THE GUIDEBOOK

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KIDS CAUGHT IN THE MIDDLE

HOW FAMILIES ARE HARMED WHEN JUDGES DON'T FOLLOW THE LAW

GUIDEBOOK

WHO: This Guidebook is for family law attorneys and judges who sit on family law cases involving children. The Guidebook covers topics as diverse as custody and parenting time disputes, guardianship and adoption proceedings, revocation of paternity and termination of parental rights. The judges who sit on these cases might include circuit court judges of the family division, probate judges, Court of Appeals judges, and Michigan Supreme Court justices. And in some counties, District Court judges even have the occasion to sit on a family law case!

WHAT: This Guidebook is intended to be a quick reference when you are confronted with an unfamiliar area of family law. Each chapter of the Guidebook includes a quick legal summary, problem areas, and issues that have not yet been resolved by the appellate courts. In addition, each chapter includes practice tips.

WHY: When judges do not follow the law, it demonstrates a lack of care – not only to the families who are impacted by the decision, but also to the people of Michigan who elect legislators to enact the laws that protect our children and families.

Next Steps: Liisa's website **(www.liisaspeaker.com/mybook)** lists the "next steps" each of us can take to overhaul Michigan's family courts and improve the lives of our children and families!

Let's take the next step together!

We thank you for your continued support in our efforts to persuade trial judges to follow the law

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CHAPTER 1: DUE PROCESS VIOLATIONS

Purpose: Due process of law is the right to have notice and opportunity to be heard before the government infringes on a person's right to life, liberty, or property.

Quick Legal Summary: Before a judge can make a decision affecting a person's rights, that person must be provided with notice and an opportunity to be heard. Moreover, parents have a liberty interest related to the parenting of their children. Therefore, before infringing on a parent's rights, the courts are required to give parents due process of law.

Problem Areas - Issues where we see challenges on appeal:

- Temporary orders entered without following the law
- Delays between an improperly entered temporary order and the final order
- Systemic delays in custody cases
- Changes to how the court rules define a "final order"
- How trial judges handle cases after being reversed or vacated
- The intersection of the FOC proceedings with the trial judge's decision-making
- Ignoring legal errors on grounds that the errors were harmless
- The Court of Appeals fails to correct the trial judge's errors
- Litigating against an unrepresented parent
- Allowing the FOC investigator to testify as a witness
- Preventing a parent from objecting to the Friend of Court recommendation
- Trial judge's unclear appointment of an L-GAL or GAL

Unresolved Issues - We need guidance from the appellate courts:

- Use of FOC investigations and conciliations in later court proceedings.
- Adopting an investigator's findings without an evidentiary hearing.
- Delegating judicial authority to a GAL who may not even be an attorney.

Practice Tip: Preservation of an issue is essential to protecting the client's interests on appeal. When a trial judge refuses to hold a hearing, preservation becomes difficult. Trial attorneys should file an objection to the FOC recommendation or file a motion for relief from judgment raising the due process violation to ensure the issue is part of the record before the appeal is filed.

"[P]robate and circuit courts should be aware of and comply with the statutory procedure that exists to insure the orderly and efficient resolution of cases involving both guardianship and child custody proceedings.... The courts' failure to abide by our [case-flow management] time guidelines [with a three-year delay] is distressing in this tragic case."

– JUSTICE MAURA CORRIGAN,
dissent in *Unthank v Wolfe*

CHAPTER 2: CHILD CUSTODY

Purpose: To avoid disruptions of the child's established custodial environment unless there is a very compelling reason.

Quick Legal Summary: When trial judges are making initial custody decisions, such as in a judgment of divorce or child custody order, there are several steps they must take. Typically, there is some sort of temporary order or interim order in place, often resulting from the Friend of the Court process. Even so, the trial judge must make findings to support their decision in the custody decision. The trial judge must first determine who has the established custodial environment with the children.

After deciding which parent or parents have an established custodial environment with the children, the trial judge will then know which burden of proof to apply. Clear and convincing evidence is appropriate if the trial judge's decision changes the established custodial environment from one parent to the other or from both parents to one. The only time the trial judge can apply the lower preponderance of the evidence standard in an initial custody determination is when neither parent has an established custodial environment with the children (which is very rare), or when both parents share an established custodial environment and the trial judge awards joint physical custody (which is very common).

The trial judge then applies the appropriate burden of proof to The best-interest factors under the Child Custody Act. The judge must make a finding on each of the 12 factors. The best-interest analysis is not a mathematical calculation. The trial judge looks to the "sum total" of those factors and can give more or less weight to certain factors based on the evidence. Once the judge completes the best-interest analysis, the trial judge can make a custody ruling.

Problem Areas - Issues where we see challenges on appeal:

- Lack of findings on the established custodial environment
- When children do not have an established custodial environment with either parent
- Ex parte or temporary orders
- Trial judge's obligation to consider up-to-date evidence on remand
- Trial judges rubber "stamping" initial orders from the Friend of Court
- Fixing legal errors quickly or not
- Interstate and international custody issues heighten cases' complexity and parents' emotions
- Inappropriate findings on best interest factors

Unresolved Issues - We need guidance from the appellate courts:

- Trial judges failing to fully examine best interests of the child after full custody trial.
- Conclusory findings on the established custodial environment.
- Deference to trial court decisions based on transcripts of referee hearings.
- The child interview.
- Reasonableness of child's preference.
- Considering each individual child's best interests.
- Are stay-at-home parents favored by judges?

