DELINQUENCY CASES

Restitution

People v Lloyd, 301 Mich App 95; 835 NW2d 453 (2013) (Court of Appeals #310355, May 14, 2013)

The Defendant was convicted of misdemeanor assault, sentenced to 93 days in jail and ordered to pay $126,561.63 in restitution. The Defendant on appeal argues that the trial court erred in awarding triple restitution pursuant to MCL 780.826(5). The Defendant hit the victim in the eye with a high heeled shoe. The victim lost her eye and now wears a prosthetic. The victim testified at the sentencing that the assault left her emotionally, physically and financially devastated. The prosecution requested $42,187.21 in actual restitution and asked the trial court to triple the award, which the trial court did. MCL 780.826(5) states that "if a crime resulting in bodily injury also results in the death of a victim or serious impairment of bodily function of a victim, the court may order up to 3 times the amount of restitution otherwise allowed by law." The Court held that the loss of an eye is a serious impairment of bodily function. The trial court's determination was **affirmed.**

In re: Chaddah, unpublished Court of Appeals #306978, October 23, 2012. *lv to appeal den'd* 493 Mich 954; 828 NW2d 370 (2013) (Supreme Court #146282, April 1, 2013)

The juvenile admitted responsibility to one count of MDOP $1000.00 to $19,999.00 by throwing a rock at the victim's vehicle. The victim requested $12,455.50 in restitution, consisting of $5360.00 in attorney fees that he incurred in the DL matter, $6088.00 in attorney fees that he incurred in a *mandamus* action, and $1007.50 for damages and repairs costs to the vehicle. The victim, prior to the prosecuting attorney filing charges, brought a *mandamus* action against the prosecuting attorney's office to compel charges against the juvenile. The *mandamus* action was dismissed by the trial court prior to the commencement of the delinquency case. After the restitution hearing, the referee found that the victim had never repaired the vehicle and awarded restitution in the amount of $895.00, which was the Kelly Blue Book value of the vehicle ($1545) less the resale value of the unrepaired vehicle ($650). The referee held that the Crime Victim's Rights Act (CVRA) does not permit the recovery of attorney fees. The circuit court affirmed the referee's findings and entered an order. The victim appealed, arguing that he should have been awarded his attorney fees The Court disagreed and held that for a loss to be recoverable under the CRVA, there must be a sufficient nexus between the crime and the loss, i.e. the loss was incurred as a result of the criminal act. The victim's unsuccessful and moot attempt in filing the *mandamus* action to compel the prosecutor to authorize charges against the juvenile were not the result of the juvenile's actions. The CRVA does not give a victim the right to require that the prosecutor immediately file charges. In addition, the victim, although permitted to retain an attorney in the DL proceedings, did not show that his voluntary decision to hire an attorney created a loss that was necessarily incurred as a result of the offense. His attorney fees are non-recoverable losses under the CRVA. Affirmed.

Effect of juvenile adjudication on adult sentencing guidelines

People v Anderson, 298 Mich App 178; 825 NW2d 678 (2012) (Court of Appeals #301701, October 23, 2012) *lv to appeal den'd* 493 Mich 955; 828 NW2d 55 (2013) (Supreme Court #146370, April 1, 2013)

The defendant was convicted of arson and sentenced to 10-20 years in prison. His argument on appeal related only to his sentencing. He argued that PRV 6 (an offender's relationship to the criminal justice system) should have been 0 as opposed to 10. Pursuant to the sentencing guidelines, the trial court is to assess 10 points if, at the time of sentencing, the offender is on parole, probation or delayed sentencing status. The defendant acknowledges that he was on probation, but because it was juvenile probation and because juvenile matters are not criminal in nature, he does not have a relationship to the criminal justice system. The Court held that the phrase "criminal justice system" is not limited to adversarial proceedings. Since juveniles on probation are involved with the corrections aspect of the criminal justice system, they do have that relationship. The Court **affirmed** the trial court's determination of PRV 6.

Determination of age

People v Woolfolk, __ Mich App __; __ NW2d __ (2014) (Court of Appeals #312056, February 27, 2014)

The defendant was convicted of 1st degree murder and felony firearm. The conviction was from a drive by shooting that occurred in 2007 on the evening prior to the defendant's 18th birthday. Among others things, the defendant argued that his mandatory life imprisonment was cruel and unusual punishment under *Miller v Alabama*, 132 SCt 2455; 183 Le2d 407 __ US __ (2012). At first glance, it appeared that the defendant had a solid argument in that the shooting occurred the evening prior to his 18th birthday and that resentencing should be required; but if the common low rule of age calculation is used, then the defendant would have reached the age of 18 prior to the shooting and resentencing would not be required. *Miller* does apply for any person under the age of 18. No case or statute provides a means for calculating WHEN a person reaches any age, so this is a case of first impression. The two competing calculations are the "common law rule of age" and the "birthday rule". Common law rule of age states that no fractions of days are included, so the person becomes of full age the first moment of the day before the anniversary of birth. The birthday rule states that the age is determined by the anniversary date of his or her birth. States are split as to which rule applies. In analyzing the issue, the Court looked to federal law, the Michigan Constitution, Michigan Attorney General Opinions, Michigan statutes and court rules, and Michigan caselaw. The bottom line was that the Court would apply the birthday rule and not the common law rule of age. There was no case in Michigan that applied the common law rule of age calculation, so what was once established in England, does not appear to be established in Michigan. "The Michigan Supreme Court, to the extent it has addressed the issue in passing, has commonly and routinely used language consistent with the birthday rule and contrary to the common law rule." In addition, the legislature, while not explicitly abrogating the common law rule has at times used language consistent with the birthday rule. Since the defendant was 17 at the time of the shooting *Miller* does apply and sentencing the defendant to life imprisonment without the possibility of parole is cruel and unusual punishment. Resentencing is required, but the conviction is affirmed.

Extension of jurisdiction beyond 19 years old

In re Kragor, unpublished Court of Appeals #307470, July 25, 2013

The trial court conducted a hearing to extend court jurisdiction until the juvenile is 21 years old and granted the extension. The hearing, however, occurred after the juvenile's 19th birthday. The juvenile argued at the hearing, and on appeal, that he should be released as the court does not have jurisdiction over him past his 19th birthday. The Court agreed and **reversed** the trial court's order extending jurisdiction and voided any orders assessing costs for benefits and services or other penalties associated with the period during jurisdiction was improperly exercised. The only time a hearing to extend jurisdiction can be after the 19th birthday is if a scheduled hearing prior to the 19th birthday is adjourned for good cause. The trial court initially scheduled the hearing to extend jurisdiction for three days before the juvenile's 19th birthday, but the hearing was adjourned. There is nothing in the record that shows good cause for the adjournment, or even why the hearing was adjourned. Appeals to the Court of Appeals can only be heard on the original record and the review is limited to the record established by the trial court. No party may expand the record. As a result, the Court cannot consider discussions off the record. The Court held that the juvenile should have been released on his 19th birthday since the trial court lost jurisdiction over the child once he turned 19.

Delayed Sentencing

People v Williams, unpublished Court of Appeals #306987, August 6, 2013; *lv to appeal den'd*

The juvenile who was 13 years old at the commission of the offenses, was tried as an adult. He was charged with 1st degree premeditated murder, 1st degree felony murder and carjacking. He was convicted by a jury of 1st degree felony murder and carjacking. The trial court imposed a blended sentence and initially committed the juvenile to a high security facility, placing him on probation. 6 years later, the trial court imposed a prison sentence of 15 to 30 years on the carjacking conviction. The defendant appealed and argued on appeal that lack of formal procedure, notice and findings violated his rights to due process. The statute provides that a delayed sentence may be imposed following a finding at a regularly scheduled review that the juvenile has not been rehabilitated, or poses a serious risk to public safety, or on the basis of a probation violation. In addition, the court must conduct a final review of the juvenile's probation not less than 91 days before the end of the probation period and annual reviews. Notice of the reviews must be provided to the prosecuting attorney, the agency to which the juvenile has been committed, the juvenile and the juvenile's parent, guardian or legal custodian and must indicate that the court may extend jurisdiction over the juvenile or impose sentence and that the juvenile has the right to an attorneys. In addition, probation violation

hearings are conducted upon receipt of a sworn supplemental petition and noticed to the juvenile along with the juvenile's rights as provided by court rule. The juvenile in this case did not receive notice of a probation violation, so the Court took the hearings as an annual review hearing and a final review hearing. The juvenile also did not receive written notice of the hearings. The Court held, however, that his notice argument was waived. The juvenile and his attorney had been present at the hearings and had received two months of verbal notice of his violations. The juvenile was further aware that he was facing imprisonment at the trial judge ordered a presentence investigation and stated on the record that he thought he was going to have to send this young man to prison. The attorney for the juvenile also prepared a sentencing memorandum. The Court held that if the purposes of the statutory notice provisions are to ensure that a defendant is aware of the time and place of a hearing and what is at stake, they were satisfied in this case. If the lack of a written notice was erroneous, the juvenile cannot show how it affected the outcome. The sentencing is **affirmed.**

Extradition

In re Boynton, 302 Mich App 632; 840 NW2d 762 (2013) (Court of Appeals #310889, October 15, 2013)

The juvenile is a resident of Michigan. When he was 12, he went to visit his godfather in Georgia for a short time. He then returned to Michigan. While the juvenile was in Georgia, an investigation began into whether the juvenile sexually assaulted a 4 year old child. After the juvenile's return to Michigan, an arrest warrant was issued in Georgia. Georgia's governor issued a requisition demand to Michigan's governor requesting the juvenile's extradition to Georgia to face charges. In the requisition demand, the state of Georgia was pursing charges in juvenile court, and stated that the juvenile was a resident of Georgia, living "somewhere in Michigan under the custody and control of his mother".

Approximately 6 months later, the juvenile became involved in juvenile court in Genesee County for domestic violence and was placed on juvenile probation. Almost 2 years later, the juvenile violated the terms and conditions of his probation. He was then served with the extradition paperwork. The juvenile's court appointed counsel filed a writ of habeas corpus challenging the extradition, which the trial court denied and ordered the juvenile to return to Georgia to face the charges.

On appeal, the juvenile argued that the Uniform Criminal Extradition Act (UCEA) does not apply to juveniles charged with delinquent behavior and only applies to adults and criminal behavior. The Court held that, by definition, the UCEA applies to "persons" and does not distinguish between a juvenile or an adult. The plain and ordinary meaning of "person" is a human being; a man, woman, or child. In addition, even though a juvenile is not considered "criminal", the activity the juvenile is accused of is criminal in nature and, if he is adjudicated through the juvenile proceedings, it constitutes criminal activity. As a result, the UCEA applies to juveniles charged with delinquent behavior.

The juvenile also argued that the UCEA does not apply to him as he is not a "fugitive from justice". The juvenile did not "flee" from Georgia to avoid prosecution. His mother dictated his travels and he was only in Georgia for a short vacation. The Court found the argument to be unpersuasive and held that the definition of "fugitive" as applied to the UCEA is more of a restricted definition and the reason for the absence of the individual from the demanding state is irrelevant for purposes of extradition and the fact that the juvenile left the state does not matter as much as the fact that he refuses to return.

The juvenile next argues that because the paperwork stated he was a resident of Georgia, which was inaccurate, the extradition paperwork should be deemed invalid. The Governor of Michigan could assume based upon the paperwork that he is signing a document returning a Georgia resident back to his home state. The Court held that the offender's permanent residence is not among the information that is required in the extradition documents and therefore would not render them invalid.

The final argument of the juvenile was that it was cruel and unusual punishment to remove the child from Michigan and his family as he is a minor. The Court held that the Constitutional protection applies only to "punishment" after the state has secured an adjudication of guilty or a conviction and therefore does not apply.

The trial court's decision to deny the writ of habeas corpus and to permit the juvenile's extradition to Georgia was **affirmed.**

Service of Waiver Motion

In re Hendricks, unpublished Court of Appeals #312764, December 12, 2013

The juvenile appeals the trial court's order waiving jurisdiction to the criminal court. The juvenile was charged with torture, based upon burns suffered by a 13 year old victim allegedly at the hands of the juvenile. The juvenile argues that the order should be set aside as the Motion to Waive Jurisdiction was not properly served. The trial court sent the motion to the respondent, his mother and his attorney by ordinary mail, contrary to the court rule requiring personal service (MCR 3.950(C)(2)). The Court held that the respondent had actual notice and an actual opportunity to be heard. In addition, the juvenile failed to articulate how he was prejudiced by the notice. As a result, he was not deprived of due process. The Court further rejected the respondent's other arguments, and **affirmed** the trial court's order.

