral arguments, and issue an opinion. MCR 3.993(A) lists the orders that a parent may appeal by right. These include an order placing a child under the court's jurisdiction or removing the child from the parental home, an order terminating parental rights, any other order required by law to be appealed to the Court of Appeals, and any final order. As explained in the preceding paragraph, orders that are not appealable by right may be appealed only by seeking discretionary leave to appeal from the Court of Appeals.[178]

In addition, the Court of Appeals sometimes grants leave to file a *delayed* appeal if the matter would have been appealable by right, but the appellant waited too long to file the appeal.[179] It's important for parents' attorneys to know about that delayed appeal possibility,[180] but they should also know that the Court of Appeals only *rarely* grants an application for a delayed appeal. Attorneys should assume that the Court of Appeals will strictly enforce the filing deadlines specified in the court rules.

In some cases, the parent's attorney may want to ask the trial court to stay (pending a final decision on appeal) the order placing the child under the court's jurisdiction or terminating a parent's rights.[181] If the trial court denies the requested stay, the parent's attorney may ask the Court of Appeals to stay the lower court's order.[182]

Extraordinary Writs

In some rare cases, instead of taking an appeal, a parent's attorney may find it necessary to request that the trial court or the Court of Appeals issue an extraordinary writ, such as a writ of superintending control or

[178] MCR 3.993(B).

[179] MCR 7.203(B)(5).

[180] The Court of Appeals cannot grant a delayed application for appeal that is filed more than 63 days after the entry of the judgment appealed from. MCR 3.993(C)(2).

[181] MCR 7.209.

[182] MCR 7.209.

mandamus.[183] A higher court may issue a writ of superintending control to direct a lower court to take certain action or to refrain from taking certain action. It would be appropriate to seek a writ of superintending control when the trial court repeatedly does something that that the law prohibits, or repeatedly refuses to take an action that the law requires. A higher court will not issue a writ of superintending control when the lower court has discretion in the matter. Also, if the issue has arisen in only one case, the aggrieved party should appeal, not seek superintending control. The courts do not view superintending control as an alternative type of appeal; the writ will issue only when an appeal in a single case would not provide complete relief -- for example, when a lower court persists in making the same error even after having been reversed on appeal in previous cases.[184]

Writs of superintending control compel action by a *lower court*. In contrast, a writ of mandamus orders a member of the *executive branch* to take an action that the law requires.[185] As with the writ of superintending control, the courts will not issue a writ of mandamus where the executive branch official has discretion in the matter and a writ of mandamus would merely substitute the court's judgment for that of the official.

Remember that an extraordinary writ will be available only where an appeal is not available or an appeal could not provide a complete remedy. Appellate courts only rarely issue extraordinary writs, but parents' attorneys should keep that possibility in mind because a writ may resolve an issue more quickly than a full appeal could.

Representing the Parent on Appeal

Upon receiving an appeal appointment, the appellate attorney should obtain the full case record and then meet with the client and trial counsel to discuss what occurred during the trial and identify potential appellate issues. The appellate attorney should carefully review the record, including all

[183] MCR 3.706. Extraordinary writs may be not be used if the party can directly appeal the order or has some other remedy available. MCR 3.302(B); *Smith v Crime Victims Comp Bd*, 130 Mich App 625, 628; 344 NW2d 23 (1983).

[184] MCR 3.302(B).

[185] MCR 3.305.

transcripts and the court's file -- both the public and confidential portions of that file.[186]

After reviewing the files and transcripts, appellate counsel must decide which issues to raise on appeal. The attorney should consider constitutional issues, statutory issues, and possible abuses of discretion by the trial court. The constitutional guarantee of procedural due process requires "fundamental fairness."[187] Counsel should have a comprehensive understanding of what the Constitution requires, and should review the transcripts and court files with a focus on spotting issues of procedural fairness. Potential procedural due process issues include defects in service or a trial court's failure to appoint counsel in a timely manner. Counsel should also discern whether the trial court proceedings followed all the statutory and court-rule requirements. If those requirements were not met, either procedurally or substantively, counsel should raise the issue before the Court of Appeals.

Michigan's Juvenile Code states that it is to be "liberally construed."[188] That means that family court judges have broad discretion in child protection proceedings. The parent's appellate attorney should identify the trial court's key decisions and test those decisions against the abuse-of-discretion standard. Counsel should also consider whether any statutes outside the Juvenile Code apply to some aspect of the case. For example, the Michigan Court of Appeals has held that, although the Americans with Disabilities Act does not provide a defense to a termination of parental rights petition, it does apply to the earlier stages of child protective proceedings. That means that the agency must make "reasonable accommodations" for a parent who has a disability covered by the ADA.[189] Examples of other possibly relevant statutes include the Indian Child Welfare Act and the Interstate Compact on the Placement of Children.

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[186] See MCR 3.925(D).

[187] See generally, *Santosky* n 3 *supra*; *Lassiter v Dep't of Social Services*, 452 US 18; 101 S Ct 2153; 68 L Ed 2d 640 (1981) (both discussing due process and fundamental fairness in the context of termination of parental rights proceedings).

[188] MCL 712A.1(3).

[189] *In re Terry*, n 118 *supra*.

The parent's appellate attorney must file a brief raising the parent's best issues and arguing the law relevant to each issue.[190] For appeals from an order terminating parental rights, counsel must remember that even *one* recognized basis for terminating parental rights is sufficient to justify a termination. For this reason, appellate counsel must challenge *every* basis on which the trial court has terminated parental rights; otherwise, the Court of Appeals may peremptorily grant a motion to affirm.[191]

Appellate Motion Practice

Sometimes filing a special motion in the Court of Appeals may resolve the appeal more quickly. Parents' attorneys should review the section of MCR 7.211 that authorizes special motions for peremptory disposition of appeals.[192] For appellants, the two most commonly filed motions are the motion to remand for further proceedings and the motion for peremptory reversal.

A motion to remand can: (1) permit the trial court to address an issue that should already have been addressed, but was not; or (2) allow appellate counsel to further develop the factual record in order to permit a better-informed appellate review.

A motion for peremptory reversal asks the Court of Appeals to peremptorily reverse the judgment below without requiring full briefing or oral arguments because the trial court's reversible error is patently obvious. Appellate counsel might file a motion for peremptory reversal when, for example, there were obvious defects in the notice provided to the parent and trial counsel properly preserved the issue below.

Appellate attorneys in child protection cases usually are court appointed. Because appointed attorneys seldom have a chance to evaluate the case before accepting an appointment, the appellate rules allow appointed appellate attorneys to withdraw from a case if the attorney cannot identify any legitimate issues to raise on appeal.[193] By pursuing only

[190] See MCR 7.212.

[191] See MCR 7.211(C)(2).

[192] See MCR 7.211(C).

[193] MCR 7.211(C)(5).

meritorious claims, appellate attorneys can ensure that the Court of Appeals focuses on those legitimate issues.

Conclusion

Parents have a constitutionally protected right to the care, custody, and control of their children. The state may interfere with these rights only by following proper procedures, and only after showing that the parent is unfit to parent his or her child. Parents' attorneys must utilize the law to protect these critically important rights, working with the parent to establish the goals of the representation, which usually are to minimize the state's interference with parental rights. The parent's attorney must be a zealous advocate for the parent and must counsel the client based on a comprehensive knowledge of the law and a detailed understanding of the particular case. The parent's attorney must carefully investigate the case at every stage and advise the client regarding all the options at each stage, but ultimately let the client determine the goals to be achieved. By taking these steps, the parent's attorney will protect the parent's interests and ensure that the court makes a decision that serves the best interests of the child.

Appendix A: Additional Resources for Attorneys Representing Parents in Child Protective Proceedings

American Bar Association Center on Children and the Law <http://www.abanet.org/child> (accessed on July 28, 2008). The Center aims to improve children's lives through advances in law, justice, knowledge, practice and public policy. You can also reach the Center via phone at (202) 662-1755.

American Bar Association, *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases* <http://www.abanet.org/child/clp/ParentStds.pdf> (accessed onJuly 28, 2008).

Children's Charter of the Courts of Michigan, Inc., *Guidelines for Achieving Permanency in Child Protection Proceedings* (2004).

Child Welfare Information Gateway <http://www.childwelfare.gov> (accessed on July 28, 2008). Formerly the National Clearinghouse on Child Abuse and Neglect Information and the National Adoption Information Clearinghouse, the Child Welfare Information Gateway provides access to information and resources to help protect children and strengthen families. The site is a service of the Children's Bureau of the United States Department of Health and Human Services.

Duquette & Ventrell, eds, *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases* (2005).

Institute of Continuing Legal Education, *How-To-Kit: Representing Parents in Child Protective Proceedings* (2007).

Tobin L. Miller, *Child Protective Proceedings Benchbook: A Guide to Abuse and Neglect Cases* (Where Printed: Michigan Judicial Institute, 2006) <http://courts.michigan.gov/mji/resources/cppbook/cpp2006.htm> (accessed on July 28, 2008).

Michigan Absent Parent Protocol <http://courts.michigan.gov/scao/resources/standards/APP.pdf> (accessed on July 28, 2008).

Michigan Department of Human Services, *Adoption Services Manual* <http://www.mfia.state.mi.us/olmweb/ex/cfa/cfa.pdf> (accessed on July 28, 2008).

Michigan Department of Human Services, *Children's Foster Care Manual* <http://www.mfia.state.mi.us/olmweb/ex/cff/cff.pdf> (accessed on July 28, 2008).

Michigan Department of Human Services, *Children's Protective Services Manual* <http://www.mfia.state.mi.us/olmweb/ex/cfp/cfp.pdf> (accessed on July 28, 2008).

Michigan Office of the Children's Ombudsman <http://www.michigan.gov/oco> (accessed on July 28, 2008). The Office of the Children's Ombudsman investigates complaints about children involved with Michigan's child welfare system. You can reach them via phone at 1-800-642-4326.

National Association of Counsel for Children (NACC) <http://www.naccchildlaw.org> (accessed on July 28, 2008). The NACC is a non-profit child advocacy and professional membership association which is dedicated to providing high quality legal representation for all parties in child abuse and neglect proceedings. You can reach the NACC via phone at 1-888-828-NACC.

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Revised Edition

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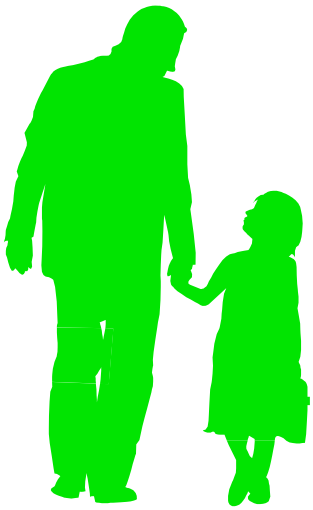

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This revised edition of the protocol was produced in 2006 in conjunction with the publication of the *Child Protective Proceedings Benchbook: A Guide to Abuse & Neglect Cases—Third Edition* (MJI, 2006). The *Lawyer-Guardian ad Litem Protocol (Revised Edition)* includes changes to applicable law made prior to April 1, 2006. Most importantly, this revised edition incorporates amendments to MCL 712A.17d made by 2004 PA 475, which became effective December 28, 2004.

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Lawyer-Guardian ad Litem Protocol

1. Introduction

The lawyer-guardian ad litem's role within an adversarial system is unique. The lawyer-guardian ad litem (L-GAL) is responsible both for protecting the legal rights of his or her client—an independent and equal party in the proceedings—and for serving as an independent voice for what is in the client's best interests. A L-GAL must know the applicable law and be familiar with a wide array of non-legal issues that arise in child protective proceedings. Being part of the adversarial process but at the same time apart from it, the L-GAL has some obligations to the client that are very similar to the obligations imposed on the lawyers for the adversaries, and some obligations that are entirely different. The child's lack of legal competence further complicates the situation. In 1998,[1] because of its concern for the protection of children who are abused or neglected by their parents, the Michigan Legislature enacted a statute that delineates the role and responsibilities of the L-GAL. This statute, MCL 712A.17d, read in conjunction with other statutes, court rules, case law, and the Michigan Rules of Professional Conduct, gives guidance to lawyers who are appointed to this important role. This protocol is intended as another tool to help assure competent, effective representation in every case in which the court appoints a L-GAL.

The Advisory Committee for this protocol recognizes that the fees paid by courts to L-GALs and the services that courts will pay the L-GAL to perform vary throughout Michigan, and that many feel that L-GALs are not fairly compensated. The Advisory Committee also recognizes, however, that a court's policy with regard to L-GAL fees does not alter or abrogate a L-GAL's

[1]MCL 712A.17d was amended in 2004. 2004 PA 475 addressed many of the issues discussed in the first edition of this protocol, which was published in 2003. This revised edition incorporates the amendments to MCL 712A.17d made by 2004 PA 475.

responsibilities under MCL 712A.17d. This protocol is intended to help L-GALs comply with MCL 712A.17d; it contains recommendations by the Advisory Committee for reasonable compliance with that statute. Any deviation from the explicit language of the statute should be read only as an Advisory Committee recommendation. Most importantly, the Advisory Committee recognizes the invaluable service to the child, court, and community that L-GALs provide.

Depending upon the circumstances of the case and available resources, several representatives of the child or the court may be appointed. The following definitions are provided to help distinguish between a L-GAL and other representatives of the child or court who may be appointed by the court in a case:

- **Lawyer-guardian ad litem:** A lawyer-guardian ad litem must be appointed for a child in every child protective proceeding instituted under the Juvenile Code.[2] The lawyer-guardian ad litem has some responsibilities derived from the attorney-client relationship, and some responsibilities that are derived from the guardian ad litem's position. A L-GAL's purpose is to determine and advocate for a child's best interests. The L-GAL's powers and duties are explained in this protocol.
- **Attorney:** In addition to appointment of a L-GAL, an "attorney" may be appointed to represent a child's expressed wishes where the L-GAL's determination of the child's best interests conflicts with the child's expressed wishes. The procedure for appointing an "attorney" is discussed in this protocol. "'Attorney' means, if appointed to represent a child in a [child protective proceeding under the Juvenile Code], an attorney serving as the child's legal advocate in a traditional attorney-client relationship with the child, as governed by the Michigan rules of professional conduct. An attorney . . . owes the same duties of undivided

[2] MCL 712A.13a(1)(g), MCL 712A.17c(7), and MCL 722.630.

loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client."[3]

- **Court Appointed Special Advocate:** If available in the jurisdiction and appropriate in a given case, the court may appoint a Court Appointed Special Advocate or CASA. A CASA is a volunteer who investigates the child's circumstances and makes recommendations to the court concerning the best interests of that child. A CASA does not need to be an attorney. A CASA must maintain regular contact with the child, investigate the background of a case, collect information regarding the child, provide written reports to the court and parties before a hearing, and testify when requested by the court.[4]
- **Guardian ad litem:** Like a CASA, a guardian ad litem (GAL) may be appointed to investigate the child's circumstances and make recommendations to the court regarding the child's best interests. A guardian ad litem's duty is to the court, not the child. "'Guardian ad litem' means an individual whom the court appoints to assist the court in determining the child's best interests. A guardian ad litem does not need to be an attorney."[5]

2. Protocol Contents

This protocol describes the authority and responsibilities under MCL 712A.17d of the Juvenile Code of a L-GAL appointed to represent a child in child protective proceedings. A L-GAL must be appointed for a child who is the subject of child protective proceedings.[6] A L-GAL may be appointed in guardianship proceedings, proceedings under the Safe Delivery of Newborns Law, and

[3] MCL 712A.13a(1)(c).

[4] MCR 3.917.

[5] MCL 712A.13a(1)(f).

[6] MCL 712A.17c(7) and MCL 722.630.

child custody proceedings, and MCL 712A.17d also applies to L-GALs appointed in those proceedings.[7] A L-GAL's role in those specific proceedings may differ from the L-GAL's role in child protective proceedings.

This protocol contains the following parts:

A. Text of MCL 712A.17d. The complete text of MCL 712A.17d, the statute that contains the duties and authority of L-GALs. The statute also provides for appointment of an attorney to advocate for a child's expressed wishes where the L-GAL's determination of the child's best interests and the child's determination of his or her own interests conflict.

B. Discussion. This portion of the protocol contains a discussion of the duties and authority of L-GALs under MCL 712A.17d. It contains sections on the role of the L-GAL, explaining that role to the child, conducting an independent investigation of the facts of the case, duties pertaining to hearings in the case, and determining and advocating for the child's best interests. Throughout the discussion, the reader will find recommendations of the Advisory Committee intended to facilitate reasonable compliance with the dictates of MCL 712A.17d, including the requirements for meeting with or observing the child and reviewing the case file. Statutes, court rules, ethics rules and opinions, and case law relevant to performance of a L-GAL's duties are also noted.

C. Appendixes. Attached to this protocol are the following materials intended to

[7] MCL 700.5213(5), MCL 700.5219(4), MCL 712.1(2)(i), MCL 712.2(1), and MCL 722.24(2). In guardianship and custody proceedings, a L-GAL may file with the court a written report and recommendation, which may only be admitted into evidence upon stipulation of all parties. The parties may also use the report and recommendation at a settlement conference.

provide further information and guidance for L-GALs and courts:

- *Appendix A:* a list of state and federal statutes, federal regulations, court rules, case law, and other resources relevant to the L-GAL's role in child protective proceedings.
- *Appendix B:* SCAO Form JC 82, Affidavit of Service Performed by Lawyer-Guardian ad Litem. A L-GAL must submit this form to the court to receive payment.
- *Appendix C:* the Forensic Interviewing Protocol, produced by the Governor's Task Force on Children's Justice and the Family Independence Agency (now the Department of Human Services [DHS]).
- *Appendix D:* a "Foster Parent Review Hearing Report," from Charlevoix and Emmet Counties, used to report information gathered during meetings between a L-GAL and foster parent.
- *Appendix E:* a "Qualified Protective Order" from Marquette County, which is used to give a L-GAL authority to consent to release of records concerning his or her client, or to consent to an examination or treatment of his or her client.
- *Appendix F:* Donadio & Wilen, "Applying the Realities of Child Development to Legal Representation: A Quick Reference for Lawyers and Judges," 3 *Mich Child Welfare L J* 2 (1999).

3. Text of MCL 712A.17d

"**MCL 712A.17d. Lawyer-guardian ad litem's duty; powers**

"(1) A lawyer-guardian ad litem's duty is to the child, and not the court. The lawyer-guardian ad litem's powers and duties include at least all of the following:

(a) The obligations of the attorney-client privilege.

(b) To serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.

(c) To determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family members, and others as necessary, and reviewing relevant reports and other information. The agency case file shall be reviewed before disposition and before the hearing for termination of parental rights. Updated materials shall be reviewed as provided to the court and parties. The supervising agency shall provide documentation of progress relating to all aspects of the last court ordered treatment plan, including copies of evaluations and therapy reports and verification of parenting time not later than 5 business days before the scheduled hearing.

(d) To meet with or observe the child and assess the child's needs and wishes with regard to the representation and the issues in the case in the following instances:

(*i*) Before the pretrial hearing.

(*ii*) Before the initial disposition, if held more than 91 days after the petition has been authorized.

(*iii*) Before a dispositional review hearing.

(*iv*) Before a permanency planning hearing.

(*v*) Before a post-termination review hearing.

(*vi*) At least once during the pendency of a supplemental petition.

(*vii*) At other times as ordered by the court. Adjourned or continued hearings do not require additional visits unless directed by the court.

(e) The court may allow alternative means of contact with the child if good cause is shown on the record.

(f) To explain to the child, taking into account the child's ability to understand the proceedings, the lawyer-guardian ad litem's role.

(g) To file all necessary pleadings and papers and independently call witnesses on the child's behalf.

(h) To attend all hearings and substitute representation for the child only with court approval.

(i) To make a determination regarding the child's best interests and advocate for those best interests according to the lawyer-guardian ad litem's understanding of those best interests, regardless of whether the lawyer-guardian ad litem's determination reflects the child's wishes. The child's wishes are relevant to the lawyer-guardian ad litem's determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity. Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child's wishes and preferences.

(j) To monitor the implementation of case plans and court orders, and determine whether services the court ordered for the child or the child's family are being provided in a timely manner and are accomplishing their purpose. The lawyer-guardian ad litem shall inform the court if the services are not being provided in a timely manner, if the family fails to take advantage of the services, or if the services are not accomplishing their intended purpose.

(k) Consistent with the rules of professional responsibility, to identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter through consultation with the child's parent, foster care provider, guardian, and caseworker.

(l) To request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment.

"(2) If, after discussion between the child and his or her lawyer-guardian ad litem, the lawyer-guardian ad litem determines that the child's interests as identified by the child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian ad litem shall communicate the child's position to the court. If the court considers the appointment appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and the lawyer-guardian ad litem's identification of the child's interests, the court may appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child's lawyer-guardian ad litem.

"(3) The court or another party to the case shall not call a lawyer-guardian ad litem as a witness to testify regarding matters related to the case. The lawyer-guardian ad litem's file of the case is not discoverable."

4. Role of the L-GAL

Nature of the representation. A L-GAL's duty is to the child, not the court. A L-GAL owes the child the duties of competent and zealous representation[8] that an attorney owes to an adult

[8] See *In re Shaffer,* 213 Mich App 429, 436 (1995) (under a previous version of MCL 712A.17c(7), a child who is the subject of a child protective proceeding is entitled to zealous

client. A L-GAL's duties, like those of any attorney, include a duty to investigate the facts of the case, appear at hearings on the client's behalf, and examine witnesses. The child is entitled to the effective assistance of counsel.[9] Failure to comply with statutory and other requirements may result in sanctions.[10]

However, as noted in the introduction to this protocol, the L-GAL's role is unique. A L-GAL is required to serve as the independent representative of the child's best interests, not as the representative of the child's wishes or preferences. Although the L-GAL is required to consider the child's wishes and preferences when determining the child's best interests, the L-GAL is not bound by them as in the traditional attorney-client relationship. Nonetheless, to the extent possible, the L-GAL must maintain a normal attorney-client relationship with the child. If there is a conflict between the child's expressed wishes and the L-GAL's perception of what is in the child's best interests, the L-GAL should notify the court, and the court may appoint an additional "attorney" who will advocate for the child's wishes.[11]

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representation). MCL 712A.17c(7) now states in part: *"In addition to any other powers and duties,* a lawyer-guardian ad litem's powers and duties include those prescribed in section 17d." (Emphasis added.)

[9] To constitute effective assistance of counsel, a child's attorney's conduct must comply with "applicable statutes, court rules, rules of professional conduct, and any logically relevant case law." *In re AMB,* 248 Mich App 144, 226 (2001). (Footnotes omitted.)

[10] Attorneys and certified social workers may be deprived of their professional licenses or certifications for violations of law and applicable ethical rules. See *Grievance Administrator v Carson,* Case No. 02-53-6A (September 5, 2002) (revocation of license to practice law for failure to visit child, consult with social worker, visit foster parent, establish a permanency plan for the child, or make reasonable efforts to expedite the proceedings) and *Becker-Witt v Dep't of Consumer & Industry Services,* 256 Mich App 358 (2003) (revocation of social worker's certification for failure to report suspected sexual abuse of the client's child).

[11] See MCL 712A.17d(2).

A L-GAL must provide the child with competent representation.[12] Before accepting appointment, a L-GAL should have an understanding of the procedural and substantive law governing child protective proceedings, child development (including the effect of abuse or neglect on development),[13] and the agencies that provide services to children and families. In any given case, a L-GAL may need to gain knowledge, through consultation with others or study, in a specialized area, including medical aspects of child abuse and neglect, child sexual abuse, substance abuse, mental illness, domestic violence, foster care regulations, funding issues, governmental benefit programs, applicable federal law (including the Indian Child Welfare Act), evaluation of psychological reports, education law, and social and cultural issues related to child-rearing practices.[14] When necessary, the L-GAL should request appointment, at public expense, of an expert witness. To help ensure that a L-GAL provides children with competent representation, the L-GAL and court should keep caseloads at a reasonable level.

A L-GAL must be diligent and prompt, and expedite the case consistent with the child's needs and interests.[15] The L-GAL must be familiar with the time requirements in the law governing child protective proceedings.[16] Adjournments should be granted only for good cause, after taking the

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[12] See MRPC 1.1 and Comment.

[13] See Appendix F for an article that provides a brief overview of child development concepts.

[14] A good overview of many of these issues is contained in Baker, et al., *What I Wish I'd Learned in Law School: Social Science Research for Children's Lawyers,* ABA Center on Children and the Law, 1997. See also Appendix A, which contains a list of resources intended to guide a L-GAL's initial investigation of these and other specialized areas.

[15] MRPC 1.3 and 3.2.

[16] See Miller, *Child Protective Proceedings Benchbook: A Guide to Abuse & Neglect Cases–Third Edition* (MJI, 2006), Section 5.13, for a table containing time and notice requirements.

child's best interests into consideration, and for as short a period as necessary.[17]

When a child is removed from his or her home, a L-GAL must seek to reduce the trauma resulting from separation of child and parent. This may be done by objecting to removal in an appropriate case, advocating for placement with a relative, seeking an early return of the child home, and helping to maintain, to the extent possible, a child's normal school and other activities.

Confidentiality and the attorney-client privilege. MCL 712A.17d(1)(a) states that a L-GAL's duties include "[t]he obligations of the attorney-client privilege." The obligations of the attorney-client privilege include those imposed by the rules of professional conduct governing confidentiality and by the common-law attorney-client privilege. The relevant rule of professional conduct, MRPC 1.6, states as follows:

> "**(a)** 'Confidence' refers to information protected by the client-lawyer privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.
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> "**(b)** Except when permitted under paragraph (c), a lawyer shall not knowingly:
>
> (1) reveal a confidence or secret of a client;
>
> (2) use a confidence or secret of a client to the disadvantage of a client; or
>
> (3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.
>
> "**(c)** A lawyer may reveal:
>
> (1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;

[17] MCR 3.923(G).

(2) confidences or secrets when permitted or required by these rules, or when required by law or by court order;

(3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used;

(4) the intention of a client to commit a crime and the information necessary to prevent the crime; and

(5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.

"**(d)** A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee."

The common-law attorney-client privilege limits the admissibility of the client's confidential communications to his or her attorney for the purpose of obtaining legal advice.[18] "The purpose of the attorney-client privilege is to permit a client to confide in the client's counselor, knowing that the communications are safe from disclosure."[19] The privilege belongs to the client; only the client may waive the privilege.[20] Although it may help the child to feel comfortable to have a person whom the child knows present at the first meeting between a child and a L-GAL, the child's meaningful

[18] *Alderman v People,* 4 Mich 414, 422 (1857).

[19] *Co-Jo, Inc v Strand,* 226 Mich App 108, 112 (1997).

[20] *Leibel v General Motors Corp,* 250 Mich App 229, 240 (2002).

exercise of the attorney-client privilege requires the L-GAL to meet with the child without other parties present. The presence of a third party during communications between attorney and client destroys the privilege, unless the third party is an agent of the attorney or client.[21]

A conflict between a L-GAL's duty to preserve the child's confidences and secrets and a L-GAL's duty to advocate for the child's best interests may arise in certain circumstances, such as when the child discloses to the L-GAL that he or she has been subject to additional abuse or neglect, or that he or she is preparing to run away from placement. A L-GAL is not a "mandatory reporter" under MCL 722.623(1) of the Child Protection Law, and running away from a placement is not a criminal offense.[22] An attorney must not disclose a client's confidential communications without the client's consent unless disclosure is required by law or court order.[23] In these circumstances, the L-GAL should counsel the child and encourage him or her to allow the L-GAL to disclose the confidential information to the court.[24] The L-GAL may also request the appointment of a guardian ad litem or CASA if available in the jurisdiction. Such circumstances exemplify the unique role and responsibilities of the L-GAL. Preservation of attorney-client

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[21] *Grubbs v Kmart Corp,* 161 Mich App 584, 589 (1987).