"[D]ecisions that will profoundly affect the lives and well-being of children cannot be left to little more than pure chance. These critical decisions must be subject to meaningful appellate review."

– HON. KIRSTEN FRANK KELLY,
Foskett v Foskett

Practice Tip: When appealing a trial judge's factual findings, it is important that the appellate court has access to the entire record, including trial exhibits. Many trial courts do not retain the admitted exhibits after a final order is entered. Trial attorneys should preserve both parties' trial binders and make notes about what exhibits were admitted or rejected to ensure the record is complete on appeal.

Practice Tip: Trial attorneys should be alert to legal errors made in temporary custody orders early in the case and consider filing interlocutory appeals with motions for peremptory reversal. Waiting to appeal a final order can leave your clients waiting months, or even years, to correct a clear error. By that time, the established custodial environment may have changed, further reducing the parent's chances before the trial judge.

"An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. The existence of a temporary custody order does not preclude a finding that an established custodial environment exists with the noncustodian or that an established custodial environment does not exist with the custodian. A custodial environment can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order. An established custodial environment may exist with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort."

– COURT OF APPEALS, PER CURIAM,
Berger v Berger

CHAPTER 3: CHILD CUSTODY MODIFICATION

Purpose: Postjudgment custody modification is based on the same premise as initial custody decisions: the best interests of the child. Trial judges should avoid unnecessary disruptions to a child's life.

Quick Legal Summary: A parent who wants to modify an existing custody order must file a motion alleging facts that amount to proper cause or a change of circumstances threshold. Depending on the extent of the modification (that is, how the proposed change alters the number of days the child spends with each parent), different threshold standards apply.

The threshold to modify custody comes from *Vodvarka v Grasmeyer*. The *Vodvarka* threshold requires the basis for the requested modification to significantly impact the child's life under at least one of the best-interest factors in the Child Custody Act. According to *Vodvarka*, "since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, [must] have materially changed." Normal life changes (such as the child getting older, the parent remarrying, the parent changing jobs) are not sufficient. The courts use less stringent threshold standards for parenting-time modifications, called the *Shade* standard after *Shade v Wright*. After deciding whether the allegations in the motion surpass the *Vodvarka* threshold, judges can then consider the evidence regarding the established custodial environment and the best interests of the child.

Deciding whether the allegations satisfy the *Vodvarka* threshold for custody or the lesser standards for parenting time will influence the ultimate outcome of the case in at least two significant ways. First, knowing which threshold applies could affect whether the trial judge must find clear and convincing evidence in favor of modification or if the lesser burden of proof, preponderance of the evidence, is appropriate. Second, custody orders are appealable by right while parenting-time orders are only appealable by application for leave.

Problem Areas - Issues where we see challenges on appeal:

- Expanding the De Novo hearing beyond the objection to the referee recommendation
- Using the wrong burden of proof to modify custody
- Judges entering temporary orders without evidence or fact-findings
- When the parents are practically equal on all best-interest factors
- Custody findings against the great weight of the evidence
- Delay between ex parte custody modification and final order
- Allegations that a parent has a mental health issue that requires custody changes
- Parental alienation as reason to change custody

Unresolved Issues - We need guidance from the appellate courts:

- Dispute on threshold facts.
- Relevance of evidence from before the last custody order.
- Children and social media.
- Holding a custody trial before making a threshold finding.
- Vacating versus reversing a trial judge's decision.

"Legislature intended to minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an 'established custodial environment,' except in the most compelling cases."

– JUSTICE JAMES L. RYAN,
Baker v Baker

Practice Tip: Trial attorneys can encourage trial judges to follow the proper steps in modifying a custody order by following the same structure in their briefs and closing arguments. Clearly state your position on the established custodial environment and the appropriate burden of proof before advocating in your client's favor on the best-interest factors.

Practice Tip: When the other party raises mental health concerns, you may need to request psychological evaluations, submit medical records, or present a treating therapist as an expert witness to show that your client's mental health condition is well controlled and does not negatively impact their ability to parent the child. Alternatively, you may also object to a lay witness's ability to testify to a medical condition or diagnosis. This will push trial judges toward requiring medical evidence to substantiate mental illness.

Practice Tip: When filing an answer where the threshold facts are disputed, explicitly request an evidentiary hearing on the issue of proper cause or change of circumstances in your requested relief. This will preserve the issue and make it easier to address on appeal.

"[I]t is important that lower courts follow the correct procedure when modifying a child's established custodial environment. As the statutory scheme reflects, doing so is serious business."

– HON. JUSTICE ELIZABETH CLEMENT,
concurring opinion in *O'Brien v D'Annunzio*

CHAPTER 4: LEGAL CUSTODY

Purpose: Each parent should be involved in the important decisions that affect their child's life, including medical, educational, and religious issues. Even when one parent has sole legal custody, the noncustodial parent is still entitled to access to their children's medical and school information.

Quick Legal Summary: Joint legal custody means that parents "share decision-making authority as to the important decisions affecting the welfare of the child." However, when parents cannot agree on those important decisions, it is appropriate to award sole legal custody to one parent. A sole legal custodian does not need input or permission from the other parent to make medical decisions or choose a school for the child.

Problem Areas - Issues where we see challenges on appeal:

- Evaluating the best interests of the child
- When legal custody problems bleed into physical custody and parenting-time decisions
- The same standards govern legal custody as physical custody (threshold, established custodial environment, and best interests)

Unresolved Issues - We need guidance from the appellate courts:

- Routine decision-making versus "important decisions" affecting the child's health, safety, and welfare.
- What constitutes "important decisions" affecting the health, safety, and welfare of the child.
- When the parents cannot agree on the child's extracurricular activities.
- Interviewing the child for reasonable preference in a legal custody dispute.
- Best interests related to legal custody.

