INTER-COM

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PROBATE COURT COMMITTEE

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From the Editor: ZERO Down, that's right I said ZERO Down, and ZERO percent Financing! (a.k.a. the tale of Two Jimmys)

by Hon. Monte J. Burmeister

Northern Michigan author, Jim Harrison, wrote the following passage in The River Swimmer: "How wonderful it was to love something without the compromise of language." While the idea of such planes of enlightenment is extremely enticing to me, I have yet to figure out how to reach such planes of enlightenment. Somewhat simplistic thinking on my part, but I also can't do an editorial without language. I guess in the end, you'll have to figure out whether you've been intellectually compromised.

Another James (sometimes referred to by those in the know as "Jimmy") Buffet, had a few chapters in Tales from Margaritaville where he talked about the trials and tribulations of twin sisters Aurora & Bora Alice. Reading about Aurora & Boring Alice (as she was more routinely called in later chapters) reminded me of how much fun characters are. Twins named in alignment with the northern lights? It's tough to get better than that.

But, now back to Jim Harrison. He had a character in The River Swimmer, who basked in "...the happy thought that he had zero percent financing on the rest of his life because no one more than nominally cared except himself."

I know that last sentence can be interpreted in a negative way. However, I viewed it in kind of the opposite way. I thought it was pretty cool---a veritable carefree mecca. Maybe because being in such a state would reflect that many of your obligations and responsibilities had dwindled. Maybe that's something that seems more enticing when you're close to having kids go to college, or other major obligatory milestones in your life. Anyway, the zero percent financing also made me think of the protagonist in Jimmy Buffet's song, He went to Paris. The song speaks of the journey of a man's life, and toward the end, after he's lost his son and wife, proclaims:

While the tears were a-fallin he was recallin
Answers he never found
So he hopped on a freighter, skidded the ocean
And left England without a sound

Now he lives in the islands, fishes the pilins
And drinks his green label each day
Writing his memoirs, losin his hearin
But he don't care what most people say

Through eighty-six years of perpetual motion
If he likes you he'll smile and he'll say
Jimmy, some of it's magic, some of it's tragic
But I had a good life all the way

Those last verses, it seemed to me, encompassed the positive side of zero percent financing.

So, how does one arrive at such a blissful Zen like state? This churned in my cranium. It was like continuing to hit the refresh button on your email. As my mind was hitting refresh, enter, stage left, Dan Ackroyd and his Bass-O-Matic. Yes, Dan Ackroyd from his SNL days in his wildly plaid, wildly 70s, jacket. What was put in the Bass-O-Matic? One part Jimmy Buffet; one part Jim Harrison; one part Jurisprudence; and one bass (although, it was a smallmouth). What came out was relatively simple. Perhaps we arrive at the oasis by following sage advice. Some of you are thinking, Holy Crap Monte, couldn't you have just

started this thing with the question, what is sage advice? I could have, but I am trying to envelope you in the total experience of how we arrived at this confluence of intellectual hubris and infinite curiosity. Doing my part as your mental tourism guide, if you will.

Well, back to my thought about how much fun characters are. As you all know, we have a few characters of our own within our association. Yes, they walk among us. So, because answering that inquiry of what "sage advice" was seemed labor intensive and overly complicated for my otherwise nimble cat-like-reflex mind, I queried some of our characters on the cleverest, funniest, best, or most memorable piece of advice they had ever received that they like to give to others.

Many of our characters answered the call and for that I thank you. With the number of responses I received, I could not publish them all. Further, many of the pieces of advice were in a similar vein with slight variation from one to the other. In that case I picked one—so please don't be offended if it wasn't yours. Still further, some gave me famous quotes from noted figures in history. While I like those, I generally did not use them as I was looking for a more home grown---pummeled by experience—how I won the county fair pie eating contest---grass roots breed of advice emanating from our own cast of characters. Lastly, some folks confused my request for the best advice as a request for the best put down. Those were amusing, but likewise are missing. So, admittedly somewhat arbitrarily, the sampling of our own characters' words of wisdom, whittled down (some credited, some not), is presented in my article "Words of Wisdom." ■

P.S. I also received a few comments more properly characterized as sayings or anecdotes as opposed to advice. They were fun nonetheless. Here are a few:

The Probate Court is the real family court. People are usually related when they go to probate and are still related when they leave.
~ Hon. Milton Mack

From one of my mental health cases, in response to question from the county attorney, the respondent said: "Your questions are hurting my answers."
~ Hon. Milton Mack

Inspirationally, though, my brothers and I frequently look to the Gene Wilder version of Willie Wonka: "A little nonsense now and then is relished by the wisest men," and my favorite, "The suspense is terrible…. I hope it lasts."
~ Hon. Michael Jaconette

When my daughter was in the county spelling bee she was full of anxiety. We had gone over the spelling lists lots of times and she knew the words cold. But she was still nervous. So I told her, "What's the worst that could happen -- that you lose? There are 50 kids in the spelling bee and 49 of them are going to lose, so just go up there and have fun." And she made it to the final round where she and a boy in her class traded words from an unpublished list until she beat him. The winning word was "absenteeism". She told me later that she sighed in relief when the word was announced, because she knew it from my campaign---sending all that mail to absentee voters when I ran for judge!
~ Hon. Karen Tighe

I attended a seminar a number of years ago and one of the speakers addressed issues related to communication and offered advice on listening. At this time we were having difficulty with our seven year old son who was constantly interrupting others when they were speaking. Armed with this new advice on listening the next time our son interrupted my wife and I, I sat him down and asked him if he knew why we had each been given one mouth and two ears. Our son paused, and with a big smile responded, " I know why daddy!!! So that I can hear myself better!!!"
~ Honorable Fraser Strome

P.P.S. After you read "Words of Wisdom," if none of the advice presented puts you in a Zen like state, you're last hope is to download the extension for Google's Chrome browser that replaces the word "literally" with "figuratively" on sites and articles across the Web, with deeply gratifying results. The extension was built by a programmer named Mike Walker, whose program addressed all those people who were bothered by the idea that people often use the word "literally" when describing things figuratively. A word of warning though, as noted in Slate magazine: Walker's widget does not distinguish between the literal and figurative uses of the word "literally." I explained to Curtis Bell that extensions like that would not be needed if he would just stop doing that. He refused, literally.

President's Report

by Hon. Lisa Sullivan, Clinton County Probate and Family Division Judge

As we go to press, the Legislature and the Department of Human Services (DHS) are attempting to implement a significant paradigm change for Michigan's child welfare system. That change is embodied in a proposal to create a Performance Based Funding (PBF) system. Members of MPJA were involved in the exploratory committees and reporting process; however, as attempts to quickly adopt this shift move forward, the time has come for all of our members to become active in this discussion with our legislators.

In a nutshell, a 2013 appropriations bill required DHS to convene a task force to explore whether a PBF child welfare system would work in Michigan. DHS was given a very short window of time to analyze this suggestion by the Legislature. To its credit, and with our appreciation, DHS included MPJA and other important systemic stakeholders on its working committees. The conclusion reached by the task force was, essentially, that under the current funding and statutory scheme, a PBF system would not work in Michigan. However, if changes could be made to the Child Care Fund and other current barriers, it might be feasible to implement such a system. The task force further recommended the establishment of several pilot programs (with a variance of demographics) to determine if the proposed changes are attainable.

In my attempt to summarize what has occurred, I do not mean to minimize the concerns of MPJA, SCAO, and MAC about

the feasibility and advisability of these changes. However, it was important during those discussions – and it continues to be imperative as we move through this process – that our members can effectively educate the stakeholders about MPJA's position without alienating the association from the deliberative process. Given the magnitude of the proposals, MPJA cannot afford to watch from the sidelines.

MPJA Board members were very skeptical and concerned as the task force started to craft its report. There were many proposed changes that raised red flags; however, because MPJA had an opportunity to voice its concerns during this process, those concerns were either included or addressed in the final report. Ultimately, then, the Board agreed to support the Task Force report but only with the following caveats: 1) Local funding units shall be held harmless as the Child Care Fund barrier is addressed; 2) Judicial discretion shall not be restricted; 3) MPJA shall have the ability to participate as this process continues; 4) Legislative changes shall be implemented (if necessary) to provide courts the authority to hold private agencies directly accountable as parties; and, 5) Any implementation of a PBF child welfare system will not be implemented in a piecemeal process.

The ink was dry on the final report in March, and already legislative proposals are surfacing to move toward a PBF child welfare system. There are some bills, which appear consistent with requests made by MPJA during Task Force discussions. However, these efforts have seemingly taken on an assumption that a PBF system is feasible in Michigan, and they read as an attempt to force state implementation before even one pilot project has been completed. Moreover, there are requests to support these proposals on a piecemeal basis – something MPJA vehemently opposed.

As a result, in the days and months ahead, MPJA leadership will likely be calling on members to contact their legislators. It will be important that MPJA speak with a united, consistent voice, and that it maintain its ability to be a participant in these discussions. To this end, more information will be forthcoming. Our membership can be effective and influential in this process, and because of the sweeping changes that could be proposed, I hope all of you can make the time to join this effort.

In other news, the Governor this year signed legislation which makes some major changes to the adoption process. The overriding intent of these bills is to bring Michigan in line with many other states which allow for out-of-court consents by biological parents, and which limit the time within which consents may be revoked. Judge Brown spent a lot of time offering feedback to lawmakers to narrow the scope of these changes. While the impact of these new laws remains to be seen, they passed in much more palatable forms because of Judge Brown's work. Summaries of these changes can be found on the following website: http://www.legislature.mi.gov.

Speaking of websites, don't forget to check out the website for MPJA. You can find it at: http://tinyurl.com/o86b6ah. Judge Dobrich worked with the State Bar to bring MPJA into the cyberspace era. This forum offers archived information about the Association, and it contains links to many areas that impact the courts' dockets and operations. The website continues to be a work in progress; so if you have any suggestions, please contact me or Judge Dobrich with your comments.

Finally, for those of you who could not attend the Annual Conference, I plan to have the materials published to the website shortly. We missed you, but I hope you enjoy the remainder of your Summer. ■

To Hear or Not to Hear? Attorney Fee Contests After *Souden v Souden*

by Hon. Elizabeth Pezzetti, Oakland County Probate Court

The recent case of *Souden v Souden*, 303 Mich App 406; 844 NW2d 151 (2013) has trial court judges wondering whether they must hold an evidentiary hearing whenever the amount of attorney fees is contested. The *Souden* Court opined on two main issues: 1) whether a divorce court has jurisdiction over attorney fee disputes between a client and his/her attorney; and 2) whether a trial court must hold an evidentiary hearing when the amount of attorney fees is contested.

Before *Souden*, many trial judges (including this Judge) denied attorneys' requests for enforcement of their own clients' attorney fees, telling the attorneys to file a breach of contract action in the appropriate district or circuit court.[1] The *Souden* Court held otherwise. Id. at 411. *Souden* was a divorce matter in which the plaintiff's counsel petitioned the trial court for payment of attorney fees from his client. The plaintiff argued that the trial court lacked subject matter jurisdiction over the attorney fee issue given that plaintiff's counsel was a third party creditor, not a party to the action. The *Souden* Court reasoned that, unlike other third party creditors, the attorney's claim for fees was "premised on his contractual relationship with Plaintiff as her attorney and on a resulting attorney's charging lien." Id. After discussing attorneys' charging liens, the Court opined that the trial court has the power to enforce an attorney's charging lien in a divorce action. Id.

The plaintiff's primary attack in *Souden* was that her attorney's claimed fees were unreasonable and inflated. At the trial court, the attorney seeking fees filed an itemized statement detailing the hourly rate charged, the time incurred and a description of the services provided. The Court of Appeals held that "the trial court did not properly review [the attorney's] claimed fees for reasonableness". Id. at 414. The Court then listed the eight factors to consider under MRPC 1.5(a), and recognized that "a trial court is not required to consider every factor in detail".[2] Id. at 416. However, in the same sentence, the Court opined that a "trial court should endeavor to briefly discuss the above factors in order to aid appellate review". [citations omitted]. The issue of the reasonableness of the attorney fees was remanded for an evidentiary hearing: "[o]n remand, the trial court should at least briefly consider the relevant factors enumerated earlier in this opinion". Id. at 417. In addition to stating that findings of fact "should" be made on each of the eight MRPC factors, the *Souden* Court indicated that a trial court "should" look at the fee agreement between attorney and client.[3] Id. at 416.

Previously, in *Smith* v Khouri, 481 Mich

519; 751 NW2d 472 (2008), the Michigan Supreme Court addressed attorney fees awarded as case evaluation sanctions and opined that a trial court "should briefly indicate its view of each of the" *Wood*[4] factors as well as the factors set forth in MRPC 1.5(a) "[i]n order to aid appellate review". Id. at 537. The Michigan Supreme Court observed that if a factual dispute exists over the reasonableness of the hours billed or the hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing. Id. at 532. However, *Smith* did not expressly overrule a line of cases providing that an evidentiary hearing is not required in all cases regarding contested requests for attorney fees.