[22] It may be a status offense. See MCL 712A.2(a)(2). If the child discloses that he or she intends to commit a criminal offense in conjunction with running away from placement, the L-GAL may be permitted to disclose such information to the court pursuant to MRPC 1.6(c)(4). Courts and supervising agencies are required to institute expedited procedures in cases involving children absent without leave from a court-ordered placement. See Admin Order No. 2002-4, 467 Mich cv (2002), and DHS *Services Manual,* CFF 722-3.

[23] MRPC 1.6(b)(1) and (c)(1) and (2).

[24] A L-GAL may also seek guidance from the State Bar of Michigan. The State Bar of Michigan Attorney Ethics Helpline number is (877) 558-4760. Neither the Michigan Legislature nor Michigan appellate courts have addressed a L-GAL's liability in a subsequent negligence action for injuries to the child. See MCL 691.1407(6) ("A guardian ad litem is immune from civil liability for an injury to a person . . . if he or she is acting within the scope of his or her authority as a guardian ad litem").

confidentiality is an important interest; however, a L-GAL may need to strike a balance between traditional attorney roles and responsibilities and the legislatively mandated responsibility to represent a child's best interests. The Advisory Committee for this protocol recognizes that L-GALs must counsel and advise their clients based on the circumstances of individual cases. In doing so, the Advisory Committee fervently hopes that L-GALs will be guided by a recognition of the unique vulnerabilities of abused and neglected children, and a recognition that a fundamental goal of child protective proceedings is that children emerge from the process in safe and permanent home settings.

Pursuant to MCL 712A.17d(1)(i), a L-GAL must inform the court of the child's wishes and preferences, but such communication must be "[c]onsistent with the law governing attorney-client privilege." "A lawyer[-guardian ad litem] who is asked to produce information that is covered by the attorney-client privilege or that contains confidences and secrets within MRPC 1.6, and with regard to which the client does not consent to disclosure, must await a subpoena, exercise the attorney-client privilege, and await the presiding judge's instruction of whether to release the information."[25]

Neither the court nor another party may call a L-GAL as a witness to testify regarding matters related to the case, and a L-GAL's case file is not discoverable.[26]

Participation in the proceedings. A L-GAL is "entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child."[27] A L-GAL

[25] RI-318 (March 22, 2000).

[26] MCL 712A.17d(3).

[27] MCL 712A.17d(1)(b).

must attend all hearings, including the preliminary hearing.[28] If the DHS is considering filing a petition requesting termination of parental rights at the initial disposition hearing, the L-GAL should attend the conference required by MCL 722.638(3) to determine an appropriate course of action. A L-GAL should attend local Foster Care Review Board meetings involving a review of the child's or a sibling's case. The L-GAL should attend mediation sessions if held.

Substitution may occur only for sufficient cause and only with court approval.[29] Courts and L-GALs should discourage the routine use of substitution by "emergency house counsel" or any other attorney for the L-GAL appointed to represent the child. Frequent substitution of L-GALs undermines the purpose of MCL 712A.17d. Nonetheless, MCR 3.915(D)(2) allows for temporary substitution in certain circumstances. That rule states in part:

> "The court may permit another attorney to temporarily substitute for the child's lawyer-guardian ad litem at a hearing, if that would prevent the hearing from being adjourned, or for other good cause. Such a substitute attorney must be familiar with the case and, for hearings other than a preliminary hearing or emergency removal hearing, must review the agency case file and consult with the foster parents and caseworker before the hearing unless the child's lawyer-guardian ad litem has done so and communicated that information to the substitute attorney. The court shall inquire on the record whether the attorneys have complied with the requirements of this subrule."

A L-GAL should ask the court for permission to withdraw from the representation only if a

[28] See MCR 3.915(B)(2)(a) (court must appoint L-GAL for child at every hearing, including preliminary hearing) and MCR 3.965(B)(2) (L-GAL must attend preliminary hearing).

[29] MCL 712A.17d(1)(h).

conflict of interest arises[30] or if the L-GAL is unable to communicate with the child for reasons other than age.

A L-GAL should seek the truth, not defend a preordained position; file necessary pleadings and other papers, including appropriate motions; and file a witness list and call witnesses independently from the petitioner. A L-GAL's position may shift during the course of the proceedings. A L-GAL's position regarding the child's best interests may mirror, wholly or in part, a parent's or the agency's position, but the L-GAL must still independently develop a theory of the case and fully participate in the proceedings rather than merely endorsing another party's position. A L-GAL should insist on his or her status as an independent representative of a party. For example, the L-GAL should insist that he or she not be required to sit with either the prosecuting attorney or a parent during a hearing.

A L-GAL should present to the court relevant and admissible evidence and information. A L-GAL may file a motion or petition for review of the child's placement when the L-GAL finds that placement to be inappropriate or unsafe.[31] If necessary, a L-GAL may also file a report of suspected child abuse or neglect with DHS. At trial, at the conclusion of the proofs, the L-GAL may make a recommendation to the fact finder as to whether one or more of the statutory grounds in the petition have been proven by a preponderance of the evidence.[32] Before entering dispositional orders, the court must consider any written or oral information concerning the child provided by the

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[30] See MRPC 1.7.

[31] See MCR 3.966(A)-(B). A L-GAL may also file a complaint with the Children's Ombudsman pursuant to MCL 722.925. Go to www.michigan.gov/oco for further information. The L-GAL may also file a complaint with the DHS against a licensed foster care home, agency, or institution. For the complaint form, go to http://www.michigan.gov/documents/comp__frm_50821_7.pdf.

[32] MCR 3.972(D).

L-GAL.[33] A L-GAL may file a petition on behalf of the child seeking court jurisdiction or termination of parental rights.[34]

A L-GAL may seek review of a decision or order by filing a request for review of a referee's recommended findings and conclusions, a petition for rehearing, or an appeal.[35]

Child's attendance at a hearing and child's testimony regarding abuse. A child has a right to attend a hearing.[36] A child who attends a hearing may understand that the issues surrounding his or her custody are being taken seriously. However, the court may determine, based on the child's age and maturity and the nature of the testimony at the hearing, that the child's interests require that he or she be excused from attending part or all of a trial or a disposition hearing.[37] The L-GAL may counsel the child regarding attending a hearing, including informing the child that his or her attendance at a hearing will not invariably result in returning home.

A L-GAL must decide whether a child should testify at a hearing regarding alleged abuse. When deciding whether the child should testify, the L-GAL may consider the child's need or desire to testify, the necessity of the child's testimony, the use of a hearsay exception to obviate the need for the child's direct testimony, and the child's ability to provide testimony and to withstand cross-examination. The L-GAL should be familiar with the law governing competence of witnesses. If the

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[33] MCL 712A.18f(4) and MCL 712A.19(11).

[34] MCL 712A.11(1), MCL 712A.19b(6), and MCR 3.977(A)(2)(b)-(d). The L-GAL may seek input from the prosecuting attorney before filing a petition but is not bound by a prosecuting attorney's decision not to file a petition.

[35] See MCR 3.991, 3.992, and 3.993.

[36] MCL 712A.12 (". . . the court in its discretion may excuse but not restrict children from attending the hearing").

[37] MCR 3.972(B)(1) and MCR 3.973(D)(1).

child is to testify, the L-GAL should prepare the child prior to his or her appearance in the courtroom by showing the child the courtroom, allowing the child to sit in the witness stand, providing a booster seat if necessary, telling the child where others will sit, and the like. If the L-GAL determines that it is not in the child's best interests to testify, the L-GAL should seek a stipulation from the other parties not to call the child as a witness. If the child will be called as a witness by another party, the L-GAL should explore the use of alternative procedures to obtain the child's testimony in the least detrimental manner.[38] The L-GAL may file a motion to ensure developmentally appropriate questions and should make every effort to prevent cross-examination by leading questions. In all cases, the L-GAL should seek direction from the court.

Case plan development and services to family. The L-GAL should be notified of the date and time of a case plan development conference to allow him or her to participate in constructing a case plan and parent-agency agreement. However, the L-GAL should not be present at the conference with a respondent unless that respondent's attorney is also present or has been made aware that the L-GAL will attend the conference. As required by the Michigan Rules of Professional Conduct, the L-GAL must first contact a respondent's attorney and ask permission to speak with that respondent.[39] A L-GAL should obtain the attorney's permission in writing or confirm it in writing once permission has been granted. Parents should be informed that they are not obligated to discuss the case with the L-GAL, and that the L-GAL may be required to use the information gained against the parent in representing the child.

A L-GAL must inform the court "if . . . services are not being provided in a timely manner,

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[38] See MCL 712A.17(7) and MCL 712A.17b. A pretrial motion must be filed before using such alternative procedures. See MCR 3.922(E). A L-GAL may also request that an impartial person address questions to a child-witness at a hearing.

[39] MRPC 4.2.

if the family fails to take advantage of the services, or if the services are not accomplishing their intended purpose."[40] The L-GAL may do so immediately, by motion, or at a scheduled review hearing. The L-GAL may also attempt to remedy the problem by contacting the caseworker, service provider, and parent's attorney.

Cooperative resolution. MCL 712A.17d(1)(k) requires a L-GAL to identify common interests among the parties and, consistent with the rules of professional conduct and to the extent possible, to promote a cooperative resolution of a case "through consultation with the child's parent, foster care provider, guardian, and caseworker." Cooperative resolution prior to trial may allow faster implementation of a case plan and parent-agency agreement. Because the L-GAL represents and advocates for the child's best interests, he or she may be particularly helpful in negotiating a cooperative resolution regarding the permanency plan for the child. The L-GAL may suggest that the case be referred to permanency planning mediation if available.[41]

On the other hand, a L-GAL should not hesitate to advocate a position contrary to another party's position. The L-GAL should participate in plea negotiations between the prosecuting attorney or other attorney for the petitioner and the respondent's attorney. The court has discretion to allow a respondent to plead to an amended petition "provided that the petitioner and the attorney for the child have been notified . . . and have been given the opportunity to object before the plea is accepted."[42] The court may allow amendment of a petition as the interests of justice require,[43] and the L-GAL should ensure that such amendments are consistent with the child's best interests.

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[40] MCL 712A.17d(1)(j).

[41] Go to http://courts.michigan.gov/scao/dispute/odr.htm for further information.

[42] MCR 3.971(A).

[43] MCL 712A.11(6).

As required by the Michigan Rules of Professional Conduct, the L-GAL must first contact a party's attorney and ask permission to speak with that party.[44] A L-GAL should obtain the attorney's permission in writing or confirm it in writing once permission has been granted. Parents should be informed that they are not obligated to discuss the case with the L-GAL, and that the L-GAL may be required to use the information gained against the parent in representing the child. However, the L-GAL may contact the caseworker without obtaining the consent of the prosecuting attorney, assistant attorney general, or other attorney representing the agency.[45] If the prosecuting attorney or assistant attorney general denies access to the caseworker, the L-GAL should seek a court order.

Requesting court authorization to pursue other issues on the child's behalf. MCL 712A.17d(1)(l) requires a L-GAL "[t]o request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment." The L-GAL should pursue issues related to the child protective proceeding, such as custody, guardianship, paternity, termination of parental rights, adoption, and appeals. In addition, the L-GAL may request court authorization and payment by the court to pursue issues on behalf of the child that do not arise specifically from the court appointment. Those issues include:[46]

- child support;
- delinquency or status offender matters;[47]

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[44] MRPC 4.2.

[45] RI 316 (December 13, 1999), citing the commentary to MRPC 4.2, which allows communications authorized by law, including "the right of a party to a controversy with a government agency to speak with government officials about the matter."

[46] This list of issues is based in part on American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1996), D-12.

[47] A L-GAL representing a child in delinquency or status offender matters may cause practical problems. For example, the L-GAL may be required to confer with parents regarding the

- social security and other public benefits;
- personal injury;[48]
- school/education issues, especially for a child with disabilities;
- mental health proceedings;
- name change;
- medication issues;
- abortion;
- estate planning;
- tribal membership; and
- employment.

Depending upon the particular need and the resources available in the community, a L-GAL may seek assistance to pursue such issues on the child's behalf. For example, a L-GAL may seek support and assistance from a CASA, a member of the private bar who offers appropriate services pro bono, a Legal Aid office, or a local tribal services office.

Length of L-GAL appointment and L-GAL duties. A L-GAL must serve until discharged by the court, and the court shall not discharge the L-GAL "as long as the child is subject to the jurisdiction, control, or supervision of the court, or of the Michigan children's institute or

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delinquency or status offender matters, but the parents may be represented by counsel in the child protective proceeding. Attorneys are forbidden from talking directly to a represented party. MRPC 4.2. It should also be emphasized that a L-GAL and an attorney functioning as defense counsel for a juvenile in delinquency proceedings have very different goals and may be advocating contradictory positions in the two proceedings.

[48] See CI-1016 (July 9, 1984) (it is not unethical for a court-appointed guardian ad litem to represent a child in a separate action alleging a violation of the mandatory reporting requirements of the Child Protection Law).

other agency, unless the court discharges the [L-GAL] for good cause shown on the record."[49] In most cases, this will entail representing the child in appeal proceedings.[50] Following termination of parental rights, a L-GAL must ensure that reasonable efforts are made to finalize a child's adoption or other permanent placement.[51] If the child has been committed to the Michigan Children's Institute (MCI), the L-GAL may consult with the MCI superintendent regarding that commitment, the child's placement, and permanency planning for the child. If the L-GAL has an objection regarding these issues, the L-GAL and MCI superintendent must consult with one another.[52]

Building relationships with others. Building good working relationships with child protective services workers, foster care workers, foster parents, and mental health or other professionals involved with the child may help the L-GAL to efficiently and competently perform his or her duties. For example, a L-GAL may wish to meet regularly with the foster care workers who are assigned to the same children as the L-GAL. This would allow the L-GAL and foster care workers to get to know one another and to exchange information and insights regarding the children. A L-GAL may also wish to organize and speak to a group meeting of foster parents so that the L-GAL becomes familiar to them. Foster parents are often invaluable sources of information regarding the children in their care, and establishing relationships with them will allow L-GALs access to such information.

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[49] MCL 712A.17c(9).

[50] Check local court practice.

[51] See MCL 712A.19c and MCR 3.978, which contain the procedures for post-termination review hearings.

[52] MCL 400.204(2).

5. Explaining the Role of the L-GAL to the Child

Establishing rapport with and explaining your role to the child. A L-GAL is required to explain his or her role to the child, "taking into account the child's ability to understand the proceedings."[53] The L-GAL should meet with and explain the L-GAL's role to the child as soon as possible after appointment. A L-GAL must establish rapport with the child. The initial meeting should occur in surroundings that are comfortable for the child, preferably in his or her home. A person whom the child knows may be present to make the child more comfortable and allow the L-GAL and child to become familiar with one another. A caseworker may facilitate meaningful communication between the L-GAL and child. However, others should only be present when non-confidential information is discussed.[54] The L-GAL should also ask the child if there is anything he or she wants from home, such as a favorite toy or book.

The L-GAL should use developmentally appropriate language and concrete examples illustrating the L-GAL's role in the proceedings. The L-GAL should consider the child's age, education level, cultural context, and degree of language acquisition when providing this explanation. After explaining the L-GAL's role, the L-GAL may ask the child to state his or her understanding of what the L-GAL has said to ensure that the child understands. The L-GAL should also allow the child ample time to ask questions. The L-GAL should also explain his or her role to the child's foster parent or guardian.

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[53] MCL 712A.17d(1)(f). The Forensic Interviewing Protocol, attached as Appendix C, contains several general recommendations regarding talking with children. See also Walker, *Handbook on Questioning Children: A Linguistic Perspective,* 2d ed, ABA Center on Children and the Law, 1999.

[54] The presence of a third party during communications between attorney and client destroys the privilege, unless the third party is an agent of the attorney or client. *Grubbs v Kmart Corp,* 161 Mich App 584, 589 (1987).

The L-GAL's explanation should include the following:

- that the L-GAL's purpose is to decide and advocate for the child's best interests, and that the L-GAL will take into account the child's wishes but is not bound to follow them;
- the procedure for addressing conflicts between the child's wishes and the L-GAL's assessment of the child's best interests;
- that the child's statements will be kept confidential unless the child consents to allow the L-GAL to tell others or an exception to confidentiality applies;
- the issues to be considered by the court, and the possible outcomes of the court proceedings; and
- the substance and effect of dispositional orders and other orders entered in the case, and whether the orders may be challenged or modified in the future.

6. Conducting an Independent Investigation of the Case

Importance of independent investigation. A L-GAL must "determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family members, and others as necessary, and reviewing relevant reports and other information."[55] An independent investigation is necessary to competently represent a child and formulate a conclusion as to the child's best interests. Although the DHS is charged with conducting an investigation of the case, the L-GAL must conduct his or her own independent investigation, interviewing persons and reviewing the petition and reports. Nonetheless, the L-GAL may wish to contact the caseworker at regular intervals to help the L-GAL stay informed regarding events in the case. A thorough independent investigation requires time, and the L-GAL should commence his or her investigation to allow time for its completion prior to a hearing.

[55] MCL 712A.17d(1)(c).

Interviewing the child regarding the allegations in the petition and using a forensic interviewing protocol. Multiple interviews of the child regarding the allegations in a petition must be avoided. The L-GAL should encourage the use of videotaped interviews.[56] Law enforcement personnel, DHS personnel, L-GALs, attorneys for respondents, and others must cooperate with one another to ensure that they are all present during a single interview of the child in a neutral location regarding the allegations. When a child is interviewed regarding the allegations in the petition, the interviewer must use a forensic interviewing protocol based on the model Forensic Interviewing Protocol attached as Appendix C.[57]

The L-GAL should also interview persons involved with the child, including the child's friends, school personnel, caseworkers, foster parents, neighbors, relatives, coaches, clergy, mental health professionals, physicians, law enforcement officers, and potential witnesses.

Court-Appointed Special Advocates (CASAs). Where a CASA has been appointed, the L-GAL may interview the CASA. A CASA must consult with a L-GAL.[58] L-GALs should collaborate with CASAs. Because they conduct investigations and submit reports to the court, CASAs may serve as a useful source of information regarding the child, thus helping to meet the L-GAL's statutory obligation to conduct an independent investigation of the case. When appropriate, the L-GAL may call the CASA as a witness.

Reviewing reports. When appropriate, the L-GAL should review reports necessary to effectively advocate for the child, including a parent's and the child's social services, psychiatric,

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[56] See MCL 712A.17b.

[57] See MCL 722.628(6). A L-GAL should determine if the county in which he or she practices has developed a forensic interviewing protocol pursuant to MCL 722.628(6).

[58] MCR 3.917(E). See also www.abanet.org/child/clp/Court Appointed Special Advocates/Top Ten Tips for Attorneys Working with CASA Volunteers.htm.

psychological, drug, medical, law enforcement, school, court, and other records. The L-GAL must resolve discrepancies or conflicts in written information and prepare to present evidence in support of the L-GAL's position. That position may be contrary to a determination contained in a report.

Obtaining access to a child's confidential records. A L-GAL is "entitled to . . . access to all relevant information regarding the child."[59] The L-GAL may obtain access to the child's confidential records via access to a caseworker's file or pursuant to court order. A DHS caseworker investigating suspected child abuse or neglect may obtain a child's confidential medical or counseling records.[60] Federal regulations permit disclosure of health care provider records pursuant to court order.[61] A L-GAL may obtain access to a child's school records pursuant to court order.[62] A "qualified protective order" authorizing a L-GAL to consent to the disclosure of records concerning a child is attached as Appendix E. The L-GAL must obtain such records in order to present an informed recommendation to the court regarding the child's best interests.

Obtaining access to a parent's confidential records. When fulfilling his or her duty to review all relevant reports and other information, a L-GAL's access to a parent's medical, counseling, or other records may be limited by confidentiality provisions. However, there are several exceptions to the confidentiality of such records of which a L-GAL should be aware. A DHS caseworker investigating suspected child abuse or neglect may obtain a parent's confidential mental

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[59] MCL 712A.17d(1)(b).

[60] See MCL 722.627(2)(j) (L-GAL access to DHS central registry), MCL 722.626(2) (contents of a physician's written report to DHS concerning suspected abuse or neglect), MCL 333.16281 (procedure for DHS to obtain medical and counseling records), and MCL 330.1748(5) and MCL 330.1748a (procedure to obtain mental health records).

[61] 45 CFR 164.512(e)(1)(*i*).

[62] See 20 USC 1232g(b)(2)(B) and MCL 600.2165.

health records pertinent to the investigation.[63] A parent's confidential mental health records may also be obtained by court order or subpoena.[64] Under federal law, a parent's substance abuse treatment and counseling records may be disclosed pursuant to court order.[65] A DHS children's protective services worker must be given access to Friend of the Court records related to investigation of suspected child abuse or neglect.[66]

Obtaining authorization to release confidential information or requesting court order. If necessary, the L-GAL should obtain authorizations for release of confidential information. If necessary, the L-GAL should use subpoenas, discovery under MCR 3.922, or the procedures set forth in MCR 3.923(A) to obtain records or other information regarding the child, a sibling, or a parent. MCR 3.923(A) allows the court to order production of other evidence "at any time the court believes that the evidence has not been fully developed . . . ."

A L-GAL may also ask the court to order an examination or evaluation of a child, parent, guardian, or legal custodian. MCR 3.923(B) allows the court to order an examination or evaluation of a minor, parent, guardian, or legal custodian, and MCR 3.973(E)(1) and MCR 3.975(E) provide that privilege may not be used to prevent the receipt and use of materials prepared pursuant to a court-ordered examination, interview, or course of treatment at a disposition or review hearing.

Abrogation of testimonial privileges. "Any legally recognized privileged communication except that between attorney and client . . . is abrogated and shall not constitute grounds for . . .

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[63] MCL 330.1748a.

[64] MCL 330.1748(5)(a) and MCL 722.631.

[65] 42 USC 290dd—2(2)(c) and 42 CFR 2.63(a)(1). See also *In re Baby X,* 97 Mich App 111, 120-21 (1980) (where drug treatment records are necessary and material to the state's proof of child neglect, a court may authorize disclosure of confidential information in such records).

[66] MCR 3.218(D).

excluding evidence in a civil child protective proceeding resulting from a report made pursuant to [the Child Protection Law]."[67] The abrogation of privileges under MCL 722.631 does not depend upon whether the person who reported the suspected abuse or neglect was a "mandatory reporter," or whether the proffered testimony concerned the abuse or neglect that gave rise to the child protective proceeding in which the testimony is introduced.[68]

7. L-GAL Duties Prior to Hearings

Reviewing the agency case file. MCL 712A.17d(1)(c) states in part as follows:

> "The agency case file shall be reviewed before disposition and before the hearing for termination of parental rights. Updated materials shall be reviewed as provided to the court and parties. The supervising agency shall provide documentation of progress relating to all aspects of the last court ordered treatment plan, including copies of evaluations and therapy reports and verification of parenting time not later than 5 business days before the scheduled hearing."

"Agency case file" is defined in MCL 712A.13a(1)(b) as "the current file from the agency providing direct services to the child, that can include the child protective services file if the child has not been removed from the home or the family independence agency or contract agency foster

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[67] MCL 722.631. See also MCL 333.16281(2), which provides that the physician-patient, dentist-patient, counselor-patient, and psychologist-patient privileges do not apply to records or information released to DHS during an investigation of suspected child abuse or neglect.

[68] *In re Brock,* 442 Mich 101, 115-20 (1993). In *Brock,* the parents' neighbor, who baby-sat for the children, reported suspected abuse. At trial, testimony of a psychologist and a physician was admitted to show the respondent-mother's history of emotional difficulties. The Michigan Supreme Court held that abrogation of privileges under MCL 722.631 does not depend upon whether reporting was required or not, or whether the proffered testimony concerned the abuse or neglect that gave rise to the protective proceeding. *Brock, supra* at 117. Instead, the testimony must result from a report of abuse or neglect and be relevant to the proceeding. *Id.* at 119–20. The Court stated that "[i]t is in the best interests of all parties for the factfinder to be in possession of all relevant information regarding the welfare of the child." *Id.* at 119.

care file as defined under 1973 PA 116, MCL 722.111 to 722.128."

Meeting with or observing the child. MCL 712A.17d(1)(d) requires a L-GAL "[t]o meet with or observe the child and assess the child's needs and wishes with regard to the representation and the issues in the case in the following instances:

"(*i*) Before the pretrial hearing.

"(*ii*) Before the initial disposition, if held more than 91 days after the petition has been authorized.

"(*iii*) Before a dispositional review hearing.

"(*iv*) Before a permanency planning hearing.

"(*v*) Before a post-termination review hearing.

"(*vi*) At least once during the pendency of a supplemental petition.

"(*vii*) At other times as ordered by the court. Adjourned or continued hearings do not require additional visits unless directed by the court."[69]

These requirements may present financial or practical problems for the L-GAL. For example, the child may be placed in another county or state and the court that appointed the L-GAL will not reimburse L-GALs for their actual expenses in meeting with or observing a child who has been placed outside of the county. Nonetheless, meeting with or observing the child is a very important element in providing the child with competent representation and in protecting the child from further abuse or neglect.

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[69]Effective February 25, 2004, MCR 3.915(B)(2)(a) was amended to require a court, "at each hearing," to "inquire whether the [L-GAL] has met with the child, as required by MCL 712A.17d(1)(d) . . . ." The amended court rule also requires the court to make the L-GAL state, on the record, his or her reasons for failing to meet with the child as required by MCL 712A.17d(1)(d). Section 17d(1)(d) was amended, effective December 28, 2004, to require a L-GAL to "meet with or observe the child" in the specific circumstances listed above. An amendment to MCR 3.915(B)(2)(a) proposed on April 13, 2006, would conform the court rule to the amended statute.

"The court may allow alternative means of contact with the child if good cause is shown on the record."[70] The following are practice suggestions aimed at both meeting the L-GAL's duties to the child and ameliorating possible financial or practical problems of compliance with MCL 712A.17d(1)(d).

- Meetings with or observations of the child should occur in the child's living environment or in a place where the child is comfortable.
- A L-GAL may meet with or observe the child in his or her home environment early in the case and outside that environment later in the case. If the child remains in his or her home or has been returned home, interviewing the child in that environment may inhibit the child from disclosing information to the L-GAL.[71]
- Although meetings with or observations of a child should not occur in the hallway outside of the courtroom just prior to a hearing, the court may require the person with custody of the child, an agency caseworker, or a DHS caseworker to make the child available to the L-GAL at the courthouse several hours before a hearing.
- A L-GAL may ask the child's foster parent or foster care worker to take the child to a comfortable meeting place "half-way" between the child's foster home and the court.
- If a child has been placed in another county, the court may appoint co-counsel located in the other county to meet with or observe the child in the child's living environment. Co-counsel would then file a report with the L-GAL.

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[70]MCL 712A.17d(1)(e).

[71] See also MCL 722.628c, which prohibits interviewing a child in the presence of the person suspected of abusing or neglecting the child.