Practice Tip: Craft your motions to modify legal custody by explaining how the sole legal custodian's decisions are negatively impacting the child's welfare; they are not just important decisions but also have a significant impact on the child. Conversely, in responding to a motion to change legal custody, frame your client's decision in terms of how it is a routine decision and does not significantly impact the welfare of the child.

"We are mindful of the fact that a court is usually ill-equipped to fully comprehend and act with regard to the varied everyday needs of a child in these circumstances, because it is somewhat of a stranger to both the child and the parents in a marital dissolution proceeding. We also recognize that requiring the parents to meet and resolve the issue 'exposes the child to further discord and surrounds the child with an atmosphere of hostility and insecurity.' However, joint custody in this state by definition means that the parents share the decision-making authority with respect to the important decisions affecting the welfare of the child, and where the parents as joint custodians cannot agree on important matters such as education, it is the court's duty to determine the issue in the best interests of the child."

- JUDGE DONALD HOLBROOK,
Lombardo v Lombardo

CHAPTER 5: DOMICILE

Purpose: Change of domicile law focuses on the effect a move has on a child and their relationships with their parents. Generally, the child should be able to move with a parent who has established a custodial environment. But if the child has an established custodial environment with both parents, judges should be cautious in disrupting those environments unless it has compelling reasons to do so.

Quick Legal Summary: To change the child's domicile, the parent who wants to move the child more than 100 miles must file a motion, and the trial judge must consider a number of factors. If the parent proves these change-of-domicile factors by a preponderance of the evidence, then the trial judge must ask whether the move would change the child's established custodial environment. If not, then the trial judge can allow the move without any further inquiry. If, however, the move will change the child's established custodial environment, then the trial judge must decide if there is clear and convincing evidence that the move is in the child's best interest using the factors in the Child Custody Act.

Problem Areas - Issues where we see challenges on appeal:

- The parent has already moved when the domicile motion is denied
- Trial judges must still decide best interest when the moving parent has sole legal custody
- Adding up miles on successive moves
- Measuring miles as the crow flies
- When successive moves create more distance between the parties
- When a parent's move is less than 100 miles, but is out of state

Unresolved Issues - We need guidance from the appellate courts:

- Findings on each of the domicile factors.
- The sole legal custodian wants to move out of state.
- When neither parent can demonstrate clear and convincing evidence to support the custody change created by a change of domicile.

Practice Tip: If faced with a case representing the nonmoving parent, you might file a motion to modify parenting time based on the effect the move had on the feasibility of the existing parenting-time order. This would allow you to address how the move has impacted the best-interest factors.

"[A] trial court is required to analyze the best-interest factors before entering a custody order that alters an established custodial environment, even in cases when that change in custody is prompted by a situation in which a parent, whose motion for a change in legal residence was denied, still decides to move, or remain, a significant distance away... Defendant did not file a separate motion requesting a change in custody in this case, but he asked for the change in his response to plaintiff's motion by requesting modification of the parenting-time schedule and the 'current custody arrangement so that he would be awarded primary physical custody' if plaintiff moved [out-of-state]."

– COURT OF APPEALS, PER CURIAM,
Yachcik v Yachcik

CHAPTER 6: PARENTING TIME

Purpose: The Child Custody Act acknowledges that it is "in the best interests of a child for the child to have a strong relationship with both of his or her parents." Trial judges must award parenting time "in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent." Depriving a child of a parent is a drastic measure that should only be undertaken under dire circumstances, and then using the Act's procedures.

Quick Legal Summary: The Child Custody Act's parenting-time provisions address several factors trial judges must consider when awarding or restricting parenting time. A parent should not be denied parenting time unless "it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health." In addition to the best-interest factors, the trial judge should also consider the parenting-time factors, including special circumstances of the child, whether the child is nursing, and the likelihood of abuse or neglect during parenting time.

Shade v Wright sets forth the threshold to modify parenting time, and includes normal life changes, such as a child moving from elementary to middle school, the parent's work schedule, and the child's extracurricular activities. *Kaeb v Kaeb* sets forth the standard to modify a condition on parenting time, such as drug testing, limits on third persons, supervision requirements, or other restrictions imposed on a parent's conduct during their parenting time. Because changes to these conditions will generally not affect an established custodial environment or the frequency or duration of parenting time, the "lesser, more flexible understanding of 'proper cause' or change in circumstances' should apply."

Problem Areas - Issues where we see challenges on appeal:

- Calling it "Parenting Time" results in judge applying wrong threshold standard
- Evaluating best interests for a parenting-time modification
- Parenting-time orders are not appealable by right

Unresolved Issues - We need guidance from the appellate courts:

- When a parenting-time change amounts to a custody modification.
- Removing a condition on parenting time.
- The difficulty in securing a parenting-time supervisor.
- Difficulty in reinstating parenting time.

Practice Tip: Help the trial judge apply the correct threshold standard by including it in your briefs and arguments. Whether trial counsel represents the moving parent or the parent opposing modification, applying the wrong evidentiary standard could harm your client and the children if the case must be later appealed to correct the legal error.

Practice Tip: When a change in overnights is needed, consider preserving your client's appeal by right by requesting both a change of custody and a change in parenting time as alternative forms of relief. Even if the court determines you have not met the *Vodvarka* threshold, the denial of the custody portion of your motion will render the decision a final order for appeal.

