My mother is a retired clinical psychologist. She specialized in children who experienced life-changing brain injuries. Some injuries were caused by an auto accident, but more than a few were caused by physical abuse. She spent more than her fair share of time in courtrooms attempting to provide information to the court to assist them in making a decision that was in the best interests of a child. I know that she often felt unsuccessful in doing that.

As attorneys, we all understand the role of an advocate. Attorneys present argument and evidence in such a way as to support the outcome that is favorable to their client. We all know attorneys who will skew the facts or the case law to favor their argument. Unfortunately, advocacy in a child custody or parenting time case is usually limited to advocates hired by each parent to further his or her position.

As referees, we are expected to digest the evidence presented by advocates and come up with a recommendation that is in the child’s best interests. This is not always an easy task. Many times the presentation of evidence does not include an advocate who solely represents the child’s best interests.

I recently read a paper by Richard Warshak called “Social Science and Parenting Plans for Young Children: A Consensus Report.” This paper isn’t new, (it is actually from 2014) but I found it interesting how on-point it was in today’s hot topic of joint custody. The paper starts by explaining the impact of advocacy in child custody cases. I found this refreshing because it shows that advocacy was considered as a factor that contributes significantly to custody arrangements.

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The rest of the paper expresses the conclusions and recommendations of a collective one hundred ten researchers and practitioners. If you are interested in the conclusions and recommendations, I urge you to find the paper and read it. For me, the bigger take away is that we need to approach our cases in a way that recognizes that advocacy is a key factor in the best interests findings and recommendations that we make.

As referees, we are attorneys who no longer advocate, at least at the office. Admittedly, the school principal and hockey association board probably are not thrilled to see me when I show up. I have one child that I advocate for very passionately; he is my son. I recognize that not all children have the benefit or curse of having an attorney for a parent.

I know that as a referee you didn’t need one more thing to be mindful of when doing your job. We have to consider implicit bias, domestic violence, and a long list of other things when we approach a case. However, for those of you lucky enough to have an advocate for the child in your hearing room, please pay close attention to what they have to say and why. My mother thanks you.

Kristi

RAM President Kristi Drake and RAM Past-President Shelley Spivack meet Gov. Gretchen Whitmer at the Winter Warm-Up in Flint, January 2019
BEST PRACTICE: SPECIALIZED DOMESTIC VIOLENCE TRAINING FOR JUDGES AND REFEREES

by Shelley Spivack, Genesee County

Domestic violence cases are tough. As judicial officers hearing these cases, our orders go well beyond the paper on which they are written. Our decisions can change and even save lives. Whether you are a district court judge hearing a case involving misdemeanor domestic violence charges, a circuit court judge deciding whether to grant a PPO, or a family court judge or referee trying to craft a custody and parenting time order for a family that has experienced physical and/or emotional violence, knowledge of the letter of the law is not enough.

In order to better enable judges to respond to the growing number of cases involving family and intimate partner violence, the National Judicial Institute on Domestic Violence (NJIDV) was created. Founded in 1998, the NJIDV is a collaboration between the National Council of Juvenile and Family Court Judges (NCJFCJ), the US Department of Justice, Office on Violence Against Women, and the non-profit organization Futures Without Violence. According to its website the NJIDV

[H]as provided highly interactive, skills-based domestic violence workshops for judges and judicial officers nationwide since 1999. During the past 18 years, the NJIDV has developed a continuum of judicial education that currently includes the Enhancing Judicial Skills in Domestic Violence Cases (EJS) Workshop, Continuing Judicial Skills in Domestic Violence Cases (CJS) Program, Enhancing Judicial Skills in Elder Abuse Cases Workshop, Faculty Development, and Technical Assistance for state and regional adaptation and replication of NJIDV programs.

In June 2018, the NJIDV held its four-day basic training, “Enhancing Judicial Skills in Domestic Violence Cases (EJS) Workshop,” in Providence, Rhode Island. Along with 49 other judges and judicial officers hailing from New Hampshire to Kentucky to the state of Washington, I participated in one of the most intense and enlightening experiences of my life. Then, in October, I attended the 1 ½ day second part of the training - “Continuing Judicial Skills in Domestic Violence Cases- Family Court Assignment Course” held in Austin, Texas. In this article I will share with readers my personal reflections of the trainings as well as how they have affected the way I hear and decide cases in which domestic violence plays a role.

“Step back,” “Process,” “See how it fits together and informs you,” – this is what stands out when I look at my notes from the last day of the June training. And, over the last several months I find myself do-
ing this on an almost daily basis. If I were to use cooking methods as a metaphor, this training more re-
sembled a slow cooker than a microwave oven. Time was needed to process the ingredients so that the
full flavor could be realized.

The June session’s Lead Trainer, Judge Jeffery Kremers, Presiding Judge of the Milwaukee Domestic
Violence Court, explained that in designing this training, the faculty created a framework focusing on the
decision-making process. “How” rather than “what” to decide would take center stage. With a view to-
wards understanding the ‘dynamics’ of domestic violence, why victims and perpetrators act the way they
do, the training uses an experiential approach. As stated by Judge Kremers, “If you don’t understand
what motivates a perpetrator or a victim, it is hard to respond.” The way we ‘respond’ as judges is
through the entry of orders. Thus, “crafting orders consistent with what we know about domestic
violence,” explained Judge Kremers, is really what the training is all about.