NEGLECT CASES

ICWA

In re Morris, 300 Mich App 95; 832 NW2d 419 (2013) (Court of Appeals #312248, March 21, 2013) *lv to appeal den'd* 494 Mich 851; 829 NW2d 883 (2013) (May 17, 2013)

This case has a long history through the appellate courts. On May 4, 2012, the Supreme Court conditionally reversed an order terminating the father's parental rights because the petitioner and the trial court did not comply with the notice requirements of the Indian Child Welfare Act (ICWA) and remanded the case to the trial court to show compliance with ICWA, *In re Morris,* 491 Mich 81; 815 NW2d 62 (2012). At the hearing after remand, all of the notices, proof of services, registered mail return receipts, responses and other correspondence between the caseworker and the tribes were admitted into evidence. Included in the stack of evidence was a letter received from the Cherokee Nation. The letter requested additional information, such as the middle names and the maiden names of the paternal relatives. The caseworker testified that after she received the letter, she immediately contacted the respondent, but the respondent did not have any of the information requested. The caseworker then sent an e-mail to the Cherokee Nation indicating she had no additional information. No response from the Cherokee Nation was received. At the hearing, the referee confirmed with the respondent that he did not have the additional information requested by the Cherokee Nation. The attorney for the respondent requested an adjournment of the hearing to conduct his own investigation to try to find the information requested by the Cherokee Nation. The adjournment was denied. The referee found that, after ample and appropriate notice, there was no indication that the child was a member or eligible for membership in any Native American tribe and recommended termination of parental rights. The trial court approved the referee's findings. The father appealed the termination order arguing that the ancestry information provided by the petitioner did not meet BIA (Bureau of Indian Affairs) guidelines or the requirements of ICWA.

In affirming the trial court's decision, the Court held that neither ICWA, BIA regulations nor Michigan case law require the petitioner to conduct independent research to provide a detailed genealogical history. The petitioner is only required to send information that is *reasonably known*. The parents are in the best position to research their own ancestry. The petitioner is not required to locate information that the respondent himself is unable to find. Imposing a burden such as this on a petitioner would only encourage parents to delay the proceedings by providing limited information regarding their heritage. That undermines the time provisions in ICWA which is in place to prevent unreasonable delays and jeopardize permanency and finality. Once the petitioner and the trial court satisfy their obligations under ICWA and the trial court determines that a child is not eligible for membership in an Indian tribe, the burden then shifts to the respondent to prove that ICWA still applies. The respondent did not meet this burden. The trial court correctly determined that proper notice was given as required by ICWA and ICWA does not apply to this case. The order terminating the respondent's parental rights was **affirmed.**

Adoptive Couple v Baby Girl, 133 SCt 2552; 570 US __; 186 LEd2d 729 (2013) (No. 12-399, June 25, 2013)

While the birth mother was pregnant with the child at issue, she and the biological father ended their relationship and the biological father agreed to relinquish his parental rights. The biological father was a member of the Cherokee Indian nation. After the child's birth, the mother put the child up for adoption through a private agency and selected Adoptive Couple, who are non-Indians, for adoption. The biological father did not provide any financial support either during the pregnancy, or for the first four months of the child's life. Four months after the baby's birth, Adoptive Couple served the biological father with notice of the pending adoption. The father appeared and stated that he did not consent to the adoption and requested custody. At the trial 2 years later, the South Carolina Family Court denied the adoption petition and awarded custody to the father. The South Carolina Supreme Court concurred and the child was given to the father at 27 months old. The United States Supreme Court **reversed** the decision and held that ICWA, which bars involuntary termination of a parent's rights in the absence of a higher standard showing that serious

harm to the Indian child is like to result from the parent's continued custody does not apply here. The father never had custody of the child. In addition, the heightened standard to show that remedial efforts have been made to prevent the break-up of an Indian family is inapplicable as well when the parent has abandoned the Indian child before birth and never had custody of the child. In addition, the placement preferences of ICWA do not bar a non-Indian family from adopting a child when no other eligible candidates sought to adopt the child.

In re Donadio, unpublished Court of Appeals #315111, February 20, 2014

The parents appealed the trial court's order terminating their parental rights. The Court **conditionally reversed and remanded** the case to the trial court to address a concern regarding compliance with ICWA. Toward the beginning of the case, the parents informed the petitioner that they belonged to The Sault Tribe or the Blackfoot tribe. The trial court determined that the burden of establishing whether ICWA applied, including determining whether or not the children were Indian children, rested with the parents. Even with this, there was an attempt to notice the tribes by the petitioner sending the notices registered mail, but the return receipts were not included with the file and responses were not received by all of the tribes notified. If the petitioner can provide information that the requisite notices were sent and the return receipts were returned, then the termination order is affirmed. If the petitioner cannot do so, then notices must be sent so the trial court can determine whether or not the children are Indian children. Even though only the father raised this issue on appeal, the Court conditionally reversed as to both parents to resolved this issue.

In re Harrell, unpublished Court of Appeals #316067, February 4, 2014

The mother appeals the trial court's orders terminating her parental rights of 7 of her 8 children. On appeal, the mother argues, among others, that the trial court erred when it failed to comply with ICWA. The Court agreed and **conditionally reversed and remanded** the case to the trial court. In order to trigger the notice requirement under ICWA, there needs to be sufficiently reliable information, or an indicia sufficient to trigger that notice. At the pre-trial, the court received information that there was a potential that the maternal great-grandmother was a member of an Indian tribe. Although this information was "slight", it was information suggesting that a member of the parent's family are tribal members. Because it's for the tribe to determine a child's eligibility for membership, the trial court clearly erred when it found that the possibility of a great-grandmother was too remote to justify the notice under ICWA.

In re Laird, unpublished Court of Appeals #315895, January 28, 2014

The father appeals the trial court's order of disposition regarding his Indian child daughter. The father argues that the trial court did not comply with ICWA and MIFPA in providing active efforts to prevent removal of the child. The child is an Indian child through the mother. The Court first determined that the father has standing to challenge the ICWA and MIFPA findings and both statutes allow a "parent" of an Indian child to raise issues regarding ICWA and MIFPA violations. The Court also defined active efforts as affirmative efforts, not passive efforts, where the caseworker takes the parent through the steps of the plan rather than requiring the parent perform the plan on his or her own. Active efforts need not be current efforts or efforts provided for the current child, unless they were provided too long ago, or too different if for another child, to be relevant to the parent's current circumstances. Only 1 expert is required and the expert's testimony can be based upon reports produced by the petitioner.

Active efforts for MIFPA are specifically defined and include reasonable efforts as well as doing or addressing all of 12 services listed in the statute (see MCR 3.002(1)).

The trial court did not err in finding active efforts in this case. As a result, the dispositional order is **affirmed.**

In re Randolph, unpublished Court of Appeals #316831, January 23, 2014; *lv to app den'd*

The parents appealed the trial court's order terminating their parental rights. The Court **affirmed** the mother's termination order, but **conditionally reversed and remanded** the father's order of termination for non-compliance with ICWA. The father indicated at the preliminary hearing that his great grandmother was a member of the "Blackfoot"

tribe. The petitioner argued that there is not such tribe, but the BIA's list of federally regulated Indian tribes includes "the Blackfeet Tribe….." The website to view the list is at http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx Since the file did not indicate that any notice was given, and, if the identity of the tribe is uncertain, notice is to be given to the Secretary of the Interior. On remand, the trial court shall give notice to the appropriate entities. If the children are not Indian children, or if the entities do not respond within the requisite time frame, the termination order shall be reinstated. If ICWA does apply, the termination shall be vacated and the proceedings begun anew to be in compliance with ICWA.

In re Gregory, unpublished Court of Appeals #314349, October 24, 2013

The parents appeal the trial court's order terminating their parental rights. The parents argue that reversal is required as the trial court did not comply with ICWA. At the preliminary hearing, the petitioner indicated that the child may be Indian because of the father's Cherokee heritage and would further investigate. The court file did not reflect any results of the petitioners investigation. Since this case was being remanded for a best interest analysis (see best interests section below), instead of conditionally reversing, the Court **remanded** the case and retained jurisdiction for the trial court to determine whether ICWA notice was given and make a determination if ICWA applies.

Best Interests

In re White, ___ Mich App ___; ___ NW2d ___ (2014) (Court of Appeals #316749, January 16, 2014)

The mother appeals the trial court's order terminating her parental rights. During the lower court case, the mother cooperated with services. The trial court found, however, that she did not make any progress as she still allowed questionable men into her apartment and life after meeting them on the internet. The mother further argued that the trial court erred by not considering the needs of each child individually in determining best interests. The Court held that the holding in *In re Olive/Metts*, "stands for the proposition that, if the best interests of the individual children *significantly* differ, the trial court should address those differences….it does not stand for the proposition that the trial court errs if it fails to explicitly make individual and—in many cases—redundant factual findings concerning each child…." Since the trial court did not err, the termination order was **affirmed.**

In re Moss, 301 Mich App 76; 836 NW2d 182 (2013) (Court of Appeals #311610, May 8, 2013) *lv to appeal den'd* ___ Mich ___; 836 NW2d 174 (2013) (Supreme Court #147519, September 6, 2013.

The mother appeals the trial court's order terminating her parental rights. Among other things, the mother argues that the petitioner failed to prove by clear and convincing evidence that termination of parental rights was in the best interests of the children. First, the Court found that there is no statute, no court rule, or any case law that supports the mother's position that the burden of proof for best interests is clear and convincing. The legislature, when they amended the statute in 2008, left out the word *"clearly"* in determining best interests. As a result, the Court held that a PREPONDERANCE OF THE EVIDENCE standard is appropriate for the best interest determination at a termination hearing. In holding that the petitioner proved a statutory basis for termination by clear and convincing evidence, and termination was in the child's best interests by a preponderance of the evidence, the termination was **affirmed.**

In re Desjardins, unpublished Court of Appeals #315048, January 7, 2014

The father appealed the trial court's order terminating his parental rights. Among other things, the father argued that the trial court erred in finding that it was in the child's best interests to terminate his parental rights. The Court agreed and **vacated** the best interest determination, remanding to the trial court. The trial court addressed best interests, but did not make explicit findings whether termination was appropriate when the child was in a placement with relatives.

In re Johnson, unpublished Court of Appeals #316211, November 14, 2013

The minor child appealed the trial court's decision to not terminate parental rights and placing the child in the temporary custody of the court. The child's argument on appeal is that the trial court erred in declining to terminate based upon the best interest analysis. The trial court, although admitting that it was a "bleak outlook" for the reunification, found that the mother was a relatively young mother and a bond existed between the mother and the child. The Court held that not much had changed since the mother's rights were terminated to an older sibling and that the child bond was outweighed by other evidence showing that termination was in the child's best interests. The Court **reversed** and remanded for entry of an order terminating the mother's parental rights.

In re Gregory, unpublished Court of Appeals #314349, October 24, 2013

The parents appeal the trial court's order terminating their parental rights. The parents argue that the trial court erred in determining that termination was in the child's best interests. The Court agreed and **remanded** the case to the trial court. The Court found that the best interest analysis is sparse and never considered the child's placement with relatives.

In re Hall, unpublished Court of Appeals #315300, October 10, 2013

The father appealed the termination of his parental rights arguing that the trial court erred by not properly considering possible relative placement in its best interests determination. The Court held that the trial court must consider actual relative placement, not the possibility of relative placement. In this case, there were reasonable efforts made to find an appropriate relative, but one was not located. **Affirmed.**

In re Vanvalkenburg, unpublished Court of Appeals #315311, October 8, 2013

The parents appealed the trial court's order terminating their parental rights. The parents argued that the trial court erred in its best interest determination. The Court agreed and **vacated and remanded** the case to the trial court for a re-determination of best interests. The trial court did not give any consideration of the children individually, or individually address their needs, their current placements or whether termination was appropriate given placement with relatives (one child was placed with their other parent). The error did not warrant reversal or a new termination hearing, just a new best interests determination.