"Whereas minor modifications that leave a party's parenting time essentially intact do not change a child's established custodial environment...significant changes do. ..[T]he plaintiff's proposal would reduce the children's overnights with defendant from 225 a year to 140 a year; the 85-day reduction is a nearly 40% decrease in the time the children would spend with defendant. Time spent with the children would be primarily on the weekends and in the summer. 'If a change in parenting time results in a change in the established custodial environment, then the *Vodvarka* framework is appropriate.' [Citing *Shade v Wright*]. Accordingly, even if one could construe plaintiff's motion as simply one seeking the modification of parenting time, the *Vodvarka* framework would still apply because the proposed changes would alter the children's established custodial environment with defendant."

– JUDGE JANE BECKERING,
Lieberman v Orr

CHAPTER 7: GRANDPARENTING TIME

Purpose: Although children frequently benefit from close relationships with their grandparents, that benefit does not overcome a parent's right to make decisions about who their child associates with. A fit parent can deny grandparenting time unless the grandparents can show that the denial poses a substantial risk of harm to the child.

Quick Legal Summary: Grandparents can only seek grandparenting time when:

- the parents are either divorced or were never married,
- the grandparent's child is deceased, or
- the grandparent provided an established custodial environment in the year before the grandparenting time request

Once the grandparents have demonstrated that they have standing to request grandparenting time, they must then prove by a preponderance of the evidence that the parent's denial of grandparenting time "creates a substantial risk of harm to the child's mental, physical, or emotional health." Once this hurdle has been passed, the trial judge still needs to examine whether grandparenting time is in the child's best interest. But two fit parents can deny grandparenting time and prevent the grandparenting time motion from going forward.

Problem Areas - Issues where we see challenges on appeal:

- The heavy burden of proving substantial risk of harm
- Whether a grandparenting-time order is appealable by right or application
- Expert witness to prove substantial risk of harm
- Granting grandparenting-time without the proper analysis or fact-findings

Unresolved Issues - We need guidance from the appellate courts:

- "Preponderance of the evidence" versus "clear and convincing evidence".
- Can a grandparent seek grandparenting time after their own child's rights to the grandchild were terminated?
- Interim grandparenting-time orders.
- Two fit parents who object to grandparenting time.

Unresolved Issues Continued:

- How much grandparenting time is appropriate.
- A parent's denial of grandparenting time as a prerequisite of the grandparents' motion.

Practice Tip: When representing grandparents, you may need to file a motion for a psychological evaluation of the child to allow your expert witness to evaluate the specific risk of harm if that child were not permitted visitation with your clients.

Practice Tip: If you represent one or both parents who object to grandparenting time, consider filing a motion to dismiss for lack of standing in lieu of an answer. This will force the trial judge to address the legal issue of a joint denial first, before weighing the merits of the grandparents' case.

"It cannot be disputed that a grandparenting-time order interferes with a parent's fundamental right to make decisions concerning the care, custody, and control of a child.... Because a grandparenting-time order overrides a parent's legal decision to deny grandparenting time, a grandparenting-time order interferes with a parent's fundamental right to make decisions concerning the care, custody, and control of his or her child."

– JUDGE DEBORAH SERVITTO,
Varran v Granneman

CHAPTER 8: THIRD-PARTY CUSTODY

Purpose: The courts presume that custody with a parent is in the best interests of the child. The fitness to parent your child is the "touchstone for invoking the constitutional protections of fundamental parental rights." When a parent is unfit, a third party must step in.

Quick Legal Summary: For a nonparent to seek custody of a child, that nonparent must be the legal guardian or have a substantive right to custody. The presumption in favor of maintaining the child's established custodial environment with a third party is outweighed by the parental presumption in the Child Custody Act. When a parent wants to regain custody, the nonparent should only retain custody where there is clear and convincing evidence that doing so is in the best interests of the child.

Problem Areas - Issues where we see challenges on appeal:

- Tension between established custodial environment and parental presumption
- Standing to seek third-party custody
- Parent does not need to demonstrate proper cause or change in circumstances to file a motion for custody

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Unresolved Issues - We need guidance from the appellate courts:

- Misusing a temporary guardianship order to file for third-party custody.
- There are few published third-party custody cases so judges may get confused.

Practice Tip: Consider whether third-party custody or guardianship is better for your client. A third-party custodian has more legal decision-making authority than a guardian, but it is easier to obtain guardianship.

Practice Tip: Standing is often the main issue in a third-party custody case and must be supported by an affidavit filed with the complaint. Consider a motion for summary disposition in lieu of an answer if the third party has not properly established standing.

“Conditioning an evidentiary hearing on a natural parent’s ability to prove proper cause or changed circumstances effectively closes the courthouse doors whenever a child thrives in the care of a third party. Taken to its logical conclusion, as long as the status quo is generally maintained in the [third parties’] home, the circuit court’s ruling precludes [the parent] from ever obtaining custody of his son.”

– JUDGE ELIZABETH GLEICHER,
Frowner v Smith

CHAPTER 9: GUARDIANSHIPS

Purpose: Guardianships are designed to keep children in a safe home when parents are unable to care for them and to give caretakers legal authority over the children in the parent's absence.

Quick Legal Summary: There are different types of guardianships, depending on whether the parent left the child with someone without legal authority or is seeking a guardian for their child.

