2009 RAM CONFERENCE
Contributed by Paul Jacokes, RAM Vice-President

The 25th annual RAM Conference is history. A good time was had by all attending. We had great speakers, (thanks to Mark Sherbow, et. al.), great accommodations (thanks to Sahera Housey, et. al.) and great weather (thanks to the powers that be). There were negatives. There were too few of us attending (thanks to the economy), the girls won Trivial Pursuit on Thursday night (thanks to the guys with truly trivial minds staying away) and our fearless leader, Art Spears, was ill and unable to attend (thanks to those powers again). In general, we all went home a little tired, a little more educated and happy that we had gone.

On Wednesday afternoon, Kimberly Alyn spoke to us about different personality types and how to deal with them. The rest of the week, we referred to each other as analytical/drivers, amiable/expressives, amiable/drivers or analytical/expressives. Then there were those of us who were amiable/amiables (the nice guys) or the driver/drivers (watch out for them!). It was a positive, energizing way to start the conference.

Wednesday evening we had dinner together in the dining room at the top of the hotel with a panoramic view of Grand Traverse Bay. We were joined by many past presidents including Wayne Kristall, our first President. For those who stayed for sunset, it was spectacular.

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Next RAM Board Meeting:
State Bar of Michigan Annual Meeting – Hyatt Regency - Dearborn, Michigan
September 17, 2009 (Exact location/time TBA)

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On Thursday, our first speaker was Paul Fischer from the Judicial Tenure Commission. He put the fear of God into us, or at least the fear of the ethics code. Mr. Fischer updated us on the most recent cases and gave us a better understanding of the do’s and don’ts.

Judge Tracey Yokich of Macomb County Circuit Court followed with a very interesting presentation on the history of Selfridge Air Base and the current state of the law with regards to military personnel. As an aside, we learned that Lt. Selfridge was the first military casualty of an air crash and, more important to our daily work, we were shown what to look at and where on a military pay stub to determine active military status.

Thursday afternoon, C. Dennis Simpson provided us a lot of worthwhile information on drug and alcohol abuse and what can be done about it. He had a lot of scary statistics and solid suggestions that we could use.

As is traditional, Thursday saw one contingent go golfing, and the other go shopping. I can only attest for the latter, and it was terrific. Traverse City has a beautiful downtown area with a number of nice shops. A group of us wandered in and out all afternoon. The golfers had a nice day, until later when it got a bit nippy. There were no complaints from the winners, Adrian Spinks, Vince Walicka, Sahera Housey and Libby Blanchard. Congratulations!

Friday morning, we had breakfast together in the wonderful dining room at the top of the hotel. What a breathtaking view. We had our business meeting and returned to the conference room for our last presentation. Judge John Gadola of Genesee County Circuit Court talked to us about the Juvenile Drug Court he operates in Genesee County Family Court and shared his successes and failures. We learned about some of the facilities available for placement and some of the steps he has taken to make the Court more responsive.

After Judge Gadola’s presentation, the 2009 Awards were handed out. The President’s Award for service to RAM went to Linda Weiss of Midland County. Erin Magley was given the RAM Service to the Board Award. Vince Walicka received the RAM Outstanding Recognition Award and the Outstanding Board Member Award went to Ron Foon. Finally, the Active Member Award went to Peggy Odette.

It was a great three days, worthy of our 25th year. We are discussing changes we can make to attract more people to next year’s conference. We hope to see you then.

-- Paul Jacokes, RAM Vice-President, submitted June 16, 2009

Please enjoy the many photos from the 2009 RAM Conference in Traverse City, later in this edition of the Quarterly!
The issue of surrogate motherhood hit the headlines in 1986 with the legal battle over the child known as “Baby M.” In a landmark case before the New Jersey Supreme Court, Mary Beth Whitehead and William Stern argued over the parental rights and custody of the child born as result of a surrogate parenting contract brokered by Dearborn attorney Noel Keane. Whitehead, who for a fee of $10,000.00, had agreed to become pregnant with Stern’s child through artificial insemination and to then terminate her parental rights, changed her mind and asked the court to invalidate the contract and award her custody of the child. The Court, in a unanimous opinion, invalidated the contract finding it to be the equivalent of the “sale of a child.”