Judicial officers are not a monolithic group, and the variety found in our group of 50 participants en-
hanced the vibrancy of the training. Jurists were male and female, rural and urban, and from criminal, fam-
ily, and tribal courts as well as from single-court jurisdictions. Working in small groups we experienced (as
much as possible during a training) the dynamics of domestic violence. As our backgrounds differed, the
lens through which we saw and experienced the differing fact patterns and scenarios led to a much
more nuanced understanding of this issue which cuts across racial, ethnic, and class lines. It also allowed
us to view the issue outside of the silos in which we practice. For example, even though I practiced crimi-
nal law for 18 years before I became a referee, I tend to think of domestic violence only in terms of the
family law custody, parenting time, and support cases I now see on a daily basis. When, during the first
exercise, I was chosen to be the judge in a case involving misdemeanor domestic assault charges, I felt
like a first-year law student the first time the professor calls your name. And, I am sure, the criminal court
judge, when asked to decide the parenting time issue in the same fact pattern, felt no differently than I.

For me, one of the most poignant and emotionally difficult exercises was that involving a child name
Jared. Based on a true story of a child who was murdered by his father during court-ordered unsuper-
vised parenting time, the exercise brought home to me what can happen if we, as well as other profes-
sionals, fail to adequately evaluate the level of risk to children in cases of domestic violence. As is the case
in many jurisdictions within Michigan, different courts and professionals (criminal courts, family courts,
probation officers, GALs, and CPS) work in silos. Information is not exchanged and judges are given a
limited set of facts which tell only part of the story. In addition, these facts are often relayed by individuals
who lack an understanding of the nature of domestic violence and its impact upon children. In relying on
only part of the story, we, as judges and referees, fail to accurately assess the risk to both victims and their
children. In Jared’s case, we did not know of the case’s tragic outcome while we were evaluating pieces of
information upon which to make parenting-time decisions at different stages of the court case. It was not
until we watched a video re-enactment of the case that we realized how at each point in the decision-

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making process, opportunities were missed that could have saved the life of a young child.

Limited to a group of 10 participants, the October specialized training allowed us to further explore issues relating to crafting effective parenting orders. Focusing more closely on the dynamics involved in the relationship between a survivor and a perpetrator (both before and after separation) improved our ability to detect the power dynamics involved in these situations. By watching video re-enactments, we also saw first-hand the effect that domestic violence has upon children. Through skill-based group exercises, we learned how to more effectively evaluate evidence and craft parenting orders to match each unique family's circumstance.

As a Family Court referee, both trainings have dramatically altered the way I look at each case and each individual who walks into my hearing room. Thinking of Jared, and the missed opportunities that arise when risk is not accurately assessed, I try to look at each case with new eyes. Realizing that risk is dynamic and inherently linked to a pattern of coercive control, with each case I try to determine the current level of risk and how it may escalate as a result of any actions I may take. Using this assessment, I try to craft my recommendations as carefully as possible to ensure the safety of the parties and the children.

Both trainings also challenged us to “explore, define, and refine your role as a judge, with the goal of advancing access to justice in your court and community.” In other words, we were challenged to think outside of the box and look beyond the individual cases we hear on a daily basis. Suggestions included developing or working with Coordinated Community Response (CCR) systems to create a multi-sectored approach at the local level as well as working to create and/or enhance services such as supervised parenting time and safe exchanges.

As a referee, I rely heavily on information relayed to me by FOC caseworkers and staff. What I realized was missing from these reports was an understanding of the dynamics of domestic violence. Taking the challenge posed to us in Providence, upon my return I began working with our FOC Deputy Director and the training coordinator at our local domestic violence shelter to begin a series of trainings for all FOC staff on issues related to domestic violence. To date, we have held one training which all FOC staff were required to attend. The feedback from the training was amazing. I have never seen my co-workers as interested and engaged as they were during this session. As a result of the interest generated by the training, we are now planning to conduct a more in-depth series of workshops for caseworkers and referees. While we as referees cannot stop domestic violence, we can do our part to facilitate the healing process, while at the same time dispensing justice.

For more information about the NJIDV visit their website at: https://njidv.org/.

Editor's Note: Shelley Spivack co-authored an article with 36th District Court Judge Adrienne Hinnant-Johnson about their experience at the basic domestic violence training program published in the Michigan Family Law Journal, Volume 48 Number 10, December 2018. SBM Family Law Section members can access that article here: https://higherlogicdownload.s3.amazonaws.com/MICHBAR/29647f32-d7bf-4b3b-97a7-a9359ef92056/UploadedImages/pdf/newsletter/December2018.pdf.
THE NEW FINAL ORDER COURT RULE
by Scott Bassett

On September 20, 2018, the Michigan Supreme Court substantially changed the court rule defining what is a “final order” appealable by right in post-judgment domestic relations matters. The new rule takes effect January 1, 2019.

Here is the background necessary to understand what happened:

1. Starting in 2016, the Court of Appeals unexpectedly changed its interpretation and application of the “affecting custody of a minor” language in MCR 7.202(6)(a)(iii). This was important because that rule determines what is a final order appealable by right in post-judgment domestic relations proceedings.
2. As a result of the unexpected change, the Court of Appeals began dismissing for lack of jurisdiction (not a “final order”) appeals that were previously deemed to “affect custody” and were therefore appealable by right.
3. Orders involving legal custody or parenting time, including the exercise of legal custody decision-making rights on school enrollment, health care, and religious upbringing previously appealable by right were suddenly no longer considered “final orders” under the rule.
4. Two of these dismissals, both involving disputes between joint legal custodians as to the children’s school enrollment, were appealed to the Michigan Supreme Court in Ozimek and Marik. By this time, there was a published COA decision in Ozimek holding that the “final order” rule included only physical custody orders, not appeals from orders changing or affecting legal custody.
5. The Supreme Court held a Mini Oral Argument on Application (MOAA) on both Ozimek and Marik on October 11, 2017. One focus of the supplemental briefs submitted for the MOAA was that legal custody decisions such as school enrollment, health care, religious upbringing, and right of association are fundamental parental rights recognized by the United States Supreme Court. Orders affecting those fundamental rights should be appealable by right, not leave.
6. After the MOAA and reading main and supplemental briefs, the Supreme Court on November 16, 2017, overruled Ozimek and remanded Marik to the Court of Appeals “for reconsideration of the question whether the Macomb Circuit Court’s June 13, 2016 order denying the defendant father’s request to change the children’s school enrollment and modifying parenting time was ‘a post-judgment order affecting the custody of a minor’ and therefore, a ‘final order’ under MCR 7.202(6)(a)(iii) and appealable by right under MCR 7.203(A)(1).”