- **EPIC guardianships** are created under the Estate and Protected Individuals Code. They can be temporary or full guardianships. Typically, an EPIC guardianship is used when a parent leaves the child with a caretaker without giving them legal authority over the child's care and maintenance. An EPIC guardianship gives the parent fewer rights and does not require a parenting plan.
- A **Limited Guardianship** is formed by agreement between the parent and caretaker. It includes a parenting plan that allows the parent to maintain a relationship with the child. However, if the parent does not comply with the requirements of the limited guardianship, the guardian can seek termination of the parent's rights.
- A **Juvenile Guardianship** allows the court in an abuse and neglect case to place a child with a guardian instead of terminating parental rights. Trial judges typically use juvenile guardianships if they determine that the child should not return home, but also that termination is not appropriate.

Problem Areas - Issues where we see challenges on appeal:

- Did the parent grant permission for the children to stay with the caretaker?
- When a guardian wants to seek termination of parental rights so that the guardian can adopt the child
- Which best-interest factors to use in guardianship cases

Unresolved Issues - We need guidance from the appellate courts:

- Is temporary placement enough?
- Does the fact that the children are in a guardianship placement mean that the parent is unfit?
- Granting a caretaker "legal authority" over the child.

Practice Tip: Be sure to include evidence of the permanency of placement in support of your petition for guardianship, such as where the children are enrolled in school, where their medical providers are located, or how the parent told the children to refer to the potential guardian.

"[I]f parents permit their child to permanently reside with someone else when the guardianship issue arises, the court may appoint a guardian for the child. Note that the term "permit," the meaning of which the parties primarily contest here, is in the present tense. Thus, the permission referred to in the statute must be currently occurring--which would be shown by the child's actual presence in the care of another--when the guardianship issue arises."

– JUDGE PETER O'CONNELL,
Deschaine v St. Germain

CHAPTER 10: ADOPTION

Purpose: The Adoption Code identifies five core purposes focused on the child's permanency, stability, and best interests:

- To ensure adoptees receive the services they need.
- To safeguard and promote adoptees' rights and best interests as paramount while also protecting the rights of all parties concerned.
- To place the adoptees with adoptive families as quickly as possible.
- To achieve permanency and stability for adoptees as quickly as possible.
- To allow all interested parties to participate in adoption proceedings so that, once finalized, each adoption will be permanent.

The Safe Delivery of Newborns Law has as its primary goal to save the lives of newborn infants who would otherwise be at risk of being abandoned by a mother in distress, and to protect the privacy of the mother.

Quick Legal Summary: There are four main types of contested adoption cases. Each type has its own set of statutory requirements, its own problem areas, and its own unresolved issues:

- **Section 39** cases arise when an unmarried mother arranges for direct placement, selecting a family to adopt her newborn baby. Before the adoption can be finalized, the trial judge must terminate the rights of any putative father—that is, any man the biological mother believes could be the father. Section 39 only applies to "do-nothing" fathers. If that man is a "do-something" father, one who provided substantial and regular support to the mother and child or has an established custodial relationship with the child, then his rights can only be terminated without his consent under the Juvenile Code (for abuse and neglect) or in a stepparent adoption. Section 39 only looks at the man's actions during the pregnancy and the ninety days before he received the notice of the adoption hearing. A "do-nothing" father must appear in court, object to the adoption, and request custody of the child. He must prove that he is fit and able to parent the

Quick Legal Summary Continued:

child, and that custody with him is in the child's best interests. If not, then his parental rights can be terminated to make way for the adoption.

- **Section 45** hearings typically occur when the parent's rights have already been terminated (usually for abuse and neglect under the Juvenile Code) and a prospective adoptive family is denied consent to adopt. The Michigan Children's Institute (MCI) —the ward for all foster children in the state of Michigan— reviews adoption requests and decides who should adopt the child. If MCI denies consent to a prospective adopter, then they can file a motion under Section 45 of the Adoption Code to have a judge review that decision. The prospective adopter must demonstrate that MCI's decision to deny consent was arbitrary and capricious by clear and convincing evidence.
- **Stepparent adoptions** occur when one parent's spouse wants to become the legal parent of their stepchildren. The other parent's rights can be terminated under the Adoption Code by showing that for two or more years, the other parent has failed to provide substantial and regular support and has failed to have substantial and regular contact with the child.
- **Safe Delivery** cases arise when a surrendering parent (usually the mother) surrenders a newborn at the hospital or to an emergency service provider within 72 hours of the newborn's birth. The hospital contacts a child placing agency, who then places the newborn with a pre-approved adoptive home. Within 28 days of surrender, the mother can ask for custody, and within 28 days of notice to the nonsurrendering parent, he can request custody. The parent(s) must submit DNA testing. If the DNA is a match then the trial judge will determine whether custody with a parent is in the newborn's best interests.

Problem Areas - Issues where we see challenges on appeal:

- **Section 39 Problems**: Adjourning an adoption case in favor of a paternity case.
- **Section 45 Problems**: Cases under Section 45 is the near-impossible burden posed by the statute. A prospective adopter must prove MCI's decision to deny consent to adopt was arbitrary and capricious by clear and convincing evidence. This is perhaps the most onerous standard in Michigan.
- **Stepparent Adoption Problems**: The Legislature needs to revise the stepparent adoption provisions of the Adoption Code to correct unintended consequences of a recent amendment.
- **Safe Delivery Problems**: Most judges and attorneys have never handled such a case before, and judges have failed to follow the statutory requirements.