- A L-GAL may visit with or observe the child during parenting time sessions, especially where the child's siblings will also be present.
- A L-GAL may meet with the child at his or her school, after school hours but before the child goes home.
- A L-GAL may meet with the child at the agency to avoid distractions and to assure that the meeting will occur in private.
- A L-GAL may meet with the child at a psychologist's or counselor's office after the child's appointment with the psychologist or counselor.
- The L-GAL must meet with or observe a very young or non-communicative child as required by MCL 712A.17d(1)(d). In addition to allowing a L-GAL to become familiar to and gather positive information about the child, an in-person visit may protect the child from being abused or neglected while in foster care. In conjunction with an in-person visit, the L-GAL should consult with the child's foster parents to gain information about the child.

Adjourned or continued hearings. "Adjourned or continued hearings do not require additional visits unless directed by the court."[72]

Maintaining communication with the child. The L-GAL must maintain communication with the child.[73] Although the caseworker is not required to arrange meetings between the child and L-GAL, a caseworker may be very helpful in arranging such meetings and in other ways. Courts, DHS, and child-placing agencies must assure that a L-GAL is kept informed regarding any change in the child's placement or address.

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[72]MCL 712A.17d(1)(d)(*vii*).

[73] MRPC 1.4 and Comment.

8. Determining and Advocating for the Child's Best Interests

MCL 712A.17d(1)(i) requires a L-GAL

> "[t]o make a determination regarding the child's best interests and advocate for those best interests according to the lawyer-guardian ad litem's understanding of those best interests, regardless of whether the lawyer-guardian ad litem's determination reflects the child's wishes. The child's wishes are relevant to the lawyer-guardian ad litem's determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity. Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child's wishes and preferences."[74]

Importance of investigation. Prior to making a determination regarding the child's best interests, the L-GAL must gather detailed information regarding the child's needs, development, and behavior, and whether the child is benefitting from or being harmed by his or her current living arrangement.

Defining a child's best interests. The Juvenile Code does not contain a definition of the "best interests of the child." Although not directly applicable to child protective proceedings, the Child Custody Act and Adoption Code contain lists of factors that courts use to determine a child's best interests in custody and adoption proceedings, and a L-GAL may refer to those factors to guide his or her determination of a child's best interests in child protective proceedings. The factors contained in the Adoption Code are as follows:

> "(f) 'Best interests of the adoptee' or 'best interests of the child' means the sum total of the following factors to be considered, evaluated, and determined by the court to be applied to

[74] See pages 11-14 for discussion of the attorney-client privilege.

give the adoptee permanence at the earliest possible date:

(*i*) The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee or . . . the putative father and the adoptee.

(*ii*) The capacity and disposition of the adopting individual or individuals or . . . the putative father to give the adoptee love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.

(*iii*) The capacity and disposition of the adopting individual or individuals or . . . the putative father[] to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(*iv*) The length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(*v*) The permanence as a family unit of the proposed adoptive home[] or . . . the home of the putative father.

(*vi*) The moral fitness of the adopting individual or individuals or . . . of the putative father.

(*vii*) The mental and physical health of the adopting individual or individuals or . . . of the putative father, and of the adoptee.

(*viii*) The home, school, and community record of the adoptee.

(*ix*) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court considers the adoptee to be of sufficient age to express a preference.

(*x*) The ability and willingness of the adopting individual or individuals to adopt the

adoptee's siblings.

(*xi*) Any other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody."[75]

A L-GAL must identify a child's best interests given the available dispositional options in the case. This may involve identifying the dispositional option that is least detrimental to the child. The L-GAL should focus on the child's particular needs and interests, not on the needs and interests of all children of similar age or developmental level. A L-GAL should consider the child's needs for food, clothing, and shelter; nurturance, stability, and continuity; physical safety; and maintenance, to the extent possible, of relationships with siblings, extended family members, and non-biological caretakers.

Using objective criteria to determine the child's needs and interests. When determining the child's best interests, the L-GAL should avoid imposing his or her values when evaluating the child's needs and interests. A L-GAL must be familiar with the cultural norms and values regarding a child's family. The L-GAL may rely on reports by and consult with experts in determining the child's needs and interests, and in weighing those needs and interests against one another.

Determining the child's competence and maturity. When determining a child's competence and maturity and deciding how much weight should be assigned to the child's wishes and preferences, the L-GAL may consider the following:

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[75] MCL 710.22(g). The factors applicable to child custody cases may be found at MCL 722.23. In child protective proceedings, it is inappropriate to compare a child's parent's home or abilities to a relative's or foster parent's home or abilities. Although a court is not required to make findings regarding the "best interests" factors when deciding whether to terminate parental rights, several of the factors in the Adoption Code and Child Custody Act may be relevant in a given child protective case. *In re JS & SM,* 231 Mich App 92, 99-103 (1998), overruled on other grounds 462 Mich 341 (2000).

- the child's age (younger children often express the desire to return home regardless of the home's condition);
- the child's developmental stage (cognitive ability, socialization, and emotional development);
- the child's ability to articulate a relevant position and reasons supporting that position;
- the child's decision-making process, including the presence of influence, coercion, or exploitation, the child's conformity to others' positions, and the variability or consistency of the child's position; and
- the child's ability to understand the consequences of the decision, including the risk of harm to the child and the finality of the decision.[76]

The L-GAL may obtain information regarding several of these factors from a psychological evaluation of the child if one has been conducted.

A child may be competent to make some decisions regarding the representation but not others. Moreover, a child's competence may change over the course of a case. A L-GAL's position may come to mirror the child's position, and the L-GAL's role then becomes similar to the traditional attorney's role.

Resolving conflicts between a child's interests and a L-GAL's determination of a child's best interests. A L-GAL must inform the court of a child's wishes and preferences.[77] MCL 712A.17d(2) gives the court discretion to appoint an attorney for the child where the L-GAL's best interests determination is inconsistent with the child's identification of his or her interests. That provision states:

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[76] This list is taken in part from *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children,* 64 Fordham L R 1281, 1313 (1996), Recommendations of the Conference, V.A.8.

[77] A L-GAL's statements to the court must be "[c]onsistent with the law governing attorney-client privilege . . . ." MCL 712A.17d(1)(i). See pages 11-14 for further discussion.

> "If, after discussion between the child and his or her lawyer-guardian ad litem, the lawyer-guardian ad litem determines that the child's interests as identified by the child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian ad litem shall communicate the child's position to the court. If the court considers the appointment appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and the lawyer-guardian ad litem's identification of the child's interests, the court may appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child's lawyer-guardian ad litem."[78]

The L-GAL may inform the court of the child's position verbally or in writing. An in-camera proceeding may be appropriate to protect confidential information.[79]

If appointed, the "attorney" serves "as the child's legal advocate in a traditional attorney-client relationship with the child, as governed by the Michigan rules of professional conduct. An attorney . . . owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client."[80]

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[78]The following cases have construed §17d(2): *In re Arnold,* unpublished opinion per curiam of the Court of Appeals, decided September 27, 2005 (Docket No. 262781), *In re CH,* unpublished memorandum opinion of the Court of Appeals, decided April 24, 2003 (Docket No. 243186, 243208), and *In re Purdy,* unpublished opinion per curiam of the Court of Appeals, decided March 30, 2001 (Docket No. 225936).

[79] See *Powell Products, Inc v Jackhill Oil Co,* 250 Mich App 89, 101 (2002).

[80] MCL 712A.13a(1)(c).

APPENDIX A
RESOURCES

Resources

Listed below are citations to statutes, court rules, cases, and other sources relevant to the L-GAL's role in child protective proceedings. This list is only intended to introduce a L-GAL to basic sources; it is not intended to be exhaustive.

Michigan Statutes

Child Protection Law, MCL 722.621 et seq. These statutes govern reports to and investigation by Children's Protective Services, DHS, of suspected child abuse and neglect.

Juvenile Code, MCL 712A.1 et seq. This code contains the substantive and procedural law governing child protective proceedings in the Family Division of Circuit Court.

Michigan Adoption Code, MCL 710.21 et seq. This code contains the substantive and procedural law governing adoption proceedings in the Family Division of Circuit Court.

Estates & Protected Individuals Code, MCL 700.1101 et seq. Includes provisions for appointment of guardians.

Child Care Organizations, MCL 722.111 et seq. Licensing and other requirements for foster care families and institutions; includes procedure for obtaining variance to licensing rules or statutes to allow placement of siblings together, and for obtaining consent for medical treatment of a court ward.

Foster Care Review Boards, MCL 722.131 et seq. Provides for citizen review of foster care cases.

Foster Care & Adoption Services Act, MCL 722.951 et seq. Includes provisions governing DHS foster care and contract agency caseworkers.

Michigan Children's Institute, MCL 400.201 et seq. Describes the authority of this agency, which is located within DHS, and to which children may be committed for adoption planning and other services following termination of parental rights.

Family Division of Circuit Court, MCL 600.1001 et seq. Describes the jurisdiction of this division of circuit court.

Uniform Child Custody Jurisdiction & Enforcement Act, MCL 722.1101 et seq. Required procedures for cases involving more than one state.

Children's Ombudsman Act, MCL 722.921 et seq. Describes the authority and duties of the Children's Ombudsman; outlines procedure for filing complaints regarding an act by an administrative or child placing agency, including DHS.

Miscellaneous provisions regarding confidentiality and release of records:

MCL 333.2640. Medical records.

MCL 333.16281. Medical records.

MCL 333.16648. Dental records.

MCL 333.18117. Records of licensed professional counselors and limited license counselors.

MCL 333.18237. Records of psychologists.

MCL 330.1748 and 330.1748a. Mental health records.

MCL 333.6112 and 333.6113. Substance abuse counseling records.

MCL 600.2165. School records.

Michigan Court Rules

Michigan Rules of Court, Subchapter 3.900, Proceedings Involving Juveniles

Model Civil Jury Instructions

Child Protection Jury Instructions, M Civ JI 97.01 et seq.

Federal Law and Regulations

Adoption Assistance & Child Welfare Act of 1980, 42 USC 620 et seq. Requires courts to make certain findings regarding removal of a child from parental custody, including that continued custody by the parent would be "contrary to the child's welfare" and that "reasonable efforts" have been made to prevent removal or to reunify the family. Provides for review and permanency planning hearings.

Adoption & Safe Families Act of 1997, PL 105-89. Includes provisions that clarify when the agency must make "reasonable efforts" to prevent removal of a child or to reunify a family.

Regulations implementing the Adoption & Safe Families Act of 1997, 45 CFR 1355.10 et seq. Detail required court and agency procedures.

Indian Child Welfare Act, 25 USC 1901 et seq. Sets forth the procedures required when an "Indian child" is involved in a child protective or other custody proceeding.

Individuals With Disabilities Education Act, 20 USC 1400 et seq. Requires states to make public education available to children with disabilities.

Miscellaneous provisions regarding confidentiality and release of records:

Health Insurance Portability & Accountability Act, 42 USC 1301 et seq. Medical records.

42 USC 290dd et seq. Substance abuse treatment and counseling records.

42 CFR 2.31 et seq. Substance abuse treatment and counseling records.

20 USC 1232g et seq. School records.

Key Michigan Case Law

In re Dittrick Infant, 80 Mich App 219 (1977). "Anticipatory neglect or abuse" and court jurisdiction over newborn child.

In re Baby X, 97 Mich App 111 (1980). Court jurisdiction over child born with controlled substances in his or her body; release of substance abuse counseling records.

In re Hatcher, 443 Mich 426 (1993). Subject matter jurisdiction and personal jurisdiction distinguished.

People v Gates, 434 Mich 146 (1986). Criminal and child protective proceedings based upon the same allegations.

Fritts v Krugh, 354 Mich 97 (1958). Temporary and long-term child neglect.

In re Jacobs, 433 Mich 24 (1989). Parental culpability and child neglect.

In re Miller, 182 Mich App 70 (1990). Domestic violence and "unfit home environments."

In re KH, 469 Mich 621 (2004). Paternity.

In re CAW, 469 Mich 192 (2003). Paternity.

In re Macomber, 436 Mich 386 (1990). Court's authority to enter orders affecting adults after taking jurisdiction over a child.

In re Hensley, 220 Mich App 331 (1996). Judges' control over interrogation of witnesses and presentation of evidence.

In re Brock, 442 Mich 101 (1993). Abrogation of privileges; use of alternative procedures to obtain child's testimony.

In re LaFlure, 48 Mich App 377 (1973). Admissibility of evidence of a parent's treatment of one child in hearings regarding a subsequent child.

In re Brimer, 191 Mich App 401 (1991). Expert witnesses in sexual abuse cases.

In re Rinesmith, 144 Mich App 475 (1985). Expert witnesses.

People v Beckley, 434 Mich 691 (1990). Expert witnesses.

People v Kasben, 158 Mich App 252 (1987). Competency of child witnesses.

People v Meeboer (After Remand), 439 Mich 310 (1992). Trustworthiness of child declarant's hearsay statements to medical personnel.

In re Snyder, 223 Mich App 85 (1997). Applicability of the rules of evidence at hearings on termination of parental rights.

In re Trejo Minors, 462 Mich 341 (2000). Burden of proof in termination of parental rights hearings.

In re Gazella, 264 Mich App 668 (2005). Procedures for termination of parental rights.

In re AMB, 248 Mich App 144 (2001). Standards for removal of life support; authority of attorney appointed for child; referee authority.

Key Federal Case Law

Troxel v Granville, 530 US 57 (2000). Fundamental rights of parents to custody, care, and control of their children; constitutionality of "grandparent visitation" statutes.

Santosky v Kramer, 455 US 745 (1982). "Clear and convincing evidence" standard required to terminate parental rights.

Wisconsin v Yoder, 406 US 205 (1972). Religious freedom and state compulsory education laws.

Prince v Massachussetts, 321 US 158 (1944). Religious freedom and state laws designed to protect the health, safety, and welfare of children.

Stanley v Illinois, 405 US 645 (1972). A biological father's right to a parental fitness hearing prior to removal of a child from his custody.

Lehr v Robertson, 463 US 248 (1983). Requirement that a biological father of a child born out of wedlock establish a relationship with the child before being entitled to notice of a hearing to terminate his parental rights.

Idaho v Wright, 497 US 805 (1990). Constitutional requirements for admitting a child's hearsay statements.

Maryland v Craig, 497 US 836 (1990). Constitutional requirements for using alternative procedures to obtain a child's testimony.

Smith v Organization of Foster Families for Equality & Reform, 431 US 816 (1977). Constitutionally

required procedures for removal of children from foster homes.

DeShaney v Winnebago County, 489 US 189 (1989). Responsibility of state and local social services agencies to protect children from parental violence.

Other Print Resources

American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1996).

Proceedings of the Conference on Ethical Issues in the Legal Representation of Children, 64 Fordham L R 1281 (1996).

Tobin L. Miller, *Child Protective Proceedings Benchbook: A Guide to Abuse & Neglect Cases*–Third Edition (MJI, 2006). Available to download at http://courts.michigan.gov/mji/resources/cppbook/cppbench.htm

Guidelines for Achieving Permanency in Child Protection Proceedings–Second Edition (Children's Charter of the Courts of Michigan, 2004).

Jennifer D. Warner, *Adoption Proceedings Benchbook* (MJI, 2003). Available to download at http://courts.michigan.gov/mji/resources/adoption/adoption.htm

Useful Websites

ABA Center on Children & the Law, http://www.abanet.org/child/

US Dept of Health & Human Services, Administration for Children & Families, http://www.acf.dhhs.gov/programs/cb/

National Association of Counsel for Children, http://naccchildlaw.org/

Michigan Child Welfare Law Resource Center, http://www.law.umich.edu/CentersAndPrograms/childlaw/

Children's Charter of the Courts of Michigan, http://www.childcrt.org/

DHS Policy Manuals, http://www.mfia.state.mi.us/olmweb/ex/html/

American Academy of Pediatrics, www.aap.org

American Professional Society on the Abuse of Children, www.apsac.org

APPENDIX B
SCAO FORM JC 82
AFFIDAVIT OF SERVICE PERFORMED BY LAWYER-GUARDIAN AD LITEM

Approved, SCAO

JIS CODE: ASP

STATE OF MICHIGAN JUDICIAL CIRCUIT - FAMILY DIVISION COUNTY	AFFIDAVIT OF SERVICE PERFORMED BY LAWYER-GUARDIAN AD LITEM	CASE NO. PETITION NO.

Court address

Court telephone no.

1. In the matter of
   name(s), alias(es), DOB

I affirm:

2. I have met with or observed the child before every proceeding or hearing as follows: (specify when and where)

☐ I did not meet with or observe the child because:

3. I have reviewed the agency case file.

4. Consistent with the Michigan Rules of Professional Conduct, I have consulted with the child's parents and/or guardians, foster care providers, and case workers.

☐ 5. I am a substitute for the appointed lawyer-guardian ad litem, I have consulted and discussed with the appointed lawyer-guardian ad litem his/her visit with the child, review of the agency case file, and any discussions with the child's parents, guardians, foster care providers, and case workers.

I understand that I will be paid for the services performed only if I have met with or observed the child before every proceeding or hearing as required by law.

Affiant signature

Address

Affiant name (type or print)

City, state, zip

Telephone no.

Subscribed and sworn to before me on _____ (Date), _____ County, Michigan.

My commission expires: _____ (Date) Signature: _____ (Deputy clerk/Notary public)

Notary public, State of Michigan, County of _____

NOTE: In order to receive payment, this affidavit must be prepared and attached to Form MC 221, Statement of Service and Order for Payment of Court Appointed Representative.

Do not write below this line - For court use only

JC 82 (11/05) **AFFIDAVIT OF SERVICE PERFORMED BY LAWYER-GUARDIAN AD LITEM** MCL 712A.17d, MCR 3.915

APPENDIX C
FORENSIC INTERVIEWING PROTOCOL

STATE OF MICHIGAN

GOVERNOR'S TASK FORCE ON CHILDREN'S JUSTICE
AND
DEPARTMENT OF HUMAN SERVICES

FORENSIC INTERVIEWING PROTOCOL

This publication is also available at:
www.michigan.gov/DHS/0,1607,7-124-5452_7119_25045---,00.html

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PREFACE

In 1992, the Governor's Task Force on Children's Justice was created pursuant to federal legislation to respond to the tremendous challenges involved in the handling of child abuse—particularly child sexual abuse—cases in Michigan. In August 1993, the Task Force published DHS Publication 794, *A Model Child Abuse Protocol—Coordinated Investigative Team Approach*.

In 1996, the DHS initiated the development of a forensic interviewing protocol by establishing a steering committee within DHS and enlisting nine county DHS offices to participate as pilot counties in testing the protocol. Debra Poole, Ph.D., Central Michigan University, was contracted by DHS to develop a forensic interviewing protocol and a training package to be used to train staff from the pilot counties. Debra Poole also then provided training to those counties. Debra Poole's professionalism and dedication to this project enabled DHS to meet its goals in developing the protocol. Independent of the DHS project, the Governor's Task Force on Children's Justice also identified the objective of developing and implementing a forensic interviewing protocol. From 1996 to 1998, DHS and the Governor's Task Force on Children's Justice worked together with Debra Poole in developing and implementing a protocol that would improve the interviewing techniques of all professionals involved in the investigation of child physical abuse and child sexual abuse in Michigan.

In 1998, the Child Protection Law was amended to require each county to implement a standard child abuse and neglect investigation and interview protocol using as a model the protocols developed by the Governor's Task Force on Children's Justice as published in DHS Publication 794, *A Model Child Abuse Protocol—Coordinated Investigative Team Approach* and DHS Publication 779, *Forensic Interviewing Protocol*, or an updated version of those publications.

In September 2003, the Forensic Interviewing Protocol Revision Committee convened to review the existing Protocol. After a careful and complete examination, the Committee edited sections for clarity, improved the examples, added Quick Guides, and provided some additional reference material, including relevant statutes.

This protocol should be used in conjunction with the Governor's Task Force on Children's Justice DHS Publication 794, *A Model Child Abuse Protocol—Coordinated Investigative Team Approach*. Proper implementation of the DHS Publication 779, *Forensic Interviewing Protocol* requires professional training. Professionals who have received appropriate training in the application of the protocol should conduct the interviews of children.

TABLE OF CONTENTS

Forensic Interviewing Protocol

Introduction

The goal of a forensic interview is to obtain a statement from a child, in a developmentally-sensitive, unbiased and truthseeking manner, that will support accurate and fair decision-making in the criminal justice and child welfare systems. Although information obtained from an investigative interview might be useful for making treatment decisions, the interview is not part of a treatment process. Forensic interviews should not be conducted by professionals who have an on-going or a planned therapeutic relationship with the child.

forensic interviews are hypothesis-testing rather than hypothesis-confirming (see Quick Guide #1)

There are two overriding features of a forensic interview (Poole & Lamb, 1998). First, forensic interviews are hypothesis-testing rather than hypothesis-confirming (Ceci & Bruck, 1995). Interviewers prepare by generating a set of alternative hypotheses about the sources and meanings of the allegations. During an interview, interviewers attempt to rule out alternative explanations for the allegations. For example, when children use terms that suggest sexual touching, interviewers assess their understanding of those terms and explore whether touching might have occurred in the context of routine caretaking or medical treatment. When children report details that seem inconsistent, interviewers try to clarify whether the events could have occurred as described, perhaps by exploring whether the child is describing more than one event or using words in nonstandard ways. Before closing an interview, interviewers should be reasonably confident that alleged perpetrators are clearly identified and that the alleged actions are not subject to multiple interpretations.

forensic interviews should be child-centered rather than adult-centered (see Quick Guide #2)

Second, forensic interviews should be child-centered. Although interviewers direct the flow of conversation through a series of phases, children should determine the vocabulary and specific content of the conversation as much as possible. Forensic interviewers should avoid suggesting events that have not been mentioned by the child or projecting adult interpretations onto situations (e.g., with comments such as, "That must have been frightening").

Pre-Interview Preparation

Pre-interview preparation will vary depending upon the nature of the allegations, the available resources, and the amount of time before an interview must be conducted. It is more important to collect background material when the child is preschool age, when the allegations are based on ambiguous information (such as sexual acting out), or when factors such as medical treatment or family hostilities might complicate the investigation. Relevant information can be obtained from a variety of sources, including children's protective services files, police reports, or collateral interviews with the reporting party and/or family members.[1]

The following list of topics illustrates the types of information that might be useful for interviews about child sexual abuse allegations (From Poole & Lamb, 1998, adapted with permission from the American Psychological Association):

- Child's name, age, sex, and relevant developmental or cultural considerations (e.g., developmental delay, hearing or speech impairment, bilingualism)
- Child's interests or hobbies that could be used to develop rapport
- Family composition/custody arrangements
- Family members' and relevant friends' or caretakers' names (especially how the child refers to significant others, with special attention to nicknames and duplicate names)
- Caretaking environments and schedules, with the child's names for these environments
- Relevant medical treatment or conditions (e.g., genital rashes, assistance with toileting, suppositories, or recent experiences with rectal thermometers)
- Family habits or events related to allegation issues (e.g., showering or bathing with the child, a mother who allows children in the bathroom while she changes tampons, physical play or tickling)
- The content of recent sex education or abuse prevention programs
- Family's names for body parts
- Nature of the allegation and circumstances surrounding the allegation
- Possible misunderstanding of the event
- Possible motivations for false allegations (e.g., family or neighborhood hostilities that predate suspicions of inappropriate behavior)

interviewers tailor their interview preparations to the needs of each case, collecting information that will help build rapport with the child and help test alternative hypotheses about the meaning of the child's comments

1. See Endnotes

The purpose of pre-interview preparation is to plan the following:

(a) questions that could test alternative hypotheses about how the allegations arose, and

(b) questions that could test alternative interpretations of details stated in the allegation.

For example, if there is an allegation that a babysitter touched a child in a sexual way, an alternative hypothesis is that the touching occurred during routine caretaking (such as wiping after a bowel movement). In this case, after the child states that he or she was touched on the butt by the babysitter, the question, "What were you doing when the babysitter touched you on the butt?" could be the first of a series of questions during the questioning and clarification stage to determine if the babysitter was cleaning the child. Similarly, if the child allegedly told her mother about a "butt licking game," the question, "Who plays the butt licking game?" could test the hypothesis that the game is a joke about the family's new puppy. (See Quick Guide #1: *Sample Questions that Test Alternative Hypotheses and Sample Form*.)

Number of Interviewers

Local customs and requirements often dictate how many professionals will be involved in conducting investigative interviews. There are advantages and disadvantages to both single-interviewer and team (e.g., child protection and law enforcement) approaches. On the one hand, children may find it easier to build rapport and talk about sensitive issues with a single interviewer; on the other hand, team interviewing may ensure that a broader range of topics is covered and reduce the need for multiple interviews.

one professional should be the primary interviewer, with the other taking a supportive role

When two professionals will be present, it is best to appoint one as the primary interviewer, with the second professional taking notes or suggesting additional questions when the interview is drawing to a close. Before conducting the interview, interviewers should have sufficient preparation time to discuss the goals for the interview and the topics that need to be covered; interviewers should not discuss the case in front of the child. At the start of the interview, both interviewers should be clearly introduced to the child by name and job. Seating the second interviewer out of the line of sight of the child may make the interview seem less confrontational.

Support Persons

The presence of social support persons during forensic interviews is discouraged. Although it makes intuitive sense that children might be more relaxed with social support, studies have failed to find consistent or great benefits from allowing support

individuals to be present during interviews (Davis & Bottoms, 2002). Support persons might be helpful during early portions of the interview, but they might also inhibit children from talking about sexual details. Individuals who might be accused of influencing the child to discuss abuse, such as parents involved in custody disputes or therapists, should not be allowed to sit with the child during the interview.

If a support person accompanies the child (a parent or teacher, for example), this individual should be seated out of the child's line of sight to avoid criticism that the child was reacting to nonverbal signals from a trusted adult. In addition, the interviewer should instruct the support person that only the child is allowed to talk unless a question is directed to the support person.

Videorecording or Audiorecording and Documentation

record identifying information

Videorecording or audiorecording policies vary widely. If your county elects to videorecord or audiorecord, follow the procedures suggested below.

A designated person should write on the recording label the interviewer's name, the child's name, the names of any observers, and the location, date and time of the interview. Michigan law states, in part, that *the videorecorded statement shall state the date and time that the statement was taken; shall identify the persons present in the room and state whether they were present for the entire videorecording or only a portion of the videorecording; and shall show a time clock that is running during the taking of the statement* (See Appendix, *Videorecording Laws*). All persons present in the interview room must be clearly visible to the camera and positioned so as to be heard. Rooms should be large enough to place videorecording equipment at an acceptable distance from the child, but not so large that a single camera (or a two-camera setup) cannot monitor the entire room. Recording reduces the need to take notes during the interview. However, the interviewer may bring a list of topics to be discussed during the interview, and may jot down notes during the interview to help remember which points need to be clarified.

If the interview is not being videorecorded or audiorecorded, it is paramount that the interviewer(s) accurately document what the child says. Beginning with introducing the topic, the interviewer should try to write down the exact wording of each question as well as the child's exact words. It is efficient to use abbreviations for common open-ended prompts (e.g., "TWH" for "Then what happened" or "TMMT" for "Tell me more about that").