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7. As part of its order, the Supreme Court also opened ADM 2017-20 for consideration of whether to amend MCR 7.202(6)(a)(iii).

8. On remand, the COA reconsidered its dismissal and found a school change order (grant or denial) to be appealable by right, stating: “The Supreme Court having determined that the term ‘custody’ in MCR 7.202(6)(a)(iii) compromises legal custody, Marik v Marik, _ Mich _; 903 NW2d 194 (2017), we find the order appealed from here to be a final order under MCR 7.202(6)(a)(iii) because it denied a motion that, if granted, would have affected legal custody of the parties’ children by ending shared decision-making authority as to important decisions affecting the welfare of their children. See MCL 722.26a(7). Therefore, the Court orders that this appeal continues as an appeal of right.”

9. Jurisdiction having been resolved, Marik was then briefed on the merits, argument took place, and the COA issued a published decision on July 24, 2018 vacating the trial court’s denial of the father’s school change motion and remanding to the trial court for a Lombardo evidentiary hearing and to make the required findings.

10. Meanwhile, in response to the opening of ADM 2017-20, on December 22, 2017, the Michigan Coalition of Family Law Appellate Attorneys (MCFLAA), sent a detailed letter to the Michigan Supreme Court suggesting changes to MCR 7.202(6)(a)(iii) that would make the rule easier to apply and would also slightly expand appellate jurisdiction to include parenting time orders as final orders appealable by right.

With that necessary background, here is what happened:

1. On April 19, 2018, the Supreme Court published for comment a proposed rule change that would preserve as appeals by right for physical and legal custody orders, domicile orders, and orders affecting shared decision-making on major issues such as school enrollment, health care, and religious upbringing. The proposal also made all parenting time orders appealable by right, which was a slight expansion of the current rule allowing appeals by right only from those parenting time orders that “affect custody.” Most importantly, the proposed rule eliminated the problematic “affecting the custody of a minor” language which was subject to varying interpretations from one case to the next, one COA District to another, and from year to year. Public comment was open until August 1, 2018.

2. The proposal for clarification and a slight expansion of appellate jurisdiction was well received by the State Bar. The State Bar Appellate Practice Section, Family Law Section, and Board of Commissioners, as well as MCFLAA and the Legal Services Association of Michigan (LSAM), all submitted timely comments in support of the proposal. Only one opposing comment was received (from the law firm representing one of the parties in Marik).

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3. Almost three weeks after the comment period closed, the Michigan Court of Appeals submitted a comment opposing the Supreme Court's April 19th proposed rule and making a substantially different proposal that not only did not expand appellate jurisdiction slightly, but substantially curtailed it.

4. The Supreme Court scheduled a public administrative hearing on its ADM 2017-20 proposal to clarify and expand appellate jurisdiction for September 20, 2018.

5. At no time prior to the public hearing, or at the hearing itself, did the Supreme Court give notice that it was considering the Court of Appeals’ late and substantially different court rule language that would restrict, not expand, appellate jurisdiction.

6. Only two witnesses testified at the public hearing on the ADM 2017-20 proposal, both in support of the Supreme Court’s April 19th proposed language. The witnesses represented the Appellate Practice Section, MCFLAA, and LSAM. No one from the Court of Appeals testified.

7. Only limited questions were asked of one of the witnesses, and those questions focused on an alternate language “material change” not in either the original April 19th proposal nor the COA’s substantially different proposal. At no time during the public hearing did the Supreme Court indicate it was considering the late COA proposal that would restrict rather than slightly expand appellate jurisdiction.

8. Before the end of day on September 20th, the Supreme Court issued an order adopting verbatim the COA’s late submission that was substantially different from the Supreme Court’s own published proposal.

9. The new version of MCR 7.202(6)(a)(iii) that takes effect January 1, 2019, states that only the following orders will be appealable by right: “(iii) in a domestic relations action, a post-judgment order that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile.”

What does this mean?

Under the current rule after Marik and the reversal of Ozimek, orders granting or denying motions on important legal custody issues like school enrollment, health care, or religious upbringing are appealable by right. Also under the current rule, parenting time orders that affect custody are appealable by right (See Lieberman v Orr, for example).

Starting on January 1st, if you have a school enrollment dispute like Marik and the trial court fails to hold a Lombardo evidentiary hearing or make the required findings, you no longer have an appeal by
right despite the fact we now have clear case law stating that such an error should result in an “inevitable remand” as Judge O’Connell stated in his Marik concurring opinion.

If you have a dispute between parents on a child’s medical treatment, such as whether to place the child on ADHD meds or have surgery, the trial court is obligated to resolve that dispute by holding an evidentiary hearing and making best interests findings. If the court fails take those steps, or if your client is otherwise aggrieved by the decision, you will have no appeal by right. Although I have not seen a case precisely like this, what if the parents disagreed about whether the child should have surgery? The trial court is obligated to resolve this dispute. Say the trial court orders the surgery go forward. Does the parent opposing the surgery have a right to appeal? Not on or after January 1.