In re Harvey, unpublished Court of Appeals #313746, August 20, 2013 *lv to app den'd* __ Mich ___; 836 NW2d 693 (2013) (Supreme Court #147691, September 27, 2013)

The father appeals the trial court's order terminating his parental rights. The father did not present any evidence or argument regarding the children's best interests. Although the trial court's factual findings were limited, the law was correctly applied. Remand for additional factual findings is not warranted. Just because the trial court did not separately address each child's best interests, these children were similarly situated. In *Olive v Metts,* 297 Mich App 35; 823 NW2d 144 (2012), it was necessary to address the children individually as the children's circumstances in that case were different.

In re Luckett, unpublished Court of Appeals #313038, August 13, 2013

The father appeals the trial court's order terminating his parental rights. The father did not comply with the treatment plan for over 3 years and moved to Arizona. The only contact he had with the children over the 3 years were a few unauthorized visits. The father did not attend the termination hearing and his appointed attorney indicated on the record that he had no contact with the father. The record does not indicate that the father requested to participate in the termination hearing by phone and was denied. The Court held that the father had a minimum responsibility to

maintain contact with his attorney and the petitioner, and he did not. He was not denied the right to counsel, nor the right to participate. In addition, the Court held the trial court correctly found a statutory basis by clear and convincing evidence. Regarding best interests, the trial court did not place on the record, or in writing, whether termination was in the children's best interests. As a result, the Court **vacated** the trial court's best interest determination and **remanded** to the trial court to state its findings of fact and conclusions of law on the record or in writing, including the issue of relative placement, for each individual child. The Court retained jurisdiction. *After remand, the Court **affirmed** the trial court's termination order.* (November 19, 2013)

In re Freeman, unpublished Court of Appeals #312800, July 25, 2013

The trial court, in making its findings regarding best interests, reasonably found that it was in the children's best interests to terminate the mother's parental rights because of the mother's non-compliance with the case services plan. But the trial court did not explicitly address whether termination was in the children's best interest considering their placement with relatives rendering the factual record inadequate, the Court **vacated** the trial court's order and **remanded** the case to the trial court to explicitly consider relative placement.

In re Froh, unpublished Court of Appeals #313700, July 18, 2013

The father appeals the trial court's order terminating his parental rights. One of the arguments on appeal is that the trial court did not specifically address in its best interests analysis that the child was placed with a relative (cousin) at the time of the termination hearing. The Court held that, although this failure would normally require a reversal, this case does not warrant a reversal. After the termination hearing, the child was removed from the cousin and placed in a foster home. As a result, the Court held that the post-termination removal of the child from relative placement renders the issue moot. The Court **affirmed** the trial court's order.

In re Rodriguez, unpublished Court of Appeals #313346, July 16, 2013

The Court **affirmed** the trial court's finding that a statutory basis for termination by clear and convincing evidence was shown, the **vacated and remanded** the case to the trial court for additional findings regarding the child's best interests. The trial court did not explicitly consider the child's placement with relatives in its best interest findings.

In re Vogts, unpublished Court of Appeals #314253, July 9, 2013

The mother appealed the trial court's order terminating her parental rights. Her argument on appeal was that the trial court did not consider the children's relative placement in making its best interest determination. The Court held that, "but for this failure to address relative placement on the record, we would affirm". The Court **affirmed in part and remanded** for further proceedings consistent with their opinion.

In re Heuer, unpublished Court of Appeals #312594. June 20, 2013

The mother appealed the trial court's decision terminating her parental rights. The mother conceded that there was a statutory basis to terminate her parental rights, but argues on appeal that the trial court erred by not considering that the children were in relative placement during the best interest analysis. The Court **vacated** the order of termination and **remanded** to the trial court to make appropriate best interest findings. The Court held that, although the trial court was informed that the children were in relative placement, the trial court did not expressly consider relative placement in its best interest determination. The trial court was more focused on the mother's recent criminal activity, which is a proper factor to consider, but the trial court also needed to explicitly address whether termination is appropriate in light of the children's placement with relatives. Even though the trial court made the finding at the permanency planning hearing, it does not satisfy the requirement because this factor must be considered at the time of

the termination hearing. The children may be considered as a group if they are similarly situated and in like circumstances. On August 30, 2013, the defect was cured and the termination order was **affirmed.**

In re Raphael, unpublished Court of Appeals #312227, April 4, 2013 *lv to appeal den'd* 494 Mich 886; 834 NW2d 507 (2013) (Supreme Court #147349, August 2, 2013)

In **affirming** the trial court's termination of the mother's parental rights, the Court found that the trial court considered a number of factors in making its best interest determination. The mother did not challenge the statutory basis for termination on appeal, only the trial court's best interest analysis. The Court found that the trial court took into account numerous factors, including the placement of the child with a relative and not with her half-sibling. The trial court did not err.

In re Wines, unpublished Court of Appeals #310659, February 28, 2013

Because the record does not support a finding that the termination of parental rights was in the child's best interests, the Court **reversed** the termination order and **remanded** the case to the trial court. The trial court never stated any reasons on the record or in a written order why termination was in the child's best interests. There was only a statement that "based on the evidence presented, the court further finds that termination of the parental rights of the respondent mother is in the best interests of the minor child", but there were no reasons given. Leave was given to have the trial court amend its order, but even the amendment did not articulate any reasons either on the record or in a written opinion.

In re Loughner, unpublished Court of Appeals #310279; 310281, January 15, 2013

The parents appealed the trial court's order terminating their parental rights to their two children. The argument on appeal was that the termination was not in the children's best interests. The Court found that the trial court did not consider the children's placement with a maternal aunt during its analysis of best interests. Although the Court affirmed the trial court's factual findings that the termination of the mother's parental rights was in the best interests of the children, the trial court must reevaluate that decision in light of the relative placement. As a result, the Court **affirmed in part, but vacated** the trial court's best interests analysis and remanded to the trial court for an evaluation how its best interests findings as to each child are impacted because of the relative placement.

Central Registry

In re Harper, 302 Mich App 349; 839 NW2d 44 (2013) (Court of Appeals #309478, August 29, 2013)

The respondent/mother was 17 years old at the time a petition was filed with the trial court alleging that her child was failing to thrive and that she had no place to live. Both the mother and the child were placed with the Department of Human Services. As a result, the respondent/mother was placed on the central registry. The mother was able to improve her circumstances and, at the permanency planning hearing, trial court terminated its jurisdiction. At the same hearing, the mother requested that her name be removed from the central registry as she wanted to become a nurse. The GAL agreed with the request and the trial court included in its order a provision requiring the petitioner to remove the mother's name from the central registry. Department of Human Services filed a request to set aside the order requiring the removal of the mother's name and the trial court denied the request. Department of Human Services appealed. The petitioner argued that only the Department of Human Services the authority to add or remove a name from the central registry. The Court agreed with the Department of Human Services and **vacated** the trial court's order and remanded the case to the trial court. Using statutory interpretation, the Court held that the plain language of MCL 722.627 grants exclusive jurisdiction to the Department of Human Services to control expunction from the central registry. The statute is clear about the administrative process that the respondent can follow to seek removal of her name from the registry. In addition, and the legislature mandated that the department shall be responsible for the maintenance of the registry, which communicates an intent that the department be the gatekeeper

for the registry. The mother did not see her administrative remedies through to completion and nothing would stop the mother from pursuing her administrative remedies now.

Nicastro v Department of Human Services, unpublished Court of Appeals #304461, September 24, 2013

The petitioners were foster parents and an investigation began after reports of physical and mental abuse in the home. After the investigation, the Department of Human Services determined that there was a preponderance of the evidence that abuse occurred and petitioners were placed on the central registry. Petitioners requested an expungement from the central registry, which Department of Human Services denied, and an immediate administrative hearing. At the administrative hearing, the ALJ found that Department of Human Services had proved by a preponderance of the evidence that abuse and neglect occurred, that petitioners were properly placed on the central registry and Department of Human Services properly denied the request for an expungement. This action in the county circuit court then commenced. The circuit court reversed the ALJ's decision and ordered expunction of the petitioners' names from the central registry as it was not supported by the evidence presented at the administrative hearing. The Court held that the standard of review of an appellate court is clear error when reviewing a decision of the circuit court reviewing an administrative agency. The Court held that a circuit court may only reverse and ALJ's findings of fact if the findings were not supported by competent, material and substantial evidence on the record as a whole. The circuit court in this case "stepped into the ALJ's shoes" and did a *de novo* review. The circuit court assessed the witnesses credibility at the administrative hearing, which was in error, and substituted its own factual findings. Upon remand, if the circuit court finds that the evidence before the ALJ would allow a reasonable mind to find as the ALJ did, then there is substantial evidence to support the ALJ's finding. The Court **reversed** the circuit court and remanded for further proceedings.

Appointment of an Expert Witness

In re Thibeault, unpublished Court of Appeals #313295, June 25, 2013

The father appeals the trial court's order terminating his parental rights. The father was the father of twins. One twin died while in the father's care. The father told medical personnel and the Child Protective Service Specialist that the child fell from a couch onto a carpeted floor. The treating physician opined that the injuries were inconsistent with a fall of this type and also discovered that the surviving twin had a fractured shin. The father petitioned the trial court for a court appointed expert witness, arguing that he needed an expert to determine the cause of the children's injuries. He argued that the treating physician was biased and that an independent expert was needed. The trial court denied the request, but indicated that it would revisit the issue if the father could demonstrate a bias or prejudice or that any independent expert would actually testify in his favor. During the trial, the motion was again made and the trial court again denied it. On appeal, the father argues, among other things, that denial of the appointment of an expert was error. The Court **affirmed** the termination and, in doing so, found that the denial of the appointment of an expert was appropriate. A motion seeking a court appointed expert witness must be accompanied by a showing that the appointment of an independent expert is necessary by showing that the petitioner's expert was biased or prejudiced against the father or by disputing with particularity the expert's opinion. In addition, the father must show that an independent expert would testify favorably for the father. The Court held that just because the initial treating physician opined that the injuries to the child were caused by abuse prior to the completion of the autopsy does not show bias. In addition, the Department was not "doctor" shopping to find a doctor that would be favorable to their position. It is not up to the petitioner to show why an expert should not be appointed.

Clear and convincing evidence

In re Reeder, unpublished Court of Appeals #315382, October 22, 2013. *Mo for reconsideration den'd.*

The mother appeals the trial court's order terminating her parental rights. The Court found that the reasons for adjudication did not exist at the time of the termination and that clear and convincing evidence did not exist to terminate, the Court **reversed** the order of the trial court. The petition requesting removal of the children was submitted 7 days after the trial court terminated jurisdiction in a prior NA file. The allegation was that the mother left the children with an inappropriate caregiver, who was on parole, had been drinking and fell asleep on the couch leaving one of the children to cry for over 20 minutes. The trial court assumed jurisdiction of the children, taking

judicial notice of the previous neglect matter. The Court held that there was no indication that the mother would continue leaving the children with inappropriate caregivers and did not allow for the completion of the DBT program.

In re Kirby, unpublished Court of Appeals #314148, October 15, 2013

The father appealed the trial court's order terminating his parental rights. The child was placed with the Department of Human Services after drug paraphernalia was located in the home and the home was unsanitary. The father was on probation and went to jail for violating his probation by being in possession of drug paraphernalia. The trial court assumed jurisdiction after the mother entered a plea. The father was released from jail and was working with services. He then was arrested on a new felony charge. He cooperated with services as best he could while incarcerated. The Court held that the conditions that led to the child coming into care were his parenting skills, substance abuse and housing. The updated services plans emphasized that the father was participating in parenting classes and substance abuse classes to the extent possible while incarcerated. No new negative information was received regarding the respondent when the trial court "switched gears" and ordered petitioner to file a termination petition. There is not clear and convincing evidence and "the mere present inability to care for one's children as a result of incarceration does not constitute grounds for termination."

In re Melton, unpublished Court of Appeals #314626 , October 15, 2013

The mother appealed the trial court's order terminating her parental rights. The mother and the GAL argue that the trial court erred when it found by clear and convincing evidence that there was no reasonable likelihood that the conditions leading to adjudication would be rectified within a reasonable amount of time. The Court agreed and **reversed** the trial court's termination order. The conditions that led to adjudication were homelessness and a lack of income. The mother went for months without support or services from the department. The trial court admonished the department for their lack of efforts. The case was sent to another agency, who did nothing to assist the mother. Then the case was transferred back to the Department, which caused a further delay in services. Despite that, the mother, on her own initiative, received treatment, started classes, entered and completed a treatment program and also completed parenting classes. "Respondent did many things on her own to improve her situation and consistently visited her child; these efforts were strong evidence that—had the Department made 'reasonable efforts' to reunify the family—respondent might have been able to rectify the conditions that led to adjudication." The mother's actions (including her ineligibility for Section 8 housing) contributed to the continued conditions leading to adjudication, but the department's failure to provide services played a significant role.