The Physical Setting

The best environment for conducting forensic interviews is a center specifically equipped for this purpose. Centers often have comfortable waiting rooms with neutral toys, games, and bathroom facilities, as well as interviewing rooms with one-way mirrors and sound hookup to adjoining observation rooms. The interview room should be equipped with a table, chairs, and a cupboard for keeping supplies out of view. The goal of designing an interview room is to provide a relaxing environment that is not unnecessarily distracting to young children. Decorations such as a simple, repetitive wallpaper are cheerful but do not invite inspection by the child.

the interview room should be friendly but uncluttered, free from distracting noises and supplies

Interviewers who do not have access to an interviewing facility should try to arrange a physical setting that recreates some of the important features of specialized centers. First, select the most neutral location possible. For example, a speech-and-language room in a school might be a better choice than the principal's office, because children often believe they are in trouble when they are called to the main office. Similarly, children may worry about being interviewed in a police station, and thus they might benefit from an explanation about why they are being interviewed there (e.g., "We like to talk to children over here because the rooms are nice and bright, and we won't be disturbed"). Second, select locations that are away from traffic, noise, and disruptions; phones, fax machines, or other potential distractions should be temporarily unplugged. Third, the interview room should be as simple and uncluttered as possible (avoid playrooms or other locations with visible toys and books that will distract children). Young children are usually more cooperative in a smaller space that does not contain extra furniture, because they sometimes roam around and bounce on sofas. Moreover, children pay more attention when attractive items such as computers or typewriters are temporarily removed from the interview space. If the interview must be conducted in the home (child is preschool age or on school break), select a private location away from parents or siblings that appears to be the most neutral spot. A child may be intimidated by having his or her parents in the home if neglect or abuse is taking place there.

Interviewer Guidelines

Several guidelines about interviewer behavior, demeanor and communication should be followed throughout the interview:

be relaxed and avoid correcting the child's behavior unnecessarily or commenting on the child's reactions to the interview

- Avoid wearing uniforms or having guns visible during the interview.
- Convey and maintain a relaxed, friendly atmosphere. Do not express surprise, disgust, disbelief, or other emotional reactions to descriptions of the abuse.
- Avoid touching the child.
- Do not use bathroom breaks or drinks as reinforcements for cooperating during the interview. Never make comments like, "Let's finish up these questions and then I'll get you a drink."
- Respect the child's personal space.
- Do not stare at the child or sit uncomfortably close. Older children and teenagers may be more comfortable talking if the interviewer does not sit directly in front of them and does not look directly at them while talking.
- Do not suggest feelings or responses to the child. For example, do not say, "I know how *hard* this must be for you."
- Do not make promises. For example, do not say, "Everything will be okay." Do not say, "You will never have to talk about this again."
- If the child becomes upset, embarrassed, or scared, acknowledge and address the child's feelings, but avoid extensive comments about the child's feelings. Comments such as, "I talk with children about these sorts of things all the time; it's okay to talk with me about this" can be helpful.
- Do not make comments such as "Good girl" or "We're buddies, aren't we?" that might be interpreted as reinforcing the child for talking about abuse issues. Supportive comments should be clearly noncontingent; in other words, encouragements should not be based on the child talking about specific types of issues. The best time to encourage children is during initial rapport building and at the close of the interview, after the conversation has shifted to neutral topics.
- Do not use the words "pretend," "imagine," or other words that suggest fantasy or play.
- Avoid asking questions about why the child behaved in a particular way (e.g., "Why didn't you tell your mother that night?"). Young children have difficulty answering such questions and may believe that you are blaming them for the situation.

- Avoid correcting the child's behavior unnecessarily during the interview. It can be helpful to direct the child's attention with meaningful explanations (e.g., "I have a little trouble hearing, so it helps me a lot if you look at me when you are talking so that I can hear you"), but avoid correcting nervous or avoidant behavior that is not preventing the interview from proceeding.
- If you have difficulty understanding what the child said, ask the child to repeat the comment with phrases such as, "What did you say?" or "I couldn't hear that, can you say that again?" instead of guessing (e.g., "Did you say _____?"). Young children will often go along with an adult's interpretation of their words.
- Be tolerant of pauses in the conversation. It is appropriate to look away and give the child time to continue talking. Similarly, it is often helpful to take a few moments to formulate your next question.
- Avoid giving gifts to a child.

Conducting a Phased Interview

Most current protocols advise interviewers to proceed through a series of distinct interviewing stages, with each stage accomplishing a specific purpose.[2] There are several advantages of a *phased* approach to interviewing:

(a) all interviewers deliver recommended introductions and instructions to children,
(b) interviewers are encouraged to use less directive methods of questioning, and
(c) phased approaches facilitate training by breaking the interview process into discrete steps that can be mastered separately.

A phased interview structure minimizes suggestive influences and empowers children to be informative. These goals are accomplished by three major guidelines:

(a) children receive clear information about the interviewer's job and the ground rules for the interview,
(b) the interviewer builds rapport in a way that encourages children to talk, and
(c) the interviewer elicits information using the least directive question formats.

Some investigations involve more than one interview, but interviewers should cover all of the phases even when children have participated in a previous interview.

Although the series of phases is specified, the structure gives the interviewer flexibility to cover any topics the investigative team determines are relevant, in any order that seems appropriate. This protocol describes the general structure of a phased interview but does not dictate which specific questions interviewers will ask.

The interview includes 8 phases:

1. Preparing the Interview Environment
2. The Introduction
3. Establishing the Ground Rules
4. Completing Rapport Building with a Practice Interview
5. Introducing the Topic

a summary of the interview phases appears in Quick Guide #3

2. See Endnotes

6. The Free Narrative
7. Questioning and Clarification
8. Closure

The order of these phases can be varied somewhat from interview to interview depending upon children's initial comments and their ages. For example, some children begin to discuss allegations without prompting. In such cases, the interviewer should not interrupt until it is clear that the child has finished giving a free narrative. Moreover, placement of the ground rules is flexible, and interviewers can remind children about the ground rules at any point during the interview. Some interviewers prefer to establish the ground rules before rapport building. This gives them a chance to review the rules during informal conversation. However, small children may not keep ground rules in mind throughout the interview, so some interviewers introduce the ground rules after initial rapport building. The purpose of the phases is to encourage interviewers to introduce themselves to children, build rapport, deliver age-appropriate instructions, allow children to talk about their lives in their own words, and use follow-up questions to clarify ambiguities in the reports. Within this framework, interviewers can select approaches that match their styles of interviewing, the ages and needs of individual children, and the specifics of individual cases.

Preparing the Interview Environment

The interviewer should remove distracting material from the room and position the chairs and recording equipment before introducing the child to the interview room. It is a good idea to be sure that the child has had a recent bathroom break and is not hungry before beginning the interview. Avoid scheduling an interview at the child's nap time. The interviewer can review the plan for the interview, including a tentative list of hypothesis-testing questions, before bringing the child into the room. (See Quick Guide #1: *Sample Questions that Test Alternative Hypotheses and Sample Form.*)

The Introduction

The purpose of the introduction is to acclimate the child to the interview, modeling a relaxed and patient tone that will be carried throughout the session. Sometimes children were not informed or were misinformed by a parent or caretaker about the circumstances of the interview. When this happens, children are often confused about the purpose of the interview or worried that they are in trouble. Moreover, children take time to adjust to new environments and may be temporarily distracted by the sights and sounds of the interviewing room.

children pay more attention when they are familiar with the environment and have some understanding about what will happen

After the child and the interviewer are seated, the interviewer begins by giving a brief explanation of his/her job and the purpose of the recording equipment. The child should be given an opportunity to glance around the room. School-aged children could even be allowed to inspect the recording equipment if they choose. There are varying decisions about whether or not to introduce the child to observers or let the child view the observation room before the interview.

Introductions can be brief or long, depending upon how relaxed the child appears. The following is a simple example adapted from Sternberg et al. (1997):

Introduction: "Hello, my name is _____. I am a police officer/detective/social worker and part of my job is to talk with children about things that have happened."

Explain recording: "As you can see, I have a video camera/recorder here. It will record what we say. Sometimes I forget things and the recording lets me listen to you without having to write everything down."

Children might be confused about being questioned by a police officer or other professional, so interviewers are free to explain more about their job (e.g., "Do you know what a social worker/police officer does? Well, part of my job is to talk with children and to help them. I talk with a lot of children in [name of town]"). When children seem distressed, it is appropriate to ask them how they are feeling and to provide some orienting information about the interview (e.g., "I talk with a lot of children about things that have happened. We are going to talk for a while and then I'll take you back to the other room where your [mom, dad, etc.] is waiting for you"). The interviewer may want to talk informally to get to know the child.

Establishing the Ground Rules

Studies have shown that children sometimes try to answer questions even when they have no basis for answering or the questions do not make sense (Waterman, Blades, & Spencer, 2002). During the ground rules phase, the interviewer motivates the child to answer accurately with a series of short, simple instructions.

There are no uniform guidelines about the need to discuss truth/lies questions during forensic interviews, but many prosecuting attorneys prefer that interviewers briefly address this issue and get verbal assent that the child intends to tell the truth.

This phase of the interview can be delayed until after the interviewer has built rapport with the child, or omitted if a supervisor advises against truth/lie questions.

During a truth/lie determination, the interviewer demonstrates that the child understands the difference between the truth and a lie by asking the child to label statements as "the truth" or "a lie," after which the interviewer gets a verbal acknowledgment that the child will tell the truth. Interviewers should avoid asking the child to define these concepts with questions such as, "What does it mean to tell a lie?" or "Can you tell me what the truth is?" These questions are difficult for children to answer and often lead to confusion.

use concrete statements such as, "It is raining in the room. Is that true or not true (a lie)?" rather than abstract questions such as, "What does it mean to tell the truth?"

The interviewer may use the following example:

> "I am going to say some things. I need you to tell me whether they are true or not true (a lie). 'You took a plane to get here today.' Is that true or not true (a lie)? What is the truth about how you got here today? 'We are sitting down.' Is that true or not true (a lie)? 'You have 6 brothers.' Is that true or not true (a lie)? What is the truth about how many brothers you have?
>
> Good. I see that you understand the difference between the truth and a lie. Is it good to tell the truth? Is it good to tell a lie? While we are talking today, it is important that you tell me the truth—what really happened. This room is a place where you should always tell the truth. So the first rule is that you are going to tell me only things that are true."

After discussing the truth, the interviewer can introduce other ground rules by saying, "I have a few other rules to talk about today. If I ask you a question you don't understand, I want you to tell me you don't understand. Also, if you do not know the answer to a question, don't guess. For example, what is my cat's name? That's right, you don't know my cat's name, so 'I don't know' is the right answer. The final rule is that I want you to correct me if I make a mistake or say something wrong. For example, you are 8 years old. That's good, you are right to tell me I am wrong because you are 6."

Completing Rapport Building with a Practice Interview

In daily conversations, adults tend to dominate conversations with children by asking numerous specific questions. Many children therefore expect that interviewers will ask a lot of questions and that their job is to respond to each one with a short answer. The purposes of rapport building are

(a) to make the child comfortable with the interview setting,
(b) to get preliminary information about the child's verbal skills and cognitive maturity, and
(c) to convey that the goal of the interview is for the child to talk.

ask the child to describe a recent event from beginning to end

Transcripts of investigative interviews show that many interviewers build rapport by asking questions about the child's teacher, family, and likes or dislikes. Although such questions are useful for starting the interview, questions that can be answered in one or two words may lead the child to expect that the interviewer will control the conversation. A better technique is to begin with a few focused questions, then shift the discussion to a recent event the child has experienced (e.g., Sternberg et al., 1997). By asking the child to recall a personally-experienced event, the interviewer can gauge the child's verbal skills and communicate that the child is expected to do the talking.

use open-ended prompts such as "and then what happened?"

One way to build rapport is to identify—during pre-interview preparation—a specific event that the child recently experienced (or experienced around the time of the alleged abuse). "Training to talk" events could be a birthday party, a recent holiday celebration, an event at school, or a significant family event (e.g., getting a new puppy). The interviewer asks the child to describe this event in detail, using open-ended prompts, and conveys complete fascination with everything the child has to say, as in the following example (Orbach et.al., 2000).

1. "A few days ago (or "a few weeks ago") was Easter (your birthday, Christmas, etc.). Tell me about your Easter (or whatever)."
2. "I want you to tell me all about Easter (or whatever). Think again about Easter and tell me what happened from the time you got up that morning until the time you went to bed that night (or some incident or event the child mentioned)."
3. "Then what happened?"
4. "Tell me everything that happened after (incident mentioned by the child)."
5. "Tell me more about (something the child just mentioned)."
6. "It's really important that you tell me everything about things that have happened to you."

encourage the child to talk by showing interest and by not interrupting

There are three general principles for rapport building:

(a) The interviewer tries to elicit information using only open-ended prompts that invite the child to provide multiple-word responses, such as, "Tell me everything about that."
(b) The interviewer invites the child to be informative with comments such as, "Tell me everything that happened, even little things you don't think are very important" or "Tell me everything that happened, from the very beginning to the very end."
(c) The interviewer can encourage the child to talk during this phase of the interview with head nods, exclamations (e.g., "Ohhhh"), partial repetitions of the child's last comment (e.g., Child: "And then he opened my present by mistake." Interviewer: "Oh, he opened your present"), or even more direct encouragement (e.g., "You told me a lot about your birthday; I know a lot more about you now").

children who have little to say about specific events may be able to describe a repeated, scripted event

Young children often have little to say about one-time events. If this is the case, it can be helpful to ask the child to describe a recurring, scripted event. A script is a general description of repeated events, such as what the child does to get ready for school each morning, what happens during a trip to the child's favorite fast-food restaurant, or how the child plays a favorite game. The following are examples designed to elicit scripted events:

1. "I'd like to get to know a little bit more about you and your family. Tell me what you do every morning when you get ready for school. First you get out of bed—then what do you do? And then what do you do next? Tell me everything from the beginning until you get to school, even little things you don't think are very important. Okay. Then what?"
2. "I talk with a lot of children, and most of them really like to get hamburgers or pizza or tacos at their favorite restaurant. Do you have a favorite restaurant? Good. Tell me about everything that happens when you take a trip to _____ to eat _____. Tell me everything that happens, from the very beginning to the very end. First you drive there, right? Then what happens?"

To engage a reluctant child, it may be helpful to express interest in a topic the child is an "expert" on, with the interviewer feigning complete ignorance about the topic:

> "I talked with your mom yesterday and she said that you really like to play _____. I don't know anything about that game, but I've heard a lot about it and think that my son might really like to learn how to play it. Tell me all about that game so I'll know all about it too."

During the rapport phase, interviewers can encourage a reluctant child with comments such as, "It is okay to start talking now" or "This is your special time to talk. I want you to be the talker today and I'll listen."

Introducing the Topic

start with the least suggestive prompts that might raise the topic of abuse (See Quick Guide #4)

The substantive portion of the interview begins when the interviewer prompts a transition to the target topic. Interviewers should start with the least suggestive prompt that might raise the topic, avoiding mention of particular individuals or events. The following examples are from Poole and Lamb (1998):

1. "Now that I know you a little better, it's time to talk about something else. Do you know the reason you are here today?"
2. "Now that we know each other a little better, I want to talk about the reason that you are here today. Tell me the reason you came to talk with me today."
3. "Now it's time to talk about something else. I understand there are some problems in your family (or, I understand that some things have been happening at camp). Tell me about them."
4. "I know that you had to move recently, and Mr./Mrs. _____ is taking care of you now. Tell me how that happened."

Avoid words such as *hurt, bad, abuse,* or other terms that project adult interpretations of the allegation. If the child does not respond to these neutral prompts, the interviewer progresses to more specific opening remarks, still avoiding mention of a particular behavior. Examples include the following:

1. "I understand something has been bothering you."
2. "Does your mom think that something has been bothering you?"
3. "I understand you were playing with someone yesterday and your teacher wanted you to stop playing. I'm really interested in the kinds of games that children play—tell me how you were playing."

Some interviewers use the techniques listed below when children fail to respond to the above invitations:

1. The interviewer can ask what the child's favorite thing and least favorite thing is about various people in his or her life (Morgan, 1995).
2. Alternatively, the interviewer can ask, "Who are the people you like to be with?" and "Who are the people you don't like to be with?" (Yuille, Hunter, Joffe, & Zaparniuk, 1993).
3. The interviewer might explore the topic indirectly by asking, "Is there something you are worried about if you talk with me today?"
4. It can be helpful to give the child some control over the interview by changing the seating, removing a second interviewer, or letting the child write an initial answer on paper. The interviewer can explore the child's feelings about such things by asking a question like, "Is there something that would make it easier for you to talk with me today — would you rather sit someplace else or have me sit someplace else?"

The goal of these techniques is to avoid asking the child a direct question, such as, "Did somebody touch your privates last week?" Research shows some children (particularly preschoolers or children who have heard events discussed by adults) will say "yes" to these direct questions even when the events have not occurred (Myers et al., 2003; Poole & Lindsay, 2002). Consequently, answers to direct questions are less informative than answers to open-ended questions. Furthermore, direct questions about touching may elicit responses about routine caretaking (e.g., bathing, temperature-taking) or other sources of knowledge (e.g., information from a recent sexual abuse prevention program) that could escalate into false allegations, especially when these questions are followed by numerous specific questions. If the interviewer asks a direct question, it is important to shift to open-ended questions that encourage the child to describe events in his or her own words.

closing the interview without a report of abuse is an acceptable outcome

Closing the interview without a report of abuse is an acceptable outcome. There are many reasons why a child may not disclose: because the abuse didn't occur, because the child is frightened or does not want to get a loved one in trouble, or because the event was not especially memorable and the child is not recalling the target event at this particular moment. The investigative team needs to decide in advance how directly a child should be prompted, taking into consideration the amount of corroborating evidence and the risk to the child from failing to obtain a disclosure.

The Free Narrative

After the topic is raised, the interviewer asks the child to provide a narrative description of the event. Research shows that children's responses to open-ended prompts are longer and more detailed than responses to focused questions (e.g., Lamb et.al., 2003; Orbach & Lamb, 2000). Answers to open-ended questions are more accurate than answers to focused questions because many children answer focused questions even when they do not remember relevant information (e.g., Poole & Lindsay, 2001). The most common interviewer errors are omitting the free narrative phase or shifting prematurely to specific questions.

To elicit a free narrative, the interviewer simply tacks on an open invitation after raising the topic:

1. "Tell me everything you can about that."
2. "I want to understand everything about that. Start with the first thing that happened and tell me everything you can, even things you don't think are very important."
3. "Tell me all about that, from the very beginning to the very end."

encourage the child to describe the event in his or her own words by using open-ended invitations such as, "Tell me everything you can about that"

After the child begins talking, the interviewer should be patient about pauses in the conversation and not feel pressured to jump to another prompt right away. The child's free narrative can be encouraged with open-ended comments such as, "Then what?", "Tell me more about that," or "What else can you tell me about that?" The interviewer can also motivate the child with neutral acknowledgments (e.g., "uh huh"), by repeating the child's comments (e.g., Child: "And then he turned on the TV," Interviewer: "He turned on the TV") or by giving the child permission to talk about the target issues (e.g., Child: "And then he...," Interviewer: "It's okay to say it"). When necessary, the interviewer can remind the child that he or she is used to talking about such things, perhaps with a comment such as, "I talk with a lot of children about these sorts of things. It's okay to tell me all about it, from the very beginning to the very end."

be tolerant of pauses in the conversation

If a child becomes non-responsive or upset, acknowledge the child's behavior and address it, but avoid extensive comments. Give the child time to respond or to regain composure. If a child remains non-responsive, it may help to gently tell the child, "You've stopped talking." He or she may then respond. If a child remains upset, it may help to restate the child's last statement or ask the child to tell you the reason that he or she is upset.

Children often make comments that adults do not understand or refer to people who have not yet been identified. Interrupting the child to request an immediate clarification may inhibit the child from talking. It is better to encourage the child by using general prompts such as "Then what?" before attempting to clarify information by entering the questioning and clarification phase. Interviewers can jot down short notes while the child is talking to remind themselves to revisit specific information later in the interview.

Questioning and Clarification (See Quick Guides #5 and #6)

The questioning phase begins after it is clear that the child has finished providing a free narrative. Throughout this phase, the interviewer should follow the guidelines for developmentally-appropriate questions that are listed in Quick Guide #2: *Guidelines for Questioning Children*, at the end of this Protocol.

The questioning phase is a time to seek legally-relevant information and to clarify the child's comments. (Also, see Quick Guide #5: Sample Question Frames.) Interviewers should avoid jumping from topic to topic. In general, it is best to build the questioning phase around the child's free narrative. For example, if the child reported a single event, the interviewer would clarify information about that event before asking whether there have been other similar events.

During questioning and clarification, the interviewer should make sure that the description of the allegation and the identity of the perpetrators are clear, explore whether there was a single event or multiple events, and determine whether there were other witnesses or whether the child witnessed similar events happening to other children. Other topics may be important, depending upon the specific case, such as descriptions of physical evidence retrieved from the crime scene (e.g., a description of cameras if pictures were taken). However, interviewers should avoid probing for unnecessary details because children may contradict themselves if interviewers ask for information that is not remembered well. For example, it is not essential to get a detailed description of an alleged perpetrator and his clothing if the accused is someone who is familiar to the child (e.g., a relative or teacher). Although it is useful if the child can recall when and where each event occurred, children may have difficulty specifying this information if they are young, if the event happened some time ago, or if there has been ongoing abuse over a period of time. The section in this Protocol entitled "Special Topics" discusses general guidelines for investigating the time element in child criminal sexual conduct cases.

use the least suggestive question possible, working for a complete description of one event before shifting to a different topic (see Quick Guide #6)

Interviewers should always use the most open-ended questions possible during questioning and clarification. If a specific question is necessary to raise an issue, interviewers should try to continue with an open-ended question. For example, if objects were retrieved from the scene of the alleged events, the question, "Did he bring anything with him when he came to see you?" might be followed by "Tell me what those things looked like." Following the terminology used in the *Memorandum of Good Practice* (Home Office, 1992), questions can be ordered along a continuum from least suggestive (open-ended questions) to most suggestive (leading questions). The following hierarchy describes this progression of question types; interviewers should try to use questions at the top of the hierarchy and avoid leading questions altogether. (Also, see Quick Guide #6: *The Hierarchy of Interview Questions*.)

when prompting the child to tell you "everything," be aware that delayed disclosure and disclosure in stages can occur

complete information in one interview may not always be possible

Open-ended questions/prompts allow children to select which details they will report, and these prompts generally require multiple-word responses. Open-ended prompts ask children to expand, (e.g., "You said he hit you with a belt. Tell me everything about that"), provide physical descriptions (e.g., "What did the belt look like?"), and clarify apparent contradictions (e.g., "You said you were alone, but then you said your mom heard you talking. I'm confused about that ...can you tell me about that again?"). Open-ended prompts can also elicit information about physical surroundings and conversation. For example, even preschoolers can respond accurately to the following prompts (Poole & Lindsay, 2001, 2002):

> "Sometimes we remember a lot about how things looked. Think about all the things that were in the room where (e.g., _____ hit you). Tell me how everything looked."
>
> "Sometimes we remember a lot about sounds and things that people said. Tell me all the things you heard when (e.g., _____ hit you)."

Specific but nonleading questions ask for details about information the child has already mentioned, and these questions can be answered with a word or brief comment. Specific but nonleading questions might ask about the context of an event (e.g., "Tell me what you were doing when...?"), request clarification (e.g., "You said 'Bob.' Who is Bob?"), or ask about a specific detail (e.g., "What color was the towel?").

Closed questions provide only a limited number of response options. Multiple-choice questions and yes-no questions are closed questions. These questions are more risky than open-ended or

specific questions because children sometimes feel they should choose one of the options. Therefore, responses are generally less accurate to these questions than to more open-ended questions. If the interviewer wants to confirm a specific detail of an allegation and the child seems confused by open-ended or specific questions, it is best to delete the correct answer from a multiple-choice question. If an event happened in the bathroom, for example, the interviewer might ask, "Where did that happen, in the bedroom, the kitchen, or in another place?" Closed questions should be followed by open-ended questions to show that the child can provide information spontaneously. Because yes-no questions are considered inherently leading by some experts, such questions should be used with caution, particularly with preschoolers. When yes-no questions are deemed necessary, it is useful to remind children that they should not guess.

Leading questions imply an answer or assume facts that might be in dispute. In practice, there is no single definition of a leading question. Determination of whether a question is leading depends upon a host of variables, including the child's age, maturity, and the tone of voice of the interviewer (Fallon & Pucci, 1994). Tag questions such as, "And then he touched you, didn't he?" are explicitly leading, as is any question that includes information the child has not yet volunteered.

During this phase, the interviewer should continually monitor that the child's statements are unambiguous. If the child talks about "Grandpa," for example, the interviewer should determine which individual is being discussed (e.g., "Which grandpa?" "Does Grandpa have another name?" "Do you have one grandpa or more than one grandpa?"). Similarly, if the child uses an unusual word (e.g., "my hot dog," "my tushee"), the interviewer should attempt to clearly identify what that word means to the child (e.g., "Tell me what your wiener is").

young children may stray off topic and begin to discuss other events during this phase of the interview

Because young children often stray off topic and begin to discuss other events during this phase of the interview, it is important that the interviewer reiterate the topic under discussion. For example, it is very helpful to begin questions with identifying comments such as, "About this time in the kitchen with Uncle Bill, ...". If the child reports new or unusual information, it is best to ask something like, "Are you talking about that time Timmy grabbed your privates, or is this another time?" It is easier for children to stay on topic if the interviewer warns the child when the topic is shifting (e.g., "I'm confused about that time in the park. Let me ask you something about that ..."). Another strategy

to avoid confusion is to verbally label events that the interviewer might want to return to later in the interview (e.g., "Okay, let's call that the kitchen time.") (Yuille et al., 1993).

Interviewers should avoid covering topics in a predetermined order. Instead, interviewers should follow the child's train of thought and ask questions that are related to the child's narrative at that point in the interview. In sexual abuse cases, the interviewer may need to ask whether the alleged event happened one time or more than one time, whether the child has knowledge that other children had a similar experience, and whether other individuals were present. Before closing the interview, all references to people and events should be clarified to ensure that there is only one interpretation of the child's comments.

Questioning and clarification is the most difficult phase of the interview. The interviewer has to listen to the child, mentally review the information already provided, make decisions about further questioning, and decide when to close the interview. Interviewers should maintain a relaxed manner and feel free to take a few minutes to collect their thoughts before deciding how to proceed. If there is a second interviewer or team members in an adjoining observation room, the interviewer can ask these individuals whether or not they have any additional questions before closing the interview.

Closure

If the child made a disclosure, the interviewer can begin the closure phase of the interview by asking, "Is there something else you'd like to tell me about (event the child described)?" Regardless of the outcome of the interview, the interviewer can ask, "Are there any questions you would like to ask me?" It is appropriate to chat about neutral topics for a few minutes to end the interview on a relaxed note. The interviewer can thank the child for coming but should be careful not to specifically thank the child for disclosing abuse. In addition, it is important to avoid making promises that might not be kept (for example, saying that the child will not have to talk about the abuse again). A school-aged child or an accompanying adult may be given a contact name and phone number in case they later think of something they want to add.

Special Topics

Questions about Time

There are several reasons why it can be very difficult for children to describe *when* an event happened. In their language development, children learn words that mark temporal relationships only gradually. Three-year-olds, for example, often use "yesterday" to mean "not today," and the words "before" and "after" are poorly understood before 7 years of age or even older. Regarding temporal concepts, children's understanding of dates and clock time is limited before 8-10 years of age. Often, children simply fail to remember exactly when target events occurred. Memory failure is common when events occurred a long time ago and when there were many similar events.