Under the new rule, among the types of orders no longer appealable by right will be orders for grandparenting time. We all know that grandparenting time orders inherently intrude on the constitutional rights of fit parents to decide with whom their children associate. We have a statute that allows those orders under certain limited circumstances, and that statute has been declared constitutional. Still, there are times when the statute is inappropriately applied or there are disputed facts about whether standing provisions have been satisfied. A parent should have a right to appeal a grandparenting time order, not rely on the uncertain leave application process.

Or maybe you have a judgment that grants the parents joint custody (legal and physical), but the kids live primarily with one parent during the week for school and with the other parent on weekends. At the request of the weekend parent, the trial court flips the schedule and the weekend parent becomes the school-week parent. But it is still joint custody and the kids still have ECEs with both parents. Does the former school-week parent have a right to appeal? Perhaps not under the new rule language.

This is not a good thing from a policy perspective. It may even be unconstitutional. Parental decisions on important matters affecting their children, such as education, health care, religious upbringing, and associational rights have all been recognized by the United States Supreme Court or other federal appellate courts as being constitutionally protected. Is the absence of at least one appeal by right from a trial court decision in these areas a constitutional flaw or just bad policy?

What Should Have Happened?

Ironically, the preamble to the Court’s September 20th order adopting verbatim the COA’s late proposal states:

“On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 7.202 of the Michigan Court Rules is adopted, effective January 1, 2019.”

Unfortunately, this did not happen. No one received notice that the Court was considering the
substantially different and restrictive language in the COA’s late proposal. There was no publication of the COA proposal as an alternative considered by the Court.

If the Court was going to consider and adopt language that was significantly different from both its own proposal in ADM 2017-20 and the current rule, it should have republished the proposed rule with the significantly different language, invited a new round of comments, and held a new hearing. Instead, the Court failed to honor its own administrative processes. On an issue of this importance that has been the subject of much litigation over the last few years, more care should have been taken to assure a meaningful opportunity for the public and Bar to comment before action was taken.

What should happen now?

There is still time before the January 1 effective date of this rule suggest to the Court that this was mishandled and should be revisited. The affected groups (Appellate Practice Section, Family Law Section, MCFLAA, even the Bar itself), along with individual lawyers and members of the public, should ask the Supreme Court to hold in abeyance its September 20 order,

Then the Court should republish both the COA proposal and the SC’s original proposal as alternative amendments, invite public comment, and schedule a new public hearing.

Could that happen? It is probably a long shot. But if you are troubled by either the process or the substance, or both, call your State Bar Commissioner. Call your Section Chair and Council members. Write directly to the Supreme Court. The Court needs to be held to its own high standards of transparency before significant rule changes are adopted.

Editor’s Note: This article was reprinted with permission from the Michigan Family Law Journal, Volume 48 Number 8, October 2018 issue. Please note opinions expressed in the article are those of the author. The Referees Association of Michigan did not take a position or comment upon the proposed rule change.

Scott Bassett is a certified fellow of the American Academy of Matrimonial Lawyers, Scott Bassett maintains a “virtual” practice of Michigan family appellate law utilizing technology without a fixed office location. He is a past chairperson of the State Bar of Michigan’s Family Law Section and a former associate editor of “Michigan Family Law Journal.” Mr. Bassett has authored over 120 published articles and book chapters on family law, appellate practice, and law office technology and has been a frequent lecturer for ICLE programs in those areas. He served for several years as a member and chairperson of the Child Support Guideline Subcommittee of the State Court Administrative Office and has been active in the legislative process, coauthoring portions of several laws involving pension rights on divorce, parenting time, child custody, and appellate practice. Mr. Bassett played a key role in passage of the legislation creating the family division of circuit court and served by Supreme Court appointment on the Statewide Family Division Implementation Task Force. He has been an adjunct professor of family law at Wayne State University Law School and a clinical professor at the University of Michigan Law School. Currently, he serves as an adjunct faculty member at Stetson University College of Law, where he teaches law practice management and previously taught family law.
The legislature typically wraps up the year around mid-December. The legislature did resume on November 27th until mid-December for a brief “lame duck” session. The members seemed to focus on Auto No-Fault reform, public employee benefits, minimum wage, paid sick time, and budget supplement. Those members not returning were focusing on their own individual legislation. Because the year ended in an even-numbered year, all bills not signed into law will not carry over into the new year. Look for the introduction of bills in the new session of 2019-2020. Also, committee assignments, including the announcement of committee chairpersons, were recently announced for the current legislative session.

Below is the summary of action prior to the end of 2018.

**GENERAL**

**SB 1171 AMENDS THE IMPROVED WORKFORCE OPPORTUNITY WAGE ACT**

This bill will amend the minimum wage rate set previously by this Act. This was a more controversial lame duck bill that was signed. Here is a chart that shows the changes effective March 29, 2019:

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<tr>
<th>Wage under the Act</th>
<th>Minimum Wage under SB 1171</th>
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<tr>
<td>2030 $14.16*</td>
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</table>

* Estimates based on inflation projections.
**Status:** This bill was signed into law by the former Governor on December 14, 2018 with effect March 29, 2019.