Two years after the ruling in Baby M, a California couple, Mark and Crispina Calvert, entered into a surrogacy contract with Anna Johnson. While the Baby M case involved what is known as “traditional” surrogacy, where the surrogate supplies the egg and the womb and is genetically related to the child, the Johnson/Calvert contract involved “gestational” surrogacy, a process where the embryo is implanted in the surrogate who then gives birth to a child who is genetically unrelated to her. In the Johnson/Calvert case a dispute arose between the parties when Johnson was 6 months pregnant and both sides filed legal actions. Reaching the opposite conclusion from that in Baby M, the California Supreme Court held the contract to be valid, enforceable and not contrary to public policy. The Johnson Court was faced with an additional issue not found in Baby M: who was the child’s legal mother. Recognizing that both “genetic consanguinity and giving birth” were means of establishing maternity, the Court found that when the two did not coincide “she who intended to procreate the child” (Calvert) becomes the legal mother.

Baby M is now twenty three years old. The Johnson/Calvert child is now legally an adult. Yet, it is still these two cases, with their widely divergent results, which are cited when discussing the issue of surrogate motherhood. In contrast to other reproductive issues, such as abortion, the United States Supreme Court has never ruled on the issue, despite the fact that numerous constitutional issues have been raised in the surrogacy debate. Equally divergent and void of certainty are state laws on the issue. While the media flurry associated with the Baby M case resulted in 72 surrogacy bills being introduced in 26 states and the District of Columbia during the 1987 legislative session, by the time the Johnson v Calvert case was decided in the California Court, only 14 states and the District of Columbia had actually enacted laws on surrogacy.

No further legislation was passed until 1999 and since that time only Texas and Utah have passed legislation on the issue. Thus, today there is no federal legislation regarding surrogacy and only 17 states and the District of Columbia have enacted laws covering this issue. Of these 18 jurisdictions, approximately one half in some manner ban or void surrogacy contracts, while the remainder of the states regulate them in varying fashions. Yet despite the lack of comprehensive legislation and the wide divergence in legal precedents, surrogacy has continued to grow with an estimated 28,000 surrogate births since 1976.

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Amongst the jurisdictions that ban surrogacy, Michigan’s statute (MCL 722.853 et seq.), passed shortly after the Baby M decision, imposes the harshest penalties. While Michigan law declares both commercial and non-commercial surrogacy contracts to be void and unenforceable, criminal penalties apply only to commercial contracts. Parties to a contract that involves compensation may be found guilty of a misdemeanor punishable by 1 year imprisonment and/or $10,000.00 in fines; while a third party who brokers such a contract may be found guilty of a felony punishable by up to 5 years in prison and/or $50,000.00 in fines. In a challenge brought by the ACLU, the Michigan Court of Appeals upheld the statute; however, neither the United States nor Michigan Supreme Court has ever ruled on its constitutionality and no further challenges have been reported.

Several attempts have been made since the Baby M case to establish either Uniform or Model State Surrogacy Laws. The 1988 Uniform Status of Children of Assisted Conception Act (USCACA) which contained two separate versions of a bill on surrogacy (one version regulating surrogacy agreements through a judicial review process and the other voiding such contracts) proved to be a failure as only two states adopted either of the proposals. In 2000 the Commissioners again attempted to regulate surrogacy by including within the provisions of the Uniform Parentage Act (UPA) a procedure for judicial approval of surrogacy agreements and for determining parentage rights and child support. Like its predecessor, the UPA has done little to regulate surrogacy as only two states, Texas and Utah, have adopted its surrogacy provisions. The American Bar Association, which recently addressed the issue of surrogacy in its adoption of the Model Act Governing Assisted Reproductive Technology, offers states two alternate versions of proposed surrogacy legislation. Alternative A, which applies both to traditional and gestational surrogacy agreements, requires judicial pre-approval; while Alternative B, which applies only to gestational surrogacy agreements, does not if certain standards (including age, medical, legal, psychological and financial criteria) are met. Both versions also provide for enforcement and dispute resolution concerning custody issues.