In its analysis of the issue, the *Smith* Court stated that a trial court should start its analysis by "determining the fee customarily charged in the locality for similar services". After the reasonable hourly rate is determined, it "should be multiplied by the reasonable number of hours expended in the case . . . ". Id. at 531. "the number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee." Id. This analysis must be performed for each lawyer. Id. at 532. Next, the trial court must consider several other factors to "determine whether an up or down adjustment is appropriate." Id. at 531. These factors are similar to the factors contained in *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982) and MRPC 1.5a, and include:

1. the professional standing, reputation, experience, and ability of the attorney;
2. the skill, time and labor involved;
3. the likelihood that acceptance of the particular employment will preclude other employment by the lawyer;
4. the difficulty of the case;
5. the expenses incurred;
6. the fee customarily charged in the locality for similar legal services;
7. the amount in question and the results obtained;
8. the nature and length of the professional relationship with the client;
9. the time limitations imposed; and
10. whether the fee is fixed or contingent.

In *Reed v Reed*, 265 Mich App 131; 693 NW 2d 825 (2005),[5] the Court of Appeals also required an evidentiary hearing: "[w]hen requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services". Id. at 166.

In a frequently cited earlier case on attorney fees, *Wood v DAIIE*, supra, the Michigan Supreme Court adopted the six factors set forth in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973), for determining the "reasonableness" of an attorney fee. The *Wood* Court stated that a trial court is not limited to the *Crawley* factors, and that there is no "precise formula" for determining the reasonableness of an attorney's fees. The *Wood* Court further stated that "the trial court need not detail its findings as to each specific factor considered." Id. at 588. *Wood* did not specifically state whether an evidentiary hearing is required. Further, the holding that a "trial court need not detail its findings as to each specific factor considered" is in conflict with *Souden* and *Smith*, which provide that a trial court "should endeavor to briefly discuss the above factors in order to aid appellate review".

Although many of the opinions are unpublished, several appellate court panels have held that an evidentiary hearing is not required if the parties have created a sufficient record. In fact, as recently as April 8, 2014, the Court of Appeals, in an unpublished per curiam opinion, *In re Don H Barden Trust,* (Docket Nos 312027 and 314391), upheld an award of attorney fees finding that the trial court had sufficient evidence to determine the costs and fees without holding an evidentiary hearing. The Court detailed the records that were provided to the trial court in lieu of a hearing, which included, "voluminous billing statements, affidavits describing the attorney's professional qualifications, and the economics of law practice from the State Bar." Id. at 13. The Court of Appeals noted the familiarity of the trial judge with the history of the case and the complexity involved. With regard to the trial court's analysis, the Court of Appeals noted that while the trial court referenced all eight of the factors from MRPC 1.5(a), as well as the factors from *Wood*, supra at 588, it only analyzed three of the six *Wood* factors ultimately finding that, "[T]he court appears to have boiled the matter down to the main factors at issue." *In re Don H Barden Trust* at 14. The Court of Appeals found no abuse of discretion with the trial court's award of attorney fees without an evidentiary hearing.

Likewise, in *John J Fannon Co v Fannon Prods, LLC*, 269 Mich App 162; 712 NW 2d 731 (2005), the Court of Appeals upheld an award of attorney fees stating that, "If the trial court has sufficient evidence to determine the amount of attorney fees and costs, an evidentiary hearing is not required." Id. at 171. The Fannon Court noted that the records provided by counsel were detailed and the trial court judge was very familiar with the case and work involved. The Court also held that detailed findings on each of the reasonableness factors are not required. Id. at 172.

Indeed, there are a number of appellate cases holding that an evidentiary hearing is not required. See *Edwards Publications, Inc v Tracy Kasdorf and Bilbey Publications, LLC*, unpublished opinion per curiam of the Court of Appeals, issued February 25, 2014 (Docket No 310907) (evidentiary hearing not required when trial court has sufficient evidence to determine the reasonableness of the attorney fees requested); *Midland National Life Insurance Company v Ralph Henry Nikkel*, unpublished opinion per curium of the Court of Appeals, issued May 12, 2011 (Docket No 295300) (evidentiary hearing on reasonableness not required where party submitted sufficient evidence); *Wolfson v Grech*, unpublished opinion per curiam of the Court of Appeals, issued December 19, 2006 (Docket No. 269930) (evidentiary hearing not required to determine reasonableness even where a billing statement was not submitted, but the trial court was familiar with the case and complexity); *Head v Phillips Camper Sales & Rental Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999) (no evidentiary hearing needed where the parties created a sufficient record to review the issue and the trial court thoroughly explains the reasons for its decision); *Giannetti Bros Constr Co v Pontiac*, 175 Mich App 442, 450; 438 NW2d 313 (1989) (an evidentiary hearing was not required in determining expert witness fees).

The problem with requiring mandatory hearings on all attorney fee disputes is that the trial courts' dockets will be greatly increased and parties will have to wait longer to achieve resolution of their disputes. Additionally, requiring evidentiary hearings on the reasonableness aspect increases the cost of litigation; costs are increased due to the additional preparation, hearing time and possible costs for expert witness fees, unless a reliable survey on fees can be found and utilized.[6]

Lacking clear direction from the appellate courts, the safest practice is to hold

an evidentiary hearing when a request for attorney fees is contested. Absent a hearing, the trial court must ensure that it has a sufficient documentary record on which to base an award and that the opinion addresses, at least briefly, all of the factors recited in *Smith*.

Practice Tip

I have adopted a procedure that has worked well for certain attorney fee disputes. After deciding that a basis exists for an award of attorney fees, I ask the attorney requesting the fees what is his hourly rate on the matter, then ask opposing counsel to stipulate to the reasonableness of the hourly rate. I usually receive a stipulation as to the reasonableness of the hourly rate. Then I tell the requesting attorney to file an affidavit with a detailed billing statement containing the hourly rate, the services provided and the costs incurred as well as a proposed order under MCR 2.602(B)(3) (the "seven day rule"). If no written objections are filed and I find the fees reasonable, I sign the proposed order. If objections are filed, they should be specific and must include an alternate proposed order and a notice of hearing. If objections are timely and properly filed, I set an evidentiary hearing; however, the scope of the hearing is reduced given the specific objections. Of course, if I have not obtained a stipulation to the reasonableness of the hourly rate, I must address that factor at a hearing.

The advantages to this method are: (1) I usually get a stipulation to the reasonableness of the hourly rate; (2) often an objection to the proposed order is not filed; and (3) if there is an objection, the scope of the hearing is limited. No order under this procedure has been appealed, so I don't know whether the Court of Appeals would find it appropriate. I have not had an opportunity to use this method when an attorney is requesting fees from an opposing pro per party, and probably would not. Further, I would not utilize it in a case such as *Souden* where a party contests fees charged by his own attorney. ■

1. In fact, the retainer agreements of some attorneys provide for venue in specific circuit or district courts.

2. The eight factors listed in Rule 1.5(a) of the MRPC are:

- *i. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;*
- *ii. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment buy the lawyer;*
- *iii. the fee customarily charged in the locality for similar legal services;*
- *iv. the amount involved and the results obtained;*
- *v. the time limitations imposed by the client or by the circumstances;*
- *vi. the nature and length of the professional relationship with the client;*
- *vii. the experience, reputation, and ability of the lawyer or lawyers performing the services; and*
- *viii. whether the fee is fixed or contingent.*

3. Often times, the fee agreement between the attorney and the client is not submitted for the trial court's review.

4. Wood v DAIIE, 413 Mich 573; 321 NW2d 653 (1982).

5. Souden, supra, relies on Smith v Khouri, 481 Mich 519; 751 NW2d 472 (2008). Smith, supra, cites to Reed v Reed, 265 Mich App 131; 693 NW2d 825 (2005). Reed, supra, relies on Miller v Meijer, Inc, 219 Mich App 476, 479-480; 556 NW2d 890 (1996) and Petterman v Haverhill Farms, Inc, 125 Mich App 30, 33; 335 NW2d 710 (1983).

6. The Smith Court promoted use of "empirical data found in surveys and other reliable reports" to determine a reasonable hourly rate. Smith specifically identified the State Bar's economic survey as one such example of "empirical data". Smith, supra at 532. However, I am extremely cautious of utilizing the State Bar's Economics of Law Practice Survey as a tool for determining a reasonable hourly rate. I do not believe the survey is a "reliable" measurement, as there are multiple problems with this survey. The survey is not an annual survey. The main problem is the sample size, or response rate. When the last survey was performed in 2010, there were a total of 33,063 members of the State Bar of Michigan. The surveys were e-mailed to 29,475 bar members; only 3,775 "usable" responses were utilized. This equates to a sample size of 12.8 % of the e-mailed bar members; and 11.4% of the total State Bar membership. Yet, many appellate opinions have approved the use of this survey. Hopefully, the 2014 Economics of Law Practice Survey will have a better response rate.

Should Incarcerated Parents Be Permitted To Receive Visits From Their Minor Children?

by Hon. Freddie G. Burton, Jr., Wayne County Probate Court

During a hearing involving the appointment of a guardian for a minor the proposed guardian asked if it would be okay for the minor to visit the incarcerated parent. I authorized the request for visitation without much thought. Sometime later as I presided over a juvenile delinquency matter, I was presented with a specific reason to limit or stop visitation between the incarcerated parent and the minor child. The respondent made it clear he didn't mind going to the training facility, because, "he had been visiting prisons for a long time" and placement didn't bother him at all.

The peculiar attitude of this youth convinced me that too much exposure to detention in part served to desensitize youth to the fears of jail. I then decided the guardian of a minor could not take the minor for visits with an incarcerated parent more than twice a year. I quickly learned this "one size fits all" approach did not work for every child. This began my journey to find a fair, responsible way to implement appropriate visitation.

It is clear that a probate judge is empowered to preclude or limit the ability of a minor ward to visit their imprisoned parent(s).

MCL 700.5204 provides in pertinent part:

(5) For the minor ward's welfare, the court may at any time order the minor ward's parents to pay reasonable support and order reasonable parenting time and contact of the minor ward with his or her parents. *(emphasis added)*

The forgoing provision of EPIC is applicable to full minor guardianships. The relevant section relating to limited minor guardianships is MCL 700.5205.

In addition to the authority of the court, the Michigan Department of Corrections (MDOC) has issued regulations concerning the ability of minors to visit inmates.

The Approved Visitors list noted in MDOC Policy Directive 05.03.140, eff. 11\1\13, declares in pertinent part:

J.4… a minor shall not be approved for placement on the prisoner's approved Visitor List under any of the following circumstances:

a. The Department is notified that there is a court order prohibiting visits between the child and prisoner;

b. The Department is notified that the parental rights of the prisoner for the child have been terminated;

c. The prisoner has been convicted of child abuse/neglect, criminal sexual conduct, or

any other assaultive or violent behavior against the child or sibling of the child unless an exception has been granted by the Director upon request of the Warden. The Warden will be notified in writing if an exception is granted. *(emphasis added)*

The ability of the MDOC to impose visitation restrictions on categories of individuals, including minors, was affirmed by the United States Supreme Court in *Overton v Bazzetta*, 539 U.S. 126; 123 S.Ct. 2162; 156 L.Ed.2d 162 (2003).

EPIC and MDOC regulations provide courts with the power to limit visitation, but there are several factors to consider if a minor ward should be permitted to visit a parent in prison. The safety of the child must be taken into consideration, as the ability of the prison to protect visitors in this environment is not guaranteed. For example, even though MDOC has improved their ability to protect children there was still an incident in Muskegon where an inmate sexually abused a minor in a waiting room.

The parent's estimated length of incarceration should also be taken into account. The shorter the period of imprisonment, the more benefit could be derived from visitation by a minor, since the parent-child relationship has the potential to be more fully resumed upon the parent's release from prison and the presumed termination of the guardianship. The longer the term of imprisonment, the less potential for a resumption of the parental relationship with the ward, who will have less influence and involvement in the child's life.

The age of the minor should also be evaluated. The prison environment can be traumatic and stressful for minors of all ages, but particularly so for young children. In addition, visitation by the minor over the course of several years can desensitize the child to prison and the fear of incarceration.

Another factor to be considered is the nature of the parent's offense. The more disturbing the crime, the more caution should be exercised in determining whether and to what extent visitation should be permitted.

It is important to note that in addition to visitation, alternative methods of communication are available for a parent to maintain contact with their child. Written correspondence can be exchanged. Telephone calls can also be used to maintain contact. These options, while not as effective as in-person interaction, enjoy the advantage of being able to be used without having the minor visit a prison.

The drawback in limiting or precluding prison visits by minors is that they are unable to see their parent(s). This makes it much more difficult to sustain a viable relationship between the child and their incarcerated parent(s). However, in these situations a determination must be made as to what is in the minor's welfare and most appropriate for their long-term interests.