*NEGLECT/JUVENILE*

**HB5121/5122/5123 AMEND THE FOSTER CARE AND ADOPTION SERVICES ACT**

This bill amendment would amend the Foster Care and Adoption Services Act to do all of the following: require the Department of Health and Human Services or a child placing agency to develop and maintain a specific policy, known as the Children's Assurance of Quality Foster Care Policy, to provide to children placed in foster care, require the Policy to ensure that children placed in foster care had access to or received certain treatment, placement, access, and other items. Further, require the Department to maintain a written policy describing the grievance procedure for a child in foster care to address any perceived noncompliance with the items listed in the Policy, including information on how and where to file a grievance. House Bill 5122 (H-1) would amend the Foster Care and Adoption Services Act to require the Department to draft and maintain a specific policy to address the access of a child in foster care to his or her advocates, relevant information related to his or her case and plan for placement, and other items. House Bill 5123 (H-1) would amend the Foster Care and Adoption Services Act to require the Department to prepare and distribute to each child placed in foster care, as age-appropriate, information describing the Children's Assurance of Quality Foster Care Policy and the process to follow if a child in foster care had concerns regarding a violation of the Policy.

**Status:** This package of bills was signed into law by the former Governor on December 24, 2018 with immediate effect.

**HB 5750/5751/5753/5754 AMEND THE SAFE DELIVERY OF NEWBORNS LAW**

This tie bar group of bills would amend the Safe Delivery of Newborns Law. The amendments would include the following:

- Allow a parent to voluntarily deliver his or her newborn to a newborn safety device provided by an emergency service provider.
- Require a device to meet the requirements provided in rules promulgated under the bill.
- Require the Department of Health and Human Services (DHHS) to promulgate rules governing newborn safety devices.
- Require an emergency service provider or a physician to perform the same functions for a newborn surrendered to a newborn safety device as is required currently for a newborn surrendered to an emergency service provider.
- Require a pamphlet that provides information to the public concerning the Safe Delivery Program to include information regarding newborn safety devices.

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• Provide that the Family Division of Circuit Court would have jurisdiction over a newborn who was surrendered to a newborn safety device.
• Define "newborn safety device" as a device provided by an emergency service provider that conformed to the rules promulgated under the Code.
• House Bill 5953 would amend the Public Health Code to require that the death of an infant who was born alive following an attempted abortion, was surrendered to a newborn safety device, and then died to be reported in the same manner as for any death.
• Specify that it would be an affirmation defense to a prosecution for exposing a child with intent to injure or abandon that the child was 30 days, instead of 72 hours, old and was surrendered to an emergency service provider or a newborn safety device.
• Specify that a criminal investigation could not be initiated solely on the basis of a newborn being surrendered to an emergency service provider or a newborn safety device.

House Bill 5750 and House Bill 5751 are tie-barred to each other. House Bills 5953 and 5954 are also tie-barred to 5750.

**Status:** This bill was agreed to and presented to the former Governor on December 27, 2018 and he vetoed it on December 28, 2018.

**DOMESTIC RELATIONS**

**HB 4691: AMEND CHILD CUSTODY ACT TO MICHIGAN SHARED PARENTING ACT**

There was a final push to attempt to get this bill signed in the lame duck session.

**Status:** The bill was not signed but watch for its renewal out of the Senate. Representative Runestad, who introduced this bill, was elected to State Senate this past November.

All of the above legislation can be accessed at: [http://www.legislature.mi.gov/(S(gw41t0asyldke545yfbmwhra))/mileg.aspx?page=home](http://www.legislature.mi.gov/(S(gw41t0asyldke545yfbmwhra))/mileg.aspx?page=home)

State House Committee information can be accessed at:

State Senate Committee information can be accessed on the “Committees” tab at:
[http://senate.michigan.gov/](http://senate.michigan.gov/)
DOMESTIC RELATIONS CASE LAW UPDATE

By Ed Messing, St. Clair County

A court may be required to conduct periodic parenting time reviews after suspending parenting time, according to Luna v Regnier, _Mich App_ (2018), #343382 10/18/18. The parties and children were previously subject to a protective proceeding in which the children were removed from Plaintiff and placed in foster care. Defendant was ordered to exercise supervised parenting time, which was eventually suspended. Defendant’s parental rights were terminated but later reinstated under In re Sanders. Plaintiff then moved to suspend Defendant’s parenting time in the custody action, but the court temporarily granted Defendant parenting time for two hours per week for two weeks, then increasing to four hours per week. At a later hearing, the Guardian ad Litem (GAL) recommended that the children continue with therapy eventually integrating Defendant into that therapy.

A month later the court granted the GAL’s motion to suspend Defendant’s parenting time based on the opinion of the children’s counselors that the stress and anxiety resulting from parenting time negatively impacted the children’s progress with mental, social and educational issues. Defendant filed a motion to rescind the order suspending parenting time. The court reviewed neurodevelopmental trauma assessments of the children and current opinions from the children’s counselors. After addressing the best interest factors the court found by clear and convincing evidence that parenting time may be harmful to the children’s mental and emotional health. The court then suspended Defendant’s parenting time until requested by the children. The Court of Appeals affirmed the suspension of parenting time because the evidence supported the court’s findings. However, the matter was remanded to the trial court to conduct periodic parenting time review hearings to receive reports from the children’s counselors and GAL otherwise the order would have constituted a de facto termination of Defendant’s parental rights.

The full panel of the U.S. Sixth Circuit Court of Appeals affirmed the prior decision in Tagliari v Monasky, 907 F3d 404 (6th Cir. 2018), #16-4128 10/17/18. The Petitioner, an Italian citizen, met and married Respondent, a U.S. citizen, in Illinois. Respondent testified that Petitioner slapped her and forced himself upon her multiple times. The parties moved to Italy where Respondent became pregnant and gave birth to their child. After an argument with Petitioner, Respondent took the eight-week-old child to the United States. Petitioner obtained an ex-parte order terminating Respondent’s parental rights from an Italian court was granted a rehearing en banc.
The full panel affirmed. Petitioner met his burden of a preponderance of evidence that Respondent wrongfully removed the child from the child’s habitual residence, which is the customary place where the child actually lives. Where a child is a young infant, the court’s decision is based on evidence of the parents’ shared intent. Although there was some conflicting evidence, there was sufficient evidence to support the court’s finding that the parents had intended to raise the child in Italy and the trial court did not commit an abuse of discretion or clear error. The court compared this highly deferential review as leaving the work of the fact finding to the district court unless their efforts “strike us as wrong with the force of a five-week-old, unrefrigerated dead fish,” citing United States v Perry, 908 F.2nd 56, 58 (6th Cir. 1990).