Interviewers should try to identify when events occurred, but young children sometimes answer inaccurately when questions demand details they cannot provide. For example, children sometimes try to answer questions about the day of the week or the time of day even when they are uncertain. Therefore, interviewers should try to determine when events occurred by asking about the context of the events. General questions about what grade the child was in or whether it was summer vacation can narrow down the time. Similarly, knowing that the child was playing with a toy received for Christmas will date the event after Christmas, and questions about what TV show the child was watching will identify a time of day. Some interviewers ask children to point to a "time line" that contains pictures of holidays and other events, but there is no evidence that preschool children report the timing of past events more accurately with this aid than with developmentally-appropriate verbal questions (Malloy & Poole, 2002).

Interviewers should be aware that time is not an element in child sexual conduct cases in Michigan, and thus it may be unnecessary to narrow down the time of an event beyond specifying a period of several months (e.g., during summer vacation). The Michigan Court of Appeals set forth four factors to consider when determining how specific the time of assault must be: the nature of the crime charged, the victim's ability to specify a date, the prosecutor's efforts to pinpoint a date, and the prejudice to the defendant in preparing a defense (*People v. Naugle, 152 Mich. App 227, 233; 393 NW2d 592 1986*).

Interviewing Aids

Because young children sometimes provide little information in response to open-ended questions, interviewers occasionally use interviewing aids, such as anatomical dolls and body outlines, to elicit information about alleged abuse.

Guidelines on anatomical dolls and drawings state that children's responses to visual aids are not diagnostic of abuse. Consequently, interviewers can be accused of suggesting sexual themes if they introduce aids before children have mentioned abuse (Poole & Lamb, 1998). It is less controversial to introduce aids during the questioning and clarification phase of the interview, when aids help to clear up ambiguities in children's reports (Everson & Boat, 2002). (For examples of anatomical drawings, see Groth & Stevenson, 1990.)

To access anatomical drawings that are available on the Prosecuting Attorneys Association of Michigan (PAAM) website:

- log on to www.micats.org
- click on "child abuse resources"
- click on the drawing you would like to access and print

Interviewers should avoid using anatomical dolls with very young children. One problem is that dolls are models that represent something else. To use an anatomical doll, a child must realize that the doll is an object itself and also a representation of the child. But children between the ages of 2 and 4 years may not have the cognitive skills to appreciate the representational purpose of dolls (DeLoache, 1995). As a result, dolls often do not improve the quality of the information obtained from young children (e.g., Lamb et al., 1996; Pipe, Salmon, & Priestly, 2002).

Special Communication Issues

Interviewers should identify whether children have special communication issues that require accommodation during their interview preparation.

Separate developmental assessments are not routinely required or useful, but they may be helpful for children who suffer from a developmental disability or have a language limitations that raise questions about their ability to respond accurately to questions. The following summary is based on a longer discussion by Poole and Lamb (1998).

Preschoolers. Whenever possible, interviews with preschool children should be scheduled for a time of the day when the children are usually alert and have recently had a snack. No special

adjustments to the interview protocol are required for preschool children, but interviewers should be aware that young children are more likely to attempt answers to closed questions than are older children. When interviewers use closed questions with young children, it is helpful to demonstrate that they are not simply going along with the social pressures of the interview. For example, omitting the correct answer from multiple choice questions will reduce concerns about acquiescence.

Bilingual Children. During pre-interview preparation, interviewers should make their best determination of the child's primary language based on information from available sources, such as official records, consultations with parents or school officials, and the child's self-report. Arrangements should be made for an interpreter of the child's primary mode of communication whenever there is concern that a child faces limitations in understanding or speaking English.

Visual Impairments. Children who have experienced vision loss before the age of 5 years frequently have delays in the development of language concepts. These children may have difficulty with personal and possessive pronouns (e.g., *her* versus *their*), and they may use words inconsistently across contexts. Because some of these children show echolalia, or a tendency to repeat the last phrases spoken to them, interviewers should avoid asking questions that can be answered by partial repetition. Additionally, a high proportion of children with vision impairments also have hearing loss or other handicaps, so interviewers should ask about additional problems if they determine that a child has a visual impairment.

Hearing Impairments. Children with hearing impairments differ widely in degree of hearing loss, the age at onset of loss, the degree to which they benefit from amplification, and their primary mode of communication (American Sign Language, Signed English, reading speech, etc.). As a general rule, a language specialist should be consulted about the child's primary mode of communication and facility with language. An interpreter, if needed, should not be an individual who might have an interest in the outcome of the case. Because children with hearing impairments tend to be poor at written English, writing generally is not an acceptable communication option for a forensic interview. Many authors report that children with hearing impairments are more impulsive than other children about responding, so interviewers should take care to warn these children about the ground rules for the interview.

Augmentative and Alternative Communication (AAC). AAC includes any system that supplements or replaces traditional communication modes, including communication by eye gaze, picture boards, or computer-based technologies. The professional who has had the most contact with the child (and/or the development of the child's communication system) and an independent specialist should be involved in evaluating the needs of children who communicate via AAC.

Developmental Disabilities. As a group, children who are developmentally disabled are more likely to respond randomly to yes-no questions and to provide inaccurate information to specific questions. Care should be taken during the rapport building and ground rules phases of the interview to ensure that the child can report a past event and does not tend to make up responses to more specific questions. If there is serious uncertainty about the accuracy of the child's information, preliminary assessments may be helpful to identify how well the child discusses past events and how the child responds to various types of questions.

Quick Guide #1: Sample Questions that Test Alternative Hypotheses and Sample Form

Alternative Hypotheses about the Allegation

touching occurred during routine caretaking:

Examples: What were you doing when Bryan touched you?
What was Bryan doing when he touched you?
What did Bryan say after he touched you? (to elicit threats or promises about secrets)

child now claims that the touching was an innocent mistake:

Example: I'm interested in learning more about your teacher. How did you get along with your teacher before all this trouble started? When did you first start feeling close to your teacher (after child states that she feels very close to her teacher)? What did you and your teacher do together next? (to elicit information about grooming)

child is acting out sexually due to influences other than sexual abuse (child calls the reenactment a "game"):

Example: Tell me about the game. Tell me about the first time you played the game. Did you make this game up? Did you see the game somewhere?

teenager made an allegation out of anger and is embarrassed to retract it:

Example: Remember that we are here to talk about the truth today, so you are right to say whatever is true. Sometimes teenagers tell when someone hurt them because it happened, but sometimes there has been a big misunderstanding. Did that really happen (child's report, such as, "your mom pushed you into the cupboard when she was angry") or was there a misunderstanding about that?

Alternative Hypotheses about Details Reported During the Interview

a name:

Example: Do you have one daddy or more than one daddy? Which daddy (child's words)?

report spins off in an unexpected direction:

Example: Are you talking about the time Sandy left you alone while she went shopping, or are you talking about something different now?

a sexual term:

Example: You said that you watched Sandy and Joe have sex. Tell me what people do when they have sex (because children often call kissing "sex").

claim that abuse happened "all the time":

Example: Tell me about the last time Joe ____ (with probes for contextual detail after the child's free narrative; this line of questioning helps establish that there was opportunity and that the child can report discrete episodes). Tell me about the first time Joe _____. Tell me about the time you remember best (with probes for contextual detail after the child's free narrative).

Sample Form: Alternative Hypotheses Documentation/Testing

Hypothesis [Allegations] --

Alternative Hypotheses--	How Tested--

Quick Guide #2: Guidelines for Questioning Children

(Poole & Lamb, 1998. Adapted with permission from the American Psychological Association. For expanded discussions, see Walker, 1999.)

Understanding the Child

- If you cannot understand something the child said, ask the child to repeat the comment. Try not to guess with comments such as, "Did you say 'Bob'?"

- Children often make systematic pronunciation errors; for example, *potty* may sound like *body* or *something* may sound like *some paint*. Do not take young children's comments at face value; instead, always try to clarify what the child was saying by asking the child to describe the event fully (e.g., "I'm not sure I understand where he peed; tell me more about where he peed") or asking for an explicit clarification (e.g., "Did you say 'Bob' or 'mom' or some other person?").

- When talking, use the usual adult pronunciation for words; do not mimic the child's speech or use baby-talk. (Exception: Do use the child's words for body parts.)

- The child's meaning for a word may not be the same as the adult's meaning. Some children use particular words in a more restrictive way (e.g., *bathing suits* or *pajamas* may not be clothing to a young child), a more inclusive way (e.g., *in* often means *in* or *between*), or in a way that is peculiar to them or their families (e.g., a *penis* is called a *bird*). Words that are critical to identifying an individual, event, or object should be clarified.

- Children may seem to contradict themselves because they use language differently than adults. For example, some children think that you only *touch* with your hands. Therefore, they may say "no" to questions such as "Did he touch you?," but later report that they were kissed. Children also tend to be very literal. For example, they might say "no" to the question, "Did you put your mouth on his penis?" but later respond "yes" to the question, "Did he put his penis in your mouth?" Interviewers should try to anticipate how a child will interpret a question and vary the phrasing of questions to check the child's understanding of the concept.

Avoid Using Difficult Words or Introducing New Words

- Children under the age of about 7 years have difficulty with temporal words such as *before* and *after*. Try to narrow down the time of an event by asking about other activities or events, such as whether it was a school day or not a school day, or what the child was doing that day.

- Young children are often confused by kinship terms (e.g., *uncle, aunt*), and word pairs such as *come/go, here/there,* and *a/the.*

- Even school-aged children often do not understand common legal terms, such as *judge, jury,* or *hearing*. Avoid legal terms or other adult jargon.

- Children often integrate new words into their narratives, so avoid introducing key words, names, or phrases that the child has not yet volunteered.

Phrasing Questions

- Questions should ask about only one concept at a time. Avoid multiple questions.

- Use a noun-verb-noun order. In other words, use the active voice (e.g., "You said earlier that you hit him ...") rather than the passive voice (e.g., "You said earlier that he was hit by you ...")

- Do not use "tag" questions such as, "And then he left, didn't he?"

- Words such as *she, he, that,* or *it* can be ambiguous to a child, even when these words are in the same sentence as their referents (e.g., "So when she came home, did mom take a nap?"). Be redundant and try to use the referent as often as possible (e.g., say, "So after *your father pushed you*, then what happened?" rather than, "So after he did *that*, then what happened?").

- Children learn to answer *who, what,* and *where* questions earlier than *when, how,* and *why* questions.

Cultural Considerations

- If a child is from a different culture, the interviewer should try to confer with someone from that culture to see if special cultural considerations should be understood prior to the interview.

- Children are discouraged in some cultures from looking authority figures in the eye while answering. Avoid correcting children's nonverbal behavior unless that behavior interferes with your ability to hear the child.

- Interviewers should be aware that some cultural groups discourage children from correcting or contradicting an adult, and children from these environments may be more likely to answer multiple-choice or yes-no questions even when they are uncertain.

Quick Guide #3: Overview of a Phased Interview

(Poole & Lamb, 1998. Adapted with permission from the American Psychological Association.)

Preparing the Environment

- Review questions that will test alternative hypotheses about how the allegation arose.
- Remove distracting materials from the room.
- Record identifying information on videorecorded statement (see p. 4), if used.

The Introduction Hello, my name is .....

- Introduce yourself to the child by name and occupation.
- Explain the recording equipment if used and permit the child to glance around the room.
- Answer spontaneous questions from the child.

Establishing the Ground Rules Before we talk some more, I have some simple rules for talking today.

- Get a verbal agreement from the child to tell the truth.
- Remind the child that he/she should not guess at an answer.
- Explain the child's responsibility to correct the interviewer when he/she is incorrect.
- Allow the child to demonstrate understanding of the rules with practice questions (e.g., "What is my dog's name?").

Completing Rapport Building with a Practice Interview I'd like to get to know you a little better now.

- Ask the child to recall a recent significant event or describe a scripted event (e.g., what he/she does to get ready for school each morning or how he/she plays a favorite game).
- Tell the child to report everything about the event from beginning to end, even things that might not seem very important.
- Reinforce the child for talking by displaying interest both nonverbally and verbally (e.g., "Really?" or "Ohhh").

Introducing the Topic Now that I know you a little better...

- Introduce the topic, starting with the least suggestive prompt.
- Avoid words such as *hurt, bad,* or *abuse.*

The Free Narrative Tell me everything about that, even little things you don't think are very important.

- Prompt the child for a free narrative with general probes such as, "Tell me everything you can about that."
- Encourage the child to continue with open-ended prompts such as, "Then what?" or "Tell me more about _____."

Questioning and Clarification I want to make sure I understand everything that happened.

- Cover topics in an order that builds upon the child's prior answers to avoid shifting topics during the interview.
- Select less directive question forms over more directive questions as much as possible.
- Do not assume that the child's use of terms (e.g., "Uncle" or "pee pee") is the same as an adult's.
- Clarify important terms and descriptions of events that appear inconsistent, improbable or ambiguous.
- Ask questions that will test alternative explanations for the allegations.

Closure Is there something else you'd like to tell me about _____? Are there any questions you would like to ask me?

- Ask if the child has any questions.
- Revert to neutral topics.
- Thank the child for coming.

Quick Guide #4: Introducing the Topic

This is a hierarchy of question types from the least suggestive to most suggestive. Whenever possible, select questions from the top of the hierarchy. Interviewers should start with the least suggestive prompt that might raise the topic. Start with a transitional statement such as, "Now that I know you a little better, it is time to talk about something else," then follow-up with one or more of the following suggestions listed below.

Do you know the reason you are here today?
or
Tell me the reason you are here today.

IF ANSWER IS "I DON'T KNOW."

It is important for me to understand the reason you came to talk to me today.

I talk to kids about things that have happened. Tell me what's happened to you.

Tell me the reason_____doesn't live with you anymore.

As I told you, my job is to talk to kids about things that have happened to them. It is very important that I understand the reason you are here. Tell me why you think your mom (dad, etc.) brought you here today.

Is your *mom* (dad, etc.) worried that something may have happened to you? Wait for a response. If it is affirmative say, "Tell me what they are worried about."

I heard that someone has been bothering you. Tell me about what happened.

I heard that something might have happened to you. Tell me all about what happened.

IF CHILDREN DO NOT RESPOND TO ANY OF THE ABOVE AND QUESTIONS MUST BE EVEN MORE FOCUSED:

I heard you told_____something. Tell me what you talked about.

I heard that you saw a policeman (social worker, doctor, etc.) last week (yesterday). Tell me what you talked about.

I heard that something might have happened to you at_____(location or time of alleged incident).

I heard that someone might have_____(brief summary of allegation without mentioning name of perpetrator).

REMEMBER TO FOLLOW UP THE ANSWER WITH:
Tell me all about_____.

Quick Guide #5: Sample Question Frames

(Poole & Lamb, 1998. Adapted with permission from the American Psychological Association.)

Familiarity with a list of flexible question frames can help interviewers ask follow-up questions that are not leading.

Elaboration

"You said _____ . Tell me more about that."
"And then what happened?"
"Sometimes we remember a lot about sounds or things that people said. Tell me all the things you heard _____ (when that happened, in that room, etc.)"
"Sometimes we remember a lot about how things looked. Tell me how everything looked _____ (when that happened, in that room, etc.)"

Clarification

Object or action: "You said _____. Tell me what that is."
Ambiguous person: "You said _____ (Grandpa, teacher, Uncle Bill, etc.). Do you have one or more than one _____?"
"Which _____?"
"Does your _____have another name?" (or "What does your _____
[mom, dad, etc.] call _____?")

Inconsistency

"You said _____ but then you said _____. I'm confused about that. Tell me again how that happened."
"You said _____, but then you said _____. Was that the same time or different times?"

Repairing Conversational Breaks

"Tell me more about that."
"And then what happened?"

Embarrassed Pause

"It's okay to say it."
"It's okay to talk about this."

Inaudible Comment

"I couldn't hear that. What did you say?"

Single or Repeated Event

"Did it happen one time or more than one time?"
(if child says, "Lots of times"):
"Tell me about the last time something happened. I want to understand everything from the very beginning to the very end." "Tell me about another time."

Quick Guide #6: The Hierarchy of Interview Questions

(Poole & Lamb, 1998. Adapted with permission from the American Psychological Association.)

This is a hierarchy of question types from least suggestive to most suggestive. **Whenever possible, select questions from the top of the hierarchy.**

Free Narrative and Other Open-Ended Questions

Free-narrative questions are used after the topic has been introduced, to encourage children to describe events in *their own* words.

Examples: "Tell me everything you can about _____."
"Start with the first thing that happened and tell me everything you can, even things you don't think are very important."

Open-ended questions allow children to select the specific details they will discuss. Open-ended questions encourage multiple-word responses.

Examples: "You said he took you into a room. Tell me about all of the things that were in that room."
"You said, 'That other time.' Tell me about that other time."

Specific but Nonleading Questions

Specific but nonleading questions ask for details about topics that children have already mentioned. Use these questions only when the details are important, because children often try to answer specific questions even when they do not know the relevant information.

Examples: "What were you doing when he came over?"
"What did your mom say after you told her?"

Closed Questions

Closed questions, which provide only a limited number of options, are used when children do not respond to open-ended questions, when there is no obvious open-ended question that will elicit the desired information, or when a specific question is developmentally inappropriate. (For example, the question "How many times did that happen?" is difficult for young children.) Multiple-choice questions, particularly when they have more than two options, are preferable to yes-no questions because they permit a wider range of responses. Interviewers should try to follow closed questions with less directive prompts.

Examples of multiple-choice questions:

"Did that happen one time or more than one time?" (Follow-up prompt: "Tell me about the last time that happened.")

(Interviewer, "Where did that happen?" Child, "I don't know.") "Did that happen at your house, at Grandpa's house, or some other place?" (Follow-up prompt: "Who else was at Grandpa's house that day")

Example of a yes-no question:

"Was your mom home when that happened?" (Follow-up prompt: "Tell me what your mom was doing.")

Explicitly Leading Questions

Explicitly leading questions suggest the desired answer or contain information that the child has not yet volunteered. Even yes-no questions are considered leading by many psychologists, particularly if the child is young or the interviewer does not reiterate the child's right to say "no." Leading questions should be avoided during forensic interviews.

Examples of inappropriate questions:

"You told your mom you were scared of him, didn't you?"

"Did he have his pants on or off when he laid next to you?" (when the child did not mention that he laid down).

End Notes

[1]There are no fixed guidelines about how much information interviewers should gather before meeting with a child. An interview is conducted "blind" when the interviewer knows only the child's name and age. The goal of a blind interview is to reduce the possibility that the interviewer can direct the child to confirm the allegations by asking specific or leading questions. There are a variety of reasons why most experts oppose blind interviews. First, it is difficult for interviewers to develop rapport with children when they know nothing about their living situations or interests. Second, because some children will not respond to general questions about why they are being interviewed, it is difficult for interviewers to introduce the topic of abuse when they know nothing about the place or timing of the alleged abuse. Third, blind interviewing makes it more difficult for interviewers to consider alternative hypotheses about the meaning of children's statements. Information about recent medical treatment, adults in a child's life who have duplicate names (e.g., two grandpas), and the child's caretaking environments and playmates can help interviewers understand what a child is describing. For these reasons, the National Center for Prosecution of Child Abuse, the American Prosecutor's Research Institute, and the National District Attorney's Association (1993, p. 59) concluded, "Interviewing a child without knowing any of the details revealed to another is analogous to performing a medical examination without knowing the patient's history or looking for an unfamiliar destination without a road map."

[2]A variety of terms are used to describe this progression from introduction to closing, including *step-wise* (Yuille, Hunter, Joffe, & Zaparniuk, 1993), *funnel* (Sternberg et al., 2002), and *phased approaches* (Bull, 1995).

Appendix

VIDEORECORDING LAWS

Criminal Statue

MCLA 600.2163a Definitions; prosecutions and proceedings to which section applicable; use of dolls or mannequins; support person; notice; videorecorded statement; special arrangements to protect welfare of witness; videotape deposition; section additional to other protections or procedures; violation as misdemeanor; penalty.

Sec. 2163a. (1) As used in this section:

(a) "Custodian of the videorecorded statement" means the department of human services, investigating law enforcement agency, prosecuting attorney, or department of attorney general or another person designated under the county protocols established as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628.

(b) "Developmental disability" means that term as defined in section 100a of the mental health code, 1974 PA 258, MCL 330.1100a, except that, for the purposes of implementing this section, developmental disability includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments and does not include a condition attributable to a physical impairment unaccompanied by a mental impairment.

(c) "Videorecorded statement" means a witness's statement taken by a custodian of the videorecorded statement as provided in subsection (5). Videorecorded statement does not include a videorecorded deposition taken as provided in subsections (17) and (18).

(d) "Witness" means an alleged victim of an offense listed under subsection (2) who is either of the following:

(*i*) A person under 16 years of age.

(*ii*) A person 16 years of age or older with a developmental disability.

(2) This section only applies to prosecutions and proceedings under section 136b, 145c, 520b to 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.136b, 750.145c, 750.520b to 750.520e, and 750.520g, or under former section 136 or 136a of the Michigan penal code, 1931 PA 328.

(3) If pertinent, the witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination.

(4) A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the witness, and give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be filed with the court and shall be served upon all parties to the proceeding. The court shall rule on a motion objecting to the use of a named support person before the date at which the witness desires to use the support person.

(5) A custodian of the videorecorded statement may take a witness's videorecorded statement before the normally scheduled date for the defendant's preliminary examination. The videorecorded statement shall state the date and time that the statement was taken; shall identify the persons present in the room and state whether they were present for the entire videorecording or only a portion of the videorecording; and shall show a time clock that is running during the taking of the videorecorded statement.
(6) A videorecorded statement may be considered in court proceedings only for 1 or more of the following:
(a) It may be admitted as evidence at all pretrial proceedings, except that it may not be introduced at the preliminary examination instead of the live testimony of the witness.
(b) It may be admitted for impeachment purposes.
(c) It may be considered by the court in determining the sentence.
(d) It may be used as a factual basis for a no contest plea or to supplement a guilty plea.
(7) In a videorecorded statement, the questioning of the witness should be full and complete; shall be in accordance with the forensic interview protocol implemented as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628; and, if appropriate for the witness's developmental level, shall include, but is not limited to, all of the following areas:
(a) The time and date of the alleged offense or offenses.
(b) The location and area of the alleged offense or offenses.
(c) The relationship, if any, between the witness and the accused.
(d) The details of the offense or offenses.
(e) The names of any other persons known to the witness who may have personal knowledge of the alleged offense or offenses.
(8) A custodian of the videorecorded statement may release or consent to the release or use of a videorecorded statement or copies of a videorecorded statement to a law enforcement agency, an agency authorized to prosecute the criminal case to which the videorecorded statement relates, or an entity that is part of county protocols established under section 8 of the child protection law, 1975 PA 238, MCL 722.628. The defendant and, if represented, his or her attorney has the right to view and hear a videorecorded statement before the defendant's preliminary examination. Upon request, the prosecuting attorney shall provide the defendant and, if represented, his or her attorney with reasonable access and means to view and hear the videorecorded statement at a reasonable time before the defendant's pretrial or trial of the case. In preparation for a court proceeding and under protective conditions, including, but not limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement, the court may order that a copy of the videorecorded statement be given to the defense.
(9) If authorized by the prosecuting attorney in the county in which the videorecorded statement was taken, a videorecorded statement may be used for purposes of training the custodians of the videorecorded statement in that county on the forensic interview protocol implemented as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628.
(10) Except as provided in this section, an individual, including, but not limited to, a custodian of the videorecorded statement, the witness, or the witness's parent, guardian, guardian ad litem, or attorney, shall not release or consent to release a videorecorded statement or a copy of a videorecorded statement.

(11) A videorecorded statement that becomes part of the court record is subject to a protective order of the court for the purpose of protecting the privacy of the witness.
(12) A videorecorded statement shall not be copied or reproduced in any manner except as provided in this section. A videorecorded statement is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, is not subject to release under another statute, and is not subject to disclosure under the Michigan court rules governing discovery. This section does not prohibit the production or release of a transcript of a videorecorded statement.
(13) If, upon the motion of a party made before the preliminary examination, the court finds on the record that the special arrangements specified in subsection (14) are necessary to protect the welfare of the witness, the court shall order those special arrangements. In determining whether it is necessary to protect the welfare of the witness, the court shall consider all of the following:
(a) The age of the witness.
(b) The nature of the offense or offenses.
(c) The desire of the witness or the witness's family or guardian to have the testimony taken in a room closed to the public.
(14) If the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under subsection (13), the court shall order both of the following:
(a) All persons not necessary to the proceeding shall be excluded during the witness's testimony from the courtroom where the preliminary examination is held. Upon request by any person and the payment of the appropriate fees, a transcript of the witness's testimony shall be made available.
(b) In order to protect the witness from directly viewing the defendant, the courtroom shall be arranged so that the defendant is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The defendant's position shall be located so as to allow the defendant to hear and see the witness and be able to communicate with his or her attorney.
(15) If upon the motion of a party made before trial the court finds on the record that the special arrangements specified in subsection (16) are necessary to protect the welfare of the witness, the court shall order those special arrangements. In determining whether it is necessary to protect the welfare of the witness, the court shall consider all of the following:
(a) The age of the witness.
(b) The nature of the offense or offenses.
(c) The desire of the witness or the witness's family or guardian to have the testimony taken in a room closed to the public.
(16) If the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under subsection (15), the court shall order 1 or more of the following:
(a) All persons not necessary to the proceeding shall be excluded during the witness's testimony from the courtroom where the trial is held. The witness's testimony shall be broadcast by closed-circuit television to the public in another location out of sight of the witness.
(b) In order to protect the witness from directly viewing the defendant, the courtroom shall be arranged so that the defendant is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The defendant's position shall be the same for all witnesses and shall be located so as to allow the defendant to hear and see all witnesses and be able to communicate with his or her attorney.

(c) A questioner's stand or podium shall be used for all questioning of all witnesses by all parties and shall be located in front of the witness stand.
(17) If, upon the motion of a party or in the court's discretion, the court finds on the record that the witness is or will be psychologically or emotionally unable to testify at a court proceeding even with the benefit of the protections afforded the witness in subsections (3), (4), (14), and (16), the court shall order that a videorecorded deposition of a witness shall be taken to be admitted at a court proceeding instead of the witness's live testimony.
(18) For purposes of the videorecorded deposition under subsection (17), the witness's examination and cross-examination shall proceed in the same manner as if the witness testified at the court proceeding for which the videorecorded deposition is to be used, and the court shall order that the witness, during his or her testimony, shall not be confronted by the defendant but shall permit the defendant to hear the testimony of the witness and to consult with his or her attorney.
(19) This section is in addition to other protections or procedures afforded to a witness by law or court rule.
(20) A person who intentionally releases a videorecorded statement in violation of this section is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.

History: Add. 1987, Act 44, Eff. Jan. 1, 1988;—Am. 1989, Act 253, Eff. Mar. 29, 1990;—Am. 1998, Act 324, Imd. Eff. Aug. 3, 1998;—Am.
2002, Act 604, Eff. Mar. 31, 2003.

Civil Statue

MCLA 712A.17b Definitions; proceedings to which section applicable; use of dolls or mannequins; support person; notice; videorecorded statement; shielding of witness; videorecorded deposition; special arrangements to protect welfare of witness; section additional to other protections or procedures.