Adjudicating the issue of visitation by a minor ward with their incarcerated parent(s) is difficult. Balancing the competing interests and factors of the parent and child in these situations is challenging. Consideration of the forgoing factors and potential issues - and their application to the circumstances of a particular case – hopefully will help you make an informed and reasoned decision concerning this sensitive issue. ■

Ability To Pay and How To Stay Off Of NPR

by Hon. Robert S. Sykes Jr., Ionia County Probate Court

In May, NPR aired a series entitled "Guilty and Charged" that focused on the issue of courts sending people to jail for failing to pay their outstanding court debts. One of the cases featured in the series involved a 19-year-old Ionia fisherman who caught a fish out of season. A citation was issued with a $155 payment due. The man did not pay the ticket, failed to appear in court and did not keep the court advised of his change of address. As a result, a bench warrant was issued and he was arrested. Upon arrest, he was able to pay a bail bondsman to get out of jail. When he appeared in the district court a few days later, he was unable to pay the outstanding costs that had increased to $215 and he was sentenced to three days in the Ionia County jail.

Unbeknownst to the judge, the American Civil Liberties Union had been advising the young angler and even had a lawyer sitting in the courtroom ready to appeal the decision to send him to jail. The ACLU had also been following other cases in Michigan where the judges had a "pay or stay" approach to collecting fines and costs. A press release was quickly issued with the headline, "ACLU Challenges Debtors' Prisons Across Michigan."

As pressure mounts on judges throughout our state to not only impose fines, costs, restitution or out of home placement fees in juvenile delinquency and child protection cases, but to collect them as well, how can you avoid being the next judge to be featured in a future NPR expose'?

The United States and Michigan Supreme Courts have held that it is unconstitutional to incarcerate someone for failure to pay fines, costs, fees or restitution simply because the person is unable to pay. In *Bearden v. Georgia*, 103 S. Ct. 2064 (1983), the United States Supreme Court stated that a sentencing court cannot properly revoke a defendant's probation for failure to pay a fine and make restitution, absent evidence and findings that he or she was somehow responsible for the failure or that alternative forms of punishment were inadequate to meet the state's interest in punishment and deterrence. Thus, the trial court erred in automatically revoking the defendant's probation and turning the fine into a prison sentence without making such a determination.

The court further held that if a state determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he or she lacks the resources to pay it. If the probationer has willfully refused to pay the fine or restitution when he or she has the resources to pay or has failed to make sufficient bona fide efforts to seek employment or borrow money to pay, the state is justified in using imprisonment as a sanction to enforce collection. However, if the person has made all reasonable bona fide efforts to pay the fine and cannot do so through no fault of his or her own, it is fundamentally unfair to revoke probation automatically and incarcerate the person without considering whether adequate alternative methods of punishing are available to meet the state's interest in punishment and deterrence.

In *People v. Jackson*, 483 Mich 271 (2009), the Michigan Supreme Court held

that any time the court is considering incarceration for failure to pay, whether at the time of sentencing or at a subsequent proceeding such as a probation revocation or a show cause hearing, the court is required to consider the person's financial resources and ability to pay. Specifically, the court stated, "We hold that once an ability to pay assessment is triggered, the court may consider whether the defendant remains indigent and whether repayment would cause manifest hardship." *Jackson* at p. 275. The manifest hardship analysis applies not only to the person ordered to pay but, also to whether compelling payment will create a manifest hardship to the person's family members. Further, it is important to note that the court stated that a person is not entitled to an assessment of his or her ability to pay fees or costs at the time they are imposed; only at the time the collection of the fees or costs is enforced.

The United States Supreme Court in *Turner v. Rogers*, 131 S. Ct. 2507 (2011), a child support enforcement case where South Carolina's Family Court enforced its child support orders by threatening incarceration for contempt (look familiar?), recognized a set of procedural safeguards that can significantly reduce the risk of an erroneous deprivation of liberty. They include: (1) notice to the person that his or her ability to pay is a critical issue in the contempt proceeding, (2) the use of a form or the equivalent to elicit relevant financial information, (3) an opportunity at the contempt hearing for the person to respond to statements and questions about his or her financial status, and, (4) an express finding by the court that the person has the ability to pay.

Recently, the State Court Administrative Office assembled the Ability To Pay Workgroup comprised of judges, court administrators and attorneys. Judge Thomas Slagle of Dickinson County and I are members. Contrary to some reports, the workgroup was not convened in response to the NPR series but had been in the planning stage for many months. We have established the goals of heightening judicial awareness of this issue, assisting courts in how to best determine a person's ability to pay, encouraging fair and consistent treatment of persons ordered to pay and maximizing enforcement efforts. To achieve these goals it may be necessary to enact legislation or create new court rules; it may require nothing more than courts adhering to established standards already created in statutes, court rules and case law. Regardless, Judge Slagle and I welcome any comments or suggestions that you might have on how we can better ensure that court ordered fines, costs, fees, restitution or child support are collected while not depriving any citizen of his or her liberty. ■

Who's Your Daddy? (And how did he get to be one?)

by Hon. Faye Harrison, Saginaw County Probate Court

In 33 years on the bench few subjects have perplexed me more than the array of ways to deal with fathers under the branches of Michigan family Law. What follows are my thoughts on some areas of Michigan daddyhood. They are not designed to be exhaustive, but hopefully will allow the reader to go, "Oh, yeah. We do have to deal with that sometimes." Add your own items to the list and share if you are so moved.

Child Protection

MCR 3.903(A)(7) defines "Father" as:

"(a) A man married to the mother at any time from a minor's conception to the minor's birth, unless a court has determined, after notice and a hearing, that the minor was conceived or born during the marriage, but is not the issue of the marriage;

"(b) A man who legally adopts the minor,

"(c) A man who by order of filiation or by judgment of paternity is judicially determined to be the father of the minor;

"(d) A man judicially determined to have parental rights; or

"(e) A man whose paternity is established by the completion and filing of an acknowledgment of parentage in accordance with the provisions of the Acknowledgment of Parentage Act, MCL 722.1001, et seq, or a previously applicable procedure. For an acknowledgment under the Acknowledgement of Parentage Act, the man and mother must each sign the acknowledgment of parentage before a notary public appointed in this state. The acknowledgment shall be filed at either the time of birth or another time during the child's lifetime with the state register."

MCR 3.907(A)(18) says that the male "parent" is the "father as defined in MCR3.903(A)(7)."

In child protection cases "[A] putative father ordinarily has no rights regarding his biological child, including the right to notice of child protective proceedings, until he legally establishes that he is the child's father." *In re AMB*, 248 Mich App, 144, 174; 640 NW2d 262 (2001).

Notice to putative fathers is covered by MCR 3.921(D):

"If, at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR 3.903(A)(7), the court may, in its discretion, take appropriate action as described in this subrule . . .

"(1)The court may take initial testimony on the tentative identity and address of the natural father. If the court finds probable cause to believe that an identifiable person is the natural father of the minor, the court shall direct that notice be served on that person in any manner reasonably calculated to provide notice to the putative father, including publication if his whereabouts remain unknown after diligent inquiry. Any notice by publication must not include the name of the putative father. If the court finds that the identity of the natural father is unknown, the court must direct that the unknown father be given notice by publication. . . . " The rule covers what must be included in the publication (omitted from this already overly long rendition)

MCL 3.921(D)(2) specifies that after notice to the putative father the court may "conduct a hearing and determine, as appropriate" that (a) the putative father was "served in a manner . . . reasonably calculated to provide notice to the putative father", (b) "a preponderance of the evidence establishes that the putative father is the natural father of the minor and justice requires that he be allowed 14 days to establish his relationship according to MCR 3.903(A)(7). The court may extend the time for good cause shown. (c) there is probable cause to believe another identifiable person is the natural father of the minor. If so, the court shall proceed with respect to the other person in accord with subrule (D) and (d) after diligent inquiry, the identity of the natural father cannot be determined. If so the court may proceed without further notice and without appointing an attorney for the unidentified person."

Under this rule the court can find that

the natural father waives all rights to further notice, including notice of a termination hearing and right to an attorney if he fails to appear after proper notice or fails to establish paternity within time set by the court. (My record is nine putative fathers for eight kids in one case. None of them did establish paternity).

Frequently, one of the issues is that the putative father wants a DNA test. This is often difficult if the putative father is in prison. The testing agencies and the prisons usually want a court order for the testing. I always give the order. Compare the unpublished case of In the Matter of N. Scoble, No. 313221 (May 38, 2013) in which the trial court refused to order paternity testing until the putative father filed a complaint for paternity. He did not do so, and the trial court terminated rights of all putative fathers. This was affirmed by a 2-1 vote in the appellate court.

The Juvenile Code

MCL 712A.18(1)(b) deals with placement of juveniles by the court and states the court may:

"Place the juvenile on probation, or under supervision in the juvenile's own home or in the home of an adult who is related to the juvenile. As used in this subdivision, "related" means an individual who is not less than 18 years of age and related to the child by blood, marriage, or adoption, as grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew or niece, first cousin or first cousin once removed, and the spouse of any of the above, even after the marriage has ended by death or divorce. A child may be placed with the parent of a man whom the court has found probable cause to believe is the putative father if there is no man with legally established rights to the child. This placement of the child with the parent of a man whom the court has found probable cause to believe is the putative father is for the purposes of placement only and is not to be construed as a finding of paternity or to confer legal standing. The court shall order the terms and conditions of probation or supervision, including reasonable rules for the conduct of the parents, guardian, or custodian, if any, as the court determines necessary for the physical, mental, or moral well-being and behavior of the juvenile. . . ." (Emphasis added)

This section does not confer legal standing, and it does not confer legal payment responsibility upon the putative father either. The portions of the statute that deal with payment (e. g. MCL 712A.18(2)–(7); and MCL712A.30(15)) all relate to the "parent", guardian or custodian: The restitution section says:

"(15) If the court determines that the juvenile is or will be unable to pay all of the restitution ordered, after notice to the juvenile's parent and an opportunity for the parent to be heard, the court may order the parent or parents having supervisory responsibility for the juvenile at the time of the acts upon which an order of restitution is based to pay any portion of the restitution ordered that is outstanding. An order under this subsection does not relieve the juvenile of his or her obligation to pay restitution, but the amount owed by the juvenile shall be offset by any amount paid by his or her parent. As used in this subsection, "parent" does not include a foster parent."

Adoption Code

MCL 710.33 establishes a means for a man who believes he may be father of an expected child to file a verified notice of intent to claim paternity:

"(1) Before the birth of a child born out of wedlock, a person claiming under oath to be the father of the child may file a verified notice of intent to claim paternity with the court in any county of this state. The form of the notice shall be prescribed by the director of the department of public health and provided to the court. The notice shall include the claimant's address. On the next business day after receipt of the notice the court shall transmit the notice to the vital records division of the department of public health. If the mother's address is stated on the notice, the vital records division shall send a copy of the notice by first-class mail to the mother of the child at the stated address."

The notice of intent to claim paternity has application even beyond the adoption code:

"(2) A person filing a notice of intent to claim paternity shall be presumed to be the father of the child for purposes of this chapter unless the mother denies that the claimant is the father. Such a notice is admissible in a paternity proceeding under Act No. 205 of the Public Acts of 1956, as amended, being sections 722.711 to 722.730 of the Michigan Compiled Laws, and shall create a rebuttable presumption as to the paternity of that child for purposes of that act. Such a notice shall create a rebuttable presumption as to paternity of the child for purposes of dependency or neglect proceedings under chapter 12a. (Emphasis added)

(3) A person who timely files a notice of intent to claim paternity shall be entitled to notice of any hearing involving that child to determine the identity of the father of the child and any hearing to determine or terminate his paternal rights to the child."

The adoption statutes then make provisions for protecting the rights of proposed natural/putative fathers (MCL 710.36):

"(1) If a child is claimed to be born out of wedlock and the mother executes or proposes to execute a release or consent relinquishing her rights to the child or joins in a petition for adoption filed by her husband, and the release or consent of the natural father cannot be obtained, the judge shall hold a hearing as soon as practical to determine whether the child was born out of wedlock, to determine the identity of the father, and to determine or terminate the rights of the father as provided in this section and sections 37 and 39 of this chapter..."

Sections 37 and 39 relate to procedures for determining and terminating rights of the putative father under the adoption code. Section 39 does provide for giving custody to the putative father in some limited cases. This provides material for many future articles, and I leave it for those who remain after I retire in 6 months.

Other statutes that deal with becoming (and un-becoming) a father are discussed below. Here, I must give special thanks to Brittany Dougherty from the Saginaw Friend of the Court's office and our Family Division Court Administrator Michelle Horn for this material.

Establishment and Revocation of Paternity

Prior to June 12, 2012, under Michigan law, a man who claimed to be the father of a child typically could not bring a paternity action if the mother of the child was married to another man between the time the child was conceived and the time the child was born. The only exception applied to situations in which there had been a prior court determination, such as a judgment of divorce, indicating the mother's husband was not the father of the child.

In situations where a child was conceived during an extramarital relationship or the child was conceived by a man and unmarried woman and the woman married another man before the child was born, the biological father could not bring a paternity action even if he and the mother of the child acknowledged his paternity or DNA test indicated that he was the father, due to a lack of standing. This allowed for the misidentification of several fathers.

In an effort to establish procedures for actions to determine that a presumed father was not the father of a child, or actions to set aside an acknowledgement of parentage or an order of filiation, the Revocation of Paternity Act (RPA) was drafted and enacted.