The trial court has the authority to vacate registration of a custody order when it later determines the registered order was modified by a later order, according to Nadimpall v Byrrauja, _Mich App_ (2018), #340405 10/9/18. The parties were married in India, and eventually moved to California where their only child was born. Defendant obtained a divorce in California in 2012, resulting in a consent order granting Defendant physical custody of the child and Plaintiff parenting time on alternate weeks. The parties later entered into a stipulated agreement for joint legal and physical custody, which was incorporated into a consent judgment in California. The judgment required Plaintiff to return the child to live with Defendant in India no later than April 15, 2014, and specified Plaintiff’s parenting time in India. The judgment granted the child parenting time on alternate weeks when they lived in the same country (the US or India), and limited the child’s city of residence in each country (Santa Clara in the US and Hyderabad in India).

In 2016, Defendant filed for exclusive custody in Hyderabad, India where she and the child had lived for the past two years. She then submitted a request for the California Court to terminate its custody jurisdiction. Six months later, the India court granted exclusive custody to Defendant based on her testimony. Plaintiff then requested that the Wayne County Circuit County register and enforce the 2014 California custody determination under the UCCJEA, MCL 722.1101 et seq. The California court tentatively found that it was up to the courts in Michigan and India to determine which court has jurisdiction. The Michigan court issued an order registering the 2014 California custody determination and sent notice of registration to Defendant. The trial court later denied Plaintiff’s motion to enforce the California custody determination and later vacated the registration of the 2014 order on the grounds that he had failed to serve Defendant with the motion, failed to establish that the Michigan court had jurisdiction to enforce the California order, and failed to present the court with all custody orders subsequent to the 2014 California order.

The Court of Appeals affirmed finding the Wayne County Circuit Court properly vacated the registration of the California custody determination because it had been properly modified by the Hyderabad, India court. India had become the home state because neither party nor the child resided in California, and the child had resided in India for the six months before entry of the custody order by the India court. The child and the parties had significant connections with India and evidence regarding custody was more likely found in India than in any other state. The India court was not required to communicate with the California Court before proceeding, and the California Court had already verbally informed Plaintiff that it no

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longer had jurisdiction over the custody issue. Although the India court did not specifically mention the UCCJEA and the 2014 California order, it generally addressed the prior California proceedings and the India court properly made its decision based on the evidence before that court.

After remand from the Supreme Court, **TM v MZ, 501 Mich 312 (2018)**, the Court of Appeals addressed the limits of obtaining a PPO to prohibit postings of derogatory comments about a petitioner on social media and other websites in **TM v MZ, _ Mich App _ (2018)**. Although the published opinion is not yet available on the Court of Appeals website, it has been posted on at least one family law site. The case does not involve adults with a child in common but could apply to domestic relations PPOs. After a hearing, the court entered a PPO prohibiting Respondent from posting statements regarding Petitioner through the use of any medium of communication, including the Internet, computer or any electronic medium pursuant to MCL 750.411s.

The Court of Appeals reversed. To obtain a PPO on the basis of MCL 750.411s, Respondent must have intended that his or her statements would make, and did in fact make, Petitioner feel terrorized, intimidated, threatened, harassed or molested, that the message would cause a reasonable person to suffer emotional distress, and that Respondent did suffer emotional distress. Although Respondent’s alleged statements were found to be inappropriate, crude and offensive, the court was also required to find that the PPO petition was not based on constitutionally protected speech. The First Amendment does not protect obscenity or defamation, within limits, or words, “which by their very utterance inflict injury or tend to incite an immediate breach of the peace,” such as “fighting words,” words “inciting or producing imminent lawless action,” or “true threat(s).” The Court of Appeals found that the trial court did not address whether the statements were false or defamatory, and the statements were not true threats, did not constitute fighting words, and did not incite lawless action. Thus, the trial court failed to determine that Respondent’s statements were not constitutionally protected speech and therefore erred when entering the PPO. Further, the PPO was an unconstitutional prior restraint on free speech. The Court of Appeals found that the PPO must be vacated and L.E.I.N. corrected to indicate the PPO was vacated as improperly entered.

The trial court did not abuse its discretion when calculating support under 2013 MCSF 2.05(A) by including both interest from Plaintiff’s inheritance and her determined withdrawals of inheritance principal from her savings account in her income under the unpublished case of **Cox v Cox, Unpub Ct App #338642 11/15/18**. Affirming Hon. Judge Thane, the Court of Appeals held that 2013 MCSF 2.05(A) does not prohibit consideration of the principal of a parent’s inheritance as income, but only states that “income generally does not include property or principal from an inheritance or a one-time gift”, and Plaintiff’s Social Security payments had been disallowed because of her inheritance. 2017 MCSF 2.05(A) contains the same language. The court did not err when basing the support award upon a calculation using the Marginsoft program, when a calculation using the Prognosticator program resulted in $40 a month more in support, because Plaintiff’s calculation had attributed the tax deductions for the children to Defendant and not included his pension deduction. The trial court properly limited the attorney fee award to Plaintiff to $1,000 under MCR 3.206(C) based upon the parties’ incomes, Plaintiff’s need, and Defendant’s ability to pay.
Juvenile Case Law Update

