In the final week of its 2011 term, the United States Supreme Court decided two companion cases that will have an important impact on how Michigan sentences juveniles tried as adults. In *Miller v Alabama* (No. 10-9646) and *Jackson v Hobbs* (No. 10-9647) (http://www.supremecourt.gov/opinions/11pdf/10-9646.pdf), the Court addressed the constitutionality of imposing mandatory sentences of life without parole (LWOP) on juveniles. In banning the imposition of mandatory LWOP sentences, the Court built on its recent precedents, *Roper v Simmons*, 543 U.S.551 (2005); *Graham v Florida*, 130 S. Ct. 2011 (2010); *JDB v North Carolina*, 131 S. Ct. 2394 (2011), to make clear that when sentencing juveniles the specifics of the crime and the child’s background must be taken into consideration.

**The Facts**

Miller and Jackson arrived at the Court with similar factual and procedural backgrounds. Kuntrell Jackson was convicted of felony murder after he and two older boys robbed a video store. One of the other boys had a gun and when the store clerk resisted his efforts to obtain money, that boy shot and killed the clerk. It was unclear whether Jackson intended this result. Nevertheless, he was charged as an adult with capital felony murder and aggravated robbery. He was convicted of both offenses and pursuant to Arkansas law was given the mandatory LWOP sentence.

After the Court decided *Roper*, Jackson filed a habeas...
petition asserting that the mandatory LWOP sentence violated the Eighth Amendment’s prohibition against cruel and unusual punishment. The state courts rejected his claims, and he appealed to the Supreme Court.

Evan Miller, who had spent time in and out of the foster care system as a result of maltreatment, was charged with murder in the course of arson after he and another boy beat a neighbor and set the man’s home on fire. Charged initially as a juvenile, he was waived into the adult court and found guilty. He, like Jackson, was 14 at the time of the crime, and like Jackson, was sentenced to a mandatory term of LWOP. The state courts affirmed his conviction.

The Certiorari Application and Briefing

Both boys, represented by Bryan Stephenson of the Equal Justice Institute, applied for Certiorari, asserting that the mandatory imposition of an LWOP sentence on a juvenile violated the Eighth Amendment’s prohibition against cruel and unusual punishment. Their petitions were granted.

Michigan Attorney General Bill Schuette was the lead author of an amicus brief on behalf of 18 states asking the Court to affirm the sentences. Schuette argued that the Court should be very reluctant to tread into this area of the law which has historically been left to the states, that the Court should leave to the democratic process the decision about whether to impose LWOP on children, that the court should be reluctant to consider international law when determining whether a consensus for or against LWOP for children exists, and finally that the Court should not impose a categorical ban on the use of LWOP sentences in cases where juveniles commit the most serious offenses. His request to participate in oral arguments was denied by the court.

The Decision

In an opinion authored by Justice Kagan, the court ruled 5 to 4 that the mandatory imposition of an LWOP sentence on a juvenile constitutes cruel and unusual punishment. In doing so, the court relied on two lines of case law. The first, Roper and its progeny, require that when making sentencing decisions, trial courts must consider the fact that juveniles are less culpable for their crimes due to their developmental immaturity. In the second line of cases, the court banned the mandatory imposition of the death penalty, requiring instead that courts consider individual aggravating factors of the crime and any mitigating factors, including the social history of the offender, which may have contributed to the commission of the crime. “[T]he confluence of these two lines of precedent,” the majority said, “leads to the
conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.”

The Court made clear that it is the mandatory nature of the sentence and not the LWOP sentence per se that offends the Constitution. That is, the court declined to address the question whether an LWOP sentence imposed on a juvenile is categorically unconstitutional. Rather, the court determined that before imposing such a sentence the trial court must hold a hearing at which it will consider the juvenile’s role in the crime and his background before imposing an LWOP sentence. “Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” The court went on to say that, “Our decision does not categorically bar a penalty for a class of offenders or type of crime. . . Instead, it mandates only that a sentence follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.”

One of the dissents stressed that the holding would foreclose a mandatory LWOP sentence even for a juvenile who was nearly 18 and who deliberately murdered an innocent victim. The majority, in a footnote, shot back that these were just the sort of facts that it would require the trial court to consider before imposing LWOP. However, the Court’s majority noted, “we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”

Impact on Michigan

The Court’s decision will have important impacts on Michigan. First, and most directly, our prisons now hold some 360 individuals given mandatory LWOP sentences when they were juveniles. Each of these individuals will likely need to be resentenced. Some of these individuals have been in prison for decades while others have only recently received their sentences. Action is underway now to prepare lawyers to handle these cases on a pro bono basis, and they will likely begin being brought forward this fall.