To have a complete understanding of the

Revocation of Paternity Act, it is imperative to define the term father and identify ways in which paternity may be established. According to the RPA, an acknowledged father is a man who is determined to be the father based on signing an acknowledgment of parentage. An affiliated father is a man who has been determined to be a child's father pursuant to a court action. An alleged father is a man who by his actions could have fathered the child. A presumed father is a man who was married to the mother at the time of conception or birth.

Paternity of a child may be established in several ways.

Paternity Act

A paternity action can be brought in Circuit Court under the Paternity Act, MCL 722.711 et seq. The mother, the alleged father or the Department of Human Services may bring the action in the county where the mother or child resides, or county of residence for the alleged father if mother and child reside outside of the state of Michigan. MCL 722.714(1). To establish standing, the plaintiff must first allege that the child was born out of wedlock. Girard v Wagenmaker, 437 Mich 231. Pursuant to this Act, paternity can be established by consent, genetic paternity testing or by default if the named father does not serve a responsive pleading within the time permitted. If a determination of paternity is made, the court must enter an order of filiation and provide for the support of the child, reimbursement of the medical expenses incurred in the child's birth, and health care insurance coverage when it can be obtained at a reasonable cost.

Acknowledgement of Parentage Act

Paternity may also be established under the Acknowledgement of Parentage Act, MCL 722.1001 et seq., by signing an affidavit of parentage. A signed acknowledgement may be the basis for court ordered child support, custody, or parenting time. If parentage is acknowledged, the child will have the same relationship to the mother and the man signing as the father as a child born or conceived during a marriage and shall have the identical status, rights, and duties of a child born in lawful wedlock effective from birth.

Revocation of Paternity Act

Paternity may also be established in an action under the RPA, MCL 722.1431 et seq. This allows, under limited circumstances, for an alleged father to initiate an action to seek the revocation of a prior paternity determination or presumption in order to establish paternity of their child. The RPA attempts to separately address standing in situations where paternity was established by Acknowledgement of Parentage, Order of Filiation, or by the presumption that a husband is the father of a child born or conceived during the marriage.

Acknowledged Father

Pursuant to MCL 722.1437, the mother, acknowledged father, alleged father, or a prosecuting attorney may request that the acknowledgement of parentage be revoked. The action must be filed within 3 years of the child's birth or within 1 year of signing the acknowledgement, whichever is later. The action must be supported by affidavit and state facts that constitute one of the following:

(1) mistake of fact;

(2) newly discovered evidence not able to be found before the Acknowledgment of Parentage was signed;

(3) fraud;

(4) misrepresentation or misconduct; or

(5) duress.

If the court deems the affidavit sufficient, the court shall order blood or tissue typing or DNA identification profiling. The person filing the action has the burden of proving, by clear and convincing evidence, that the acknowledged father is not the father of the child.

Affiliated Father

If the mother had previously obtained an order of filiation naming a particular man the father of her child by default, MCL 722.1439 allows the mother, the affiliated father, or the alleged father to file a motion to set aside that determination. The action has to be filed within 3 years of the child's birth or 1 year of the order of filiation, whichever is later. The court shall order the parties to participate in and pay for blood or tissue typing or DNA identification profiling to assist the court in making a determination. It is important to note that the results of blood or tissue typing or DNA identification profiling are not binding on a court in making a determination.

Presumed Father

Prior to the RPA, it was presumed by law and by the courts that a child conceived or born during a marriage was a product of that marriage and that the husband was the father of the child. The only way that presumption could be challenged was by either the husband or the wife during divorce proceedings. The alleged father could never file a motion to establish paternity. Under the RPA, this has changed. MCL 722.1441 lists several ways in which the presumption may be challenged.

There are two possible ways for the mother of a child to file a motion to establish paternity under this act. According to the first procedure, all of the following must apply:

(1) the complaint or motion identifies the alleged father by name;

(2) the presumed father, alleged father and mother at some time mutually and openly acknowledged a biological relationship between the alleged father and child, and

(3) the action is filed within 3 years of the child's birth.

According to the second procedure, all of the following must apply:

(1) the complaint or motion identifies the alleged father by name; and

(2) either of the following applies:

(a) the presumed father, having the ability to support or assist in supporting the child, has failed or neglected, without good cause, to provide regular and substantial support for the child for a period of 2 years or more before the filing of the action or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the action; or

(b) the child is less than 3 years of age and the presumed father lives separately and apart from the child.

A presumed father can ask the court to determine that the child is born out of wedlock if an action is filed by the presumed father within 3 years after the child's birth or if the presumed father raises the issue in an action for divorce or separate maintenance between the presumed father and mother.

There are three possible ways for the alleged father of a child to file a motion to challenge the legal presumption that the husband of the mother is the father of her child. According to the first procedure, all of the following must apply:

(1) the alleged father did not know or have reason to know that the mother was married at the time of conception;

(2) the presumed father, the alleged father, and the child's mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child; and

(3) the action is filed within 3 years after the child's birth.

According to the second procedure, all of the following must apply:

(1) the alleged father did not know or have reason to know that the mother was married at the time of conception; and

(2) either of the following applies:

(a) the presumed father, having the ability to support or assist in supporting the child, has failed or neglected, without good cause, to provide regular and substantial support for the child for a period of 2 years

or more before the filing of the action or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the action; or

(b) the child is less than 3 years of age and the presumed father lives separately and apart from the child.

The final procedure requires all of the following to apply:

(1) the mother was not married at the time of conception; and

(2) the action is filed within 3 years after the child's birth.

Best Interests of the Child

Issues surrounding interpretation of the Revocation of Paternity Act have already begun to surface and the courts have been busy addressing those issues. One such issue is in regard to best interest factors and whether the trial court may consider them in actions to revoke acknowledgment of paternity.

According to MCL722.1443(4) a court may refuse to enter an order setting aside a paternity determination or determining that a child is born out of wedlock if the court finds evidence that the order would not be in the best interests of the child based upon the following factors:

(1) the presumed father's conduct;

(2) length of time the presumed father was on notice that he might not be the child's father;

(3) the facts surrounding the presumed father's discovery that he might not be the child's father;

(4) the nature of the relationship between the child and the presumed or alleged father;

(5) the age of the child;

(6) the harm that may result to the child;

(7) the disruption of the father-child relationship; and

(8) any other factor the court determines appropriate to consider.

Two cases addressing this issue have been decided by the Court of Appeals. The two cases are *In re Moiles*, 303 Mich App 59; 840 NW2d 790 (2013), and *Helton v Beaman*, ___ Mich App ___, File No 314857 (02-04-14).

In the *Moiles* case, the trial court did not consider the best interest factors. The Court of Appeals interpreted "paternity determination" to mean a determination of paternity under the Paternity Act; therefore, the "best interests" test does not apply to cases in which paternity was established by an acknowledgement of parentage.

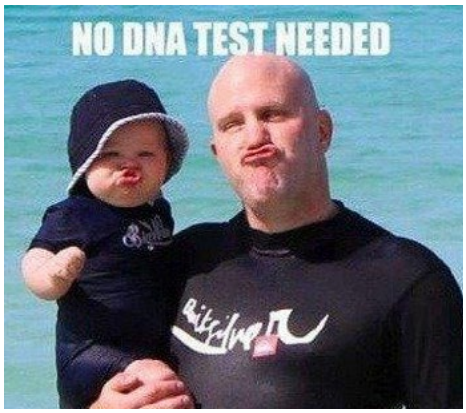
The majority opinion in the *Helton* case indicated that a DNA test that identifies an alleged father as a child's biological father is not, standing alone, sufficient to revoke an Affidavit of Parentage that is signed by an acknowledged father. The court must conduct a common law best interest analysis. If the child has an established custodial environment, the Affidavit of Parentage should be revoked only if the moving party proves, by clear and convincing evidence that revocation is in the child's best interest, based on the factors set forth in the Child Custody Act.

The concurring opinion in *Helton* found a signed acknowledgment of parentage to constitute a "paternity determination." Therefore, a court must apply the statutory best interest analysis before deciding whether to revoke an Affidavit of Parentage.

The dissenting opinion in *Helton* found fault with both opinions, and notes that nothing in the Revocation of Paternity Act directs the trial court to consider a child's best interests when determining whether the man is the child's father.

As evidenced by the limited published opinions regarding the new law, this issue as well as many others remain open for interpretation. As a result, paternity actions in Michigan will continue to evolve and provide remedies for families that previously were not available.■

[**Editor's Note**: Right after I saw the title to Judge Harrison's article, Toby Keith's "Who's your Daddy" began running through my mind. If only it were as simple as the picture below indicates.]



Words Of Wisdom
A Review of Selected Works From the Archnyabald Collection
by Hon. Monte J. Burmeister, Crawford County Probate Court

First, on the subject of Urination:

"Don't get in a Pissing match with someone who drank more beer than you."
~ Anonymous

"And, a variation on the theme: Don't get in a pissing match with a skunk."
~ Anonymous

"Son, just remember one thing: Be sure to take a leak, before you take the bench..."
~ Hon. Frank Arnold, repeating advice Justice Alton T. Davis provided at his investiture. [Editor's note: Lest we be accused of being too Freudian, or falling into the category of the next piece of advice, we shall move on].

One liners:

"Don't stay where you aren't appreciated."
~ Anonymous

"I always tell defendants that once the cops get called twice, it's probably best to break up."
~ Hon. Elizabeth Church

"Your Honor should remember that Judicial Humor is neither."
~ Hon. Kenneth Tacoma, quoting an old prosecutor from his county, from a time long, long ago.

"My kids have taught me I can't run my home like my courtroom and that parental patience is a work in progress."
~ Anonymous

"You get what you are willing to accept."
~ Hon. Elizabeth Pezzetti

"Remember, it's not what happens to you, it's how you react to what happens to you."
~ Anonymous

On getting to the bench:

"When I was 12 years old I told a police officer I wanted to be a Judge. He looked me in the eye and told me to stay out of trouble or I would never make it. He talked to me like an adult. I never forgot him and I listened. When running my campaign, it got nasty. A battle worn commissioner told me to stay out of the mud, I was a novice at it and would never beat an experienced pig.

She was right."
~ Hon. Elizabeth Church

"As I'm writing this e-mail, I did remember the advice my wife gave me about 4 years ago when we learned that the current Judge wasn't seeking re-election and another Judge approached me about running. I was going back and forth, pros and cons about money and time and amount of support and uncertainty about whether we could win, and my wife (probably tired of it all) said: 'You've talked about running for judge for a long time as a goal before and now the opportunity is here and you're not going to take it? Run, because if you don't, you'll be living with the what-ifs for the rest of your life.' And that was that."
~ Anonymous [Editor's note: this Judge won by 59 votes].

On that special experience of being a new Judge:

"The first day I'm on the bench I enter the courtroom with my eyes down walking to my chair. Get my files ready. After a few minutes I look up. Everyone is still standing waiting for me to say 'be seated.' Moral: look up. First witness is called. Told to raise their righthand. Judge's mind goes blank. Can't remember the oath I've heard a million times. Said: 'You're not going to lie now are you?' Moral: think fast."
~ Hon. George Economy

"The best advice I received before I took the bench was from retired Muskegon Probate Judge Tom Linck. He told me to gather three trusted friends who are lawyers. Promise them that no retribution will be exacted for their honesty and make them promise that whenever they see or hear me acting like a 'horse's ass' they will immediately tell me I've been acting like a horse's ass."
~ Hon. David Murkowski

"Judge Steketee, my predecessor who was on the bench for 33 years, was mentoring me before and after I took the bench. My first day on the bench he said to me the following: 'Yes, you have to know the rules of evidence, the statutes and the case law, but one of the most important things you can bring to this job is wisdom.'"
~ Hon. Patrick Hillary

"When I started as a referee YEARS AGO (and I'm not telling how long because then you will know how old I am), my mentoring judge told me 'that with great power comes great responsibility'. Of course, he stole the line from Spiderman. However, when I took the bench, this same judge reminded me of this advice. And, he is correct. So, with the web of decisions that we spin every day, we need to remember that 'with great power comes great responsibility.'"
~ Hon. Nancy Thane [Editor's note: Roosevelt's got nothing on Spiderman, and Voltaire's got nothing on Roosevelt. Regardless of in which century it is uttered—it's a great quote]

"When I first took the bench our District Judge and I were talking and he picked up a file. He said something to the effect that we had to remember these were people, not just files and we were dealing with their lives. That stuck."
~ Anonymous

On making decisions:

"In my younger days I often fished with a Judge who had been on the bench for over 30 years. I recall two pieces of advice. First, 'get the hell out of the courthouse for at least one week twice a year and go so far that they can't find you and if you forgot to do something you can't fix it anyway.' And, second, 'make decisions now.' He explained that everyone wants to be correct. However look at it this way: In 30 years on the bench I have made thousands and thousands of decisions. Assuming I had a 90% batting average. That means I was only wrong several thousand times. Get it over so the parties can go on with their lives."
~ Hon. Mark Wickens [Editor's note: I love Mark's response to me about whether to credit him. "Monte, I don't care if you use my name or not. I certainly have said many dumber things in my life."]