By Ariana Heath, Genesee County

Abuse/Neglect

In re Blakeman, October 25, 2018, No. 341836, Ingham Circuit Court. Respondent Father’s wife was babysitting an unrelated toddler. She left the home and left the toddler with Respondent. When she returned, the toddler was unresponsive. The toddler had a large, life-threatening skull fracture. He survived, but doctors expect significant long-term physical and cognitive defects. DHHS filed a petition against Respondent and his wife regarding their four minor children. The children were not removed from the home initially but were removed following a custody review hearing. After an additional custody review hearing the court ordered the children released to the parents. Respondent testified and maintained his innocence at the adjudication trial. The trial court found Respondent fractured the toddler’s skull, assumed jurisdiction, and ordered Respondent to leave the family home, permitting only supervised contact between the father and the children. Respondent participated in services, including a psychological evaluation where the evaluator concluded there was no compelling reason why Respondent should not be able to return home. At an October 2017 review hearing, the DHHS worker stated there were no concerns from the agency about Respondent returning to the family home while continuing counseling. The APA representing DHHS said he was not comfortable with that recommendation. The trial court rejected recommendation and expressed dissatisfaction with how the case had been overseen by DHHS; it expressed disbelief that DHHS was recommending reunification when Respondent had not admitted to the assault. At the next review, DHHS and Respondent’s therapist defended their recommendation to allow Respondent to return home. Again, the APA disagreed. This time the GAL changed her position and stated that the Respondent should not be permitted to return home. The trial court continued the prior orders, prohibiting the Respondent father from residing in the family home and continuing to only permit supervised contact with the children. Respondent appealed raising the question of whether a parent’s constitutional right against compelled self-incrimination bars a court, in a child protection case, from requiring that parent to admit to having abused an unrelated child as a condition of reunification. The COA concluded that it does and remanded the case.

The COA noted 5th Amendment privilege may be invoked even when criminal proceedings have not been instituted or planned. Although Respondent had not been charged, it was reasonable to conclude

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that it does and remanded the case.

The COA noted 5th Amendment privilege may be invoked even when criminal proceedings have not been instituted or planned. Although Respondent had not been charged, it was reasonable to conclude that any statement could be used in the future. The court differentiated this case from In re Stricklin (148 Mich. App. 659). Stricklin recognized two interrelated requirements for a Fifth Amendment violation: “evidence that a person is unable to remain silent unless he chooses to speak in the unfettered exercise of his own will that is grounded on a penalty exacted for the refusal to testify.” In this case, Respondent waived his Fifth Amendment privilege at the adjudication trial. COA ruled there was a sufficient showing of compulsion at the dispositional review hearing. In Stricklin, any testimony offered would have been non-incriminating and therefore did not invoke the Fifth. The trial court in this case predicated reunification upon admission of child abuse. There was no lack of compulsion just because Respondent had previously waived the right. Respondent was forced to choose between his liberty and his children, which made his right to remain silent no longer unfettered.

The second requirement, a penalty being exacted for Respondent refusing to admit to the abuse sufficient to compel self-incrimination, was obvious to the appellate court in this case as Respondent was ordered to remain outside the family home and was looking at possible termination of his parental rights. The COA stated “this practice offends due process when a respondent is required, on pain of being deprived of the care and custody of his children, to confirm the trial court’s determination that he had committed severe child abuse.”

Although not raised on appeal, the COA stated in a footnote that the trial court should address whether the prosecutor has standing to proceed in the case if the prosecutor was not going to represent DHHS. Case law, court rules, and statues allow the prosecutor to appear when requested by the court, by DHHS, or when the prosecutor has filed the original petition. Additionally, the COA stated it was difficult to provide guidance to the trial court given the trial court must weigh whether the parents have complied with and benefited from services and must take into account any likely harm to the children if separated from Respondent or returned to Respondent. The COA directed the trial court to conduct a “balancing of the imperatives” and decide the questions of visitation/reunification taking into consideration all facts and circumstances while refraining from considering Respondent’s “persistent claim of innocence in connection with the toddler.”

Vacated and remanded.

In re Long, November 20, 2018, No. 344326, Oakland Circuit Court. A few months after the child subject to this case was born, the maternal grandmother filed a petition to become the child’s legal guardian. Respondent Father in this appeal was not the legal father at the time. In 2016, the guardian filed a petition to terminate the parental rights of mother and the unknown father. In September 2017, which was after the filing of the termination petition, Respondent formally established paternity. A termination trial was held in
November 2017. The trial court issued an opinion and order finding statutory grounds for jurisdiction. There was a subsequent hearing in May 2018 and the trial court terminated parental rights.

The COA ruled jurisdiction was improper as to MCL 712A.2(b)(2) because the statute bases jurisdiction in that portion of the statute on the child’s home at the time of the filing. At the time of the filing, the child’s home was with the guardian and her home was not unfit at any time.

The COA ruled jurisdiction was also improper as to MCL 712A.2(b)(6) because a putative father does not qualify as a parent for the purposes of exercising jurisdiction in child protective proceedings. The trial court is required to "examine the child’s situation at the time the petition was filed" (In re MU, 264 Mich. App. at 279), Respondent’s status as a putative father at the time the petition was filed meant that he did not qualify as a parent and therefore his actions or inactions during the two years or more preceding the filing of the petition are immaterial. To rely on his actions when he was not a legal parent is a violation of due process. Because jurisdiction was improper, termination was reversed as well.