As this discussion indicates, while the technologies associated with assisted reproductive techniques advance and the numbers of surrogate births grow, legislation lags behind. As a result, the ‘parents’ who supply either the eggs, sperm or pre or post natal homes play a game of hopscotch seeking friendly jurisdictions that allow them to create engineered families. The children born of these techniques are often left in legal limbo not only in cases where custodial disputes arise such as Baby M and the Johnson case, but where legal issues such as inheritance, immigration and nationality are also at issue. As the number of surrogate births will continue to rise, states such as Michigan, should look to the ABA Model Act for guidance in creating a more just, workable and comprehensive statutory scheme.

Contributed by Shelley R. Spivack, J.D., M.A. Genesee County Family Court Referee
25th ANNUAL RAM CONFERENCE
PARK PLACE HOTEL, TRAVERSE CITY,
MICHIGAN

MAY 20, 21, 22, 2009

RAM Annual Conference
May 20 - 22, 2009
Traverse City, Michigan

Checking in!

Kimberly Alyn

Paul Jacokes & Nancy Thane
Group Dinner at the top of the Park Place Hotel, overlooking the Grand Traverse Bay

Ken Randall & Mark Sherbow

Wayne Kristall & Vince Welicka
Recognizing Jon Ferrier

Past Presidents of RAM:
Mark Sherbow, Wayne Kristall, Ken Randall, Ron Foon, Jon Ferrier, Vince Welicka
Wayne greeting a new generation of referees…

Hospitality Room and Trivial Pursuit!

Macomb County Judge Tracey Yokich & Kathy Oemke
Paul Fischer & Mark Sherbow

Enjoying the Park Place & Traverse City

Conference Sessions

Sushi!
We missed you, Art!

Ready to roll!

The Golf Scramble winners!
Vince Walicka, Libby Blanchard, Adrian Spinks, and Sahera Housey.
Vince Walicka & Paul Jacokes

Judge John Gadola from Genesee County

Erin Magley & Paul Jacokes

See you next year!
DOMESTIC RELATIONS

Unthank v Wolfe __Mich__ (2009) #138172 4/24/09 vacated the portion of the Court of Appeals decision (#284182 12/23/08) that the temporary guardianship, which Plaintiff’s filed after Defendant had revoked her consent to their proposed adoption of the child, was not valid and as Plaintiffs were not related to the child they lacked standing to file for custody. However, the Court upheld the balance of the Court of Appeals opinion, i.e. that while many of the custody factors weighed in favor of the temporary guardians, they did not overcome the presumption in favor of a fit parent by clear and convincing evidence.

Although Plaintiff was granted sole legal and physical custody and the ability to move without seeking permission, the court in Brausch v Brausch __Mich App__ (2009) #282985 4/14/09 found that the provision in the judgment waiving the requirement to obtain court permission to change domicile was void as it was contrary to the court rule requiring permission of the court before changing the child’s domicile out of state. However, the trial court tacitly granted the Plaintiff permission to move to Canada when it denied Defendant request for an ex-parte order prohibiting the move. The court improperly denied the change of Domicile and granted change custody after considering the move to be a change in circumstances when the matter was heard over a year after Plaintiff had moved.

Although Defendant claimed that the Arbitrator only awarded her 25% of the marital property while also making her responsible for 75% of the debt, the Court in Washington v Washington __Mich App__ (2009) # 281174 5/12/09 upheld the Divorce Judgment based upon the arbitration award of property and a settlement of custody, parenting time and spousal support following mediation. While Defendant received $177,428 less in assets than Plaintiff, the arbitrator found that this was an equitable award of property. Defendant’s excessive credit card spending and use of the home’s equity dissipated the marital assets to an extent greater than $100,000. The dental practice awarded to Plaintiff was reduced by the $33,500 per year non-modifiable spousal support for 4 years and $2897 per month child support to be paid from his earnings to Defendant, and Defendant also has $212,500 from a personal injury settlement which was for non-economic damages, considered a separate asset.
JUVENILE LAW

The Supreme Court reversed the Court of Appeals, In re Hall __Mich__(2009) #138312 6/3/09, reinstating the trial courts decision terminating respondent’s parental rights. The Court of Appeals, in a 17 page unpublished opinion (# 285683 1/29/09) extensively reviewing the evidence and determined that it “did not establish clear and convincing evidence that the children would likely suffer harm or abuse if returned” home. Respondent had prior protective service cases due to her ex-husband’s abuse of the 2 oldest children and her later failure to follow through on services for her son’s mental illness; the petition was filed when she waited 3 weeks to report her current’s husband’s fondling of a 9 year old daughter, who told worker that she had reported previous incidents to respondent. The Court of Appeals cited the children’s desire to return home with their mother and testimony of a friend of respondent who is a psychotherapist, while moderating the testimony of Petitioner’s witnesses. The Supreme Court that the Court of Appeals “had misapplied the clear error standard by substituting its judgment for” the trial court’s, and that clear and convincing evidence supported the termination.