In addition, the legislature will likely step in and provide guidance to sen-
U.S. SUPREME COURT DECLARES “CHILDREN ARE DIFFERENT” FOR SENTENCING PURPOSES

Frank E. Vandervort is Clinical Professor of Law at the University of Michigan Law School where he co-founded the Juvenile Justice Clinic and teaches in the Child Advocacy Law Clinic. He has represented minors in juvenile court proceedings for more than 20 years and is the author of numerous articles and book chapters about the law’s impact on children.

sentencing courts in determining sentences for young people convicted of the most serious offenses. When it does so, it will want to tip the scales in favor of harsher sentences. However, the Court’s opinion, and the several cases leading up to this decision, makes clear that the Court intends for states to take seriously its directive that serious consideration be given to these young peoples’ age, their “age-related characteristics,” and “the nature of their crimes.” The Court made specific and repeated references to Miller and Jackson’s history of child maltreatment, which we have long known predisposes individuals to violent behavior. While our law has not recognized a history of abusive victimization as either an excuse or a justification for criminal behavior, it has long recognized that it may mitigate culpability and must be considered when imposing the harshest sentences. See Wiggins v Smith, 539 U.S. 510 (2003); Rompella v Beard, 545 U.S. 374 (2005). This is particularly true when the criminality is closely linked in time, as it was in these companion cases, with their victimization. The legislature should recognize this cycle of violence and should address it directly.

While the Court did not categorically rule out LWOP sentences for juveniles neither did it explicitly approve them. Thus, the possibility remains that the Court may yet confront the categorical question it left open in these cases.

Conclusion

The Supreme Court has long recognized that “death is different,” and, that before imposing the death penalty, courts must consider both the aggravating and mitigating factors at work in the particular case. In Miller, and the cases leading up to it, the Court has made clear, too, that children are different.

MAJOR CHANGES IN THE 2013 CHILD SUPPORT FORMULA

Contributed by Ron Foon, Oakland County

Sec. 1.04(E) Deviation Factors

Three new factors were added:

(18) — Child in custody of a 3rd party support recipient spends a significant number
of overnights with the payer that causes a significant savings in the 3rd party’s expenses. This was a logical addition.

(19) — The court ordered non-modifiable spousal support paid between the parents before Oct 2004. This date was prior to clarification that child support is determined prior to a spousal support obligation.

(20) — When a parent’s share of net child care expenses exceeds 50% of that parent’s base support obligation calculated under section 3.02(C) before applying the parental time offset. (Low Income equation.)

**Sec 2.01(C)(8)**

Employer contributions to pension or other retirement plans, or individual contribution to qualified private retirement plans would be considered income.

**Sec 2.01(E)**

Provisions for business owners, executives, and self-employed were updated and incorporate detailed explanations as found in the pre-2008 MCSF manual. This was done to provide more guidance in understanding the nature of funds not reported as income for income tax purposes to the individual, but otherwise available to pay child support.

**Sec 2.05(B)**

Excludes gifts, money gratuities, etc from a *spouse* as being considered income.

**Sec 2.07(E)**

Employee contributions to retirement funds can be deducted from income up to 5.5% of employee’s gross income.

**Sec 3.01 (Former 3.01(C))**

Removed $25 per month minimum order amount requirement. It was suggested that this was unrealistic in cases where one is truly indigent with subsistent income.

**Sec 3.04 (A)**

Added section (6) clarifying that a parent’s/custodian’s qualifying medical expenses include those paid with monies from a health savings account or flexible benefit account, provided that the account is funded in whole or part, with monies reported as that individual’s income.
Updated tables and schedules for economic changes.

S-3.01

Substantial Changes in Circumstances Reviews:

Sec 3.01(A) Delineates when an FOC office is not obligated to conduct the three year review pursuant to MCL 552.517(1), but must conduct a review under MCL 52.517b (9) when a party presents evidence that a substantial change in circumstances has occurred after the last support order was entered. Limits the change of circumstances for a review to factors cited in section 3.01 (B).

Sec 3.01(B) A substantial change in circumstances to warrant a review of the support amount occurs when any of the following eight situations arise:

1. Payer begins or stops receiving social security benefits (SSB).
2. Child receives SSB based on payer’s earnings record, or $50 or more reduction in those benefits.
3. Health issue affects a party’s ability to earn income for a substantial period of time.
4. A parent’s income changes by 75% or more.
5. A parent is called to active military duty for six months or more resulting in significant income reduction.
6. Significant changes in medical expenses of a party.
7. Changes in physical, mental, or educational needs of a child.
8. Significant change in financial circumstances because of a modification of the payer’s other support obligations.

S-3.02 (A) & (B)

Section added to aid in determining which parent should provide health care coverage for children. It is attempting to avoid automatically requiring both parents to provide coverage. Goal is to prevent duplicate coverage, extra costs and unnecessary enforcement action.

- Provides for alternative means of coverage when appropriate.
- Do parents agree? If not, is coverage available to either of them?
- Logical steps in determining which parent, if any, should provide coverage.