**Reversed, order vacated, and remanded.**

Ayotte v Department of Health and Human Services, November 27, 2018, No. 339090, Arenac Circuit Court. The child was detained for domestic violence against his mother in a delinquency case. Two days later, DHHS filed a petition against mother and requested the child be removed and placed in foster care. Contrary to the welfare findings were made in the initial order on the NA case but not in the DL case. Initially, the child qualified for IV-E funding. A year later the case was chosen at random during an annual review and it was determined it should not have been eligible for IV-E funding. The child’s GAL appealed. At an administrative hearing, the administrative law judge found that while there were contrary to the welfare findings in the initial order in the NA case, the child had already been removed in the DL case and the denial of funding was proper. The GAL appealed to the trial court. The trial court concluded the AJL committed clear legal error because the temporary detention order was not the first order of removal but an arrest warrant. DHHS appealed. The COA affirmed the trial court.

Plaintiff argued the detention order did not need contrary to the welfare findings because it was placing the child into detention, not foster care. The COA agreed and stated, “The plain language of 42 USC 672(a) (1) indicates that the state shall make foster-care maintenance payments on behalf of a child who has been removed from the home of a specified relative into foster care.” The COA stated that the juvenile was placed into detention initially, not foster care, because of alleged criminal acts. It also noted that detention facilities are specifically excluded from the definition of a child caring institution under the federal statute. Therefore,
the requirement for contrary to the welfare findings was not triggered until DHHS filed its petition and requested foster care.

Affirmed.

Juvenile Delinquency

Unpublished

People v Sanno, October 16, 2018, No. 340351, Wayne Circuit Court. This juvenile was convicted of CSC 1st degree. The first argument on appeal was the belief that the trial court improperly limited the juvenile’s opportunity to cross examine the victim. At trial, counsel had attempted to use the videotaped forensic interview of the victim when cross-examining the officer on the case. Counsel for the juvenile never attempted to impeach the victim with any statements she made to the officer. The COA ruled the victim was never afforded the opportunity to explain any inconsistencies and thus a proper foundation was never laid for use of a prior statement under MRE 613(B). The appellate court also rejected the argument that counsel should have been allowed to circumvent the rules because a four-year-old (the age of the victim) would be unable to testify truthfully. The COA also rejected all arguments regarding ineffective assistance of counsel.

Affirmed.

UPCOMING EVENTS

• RAM Board Meeting
  Thursday, April 11, 2019
  10 a.m.
  State Bar of Michigan
  Lansing, MI

• RAM Annual Training Conference
  May 22-24, 2019
  The H Hotel
  Midland, MI
MEMBER VOIR DIRE
by Susan G. Murphy, Jackson County

After da moonlight in Escanaba ended on January 1, 2019, Jessica Gallagher began her new position as the Domestic Relations Referee with the 47th Circuit Court in Delta County. She hit the ground running on January 2nd by preparing for her first hearings scheduled on January 3rd. But before that day even came, Jessica had joined RAM.

Jessica was born and raised in Delta County, Michigan. She graduated from Gladstone High School and moved to East Lansing to attend Michigan State University. She completed a bachelor’s degree in English from MSU in 1995. Jessica went on to complete her master's degree in English with a specialization in Applied English Linguistics from the University of Wisconsin-Madison in 1998. Not being tired of school yet, she moved back to Detroit to obtain her J.D. from Wayne State University Law School in 2002.

During law school, Jessica clerked for Judge Peter J. Maceroni in the Macomb County Circuit Court and was a summer intern for Timmis & Inman PLLC. Upon graduation she became an associate at Timmis & Inman PLLC. In 2005, Jessica returned to Escanaba to work with Butch, Quinn, Rosemurgy, Jardis, Burkhart, Lewandowski & Miller, P.C. She remained at the firm until 2012, with only a brief hiatus, between 2007 and 2009, when she served as legal counsel to the Michigan House of Representatives’ Democratic Caucus.

From 2012-2014, Jessica worked from home doing HR/legal work for her husband's engineering firm and then worked with Mead & Hunt, Inc., in Madison, Wisconsin, where she served as in-house counsel. In 2016, she joined the Delta County Friend of the Court staff as their Staff Attorney/Deputy FOC until January 1, 2019, when she was appointed as the Referee.

Jessica is married to Troy Gallagher. They have two sons, Samuel (9) and Wyatt (8). She also has a step-daughter, Sydney (18). They have a family Golden Retriever named Sully, who is three-years-old.

Currently Jessica drives a 2018 GMC Acadia, but if money were no object she would prefer to travel by horse. This makes more sense when you learn that her happiest childhood memory is when she rode horses with her sister and cousins on their grandmother’s farm. Those moments were enjoyable even though she was bucked off and bitten multiple times. I have a feeling she’ll adjust to the referee's hot seat quickly.

Before her legal career, Jessica sold athletic shoes, washed dishes at a golf club, served Pizza Hut pizzas, made paper at the Escanaba Paper Company, reported the news at WLUC-TV6 News in Marquette, and edited copy for The Sportsman’s Guide in South St. Paul, MN. When you hear that, you think sports and outdoors. Some might say that the athletic lifestyle is deeply ingrained in her. Her super power wish is to have the ability to play any sport on a professional level. Favorite pasttime? Running. Favorite place to spend money? Sporting goods store. Favorite hangouts? Wooded trails, the beach, the kids’ sports fields/courts, and home. And, her current reading material? Right now that includes Coaching Youth Baseball the Ripken Way, by Cal Ripken, Jr. and Bill Ripken and Born to Run: A Hidden Tribe, Superathletes, and the Greatest Race the World Has Ever Seen, by Christopher McDougall.

It sounds to me like we have a new player for the golf outing; maybe even a sports ringer for trivia. Welcome to our team, Jessica!
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