Unresolved Issues - We need guidance from the appellate courts:

- **Section 39 Unresolved Issues**:
  - Good cause to adjourn highest priority adoption cases.
  - Can a paternity order make an adoption appeal moot?
  - Personal attendance at a Section 39 hearing.
  - Conditional requests for custody.
  - Sporadic or limited-duration support.
- **Section 45 Unresolved Issues**:
  - Timing and the ability to file a request for a Section 45 hearing.
- **Stepparent Adoption Unresolved Issues**:
  - Newly entered custody or support orders.
  - Having the ability to support or have contact with the child.
- **Safe Delivery Unresolved issues:**
  - Does the agency satisfy reasonable efforts to locate a non-surrendering parent by publishing notice when the agency does not know any identifying information about the nonsurrendering parent?

- **Safe Delivery Unresolved issues Continued:**
  - If the nonsurrendering parent files a custody action in a different county, what is the consequence if that custody judge does not follow the law that requires him to locate the safe delivery case and to transfer the custody case to the safe delivery judge?
  - If the child is born to a drug-addicted mother and CPS swoops in to remove the child, does the mother still have the authority to surrender the child under the safe delivery law as long as it is within the 72 hours of birth?

Practice Tip: There are at least seven things that many trial judges consistently do wrong in adoption cases:

1. Ordering a DNA test or asking a putative father if he wants to "contest the adoption" (the Adoption Code does not allow the court to order a DNA test).
2. Failing to require putative fathers to unequivocally ask for custody of the child to avoid termination of his rights.
3. Failing to prioritize the child's rights over conflicting rights of another party, particularly a putative father.
4. Appointing an attorney before the putative father asks for one and without determining whether he can retain counsel or plans to object to the adoption.
5. Granting adjournments rather than terminating the putative father's rights (as required by the Adoption Code) if he doesn't show up at a hearing.
6. Giving do-nothing putative fathers the same rights and protections as do-something putative fathers and legal fathers.
7. Failing to penalize discovery violations or enforce court orders, thus delaying the proceedings and interfering with the adoptee's stability and permanency.

Practice Tip: Either the biological mother or the prospective adopters can appeal an adoption order granting an adjournment and, if a motion was filed in the paternity court, also appeal a paternity order denying a stay of the paternity case.

Practice Tip: Prospective adopters should hire an attorney early and not wait until MCI denies consent to adopt. Before MCI makes its decision, the attorney should be prepared to proactively demonstrate to MCI that other information from an agency or caseworker is false or misleading.

Practice Tip: To satisfy *AGD's* reading of the amended statute, when representing a mother with a putative father or an affidavit of parentage, you may want to ask the trial judge to explicitly reserve the issue of child support in light of the pending adoption. This will avoid creating a low dollar child support order or triggering an automatic income withholding order that will interfere with the termination of the father's rights.

"When an unwed father demonstrates a full commitment to the responsibilities of parenthood by '[coming] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he '[acts] as a father toward his children'. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. '[The] importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in '[promoting] a way of life' through the instruction of children . . . as well as from the fact of blood relationship.'... The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie."

– US SUPREME COURT JUSTICE JOHN PAUL STEVENS,
Lehr v Robertson

CHAPTER 11: REVOCATION OF PATERNITY

Purpose: The Revocation of Paternity Act provides a way to revoke a man's legal parental status when he is not the child's biological father, making way for the child to have a legal relationship with the biological father.

Quick Legal Summary: There are four types of legal fathers whose rights can be revoked to make way for another man to be declared the father. There is a different set of requirements for each type of legal father:

- **Affiliated fathers** establish paternity through an order of filiation. Their paternity can be revoked if it is shown that the affiliated father failed to participate in the court proceedings that resulted in that order.
- **Acknowledged fathers** establish paternity through an acknowledgment of parentage. Their paternity can be revoked by proof of mistake, newly discovered evidence, fraud, misrepresentation or misconduct, or duress in signing the acknowledgment.
- **Genetic fathers** establish paternity solely through DNA testing under the Paternity Act, the Summary Support and Paternity Act, or the Genetic Parentage Act. Their paternity can be revoked by showing that the genetic test was inaccurate, the man's genetic material was not available to the child's mother, or a man with identical DNA is the child's father.
- **Presumed fathers** establish paternity by being married to the mother when the child was conceived or born. There are a variety of ways to revoke a current or former husband's paternity, depending on who is seeking to revoke paternity. There are too many scenarios to recount here, but the following provides one example of a statutory basis for each of the possible moving parties:
    - The mother can revoke her husband's paternity if she, her husband, and the alleged father at some time "mutually and openly acknowledged" a biological relationship between the alleged father and the child.
    - The presumed father can revoke his own paternity if he raises it in the divorce action.

- An alleged father can revoke the husband's paternity if the alleged father did not know the mother was married at the time of conception.
- The presumed father has failed or neglected to provide substantial and regular support to the child for 2 years, or if a support order has been entered and the presumed father has failed to substantially comply with the order for 2 years.
- DHHS can seek to revoke the presumed father's paternity when the child is being supported by public assistance and the presumed father lives separate and apart from the child.

Problem Areas - Issues where we see challenges on appeal:

- The need for an evidentiary hearing under the revocation statute
- The alleged father's standing to revoke paternity requires clean hands
- The alleged father's ability to intervene in the divorce case

Unresolved Issues - We need guidance from the appellate courts:

- Standard for deciding revocation of paternity.
- Burden of proof to revoke.
- Burden of proof for the best-interest analysis.

Practice Tip: Standing is important when an alleged father is the one seeking revocation of paternity. Examine whether the alleged father knew or had reason to know the mother was married. If so, and if you represent the mother or the legal father, consider a motion to dismiss based on that lack of standing.