"The most memorable judicial advice came from retired probate Judge Charles Jameson: no one is infallible and if you wake up the day after making a ruling that in retrospect you think is not right, sua sponte reconsider and try and set it right. You'll sleep better at night if you do."
~ Hon. Darlene O'Brien

"A person I hold in high regard was very self-confident who believed he was correct about everything!! He was ALWAYS willing to remind me that, 'I may not always be right, but I am NEVER wrong!!' It took some time for me to understand this peculiar comment meant never quit and never let anything deter you from your beliefs and aspirations. It's advice that stays with me every day."
~ Anonymous

"I learned from my dear friends, Judges Janet Haynes and Nan Carpenter that justice (even when it is a profoundly difficult decision) is best delivered in a calm rational respectful tone. (no yelling allowed)."
~ Anonymous

On controlling your Docket

"Just a couple of years before I was elected judge, I was hired by DHS in a nearby county to represent them in a termination of parental rights hearing. The local prosecutor had a conflict, because he was also pursuing criminal charges against one of the parents, and his primary witness was the other parent. I did not usually practice in this court, but I accepted the challenge. I had been involved in numerous termination trials and appeals before, but had never represented DHS, so I really wanted to do a great job.

There were numerous witnesses, including experts, a college professor, law enforcement officers and the like. I interviewed them and meticulously prepared for trial. The entire presentation, I thought, was perfectly scripted. On the day of trial, I arrived at the court house and the place was packed. I surveyed the crowd and located my witnesses. I was ready to go.

Much to my surprise, numerous other cases were scheduled at the same time as my trial, and they were all being called ahead of me. After waiting about an hour and a half, the judge finally called our case. He then asked me, (and me alone), to approach the bench. 'This is odd', I thought to myself. I went up, and greeted the Judge. He then asked me how many witnesses I intended to present. I looked through my notes, and said, 'I believe I have 11 witnesses, Your Honor, and I expect that the trial will take about a day and a half to complete.' The Judge leaned back in his big black leather chair, looked up at the ceiling, removed his reading glasses, looked down upon me, smiled and then proclaimed, 'Mr. Nellis, you've got an hour'! '#@!%^#'... I thought to myself. I looked back at the judge and said 'OOOOk', walked back to counsel table and vomited in my mouth, (just a little). I was certain that I had lost the case, even before I started.

As it turns out I called three witnesses,

which took about two hours and I won the case. Although I joke about this situation, the judge is an individual whose body of work on the bench I greatly admire. And since taking the bench myself, I have come to learn, (as this situation taught me), that time on the record is a precious commodity, and that getting to the point has become a lost art."
~ Hon. Jeffrey Nellis

Advice from Mom and Grandma:

"The old school, southern advice my Mom gave was to 'always treat others the way you want to be treated.' Obviously that serves me well on the bench. That is probably the most memorable."
~ Hon. June E. Blackwell-Hatcher

"And, the corollary... [Mom's] most comical was 'I brought you in this world and I can take you out!'"
~ Hon. June E. Blackwell-Hatcher

"My grandmother told me to do three nice things each day for other people. Somehow this advice keeps me grounded even on very bad days and reminds me that coworkers and litigants should not be the recipients of my frustrations."
~ Hon. Lisa Sullivan

"If you don't have something good to say, shut up."
~ Hon. Thomas Byerley [Editor's note: I interpret this as giving one a lot more leeway than the typical saying, as "good" is not necessarily the same as "nice"].

"When you didn't get the big job, or you broke your leg, or whatever happened that wasn't in the plan, my grandmother would say 'Everything happens for a reason.' While it is very simple advice, it helps me keep things in perspective, especially when things are not going quite the way I hoped."
~ Hon. John Tomlinson

"I was a registered nurse and suffered a very big back injury. I was advised to go back to school. I contemplated my options and it came down to medical school or law. After I chose I said to my mother 'but mother if I go to law school when I graduate I'll be 36.' She said well Kathy you'll be 36 anyway. Great life lesson."
~ Nancy George, the Hon. Kathryn A. George's mother

Advice from Dad:

"My father would often say, 'forgive and forget' or 'live and let live.' While they are not the same, both allow one to move forward and move on without letting the actions of others control us. Neither is particularly clever or funny. It is, however, the best advice I have ever been given."
~ Anonymous

"My Dad (long time personal injury/malpractice attorney who died in the arms of his fifth wife!!) told me 'if it is going to feel good, don't say it!! That has come in handy especially in this job!'"
~ Hon. Jennie Barkey

On being comfortable in your own skin:

"Best piece of advice I ever got was at my very first bench trial, when I was scared to death. The opposing attorney, an older more experienced attorney, noticed my panic and leaned over and said, 'Don't worry. Just be yourself and it will be fine.' That act of kindness calmed me down. So I have used it with others. [Editor's caveat—If you have ever been described as being closely associated with a certain sphincter muscle in the human body you may wish to disregard Judge Tighe's advice about being yourself]. And I proceeded to find myself a mentor. That's the second piece of advice I give to everyone, male and female—find a mentor."
~ Hon. Karen Tighe

"As a Judge you will find that people laugh at all your jokes and hang on your every word at social gatherings. Make no mistake my friend, you are neither funnier nor more interesting than you were yesterday before you became a Judge."
~ 8th District Court Judge Paul Bridenstine at the Investiture of Kalamazoo County Probate Judge Scott Pierangeli

On the physicality of being a Judge:

"[As a new Judge] While sitting at lunch [with seasoned Judges], they each took their turn giving me advice. One of them said, 'I have one piece of advice I always give new judges: Watch your butt!' I thought she was being polite and actually meant CYA, but she explained, 'When you're a judge, you sit all day, and there are always plenty of snacks and sweets to eat. If you're not careful, you'll get fat!' Of course, I didn't listen to her advice, and I did put on twenty pounds in a couple years. I've given the advice to other new judges. I'll let them be the judges of whether they listened."
~ Hon. Dan O'Brien

"And, in a similar vein, Being a Judge is a very sedentary job, so if you suddenly find that your robe is fitting like a leotard, it's time to get up and move around a little bit."
~ 8th District Court Judge Paul Bridenstine at the Investiture of Kalamazoo County Probate Judge Scott Pierangeli.

"On the use of Video technology: The best advice I got was to watch myself on video of my court hearings, on a regular basis. It was from Judge Schmucker (remember him?). Anyway, he gave me pointers on what to watch myself for - was I looking at the clients (or browsing the file appearing disinterested), were my body language and voice inflections appropriate for the circumstances, was I expressing myself in clear plain language when giving an opinion and, most importantly, am I consistent in my rulings. I could go on forever about what I have learned from watching myself on video - it's not fun but it is definitely educating. Also, it can at times be reassuring to watch yourself and know you did a good job."
~ Hon. Diane Rappleye

On listening:

"In BIG JAKE, John Wayne tells one of his sons (in the movie and real life), 'you're long on mouth and short on ears.' It struck a chord with me when I first heard it over 25 years ago. I often tell people that they give themselves a chance to learn a lot more with their mind, eyes, and ears open and their mouth shut."
~ Anonymous

"Two concepts I try to follow and often impart to kids. Two eyes, two ears, one mouth. Engage in that order. And, if you're guessing, you're wrong."
~ Hon. Fred Mulhauser

On reputation:

"Your name given to you by your father is the most important asset you have. Your name represents you in society. Respect it and you respect your father, grandfather, and those before him and those that will follow you!"
~ Hon. Patrick McGraw

On reflection after being on the bench:

"First, a piece of advice that I received that had a significant impact on me - even though it is really simple commonsense - even though it never dawned on me until I was in my 30's. Being, 'Type A', for years my life had been driven by setting goals and

achieving those goals. The 'ends' were all important to me. I never really had time to enjoy the process and any small intervening accomplishments along the way. Then, someone told me to learn to 'enjoy the journey' and not just the focus on the goal & attainment of that ultimate goal. After all, one could view reaching the end of your life as the ultimate 'goal', eh? Pretty depressing. So, each day I now am able to remind myself that life is a "journey"; it is not just a set of goals that are each ends unto themselves.

The second is a process I implemented from the time I became a judge. Each juvenile delinquent receives a $2 bill from me when s/he successfully concludes his/her involvement with the Court. At that time, I remind them to believe in themselves. I tell them that they have proven that they can do that as evidenced by their successful release from Court jurisdiction. For some, that has taken a great deal of effort; for others not so much so. But, in any case, I give them the $2 bill so they have a visible reminder that they can continue to overcome each difficulty in life (just as they have with their delinquency case) by believing in themselves and working hard just as they have to reach each goal. As I write this, it seems to me that this 'advice' may run somewhat counter to my first personally received advice--as it focuses on 'goals' rather than 'journeys'. But, then again, maybe it doesn't because by understanding the journey and how they got to the goal may be something that they can use as a pattern for future successes in life as they continue to (hopefully) enjoy their own journey."
~ Anonymous

On Humility:

"I would say that the most meaningful piece of advice and/or enlightenment that I ever received came from a 5 year old boy who had been brought to court by his father. The little boy had received a severe dog bite which had healed nicely and was at the Courthouse to have a conservator appointed in order to settle a personal injury claim. The 5 year old was in my Courtroom and was waiting with his father for the 'Honorable Judge" to make his grand entrance into the court room. He was being held by his father as the bailiff boomed, 'All Rise, the Honorable Frank D Willis presiding.' The crowd all reverently came to their feet and the father stood up with the boy in his arms.

The courtroom was as quiet as could be when I entered the Courtroom. Then, without warning, the silence and mood was completely shattered as the 5 year old said out loud and very respectfully, 'Daddy, why is that man wearing a dress?' We all burst into laughter!

However, I have never forgotten that moment as it was basically my 'The Emperor's New Clothes' (written by Hans Christian Anderson) moment. I was humbled and it had helped me to never get a case of 'Black Robe Fever' which I believe is at least one important element of my longevity.

I could not, and still cannot, answer the boy's question however I have come to the conclusion that the requirement by the Michigan Supreme Court that we all wear our LBD is conscious and meant to daily remind us to be humble in our role as Judge of people's lives. It has worked for me!"
~ Hon. Frank D. Willis [Editor's Note: Judge Willis notes he is currently the longest serving Probate Judge in the State. He was appointed by Governor Milliken on June 7, 1976. On June 7, 2014, he will have served continuously for 38 years].

On Domestic Relations:

"In as much as I was taking over a court that has a domestic docket I sought the advice of a retired judge about divorce. He told me that in a divorce case if either party walks out of your courtroom too happy, you haven't done your job. That one has stuck with me."
~ Hon. Elwood Brown

"Remember your child is a product of each of you. So when you call your spouse or his mom an idiot or worse, you are calling that child the same as he is one half his mother!"
~ Hon. Patrick McGraw [Editor's note: Judge McGraw admits to stealing this from Ann Landers. He keeps reading her column to see if she will answer his letters. The lack of answers, unfortunately, has skewed his case flow management results].

On Fashion Sense:

"Don't wear those red shoes. People won't believe you're a judge."
~ Hon. Faye Harrison

"Really, really serious Philosophy: Max Ehrmann's poem, Desiderata, which due to space constraints I have not printed but you can look up on the web. It is described as 'so profoundly clear' in terms of the best disposition to carry through life that I had a large copy framed, matted, and posted in my courtroom."
~ Hon. Richard Vollbach

"And, I will end on this one, which sounds strikingly close to zero percent financing to me: When I was a young assistant prosecutor I received considerable heat for a prosecution I handled in the editorial section of the local newspaper. Angered, I fired back a caustic response which only added fuel to the fire. Our wise circuit judge at the time offered the following advice should I ever become embroiled in similar circumstances: He told me to 'never complain and never explain' and reminded me that probably 90% of our community never read the editorial page in the first place and of those who read it 90% probably did not remember any of it three days later and that choosing to respond only heightened the chance that it would be more widely read and remembered. I then discussed this with my father who offered the following gem: 'Son let me put this in perspective for you, when you are 20 (I was about 26 at the time) you spend a lot of time worrying about what others think of you. When you become 40 you no longer care about what others think of you and when you turn 60 you will realize that nobody was ever really thinking about you in the first place.'"
~ Hon. Fraser Strome

Hello, my name is....

The Honorable Marcy Klaus

Greetings from the middle of the mitt. I'm Marcy Klaus and I serve Clare and Gladwin Counties as the Probate and Family Court Judge. I'm the Noah of the north with two funding units, two DHS offices in two regions, two CMH offices, two of everything. My husband is Jeffrey "JJ" Klaus, an attorney with Martineau, Hackett, Romashko, O'Neil and Klaus. We have two sons, Andrew, 8 and Sutton, 4, and a standard poodle puppy, the only other girl in the house. JJ and I were in practice with my dad, Richard Allen, before I took the bench, dad retired and JJ joined the firm.

I am an MSU-James Madison College graduate (Madison people take great pains to mention that) and attended Valparaiso University Law School. I took a year off between MSU and Valpo to live and work in London. I worked for the Economist In-

telligence Unit. I learned to appreciate cider, minding the gap, and Marmite snacks. I also learned to appreciate central heating, clean air, and disorderly conduct.