Editor’s Note: A big thank you to Ron Foon and Ken Randall for serving again as the referee representatives on SCAO’s committee to revise the child support formula.
Approximately forty-five referees gathered at the Park Place Hotel in Traverse City this May for an enlightening forum addressing a variety of topics. To kick off the conference, attendees loosened up with a presentation from Go Comedy. Referees were challenged to think quickly and listen carefully, while trying not to make a complete fool of themselves. We were also honored to welcome Director Maura Corrigan from the Department of Human Services, who updated us on budgetary issues and the challenges the department is trying to address during the current administration. A wide range of topics from food assistance to holistic approaches to juvenile justice was discussed, along with an informative question and answer period. Michelle Sunny imparted her wisdom on adolescent development and their ability to make well-reasoned decisions. Sheri Noga lent insight into how to assist parents to develop a strong bond with their children, while also setting appropriate limits and using appropriate discipline. We were delighted to have Ed Messing present his always informative case law update, as well.

During the conference members were also honored for their contributions to the organization. Congratulations go to:

- Kristi Drake, President’s Service Award for Service to RAM
- Traci Rink, Service to the Board Award
- Hon. Tracy A. Yokich, Outstanding Recognition Award
- Shelley Spivack, Active Member Award
- Paul Jacokes, Outstanding Executive Award
- Kathy Oemke, Service to the Board Award
In *Peck v Peck* _Mich_(2012) Supreme Court #145135 6/20/12, the trial court denied Defendant’s motion to change domicile to Arkansas based on a proposed lateral transfer from her employer, and instead granted a change of custody to the Plaintiff. The Court of Appeals reversed, in an unpublished case *Peck v Peck* unpublished docket #306329 3/8/12. In lieu of granting leave, the Supreme Court adopted the Court of Appeals dissent, reversed the unpublished Court of Appeals decision, and reinstated the trial court decision. While Defendant’s lateral transfer to a job in Arkansas resulted in a $2,500 increase in salary and a one-time $4,500 bonus, she would also incur $400 a month to transport the child for parenting time, and thus there was no financial improvement for the Defendant and child. Also, Defendant did not present evidence that the educational opportunities were better in Arkansas, and did not prove that the move would improve the child’s quality of life. Finally, Defendant’s proposal to transport the child one week per month was unrealistic, especially considering the time and expense for the child’s travel, as the child has ADHD and other education problems and is involved in many extra-curricular activities.

In *Clarke v Clarke* _Mich App_(2012) #303580 6/26/12, the Court of Appeals reversed a trial court’s finding that Defendant’s refusal to collect early SSA retirement benefits, in and of itself, constituted an unexercised ability to earn. The court held that where a parent declines early SSA retirement benefits in order to receive higher benefits at a later time, there is not an unexercised ability to earn and the SSA benefits cannot be imputed. However, as the trial court failed to make a finding as to the reason Plaintiff withdrew his SSA application, the Court of Appeals reversed the trial court and remanded the matter back for a finding as to the reasons he withdrew his SSA application. The Court further ruled that any modification could only be made retroactive to the date Plaintiff received notice of the motion; not the date Defendant filed the motion. The Court of Appeals affirmed the trial court’s reassignment of the dependent benefits as the judgment provisions alternating the use of the dependent was based on the assumption that each party would have the child the majority of times in alternate years.

In *Estate of Mullin v Duenas* _Mich App_(2012) #303192 4/17/12 the Court of Appeals held that the trial court had properly dismissed the deceased wife’s estate’s annulment complaint as the estate failed to overcome the strong presumption of the marriage by clear and definite proof that the decedent was of unsound mind and had no reasonable perception of the nature and effect of the marriage that she had consummated with defendant. Two days prior to naming her mother as patient advocate, the decedent, Ellen Mullin, who was hospitalized with stage 4 cancer married Defendant in the hospital. Ellen died 8 days later, at which time her family learned of her marriage and sued to annul it. The Court further held that only the defrauded spouse has standing to annul the marriage based on al-

[Continued on Page 9]
leged fraud and therefore the estate’s separate fraud count was properly dismissed.

**Frowner v Frowner _Mich App_(2012) #305704 4/26/12.** The Court of Appeals determined that a parent is entitled to a custody hearing upon filing a custody motion when a third party has custody. After the 7 year old child’s mother died, maternal grandparents and the child’s father entered a consent order granting Joint Legal custody with the grandparents having primary residence of the child until further order. The trial court denied the father’s motion without an evidentiary hearing based on his failure to show proper cause or a change of circumstances. The Court of Appeals reversed. When a third party has custody, the constitutional presumption favors custody with a parent, and the court must conduct an evidentiary hearing addressing the child’s best interest without requiring that the moving parent show proper cause or a change in circumstances.

**Mitchell v Mitchell _Mich App_(2012) #306559 3/13/12, pub 5/15/12** The Court of Appeals had previously vacated the trial court’s award of temporary custody to Plaintiff, without addressing the custody threshold or conducting an evidentiary hearing, based on Defendant’s failing to provide her boyfriend’s birth date and social security number in order to conduct a background check. Before the Court of Appeals decision was released, the court conducted a 2 day evidentiary hearing, finding that proper cause existed, and issued its oral opinion granting a change in custody.