The problems of fully implementing the “one family-one judge” concept in Family Division was addressed in In re A.P. and B.J., Minors __Mich App__(2009) #286431 5/5/09 The child’s (B.J.) mother had custody pursuant to a Paternity order of filiation, but 2 years later the child was removed from her home pursuant to a petition alleging that she physically abused both of her daughters. The court took jurisdiction, and eventually one child was placed with her father at a dispositional review hearing as he had complied with the court’s requirements while the mother had only partially complied. The father then filed a motion for change of custody in the Juvenile case, and after considering the parent’s and child’s attorney’s arguments, the court awarded the parents joint legal custody and granted sole physical custody. The court then conducted a dispositional review and permanency planning hearing and dismissed jurisdiction over the child BJ. Upon appeal, the Court of Appeals held that the trial court, as part of a circuit court’s family division which is presiding over a juvenile case has jurisdiction to address related actions under the Child Custody Act but must follow the procedural and substantive requirements of the Act. Because the trial court failed to determine whether there was an established custodial setting and determine the appropriate burden of proof, and failed to make findings of fact regarding the custody factors based on the available evidence, the custody order was vacated.

Although Respondent in In re Rood __Mich__(2009) # 136849 4/2/09 was “less-than-ideal parent” and shared responsibility for his lack of communication with DHS and the court, he was denied minimal due process as he had provided his current address and phone numbers to the CPS worker when he was released from jail but notice of the preliminary hearing, proposed ISP, again provided his address and phone number at the 1st disposition hearing but improper notice was again given for the 2nd disposition, review, and permanency planning hearings were mailed to an incorrect address and no notice was sent for the 2nd review hearing.
STATUTES, COURT RULES, AND ADMINISTRATIVE MEMORANDUM

2009 PA 15 HB 227 effective 4/9/09, MCL 772.871 et seq, the Guardianship Subsidy Act, was renamed the Guardianship Assistance Act and amended to comply with recent changes to Section IV-E of the Social Security Act to allow for Federal funding. A child is eligible if removed from home due to a judicial determination that to remain in there would be contrary to the child’s welfare, the child resided with the licensed foster parent who is the prospective guardian for at least 6 consecutive months and steps were taken to determine that reunification or adoption are no appropriate permanency options. Further, the child must have a strong attachment to the prospective guardian and the prospective guardian has a strong commitment to permanently caring for the child; if the child is at least 14 years old, he or she must be consulted regarding the proposed guardianship. The guardian must be the child’s relative or custodian, was the child’s licensed foster parent for at least 6 consecutive months and has passed criminal background and Central Registry checks.

If the guardian and child are eligible, a Guardianship Assistance Agreement is negotiated for the amount of financial support for the child and need-based adjustments, the procedure to obtain additional services, and reimbursement of up to $2000 in non-recurring expenses of obtaining legal guardianship. The child may still be eligible for state funded assistance if not eligible for IV-E funding. The act also allows placement of the child’s sibling with the same relative, and funding if agreed appropriate between DHS and the relative. The agreement does not require state residency, guardianship assistance shall not exceed the prospective foster care maintenance payment, assistance eligibility shall be determined in 30 days and shall be reviewed annually by DHS.

Where a child’s Permanency Plan includes guardian placement and assistance payments, DHS shall include in the child’s case service plan the steps taken to determine inappropriateness of reunification or adoption, reason for separation of any siblings, the reason guardianship is in the child’s best interests, how the child is eligible for guardianship assistance payments, efforts made to discuss adoption by the prospective guardian and documented reasons adoption was not pursued, and if parental rights have not been terminated, efforts made to discuss the guardianship assistance arrangement with the child’s parents or why efforts to discuss the same were not made.

The Guardianship must be judicially created pursuant to MCL 712A.19A and 712,19C, be permanent and self-sustaining, and transfer to the guardian the parental right to protect, provide education for, and care and control the child, and give the guardian custody of and decision making for the child.