JJ and I met our second year in law school attending a summer legal institute in Austria. JJ attended law school in San Antonio, so naturally we married in the Keys on spring break our third year and I moved to Dallas, Texas after graduation. We took the Texas bar exam (three days, oil and gas, Texas procedure, oh my!) and practiced in Dallas for two and a half years. I learned to appreciate sweet tea, real Margaritas, and Uncle Julio's fajitas. I also learned to appreciate temperatures below 100, water, and being a Yankee.

We moved to my hometown of Clare in December of 1998. We took another bar exam together and settled into general practice. I enjoyed my work in probate and family law more than any other area. I knew early on that, if Judge McLaughlin decided to retire, I wanted to run. Judge McLaughlin was very gracious about answering my questions before and during the campaign.

My hobbies these days are Little League games, Cub Scouts, T-Ball, Legos, driveway tennis and freeze tag. My husband was a dive instructor and I have my NAUI card, so we look forward to getting back to diving and boating as the kids get older. In the summer we head to Grand Marais as often as we can.

I have excellent clerks in both counties. So coming to work is a pleasure, even when they point out that "something like this has never happened in twenty years", which happens with some regularity. We've made some small changes over the past year and a half without shocking the system.

I'm really proud to be associated with such a smart and caring group of professionals in MPJA (and McGraw).

The Honorable Michelle A. Bianchi

When the one and only Hon. Monte Burmeister first asked me if I would be willing to write an autobiographical bit for the Intercom, I said, "Sure, no problem." That was probably two months ago and as the days flew by and the "mid June" deadline began drawing near, I realized I was dreading it nearly as much as having a root canal! When I realized I was actively avoiding having to sit down in order to write the piece, I began thinking of how I might accomplish the task without having to actually write it myself. My first thought was to try to talk my fourteen year old daughter into writing it for me. That did not go over very well as her immediate response to me was, "Mom, I thought you said it was supposed to be an autobiography, not a biography!" Mere details! Then I contemplated having my Juvenile Referee write it for me. That didn't exactly seem right either somehow, so I decided to write it myself.

The biggest problem or challenge with this assignment is that it requires us to write about ourselves. This of course is never an easy thing, unless you are Gregg Iddings! I swear that guy's biography was 10 pages long! Really! Gregg's biography was "kindly" provided to me as an example I could follow. However, after I read about Judge Iddings very impressive accomplishments of developing youth programs in his community while simultaneously training for Iron Man contests and being on every task force and probate committee known to the mind of man, I determined that Monte gave me Gregg's biography so I would know what is expected of me! And so that I would have an appreciation for what an industrious and incredible group I have had the good fortune of joining!

So, without any further b.s., I am Michelle Bianchi. I am the Probate Judge for Hillsdale County. My immediate predecessor is the 6'5"cowboy boot wearing Honorable Michael E. Nye. Prior to Judge Nye the Probate bench in Hillsdale was held by the always entertaining, irrepressible, lovable Honorable Albert J. Neukom. To those of you who know Judge Nye and Judge Neukom, I will seem quite boring and quite "normal!" Wait, did I just infer that Judge Nye isn't normal??? Those of us you who know Judge Neukom would never accuse him of being normal. Seriously though, both are great guys who are very different from each other but both of whom performed this job with integrity, honor, and heart.

As to my immediate family, my husband Chuck, is a retired hospital CEO. Since retirement, Chuck spends most of his time acting as Mr. Mom, carting our daughter, Elizabeth, around to her various activities, shopping for groceries, and cooking dinner each night. In his spare time, Chuck mentors local businessmen and provides consulting services for local businesses. When he is not engaged in the foregoing he can usually be found at our cottage in Port Clinton (located on Lake Erie) fishing for walleye.

Our daughter Elizabeth is 14, sings like an angel, plays a mean volleyball game, recently learned how to swish a basketball, and was on the 4 x 100 relay team that just broke her school's junior high track record. At least at this point in her life, she thinks she would like to be a physician. (I am pushing her toward plastic surgery for obvious reasons!)

I am a graduate of James Madison College, a residential college within Michigan State University. My field of study was "Justice, Morality, and Constitutional Democracy." I received my J.D. degree from Valparaiso School of Law. I have a black belt in Tae Kwon Do and really need to find time to get back to it!

I practiced law in Hillsdale and its surrounding counties for 25 years before taking the bench on January 1, 2013. The 18 months I have been on the bench have been the most exhausting, exhilarating and professionally rewarding months I have experienced in my career. There is so much to learn and know, there is so much to do, there is so much need in the community of Hillsdale (and perhaps in all of our communities) that there are times when I have to remind myself that we, as Probate judges, can and do inspire others to make positive changes in their lives.

By the end of this year, I am hopeful that I will have my first Court Appointed Special Advocate appear to testify for and on behalf of a child. With the requirement for privatization in the neglect and abuse field and the accompanying fallout of constantly changing workers in neglect and abuse cases, I believe having an individual CASA worker assigned to a child or family for the duration of a case will be helpful to the family as well as to the court. This is a program we are just bringing to Hillsdale so any of you with CASA in place, please share any great suggestions you might have with me.

In my spare time, I love spending time on the lake with my family, attending Elizabeth's extracurricular activities, reading pretty much anything, and getting the occasionally workout in.

As a relative neophyte judge, I am still looking to all of you for your wisdom, expertise and guidance. I very much appreciate being able to view others' questions and the varied responses in the e-mail exchanges. It is a very helpful and often entertaining tool.

Lastly, thank you to Judge Dobrich and Judge Iddings for serving as my mentor judges. I have been blessed to have two wonderful judges who always take the time to return my calls and each of whom has provided excellent advice each time I have called upon them for assistance. They have been amazing.

I am looking forward to seeing all of you next week at the summer conference!

[Editor's Note: "I knew there was something I liked about Judge Bianchi" ---the Hon. Monte J. Burmeister, fellow graduate from James Madison College, who also alligator wrestled with the major "Justice, Morality, and Constitutional Democracy."]

These Are A Few Of My Favoirte Rules

by Hon. Carl J. Marlinga, Macomb County Probate Court

I confess: I like trials. I have always liked trials, even as a kid watching Perry Mason rip apart that slow-witted prosecutor on my parents' black and white television set. The "Rumpole of the Bailey" series – both the books and the BBC production – is also a favorite. I loved being a trial lawyer so much, I worried that being a judge would not be as much fun. Wow, was I wrong. The view from this side of the bench is fantastic.

In the past year and a half since I took the bench, two particularly intense jury trials stand out. I will quickly summarize each to provide some context for the procedural and evidentiary rules that I really want to talk about.

In the first case, the 20-year old daughter of a deceased brought a civil action against the deceased's widow (his second wife) asking the court to impose a constructive trust on $375,000.00 in insurance proceeds collected by the widow upon her husband's death. The theory was that a few years prior to her husband's death, the widow fraudulently changed the beneficiary designation on his insurance policy, naming herself as the beneficiary in place of the trust that her husband had created for the benefit of his daughter. The alleged switch was accomplished electronically over the internet, so there was no signed piece of paper authorizing the change. The plaintiff also alleged that there was a breach of an oral trust. The allegation was that after the daughter discovered that the trust created for her was unfunded and totally worthless, the widow consoled her by telling her that she (the stepmom/widow) would provide for her college education since that was what the deceased asked her to do with at least some part of the insurance proceeds. Of course, the widow asserted that the amount to be contributed to the daughter's education was discretionary, conditioned upon the widow's assessment of how serious a student the daughter proved to be. The proofs at trial indicated that a four year college education would require about $213,000, inclusive of all tuition, room and board. The proofs at trial also established that the widow contributed nothing, since, in the widow's opinion, the daughter did not work hard enough on her education to deserve any financial assistance.

The jury returned a verdict of $213,000 on the oral trust theory. The jury also returned an advisory verdict on the question of whether the deceased or his wife had switched the beneficiary designation on the insurance policy. The jury's answer was that it was the wife who made the change without her husband's knowledge. Using that answer, I then imposed a constructive trust on the entire $375,000 insurance policy proceeds. (The judgment was not appealed.)

Now for the good stuff: The case was interesting because of the evidentiary questions involving MRE 803(3). The rule provides that a statement of an out-of-court declarant evidencing the declarant's then existing state of mind (including his or her intent) is admissible as an exception to the hearsay rule. The rule also expressly makes admissible a statement of memory or belief to prove the fact remembered or believed if it relates to the execution, revocation, identification, or terms of declarant's will. Case law is rather stingy in extending this last exception to anything other than a will. [See In re Cullman Estate, 169 Mich App 778, 426 NW2d 811 (1988), holding that statements by a declarant concerning his state of mind when depositing funds into a joint bank account are not within the exception of MRE 803(3) if the statements are made subsequent to the deposits being made.]

The crucial evidence in the case was the testimony of several witnesses who said that the deceased, right up to the time of his death, had spoken lovingly about his daughter and had expressed his peace of mind that he had established a trust to provide for her education and a sizeable nest egg to get her started in life. These witnesses included family members, friends, some of his daughter's high school teachers, and the daughter herself. Of course, if the trust had been knowingly de-funded as a result of the change in the beneficiary designation, these statements would have been untrue. They would also have been a cruel deception since the statements were made in the context of saying how much the deceased loved his daughter.

Counsel for the defendant/widow brought a motion in limine to exclude all such statements, arguing that since the statements were made after the written trust was created, and after the date of the change of beneficiary designation, they were excluded by MRE 803(3). Counsel for plaintiff argued that the statements were not offered to prove the state of mind of the deceased at the time that the trust was created; rather the purpose was to show that he was totally unaware that a change in beneficiary designation had taken place. That inference, coupled with testimony about the wife's access to the deceased's computer and her knowledge of his user names and passwords, was circumstantial evidence that it was she, rather than he, who submitted the electronic request for a change in beneficiary. I agreed with the plaintiff and admitted the evidence. From that point forward, the jury's verdict was predictable.

In addition to an enhanced respect for MRE 803(3), I was also quite taken by the usefulness of MCR 2.509(D)'s language permitting a judge to ask the jury for an advisory verdict on an equitable question (the imposition of a constructive trust) and MCR 2.515's provision allowing a court to submit very detailed questions to the jury, seeking specific answers, on concise, well-defined issues of fact. Obviously, as a civil trial lawyer, I had used the procedures before, but, now, as a judge – where I got to write the questions – I finally understood how synergistically a judge could work with a jury in ferreting out the truth. (There is an additional advantage to an advisory verdict; namely, it is truly only advisory. A judge is still free to make his or her own findings; and, in fact, the judge must make it clear that he or she is not surrendering his or her independent fact-finding role.)

The second case has just been concluded, and there will likely be an appeal – so I will be very careful in describing it lest this article be attached to somebody's appellate brief. In this case the personal representative brought suit on behalf of the two sons of the deceased against the deceased's widow (a late in life second wife) arguing that the widow had taken the deceased's money during his lifetime and, without his knowledge, had shipped it to her daughter and other relatives in Ukraine. The jury returned a verdict of $499,000.00. The jury also returned a special verdict on an advisory question (again using MCR 2.515 and MCR 2.509(D)), saying that certain deeds were voidable because they had been procured by fraud. As a result of the jury's answer to the advisory questions, I entered a judgment returning certain parcels of land to the estate. I also, upon plaintiff's motion, trebled damages on that part of the verdict that was based on conversion. The total judgment, with the adjustment for the treble damages, was $877,000 plus interest. The plaintiff was also awarded partial attorney fees as a result of case evaluation sanctions.

Key evidence in the case was that the deceased was an extremely frugal individual. He worked his entire life – often three jobs at a time – and saved nearly every penny. He collected rain water in a barrel to wash his clothes, and then used the left over laundry water to fill the toilet tank so as to conserve even more water. He also chopped his own

firewood on some parcels of land that he owned and went to scrap yards for additional combustibles to burn in his wood burning stove to heat his home. The plaintiff used these behaviors as circumstantial evidence that the deceased would not have knowingly permitted his wife to send hundreds of thousands of dollars abroad.

This was a thoroughly interesting case, skillfully tried on both sides. The takeaway that I can freely talk about even pending a possible appeal is my fondness for MCR 2.513(H) and (I) – the rules allowing judges to permit jurors to take notes and ask questions. I have seen this work so well in trials I had as an attorney. I now have the experience in seeing the effectiveness of these rules as a judge. I cannot imagine how we ever conducted trials without such juror participation.

The procedure I used was patterned after the procedure employed by Macomb County Circuit Court Judge Mary Chrzanowski in a murder trial that I had before her in 2011. She had the jurors write out questions on 3 by 5 cards and hand them to her court officer. The judge then went back in chambers (or in a hallway far away from the jury) so that the attorneys could review the questions and voice any objections before returning to the courtroom. Then, with certain amendments recommended by the attorneys, the judge read the jury's question to the witness. If the witness did not fully respond to the question, the judge would either repeat the question or amend it slightly so that the witness got the meaning. Following the jury's questions, the judge allowed another round of questions from the attorneys based on the new information elicited by the jury's questions. At the next break in testimony the attorneys were free to make a record, outside of the presence of the jury, as to any objections that they wanted to preserve. I highly recommend this method – especially moving the discussion with the attorneys to a place sufficiently distant from the jury so that the attorneys can freely discuss the matter in a loud, clear voice. It is very awkward trying to whisper additions and corrections in the traditional sidebar conference in the courtroom.