The Court of Appeals held that the trial court is not required to hold a separate threshold hearing or address the threshold issue before conducting the best interest hearing, it must only find proper cause or change in circumstances before addressing the best interest factors. The Trial court’s award of custody to Plaintiff during the school year and suspension of Defendant’s parenting time was supported by the court’s findings. In addition to other best interest findings, the trial court found that Defendant had likely fabricated allegations that Plaintiff improperly touched the child; she had failed to facilitate Plaintiff’s communication with the child and to sign release of school records, she failed to pay her share of travel costs and provide information to allow the background check.

**Wardell v Hincka _Mich App_(2012) #308243 6/21/12** The parties had a Joint week to week custody schedule, with the order providing the child would attend school in Posen, between the parties homes in Alpena and Rogers City. Defendant filed a motion to change custody based on his move from Rogers City to Cheboygan, and on his discovery that Plaintiff’s husband had a criminal record. After a trial, the
court denied both parties motions for custody, noting that the custody arrangement was working, the best interest factors weighed equally in favor of the parties, and the only change of circumstance, Defendant’s move to Cheboygan, was not so burdensome to the child to justify changing custody. The Court of appeals affirmed, first finding that a denial of a custody motion is a final custody order for appeals purposes. The Court of Appeals further found that the evidence showed the child’s waking and sleeping schedule were not abnormal hours and the child was doing great in school, and that the proposed change in custody to eliminate 50 minutes in commute time did “not clearly and convincingly outweigh the benefits of a stable, successful, and unchanging joint custody relationship.”

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In re Tiemann, _______ Mich App _______ ; ______ NW2d _____ (2012) (Court of Appeals #303813 and #306407, May 8, 2012) The respondent, a 15 year old male, was charged with 3 counts of CSC 3rd, victim between 13 and 16, and 1 count of CSC 4th involving force or coercion. The respondent ultimately pled nolo contendre to 1 count of CSC 3rd, victim between 13 and 16 years old. The respondent then moved to withdraw his plea arguing he was unaware that he would be required to register under SORA or did not fully understand the ramifications of registration. The motion was denied and the respondent appealed (#303813).

In the meantime, an amendment to SORA went into effect, stating that for cases pending on July 1, 2011, a juvenile could be excused from registering in certain circumstances if consent could be established. The trial court held a hearing on the issue of consent. Several witnesses were called and the victim read a statement into the record. In her statement, the victim indicated that she may have acquiesced so that the respondent “wouldn’t be so mean”, but gave further indications that the sex was not consensual. The respondent was not per-
mitted to cross examine the victim. The trial court determined that consent was not shown and the respondent was not exempt from the registration requirements. The respondent appealed this decision as well (#306407).

The respondent argued on appeal that, because both the respondent and the victim were in the same protected age class (13 to 15), MCL 750.520d (CSC 3rd degree) violated public policy. The Court followed In re Hildebrant, 216 Mich App 384; 548 NW2d 715 (1996), and held that the purpose of the statute is to protect the minor victim and the age of the offender is not relevant.

The respondent next argues that MCL 750.520d (CSC 3rd degree) violates public policy because it is ambiguous as it relates to teenagers having consensual sex. The respondent argued, among other things, that there is a conflict of laws rendering MCL 750.520d ambiguous. A juvenile convicted of statutory rape under MCL 750.520d who is later determined to not have to register under SORA because the sexual act was consensual, would still remain convicted of statutory rape. The Court held that there is no conflict between SORA and MCL 750.520d as a defendant is responsible for their illegal conduct regardless of the duty to put law enforcement and the public on notice of that illegal conduct.

The respondent further argues that his constitutional rights to equal protection were violated as he and the victim were similarly situated as both were in the protected class of 13-15 year olds and the charges against him were based solely upon his gender. The Court held that there is a two-prong test to determine if a prosecution violates equal protection. First, it must be shown that the defendant was singled out for prosecution while others in the class were not; and second, that the prosecution was based upon an impermissible ground, such as race, sex, religion or the exercise of a fundamental right. In this case, the respondent and the victim are similarly situated and the victim was not charged with a crime, so the respondent must show that he was prosecuted because of his gender. The Court held that, based upon the evidence and the facts in this case, the respondent was more than likely charged because of his aggressive behavior in not stopping his actions, and not because he was male.

Finally, the respondent argues that the consent hearing to determine whether or not he should be required to register as a sex offender was a quasi-criminal proceeding and he should have been afforded additional procedural due process guarantees, such as cross examination of the victim and not having the burden of proof to prove consent by a preponderance of evidence. The Court reiterated that no due process rights are implicated by SORA as the act does not deprive the respondent of liberty or property. Any deprivation suffered flowed from the misconduct, not the act itself. In addition, the confrontation clause does not apply as SORA is a regulatory statute, not a criminal statute.