2009 PA 17 amends MCL 400.115g et seq modifying the Adoption Subsidy Act to comply with IV-E standards and revises the eligibility requirements for adoptive parents to receive support subsidies from DHS. The maximum subsidy must equal the rate the child received, or would have received, in family foster care placement. The Act requires an Adoption Assistance Agreement which includes services or assistance provided pursuant to the agreement and provisions to protect the child’s interests if the adoptive parent moves out of state. Conditions for continuation of adoption assistance payments through age 21 are revised to require DHS to certify the child has special needs before the child’s 18th birthday and before the filing of the adoption petition, and payments of adoption assistance to a guardian through state funding are required.
2009 PA 28 Amends MCL 780.752 et seq Allows restitution to be based on replacement value when fair market value is impractical or impossible to determine.

Michigan Court Rule Amendments effective July 1, 2009:

MCR 3.901 Renumbers references to other sections.

MCR 3.903 Adds the definition of, and references to, juvenile guardianship.

MCR 3.921 Requires notice in juvenile guardianship proceedings to: Children 11 years and older, DHS, Parents whose right haven’t been terminated, juvenile guardian, other court’s with jurisdiction over the child, parties attorneys, prosecuting attorney, tribal leader if child is affiliated with a tribe, and other persons directed by the court.

MCR 3.965 Allows screening for concurrent planning eligibility at the preliminary hearing.

MCR 3.975 Requires review of concurrent plan, if applicable, in post dispositional hearings.

MCR 3.976 During a permanency planning hearing, the court must obtain the child’s view of the plan in an age appropriate manner. If child will not be returned home, the court must consider in-state and out-of-state placement, and if placed out-of-state the court must determine whether the placement continues to be appropriate and in the child’s best interest. The court must ensure that the agency is providing appropriate services to assist a child transitioning from foster care to independent living. If the child is in foster care under state responsibility for 15 of last 22 months, the court shall order the agency to initiate termination proceedings within a specific time no less than 42 days of the order unless: the child is cared for by relatives; or, the plan documents a compelling reason that a termination petition is not in the best interest of the child, such as adoption is not an appropriate goal, lack of grounds to terminate parental rights, the child is an unaccompanied refugee minor, or there are international legal obligations or compelling foreign policy reasons precluding termination; or, if reasonable efforts to reunify the family are required, the state has not provided the child’s family with services considered necessary for the child’s safe return within the time set in the case service plan. The amendment also adds the option of juvenile guardianship to other permanency plans.

MCR 3.977 The rule no longer requires, but permits, the suspension of parenting time pending a petition to terminate parental rights. Termination now requires a finding by clear and convincing evidence that termination of parental rights is in the child’s best interest before terminating parental rights.

MCR 3.978 Includes the juvenile guardianship option in the court’s placement findings.
MCR 3.979 This new court rule governs Juvenile Guardianship procedure. If the court determines a juvenile guardianship is in the child’s best interest it must order DHS to conduct criminal background and central registry checks within 7 days and a home study in 28 days (unless one has been conducted in the last 365 days). A child in foster care shall continue in that placement and the court shall order the required information; if the information is provided already, the court may appoint the proposed juvenile guardian.

If parental rights to a child have been terminated, the court shall not appoint a guardian without written consent of the MCI superintendent and may order DHS to seek such consent, which must be filed no later than 28 days after the permanency planning hearing or post termination review hearing unless good cause is shown. A person may file a motion contesting a decision to withhold consent within 56 days of receipt of the denial setting forth specific steps taken to obtain consent and the results, and the reasons why the decision was arbitrary or capricious. The court must set a hearing date for the motion, provide notice to the MCI superintendent and all parties entitled to notice under MCR 3.921. If the court finds by clear and convincing evidence that the decision to withhold consent was arbitrary or capricious after the hearing is held the court may approve the guardianship without the MCI superintendent’s consent. The court determines the continuing necessity and appropriateness of the guardianship.