Practice Tip: If there are disputed facts around whether the mother or alleged father can establish their standing to request revocation, these should be addressed early in the case, before the trial judge hears evidence related to the best-interest factors. You may need to request an evidentiary hearing on the threshold issue of standing.

"The Legislature's objective [in enacting ROPA] was to permit putative fathers who were genuinely unaware of the mother's marital status at the time of conception to sue to establish paternity in certain instances, but also to protect presumed fathers and extant marital families from competing claims to paternity by knowing adulterers. It bears repeating that, not so long ago, no putative father could assert a claim of paternity with respect to a child born during the mother's marriage to another man. It is true that the Michigan Legislature has altered this common-law rule in certain respects, now permitting certain alleged fathers who were genuinely unaware that the mother was married at the time of conception to commence actions under the Revocation of Paternity Act seeking to revoke the presumption of paternity that attaches to the mother's husband. But it is axiomatic that the Legislature may partially confer such rights on alleged fathers in a gradual or step-by-step fashion and need not immediately give alleged fathers the full panoply of rights and privileges that attach to presumed fathers."

- JUDGE KATHLEEN JANSEN,
Grimes v Van Hook-Williams

CHAPTER 12:
TERMINATION OF PARENTAL RIGHTS

Purpose: The purpose of child welfare law is to keep children safe if the parents are unable to care for them or to protect children if they have been abused or neglected by their parents.

Quick Legal Summary: Child Protective Services (CPS) investigates all allegations that a parent has abused or neglected his or her child. If CPS believes that the child is in danger, then the Department of Health and Human Services (DHHS) can file a child-protective petition. Most of the time, the child is removed from the parent's home, but sometimes DHHS can develop a safety plan to keep the child and parent together in the same house.

The trial judge or a jury can decide whether there are grounds to take jurisdiction over the child - this is called the adjudication. Typically, jurisdiction is appropriate if DHHS can prove by a preponderance of the evidence that:

- the parent neglected to provide the child with the necessary support, education, medical, or other care;
- the child was subjected to a substantial risk of harm to his or her mental well-being;
- the parent left the child without proper care or custody; or
- the child's home environment was unfit due to neglect, cruelty, drunkenness, criminality, or depravity of the parent.

Rather than going through an adjudication trial, most parents take a plea allowing the court to take jurisdiction, which enables them to receive services to reunify with their children.

If DHHS has proven 1 of the 14 statutory grounds to terminate by clear and convincing evidence, then the trial judge must consider whether termination is in the child's best interests by a preponderance of the evidence. Some of the factors the trial judge may consider are the child's bond to the parent; the parent's parenting ability; the child's need for permanency, stability, and finality; the advantages of a foster home over the parent's home; and the child's placement with relatives as a reason not to terminate parental rights.

Problem Areas - Issues where we see challenges on appeal:

- **Adjudication Problems**:
  - When a parent takes plea to jurisdiction
  - Jurisdiction based on only one parent's conduct
  - Adjudication over siblings with different issues
- **Reasonable Efforts Problems**:
  - Immediate termination without aggravated circumstances
  - DHHS failing to provide or verify services for incarcerated parents
  - Interplay of criminal and termination cases
  - Demanding confession of abuse to reunify with children
- **Statutory Grounds Problems**
  - The time it will take a parent to improve their situation after they are released from prison or treated for drug addiction
  - DHHS created the situation that caused parents not to be able to care for their children
  - A parent has had parental rights to other children terminated
- **Best-Interest Problems**:
  - Trial judges failing to determine if a child or parent is a member of an Indian tribe
  - Trail judges failing to consider relative placement as a reason not to terminate parental rights
  - Consideration of each child's best interests individually

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Unresolved Issues - We need guidance from the appellate courts:

- **Unresolved Adjudication Issues**:
  - Anticipatory neglect as a ground to take jurisdiction over the child.
- **Unresolved Reasonable Efforts Issues**:
  - Not allowing visitation after adjudication.
- **Unresolved Statutory Grounds Issues**:
  - Termination based on anticipatory failure to protect.
  - Using domestic violence as grounds for anticipatory failure to protect.
- **Unresolved Best-Interest Issues**:
  - Using preponderance standard for best interests of child.

Practice Tip: As a parent's attorney, make sure you know the status of any related criminal matters before allowing your client to take a plea to jurisdiction. If possible, negotiate to plead to grounds unrelated to the pending criminal action to avoid any admission that could hurt their criminal defense.

Practice Tip: If DHHS and the trial judge are moving straight to termination without providing services, ask the judge to explain the aggravated circumstances that apply. This will create a record for appeal and pressure the trial judge to require reunification services where the facts don't support immediate termination.

"We recognize that the state has a legitimate—and crucial—interest in protecting the health and safety of minor children. That interest must be balanced, however, against the fundamental rights of parents to parent their children. Often, these considerations are not in conflict because 'there is a presumption that fit parents act in the best interests of their children.' ...Adjudication protects the parents' fundamental right to direct the care, custody, and control of their children, while also ensuring that the state can protect the health and safety of the children.... The Constitution does not permit the state to presume rather than prove a parent's unfitness solely because it is more convenient to presume than to prove."