Statutory Basis

In re Cheeks, unpublished Court of Appeals #315523, October 15, 2013

The mother appeals the trial court's order terminating her parental rights. The trial court failed to identify or provide a statutory basis to support the termination decision. The supplemental petition requesting termination alleged that the child had been sexually abused. The trial court indicated that the mother maintained contact with her boyfriend, but did not specify a statutory basis for its order and was not in compliance with MCR 3.977(I)(3), which states that "(a)n order terminating parental rights…may not be entered unless the court makes findings of fact, states its conclusions of law, and includes the statutory basis for the order". The Court **remanded** the case to the trial court and required the trial court to provide additional findings and conclusions concerning the decision to terminate.

Parenting time suspension

In re Laster, 303 Mich App 485; ___ NW2d ___ (2013) (Court of Appeals #315028, December 28, 2013) *Motion for reconsideration den'd* February 13, 2014

The trial court terminated the mother and the father's parental rights and both appealed. The trial court suspended the mother's parenting time 10 months after adjudication, but before a termination petition was filed, without making a finding of "harm" to the children. The mother argued that the trial court erred in terminating her rights

as she was unlawfully denied mandatory parenting time prior to the filing of the termination petition and that interfered with her ability to be able to reunify with the children. The Court held that the statutes and court rules provide for the suspension of parenting time for the time period between the preliminary hearing and the adjudication and for the time period after a termination petition is filed, but there is no provision that applies from the time period between the adjudication and the filing of a termination petition.

MCL 712A.13a(13) and MCR 3.965(c)(7)(a) require a trial court to make findings of harm before suspending parenting time, but it only governs parenting time from the time of the preliminary hearing to the time of adjudication, or the pre-trial placement of the children. Nothing in the language of the statute or the court rule indicates that these provisions apply after adjudication. The Court held that the trial court is in a better position to make a more informed decision regarding parenting time based upon legally admissible evidence introduced at the adjudication and does not need the statute or court rule finding that parenting time is harmful to the child.

Additionally, MCL 712A.19b(4) and MCR 3.977(D) govern the suspension of parenting time after the termination petition is filed to the time of the termination hearing. The trial court may, during this time period, suspend parenting time without a showing of harm.

There is a provision that addresses the required contents of the case service plan (MCL 712A.18f(3)(e) and (f)), which includes an element of harm for parenting time to be suspended. The Court held it is clear that these provisions only apply to the agency and not the trial court.

Since there is nothing that governs parenting time between the adjudication and the filing of a termination petition, parenting time decisions are left to the sound discretion of the trial court and is to be decided in the best interests of the child. No finding of harm is required between the adjudication and the filing of a termination petition, although implicit in the court's decision, there is usually such a finding of harm. Just because the court form has the "harm" language in it, it does not have the force of law. As a result, the trial court did not err when it suspended the mother's parenting time without making a finding of harm.

Although there were errors in finding that some of the statutory grounds for termination of the respondents' parental rights were met, only one statutory ground is required and at least 1 ground was met for both parents. The termination of both parents' parental rights was **AFFIRMED.**

In re Gregory, unpublished Court of Appeals #314349, October 24, 2013

The parents appealed the trial court's order to terminate their parental rights. The father argued on appeal that the trial court erred when his parenting time would be suspended until he submitted to 3 negative drug screens. Under MCL 712A.13a(13), a trial court can deny parenting time when it would be harmful to the child. Since the child in this case was only an infant, a psychological evaluation and counseling requirements were not practical. In addition, the Clinic for Child Study evaluation of the family recognized that the father's continued use of marijuana was harmful to the child and affected his ability to parent. Any error of the trial court's conditional suspension of parenting time was harmless as his failure to visit with the child was not the basis for the termination order. **Affirmed.**

In re Stamkoff, unpublished Court of Appeals #310161, February 19, 2013

The father appealed the trial court's order terminating his parental rights. The Court **affirmed** the termination order. Although the Court found the trial court did not err in finding by clear and convincing evidence that a statutory basis existed for termination and that termination was in the child's best interest, concern was expressed regarding the denial of the father's request for supervised parenting time. The Court, citing MCL 712A.13a(13), held that parenting time can only be conditioned if the visitation may be harmful for the child and after the child undergoes a psychological evaluation and/or counseling. As a result, a blanket policy that conditions any parenting time upon a parent's compliance with the PAA without following the statutory frame work is contrary to Michigan law.

In re Jones/Gipson, unpublished Court of Appeals #311925, February 5, 2013

The mother appeals the trial court's order terminating her parental rights. The mother argues on appeal, amoung other things, that the trial court erred when it conditioned the mother's parenting time on her submission to four clean drug screens relying on MCL 712A.13a(13), which requires a psychological evaluation and/or counseling if parenting time is to be suspended. The Court held that since the mother's counsel did not object to the trial court's

order, her claim is forfeited. As a result, the Court reviewed for plain error. Since the mother did not show any connection between the suspended parenting time and her eventual termination, any error made in the trial court was harmless. The trial court did not err in finding clear and convincing evidence of a statutory basis and that the termination was in the child's best interests. The Court **affirmed** the termination.

Service/amended petitions

In re Dearmon, ___ Mich App ___; ___ NW2d ___ (2014) (Court of Appeals #314459/316653, January 14, 2014)

A petition, which included the request to terminate the mother's parental rights at the initial disposition, was filed alleging that domestic violence occurred in the home between the mother and her boyfriend while the children were present. In addition, the petition alleged that the mother had her parental rights to other children terminated in the past. The original petition was properly served on the mother. An amended petition was submitted to the trial court, but that petition was never authorized or served on the mother. A second amended petition was then submitted alleging most of the same information as the original petition, correcting some dates and adding additional allegations which occurred after the original filing. The second amended petition was authorized, but, again, not served on the mother. A jury trial was held. The second amended petition was read to the jury. When it was discovered that the amended petition was read, the mother's attorney requested a mistrial. The trial court denied the motion.

During the jury trial, the petitioner presented evidence of taped telephone conversations between the mother and the then jailed boyfriend. The mother objected to this evidence as it was post-petition. The trial court denied the motion finding that the mother opened the door by asserting that the mother separated from the boyfriend and had no voluntary contact with him since an earlier DV incident.

At the end of the trial, the trial court read the original petition to the jury during its final instructions. The jury found that there was a statutory ground for jurisdiction. The mother appealed.

A termination at the initial dispositional hearing began and the trial court terminated the mother's parental rights. The mother appealed the termination order.

The mother challenged the adjudication on two separate due process grounds. First, she argued that, since she was never served with the second amended petition, the trial court did not have personal jurisdiction over her and violated her due process. The Court held that once personal jurisdiction is established by the proper service of the original petition, it does not "evaporate" upon the filing of amended petition(s). In addition, the trial court did not err when it read the second amended petition to the jury as the original petition had put the mother on notice as to what evidence would be used against her at trial. The amended petition did not add different allegations.

The mother's second due process argument was that the trial court erred by allowing evidence obtained after the filing of the original petition. The Court held that "if evidence of postpetition facts qualifies as relevant to an issue presented in an adjudication trial and is otherwise admissible under the rules of evidence, it may be admitted".

Since the Court also found that the trial court did not err in finding that there was clear and convincing evidence that a statutory basis existed to terminate the mother's parental rights at the trial and that termination was in the children's best interests, the Court **affirmed** the termination order.

Evidence/hearsay from child

In re Brown, unpublished Court of Appeals #316761, January 16, 2014. *Lv to app den'd* March 7, 2014.

The mother appeals the trial court's order terminating her parental rights. She argues that the trial court erred by allowing hearsay statements made by one child to the child protective services specialist about abuse of the other child by his father. The mother argues that the tender years exception only applies to abuse where the declarant was the subject of the abuse. The Court agreed as MCR 3.972(C)(2) states that the act of child abuse was "performed with or on the child". The Court goes on to hold, however, that the statement was admissible through the catch all exception to hearsay, specifically MRE 804(24). To be admissible under this provision, it must meet four requirements: 1) the statement must "demonstrate guarantees of trustworthiness…", 2) the statement must "be relevant to a material fact", 3) the statement must be "the most probative evidence of that fact reasonably available", and 4) the statement must "serve the interests of justice by its admission". Further, the statement must be made known to the adverse party to allow that party an opportunity to deal with it. Since the petitioner sought to admit the statements under the tender years exception, notice was given. In addition, the statement met the 4 criteria, so therefore was admissible. Just because the trial court reached the right conclusion by the wrong reasoning, the ruling will not be disturbed. The trial court's termination order is **affirmed.**

In re McLaurin, unpublished Court of Appeals #313718, August 20, 2013

The mother appeals the trials court's order terminating her parental rights. Among others, the mother argued that the trial court erred in allowing a Child Protective Service Specialist to testify regarding statements made by one of the children during a forensic interview. The mother objected at the hearing, arguing the statements were inadmissible hearsay. The trial court held that the statements were not hearsay because they qualified as an admission by a party/opponent under MRE 801(d)(2). The Court held that the statements were inadmissible hearsay. The statements were not offered against the child, but offered against the mother. Since the error was harmless as the statements were of minor significance in comparison to the overwhelming evidence of injuries to a sibling, the termination order was **affirmed.**

Evidence

In re Nolan, unpublished Court of Appeals #315380, February 20, 2014

The father appeals the trial court's order terminating his parental rights. Among other things, the father argued that the trial court erred by admitting into evidence the conditions of his probation. The information was read by a witness from the father's biographical informational page on OTIS (offender tracking information system), the MDOC's online database. The Court agreed that the information was hearsay and that an error occurred, but it was harmless error. The petitioner argued that there was an exception to hearsay, that being MRE 803(6) or 803(8). The Court held, however, that the MDOC specifically states that OTIS may not be completely accurate or up-to-date and should be independently verified. As a result, the page lacked the "necessary guarantee of trustworthiness to be admissible…". The Court **affirmed** the trial court's termination order.

In re Brooks, unpublished Court of Appeals #316245, January 16, 2014

The parents appealed the trial court's order terminating their parental rights. Among other arguments, the father argues that the trial court's order should be reversed because the trial court admitted evidence that he failed a polygraph test. The Court held that reference to a polygraph does not always constitute error requiring reversal. A number of factors are to be analyzed to determine if the father was prejudiced by the admission, especially as it was a judge and not a jury making the determination. The factors include: 1) was an objection raised, 2) was the reference inadvertent, 3) where there repeated references to the polygraph, 4) was the reference an attempt to bolster a witness's credibility, and 5) where the test results admitted or was it the fact that a polygraph had been conducted. Based upon the review, the Court **affirmed** the termination as it found that the father was not prejudiced by the two statements that the father failed the polygraph.

In re Robbenholt, unpublished Court of Appeals #316087, November 21, 2013

The parents appealed the trial court's order terminating their parental rights. The mother argued on appeal that the trial court erred in allowing the child's therapist to repeat statements made by the child in play therapy. MRE 803(4) allows admission of hearsay statements if the statement was made for the purposes of medical treatment or medical diagnosis. To qualify for the exception to hearsay, the statement must be 1) made for the purposes of medical treatment, 2) describe medical history, past or present symptoms, pain, or sensations, or general character of the cause, 3) reasonably necessary to diagnosis or treatment. In addition, a young child's statement must also be trustworthy to be admitted under MRE 803(4). Since there was a sufficient indicia of trustworthiness, the statements were admissible. The Court **affirmed** the termination.

In re Mackin, unpublished Court of Appeals #316355, November 14, 2013

The father appealed the trial court's order terminating his parental rights. The petitioner sought to terminate the father's parental rights at the initial disposition. The trial court previously terminated the father's parental rights to another child and took judicial notice of the prior file. On appeal, the father argued that the trial court allowed inadmissible evidence into the termination hearing. When a petitioner seeks termination at the initial disposition, the

court must make its determination on clear and convincing legally admissible evidence that was introduced at trial or in the dispositional hearing. During the hearing, the trial court, over the father's objection, allowed the foster care worker to read a portion of a psychological report prepared in the prior action. The report was not admitted into evidence in this new case. The contents of the report qualify under the medical treatment and diagnosis hearsay exceptions in MRE 803(4), the Supreme Court recently held that allowing such testimonial statements from a nontestifying declarant violates the Confrontational Clause of the US Constitution and is inadmissible. *People v Fackelman,* 489 Mich 515; 802 NW2d 552 (2011). As a result, the trial court abused its discretion by allowing the foster care worker to recite statements from the report. However, the error is harmless as all of the contested evidence were subject to judicial notice and therefore admissible. MRE 201(b). All that evidence was submitted to the court on a previous occasion and the father had an opportunity to contest that evidence and confront the witnesses in that case. Because the same judge also decided the prior case, the court's prior findings and supporting evidence were not subject to reasonable dispute, so the judge could properly take judicial notice of the evidence. As a result, the Court **affirmed** the termination order.