Once the court receives the ordered information it shall within 7 days enter an order or schedule a hearing; upon finding that a juvenile guardianship is in the child’s best interests, it may appoint the juvenile guardian on a SCAO approved form with a separate order for each child. The guardian shall file an acceptance of appointment on an SCAO approved form stating acceptance of appointment, submission to the court’s jurisdiction, that he or she will not delegate guardianship authority and will perform their duties. The court will then issue letters of authority with any restrictions or limitations, including prohibition of changing the child’s domicile outside of Michigan without court approval. The letters may be certified with a statement of the dated of their effect. Notice to the juvenile guardian shall be 1st class mail at the last known address in court records and any address known to the petitioner.

The court’s jurisdiction over the child under 2(b) shall be terminated after appointment of a guardian and a review hearing within 91 days of the last review hearing if the child has been removed from home 1 year or less, or 182 days of the last review if the child has been removed from home more than 1 year. The order terminating the protective proceeding terminates the lawyer GAL appointment that proceeding but the court may then reappoint the lawyer GAL in the juvenile guardianship.

The court shall conduct annual reviews commenced within 63 days of the appointment anniversary date until the juvenile guardian released by the court, and may conduct additional reviews when deemed necessary. The court shall take appropriate action if the guardian fails to file their report. When the court deems it appropriate or upon petition of DHS or an interested person, the court shall order DHS or another person to investigate the guardianship and within 28 days of the appointment file a written report, to be served on interested parties per MCR 3.921(C). The recommendation must state whether the guardianship should be continued, or modified stating the nature of the modification, and whether a hearing should be scheduled. Upon informal review of the report the court shall either deny the modification by order or set a hearing within 28 days. A discharge order shall enter upon the child’s death, & the court may schedule a hearing before entry of the order.
The juvenile guardian has all of the powers and duties under EPIC, shall file a written report on a SCAO approved form within 56 days after the appointment anniversary and other times as ordered, a copy to be served per MCR 3.921. The court shall determine if the juvenile guardian has sufficient assets under their control to require a conservatorship and if so order the guardian to petition for a conservator. The guardian must provide written notification to the court within 7 days of a change in their address, and to the court and interested parties within 14 days of the child’s death.

The court may on its own motion, or petition of DHS or the child’s lawyer GAL, conduct a hearing to revoke the guardianship; a guardian or interested person may petition to terminate the guardianship, or request to appoint a successor guardian. A hearing on revocation or termination shall be held within 28 days after the petition; the court may order temporary removal of the child to protect the child’s health safety and welfare and proceed under MCR 3.974(B). DHS shall be ordered to investigate and file, no later than 7 days prior to the hearing, a written report that includes the reasons for terminating or revoking the guardianship and any recommended temporary placement. Notice shall be given to interested persons per MCR 3.920 & 3.921 informing them of their opportunity to participate in the hearing and provide information in advance to the court, agency, lawyer GAL, and an attorney for one of the parties.

The guardianship may be revoked, if after notice and hearing a preponderance of evidence the court finds that continuation of the guardianship is not in the child’s best interests and upon finding it is contrary to the welfare of the child to be placed in or remain in the guardian’s home and reasonable efforts were made to prevent removal, the court shall revoke the guardianship. An order revoking the guardianship and placing the child under DHS care and supervision shall enter on an SCAO approved form. Jurisdiction under MCL 712A.2(b) is reinstated under the prior protective proceeding. A dispositional review hearing under MCR 3.973 or 3.978 shall be held within 42 days of revocation of the guardianship, DHS shall prepare and file a case service plan no later than 7 days prior to hearing, and subsequent hearings shall be scheduled per MCR 3.974 and 3.975.

If the court finds it is in the child’s best interest to termination of the guardianship and there is no successor, the court follows the same procedure as revocation. If there is a successor, the court shall terminate the guardianship and proceed with investigation and appointment of the successor guardian, an order terminating the guardian and appointing the successor shall enter on an approved SCAO form.

ADM FILE 2008-40 Juvenile Court Standards and Administrative Guidelines for Care of Children Eff 9/1/09 modified, which now includes degrees in related fields to Desired and Minimum Standards for employment as a Court Administrator, Supervisor, Probation Officer, and Caseworker, as well as a County Child Care Facility Administrator, Child Care Staff Supervisor, and Child Care Worker. The revised standards and guidelines allow the State Court Administrator to authorize a court to hire an employee who is given a reasonable period to meet the education standards, and provides that a degree be accredited by an accrediting body of the Council for Higher Education Accreditation.
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