In the second probate court trial discussed above, the jurors must have written out over 150 questions over the three weeks of the trial. Except for possibly three questions, they were all perfectly good questions, seeking admissible information. I believe that in addition to assisting in the truth-finding process, the practice of allowing jurors to ask questions has these distinct advantages: First, the questioning process keeps juror's minds focused and alert. Think of any conversation in which you have participated. If you are consigned to just listening, your mind wanders. If you know that your input will be welcome, you necessarily follow the conversation more attentively. (In both probate trials discussed here, the jurors requested, and the attorneys agreed, to keep all seven jurors for deliberations. I think that is some measure of the jurors' enthusiasm for the process.) Second, the jurors inevitably think of things that the lawyers do not. Six minds, or twelve minds, are better than one. The jurors also come at the witnesses without any fear of what the answer may be. Lawyers, on the other hand, must always be thinking about protecting their case. Third, the questions are a very handy guide to the lawyers about what is going right and what is going wrong with their respective presentations. It is better to know what the jury is thinking while the trial is going on while there is still time for a mid-course correction.

The one rule that I really like but have not had the guts to try is MCR 2.513(M) permitting the judge to sum up the evidence – as is the practice in British courts. With our American bias against the judge giving any hint of his or her thinking about the case, it seems that any attempt to "fairly and impartially" sum up the evidence will be the subject of an inevitable appeal. Some brave trial judge will start us off, and I hope it happens soon. I pray that when that first case hits the Supreme Court, the Justices will remember that it was their idea and be gentle with us. ■

Grin for the Day

The Good.

A very prim and proper lady appeared before the Court. When asked for her occupation, the woman (charged with a traffic violation) said she was a schoolteacher.

The Judge rose from the bench and looked down at the lady with a gentle smile.

"Ma'am, I have waited years for a schoolteacher to appear before this court," she smiled with delight. "Now sit down at that table and write 'I will not drive through a red light' five hundred times."

The Bad.

A couple arrived at the Courthouse seconds before closing time, and caught a judge just as he was about to leave, and asked him to marry them. He asked if they had a license and, when they didn't, sent them off to the Clerk to get one. They caught the Clerk just as he was locking up, and got the license from him. When they got back to the judge, he pointed out they had filled the names in backwards--his where hers belonged and vice versa. They rushed back to the clerk's office, caught him again, and got another license.

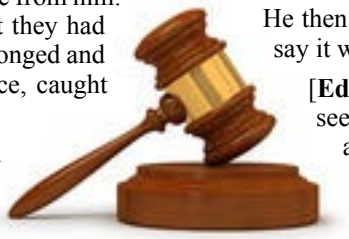
This time, the judge noticed that the clerk had filled in the date in the wrong format, and had used a pen with blue ink instead of black ink. Again, the hopefully soon to be newlyweds caught the Clerk... and... after five reissued licenses, the judge was finally satisfied and the following colloquy took place:

The Judge: "I hope you appreciate why I made you keep going back. If there are irregularities in the license, your marriage would not be legal, and any children you might have would be technical bastards."

The Groom: "That's funny-- that's just what the clerk called you."

And, of course, the Ugly.

A man charged with assault and battery insisted at his trial that he had just pushed his victim "a little bit." The Prosecutor, hoping to provoke the Defendant, got into his face on cross-examination. When he was pressured by the prosecutor to illustrate just how hard he had pushed the victim, the defendant jumped from the witness stand, approached the lawyer, slapped him on one side of the face, then the other, grabbed him firmly by the lapels and flung him over the table.



He then faced judge and jury and calmly declared, "I would say it was about one-tenth that hard."

[**Editor's Note**: This probably is not as funny as it seemed to me at first blush. But it is strikingly similar to a miscommunication Judge Clayton Graham encountered in the Courtroom with a Defendant when he was still a prosecuting attorney]

Probate Case Summaries

Hon. David M. Murkowski, Chief Judge of Kent County Probate Court

Ducharme v Ducharme, ___Mich App___, 2014

Published April 17, 2014

#314736

CLAIMS AGAINST A TRUSTEE ALLEGING A BREACH OF DUTY DO NOT SOUND IN TORT BUT ARE ALLEGATIONS OF A BREACH OF TRUST THE TRUSTEE OWES TO A TRUST BENEFICIARY UNDER THE MICHIGAN TRUST CODE.

Plaintiff and defendant are siblings and beneficiaries of two trusts created by their parents. Defendant is the successor trustee of the two trusts.

The successor trustee issued annual reports between 2009-2011. In June 2011, the defendant served an amended 1st annual account and final accounts for both trusts and later, served amended final accounts reflecting minor adjustments to the accountings.

The annual accounts for both trusts included a disclaimer that a beneficiary may not bring an action for breach of trust if more than one year has lapsed since the sending of the report. The amended accounts and the supplement to the final account did not contain the disclaimer.

Plaintiff filed a fiv count complaint against successor trustee on October 31, 2012, alleging claims for breach of fiduciary duty, conversion, commingling, violation of impartiality, fraud and misrepresentation.

Defendant successor trustee filed motions for summary judgment under MCR 2.116(C)(7), (C)(8), and (C)(10)

The probate court found the accountings provided to the plaintiff adequately disclosed the potential claims and held the claims were properly categorized as breaches of trust and thus were barred by the one-year statute of limitations as set forth in MCL 700.7905(1)(a).

Plaintiff argued on appeal that summary disposition was inappropriate because the claim was grounded in tort.

The Court of Appeals affirmed the probate court. The Court of Appeals commenced its analysis by reviewing the statutory definition of "breach of trust". A breach of trust is a " violation by a trustee of a duty the trustee owes to a beneficiary".

In count I, plaintiff alleged a breach of fiduciary duty in not protecting trust assets. The Court of Appeals found that alleging a breach of duty is an allegation of a breach of trust. Counts II and III of plaintiff's complaint alleged conversion and commingling. The Court of Appeals held that the Michigan Trust Code (MTC) requires a trustee to keep separate trust property from a trustee's own property and to administer the trust in the interests of the trust beneficiaries and any conversion or commingling would be a breach of duty the trustee owes to a trust beneficiary. Count IV of the plaintiff's complaint alleged the trustee violated the duty of impartiality by claiming excess property for herself. Again, the Court of Appeals held that by alleging a breach of duty to a trust beneficiary plaintiff has alleged in essence breach of trust. Count V of plaintiff's complaint alleged fraud and misrepresentation. The Court of Appeals held that any inappropriate taking of trust property or misevaluation of trust property would be a failure of the trustee to administer the trust in the interest of all beneficiaries and would constitute a breach of trust.

The Court of Appeals concluded: "Plaintiff's allegations clearly involve claims the defendant breached her duty as trustee in her administration of the trust. Indeed, plaintiff's standing relies upon his interest in the trust as a trust beneficiary. Thus, plaintiff alleged in each count a 'violation by a trustee of a duty the trustee owes to a trust beneficiary. '" MCL 700.7905(1)(1).

The Court of Appeals also opines in a footnote regarding the applicability of statutes with a common purpose: "The existence of a cause of action outside the trust context does not allow that action to supersede the trust action. When two statutes have a common purpose, 'the specific statute rather than the general statute controls.' Sutton v Cadillac Area Pub Schs, 117 Mich App 38, 44; (1982). Both the breach of trust statute and the breach of fiduciary duty statutes seek to protect beneficiaries from misdeeds by their trustees. Because the breach of trust statute specifically applies to the trust context, it and its statute of limitations applies in the specific application."

The Court of Appeals also affirmed the findings of the probate court that the reports or accountings provided by the defendant trustee adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding. The Court held the statute does not require that the trust be terminated or that a final report be issued in order for the one- year statute of limitations to begin running. Thus, the probate court properly granted summary disposition pursuant to MCR 2.116(C)(7) on the ground that the claims were timed barred under MCL 700.7905(1)(a).

Reporter's Note: This seminal published case is extremely important in that the opinion defines the type and form of remedy available to a beneficiary of a trust and the applicable statute of limitation controlling such remedy. This ruling prohibits a trust beneficiary from using a more generic remedy outside the Michigan Trust Code to avoid a statute of limitations.

In Re Filibeck Estate, ___Mich App___ 2014

Published June 5, 2014

#315107

FUNDS SOLICITED AND DONATED TO ASSIST AN INDIVIDUAL DEFRAY MEDICAL EXPENSES ARE HELD IN TRUST FOR THE INDIVIDUAL FOR THAT PURPOSE; THE INDIVIDUAL DOES NOT OWN THE DONATED FUNDS AND CANNOT GIFT THE FUNDS DURING HIS LIFETIME.

Steve Filibeck was employed by the State of Michigan, laid off, and subsequently lost his medical benefits as a result of his layoff. Later he was diagnosed with cancer requiring expensive medical treatment.

Laura Beal, daughter of decedent from a previous marriage, spearheaded a fundraising campaign with the help of others, for the purpose of defraying Stephen's medical costs. A benefit dinner was held and approximately $45,000 was raised. The funds were held in Laura's name.

Stephen later regained his health benefits when he was reclassified as a retiree. Stephen directed some payments from the fund to bills unrelated to his medical expenses without objection. Upon Stephen's death, approximately $30,000 remained in collected funds.

Stephen died intestate survived by his current wife, his daughter Laura, and another child.

Laura claimed that shortly before his death Stephen directed that the funds be divided between his two children. Laura also claimed she owned the money outright because she raised the funds and in addition, Stephen gifted the money to the children during his lifetime. The widow claimed the money belonged to Stephen's estate and further claimed certain expenses of Stephen remained unpaid.

The probate court found that Stephen had instructed Laura to divide the funds with her sister but that Stephen had no author-

ity to do so because he was not the owner of the funds at that time. The probate court imposed a constructive trust upon the funds reasoning that the finds were donated for the purpose of defraying the costs of Stephen's medical treatment.

The Court of Appeals affirmed the probate court's findings that the funds were raised for the purpose of covering Stephen's medical treatment and not an outright gift to Stephen and that the funds were donated rather than a profit derived from payments for goods or services in conjunction with the benefit dinner.

The Court of Appeals found there was no question the donors here, intended to make donations for the purpose of defraying the costs of Stephen's medical costs and the intent of the donor is dispositive.

The Court held that the solicitors of the funds act as agents for the donors and occupy the position of trustee. The Court continued that the probate court correctly found that equity compelled a finding that the money Laura received was not for her benefit and the probate court appropriately imposed a constructive trust. Further, Stephen did not own the collected funds and consequently could not gift those funds.

Finally, the Court of Appeals opined that any gift, inter vivos or causa mortis, requires an intent to convey something, acceptance, and delivery or, at a minimum, written instructions to make such a delivery. Though intent and acceptance were established, no evidence exists establish that Stephen made delivery or that Stephen left written instructions. Affirmed

Reporters Note: Now we know what is supposed to happen to that dollar you put in the pickle jar at the mini-mart.

Family Law Case Summaries

Hon. Gregg Iddings, Lenawee County Probate Court

Grandparent Visitation

Case Name: Porter v. Hill

Court: Michigan Supreme Court

Docket Number: 147333 (4/23/14)

Judge(s): Young, Robert P. Jr., Michael F. Cavanagh, Stephen J. Markman, Mary Beth Kelly, Brian K. Zahra, Bridget M. McCormack, and David F. Viviano.

The plaintiffs in the present case are the parents of the deceased, Russell Porter. Russell previously had his parental rights to his children terminated by court order. The mother of the children, Christina Hill, and Russell divorced. Russell had continued paying child support until his death. After the death of their son, the Porter's sought a court order to grant them grand parenting time, which Hill opposed due to Russell's parental rights being previously terminated. The trial court ruled with Mrs. Hill, stating that under the Child Custody Act the rights come from those of your children. The trial judge also ruled that the Child Custody Act does not allow grandparents to seek visitation when the parents' rights are terminated.

On appeal, the Court upheld the trial court, stating that the Porter's lacked standing under the Child Custody Act. MCL 722.27b(1) states, "a child's grandparent may seek a grand parenting time order under 1 or more of the following circumstances:…(c) The child's parent who is a child of the grandparents is deceased." The court noted that "parent" was defined as the natural or adoptive parent of the child and "grandparent" was defined as a natural or adoptive parent of a child's natural or adoptive parent. At the time Russell had died he was not a legal parent of the children. The Court of Appeals also determined that even though Russell had paid child support, a parent whose rights were terminated cannot assert a right to have contact with the children. It was also rejected that the Child Custody Act permits grandparents to seek a visitation order when their child's rights have been terminated. The plaintiffs used MCL 722.27b(5) which the Court stated didn't advance the plaintiff's case. The court urged the Legislature to amend this statute to ensure that it doesn't apply in cases where the parent's rights were involuntarily terminated.

The dissenting judge in the Court of Appeals stated that the majority erred by equating "natural parent" with "legal parent." The Child Custody Act doesn't specifically define "natural parent" but it is implied that it is related by blood or birth. The dissenting opinion also disagreed with the majority's assertion that the Porter's derive their grand parenting rights through Russell. Lastly, the dissent stated that MCL 722.27b(5) states that even when a person's parental rights are terminated, they can still be the "parent" for purposes of enabling a grandparent to seek time.