In re Jones, unpublished Court of Appeals #313689, June 20, 2013

The mother appeals the trial court's order terminating her parental rights to her children #3 and #4. The mother's first child died from shaken baby syndrome and that child's death was ruled a homicide. The mother and the father of that child were considered suspects, but no one was ever charged. The mother's rights to her 2nd child were terminated previously. A stipulation was made that a statutory basis existed for the termination of the 3rd and 4th children and a hearing was held on best interests. During the hearing, the foster care worker testified that the mother and her family had extensive child protective services history and that the mother was going to live with these same family members, despite the fact that the 1st child suffered fatal injuries while living with them. The foster care worker also testified that the mother did not cooperate with the police investigation into the death of the 1st child. As part of the testimony, the foster care worker testified that the mother refused to take a lie detector test. The trial court then concluded, in terminating the mother's rights, that the mother had 4 years to cooperate with the police and protect her children, but chose to protect her family instead and that the children were not safe with the mother. The mother argued on appeal that the references to her refusal to take a polygraph was her failure to cooperate with police is reversible error. The Court held that, generally, it is plain error to reference a polygraph or the refusal to take a polygraph. This plain error, though, does not always result in reversal. To determine if reversal is required, the Court analyzes a number of factors including whether there was an objection; whether the reference was inadvertent; whether there were repeated references; whether the reference was an attempt to bolster a witness's credibility; and whether the results were admitted. These factors can determine whether the mother was prejudiced by the polygraph references or whether the error affected the outcome. In this case, none of the factors were present, so the admission of the polygraph references did not constitute error requiring a reversal. The trial court's order is **affirmed.**

Guardians seeking termination/jurisdiction

In re Young, unpublished Court of Appeals #307761, April 9, 2013

The petitioners are currently the legal guardians of the child. In 2007, the mother was pregnant and was convicted of involuntary manslaughter. While she was waiting to begin her prison term, the child was born. Utilizing a private agency, the mother made a temporary placement of the child with the petitioners and the petitioners took the child home from the hospital. The mother then sought to rescind the temporary placement and wished to regain custody to make alternative plans during her prison term. A Guardian ad Litem was appointed and statute required the LGAL 14 days in which to file a petition under the juvenile code or the child would be returned to the parent (MCL 710.23e). Although a petition was not filed, the court assumed jurisdiction over the child and designated the petitioners as the child's temporary guardians under EPIC. No one appealed that decision, so, despite the procedural error, the trial court retains jurisdiction over the child through today. Shortly after the appointment of the temporary guardians, a newly filed guardianship matter came before the trial court judge. Petitions for guardianship were filed by the petitioners and by the mother's two sisters and their husbands. The judge, after hearing and making findings under the best interest factors of MCL 700.5101, granted full guardianship to the petitioners. Three years later, the petitioners filed a petition under the juvenile code (MCL 712A.2) and sought to terminate the mother's parental rights at the initial dispositional hearing. The trial court found that none of the jurisdictional averments applied and dismissed the petition. Petitioners appeal. The Court held that the trial court already had jurisdiction of the child based upon the earlier ruling of the trial court and therefore should have proceeded under MCL 712A.19b(1). MCL 712A.19b(1) states

that "(i)f a child remains in the custody of a guardian or limited guardian, upon petition….of the guardian….the court shall hold a hearing to determine if the parental rights to a child should be terminated…." Since the trial court failed to acknowledge that court jurisdiction already existed, even though there were procedural errors. The current trial court judge could not reconsider and overturn the prior judge's unappealed jurisdictional decision. The Court **reversed** the dismissal of the petition and directed the trial court to accept the jurisdiction that has already been established and proceed to consider the grounds for the termination of parental rights.

In re Kloosterman, unpublished Court of Appeals #312138, March 26, 2013

The petitioners are the grandparents/guardians of the child and parents of the father. For over six years (since the child was 6 months old), the child resided with the petitioners under a full guardianship. The father was unable to terminate the guardianship as he continued to abuse drugs and commit crimes. Since the guardians wished to adopt the child to make her placement permanent, they filed a petition in the trial court under the juvenile code. The trial court after the trial, assumed jurisdiction under MCL 712A.2(b)(1) (parent legally responsible when able to do so neglects or refuses to provide proper or necessary support, education, medical, surgical or other care necessary…, who is subject to substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents….or who is without proper custody or guardianship and (2) (home or environment, by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of a parent is an unfit place for the juvenile to live in) and terminated his parental rights under MCL 712A.19b(3)(g) (the parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be to provide proper care and custody within a reasonable time considering the child's age). The father appeals arguing that the child was not neglected and did not reside in an unfit home so his parental rights should not have been terminated. In its decision, the trial court correctly found that MCL 712A.2(b)(3) (limited guardianship), (4) (court structured plan) or (5) (guardianship, but no support or visits for 2 years prior) did not apply. The father, even though he was in prison, had maintained contact with the child through visits facilitated by the guardians, telephone calls and letters. The trial court then turned to MCL 712A.2(b)(1) and (2) and determined that (1) permits jurisdiction where a child is thriving in a guardianship and the parent does not take the steps necessary to resume the care and custody of the child and that (2) permits jurisdiction as it encompasses a broader social environment for the child. The Court held that these determinations fail as (1) and (2) are intended to apply in cases where the parent or other legally responsible person have custody of the child and where the environment is that in which the child lives. As a result, the Court **reversed** the termination, **reversed** jurisdiction and left the guardianship in tact.

In re Osborne, unpublished Court of Appeals #310171, January 29, 2013

A limited guardianship placement plan was submitted to the trial court wherein the mother admitted to inadequate housing and intended to continue the guardianship until she was gainfully employed and had established a residence. The plan required the mother to visit the child four times each week, pay for transportation to and from the visits, speak to the child by phone daily, and attend all non-emergency health care appointments. The trial court later amended the placement plan requiring the mother to attend substance abuse counseling and domestic violence counseling. After the mother found employment and a house, she did nothing to regain the custody of the child. The mother was later arrested for maintaining a drug house and delivering/manufacturing a controlled substance. The petition filed a petition with the juvenile court seeking to terminate the mother's parental rights at the initial disposition. The trial court after hearing, entered an order termination the mother's parental rights. She appeals. The mother argued on appeal that the trail court erred in assuming jurisdiction of the child. The trial court assumed jurisdiction over the child under MCL 712A.2(b)(3) (the parent substantially failed, without good cause, to comply with a limited guardianship placement plan regarding the juvenile) as well as MCL 712A.2(b)(2) (home or environment, by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of a parent is an unfit place for the juvenile to live in). The mother argued that she had good cause for her noncompliance due to the distance of the child, the alleged failure of the guardian to inform her of doctor's appointments and her occasion offers of payment for transportation. Court held that the trial court correctly assumed jurisdiction as the trial court found the mother's testimony to not be wholly credible. Since one basis for jurisdiction has been proven, the Court did not consider the other basis (MCL 712A.2(b)(2)). The mother next argued that, even if noncompliance with the limited guardianship plan was sufficient for jurisdiction, it was not sufficient for termination. The Court held that the termination statute (MCL 712A.19b(3)(d)), although similar to the jurisdiction statute, requires an additional element--a finding by clear and convincing evidence that the parent's noncompliance with the plan resulted in the disruption of the parent-child relationship. The trial court

found that the mother was content with her limited role and absolution of the responsibility of the child until a proceeding was commenced to terminate her parental rights. It was only at that time the mother sought regular visits and a desire to terminate the guardianship. Termination was appropriate and the trial court was **affirmed.**

Juvenile Guardianship

In re COH, unpublished Court of Appeals #309161, June 25, 2013 *lv to appeal granted* __ Mich __;837 NW2d 279 (2013) (Supreme Court #147515, October 2, 2013) *(Also request for stay granted—children returned to the foster home)* **Oral arguments heard on December 10, 2013.**

The trial court previously terminated the father's parental rights. In a later proceeding, the paternal grandmother of 3 of the 4 children, filed a petition for a juvenile guardianship. The mother, in an agreement with the prosecutor's office, admitted to the allegations in the supplemental petition to terminate her parental rights and consent to the termination, but the children were not to be committed to MCI until after the trial court made a decision on the paternal grandmother's petition for guardianship. At the trial on the JG case, the trial court used the best interest factors under the Child Custody Act to deny the grandmother's petition, finding that it was in the children's best interests to be adopted by the current foster parents. The grandmother then sought to adopt the children and MCI denied her consent, finding that adoption by the foster parents was in the children's best interests. A section 45 hearing was held, and the trial court determined that the MCI superintendent's decision was not arbitrary or capricious and denied the grandmother's motion. The grandmother appealed both the denial of the JG and the section 45 determination. The Court **reversed** the trial court's decision on the JG matter and **remanded** to the trial court to enter an order appointing the grandmother at the juvenile guardian of the children.

The grandmother argued that the trial erred in using the Child Custody Act tp determine best interests, comparing her to the foster parents. The Court held that the trial court erred in comparing the grandmother and the foster parents. A JG is similar to an adoption, and, where a grandparent of the children have an established and continuing relationship with the children, the trial court should have considered whether the grandmother was an appropriate JG for the children without regard to the foster parent. The grandmother, being advised of their removal several months after the children were placed in care, obtained full time employment as a nurse, bought a 5 bedroom home (as she was told she needed adequate space for the children), became a licensed foster parent and went "significantly above and beyond" any legal requirements to ensure she would be well prepared to care for her grandchildren. The arguments at the trial court were that, even though the grandmother was more than appropriate, the children found stability with the foster parents. The grandmother was never considered by Department of Human Services or the purchase of service agency as a possible permanent placement for the children. The stability derived with the foster parents was only after the grandmother was not considered as a permanent placement for the children. The trial court failed to recognize the preference for children to be placed with relatives. There is nothing that prevents the trial court from revoking its commitment of the children to MCI when it reverses an erroneously entered order that led to the children's commitment. Because of this reversal, the appeal from the section 45 hearing is moot.

Juvenile Code vs. Adoption Code for termination of parental rights

In re Hernandez/Vera, unpublished Court of Appeals #312136, April 16, 2013 (after vacating the published Court of Appeals decision issued February 7, 2013 on March 11, 2013)

The trial court scheduled a termination hearing and, the day before the scheduled hearing, the trial court convened so the mother could release her parental rights. Instead of releasing her rights, the mother requested an adjournment to seek a different attorney. The trial court denied her request and started the termination hearing as scheduled. After two witnesses testified, the mother decided she wished to release her rights. The trial court asked the mother a series of questions to determine if her decision was knowing and voluntary. The mother said she had mixed feelings, but acknowledged that no one threatened or coerced her or promised her anything in exchange for her releases, that she had time to consider the decision and that her decision was voluntary and knowing. The written releases for each child in the file stated that her legal rights had been fully explained, that she did not have to sign the releases and, that if she did, she would be giving up permanently all of her parental rights to the children. In addition, the mother's attorney indicated that he read the petition out loud to the mother to make sure she understood.

In the vacated published decision, the Court believed that the releases were executed under the Juvenile Code as opposed to the Adoption Code and concluded that the mother's releases did not need to comply with §29 of the Adoption Code (MCL 710.29(6)). Nonetheless, the Court held that any release of parental rights under the Juvenile Code must also be knowing and voluntary. Based upon the record, the Court found that the mother's releases

were knowingly and voluntarily made. The mother also argued that she was not competent to relinquish her parental rights or the trial court should have ordered a competency evaluation to determine if she was competent to release her rights. The Court held that the standards used to determine competency in the criminal proceedings also apply in termination of parental rights proceedings, but even though she had misgivings, there was nothing in the record to show that she lacked the competency to understand what she was doing when she signed the releases.