The trial court was affirmed.
In the Matter of Frey, Mich App NW2d (2012) (Court of Appeals # 307152 and #307154, July 3, 2012)

The respondents appealed the lower court’s decision to terminate their parental rights. The child was placed in foster care after the family was in a car accident. The father was intoxicated at the time (his 5th criminal drunk driving conviction in less than 3 years) and the mother admitted to taking a narcotic just before getting into the car. The mother also admitted that she knew the father was intoxicated when she and the child entered the vehicle. Alcohol and substance abuse were the primary basis for adjudication. The mother completed an inpatient rehab program. The father, after his release from incarceration, also participated in services, but he and the mother started to miss most of their drug screens. At one point in time, the trial court found that the parents were 95 or 98 percent compliant, except for failing to regularly provide drug screens. The parents were then arrested for other criminal activity. The father was re-incarcerated and the mother was placed on probation and required to complete a 90-120 day inpatient substance abuse program. The trial court was legitimately concerned with the ability of these parents to remain clean, sober and out of prison long enough to be able to provide for the child. On appeal, the respondents argued that the Department of Human Services failed to accommodate their need for transportation to ensure compliance with drug screens. The caseworker offered bus tickets to the parents, but the parents refused the bus tickets because they lived too far from the bus stop. The Court of Appeals, in affirming the termination of parental rights, held that “(w)hile DHS has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered.” The respondents in this case did not show sufficient compliance or benefit from the services, which were aimed at the primary reason for adjudication—their problems with alcohol and substance abuse. Termination was also in the child’s best interests as it was unlikely that the child could be returned to the parents in the foreseeable future, if at all. The trial court did not err in terminating the parents’ parental rights and affirmed the trial court.

In the Matter of Olive/Metts, Mich App NW2d (2012) (Court of Appeals #306279, June 5, 2012)

The respondent mother appealed the trial court’s order terminating her parental rights. The Court held that, although there was a statutory ground proven by clear and convincing evidence to terminate the mother’s parental rights to all 5 children, the trial court did not take into account the fact that the two youngest children (twins) were residing with a relative in determining best interests. As a result, the termination order for the 3 older children was upheld, but the termination order was vacated and remanded for further findings regarding the twins. The Court held that it is “incumbent upon the trial court to view each child individually when determining whether termination of parental rights
is in that child’s best interests.” Since a child’s placement with relatives weighs against termination, the fact that a child is residing with relatives at the termination hearing is a factor that needs to be considered in the court’s best interests findings. “A trial court’s failure to explicitly address whether termination is appropriate in light of the children’s placement with relatives renders the factual record inadequate to make a best interests determination and requires reversal.”

In re C.I. Morris and In re J.L. Gordon, 491 Mich ______; NW2d ______ (2012) (Supreme Court #142759 and #143673, May 4, 2012)

The Supreme Court combined two cases involving notice to an Indian tribe under ICWA (Indian Child Welfare Act). The Court of Appeals conditionally affirmed the trial court’s termination orders and remanded to the trial court for notice to the Indian tribes. In determining that a conditional affirmance of the trial courts’ orders was not proper, the Supreme Court reversed the Court of Appeals and conditionally reversed the trial court’s termination of parental rights and remanded both cases to the respective trial courts to provide proper notice pursuant to ICWA. If the children are determined to not be Indian children as defined, or if the tribes choose not to respond upon proper notice, the trial courts’ orders of termination would be reinstated. If the determination was made that ICWA does apply, then the trial courts’ orders must be vacated and all proceedings begun anew in compliance with ICWA.

First and foremost, the trial court must determine whether a child is an “Indian child”. An Indian child is defined as any unmarried person under 18 who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child or a member of an Indian tribe. Only the Indian tribe can determine its members. If the trial court has received sufficient indications that the child in question may be an Indian child, then the tribe MUST receive notice of the proceedings.

ICWA and its notice provisions apply only to involuntary foster care placements and involuntary termination of parental rights proceedings and is triggered if the court “knows or has reason to know” that the child is an Indian child. The notice to the tribe and to the parent or Indian custodian is required to be sent by the party seeking foster care placement or termination by registered mail with return receipt requested, and must advise the person and tribe of the pending proceedings and the right of the party to intervene. If the party seeking foster care placement or termination cannot ascertain the identity of the parent or Indian custodian or the tribe, then notice must be sent to the Secretary of the Interior. The return receipt shows that proper notice was sent and starts the 10 day time period in which the Indian tribe or parent or Indian custodian
Neglect Continued

Contributed by Jennifer Kitzmiler

has to respond, but either may request a 20 day extension to determine membership. Finally, the trial court may not hold foster care placement or termination proceedings until the time period has elapsed.