Sec. 17b. (1) As used in this section:
(a) "Custodian of the videorecorded statement" means the department of human services, investigating law enforcement agency, prosecuting attorney, or department of attorney general or another person designated under the county protocols established as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628.
(b) "Developmental disability" means that term as defined in section 100a of the mental health code, 1974 PA 258, MCL 330.1100a, except that, for the purposes of implementing this section, developmental disability includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments, and does not include a condition attributable to a physical impairment unaccompanied by a mental impairment.
(c) "Videorecorded statement" means a witness's statement taken by a custodian of the videorecorded statement as provided in subsection (5). Videorecorded statement does not include a videorecorded deposition taken as provided in subsections (16) and (17).

(d) "Witness" means an alleged victim of an offense listed under subsection (2) who is either of the following:
(*i*) A person under 16 years of age.
(*ii*) A person 16 years of age or older with a developmental disability.
(2) This section only applies to either of the following:
(a) A proceeding brought under section 2(a)(1) of this chapter in which the alleged offense, if committed by an adult, would be a felony under section 136b, 145c, 520b to 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.136b, 750.145c, 750.520b to 750.520e, and 750.520g, or under former section 136 or 136a of the Michigan penal code, 1931 PA 328.
(b) A proceeding brought under section 2(b) of this chapter.
(3) If pertinent, the witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination.
(4) A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the witness, and give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be filed with the court and shall be served upon all parties to the proceeding. Court shall rule on a motion objecting to the use of a named support person before the date at which the witness desires to use the support person.
(5) A custodian of the videorecorded statement may take a witness's videorecorded statement. The videorecorded statement shall be admitted at all proceedings except the adjudication stage instead of the live testimony of the witness. The videorecorded statement shall state the date and time that the statement was taken; shall identify the persons present in the room and state whether they were present for the entire videorecording or only a portion of the videorecording; and shall show a time clock that is running during the taking of the statement.
(6) In a videorecorded statement, the questioning of the witness should be full and complete; shall be in accordance with the forensic interview protocol implemented as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628; and, if appropriate for the witness's developmental level, shall include, but need not be limited to, all of the following areas:
(a) The time and date of the alleged offense or offenses.
(b) The location and area of the alleged offense or offenses.
(c) The relationship, if any, between the witness and the respondent.
(d) The details of the offense or offenses.
(e) The names of other persons known to the witness who may have personal knowledge of the offense or offenses.

(7) A custodian of the videorecorded statement may release or consent to the release or use of a videorecorded statement or copies of a videorecorded statement to a law enforcement agency, an agency authorized to prosecute the criminal case to which the videorecorded statement relates, or an entity that is part of county protocols established under section 8 of the child protection law, 1975 PA 238, MCL 722.628. Each respondent and, if represented, his or her attorney has the right to view and hear the videorecorded statement at a reasonable time before it is offered into evidence. In preparation for a court proceeding and under protective conditions, including, but not limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement, the court may order that a copy of the videorecorded statement be given to the defense.
(8) If authorized by the prosecuting attorney in the county in which the videorecorded statement was taken, a videorecorded statement may be used for purposes of training the custodians of the videorecorded statement in that county on the forensic interview protocol implemented as required by section 8 of the child protection law, 1975 PA 238, MCL 722.628.
(9) Except as provided in this section, an individual, including, but not limited to, a custodian of the videorecorded statement, the witness, or the witness's parent, guardian, guardian ad litem, or attorney, shall not release or consent to release a videorecorded statement or a copy of a videorecorded statement.
(10) A videorecorded statement that becomes part of the court record is subject to a protective order of the court for the purpose of protecting the privacy of the witness.
(11) A videorecorded statement shall not be copied or reproduced in any manner except as provided in this section. A videorecorded statement is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, is not subject to release under another statute, and is not subject to disclosure under the Michigan court rules governing discovery. This section does not prohibit the production or release of a transcript of a videorecorded statement.
(12) Except as otherwise provided in subsection (15), if, upon the motion of a party or in the court's discretion, the court finds on the record that psychological harm to the witness would occur if the witness were to testify in the presence of the respondent at a court proceeding or in a videorecorded deposition taken as provided in subsection (13), the court shall order that the witness during his or her testimony be shielded from viewing the respondent in such a manner as to enable the respondent to consult with his or her attorney and to see and hear the testimony of the witness without the witness being able to see the respondent.
(13) In a proceeding brought under section 2(b) of this chapter, if, upon the motion of a party or in the court's discretion, the court finds on the record that psychological harm to the witness would occur if the witness were to testify at the adjudication stage, the court shall order to be taken a videorecorded deposition of a witness that shall be admitted into evidence at the adjudication stage instead of the live testimony of the witness. The examination and cross-examination of the witness in the videorecorded deposition shall proceed in the same manner as permitted at the adjudication stage.
(14) In a proceeding brought under section 2(a)(1) of this chapter in which the alleged offense, if committed by an adult, would be a felony under section 136b, 145c, 520b to 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.136b, 750.145c, 750.520b to 750.520e, and 750.520g, or under former section 136 or 136a of the Michigan penal code, 1931 PA 328, if, upon the motion of

a party made before the adjudication stage, the court finds on the record that the special arrangements specified in subsection (15) are necessary to protect the welfare of the witness, the court shall order 1 or both of those special arrangements. In determining whether it is necessary to protect the welfare of the witness, the court shall consider both of the following:
(a) The age of the witness.
(b) The nature of the offense or offenses.
(15) If the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under subsection (14), the court shall order 1 or both of the following:
(a) In order to protect the witness from directly viewing the respondent, the courtroom shall be arranged so that the respondent is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The respondent's position shall be located so as to allow the respondent to hear and see all witnesses and be able to communicate with his or her attorney.
(b) A questioner's stand or podium shall be used for all questioning of all witnesses by all parties, and shall be located in front of the witness stand.
(16) In a proceeding brought under section 2(a)(1) of this chapter in which the alleged offense, if committed by an adult, would be a felony under section 136b, 145c, 520b to 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.136b, 750.145c, 750.520b to 750.520e, and 750.520g, or under former section 136 or 136a of the Michigan penal code, 1931 PA 328, if, upon the motion of a party or in the court's discretion, the court finds on the record that the witness is or will be psychologically or emotionally unable to testify at a court proceeding even with the benefit of the protections afforded the witness in subsections (3), (4), and (15), the court shall order that a videorecorded deposition of a witness shall be taken to be admitted at the adjudication stage instead of the witness's live testimony.
(17) For purposes of the videorecorded deposition under subsection (16), the witness's examination and cross-examination shall proceed in the same manner as if the witness testified at the adjudication stage, and the court shall order that the witness, during his or her testimony, shall not be confronted by the respondent but shall permit the respondent to hear the testimony of the witness and to consult with his or her attorney.
(18) This section is in addition to other protections or procedures afforded to a witness by law or court rule.
(19) A person who intentionally releases a videorecorded statement in violation of this section is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.
History: Add. 1987, Act 45, Eff. Jan. 1, 1988;—Am. 1989, Act 254, Eff. Mar. 29, 1990;—Am. 1998, Act 325, Imd. Eff. Aug. 3, 1998;—Am.
2002, Act 625, Eff. Mar. 31, 2003.

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QUANTITY: 3,000
COST: $2,939.87 ($.97 ea.)
AUTHORITY: DHS Director

The Department of Human Services (DHS) will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, political beliefs or disability. If you need help with reading, writing, hearing, etc., under the Americans with Disabilities Act, you are invited to make your needs known to a DHS office in your county.

DHS-PUB-779 (Rev. 4-05)

APPENDIX D
FOSTER PARENT REVIEW HEARING REPORT

(Child's attorney to complete and return to the Court seven days prior to the scheduled hearing.)

FOSTER PARENT REVIEW HEARING REPORT

Child's Name:_____ File #_____

Foster Parents' Name/Address:

Phone #

Names/Relationships of others living in your home:

Date foster child was placed with you:

Agency/social worker name:

Please answer the following and add any comments you wish the Court to consider:

1) Have you received a copy of the Case Service Plan?
( ) Yes ( ) No Comments:

2) Do you understand the child's Case Service Plan?
( ) Yes ( ) No Comments:

3) Do you feel the child's Case Service Plan needs any changes?
( ) Yes ( ) No Comments:

4) Have you been consulted regarding any changes in the Case Service Plan?
( ) Yes ( ) No Comments:

5) Is the child receiving all the needed services?
( ) Yes ( ) No Comments:

6) Are you receiving adequate support and assistance from the assigned social worker?
( ) Yes ( ) No Comments:

7) Are there any existing problems regarding the child's placement?
( ) Yes ( ) No Comments:

8) What perceptions of the child might be relevant to the Review Hearing?

9) What are your feelings and observations regarding the child's contacts and visitation with the natural parents?

10) Do you wish any additional service from the Court?
( ) Yes ( ) No Comments:

11) Are you willing to continue as foster parents for the child?
( ) Yes ( ) No Comments:

12) Additional comments or information:

_____
Foster Parent Signature

_____
Attorney Signature

Date Completed:_____

REV 7-95

APPENDIX E
QUALIFIED PROTECTIVE ORDER

FROM :MQTPROBATECOURT FAX NO. :9062281533 Apr. 03 2003 05:30PM P2

STATE OF MICHIGAN

CIRCUIT COURT, FAMILY DIVISION

JUVENILE DEPARTMENT

In the matter of:

File No:

Minor Child

_____/

QUALIFIED PROTECTIVE ORDER

The guardian ad litem has the authority to consent to the disclosure of information that pertains to medical, dental, psychological, and psychiatric or counseling services provided to his or her client(s). The guardian ad litem also has authority to consent to examination or treatment of the client(s). This authority begins with authorization of the petition and ends with the order terminating court jurisdiction over the client(s).

Information disclosed to a guardian ad litem pursuant to this order shall not be used or redisclosed by the guardian ad litem other than for purposes of this case.

Information disclosed to a guardian ad litem pursuant to this order shall be returned to the individual or organization who disclosed it to the guardian ad litem upon dismissal of this case.

Any parent who objects to the disclosure of information to the guardian ad litem must file a written objection with this court within twenty-one (21) days of the date of this order.

A service provider may rely upon the Qualified Protective Order in commencing services or releasing records irrespective of the 21-day time period for the filing of written objections under this order.

Dated:

_____

MICHAEL J. ANDEREGG
Presiding Judge

APPENDIX F

APPLYING THE REALITIES OF CHILD DEVELOPMENT TO LEGAL REPRESENTATION:
A QUICK REFERENCE FOR LAWYERS AND JUDGES

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Applying the Realities of Child Development to Legal Representation: A Quick Reference for Lawyers and Judges

By: Brian T. Donadio, J.D. and Sondra R. Wilen, M.A.

Brian Donadio graduated cum laude from the University of Michigan Law School in December 1998. Brian will be a law clerk for the Honorable Jay C. Waldman of the United States District Court for the Eastern District of Pennsylvania during the 1999-2000 term and will then join the Philadelphia office of Dechert, Price & Rhoads. Brian is a 1994 honors graduate of the University of Pennsylvania (B.A. Political Science). Before attending law school he worked in Lansing, Michigan, as a recruitment coordinator for a literacy agency and an English as a Second Language instructor for Cuban refugees. While in law school, Brian served as Symposium Editor for the University of Michigan Journal of Law Reform and began studying and working with child law issues at the University of Michigan Child Advocacy Law Clinic, the Michigan Child Welfare Law Resource Center and the Washtenaw County Prosecutor's Office.

INTRODUCTION

Whether a legal matter involves a delinquency adjudication, an abuse and neglect investigation, or even a child custody dispute, determining whether a child is developing at a normal rate–physically, intellectually, and emotionally–is often[1] an important consideration in ascertaining the best method of vigorously and effectively representing a child client. It is also expected that an attorney will have neither the time nor the expertise to conduct an evaluation of the child client's development that is thorough enough to provide adequate information for effective representation. In many cases, this lack of time and expertise will not be an issue because the child client falls within a normal range of development; thus, developmental concerns would not be an impediment to representation. Often, however, the development of a child–physical, emotional, or otherwise–may play an important role in the case and thus inattention to developmental factors could impede the attorney's ability to represent the child adequately. These concerns apply equally to judges–whether sitting in family court or in a court of general jurisdiction–when a pending case involves the interests of a child. It is therefore important for attorneys and judges alike to recog-

Sondra Wilen is currently a doctoral student in child and family clinical psychology at Michigan State University. Sondra earned her Master's degree in clinical psychology in December 1997. She also graduated summa cum laude and Phi Beta Kappa with undergraduate degrees in psychology and business from the University of Pennsylvania and Penn's Wharton School of Business. Sondra's research and clinical practice is concentrated on child and family therapy issues, particularly attachment theory and adolescent depression and suicidality. Before attending graduate school, Sondra worked as a Pennsylvania/VA Medical Center Addiction Treatment Research Center. Sondra has previously presented research posters at the Annual Meeting of the Society for Research in Adolescence and the Annual Convention of the American Psychological Association.

nize when issues of child development arise that significantly impact a case, thus necessitating consultation and assessment by psychological professionals.

Before sketching the basic developmental milestones and important deviations, it is important to highlight the purpose of this article. This article is an attempt to provide attorneys and judges with a rudimentary understanding of developmental issues likely to arise in cases involving children. Consideration of a child's level of development is important because there are such significant "moral, cognitive, and social development" differences between adults and children.[2] These differences can affect a child's culpability in a delinquency matter; the degree of immediacy when considering the need for removal of a child from the home in an abuse and neglect case; and the appropriateness of any given placement in child custody litigation. The study of child development is by no means a novel or unexplored field, but rather it is a science that has been studied widely and thoroughly for many years.[3] Thus, attorneys and judges should give serious consideration to child development issues and make certain to consider professional consultation and evaluation in cases where a child's development appears to deviate from the norm.

Keep in mind that this article is by no means an exhaustive undertaking. In fact, this article endeavors only to be a sort of summary of the summaries, a most pared down coverage of the issues aiming to raise awareness and provide a starting point for what should be a more comprehensive research and education effort by attorneys and judges involved in child-related legal issues. Thus, the information provided here can serve only as the initial reference in what will turn out in many cases to be a series of evaluations in an effort to locate the precise nature of a particular psychological or developmental problem.

I. The Initial Assessment by the Attorney:

A Guideline to Recognizing Basic Developmental Milestones

Because time and resources are at a premium in most cases involving a child's interest–again, most attorneys typically have neither the time nor the training to complete an effective battery of evaluative measures–there is a need for an abbreviated, easy-to-use method of evaluation. To that end, a summary of child developmental milestones and deviations from the norm may prove helpful. Several categories of development have been included here as an initial reference; however, the information provided here is far from complete–it is intended only to suggest the types of developmental milestones children are expected to attain. It is important to keep in mind, therefore, that there often exists the need for *careful, intensive* interviews when deviations from the norm are discovered; this is particularly so when dealing with juvenile delinquency clients or children in abuse and neglect cases.[4] Thus, it is recommended that any "positive" results in a "checklist" evaluation be followed up, preferably either through a complete evaluation, such as a *pro bono* or court-mandated assessment by a psychological/psychiatric professional.[5]

When assessing the child for deviations from normal development, consider the following techniques:

- Whenever possible, conduct interviews with the child client and parents, as well as others who may have additional information, such as teachers, day care providers, neighbors, parents of friends, close relatives, or even alleged abusers in abuse/neglect cases. Teachers and day care providers are especially important sources of information because they observe the child on a regular basis, have a large number of children

against which to compare development, and may be less likely to have an interest in minimizing concerns than parents or others who may fear blame for developmental problems.

- Ask questions[6] and make observations about issues such as, but not limited to the following: prenatal medical care; motor skills, including mobility and physical coordination; medical problems (including untreated daily concerns such as regular headaches); school performance; relations with friends and family members; home environment (e.g., parental employment, parental physical or psychological problems, who and how many caregivers); hobbies and interests; general temperament (e.g., cranky, outgoing, calm, timid), mood or feelings; fears or worries; self-concept (e.g., what the child likes best and worst about herself, how the child views herself in relation to others); memories or fantasies; future goals; assessments or diagnoses by other professionals (including educational assessments at school or placement in special classes); and involvement with the legal system, protective services, or mental health agencies.[7]

- Pay special attention to signs such as aggressive antisocial actions, pervasive isolation, self-harm, precocious sexual activity, age-inappropriate problems with reality (e.g., hearing voices or paranoia), substance use, delayed language and physical development, low self-esteem, lack of trust, inept interpersonal relationships, learning difficulties, phobias, nightmares, and excessive clinging or avoidance of closeness.[8]

- Diligently collect and review records, such as medical, school, employment and mental health.

II. Important Milestones of Cognitive/Language and Social/Emotional Development[9]

Birth - 12 Months[10]

Cognitive/ Language[11]

Imitation of adult expressions and repetition of unintentional actions leads to purposeful, causal behaviors; recognition of people, places, objects begins; object permanence (understanding that objects continue to exist when removed from sight) transitions to ability to find hidden objects (but only in the first place hidden); cooing and babbling followed by imitation of language sounds; development of communication of dependency, exploration, pleasure, anger, fear, and anxiety through nonverbal gestures (e.g., pointing, facial expressions).

Emotional/ Social[12]

Basic emotions apparent (happiness, anger, fear, surprise, sadness), focused first on internal needs (hunger) and later toward external cues (parental ability to make hungry child smile); emergence of fear of stranger and anxiety about separation from the primary caregiver; engagement and interactive relationship with caregivers and others, including intentional, social smiles and laughter (rather than spontaneous smiles caused by physiological factors such as gas); appears bonded/attached to primary caregivers; shows interest in exploring while looking to caregiver for support and encouragement (as a "secure base").

12 - 24 months

Cognitive/ Language

Shows interest in trial and error experimentation with objects and problem solving; looks in additional places when hidden object not found in first hiding place; able to find object moved when outside the child's field of vision; categorizes objects (e.g., cat, drinking cup); begins make-believe play; first words spoken,

with vocabulary gradually increasing to about 200 words.

Emotional/ Social

Begins playing with siblings and same age children; recognizes images of self; security and curiosity replace clinginess and apprehension about novel situations; signs of empathy, shame, and embarrassment emerge; recognizes age/sex categorizations and begins to choose toys based on gender stereotypes; compliance with requests leads to improved self-control; begins to organize opposing emotions in singular situations (e.g., when playing, "the doll is bad, gets spanked, and then is hugged").

Age 2

Cognitive/ Language

Recognition memory developed; able to take perspective of others in simple situations; cognizant of difference between inner mental and outer physical events; rapid vocabulary increase leads to understanding of simple sentences, ability to name many objects, and use of simple sentences following proper grammatical order; conversational abilities grow to include taking turns in dialogue and maintaining singular topic.

Social/ Emotional

Self-esteem begins to develop; understands intentional versus unintentional behavior; cooperation emerges; understanding of causes and consequences of emotions begins to develop; ability to deal with anxiety through fantasy appears (e.g., thoughts that things will change for the better in the future); continued development of empathy and gender stereotyped behaviors and preferences; themes of "power" emerge (e.g., fear of monsters, desire to be a superhero).

Age 3-4

Cognitive/ Language

Begins to understand the concept of causation in relation to action; speaks to self to guide complex actions; understanding of fantasy and false belief emerges; able to speak in more complex sentences (e.g., using "but" and "because" to qualify or explain actions or events); counting and numerical skills begin to emerge; begins to grasp grammar rules and the existence of exceptions; able in many instances to adjust speech for age, sex, and social standing (e.g., parent/adult versus sibling) of the listener.

Social/ Emotional

Continued growth of self-consciousness (shame and pride) and ability to regulate emotions, including reactions to frustration social interactions increase with corresponding decrease of isolated play; emergence of "normal" levels of hostile physical and verbal aggression (occasional aggressive exchange between young children, even where the intention is to harm another child, so long as aggressive episodes are far outweighed by friendly interactions), as well as jealousy and envy; continued increase of gender-stereotypical preferences, including playmates; anxiety about being hurt of kidnapped is common, but child usually is able to recognize such thoughts as fantasy.

Age 5-6

Cognitive/ Language

Understanding of difference between reality and mere appearance improves; attention capacity enhanced; begins to understand basic phonics; vocabulary grows to approximately 10,000 words; shows complex grammar mastery; counting improves and expands to basic addition and subtraction.

Social/ Emotional

Increasing comprehension of intentions underlying actions of others; shows ability to predict and interpret and provoke actions and emotions of others; exhibits fears such as thunder and lightening, dark, bodily injury, loss of love, and the supernatural (e.g., ghosts); uses language to express empathy; understands moral basis of many rules and

behaviors; strong ability to regulate both concentration/attention and emotion tempered by continuing need for external support with such efforts; able to fear loss of self-esteem (e.g., "I am bad"); triangular patterns of relationships present (i.e., feeling left out or wanting to leave others out of situations).

Age 6-11

Cognitive/ Language

Logical thought improves but remains connected to concrete, rather than abstract situations; improved understanding of spatial concepts such as time, distance, and speed; ability to maintain attention and focus improves (and is very well established by age 8 or 9), thus enhancing understanding of the role of memory, attentiveness, and motivation to the successful performance of tasks; long-term memory and knowledge accumulation grows; rapid addition of vocabulary; complex grammar application steadily improves, especially around age 10 or 11 (e.g., "I did this because she said that, and she said that because something else happened that I did not see."); use of synonyms/ word categories and double word meanings present (e.g., metaphors and humor).

Social/ Emotional

Self-esteem becomes more realistic and gradually rises, while understanding of personality traits of self and others grows; fears of the dark, thunder/lightening, bodily injury, loss of love, and the supernatural continue, with the last dissipating and being replaced by anxiety about shame in contests such as tests and grades in school and physical appearance; ability to differentiate between luck and skill emerges; able to grasp the need for effort, self control, and frustration tolerance in task performance; understands that individuals have different perspectives on events based on differing knowledge; concept of justice changes from equality to merit (ability to earn benefits) to benevolence (willingness to bestow benefit out of the goodness of one's heart); physical aggression declines as social interaction increases, leading to the formation of peer groups and a growing interest in "roles" (self-definition such as "I am a football player" or "I am good at this"); associates pride and guilt with personal responsibility (and experiences a growing fear of guilt); recognizes connection between morality and social norms but sense of morality remains unstable; begins to temper spontaneous curiosity with growing sense of order, including order necessary for appropriate interactions with others (e.g., playing games with rules); academic interests and personality traits become gender-stereotyped and focused on role models (adult stereotypes); by age 9 or 10, special relationships with same sex parent is strong (parent used as a role model).

Age 11-14

Cognitive/ Language

Abstract/hypothetical thought emerges; self-consciousness continues to grow; critical and idealistic thought grow substantially; begins to consider long-term vocational goals based on present interests; abstract vocabulary appears; irony and sarcasm understood; understanding of the need to manipulate speech patterns and style based on individual situations grows.

Social/ Emotional

Parent-child conflict increases commensurate with moodiness and further transition from family social interaction to focus on peer involvement; intimacy and loyalty begin to define friendships; "membership" in cliques becomes more standard, with self-definition focused increasingly on reputation and stereotypes; need to conform to peer pressure is prominent.

Age 14-18

Cognitive/ Language

Problem solving increasingly based on complex rules of thought; abstract/hypothetical reasoning improves substantially; self-consciousness sub-

sides; planning and decision making enhanced; long-term vocation goals now based on abilities and values in addition to interests; verbal skills advanced to ability to comprehend adult literature.

Social/ Emotional

Search for a personal identity/self-definition commences; self-esteem continues to rise and differentiate with regards to different situations; growing understanding of the societal perspective and the importance of laws and rules to the maintenance of relationships and societal order; dating often begins.

III. Deviations from Normal Development

When considering whether a child has attained an age-appropriate level of development, the attorney or judge must look not only to the apparent indications of normal development, but also to certain reliable indicators of abnormal development. Factors associated with a deviation from normal development include negative life events, such as physical or sexual abuse; chronic stress caused by domestic violence or marital discord; parental psychopathology/mental illness, such as depression or substance abuse; and the availability of parental "resources," including friendships and extended family relations.[13] There exists a large number of possible psychological problems resulting from or appearing as deviation from normal development. Included here is a brief description of some of the more common problems (Attention Deficit-Hyperactivity Disorder; Conduct Disorder; Mood Disorders, such as Major Depression; and Anxiety Disorders) and some representative deviations from normal development.

1. Attention Deficit-Hyperactivity Disorder (ADHD)[14]

ADHD is often evidenced by some combination of the following signs:

- Persistent inattention to school work, tasks at home, or play;
- Failure to listen when spoken to directly;
- Disorganization, persistently losing things such as toys or school books, or forgetfulness;
- Easily distracted or excessive movement/restlessness that is not age-appropriate;[15]
- Excessive talking;
- Inability to await turn or participate in games or conversations without interrupting.

2. Conduct Disorder[16]

Conduct disorder holds a close relationship to juvenile delinquency and is evidenced in part by a repetitive and persistent pattern of behaviors, such as the following:

- Aggression toward people or animals, including physical cruelty or threats and intimidation;
- Deliberate destruction of property;
- Deceitfulness or theft;
- *Serious* violations of rules, such as curfews or school attendance.

3. Mood Disorders (including Major Depression and bipolar disorder)[17]

Signs of Major Depression[18] include the following:

- Subjective reports of sadness or feelings of emptiness;
(note that this factor is not necessary for children and adolescents because chronic; irritability may be another manner in which they present depression);
- Objective observations by others of persistent tearfulness;
- Changes in weight, appetite, or sleep patterns;
- Fatigue or loss of energy/ interest in activities;
- Reoccurring thoughts of death or self-harm.

4. Anxiety Disorders (including Generalized Anxiety and Obsessive-Compulsive Disoder)[19]

Certain deviations from normal development may indicate that the child suffers from a psychological problem that falls within the category of Anxiety Disorders. Such deviations include the following:

- Excessive anxiety concerning separation from the home or from caregivers;[20]
- Excessive fear and avoidance of social situations;[21]
- Excessive concerns about performance or competence;[22]
- Excessive generalized or specific fears or worry.[23]

CONCLUSION

The possible impact of a child client's development on the outcome of a case cannot be overstated. Deviations from normal development can be either the cause or the effect of the subject matter of a particular case: the "delinquent" child's slow development may lead him to act in some way because he does not completely understand the consequences of his actions; abuse or neglect might result in some abnormality in development; a child's proper custodial placement may rely on the relative capacities of the contending caregivers to administer to a child's need; the comparison of a child client's development with "normal" milestones may even assist a trier of fact in determining the damages at issue in tort litigation.

The importance of child development in so many areas of law suggests that attorneys, whether in a representative capacity or sitting on the bench, must be aware of the basic milestones and common deviations from those norms. Hopefully, this article not only will provide a bare bones reference for child development norms, but also will motivate the reader to pursue more comprehensive treatment of this subject matter elsewhere.

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[1]At least, it certainly should be.

[2]*See* Elizabeth S. Scott & Thomas Grisso, *The Evolutions of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 174 (1997).