In the unpublished final opinion of the Court, it appears that the mother's releases were truly taken under the Adoption Code, not the Juvenile Code. The record of the lower court was confusing. When the trial court accepted the releases, terminated her rights and committed the children to the Department of Human Services, the intention was that it be done under the Adoption Code and the forms and orders used were Adoption Code forms and Orders. The trial court, however, put the juvenile case number on the forms and orders and it was done during the juvenile termination proceeding. After the releases were executed, the trial court then terminated the father's parental rights under the Juvenile Code. The Court urged the trial courts to not mix Juvenile Code and Adoption Code files or proceedings to avoid confusion. The trial judge should have taken a recess in the juvenile case and started the adoption proceeding. After
taking the mother's releases in the adoption proceedings, the juvenile proceeding could then reconvene to complete the termination of the father's parental rights. The trial court at that time could have, and should have, entertained and taken under advisement a motion to dismiss the juvenile termination proceeding against the mother, scheduling a decision for after the time period for the mother to request a rehearing or filing an appeal in the adoption file. If the mother did not request a rehearing or filed an appeal, then the motion to dismiss the termination proceeding against the mother could be granted.

The bottom line was that there was no plain error in the trial court's decision that the mother's releases were knowingly and voluntarily made. In addition, although the mother had misgivings about releasing her parental rights, there is nothing in the record to indicate that she lacked the competency to understand what she was doing. The Court **affirmed** the order terminating the mother's parental rights.

Juvenile or Domestic Judge to hear change of custody

Williams v Williams and *In re Sherrod,* unpublished Court of Appeals #307855, May 30, 2013. *Mo for reconsideration den'd.*

The mother appeals the trial court's order granting the father sole physical custody, changing the child's domicile to Georgia and terminating jurisdiction over the child in the neglect case. The mother argues on appeal that the trial court judge in the neglect matter should have returned the child to her and transferred the motion for change of custody to the domestic judge assigned to the case. The juvenile court had jurisdiction the child at issue here and her step-siblings for almost 2 years prior to the father's filing of his mother for change of custody. The mother asserts that once the finding was made that the returning the child to her home would not cause a substantial risk of harm, the court should have returned the child and terminated jurisdiction. The Court held that the juvenile court's retention of jurisdiction was logical and an economic use of judicial resources considering its familiarity with the parties and issues relevant to a custody determination. This conclusion is consistent with the family court plan of the county and its administrative procedures.

Step-Parent adoptions

In re TAHL, 302 Mich App 594; 840 NW2d 398 (2013) (Court of Appeals #314749, October 10, 2013)

The respondent/father acknowledged his paternity and accumulated a child support arrearage. He was convicted of a crime and sentenced to prison. As a result, the trial court modified his child support order, requiring $0.00 to be paid until his release from incarceration. In the meantime, the mother remarried and, 23 months after the child support order was modified, petitioned for a step-parent adoption and termination of the father's parental rights. The father argued that he substantially complied with the court order regarding child support. The mother argued that he failed to comply with the child support order in the years before it was modified to $0. The trial court agreed with the father and dismissed the petition to terminate his rights. The mother appealed. The Court found that the trial court did not err by holding that the statute is clear and unambiguous in that courts are to look at the two-year period immediately preceding the filing of the termination petition. As a result, it was undisputed that the father had complied with the child support order for the 23 months preceding the filing of the petition, so the Court **affirmed** the trial court's ruling. As a side note: the Court did URGE the legislature to revisit the statute to address a situation such as this one.

In re AJR, 300 Mich App 597; 834 NW2d 904 (2013) (Court of Appeals #312100, April 18, 2013) *lv to appeal gnt'd* __ Mich __, 838 NW2d 148 (October 23, 2013). **Oral arguments were made to the Supreme Court on March 6, 2014.**

The trial court terminated the father's parental rights during a step-parent adoption proceeding. The father appealed the termination order. The Court held that, since the father had joint legal custody, MCL 710.51(6) did not apply and **reversed** the termination order.

The mother and father were married, had a child, and later divorced. In the divorce judgment, the parents had joint legal custody, the mother had sole physical custody and the father had reasonable rights of parenting time. Several years later, the mother re-married. She and the step-father filed a petition to terminate the father's parental rights and to allow the step-father to adopt. After a two day evidentiary hearing, the trial court found that the father failed to provide support for the child for the two years preceding the petition and the father substantially failed to visit or communicate with the child during the same two year time period. The trial court then terminated the father's parental rights; and allowed the step-father to adopt.

In reversing the trial court's decision, the Court applied general principals of statutory interpretation. MCL 710.51(6), the applicable statute in this case, states that "(i)f the parents of a child are divorced….and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent…." The Court held that the legislature's use of ***"the"*** *parent having legal custody* is referring to something particular, so it requires the parent seeking termination to be the only parent having legal custody. If the legislature wanted to refer to something in general, then stating ***"a"*** *parent having legal custody* would allow either parent with legal custody to pursue the termination. As a result, even though the two conditions to terminate the father's parental rights were satisfied, the mother did not have sole legal custody and therefore could not file a petition to terminate the father's parental rights under MCL 710.51(6).

Competing parties for adoption/arbitrary and capricious

In re NAD, unpublished Court of Appeals #311694, February 12, 2013 *lv to appeal den'd* 494 Mich 873; 832 NW2d 248 (2013) (Supreme Court #147071, June 28, 2013)

The child was removed from the mother in 2009 and placed in a foster home. Child and Family Services was assigned to the case as a contract agency. The maternal grandparents came forward to request placement and were approved. Two months after being removed, the child was placed with the maternal grandparents. Five months later, the maternal grandfather suffered a stroke and died. The maternal grandmother asked for removal of the child from her home and the child was placed back into foster care, but maintained regular visits with the grandmother. Proceedings to terminate the mother's parental rights were continuing during this time. After CFS found out that the maternal grandmother allowed the mother to spend the night while the child was visiting with her in violation of policy and the court order, the child was moved from the foster parents to a pre-adoptive home with the Wharton's. Shortly after the filing of the petition to terminate the mother's parental rights, the maternal great aunt (grandmother's sister) expressed an interest in adopting the child (Gordon). The Gordon's resided in Oklahoma and were experienced foster parents and she was a
family support specialist with CFS in Oklahoma for a number of years. An adoptive home study was completed and the Gordon's home was found appropriate for placement. Despite the relative connection and the foster care manual's preference for relative placement, CFS showed a lack of enthusiasm and it was clear that they were not in support of a placement or adoption with the Gordon's. The mother subsequently released her parental rights and the Gordon's met the child for the first time. The Gordon's thereafter traveled to Michigan every two weeks for supervised and unsupervised visits. The reports coming from CFS were appearing biased and the Department of Human Services supervisor indicated that they were lacking objectivity. CFS was continuing to recommend placement with the foster family over the relative placement. CFS then restricted the Gordon's to supervised visits. CFS believed that, since the grandmother moved to Oklahoma and that her intention was to have the mother move in with her, the child would effectively be returned to the mother, which would be harmful to the child. The competing parties assessment was prepared by the adoption specialist and described the Gordon's as capable of providing an adoptive home, but expressed concerns about boundaries for the grandmother and the bio mother. The Wharton's were described as providing a stable and loving home for the child. The assessment recommended adoption by the Wharton's "for the sake of continuity of care, her connections and bonds with her family and community". While the case was pending a decision by the MCI superintendent, the Gordon's discovered via the internet that Mrs. Wharton was pregnant with twins, it was a high risk pregnancy, their home was in foreclosure and a default judgment was entered against them for a substantial American Express bill. This information was e-mailed to the superintendent, who in turn, ordered CFS to investigate. CFS discovered that Mr. Wharton was providing day care for the child while Mrs. Wharton was on bed

rest and there was a pending loan "re-modification" for the mortgage. A decision was then made by the MCI superintendent was made almost a year after the competing parties were identified, which favored the Wharton's. The Gordon's then filed a motion under MCL 710.45(2) requesting a hearing. The Bureau of Children and Adult Licensing in the meantime had found that CFS violated Department of Human Services policy by failing to attempt to locate or notify the child's relatives, other than the grandmother, before placing the child with the Wharton's. During the section 45 hearing, the MCI superintendent admitted he harbored ill feelings toward the Gordon's based upon his perception of their indifference to the child's care until shortly before the mother's rights were terminated and characterized their delay in presenting themselves as possible adoptive parents "despicable". The superintendent also testified that he selected the Wharton's over the Gordon's based on the child's circumstances rather than his personal feelings and characterized the Gordon's as suitable for adoptive placement. The trial court found that the Gordon's did not clearly and convincingly demonstrate that the superintendent's decision was arbitrary and capricious and affirmed the adoption by the Wharton's. The Gordon's appealed. The Court held that, because the initial focus is whether the superintendent acted arbitrarily and capriciously, the focus of the section 45 hearing is not what reasons existed to authorize the adoption, but the reasons given by the superintendent for withholding the consent. If there are good reasons why consent should be granted and good reasons why consent should be withheld, it is not arbitrary and capricious, even if the trial judge would have found in favor of the Gordon's. The superintendent's decision focused on the best interests of the child. The Court went on to say that CFS's position, as well as the superintendent's hostility, toward the Gordon's was not appropriate. But this, and CFS's failure to abide by policy did not make the superintendent's decision arbitrary or capricious. The trial court's decision was **affirmed.**

One Parent Doctrine

In re Sanders, 493 Mich 959; 828 NW2d 391 (2013) (Supreme Court #146680; Court of Appeals #313385, April 5, 2013). **Oral arguments held November 7, 2013.**

Leave to appeal a trial court's order was denied by the Court of Appeals. An application for Leave to Appeal to the Supreme Court was granted. In its Order, the Supreme Court directed the parties to address the application of the one-parent doctrine and whether it violates the due process or equal protection of unadjudicated parents. It appears that the appeal is based upon the trial court's denial of a request of the appellant/father for a trial or adjudication. Amicus briefs have been filed by the Prosecutor's Association of Michigan, the National Association of Council for Children, the Legal Services Association For Michigan and the University of Detroit Mercy School of Law Juvenile Appellate Practice Clinic.

Sibling visits

Wilson v King, 398 Mich App 378; 827 NW2d 203 (2012) (Court of Appeals #305468, November 6, 2012 *lv to appeal den'd* 493 Mich 955; 828 NW2d 378 (2013) (Supreme Court #146373, April 1, 2013)

The trial court terminated the Plaintiff's rights to 3 children, who were subsequently adopted by the Defendant. The Plaintiff gave birth to another child. The Plaintiff alleges that the Defendant allowed sibling visits between her current child and their biological siblings, but then stopped allowing visits. The Plaintiff filed an action as next friend to the youngest child pursuant to the Child Custody Act requesting visitation between the siblings. The Defendant did not file an answer, but did appear at the default hearing. The trial court denied the Plaintiff's motion and sua sponte dismissed her lawsuit on the basis that Michigan does not recognize a cause of action for sibling visitation. The Plaintiff appeals. The Court did not determine whether or not Michigan allows a cause of action, but did **affirm** the trial court's ruling. The Court took the trial court's action as synonymous with failing to state a claim upon which relief can be granted and viewed the court's action as the granting of summary disposition. In comparing to the grandparent visitation case involving an adopted child, the Court held that the adoption legally severed at law the 3 older children's "prior, natural family relationship" and created "a new and complete substitute relationship after adoption." Legally, it is as if the 3 older children were born to the Defendant and thereby severed any relationship with their younger biological sibling. Since the youngest child is not a sibling, the Plaintiff has failed to state a claim upon which relief can be granted. Although the trial court's reasoning was different, it did not preclude the Court from affirming the decision as the trial court reached the correct result.

Right to counsel

In re Johnson, unpublished Court of Appeals #311862, April 16, 2013

The Court **reversed** the trial court's order terminating the father's parental rights and **remanded** the case to the trial court for additional proceedings. The father was incarcerated and was not given the opportunity to participate in the proceedings (see Incarcerated Parents below). Further, the father argued on appeal that the trial court violated his due process rights by failing to inform him of his right to counsel. The Court agreed. At the father's first appearance, the trial court is required to advise him of the right to counsel to represent him at any hearing. When the father first appeared by telephone 13 months after he was incarcerated, at no time was he offered the assistance of counsel. The record showed that the father did request an attorney just prior to being served with the summons and petition seeking to terminate his parental rights, but there is no record that the trial court ever advised him of that right. The Court held that the father was not treated fairly. It is likely, based upon the father inquiring about why he had not been included in the hearings, by requesting an attorney prior to the termination hearing and requesting an appellate attorney after his rights were terminated that he would likely have exercised his right to counsel had he been advised of it or included in prior hearings. The record gave no indication that the father knowingly waived his right to counsel.