The Supreme Court held that a court has a reason to believe a child is an Indian child when any party to the case, Indian tribe or public/private agency informs the court of such; when any public or state licensed agency involved in child protection services or family support discovers information that suggests the child is an Indian child; when the child gives the court reason to believe he/she is an Indian child; when the residence or domicile of the child, the biological parent(s) or the Indian custodian is known by the court to be or is shown to be in a predominately Indian community; or when an officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

The Supreme Court held that the original or a copy of each notice sent along with the return receipts or other proof of service must be filed with the trial court. This allows for the establishment of the appropriate time periods and for appropriate appellate review.

In both of the cases at hand, the Supreme Court determined that each trial court was correct in their findings that tribal notice was required; but that each court file did not contain the appropriate documentation to show that notice under ICWA was proper. If the trial court was able to positively conclude that the children were Indian children an automatic reversal would be appropriate. Since that conclusion could not be made by either court, the Supreme Court discussed the difference between a conditional reversal and a conditional affirmation. Although as a practical matter, little difference exists between the two, a conditional reversal would be more deferential to the tribal interests as advocated by ICWA since it is more consistent with ICWA’s notice provisions and sends a clearer message to the lower courts and Department of Human Services to pay proper deference to ICWA.

In the Matter of Budd, _____ Mich _____; _____ NW2d _____ (2012) (Supreme Court #143894, June 15, 2012)

This case also involved a problem with the trial court’s compliance with ICWA’s notice provisions. The respondent’s application for leave to appeal was held in abeyance pending a decision in Morris, above. The Supreme Court, in lieu of granting leave to appeal, reversed the Court of Appeals’ conditional affirmation of the trial court’s order terminating parental rights and conditionally reversed the trial court’s order and remanded the case to the trial court for resolution of the notice requirements in ICWA. If the trial court conclusively determines that ICWA does not apply (either because the children are not Indian children or the tribe does not timely respond), the order terminating parental rights shall be reinstated. If ICWA does apply, the order terminating parental rights must be vacated and all proceedings must begin anew in accordance with ICWA.
PA 159: REVOCATION OF PATERNITY ACT, effective 6/12/12

This Act substantially revises the procedures for setting aside an acknowledgment of parentage (Section 7); creates a procedure for setting aside an order of filiation (Section 9); allows the court to determine that a child is “born out of wedlock for the purpose of establishing paternity” in a third party where the mother was married at the time of the child’s birth or conception (section 11); and allows the court to make a determination and enter an order of filiation (Section 13).

Motions for such relief can be filed in an existing case where there is an order for support, custody, or parenting time, or where there is a pending neglect case. Where there is no existing case, it can be filed as an original action in the county where the mother or child resides. (Section 13 (1)).

In cases filed under Section 7, the Act allows the mother, the “acknowledged father,” the “alleged father” (a man who by his actions could have fathered the child), or the prosecuting attorney to file an action for revocation of an acknowledgment of parentage. Section 7 requires that the petitioner file an affidavit stating facts constituting either: mistake of fact; newly discovered evidence; fraud; misrepresentation or misconduct; or duress. If the court finds the affidavit to be sufficient, the court “shall” order the parties to “participate in and pay for” paternity testing. (Section 13 (5)). The burden of proof is “clear and convincing evidence” and is on the moving party.

In cases filed under Section 9, the Act allows a mother, an “alleged father” or an “affiliated father” (a man who has been determined in a court to be the child’s father) to set aside a judgment of paternity in cases where paternity is based upon the affiliated father’s “failure to participate in the court proceedings.” Section 13 (5), as set forth above, gives the court authority to order paternity testing in these types of cases.

Section 11 allows the court to determine that a child has been born out of wedlock in cases where the mother was married at the time of the child’s conception or birth and her husband (the “presumed father”) is not the natural father of the child. In these cases, under certain limited circumstances (see below) the mother, the “presumed father” (husband), DHS, or the “alleged father”, may have standing to bring such an action. In order for a mother to bring such an action she must name the “alleged father” in her complaint and the court must determine the child’s paternity in either the current action or a future action. (Several additional qualifications must also be met, see Section 11 (1) (a) and (b).) The “presumed father” may raise the matter in a divorce action or a separate action if it is filed within the

[Continued on Page 16]
statute of limitations. In order for an “alleged father” to bring such an action, he would have to show either: that the mother was not married at the time of conception; or, if she was married at that time, that he did not know, or have reason to know that she was married. (See Section 11(3) for additional qualifications.) An “alleged father” cannot bring an action if the child was conceived as a result of an act of Criminal Sexual Conduct for which he was convicted.

Section 13 (3) makes clear that the Act prohibits any retroactive modification of child support as only that support that was incurred after the action was filed can be waived. This section also reserves a party’s right to set aside a judgment under the applicable court rules.

Section 13 (5) gives the court the authority to order parties to participate in and pay for paternity testing (see above), and makes clear that the results of such testing are not binding on a court in making a determination under the Act.

Section 13 (4) allows a court to refuse to grant relief where “the court finds evidence that the order would not be in the best interests of the child.” The section gives a list of factors the court can consider in making such a finding.