The Michigan Supreme Court found that the Court of Appeals erred. A biological parent is encompassed by the term "natural parent" in MCL 722.22(e) and (h), regardless of whether the biological parent's parental rights have been terminated. Accordingly, the published decision of the Court of Appeals was reversed and remanded for further proceedings.

Termination Decisions

Case Name: In Re Donadio

Court: Michigan Court of Appeals (unpublished)

Docket Number: 315125 (2/20/14)

Judge(s): Per Curiam – Sawyer, P.J., Borrello, and Beckering, JJ.

The Respondents appeal as of right from an order terminating their parental rights to their two children based on MCL 712A.19b. The Court of Appeals conditionally reversed the lower court's decision in order to address a concern regarding compliance with the Indian Child Welfare Act (ICWA), but otherwise affirmed. The Court stated that when a party informs the court that a child may be an Indian child, the court will have "reason to believe" the child is an Indian Child, and the notice provisions will be triggered. The burden of establishing the applicability of the ICWA rested with the parents; however, if there was "reason to believe" the child was Indian the notice requirements couldn't be avoided by placing the burden on the parents. The respondents would have to present the requisite notices and return receipts, therefore establishing compliance with the notice requirements. If the respondents can prove that they are indeed Indian children, new proceedings will commence. If they cannot, the termination order can be reinstated. The Court of Appeals also determined that the trial court did not err in finding that reasonable efforts at reunification were made, and that termination was in the best interests of the children.

Case Name: In Re A.K. and J.K., MINORS

Court: Michigan Court of Appeals (unpublished)

Docket Number: 318099; 318100

Judge(s): Gleicher, P.J., and Hoekstra and O'Connell, JJ.

The respondents in the present case are the mother and father or A.K. and J.K., appealing as of right the order terminating their parental rights. The circuit court hand found that statutory grounds for termination existed under MCL 712A.19b(3)(c)(i)(ii)(g) and (j). The trial court had also found that the termination was in the children's best in-

terest under MCL 712A.19b(5). The mother challenged the circuit court's findings on the statutory grounds for termination and on the children's best interest. The father challenged on the best-interest findings.

The Court of Appeals affirmed the circuit court's finding that there was clear and convincing evidence of one or more statutory grounds for termination. They also determined that the record was insufficient to whether the circuit court properly considered whether the children were placed with a relative. In the trial court's decision regarding the best interest of the children, they can focus on the parent-child bond, the child's need for permanency and stability, and the relative advantages of a foster home over the parent's home. The father had argued that the best interest of the children needed to be done so separately. The Court ruled that this is only so if the best interest of the individual children significantly differ. The father had also failed to make progress during the 16-month proceeding. It was determined by the Court of Appeals that during the circuit court's decision making process they must "explicitly address each child's placement with relatives at the time of the termination hearing if applicable." The decision was affirmed in part, vacated in part, and remanded for further proceedings consistent with the opinion that states the circuit court must address relative placement.

Case Name: In Re I.A. Crigler, MINOR

Court: Michigan Court of Appeals (unpublished)

Docket Number: 317400; 317401

Judge(s): Jansen, Kathleen, and Donald S. Owens, and Douglas B. Shapiro

The present case consist of consolidated appeals, respondent C.L Crigler and N. Crigler (respondent's mother and father) appeals as of right in the trial court's initial order of disposition terminating their parental rights to the minor child pursuant to MCL 712A19(b). The respondents in the present case argue that they were deprived of procedural due process when the trial court informed them that they would be assessed fines and costs if they elected to have a jury trial at the adjudication of the petition for jurisdiction. The Court of Appeals stated that the respondents bear the burden of proving prejudice, which they didn't do. The Court of Appeals reviewed the record of the pre-trial hearing and stated that it clearly demonstrated that both respondents were aware of their right to demand a jury trial and that the court advised them that they had an absolute right to a jury trial. The court did tell the respondents that they would be assessed fines and costs to compensate for the jury.

The Court of Appeals stated that it was clear that the trial court erred in their statements about jury fees. The statement could deter anyone for electing for a jury trial. However, the court ruled that this error did not affect the outcome of the case. Importantly noted was that the respondents have failed to meet their burden to show that the plain error prejudiced them in any way.

As for the termination of parental rights, the trial court was insufficiently clear in making "brief, definite, and pertinent" findings for statutory grounds for termination (MCR 3.977(I)(1)). The court remanded for the trial court to make the required findings consistent with MCR 3.977(I)(1) necessary for review. The court affirmed in all other respects and retained jurisdiction.

Case Name: In re Wangler/Paschke

Court: Michigan Court of Appeals (Published)

Docket Number: 318186

Judge(s): Hoekstra and Sawyer; Dissent – Gleicher

Holding that the trial court's previous order was appealable as of right under MCR 3.993(A)(1), the court required the respondent mother to raise her jurisdictional challenges in an appeal of that order, and concluded that those challenges in this appeal of the trial court's later order terminating her parental rights constituted an impermissible collateral attack. The court declined to consider the merits of her arguments and affirmed the trial court's order terminating her parental rights. On appeal, she only challenged the validity of the trial court's exercise of jurisdiction over the children. The issue was whether termination occurred at the initial disposition such that this attack was a direct appeal or whether there was an order of disposition that she was required to appeal as of right in order to raise this challenge.

"In this case, contrary to the typical order of proceedings, the trial court ordered the parties to engage in mediation immediately after the preliminary hearing wherein it found probable cause to authorize the petition and ordered temporary placement" of the children. "During mediation, the parties negotiated an agreement that was signed by all participants, including respondent." The agreement set forth the consequences of the trial court's acceptance of her plea of admission and stated that respondent admitted several paragraphs of the petition. It also stated that her plea of admission and the trial court's exercise of jurisdiction would "be held in abeyance," while respondent participated in services. However, as the case progressed, it became clear that she "was not making significant progress," and the trial court accepted her plea of admission and took formal jurisdiction over the children after a dispositional review hearing. The order following a later hearing "constituted the trial court's formal order of adjudication because it was the first order wherein the trial court formally exercised its jurisdiction pursuant to the mediation agreement." It "also constituted an 'order of disposition placing a minor under the supervision of the court or removing the minor from the home,' under MCR 3.993(A)(1)." Because under that order the trial court formally exercised its jurisdiction over the children and placed them under the supervision of DHS, it constituted an order that was appealable as of right under MCR 3.993(A)(1). Instead of appealing, respondent impermissibly "waited until after the filing of a supplemental petition seeking termination, a termination hearing, and an order terminating her parental rights to challenge the trial court's exercise of jurisdiction."

Case Name: In Re COH, ERH, JRG, & KBH, MINORS

Court: Michigan Supreme Court

Docket Number: 147515 (4/22/14)

Judge(s): Young, Robert P. Jr., Michael F. Cavanagh, Stephen J. Markman, Mary Beth Kelly, Brian K. Zahra, Bridget M. McCormack, and David F. Viviano.

The department of Human Services (DHS) petitioned the Muskegon Circuit Court, Family Division, to terminate parental rights of the mother and two fathers of the minor's COH, ERH, JRG, and KBH. The children were already removed from the mother's home and placed in foster care. The biological grandmother, Lori Scribner, expressed interest in becoming the guardian if the children were not returned to their mother. The court terminated the rights of the fathers in the case, however determined that terminating the mother's rights were not in the best interest of the children. The next year, the DHS again petitioned to terminate the mother's rights, this time she plead no contest. At this time Scribner moved to be appointed the children's guardian, this motion was denied. The children were sent to the Michigan Children's Institute (MCI). Scribner then attempted to adopt the children, this request was also denied.

The case required a consideration of the interplay between MCL 722.954a and MCL 712A.91c. In a unanimous decision, the court held that the preference created in MCL 722.954a for a child who has been re-

moved from the parental home to be placed with relatives applies when the DHS is making its initial placement decision, but it does not apply to a court's decision regarding whether to appoint a guardian for the child under MCL 712A.19c(2). In deciding whether to appoint a guardian under MCL 712A.19c(2), a court must determine whether the guardianship is in the child's best interests and has the discretion to consider the statutory best interest factors from MCL 722.23 or any other factors that may be relevant to that particular case.

Juvenile Justice

Case Name: People of the State of Michigan v. Arek Napieraj

Court: Michigan Court of Appeals (Published)

Docket Number: 314305 (4/15/14)

Judge(s): Borrello, P.J., and Whitbeck and K.F. Kelly, JJ.

In the present case the respondent, Arek Napieraj, is appealing an order of disposition following his adjudication of guilt on one count of school truancy. The respondent had a history of frequent absences from the school. The school acted by meeting with the parent on two separate occasions, warning the mother about unexcused absences. The respondent's mother listed numerous reasons why her child had missed school. The respondent was absent several times after the meetings and at the school's request, the prosecutor's officer sent a warning letter, and filed a petition. The trial court adopted the referee's conclusion that the respondent was guilty of truancy.

The truancy statute, MCL 712A.2(a)(4), states that the juvenile must "willfully and repeatedly absent himself or herself from school." Respondent is arguing that his absences were not "willful" and they should have been deemed excused. The Court of Appeals stated that "Michigan courts must infer a criminal intent for every offense in the absence of an express or implied Legislative intent to dispense with criminal intent." The specified statute in this case states that the juvenile must be willfully absent from school. The court stated that the respondent was entitled to individual consideration of the law and facts in this case, which were not provided for him. The court found that the respondent's conduct was not willful and didn't fall under the MCL 712A.2(a)(4) statute. The absences should have been considered excused based on the request of the parent and numerous doctors' notes. The court noted that the referee failed to address evidence or make a reference to the "willful" element within the case. Furthermore, the referee failed to apply the law to the facts in any way. Rather the referee substituted personal experience and bias while failing to comply with law to the facts. The case was reversed and remanded for an order of dismissal.

Child Support

Case Name: Macomb County Department of Human Services v. Keith Anderson

Court: Michigan Court of Appeals (Published)

Docket Number: 313951 (4/15/14)

Judge(s): Borrello, P.J., and Whitebeck and K.F. Kelly, JJ.

The plaintiffs, Macomb County Department of Human Services (DHS and Jessica Glambin, appeal as of right an order dismissing plaintiffs' claim against defendant in this child support enforcement action. The action was brought under the Family Support Act, MCL 552.451. The plaintiffs filed a complaint against the defendant stating that the defendant didn't live with the plaintiff and he had the ability to provide support for the child. A default was entered to the defendant's failure to respond to the summons. During the hearing on the plaintiff's motion, Glambin and the defendant failed to appear. The trial court denied the request to enter the support order of child support in the sum of $403. The plaintiffs then filed a motion for reconsideration, arguing that the court erred in their dismissal based on Glambin's absence.

On appeal, plaintiffs argued that the trial court erred when denying their motion for reconsideration. The Court of Appeals agreed, stating that the error in dismissing the complaint was based on Glambin's failure to appear, which was unnecessary. The court recognized that child support wasn't specifically for the custodial parent, but rather to satisfy the needs of the child. Due to the previous absences of the defendant, many of the claims were invalid. The allegations were deemed admitted, these consisted of disputes with regards to the child's custody and whether or not the defendant could financially provide for the child. If the defendant could not afford to pay the child support, it was his burden to prove so. Most importantly, MCL 552.452 doesn't require that a custodial parent need to be present at the hearing. It is stated that the prosecuting attorney shall act as the attorney for the petitioner. The Court of Appeals vacated the ruling, stating that the trial court erred when it dismissed the complaint based on Glambin's absence at the hearing. The trial court abused its discretion in denying the motion for reconsideration.

THANK YOU to Eric Dermanelian, Adrian College Graduate Student, for his assistance.

9th Annual MPJA Golf Scramble - Another Success

Hon. Patrick McGraw, Saginaw County Probate Court

The 9th Annual MPJA Golf Scramble was another success. It occurred on Tuesday, June 24, 2014 at the beautiful Grand Traverse Resort Spruce course. The weather cooperated with a sunny day of 75 degrees.

The championship golfers and winners of the tournament this year was the team of McGraw, Economy, and Sullivan with a 64. Coming in second was the team of Hohman, Hohman, Brunner, and Brunner with a score of 67. The high team honors this year went to the team of Buck, Buck, Butts and Martin with an 80.

The closest to the pin for men was Don McLennan, closest to the pin for women was Ann Marie Hohman, the men's longest drive was Leon Holmes and the women's longest drive was Denise Nebel.

All golfers received prizes with a round of golf being raffled off to Kate Ryan, and a golf bag raffled off to Joe Massie besides the regular array of prizes.

A special prize was given to Judge Charles Nebel for his golfing attire and entertainment skills.

Next years' golf outing will be held at the Treetops Resort in Gaylord and I will be looking into making arrangements very shortly.

I look forward to having everyone back for the 10th Annual MPJA Golf Scramble.

If you have any comments, concerns or suggestions for next years' tournament, please do not hesitate to give me a call (but don't expect me to respond). ■