In re Gaddis/Paul, unpublished Court of Appeals #312041, February 28, 2013

The parents both appealed the trial court's order terminating their parental rights. The Court **affirmed** the termination of the father, but **vacated** and **remanded** the termination order of the mother. In the trial court, prior to the termination hearing commencing, the attorney for the mother informed the court that the mother intended to relinquish her parental rights, but she was not present. The attorney requested to be released as her counsel arguing that without her present, he could not represent her interests during the hearing. The trial court released the attorney and began the hearing. The petitioner's only witness was the caseworker and, upon completion of the testimony, the mother appeared. The mother indicated her desire to release her rights, but when the consequences were explained to her, she changed her mind. The trial court then told the mother that it was not going to start the hearing over and would allow her to present her case, but she would be required to represent herself for the rest of the hearing. The mother argued that the trial court unjustly deprived her of her right to counsel. The Court agreed. The Court held that the US Constitution guarantees a right to counsel in parental termination cases and there was nothing in the record that indicated that the mother knowingly, intelligently and voluntarily waived her right to counsel. It may have been appropriate for the trial court to refuse to allow
the mother to have a completely new hearing and recall the previous witness, there is no legal support to justify the court's failure to protect the mother's previously invoked right to counsel. The mother's conduct did not effectively or constructively terminate the attorney/client relationship (such as no contact with the attorney for over a year or non-attendance at court hearings). In this case, the trial court implied that the mother gave up her right to counsel by arriving late at the hearing. The Court further stated that an erroneous deprivation of counsel can be subject to a harmless error analysis, even though it was undisputed that neither parent fully complied with the case services plan, the mother was required to present a complete defense in her case without the benefit of counsel. This error affected the fundamental fairness of the proceedings and the mother is entitled to a new termination hearing.

Putative Father

In re Miller, unpublished Court of Appeals #314870, October 22, 2013

The biological father and the mother each appeal the trial court's order terminating their parental rights to the minor child. The mother was married, but estranged from her husband when the child was born. The petitioner and the trial court treated Miller as a putative father because the mother identified him as the biological father. The legal father's parental rights had been terminated. The Court held that because the child has a legal father, Miller cannot be deemed to be a putative father. The termination order for the legal father does not affect his status as the legal father. A prior determination that the child was issue of the marriage had never been made. As a result, the Court held that Miller had no standing to appeal. Even if he did have standing to appeal, no errors were made. The trial court's decision was **affirmed.**

Ineffective assistance of counsel

In re Reece, unpublished Court of Appeals #309870, April 23, 2013

The father appeals the trial court's order terminating his parental rights, arguing that his trial counsel was ineffective. The Court held that the same standard used in criminal proceedings is applied in child protection proceedings. The father argues that since counsel only met with him for five minutes prior to the termination proceeding, prejudice should be presumed. There are only 3 rare situations where prejudice is presumed. They are the complete denial of counsel at a critical stage of the proceeding; that counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and where, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate. The father was unable to show how any of these situations occurred as counsel cross examine witnesses and made a closing argument. As a result, the father must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and the resultant proceedings were fundamentally unfair or unreliable. There is also a strong presumption that the actions of counsel were reasonable trial strategy that must be overcome. The father listed 8 errors of trial counsel that equated to prejudicial errors. Counsel sent the father a letter requesting a list of witnesses and exhibits, to which the father did not respond. Counsel testified that it was his practice to send such a letter and, when he met with the father before the hearing, the father did not mention any witnesses or exhibits. If he had, counsel would have requested an adjournment. Counsel argued that the father should be given more time to fully cooperate and benefit from services. This is a reasonable trial strategy and an appellate court must not second guess counsel on matters of trial strategy. In addition, the father does not show how, if counsel had completed his 8 allegations of error, the outcome of the proceeding would have been different. Since the father did not show prejudice, the termination order was **affirmed.**

Pending criminal cases/5th Amendment in NA cases

In re Thornsberry, unpublished Court of Appeals #308615, January 29, 2013

The father appeals the trial court's order terminating his parental rights. One of the arguments on appeal was that the termination was premature as he had not exhausted all avenues of appeal of his criminal conviction and the trial court did not consider the status of his appeal in its decision. The Court held that there is no authority requiring a court to consider the strength of a criminal appeal or influence temporary wardship when deciding a termination case. Since the statutory basis was appropriate and it was in the children's best interests to not delay their opportunity for permanence, the Court **affirmed** the termination order.

Interpreters

In re Young, unpublished Court of Appeals #312688, April 18, 2013

The mother appeals the trial court's order terminating her parental rights. The mother argued, among other things, that the trial court violated her due process when it chose a Spanish-language interpreter in completing the termination hearing. The mother's native country was Guatemala and her first language was Mam (which is a Mayan language), her second language was Spanish, and she spoke very little English. During all the hearings, the trial court provided a Mam interpreter, but at the termination hearing, the Mam interpreter was required to leave in the middle of the hearing, so a Spanish interpreter completed the hearing. The Court found that a defendant's right to adequate translation in a criminal case was guaranteed under due process, but occasional lapses will not render a proceeding unfair. Since parents have a liberty interest protected by due process in regard to the companionship, care, custody and management of their children, the Court "assumed" for their analysis that, although child protective proceedings are not criminal, due process requires adequate translation at a termination hearing. In this case, the mother had used a Spanish interpreter at a criminal proceeding, during her immigration proceeding, and spoke with the caseworker in Spanish on numerous occasions without a problem. The Court found that the mother was able to understand the termination hearing using a Spanish interpreter and **affirmed** the termination.

Jurisdiction/Adjudication

In re Sidiropoulos, unpublished Court of Appeals #313870, October 8, 2013

The father appealed the trial court's Order terminating his parental rights. The family resided in Greece, until the mother and the children moved to Michigan in 2011. The father remains in Greece. A petition was filed requested termination of the father's rights at the initial disposition. Allegations in the petition alleged that the father sexually abused one of the children, inappropriately touched an older child and was physically assaultive to the mother and daughters when they resided in Greece. The father participated in the hearings by telephone. A copy of the petition, along with other court documents, were served on the father by e-mail and the trial court appointed an attorney for the father. At the Pre-Trial Conference, the Child Protective Service Specialist testified that he e-mailed the petition (no summons) to the father, sent a copy of the petition by certified mail to the Greek Embassy in Chicago and faxed a copy of the petition to the local police in Greece. The father admitted that he received the e-mailed copy of the petition. The trial court found that personal service had not been accomplished, but that personal service was impracticable, so ordered the petitioner to send a copy of the petition by registered mail to the father. After trial, the trial court assumed jurisdiction over the children and terminated the father's parental rights. The father argues on appeal that the trial court lacked subject matter jurisdiction. The Court rejected the argument, holding that jurisdiction is given by statute and, even though the children are in an appropriate environment now, there was enough evidence for the court to find a preponderance of the evidence. The father next argues that the trial court failed to secure personal jurisdiction over him. The Court held that the father waived this issue as he appeared by phone and contested the cause of action. An appearance occurs when the party has knowledge of the pending proceedings and shows an intent to appear. The father did not object personal jurisdiction or improper service at the first preliminary hearing. In addition, the trial court did not err by finding that personal service was impracticable as the father was not just out of state, he was out of the country. There is no authority that requires a trial court to hire the services of an international process server instead of ordering registered mail. By statute, registered mail is an appropriate method of service for an out of state resident.

In re Belcher, unpublished Court of Appeals #312847, March 14, 2013

The minor child appeals the trial court's order of adjudication dismissing a petition seeking jurisdiction over the child and requesting termination at the initial disposition of the father's parental rights. The petition alleged that the father sexually abused the child during a weekend visit. After the bench trial, the trial court found that the Department of Human Services did not establish a statutory ground for termination by clear and convincing evidence as required for termination of parental rights and dismissed the petition. The child argues on appeal that the trial court failed to separately determine whether a statutory basis for jurisdiction existed using the lesser preponderance of the evidence standard. The Court held that regardless of the evidence presented at the trial, the trial court cannot terminate parental rights at the conclusion of the trial. The court must hold a separate dispositional hearing to determine, in part, if the termination is in the child's best interests. But first, jurisdiction must exist before the court can terminate parental rights. Since the trial court did not determine whether it had jurisdiction before it reached the issue of termination, and did not make a finding or even discuss whether the allegations of sexual abuse had been established by a preponderance of the evidence, the Court **vacated** the adjudication order and remanded the case to the trial court.

Incarcerated parents

In re Hall, unpublished Court of Appeals #316706, January 23, 2014

The father appeals the trial court's order terminating his parental rights. The child was removed from the mother's care after birth. The mother used heroin and cocaine during the pregnancy and the child had severe withdrawal, necessitating her remaining in the hospital after birth for 5 weeks. The child also tested positive for herpes. The child was removed and placed in foster care. Respondent was identified as the biological father and became the legal father during the trial court's case. When the child was 3 months old, the father was incarcerated. He admitted to using heroin and cocaine with the mother during her pregnancy. He had a 20-year history of substance abuse and had not had a job outside of prison for several years. He also had not visited with the child prior to his incarceration. The Court held that the trial court did not err in finding clear and convincing evidence to support termination. The father failed to provide proper care and custody during the child's entire life; he never provided support, could not care for the child because of his incarceration and never inquired about the child. He also had a long history of repeated incarcerations and parole violations. In addition, upon his release from incarceration, he would need to complete significant services and would have to develop a bond with the child. The Court **affirmed** the termination.

In re Morse, unpublished Court of Appeals #313196, June 24, 2013

The parents appealed the trial court's order terminating their parental rights. Both parents were incarcerated through the Department of Corrections for conducting a criminal enterprise. The parents both argued that they were denied their right to participate in the court proceedings pursuant to MCR 2.004. The Court found that, after the adjudication, the trial court held 7 hearings. Prior to each hearing, an order was issued requesting the parents' respective correctional facilities to allow them to participate by phone. Each order included the date and time of the upcoming hearing and was delivered to the correctional facility before the date of the hearing. The mother participated by phone in 6 of the 7 hearings and the father participated 4 of the 7 hearings. The record showed that at each hearing, the court made attempts to facilitate the telephonic participation and only proceeded with the hearing with the approval of the parent's respective counsel. The Court held that MCR 2.004 does not require the petitioner or the court to successfully procure the parent's participation, but is required to "offer the parent the opportunity to participate". Here, the trial court took great effort to offer participation in each proceeding, and only proceeded in the absence of the parent with the approval of their respective counsel. There was no violation of MCR 2.004. The Court **affirmed** the termination order.

In re Johnson, unpublished Court of Appeals #311862, April 16, 2013

The father appeals the trial court's order terminating his parental rights. On appeal, the father does not argue the statutory basis, but argues that the trial court did not comply with MCR 2.004 and he was not properly included in the proceedings. As the Court agreed with the father, the termination order was **reversed** and the case was **remanded.** MCR 2.004 requires the petitioner and the trial court to offer the parent an opportunity to participate in each proceeding as child protective proceedings consist of a series of proceedings, each involving different issues. In this case, orders were sent to the local jail or to a local address as opposed to where he was placed through the Department of Corrections. Five hearings occurred without mention of the father, or without giving the father a chance to participate in the proceedings. Finally, the father received notice and an order requesting his participation for the PPH, but the hearing was held without the father's participation. Thirteen months after the review hearing where the trial court was made aware of
the father's incarceration with the Department of Corrections, the father was finally made available by phone. He inquired at that hearing as to why he had not been included in prior court hearings. The trial court assured him that he would be involved in future proceedings, but four more hearings were held and the father was not included, nor did it appear that the father was noticed. Ten months after the only hearing in which he participated, he was served with a summons and petition seeking to terminate his parental rights. The Court held that as in *Mason*, the father missed the crucial year-long review period during which the court was called upon to evaluate the parents' efforts to decide whether reunification of the children could be achieved. In addition, the father was not given a chance to participate with services. The Court found that the petitioner failed to make reasonable efforts to provide services to the father. The caseworker made very little effort to involve the father. Although the caseworker blamed the father's prison caseworker for not getting back to her, there was no evidence of what efforts the caseworker made to follow up even though it was her duty to make reasonable efforts to facilitate treatment before termination of parental rights. The trial court terminated the father's parental rights soley upon his incarceration in violation of *Mason.* In addition, the father was not advised of his right to counsel (see right to counsel above). As a result, reversal was warranted.