Section 13 (6) allows the court to appoint a GAL to represent the child’s interests and an attorney to represent the state’s interests in Title IV-D cases.

Section 13 (7) prohibits courts from setting aside paternity determinations originating in another state, even where a support order is being enforced in Michigan.

Section 15 prohibits an action under this act where a child is under the court’s jurisdiction in a neglect action and a termination petition has been filed, unless the court first finds such an action to be in the child’s best interest.

The Act generally sets forth a statute of limitations of 3 years after the child’s birth or within one year after the acknowledgement of parentage had been signed or the Order of filiation had been entered, whichever is later. The court may extend the time for filing under certain conditions (Section 12). The statute of limitations does not apply to actions filed either on or before 1 year after the bill’s effective date.


PA 163: EX PARTE EMERGENCY REMOVAL OF CHILDREN, effective 6/12/12

This Act amends the standards and procedures for the emergency after-hours removal and placement of children by law enforcement and the Department of Human Services as well as specifically authorizing referees to issue interim orders of placement.
Section 14a (1) allows an “officer” to remove a child “if there is reasonable cause to believe that a child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child’s immediate removal is necessary to protect the child’s health and safety.” The officer must immediately notify DHS and while awaiting arrival of DHS may NOT hold the child in a detention facility. If the child is not released, the officer or DHS must immediately contact a designated judge or referee to seek a court order pending a preliminary hearing. If the court is closed, the DHS worker must submit, electronically or otherwise, a petition or affidavit of facts to the judge or referee prior to the issuance of an order for placement. Upon receipt of the petition or affidavit, the judge or referee “may order placement if the placement order is communicated in writing, electronically or otherwise, to the appropriate county department office and filed with the court the next business day.” Removal orders signed by referees become “interim orders” pending a preliminary hearing.

Section 14b (1) sets forth the standards for an ex-parte emergency removal order and requires the judge or referee to find all of the following:

(a) There is reasonable cause to believe that the child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child’s immediate removal from those surroundings is necessary to protect the child’s health and safety.

(b) The circumstances warrant issuing an ex parte order pending the preliminary hearing.

(c) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.

(d) No remedy other than protective custody is reasonably available to protect the child.

(e) Continuing to reside in the home is contrary to the child’s welfare.

Section (2) requires that the ex parte order shall be supported by written findings of fact.


PA 115: CHILD DEVELOPMENT TRAINING FOR LAWYER-GUARDIAN AD LITEMS; MODIFY TERMINATION OF PARENTAL RIGHTS PROVISIONS, effective 5/1/12

This Act amends several key portions of the Juvenile Code concerning Lawyer-Guardian Ad Litems, termination of parental rights, and case service plans.
LGALs will now be required to attend training in early childhood, child, and adolescent development. The grounds for termination of parental rights were amended to include sexual abuse of a child, a sibling, or another child. In its service plans, agencies must now include provisions that would limit or preclude placement or parenting time with a parent who is required, by court order, to register under a Sex Offender Registration Act. Further, the Act creates an exception to the reasonable efforts requirement for such parents. However, courts still retain the power to order that reasonable efforts be made for parents required to register under the Sex Offender Registration Act.

LEGISLATIVE UPDATE

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Contributed by Shelley R. Spivack

SB 246, SB 247 - JUVENILE COMPETENCY

Two bills, SB 246 and 247 have been passed by the State Senate that would amend the Juvenile Code and the Mental Health Code respectively so as to provide for determinations of juvenile competency. Similar bills have been introduced in the House and have been referred to the Judiciary Committee.

The bills would:

- Establish a presumption of competence for juveniles 10 years or older and a presumption of incompetence for those under 10
- Allow a court to order a competency examination to be conducted in the least restrictive environment
- Establish standards for conducting the examination, the qualifications of the examiner, and minimum requirements for the content of the report; and allow parties to hire independent examiners
- Require reports to be submitted within 30 days and hearings to be held within 30 days of the submission of the report
- Require dismissal of charges, with prejudice, if the court finds the juvenile is incompetent and there is a substantial probability that he or she will remain incompetent in the foreseeable future
- Gives the court various options, from dismissal to issuing a restoration order, if the juvenile could be restored to competency. Restoration orders would be initially issued for 60 days and could be extended to 120 days
- Require the court to dismiss charges and either direct civil commitment or release of the juvenile to a parent if competency cannot be restored
- Counties could apply for reimbursement from the Child Care Fund for mental health services

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LEGISLATIVE UPDATE

Contributed by Shelley R. Spivack

Pending Legislation

- Gives the court discretion to order that mental health services be provided to the juvenile by either CMH, DHS, DCH, or another appropriate mental health provider


SB 1001: EMPLOYER CHARGES FOR INCOME WITHHOLDING

This bill would amend the Support and Parenting Time Enforcement Act to allow an employer to charge and collect fees from payers. If income is withheld by electronic means it would allow the employer to charge $1.00 for each withholding, with a maximum charge of $2.00 per month. If payments are submitted other than electronically the allowable charge would be $2.00 per withholding, with a maximum charge of $4.00 per month. This bill was passed by the Senate on 5/17/12.