[3]This is especially so with regards to the impact of developmental issues on older children and adults. There is, however, a continually growing focus on young child development, as well as a corresponding increase in interest in early diagnosis and intervention in cases of developmental deviance or diability. *See* Jan L. Culbertson & Diane J. Willis, *Introduction to Testing Young Children, in* TESTING YOUNG CHILDREN: A REFERENCE GUIDE FOR DEVELOPMENTAL, PSYCHO-EDUCATIONAL, AND PSYCHOSOCIAL ASSESSMENTS 1 (Jan L. Culbertson & Diance J. Willis eds., 1993).

The Product of such study has been the emergence of two primary perspectives regarding the nature of child development. *See* Mary L. Perry & Cecil R. Reynolds, *Develomental Theory and Concerns in Personality and Social Assessment of Young Children, in* TESTING YOUNG CHILDREN: A REFERENCE GUIDE FOR DEVELOPMENTAL, PSYCHO-EDUCATIONAL, AND PSYCHOSOCIAL ASSESSMENTS 1 (Jan L. Culbertson & Diance J. Willis eds., 1993) (noting the conflicting concepts of continuous and discontinuous development); LAURA E. BERK, INFANTS, CHILDREN AND ADOLESCENTS 6-7 (2d ed. 1996) (same). For a more in-depth but introductory level discussion of competing theories on child development, it is best to turn to one of the many texts on the subject. *See, e.g.*, HELEN BEE, THE DEVELOPING CHILD 3-27 (6th ed. 1992); BERK, *supra* note 3, at 2-32; HOWARD GARDNER, DEVELOPMENTAL PSYCHOLOGY 493 (2d ed. 1982) (summarizing theory labels and directing to relevant portions of text); JEROME M. SATTLER, ASSESSMENT OF CHILDREN 37-59 (3D ED. 1992). One perspective considers child development to be a discontinuous series of step-like changes in the child. These changes are often referred to as stages. *See* Perry & Reynolds, *supra* note 3, at 31-38 (discussing Jean Piaget's cognitive

development stages, Sigmund Freud's psychosexual stages, and Erik Erikson's psychosocial stages of ego develoment). The contrary foundational theory on development is that a child grows and matures in a continuous, "ever-evolving" manner. *See* Perry & Reynolds, *supra* note 3, at 38-41 (discussing Bandura and social learning theory, life-span perspectives, and interactional systems approach).

The primary categories of child development have been labeled variously as physical, motor skills/coordination, educational, intellectual, language, social, emotional, and moral. *See* Culbertson & Willis, *supra* note 3, at 7; *See generally* BERK, *supra* note 3. This article will focus on the combined areas of development known as cognitive/language and social/emotional. However, it is also worth taking some time to become acquainted with the physical and sensorimotor areas of development. *See*, e.g., STANLEY I. GREENSPAN, THE CLINICAL INTERVIEW OF THE CHILD 61-77 (2d ed. 1991); Nancy Bayley, *The Development of Motor Abilities During the First Three Years*, 1 MONOGRAPHS OF THE SOCIETY OF RESEARCH IN CHILD DEVELOPMENT (1935).

[4]For example, when preparing a delinquency defense, it is "vital when evaluating violent children... to obtain a comprehensive history of perinatal difficulties, accidents, injuries and illnesses." Pavlos Hatzitaskos et al., *The Documentation of Central Nervous System Insults in Violent Offenders*, JUV. & FAM. CT. J. 29, 30 (1994).

[5]For an authoritative discussion of clinical assessment models and methods likely to be used by the psychological professional conducting a child client's psychological/developmental assessment, *See* SATTLER, *supra* note 3. *See also* MICHAEL J. BREEN & THOMAS S. ALTEPETER, DISRUPTIVE BEHAVIOR DISORDERS IN CHILDREN 65-163 (1990) (discussing questionnaires, measurement devices, observation techniques, and treatments for behavior disorders such as, attention deficit hyperactivity disorder, conduct disorder, and oppositional defiant disorder); TESTING YOUNG CHILDREN: A REFERNCE GUIDE FOR DEVELOPMENTAL, PSYCHOEDUCATIONAL, AND PSYCHOSOCIAL ASSESSMENTS 1 (Jan L. Culbertson & Diance J. Willis eds., 1993).

[6]Make certain to inquire about the past in addition to the current state of each category.

[7]*See, e.g.*, BREEN & ALTEPETER, *supra* note 5, at 221-225; GREENSPAN, *supra* note 3, 229-230; SATTLER, *supra* note 3, at 418-19, 426-27, 440-41; Joel Nigg, What to Consider in a Child Assessment (March 1, 1997) (unpublished assessment guide, on file with authors).

[8]*See* Brandt F. Steele, *The Psychology of Child Abuse*, 17 WTR FAM. ADVOC. 19, 22 (1995).

[9]Consider also a thorough chart compiled by Dr. Greenspan illustrating age-appropriate physical functioning (neurological, sensory, and motor), relationship patterns, emotional states, and affects/expressions for children ages birth through ten years. *See* GREENSPAN, *supra* note 3, at 61-77.

[10]For a more elaborate discussion of prenatal and infant development, *See*, for example, George W. Hynd & Margaret Semrud-Clikeman, *Developmental Considerations in Cognitive Assessment of Young Children*, *in* TESTING YOUNG CHILDREN: A REFERENCE GUIDE FOR DEVELOPMENTAL, PSYCHO-EDUCATIONAL, AND PSYCHOSOCIAL ASSESSMENTS 1 (Jan L. Culbertson & Diance J. Willis eds., 1993).

[11]The information compiled in the cognitive/language section is a mere fraction of that found in a number of authoritative texts. *See e.g.*, BEE, *supra* note 3, at 205-336; BERK, *supra* note 3, at 208-245, 312-351, 420-463, 546-581; GARDNER, *supra* note 3, at 67, 167; GREENSPAN, *supra* note 3, at 61-77.

[12]The information compiled in this list of emotional/social milestones is also a small, but representative portion of that found in a number of texts. *See e.g.*, BERK, *supra* note 3, at 246-283, 352-393, 464-507, 582-623; BEE, *supra* note 3, at 337-488; GARDNER, *supra* note 3, at 462, 468, 523 (addressing, among other theories, Damon's authority and obedience recognition and Kohlber's moral reasoning); GREENSPAN, *supra* note 3, at 61-77.

[13]*See* Perry & Reynolds, *supra* note 3, at 43-48.

[14]*See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 83-85 (4th ed. 1994) (hereinafter DSM-IV). ADHD is found in approximately three to five percent of school-age children. *See* id. at 82. For a discussion of the etiology and developmental course of attention deficit hyperactivity disorder, *See* BREEN & ALTEPETER, *supra* note 5, at 11-23.

[15]For example, it would be age-appropriate for a two year-old child to become restless or attempt to move around when asked to sit still for hours at a time.

[16]*See* DSM-IV, *supra* note 14, at 90-91. Conduct disorder is found in six to sixteen percent of boys and two to nine percent of girls. *Id.* For a discussion of the etiology and developmental course of conduct disorder, including associated aggression and delinquency, *See* BREEN & ALTEPETER, *supra* note 5, at 23, 33-37.

[17]Twenty to 35 percent of adolescents experience a mild level of depression, while twelve to fifteen percent become moderately depressed, and five percent endure a severe bout of depression. *See* BERK, *supra* note 2, at 610.

[18]*See* DSM-IV, *supra* note 14, at 327.

[19]Approximately twenty percent of children develop an extreme anxiety. *See* BERK, *supra* note 2, at 496.

[20]*See* DSM-IV, *supra* note 14, at 110.

[21]*See* DSM-IV, *supra* note 14, at 413.

[22]*See* DSM-IV, *supra* note 14, at 434.

[23]*See* DSM-IV, *supra* note 14, at 407, 435.

Related Readings:

Promoting Positive Relationships Between Parents and Young Children When There are Two Homes (1996) is a 43 page 5" x 8" pamphlet directed at divorcing parents of infants and toddlers. It should be read not only by divorcing parents but also by judges and friends of the court who need to be aware of the impact of their decisions on the well-being of very young children.

The content

- outlines the importance of relationships for the normal development of very young children
- indicates what parents need to provide for emotional growth at various ages
- makes suggestions about parenting when the child spends time in two homes
- describes what behavior is characteristic of infant/toddlers at three ages (0-6 months, 7-18 months, and 19-36 months)
- provides guidelines for recommended length and frequency of contact at various ages

Three types of situations are outlined and recommendations made for each level and age:

- transitional situations where the child and/or parents are not prepared to handle typical shared parenting time, where there has been little previous contact, young children who are particularly sensitive to change, or parents who are experiencing difficulty with communication and teamwork
- typical readiness of most parents and children
- exceptional situations in which parental teamwork and child resilience are strong.

Overnights and contacts for more than 8 hours are not recommended for infants and toddlers under 18 months of age.

An appendix summarizes determination of custody and parenting time under the Child Custody Act and the role of the friend of the court. Selected readings for parents and for professionals are included.

Copies may be obtained for $2 each from Children's Charter of the Court of Michigan, 324 N Pine Street, Lansing, MI 48933. Tel: (517) 482-7533.

Guidelines For Assessing Parenting Capabilities In Child Abuse And Neglect Cases (1985) is directed at court-ordered assessments with respect to custody. Although relevant for any such assessment, the guidelines were developed with special reference to infants of parents with mental illness and mental impairment. Currently under revision, this 28 page 8 "" x 11" pamphlet covers court procedure, the needs of an infant and relevant parenting capabilities, and the assessment process. The questions to be asked to determine risk to the infant are outlined and the criteria for recommending termination of parental rights stated. A checklist is provided.

Copies may be obtained for $5 each from Michigan Association for Infant Mental Health, Kellogg Center #27, Michigan State University, East Lansing, MI 48824. Tel: (517) 432-3793.

Case Law Update: January 1-27, 2014

Cases of Interest

U.S. Supreme Court

Adoptive Couple v. Baby Girl,
570 U.S., (2013). 2013 Lexis 4916; WL 3184627.

Topic: Indian Child Welfare Act

Facts: A South Carolina couple sought to adopt a child whose biological father was an enrolled member of the Cherokee Nation. The Oklahoma biological father was in the military at the time he learned of the child's adoption. He contested the adoption by invoking the Indian Child Welfare Act (ICWA) on the grounds that he was not properly notified pursuant to ICWA's provisions.

Court Proceedings: The South Carolina Supreme Court upheld the removal of the 2 year old girl ("Baby Veronica") from her adoptive parents. The biological father was given custody of the child in December 2011. In October 2012, the adoptive couple petitioned the Supreme Court of the United States. In January 2013, the court granted *certiorari*.

The adoptive couple filed a cert petition with the U.S. Supreme Court to address (1) Whether a non-custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law; and (2) Whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state rules to attain legal status as a parent. The case was heard in April 2013. In June 2013, the Supreme Court held that a non-custodial father did not have rights under the ICWA and remanded the case back to South Carolina. Specifically, § 1912(f) does not apply to a parent who has never had custody of the child; that §1912(d) regarding remedial efforts only applies when there is an existing parent/child relationship; and that §1915(a) preference for an Indian couple for adoption do not apply when there is no alternative party seeking to adopt the child. In July 2013, the South Carolina trial court finalized the adoption of the child to the adoptive couple. The Oklahoma Supreme Court prohibited the adoption and issued a stay preventing the child from immediate transfer from the father's custody to the adoptive parents. In September 2013, the stay was lifted and the child was given to the adoptive parents. In October 2013, the father dropped his appeals. In November 2013, the adoptive parents filed a lawsuit in Oklahoma against the father and Cherokee Nation for court costs.

Michigan Supreme Court

In Re Sanders, SC 146680, COA 313385

Topic: One Parent Doctrine

The question presented in this case is whether the application of the one-parent doctrine violates the due process or equal protection of un-adjudicated parents.

Facts: A child was born in September 2011 and tested positive for drugs. The baby was removed from its mother and placed with the father. In November 2011, the Department of Human Services requested that the baby and a second older child be removed from the father. The father was on probation for a domestic violence conviction and subsequently tested positive for cocaine. The worker also received reports that the parents spent time together using drugs and that the father was allowing the mother to have contact with the children. At the adjudication, the mother entered a plea of no contest. The father requested a jury trial. The jury trial was never held because DHS dismissed the allegation that it had made against him in its amended petition. At the dispositional review hearing, the court applied the One-Parent Doctrine and ordered the father to comply with a service plan.

Court Proceedings: The father's attorney made a motion for return of both children to the father in September 2012. The motion was denied by the trial judge. The father filed an application for leave to appeal with the Court of Appeals which was denied. The father then sought leave to appeal in the Supreme Court which was granted on April 5, 2013.

In re COH, ERH, JRG, KBH,
SC 147515, COA 309161

Topic: Juvenile Guardianship

This case presents the following questions:

1. Whether the Court of Appeals erred in holding that there is a preference for relatives under MCL 712A.19c(2) when a circuit court decides whether to create a juvenile guardianship after parental rights have been terminated;
2. If such a preference exists, whether the paternal grandmother was entitled to that preference where her son's parental rights to the children had been terminated;
3. Whether the Court of Appeals erred by not applying a clear error standard of review to the Muskegon Circuit Family Division's determination of the children's best interests pursuant to MCL 712A.19c;
4. Whether the circuit court erred by using the best interests factors enumerated in MCL 722.23 of the Child Custody Act in deciding whether to grant the petition for a juvenile guardianship; and
5. Whether the Court of Appeals erred by reversing the circuit court on the ground that it was improper to compare the foster parents with the proposed guardian, or erred on any other basis?

Facts: Four children were removed from their mother and placed into foster care in a non-relative placement. The trial court terminated the parental rights of two different fathers, but not the mother. The trial court found that statutory grounds existed to terminate the mother's rights; however, it was not in the children's best interests. A second petition was filed against the mother. The mother and the prosecutor agreed that the mother would enter a plea of no-contest to the second petition and that it was in the children's best interest to terminate her rights. If the plea were accepted, the prosecutor would agree that the children would not be committed to MCI until after the trial court ruled on paternal grandmother's pending guardianship petition. The trial court denied the guardianship petition. It determined that it was in the children's best interest to remain with their foster parents who had already filed a petition to adopt the children. The paternal grandmother requested consent from the MCI superintendent to adopt the children. This consent was denied. She then filed a motion under MCL 710.45(2) and this motion was denied.

Court Proceedings: The Court of Appeals declined to review MCI's denial of the grandmother's request to adopt. The court found the issue to be moot because the children were no longer wards of MCI following its decision. Further, the grandmother represented that she would dismiss her adoption petition if her guardianship was granted.

Porter and Porter v Hill, SC 14733; COA 306562

Topic: Grandparent Visitation

The questions presented in this case are as follows:

1. hether the parents of a man whose parental rights to his minor children were terminated prior to his death have standing to seek grandparenting time with the children under the Child Custody Act, MCL 722.21 *et. seq.* and;
2. Whether the term "natural parent" in MCL 722.22(d) and (g) is the equivalent of "legal parent" or "biological parent".

Facts: Paternal grandparents sought a court order to have grandparenting time with their son's children. The son was divorced from the children's mother and his parental rights were terminated. The son did continue to pay child support until his death.

Court Proceedings: The trial court held that the grandparents did not have a right under the Child Custody Act to seek visitation. The trial court found that the grandparents access to visitation is based upon the parental rights of the son that were terminated in denying their request. The Court of Appeals upheld the trial court citing the lack of standing to sue for grandparenting time under the Child Custody Act.

In re AJR, Minor, SC 147522, COA 312100

Topic: Step-parent Adoption

The questions presented are as follows:

1. Whether the Court of Appeals properly interpreted the statutory phrase "the parent having legal custody of the child" in the stepparent adoption statute MCL 710.51(6) as necessarily referring to "*the*" sole parent with legal custody;
2. Whether the phrase "legal custody" in Section 51(6) is synonymous with the concept of joint custody in the authority as to the important decision affecting the welfare of the child;

3. If the Court of Appeals did not err in interpreting the statute, what, if any, remedy is available to the petitioners in this case that is consistent with the general purposes of the Adoption Code, MCL 710.21a?

Facts: Parents were divorced. The mother had sole physical custody. The father was granted parenting time. The Mother remarried and the step-father filed a petition to terminate the father's parental rights and to allow the step-father to adopt. The trial court found that the father failed to provide child support, visit or communicate with the child during the two years before the filing of the petition. The trial court terminated the father's rights and granted the step-father's petition to adopt.

Court Proceedings: The COA reversed the trial court findings. It held that since the mother did not have sole legal custody, she could not file a petition to terminate the father's parental rights under MCL 710.51(6). The Supreme Court accepted the case on appeal.

Court of Appeals

Lauren Furneaux vs. Sally Miller & Morrice Lengemann & Miller, P.C., COA 316623

Topic: Attorney Responsibility

The Lapeer County Circuit Court denied Defendant's Motion for Summary Disposition when it held that where an attorney for a parent is informed of incidents of suspected child abuse, the attorney has voluntarily assumed the duty to render advice for the benefit of the child and has the duty to advise the parent to take affirmative action and to report the allegations to Child Protective Services, as a matter of law. The Court allowed a malpractice case brought by the child's estate against the attorney to proceed where a person suspected of the child abuse later killed the child.

In re Cullen Alexander Tiemann SC 145416, April 3, 2013; COA 303813; 306407

Topic: Sex Offender Registry

Facts: A 15 year old boy entered a plea of no contest to a charge of third-degree criminal sexual conduct involving a victim between the ages of 13 and 16. He filed a motion to withdraw his plea, in part, based on his lack of knowledge that his plea would result in having to register under the Sex Offenders Registration Act (SORA). He was placed on in-home probation for six months. He appealed the order of disposition.

Court Proceedings: The trial court held a subsequent hearing to address whether the boy could meet the burden of establishing consent by the victim in order to avoid the SORA registration. The subsequent hearing was based on the amendment to SORA that allows a juvenile to be excused from registration under certain circumstances if the juvenile can establish that the victim had consented. The trial court found at that hearing that he had not met his burden and that he was not exempt from SORA registration requirements.

In re Morris, 300 Mich App 95 (2013); SC 146993; COA 312248, March 21, 2013

Topic: Indian Child Welfare Act

Court Proceedings: The Supreme Court reversed an order terminating the father's parental rights and remanded the case back to the trial court because the trial court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA). On remand, the trial court received evidence in order to comply with the ICWA requirements. As part of the evidence, the caseworker testified that she received a letter from the Cherokee Nation. The tribe requested additional information that she was unable to ascertain. The father's attorney asked for an adjournment to attempt to find the information requested by the tribe. The referee denied the adjournment and made findings that there was no indication that the child was a member or eligible for membership in any Native American tribe and recommended termination of parental rights. The trial court approved the findings of the referee. The father appealed the termination and argued that the caseworker failed to adhere to the Bureau of Indian Affairs guidelines or ICWA. The COA held that the petitioner is only required to send information that is reasonably known to it and does not have to locate information that the father himself could not find. Once the petitioner and the trial court satisfied their obligations under ICWA and the trial court determined that a child is not eligible for membership in an Indian tribe, the burden shifted to the father to prove that ICWA still applies. Since the father failed to meet this burden, the trial court was correct in its assessment that ICWA did not apply to the facts of this case and the court affirmed termination

of the father's parental rights. An application for leave to appeal to the Supreme Court was denied because it was not persuaded that the questions presented should be reviewed by the court.

In re Moss, 301 Mich App 76 (2013); COA #311610, May 9, 2013

Topic: Best Interest Factors

Facts: A mother filed an appeal arguing that it was not in the children's best interest to terminate her parental rights.

Court Proceedings: The COA held that the preponderance of the evidence standard is the evidentiary standard that applies to a best interest determination in a termination hearing. In 2008, the legislature amended the statute to remove the word "clearly" from the part of the law that deals with best interest in termination proceedings. By removing the word "clearly", the clear evidence standard is not applicable. The COA affirmed the trial court's decision to terminate the mother's parental rights. Leave for application to the Supreme Court was denied.

In re Harper, 302 Mich App.349 (2013) COA 309478, August 29, 2013

Topic: Expungment from Central Registry

Facts: A 17 year old mother was placed on the central registry after her baby came to the attention of the trial court for failure to thrive. The mother engaged in services and the trial court closed the case.

Court Proceedings: At the time of case closure, the trial court ordered that the mother's name be removed from the registry by the Department of Human Services. The COA vacated the trial court's order and remanded the case back to the trial court. The COA found that DHS has exclusive jurisdiction in maintaining and removing persons from the central registry per MCL 722.627. Since the trial court did not have jurisdiction to enter an order removing the mother's name from the registry, she needed to exhaust her administrative remedies to remove her name before she could seek relief from the trial court.

Ashlee Book-Gilbert v Jerry Ryan Greenleaf and Healther McCallister and Angela Tyndall, 302 Mich App 538; COA 308755, September 26, 2013

Topic: Grandparent Visitation

Facts: A paternal grandmother filed a motion for grandparent visitation pursuant to MCL 722.27b. The trial court denied her motion and relied on the "fit parent presumption" to allow a relative guardian the right to determine whether grandparent visitation would continue. The guardian subsequently refused to allow the visits.

Court Proceedings: The COA held that the trial court's holding is contrary to the plain language of MCL 722.27b(4)(b) which grants "fit parents" a presumption with regard to the denial of grandparenting time. Since the legislature did not include a presumption to "custodians" or "guardians" of a grandchild, the court held that to permit the guardian or custodian to derive the benefit of the fit-parent presumption, the statute would need to be rewritten. The COA found that the trial court erred by allowing the guardian to step into the shoes of a "fit parent" and remanded the case for additional proceedings consistent with its opinion.

In the Matter of Laster, COA 315028 & 315521, December 26, 2013)

Topic: Parenting Time

Facts: A mother appealed the termination of her parental rights based on the denial of parenting time prior to the filing of a petition to terminate her parental rights.

Court Proceedings: The COA held that the trial court has discretion to decide the amount and conditions of parenting time following adjudication and before the filing of a petition to terminate parental rights. The COA found that the trial court is not required to find harm before denying visitation; however, "such a finding is usually implicit in the court's decision".

In the Matter of Dearmon/Harverson-Dearmon, Minors, COA 314459 & 316653, January 14, 2014

Topic: Evidence Obtained After Petition Filed Used to Terminate Rights

The primary question presented in this case was whether evidence obtained after a termination petition has been filed and served may be presented at an adjudication trial.

Facts: The caseworker filed a petition to terminate the mother's rights. The petitioner filed an amended petition that was never authorized by the court or served on the parent. A second amended petition was authorized but not served on respondent-mother.

Before a jury trial, the court read the factual allegations contained in the second amended petition aloud to the parties. None of the parties were aware that the second amended petition had not been served on the parent. The new allegations related to the respondent having a jailhouse conversation with her boyfriend who was in jail for domestic violence.

The prosecutor introduced the audiotapes of the conversation to counter the parent's credibility.

Court Proceedings: The COA found that since the mother was served with the original petition and a summons, personal jurisdiction was established. The petitioner's preparation and filing of the amended petitions did not invalidate the personal jurisdiction that had already been obtained by the court merely by the filing of the amended petitions.

The court held that as long as the evidence conforms to the rules of evidence; the parties have notice of the evidence, and the evidence is relevant to prove or defend a statutory ground for termination; it is potentially admissible at an adjudication trial despite that the evidence involves post-petition facts. The COA affirmed the trial court's decision to terminate the mother's rights.

Legislative Update

by William Kandler, Cusmano Kandler & Reed
Lobbyist for Children's Law Section

As the calendar turns to a new year, the attention in the Capitol turns to the proposed budget that the Governor must submit each year in early February. We are all accustomed to hearing and reading about the dire circumstances of the state's finances. For at least the last decade, all of the talk has been about what the governor will propose cutting from the budget. Because for most of the several past years the anticipated shortfall has been quite large, the proposed, and then enacted, cuts have been large enough that they had to be taken primarily from those portions of the budget where one would find most of the money. So, large cuts have been made over the years to such areas as K-12 education, higher education, revenue sharing to cities, villages and townships and to essential services such as mental health care.

Tight budget years require legislators to make some tough decisions. Do they decide to make cuts to areas that they might find important and deserving, or, instead, do they decide to raise more revenue in order to keep certain budget priorities whole? For the past couple of decades, there has been little appetite for raising revenue (tax increases!) so spending cuts have been the favored approach to budget balancing. This approach is without a doubt less than satisfying to most legislators but posting votes to make cuts "across the board" and "sharing the pain" in lean years are relatively easy to explain to constituents who advocate for more dollars in any of the several budget categories.

This year, things are different! The news coming out of the January Revenue Estimating Conference is that the current fiscal year (which ends September 31, 2014) will end with a sizable surplus. And, future years should see continued growth in revenue! After years of managing shrinking or stagnate revenue flows, legislators are suddenly faced with the "problem" of how to handle a surplus! And this does become a "problem" for legislators. Instead of cutting the budget, the thorny question of what to do with/about the extra revenue becomes a serious dilemma. There is no shortage of ideas. Should the state increase funding for education? And if more dollars are to go to education, how much to K-12 and how much to higher education? Should the cuts to local units of government (which help fund police and fire units) be restored? Should mental health services cuts be partially restored? Should Michigan invest some of this newly available money in its crumbling roads? Or, should the "extra" money simply be returned to taxpayers in the form of tax cuts? And of course, there are many other ideas that at least a portion of the legislators deem worthy.

More money to spend might seem, at first blush, like a positive development for public office holders who will be facing election this year. However, the increased revenue is not enough to satisfy all interested parties and forces the issue of tax cuts to the surface. You can expect that the budget writing process this year will be more difficult this year than is has been in the more lean years. It will be interesting to watch as these confliction priorities play out over the next several months.

The legislature will find time to consider issues other than the budget also. We are certain that there will be another effort (actually within the budget for the Department of Human Services) to close all or some of the three state operated Juvenile Justice facilities in Michigan. Some in the legislature argue that the state could save significant dollars by using private contracted entities for these services. The Children's Law Section has been skeptical of this approach and will no doubt weigh again on that discussion.

At the request of the Children's Law Council, Representative Rudy Hobbs has introduced HB 4356 which would establish in statute a list of factors to be considered in child welfare proceedings. Not surprisingly, several interested parties, the Courts, DHS, prosecutors and others, have expressed an interest in shaping this legislation. Rep. Hobbs formed a workgroup of the interested parties. From the workgroup discussions, several modifications were agreed to. We are now awaiting a revised version of the bill that the workgroup will review. We hope to get this legislation moving soon.

One last priority for the Council that is in active discussion is SB 736. This bill, which is an initiative of the Children's Law Council would clarify in statute how the courts can consider a parent's use of medical marijuana in child welfare proceedings. The Children's Law Council participated in a recent discussion of this bill with several interested parties and representatives of the office of bill sponsor Senator Rick Jones. The result of this meeting was a broad agreement on some amendments to the bill. Senator Jones, who is also Chair of the Senate Judiciary Committee will likely schedule this bill for committee action very soon.