In re Sparks, unpublished Court of Appeals #312509, April 19, 2013

The father appeals the trial court's order terminating his parental rights. His argument on appeal was that the trial court error in finding clear and convincing evidence for the statutory basis under MCL 712A.19b(3)(h) (a parent incarcerated for a period exceeding 2 years, has not provided for the child's proper care and custody and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time). Although the *Mason* court held that the "mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination", the trial court in this case did not err in terminating his parental rights. The father did not request placement with his older sister until AFTER the child was placed there by the petitioner. In addition, the psychological evaluation and the caseworker opined that, due to the father's extensive criminal and drug history, he would not be able to provide proper care and custody for the child within a reasonable time period. Further, the father had the opportunity to comply with services, but he did not engage in those services. The trial court properly considered the fact that the child was placed with a relative in its best interest determination, even though it may have erred by finding that there was no bond between the father and his older sister (the relative

placement), so did not consider the placement as a relative placement. The order termination the father's parental rights was **affirmed.**

In re Burke, unpublished Court of Appeals #311817, March 21, 2013

The father appealed the trial court's order terminating his parental rights. He argued on appeal that the trial court erred because he was not given a meaningful chance to participate in the proceedings due to the failure to immediately identify him as the father and due to his incarceration. The original petition filed in the trial court named a different father. When the father was finally identified, he was located at a Department of Corrections facility. Since his identity, he was included in all the following court proceedings. The Court found that this case differed from *Mason* and *Rood* in that he had prior involuntary terminations of siblings to this child, so MCL 712A.19a(2)(c)'s exception did not apply. Even so, the petition included him in reunification efforts by communicating with him and notifying him of programs available to him in prison. Further, the father was engaged in the proceedings as soon as he was identified as a putative father, he was appointed counsel and participated in every hearing thereafter. The order terminating his parental rights was **affirmed.**

In re Clarmont, unpublished Court of Appeals #310118, February 19, 2013

The mother appealed the trial court's termination of her parental rights and argued that the petitioner relied soley upon the mother's criminal history and substance abuse before the child protection proceedings began was in violation of the *Mason* decision. The Court agreed and **reversed** the trial court's order. The mother was scheduled to be released in five months, had completed all the services available to her in prison, including parenting classes, sent monthly letters to her children, did not have any major behavioral issues in prison and had a non-violent criminal history. The evidence presented at the termination hearing only involved her parenting ability prior to her incarceration and the petitioner admitted that she had not evaluated the mother's current parenting ability. The Court found that termination was premature in this situation and the mother should be allowed time to show her ability to provide proper care and custody in a reasonable time. The termination order was **reversed.**

CASES OF INTEREST

Ratte v Corrigan, et al., Eastern District of Michigan, Southern Division, Case No. 11-11190, November 26, 2013.

In the civil rights case resulting from the a father "inadvertently" giving his 7 year old son a Mike's Hard Lemonade at a Detroit Tigers game, the Plaintiff minor and his parents are suing numerous individuals. One of the individuals named is Third Judicial Circuit Judge Judy Hartsfield in her individual capacity. Judge Hartsfield filed a motion to dismiss on the basis of failing to state a claim and on judicial immunity. The Federal Court denied the motion. The Court held that the source of injury in the plaintiff's complaint was the practice of allowing the removal of children from homes without judicial review by pre-signing form orders and allowing a non-judicial officer (a probation officer) to complete the form. The policy of pre-signing removal forms, which are later filled in by non-judicial personnel without judicial review are administrative acts and not "judicial acts". The alleged due process violations against Judge Hartsfield shall proceed forward.

Porter v Hill, 301 Mich App 295; 836 NW2d 247 (2013) (*lv to app pending*) (Court of Appeals #306562, June 11, 2013). **Oral argument on lv to app heard January 15, 2014.**

The Defendant is the mother and sole legal parent to the two children. The biological father of the two children, Russell, was the defendant's ex-husband and the son of the plaintiffs. Russell's parental rights to the children were involuntarily terminated due to allegations of physical abuse. Russell continued to pay child support after his rights were terminated. After Russell's death, the Plaintiffs sought an order for grandparenting time pursuant to the grandparent visitation section of the Child Custody Act. The defendant/mother moved for summary disposition arguing that the grandparents did not have standing as their son's parental rights were terminated prior to his death. The trial

court granted summary disposition. The grandparents argued on appeal that the term "natural" parent under the grandparent visitation section refers to a "biological" parent. The Court held that "natural" parent is not synonymous to "biological" parent. Since Russell's parental rights were terminated, his death does not revive those rights for purposes of grandparent visitation. The fact that Russell continued to pay child support does not impose any rights upon him as it relates to the children as parental rights are distinct from parental obligations as stated in *In re Beck,* 488 Mich 6; 793 NW2d 562 (2010). Even if the defendant claimed social security benefits through Russell for the children after his death, that is a continuing financial support issue and does not revive parental rights.

In a dissenting opinion, Justice Boonstra states that equating "natural" parent with a "legal" parent does not seem appropriate as the term "natural parent" used in the same sentence as "adoptive parent" must connote something more or different than having "legal" parental rights. Prior case law found that a parent whose rights were terminated does not have standing to initiate a custody action under the Child Custody Act because it amounts to a collateral attack on the prior proceedings and that a termination order, by its nature, finds that custody with the natural parent is not in the child's best interests. In other words, a parent whose parental rights have been terminated and who has therefore lost his or her rights as a "legal parent" still remains a "natural parent" and, therefore, a "parent" under the definition of the Child Custody Act.

People v Prominski, 302 Mich App 327; 839 NW2d 32 (2013) (Court of Appeals #309682, August 22, 2013)

The defendant was a pastor at a church in 2009 when a parishioner approached him regarding her concerns about her husband and her daughters. The mother found out that her husband was having the daughters touch themselves and went to the pastor as she did not know what to do or if she should make a report when the husband did not actually touch the daughters. She was seeking help from the pastor with her family and guidance on how to proceed. After another incident in 2011, when one of the daughters told the mother that the husband was touching her, the parishioner went to the pastor again. At that time, the pastor told the mother that she needed to report it and, if she didn't, he would. During the investigation, the police learned about the incident in 2009 and the pastor was charged with failure to report child abuse. The pastor moved to dismiss the charges based upon privilege and the trial court granted the motion. The prosecutor appealed, arguing that the conversation in 2009 between the mother and the pastor was not "confessional" in nature and, therefore, not privileged.

Using statutory interpretation, the Court held that the plain language of the statute clearly reveals that the privilege applies to confessions and other communications that are similarly confidential. This includes a communication for which the parishioner has an expectation that the communication will be kept secret or private, similar to the expectation they would have for a confession.

The communication in 2009 was to help the mother make the decision about whether or not to report the incident and she made the decision not to report it and instead relied upon her husband seeking counseling and reforming his behavior. The mother expected the communication to be private and approached the pastor in his role as a pastor. This type of communication falls under MCL 722.623(1)(a) and the Court **affirmed** the trial court. The motion to dismiss was properly granted.

People v Koon, 494 Mich 1; 832 NW2d 724 (2013) (Supreme Court #145259, May 21, 2013; Court of Appeals #301443)

The defendant was stopped for speeding. He told the police officer that he had a medical marijuana card and admitted that he had smoked marijuana 5-6 hours earlier. A blood test showed the presence of THC. The trial court found that his registration under the Michigan Medical Marihuana Act (MMMA) protected him from prosecution under MCL 257.625(8) (operating a motor vehicle with the presence of a Schedule 1 controlled substance in his body) unless the prosecution was able to prove that he was actually impaired by the presence of marijuana in his body. The prosecution appealed to the county circuit court, which affirmed the district court's ruling by concluding that the MMMA superseded the zero-tolerance provision. The prosecution appealed by leave granted. The Court of Appeals reversed, holding that a person is under the influence of marijuana if he or she has any amount of marijuana in their system. The defendant then appealed to the Supreme Court. In lieu of granting leave, the Supreme Court **reversed** the Court of Appeals and reinstated the ruling from the county circuit court. The Supreme Court held that under MMMA, a qualifying registered patient is not subject to arrest, prosecution, or penalty for the medical use of marijuana provided that the patient possesses an amount of usable marijuana that does not exceed 2.5 oz. Medical use includes internal possession. Not protected by the MMMA, though, is "driving while under the influence". The MMMA does not define "under the influence", but the phrase contemplates something more than having any amount of marijuana in

their system and requires some effect on the person. The MMMA's prohibition against driving under the influence is inconsistent with the motor vehicle code's zero-tolerance provision, so the MMMA supersedes the vehicle code.

In re Sardy, unpublished Court of Appeals #312888, January 23, 2014. *Publication request den'd March 4, 2014.*

The attorney for a respondent father appealed an order from the trial court imposing sanctions under MCR 2.114(D) for unsubstantiated claims in an emergency motion for recusal (MCR 2.003(C)(1)(a and b)). The trial judge had a history with the respondent/father, including presiding over the mother's requests for PPO's. After denying the motion for recusal, the trial court held that the motion was based "totally on unsubstantiated and unsupported allegations made by Respondent and signed by his counsel…." The trial court assessed $200 for each unsubstantiated claim, totaling $800. The Court reviewed each claim and held that, even though an attorney has a duty to serve his client zealously, that duty has to be exercised within the confines of the court rules and the MRPC. Counsel in this case signed a motion impugning the honesty, impartiality and integrity of the court and did so "in an extremely disrespectful manner…permeated with hyperbole and inflammatory language" without seeking independent verification by listening to the tape of the hearings or conduct a reasonable inquiry into the factual basis for the allegations. A clients affidavit does not, in and of itself, suffice as reasonable inquiry.

ATTORNEY GENERAL OPINIONS

Application of Michigan Medical Marijuana Act to child protective proceedings, Opinion #7271, May 10, 2013

The MMMA permits the use of marijuana to the extent that it is carried out in accordance with the provisions of the MMMA. The MMMA further states that a person shall not be denied custody or visitation for acting in accordance with the MMMA unless the "person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated". An order or judgment in a child protective proceeding under the Juvenile Code that imposes restrictions on custody or visitation, requires removal of a child from the home or results in termination of parental rights plainly results in the denial or a right or privilege for purposes of the MMMA. As a result, registered patients and primary caregivers may invoke the protection or immunity provisions of the MMMA, but they may only do so if they are properly registered, possess a registration card and their medical use of marijuana was in accordance with the act. The immunity or protections may be lost, however, if the use creates an unreasonable danger to the child that can be clearly articulated and substantiated.

The MMMA does not define unreasonable danger, or articulated and substantiated, nor has any court issued a decision expressly interpreting these phrases. According to the Department of Human Services policy, "substance abuse, or the addition of the parent-caretaker or adult living in the home to alcohol or drugs, does not in and of itself constitute evidence of abuse or neglect of the child…..a careful evaluation must be made to determine whether a child is at risk". This policy is consistent with the MMMA. If the marijuana use affects the parent's or caregiver's ability to adequately care for a child, or presents a particular danger, such as to an asthmatic child, it could create an unreasonable danger. An evaluation of the facts of each case must be made. To be articulated and substantiated, it must be clearly expressed and supported by the evidence.

In addition, a court in a child protection proceeding may not independently determine whether or not a person is a qualifying patient. A court may, however, entertain evidence that the patient's use of marijuana was not for the purpose of alleviating the patient's debilitating medical condition or symptoms associated with the debilitating medical condition. In other words, the court can order the person to undergo a medical exam, obtain the medical records and review any other evidence to determine whether the person's conduct relating to marijuana is for the purpose of treating or alleviating the personal's condition or symptoms. If the evidence supports a contrary conclusion, then the court can find that person's use or possession is not in accordance with the MMMA and therefore not entitled to the MMMA's protections.

Child Care Organization; can a child care organization employee, who is not a licensed health care professional, administer insulin and glucagon to children who have diabetes and require the medications while in attendance at the child care organization. Opinion #7274, August 28, 2013.

Yes, the Child Care Organization Act, as implemented by the Department of Human Services, permits adult caregivers to administer insulin and glucagon to a child in attendance at a child care organization with the prior written permission of a parent, pursuant to instructions of the child's licensed practitioner, and in accordance with the rule's provisions. The adult caregiver is not practicing medicine by giving insulin and glucagon to a diabetic child.