UPCOMING EVENTS

- Wednesday. October 17, 2012.
  MJJI Referee Training: Abuse and Neglect
  Hall of Justice in Lansing, Michigan

  MJJI Referee Training: Abuse and Neglect
  Hall of Justice in Lansing, Michigan

- Thursday. October 25, 2012. 9:30 a.m.
  RAM Board Meeting and Strategic Planning Meeting
  Hudson Room of the Michigan State Bar Building in Lansing, Michigan

  RAM Board Meeting and Holiday Luncheon
  Redwood Lodge in Flint, Michigan
This past year, under the leadership of our immediate past president Paul Jacokes, RAM began the task of strategic planning for our organization. Having spent many long hours on the strategic planning process for two other organizations in the past few years, I can easily say that I was not a happy camper to learn that I would be inheriting the responsibility of completing this process when I took on the role of RAM President. HOWEVER, (and I capitalize this purposefully) under the extremely able guidance of Anne Vrooman, Director of Research and Development at the State Bar of Michigan, I now actually look forward to working with the membership and board to develop and implement goals and strategies that will not only strengthen our organization, but will serve to improve the quality of services provided by Family Court Referees to families throughout the State of Michigan.

One of the first tasks in the strategic planning process is to conduct a survey that assesses the strengths and weaknesses of the organization and solicits input from members, non-members, and other stakeholders as to how the organization can be improved. The RAM survey, composed by Anne with the active assistance of Paul and other board members, was widely distributed by e-mail to both attorney and non-attorney referees throughout the State of Michigan.

We had a good response to the survey as we received one hundred responses from a fairly equal numbers of juvenile and domestic relations referees from each of the four SCAO regions. Of those responding, the majority (56) were not current RAM members. However, almost a third (19) of these non-members had once been RAM members. When asked why they were not current members of RAM, several people admitted to procrastination and laziness, while several others mentioned too many other commitments. The largest group (12) of non-members were either unaware of RAM’s existence (5) or of the purpose and benefits of the organization (7). A fairly significant number (10) positively responded to the question “I do not feel that RAM would provide value to me.” Two individuals were not members as they were non-attorney referees.

In looking at the programs and services RAM offers, those who are aware of what we do are generally well satisfied. For example, only one person who was aware of the Referees Quarterly expressed dissatisfaction with it. However, a majority of those who responded to the question (51%) were not aware of this newsletter that we publish four times per year! Our annual conference has the greatest name recognition of all our activities as only 33% were not aware of its existence. While cost was generally not a barrier to attending the conference,
several responses indicated problems with scheduling, with management permitting attendance for three days, as well as what is perceived of as more of a social than an educational gathering. Several people suggested scheduling the juvenile and domestic relations portions of the conference on separate days, similar to what is done with the MJI Referee trainings.

When asked to rank the importance of the activities engaged in by RAM, the responses clearly show that the educational function of RAM is most important to referees throughout the state. Providing legal updates ranked first amongst a list of seven priorities, while educational activities for referees ranked second. RAM’s role as an advocate for referees and for children and family issues ranked third and fourth; while networking, collaborating with other groups, and strengthening relationships with judges associations were of lesser importance.

The issues of diversity, regional representation, and accessibility are also issues of concern to both juvenile and domestic relations referees throughout the state. The importance of RAM representing and serving both juvenile and domestic relations referees was mentioned throughout the survey, as was the need for regional diversity on the board. Scheduling board meetings in locations other than Lansing, electronic meetings, and representation by SCAO regions on the board were several of the ideas suggested to remedy these issues.

What I think the survey tells us is that for a small organization we offer many good programs and benefits to our members at a very reasonable price, and that our members are generally satisfied with what we do. However, our membership base is too small, too many referees throughout the state are unaware of what we have to offer, and we lack diversity. Our task as we continue with the strategic planning process is to use the information gathered in the survey to increase our visibility and our effectiveness as an organization, and to ensure that all referees (both juvenile and domestic) throughout the state are adequately represented by our organization. The next step in this process will be holding a board meeting, led by Anne Vrooman, in which we will seek to re-define our goals and develop a working strategy to achieve them. Your input in this process is vital. Please use the list serve to post your comments and suggestions as to how RAM should move for-
WHO WE ARE

The Referees Association of Michigan (RAM) is recognized by the State Bar of Michigan as a special purpose organization. The Association consists of both Juvenile Court and Friend of the Court (collectively referred to as “Family Court”) referees throughout the State of Michigan. RAM’s primary function is to educate its members by providing a forum for communication, by holding an annual training conference, and by providing a quarterly publication, called Referees’ Quarterly. RAM also offers guidance to both the State Legislature and Michigan Supreme Court regarding proposed amendments to statutes and court rules. Collectively, the referees who comprise RAM’s membership preside over 100,000 family law hearings every year.