Legislation that the Children's Law Section is monitoring:

4050 PA 0038'13	**Sponsor** Kenneth Kurtz Children; protection; children's ombudsman to investigate victims of child abuse or neglect; expand criteria to include children who have died as a result of child abuse or neglect. Amends secs. 5a, 6, 7, 8 & 9 of 1994 PA 204 (MCL 722.925a et seq.).
4060	**Sponsor** Jeff Irwin Children; adoption; second parent adoption; provide for. Amends secs. 24, 41 & 51, ch. X of 1939 PA 288 (MCL 710.24 et seq.).
4064 PA 0199'13	**Sponsor** Kurt Heise Courts; records; digital court records and electronically filing court papers; allow. Amends secs. 832, 859, 1427, 2137 & 8344 of1961 PA 236 (MCL 600.832 et seq.); adds secs. 1426 & 1428 & repeals 1949 PA 66 (MCL 780.221 - 780.225).
4199	**Sponsor** Sean McCann Children; protection; mandatory reporting requirements for child abuse or child neglect; expand to include coaches and school volunteers. Amends sec. 3 of 1975 PA 238 (MCL 722.623).
4206	**Sponsor** Harvey Santana Criminal procedure; youthful trainees; eligibility criteria for youthful trainee program; modify. Amends sec. 11, ch. II of 1927 PA 175(MCL 762.11).
4294	**Sponsor** Harvey Santana Criminal procedure; youthful trainees; assigning youthful trainee status; allow multiple times. Amends sec. 11, ch. II of 1927 PA 175 (MCL 762.11).
4356	**Sponsor** Rudy Hobbs Family law; child custody; factors determining best interest of the child for permanency decisions by agency and court; provide for. Amends 1939 PA 288 (MCL 710.21 - 712A.32) by adding sec. 19d to ch. XIIA.
4366	**Sponsor** Fred Durhal, Jr Labor; fair employment practices; job applications; eliminate reference to felony conviction. Creates new act.
4385	**Sponsor** Dian Slavens Human services; foster parents; foster care parents bill of rights act; create. Creates new act.
4388	**Sponsor** Al Pscholka Human services; services or financial assistance; family independence assistance program group's compliance with compulsory school attendance; require in order to receive assistance. Amends sec. 57b of 1939 PA 280 (MCL 400.57b).
4524	**Sponsor** Gail Haines Occupations; health care professions; health care professionals to wear identification cards; require, and regulate advertising. Amends sec. 16221 of 1978 PA 368 (MCL 333.16221) & adds sec. 16221a.

4583 Oppose	**Sponsor** Joel Johnson Children; parental rights; immediate termination of parental rights and visitation rights for parent or legal guardian upon sentencing for criminal sexual conduct or other sex crimes; allow. Amends sec. 19b, ch. XIIA of 1939 PA 288 (MCL 712A.19b).
4584 Oppose	**Sponsor** Joel Johnson Family law; parenting time; immediate termination of a grandparenting time order upon sentencing for certain criminal sexual conduct; allow. Amends sec. 7b of 1970 PA 91 (MCL722.27b).
4589	**Sponsor** Kurt Heise Children; adoption; adoption of children in foster care by foster parents; clarify. Amends secs. 41, ch. X of 1939 PA 288 (MCL710.41) & adds sec. 42 to ch. X.
4606	**Sponsor** Gail Haines Juveniles; truancy; family division of the circuit court to notify secretary of state of truancy disposition; provide for. Amends 1939 PA 288 (MCL 710.21 - 712A.32) by adding sec. 2f to ch. XIIA. TIE BAR WITH: HB 4607'13"
4646 Support	**Sponsor** Mike Shirkey Children; adoption; temporary placement, consent, and release; provide for general revisions. Amends secs. 23d, 29 & 44, ch. X of 1939 PA 288 (MCL 710.23d et seq.).
4647 Support	**Sponsor** Margaret E. O'Brien Children; adoption; supervisory period for infants less than 1 year of age placed for adoption; modify. Amends sec. 56, ch. X of1939 PA 288 (MCL 710.56).
4648 Oppose	**Sponsor** Kenneth Kurtz Children; adoption; termination of rights of putative father; clarify. Amends sec. 39, ch. X of 1939 PA 288 (MCL 710.39).
4649	**Sponsor** Kevin Cotter Human services; foster parents; resource families bill of rights; create. Amends sec. 3 of 1994 PA 203 (MCL 722.953) & adds sec. 8a.
4650	**Sponsor** Ben Glardon Children; other; children's ombudsman to investigate violations of resource families bill of rights law; require. Amends secs. 2, 5a & 6 of 1994 PA 204 (MCL 722.922 et seq.). TIE BAR WITH: HB 4649'13
4659 Oppose	**Sponsor** Robert L. Kosowski Family law; paternity; responsible father registry; create. Amends1978 PA 368 (MCL 333.1101 - 333.25211) by adding secs. 2892, 2892a, 2892b, 2892c, 2892d & 2892e.
4660	**Sponsor** Mike Shirkey Children; adoption; process by which putative fathers are identified or located in adoptions; revise. Amends secs. 22, 31 & 36, ch. X of 1939 PA 288 (MCL 710.22 et seq.). TIE BAR WITH:HB 4659'13
4661 Oppose	**Sponsor** Cindy Denby Children; adoption; registration with the responsible father registry in order to receive notice of certain proceedings; require. Amends sec. 33, ch. X of 1939 PA 288 (MCL 710.33). TIE BAR WITH: HB 4659'13

4662 Oppose	**Sponsor** Eileen Kowall Children; parental rights; notice to putative father regarding certain hearings; revise. Amends sec. 37, ch. X of 1939 PA 288(MCL 710.37).
4701	**Sponsor** Eileen Kowall Criminal procedure; probation; probation and youthful trainee status revocation; require for violation of the ferrous metal and nonferrous metal regulation and scrap metal offenders registration act. Amends sec. 12, ch. II & sec. 4a, ch. XI of 1927 PA 175(MCL 762.12 & 771.4a). TIE BAR WITH: HB 4699'13""
4719	**Sponsor** Sean McCann Crimes; other; leaving minor children without appropriate supervision; provide penalties. Amends sec. 135a of 1931 PA 328 (MCL750.135a).
4720	**Sponsor** Sean McCann Criminal procedure; sentencing guidelines; description of crimes involving leaving child unattended; amend. Amends sec. 16g, ch. XVII of 1927 PA 175 (MCL 777.16g). TIE BAR WITH: HB 4719'13
4806	**Sponsor** Joe Haveman Criminal procedure; sentencing; life offense where accused is a minor; revise factors to consider. Amends 1927 PA 175 (MCL 760.1- 777.69) by adding sec. 33 to ch. IX.
4807	**Sponsor** Al Pscholka Juveniles; criminal procedure; criteria for waiving jurisdiction over juvenile to adult court or disposition; revise. Amends sec. 18, ch. XIIA of 1939 PA 288 (MCL 712A.18). TIE BAR WITH: HB 4806'13
4808	**Sponsor** Margaret E. O'Brien Crimes; penalties; mandatory life imprisonment for certain crimes; eliminate to reflect United States supreme court decision in Miller v Alabama. Amends secs. 16, 18, 200i, 204, 207, 209, 210, 211a, 316, 436, 520b & 543f of 1931 PA 328 (MCL 750.16 et seq.). TIE BAR WITH: HB 4806'13
4893 Support	**Sponsor** Margaret E. O'Brien Children; protection; central registry records; require certain notifications to recipients regarding expungement, limit maintenance of records to 10 years, and add certain individuals to the list of those who may receive the confidential record. Amends secs. 2, 7 & 8d of 1975 PA 238 (MCL 722.622 et seq.).
4927 Oppose	**Sponsor** Andrea M. LaFontaine Children; adoption; licensure of child placing agency that objects to placements on religious or moral grounds; allow. Amends 1939 PA 280 (MCL 400.1 - 400.119b) by adding sec. 5a.
4928	**Sponsor** Kenneth Kurtz Children; adoption; objection to placements by child placing agency based on religious or moral convictions; allow. Amends secs. 23b, 23d, 23e & 46, ch. X of 1939 PA 288 (MCL 710.23b et seq.).
4940	**Sponsor** Kenneth Kurtz Children; protection; provision related to compensation for members of task force on prevention of sexual abuse of children; eliminate. Amends sec. 12b of 1975 PA 238 (MCL 722.632b).
4991	**Sponsor** Tom Leonard Children; adoption; objection to placements by child placing agency based on religious or moral convictions; allow. Amends1973 PA 116 (MCL 722.111 - 722.128) by adding sec. 14e. TIE BAR WITH: HB 4927'13, HB 4928'13

5004	**Sponsor** Pam Faris Crimes; homicide; second degree child abuse; include in felony murder statute. Amends sec. 316 of 1931 PA 328 (MCL 750.316).
5007	**Sponsor** Sam Singh Tobacco; retail sales; electronic cigarettes; prohibit sale to or use of by minors. Amends title & secs. 1, 2 & 4 of 1915 PA 31 (MCL722.641 et seq.).
5012	**Sponsor** Eileen Kowall Crimes; prostitution; minors engaged in prostitution; create presumption of coercion under certain circumstances. Amends sec. 451 of 1931 PA 328 (MCL 750.451). TIE BAR WITH: HB 5026'13
5018	**Sponsor** Tom Leonard Criminal procedure; expunction; requirement for attorney general review of a set-aside application; eliminate. Amends sec. 1 of1965 PA 213 (MCL 780.621).
5019	**Sponsor** Joel Johnson Juveniles; criminal procedure; requirement for attorney general review of a set-aside application; eliminate. Amends sec. 18e, ch. XIIA of 1939 PA 288 (MCL 712A.18e).
5026	**Sponsor** Kurt Heise Juveniles; other; court jurisdiction over dependent juveniles in danger of substantial physical or psychological harm; allow. Amends sec. 2, ch. XIIA of 1939 PA 288 (MCL 712A.2). TIE BAR WITH: HB 5012'13
5038	**Sponsor** Kenneth Kurtz Children; services; child welfare caseloads; codify. Amends 1939 PA 280 (MCL 400.1 - 400.119b) by adding sec. 18f.
5039	**Sponsor** Kenneth Kurtz Children; protection; duties of children's ombudsman; expand. Amends secs. 4, 5a, 6 & 10 of 1994 PA 204 (MCL 722.924 et seq.).
5153	**Sponsor** John J. Walsh Courts; judges; salary formula for judges; modify. Amends secs. 304, 555, 821& 8202 of 1961 PA 236 (MCL 600.304 et seq.).
5154	**Sponsor** Tom Leonard Criminal procedure; preliminary examination; certain rules and procedures for conducting a preliminary examination; revise. Amends secs. 4, 7, 11a, 11b & 13, ch. VI of 1927 PA 175 (MCL 766.4 et seq.). TIE BAR WITH: HB 5155'13
5155	**Sponsor** John J. Walsh Courts; district court; probable cause conferences in felony and misdemeanor cases; clarify district court's jurisdiction. Amends secs. 8311 & 8511 of 1961 PA 236 (MCL 600.8311 & 600.8511) & repeals sec. 2167 of 1961 PA 236 (MCL 600.2167). TIE BAR WITH: HB 5154'13
5156 PA 0205'13	**Sponsor** Mike Shirkey Courts; judges; court of claims exceptions to trial by court without jury; provide for under certain circumstances. Amends sec. 6421 of 1961 PA 236 (MCL 600.6421).
5158	**Sponsor** Kurt Heise Law enforcement; other; human trafficking commission; create. Creates new act.
5190	**Sponsor** Dan Lauwers Criminal procedure; habitual offenders; use of certain prior juvenile offenses for purposes of determining status as habitual offender; allow. Amends secs. 10, 11, 12 & 13, ch. IX of 1927 PA 175 (MCL 769.10 et seq.).
5198	**Sponsor** Michael D. McCready Labor; mediation; access to certain case files for use in human services employee disciplinary proceedings; allow without a court order. Amends sec. 7 of 1975 PA 238 (MCL 722.627).

5208	**Sponsor** Andy Schor Juveniles; truancy; family division of the circuit court to notify secretary of state of truancy disposition; require. Amends 1939 PA 288 (MCL 710.21 - 712B.41) by adding sec. 2f to ch. XIIA. TIE BAR WITH: HB 5209'14
5209	**Sponsor** Andy Schor Traffic control; driver license; issuance of driver license to students not in compliance with school district truancy policy; prohibit. Amends secs. 303 & 319 of 1949 PA 300 (MCL 257.303 & 257.319). TIE BAR WITH: HB 5208'14
5238	**Sponsor** Eileen Kowall Criminal procedure; expunction; set-aside of certain criminal records for victims of human trafficking; provide for. Amends secs. 1, 2 & 4 of 1965 PA 213 (MCL 780.621 et seq.).
5239	**Sponsor** Kenneth Kurtz Children; protection; department of human services to report suspected child abuse or child neglect involving human trafficking to law enforcement; require. Amends sec. 3 of 1975 PA 238 (MCL 722.623).
5272	**Sponsor** Tom Hooker Children; protection; videorecorded statements; allow to be used in child protective services hearings, increase fines for improper release of, and require to retain for certain period of time. Amends sec. 17b, ch. XIIA of 1939 PA 288 (MCL 712A.17b). TIE BAR WITH: HB 5270'14, HB 5271'14
0044 PA 0002'13	**Sponsor** Rick Jones Criminal procedure; sex offender registration; placement on the public registry; remove certain exceptions. Amends sec. 8 of 1994 PA 295 (MCL 28.728).
0074	**Sponsor** Glenn Anderson Education; discipline; cyberbullying to be defined and addressed in anti-bullying policy; require, and require certain reporting. Amends sec. 1310b of 1976 PA 451 (MCL 380.1310b).
0135	**Sponsor** Rick Jones Crimes; criminal sexual conduct; age of consent for sexual contact between school employee and student; revise. Amends secs. 520d & 520e of 1931 PA 328 (MCL 750.520d & 750.520e).
0144	**Sponsor** Glenn Anderson Mental health; guardians; guardianship petitions for developmentally disabled minors; allow the court to schedule certain hearings before the minor turns 18 years of age. Amends secs. 609, 614 & 618 of 1974 PA 258 (MCL 330.1609 et seq.).
0165 PA 0057'13	**Sponsor** James Marleau Health facilities; hospitals; policy regarding life-sustaining or nonbeneficial treatment; require policy be disclosed in writing upon request and provide to parent or guardian if it applies to a minor or ward. Amends 1978 PA 368 (MCL 333.1101 - 333.25211) by adding pt. 204.
0170	**Sponsor** Bert Johnson Criminal procedure; youthful trainees; eligibility criteria for youthful trainee program; modify. Amends sec. 11, ch. II of 1927 PA 175(MCL 762.11).
0176	**Sponsor** David Hildenbrand Mental health; guardians; guardianship petitions for developmentally disabled individual; allow the court to schedule a hearing before the individual turns 18 years of age. Amends secs. 609, 614 & 618 of 1974 PA 258 (MCL 330.1609 et seq.).
0177	**Sponsor** David Hildenbrand Probate; guardians and conservators; guardianship petitions; allow probate judges to schedule certain hearings prior to minor turning 18 years of age. Amends secs. 5303 & 5306 of 1998 PA 386 (MCL 700.5303 & 700.5306).
0254	**Sponsor** David Robertson Children; parental rights; process for judicial waiver of parental consent requirement; clarify. Amends secs. 3 & 4 of 1990 PA 211(MCL 722.903 & 722.904).

0304	**Sponsor** Tonya Schuitmaker Education; attendance; local truancy policies; require adoption and implementation by schools and prosecutors. Amends sec. 1599 of 1976 PA 451 (MCL 380.1599) & adds sec. 1590.
0305	**Sponsor** Tonya Schuitmaker Juveniles; truancy; family division of the circuit court to notify secretary of state of truancy disposition; provide for. Amends 1939 PA 388 (MCL 710.21 - 712A.32) by adding sec. 2f to ch. XIIA. TIE BAR WITH: SB 0306'13
0306	**Sponsor** Tonya Schuitmaker Traffic control; driver license; certain school attendance requirements to maintain driver license; establish. Amends secs. 303 & 319 of 1949 PA 300 (MCL 257.303 & 257.319). TIE BAR WITH: SB 0305'13
0318	**Sponsor** Rick Jones Corrections; parole; parole of certain juvenile offenders; allow under certain circumstances. Amends sec. 34 of 1953 PA 232 (MCL791.234). TIE BAR WITH: SB 0319'13
0319	**Sponsor** Rick Jones Criminal procedure; sentencing; procedures for determining whether juvenile convicted of murder should be sentenced to imprisonment without parole eligibility; provide for. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding secs. 32 & 33 to ch. IX. TIE BAR WITH: HB 4808'13, SB 0318'13
0457	**Sponsor** Rebekah Warren Children; adoption; second parent adoption; provide for. Amends secs. 24 & 51, ch. X of 1939 PA 288 (MCL 710.24 & 710.51).
0519	**Sponsor** John Proos Civil procedure; other; fines, costs, and other indebtedness to courts; require SCAO to establish a database, and require civil litigants to check database before paying or collecting on a judgment. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 1477.
0520	**Sponsor** Judith Emmons Crime victims; restitution; restitution orders for crime of nonpayment of support; clarify. Amends sec. 165 of 1931 PA 328 (MCL 750.165).
0521	**Sponsor** Judith Emmons Family law; child support; authority of friend of the court to issue subpoenas for show cause and notice to appear; allow, and provide for other general amendments. Amends secs. 31, 32, 33, 37, 44 & 45 of 1982 PA 295 (MCL 552.631 et seq.) & adds sec. 36.
0522	**Sponsor** Bruce Caswell Family law; child support; certain fees; repeal. Repeals secs. 14a & 23 of 1952 PA 8(MCL 780.164a & 780.173).
0523	**Sponsor** Mike Nofs Family law; child support; qualified individual retirement accounts; include in financial institutions data match. Amends sec. 2 of 1982 PA 295 (MCL 552.602). TIE BAR WITH: SB 0524'13, SB 0525'13
0524	**Sponsor** Mike Nofs Civil procedure; garnishment; retirement accounts; subject accounts that are levied upon for child support to garnishment. Amends sec. 6023 of 1961 PA 236 (MCL600.6023). TIE BAR WITH: SB 0523'13, SB 0525'13
0525	**Sponsor** Mike Nofs Family law; child support; qualified individual retirement accounts; include in financial institutions data match. Amends sec. 1 of 1971 PA 174 (MCL 400.231). TIE BAR WITH: SB 0523'13, SB 0524'13
0526	**Sponsor** Bruce Caswell Family law; child support; assignments of support process; modify. Amends sec. 5d of1982 PA 295 (MCL 552.605d).

0527	**Sponsor** Bruce Caswell Civil procedure; costs and fees; fees for actions involving child custody, support, or parenting time; require payment at time action is filed. Amends sec. 2529 of 1961 PA 236 (MCL 600.2529).
0528	**Sponsor** Mike Nofs Gaming; lottery; distribution of lottery winnings for child support arrearages; update to reflect payment to the state disbursement unit. Amends sec. 32 of 1972 PA 239(MCL 432.32).
0529	**Sponsor** Bruce Caswell Family law; child support; allocation and distribution determination authority; modify. Amends sec. 3 of 1971 PA 174 (MCL 400.233).
0530	**Sponsor** Bruce Caswell Family law; friend of the court; powers and duties of office of child support; modify, and provide other general amendments. Amends secs. 9, 12, 13, 15, 22 & 26 of 1982 PA 294 (MCL 552.509 et seq.).
0537	**Sponsor** Glenn Anderson Health; occupations; tattooing, branding, or body piercing of minors; prohibit under the age of 16 and require body art facility maintain signed consent forms for at least 1 year. Amends sec. 13102 of 1978 PA 368 (MCL 333.13102).
0584	**Sponsor** Judith Emmons Criminal procedure; indictment; statute of limitations for child sex trafficking or commercial sexual exploitation of children offenses; eliminate. Amends sec. 24, ch. VII of 1927 PA 175 (MCL 767.24).
0585	**Sponsor** Mike Nofs Crimes; prostitution; minimum age of person committing certain prostitution-related crimes; increase, and prohibit local units of government from enacting or enforcing ordinances that establish a lower minimum age except under certain circumstances. Amends title & secs. 448, 449 & 450 of 1931 PA 328(MCL 750.448 et seq.) & adds secs. 451b & 451c. TIE BAR WITH: SB 0586'13
0586	**Sponsor** Tory Rocca Courts; probate court; jurisdiction of probate court over individuals less than 18 years of age who commit certain prostitution-related crimes; provide for. Amends sec. 2, ch. XIIA of 1939 PA 288 (MCL 712A.2) & adds sec. 11a to ch. XIIA. TIE BAR WITH: SB 0585'13, SB 0587'13
0587	**Sponsor** Vincent Gregory Children; services; counseling program for children found to be victims of human trafficking; provide for. Amends sec. 4c of 1994 PA 203 (MCL 722.954c).
0588	**Sponsor** Mark Jansen Criminal procedure; defenses; affirmative defense for victims of human trafficking; provide for in certain criminal prosecution. Amends 1927 PA 175 (MCL 760.1 - 777.69) by adding sec. 21d to ch. VIII.
0589	**Sponsor** Bruce Caswell Children; parental rights; grounds for termination of parental rights; expand to include certain victims of human trafficking. Amends sec. 19b, ch. XIIA of 1939 PA 288 (MCL 712A.19b).
0590	**Sponsor** John Proos Civil procedure; civil actions; human trafficking; allow victims to sue violators for damages. Creates new act.
0591	**Sponsor** John Proos Criminal procedure; expunction; setting aside criminal conviction on grounds of being a victim of human trafficking; allow under certain circumstances. Amends secs. 1, 2 & 4 of 1965 PA 213 (MCL 780.621 et seq.).
0592	**Sponsor** John Proos Human services; medical services; victims of human trafficking to receive medical and psychological care; establish. Amends 1939 PA 280 (MCL 400.1 - 400.119b) by adding sec. 109m.

0593	**Sponsor** Rebekah Warren Children; foster care; consideration within foster care system for minors who may be victims of human trafficking; allow. Amends 1994 PA 203 (MCL 722.951 - 722.960) by adding sec. 4e.
0594	**Sponsor** Judith Emmons Local government; other; local regulation of adult entertainment business employees act; create. Creates new act.
0595	**Sponsor** Michael Green Taxation; other; adult entertainment tax act; create and impose. Creates new act.
0596	**Sponsor** David Robertson Law enforcement; other; human trafficking board; create. Creates new act.
0597	**Sponsor** Rebekah Warren Health; occupations; training requirements for medical professionals regarding human trafficking; implement. Amends secs. 16148 & 17060 of 1978 PA 368 (MCL 333.16148 & 333.17060).
0598	**Sponsor** Thomas Casperson Crimes; definitions; definition of racketeering; include enticing away a female under 18 years of age. Amends sec. 159g of 1931 PA 328 (MCL 750.159g).
0599	**Sponsor** Goeffrey Hansen Crimes; criminal sexual conduct; use of internet or computer system to solicit prostitute less than 21 years of age; prohibit. Amends sec. 145d of 1931 PA 328 (MCL 750.145d).
0600	**Sponsor** Rick Jones Criminal procedure; warrants; installation, placement, monitoring, and use of wiretapping or electronic monitoring device; allow in execution of search warrant. Amends sec. 1 of 1966 PA 189 (MCL 780.651) & adds sec. 1a. TIE BAR WITH: SB 0601'13
0601	**Sponsor** Rick Jones Criminal procedure; warrants; request by prosecutor to use wiretapping or electronic monitoring device; allow. Amends sec. 539d of 1931 PA 328 (MCL 750.539d). TIE BAR WITH: SB 0600'13
0602	**Sponsor** Joseph Hune Criminal procedure; sex offender registration; definition of tier II offender; revise to include crime of soliciting prostitute. Amends sec. 2 of 1994 PA 295 (MCL 28.722).
0628	**Sponsor** Tonya Schuitmaker Crime victims; statements; delivery of victim statement by parents of a minor; allow under certain circumstances. Amends sec. 2 of 1985 PA 87 (MCL 780.752).
0705	**Sponsor** Rick Jones Courts; records; recording of hearing involving minor; require to be maintained pursuant to supreme court rules. Amends sec. 17a, ch. XIIA of 1939 PA 288 (MCL 712A.17a).
0717	**Sponsor** Rebekah Warren Property; other; property owners associations; prohibit from adopting rules prohibiting child care centers. Amends title of 1973 PA 116 (MCL 722.111 - 722.128) & adds sec. 16a.
0736	**Sponsor** Rick Jones Children; protection; in child protection cases with a parent or guardian who has certain prescribed medication; revise determination process of whether the parent or guardian is competent to continue custody of the child. Amends sec. 13a, ch. XIIA of 1939 PA 288 (MCL 712A.13a).
0743	**Sponsor** Arlan Meekhof Occupations; attorneys; voluntary membership in state bar; establish. Amends sec. 901 of 1961 PA 236 (MCL 600.901).

Upcoming Events

The Children's Law Section invites all members to actively participate in our events and meetings. We also welcome members to notify us of announcements and items of interest to our membership. If you would like something included in future editions, please notify the section chairperson.

Council Meetings

Meetings are held on the third Thursday of each month.

All meetings are held at the State Bar of Michigan, 306 Townsend, Lansing, MI unless otherwise announced. Changes will be posted on the State Bar of Michigan Children's Law Section website in advance when made.

Meetings start at 5:00 p.m.

Children's Law Section members who are not Council members are welcome to attend all Council meetings. If you are not a Council member and wish to attend, please contact the Chairperson, Christine Piatkowski, at piatkowski.law @chartermi.net, in advance so that appropriate accommodations can be made for space and food.

Annual Conference

Arrangements are being made to hold the Children's Law Section Annual Conference in October 2014. The conference will feature guest speakers on a variety of child welfare and juvenile delinquency topics. The event promises to be the best yet with new information, tips, trends and items of interest. Watch for announcements in the next few months and plan to join us in the fall.

Annual Meeting

The Children's Law Section will be hosting its annual business meeting with guest speaker on Thursday, September 18, 2014 at the State Bar Annual Meeting in Grand Rapids. Everyone is invited to attend. The event is currently scheduled from 9:00 a.m. until 11:00 a.m. Stay tuned for more details.

Upcoming Events Around Town

- **April 16-17, 2014**-The State Court Administrative Office is sponsoring "Working Towards Wellness in Child Welfare: Exploring Practices to Promote Well-Being, Safety and Permanency". Contact Heather Leidi at (517) 373-5322 for more information.
- **May 14, 2014**-The State Court Administrative Office is sponsoring "Client Engagement for Child Welfare Professionals". Contact Heather Leidi at (517) 373-5322 for more information.
- **May 22-23, 2014**-The Govenor's Task Force on Child Abuse and Neglect is sponsoring the 18th Annual Govenor's Task Force on Child Abuse and Neglect Summit. Contact Jennifer Vorce at (517) 241-6131 for more details.
- **June 4, 2014**-The State Court Administrative Office is sponsoring "Staying Up When Things are Down: Self-Care Strategies for Child Welfare Professionals". Contact Heather Leidi at (517) 373-5322 for more information.
- **June 11-14,2014-** The American Professional Society on the Abuse of Children is holding its 2014 Colloquium in New Orleans, Louisiana. For more information, go to *www.apsac.org*.

Join a Subcommittee

Members are invited to participate in a number of standing subcommittees. The Children's Law Section has the following standing subcommittees for your consideration:

1) Legislative 2) Amicus 3) Education and 4) Bylaw. Additional subcommittees are in the process of being developed. If you are interested in participating in a subcommittee, please contact the Chairperson, Christine Piatkowski, at *piatkowski.law@chartermi.net*.

The Michigan Child Welfare Law Journal Call for Papers

The editorial board of *The Michigan Child Welfare Law Journal* invites manuscripts regarding current issues in the field of child welfare. 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 5,000 words). The deadline for submission is June 27, 2014. Manuscripts should be submitted electronically to *kozakiew@msu.edu.* Inquiries should be directed to:

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