– BRIDGET MCCORMACK, JUSTICE OF MI SUPREME COURT, *In re Sanders*

ABOUT THE AUTHOR

Liisa Speaker

Liisa Speaker is an appellate attorney based in Lansing, Michigan. She is the owner and lead attorney of Speaker Law Firm, PLLC – the only appellate boutique firm in the state of Michigan. Since graduating from The University of Texas School of Law, one of the nation's top law schools, Liisa has become well known for her excellent written and oral advocacy. Her appellate skills have helped clients obtain victories in appeals ranging from custody disputes to no-fault automobile insurance. But in the past five years, Liisa has focused her appellate practice on family law, adoption and child welfare cases. She achieved the status of fellow in the American Academy of Matrimonial Attorneys, an elite group of family law attorneys and serves as an officer for the State Bar of Michigan Family Law Section.

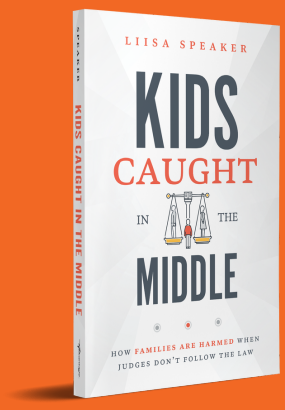
After starting her firm in 2007, she began taking on more family law cases. Her interest in family law grew to a passion, and today she focuses the work of her law firm with one goal in mind: to get trial court judges to follow the law! That goal continues to drive her work as an attorney and author and provides her clients with a second chance and a voice that they may have been denied in the trial court.

NEXT STEPS

I hope you, as a family law attorney, or perhaps even as a judge care to know how bad decisions are made and how they affect our families and our children, but together we can create change!

Liisa's website **(www.liisaspeaker.com/mybook)** lists the "next steps" we can take to overhaul Michigan's family courts and improve the lives of our children and families!

Let's take the next steps together!



NEXT STEPS – FAMILY LAW ATTORNEYS!

Kids Caught In The Middle was written for family law attorneys, to help them better represent their clients in court, to give them the courage to challenge judges who don't follow the law.

But there is a lot more family law attorneys can do to effect change, both inside and outside of the courtroom. **And here's how…**

1

Use *Kids Caught in the Middle* as a tool to represent your clients and help you in the trial court. Take a stand against judges who are not following the law in your cases, educate judges, always with the hope that – regardless of the outcome in any particular case – trial judges will correctly interpret and apply the law for cases involving children.

Your role is a pivotal step in the process of effectuating change. Unless you raise the issues in the trial court, or challenge a judge who appears inclined not to follow the law, then there won't be an issue to raise on appeal. And getting good appellate decisions is a great way to start effectuating change, even if it is only on a case-by-case basis.

2

If you are not already a member, join and get involved with the **State Bar of Michigan's Family Law Section**. The Section takes positions on legislation, court rules, and legally significant family law cases. The more voices of attorneys who join and participate in the Family Law Section, the more impact the Section can have on all of these fronts.

3

We need your help in educating the Governor on the importance of family law cases. The Governor often appoints judges to fill unexpired terms. But if the Chief Judge cannot guarantee that the seat will remain a family law seat, then the Governor tends to appoint a judge with broader experience who will be able to sit on

NEXT STEPS – FAMILY LAW ATTORNEYS!

the general circuit bench. This means that many of our judges appointed to sit in the family law bench do not have any, or very minimal, family law experience.

You can start by sending letters to the Governor in support of family law attorneys who are applying for a judgeship and otherwise contacting the Governor's office to show that we believe this to be a widespread problem. And it is a problem that can and should be easily fixed, but we have to get the Governor's attention first.

4

When proposed legislation comes up that impacts family law, sometimes we have a chance to testify before the Legislature either to support or oppose legislation. When that occurs please **come to Lansing and testify**!

Even if your card is not chosen to speak, the Legislators will still see all the cards supporting or opposing the pending legislation. They will also see all the people filling the room so they know the legislation before them is significant to Michigan families.

5

When proposed court rules amendments come before the Michigan Supreme Court, **come to Lansing to testify** in favor of or in opposition to the rules. We have had mixed and sometimes even bad results on court rules modifications. We need more attorneys to come speak up on the important court rules that the Supreme Court is considering.

NEXT STEPS – JUDGES & JUSTICES!

Judges at all levels of our judicial system play such an important role in the future of our families and children. Every case a judge decides has the potential to effect broader change – for better or for worse. Trial court decisions can be appealed and ultimately result in appellate decisions that other judges and family law attorneys will rely on.

Remember, attorneys and judges will regularly look to unpublished decisions. And, of course, published decisions are binding on the courts. **Here how judges can make a difference…**

Trial Judges:

1. **Focus on the child** as you do the step-by-step statutory analysis, and you will be more likely to make a decision that is in the best interests of the child – because the statute is designed to protect the children.

   When you as a judge stray away from the statutory scheme, and act based on your gut instinct, then you really won't know if you "got it right." A decision that could impact the trajectory of a child's life should not be based on a judge's "feelings" about one parent or the other. Parents and children have to live with your decision, even if that decision is legally wrong.

2. Carefully study the arguments presented, and know enough about family law to understand the tenets that apply to the case before you. **Use the family law bench book as a resource** – it provides helpful information to keep judges out of trouble.

3. Trial judges should **spread the word** to their colleagues about *Kids Caught in the Middle* and other resources to help trial judges correctly interpret and apply the law – because after all, that is the goal!

NEXT STEPS – JUDGES & JUSTICES!

Trial Judges:

4 **Talk to other family law judges** and join the brand new list serve for family law judges (regardless of whether you are a circuit court judge or a probate judge).

5 **Attend family law conferences**. Not only will you learn more to make better decisions on the family law cases before you, but you will be able to interact and better know family law attorneys.

COA Judges & Supreme Court Justices:

6 If you are an appellate court judge, **please do not allow trial courts to ignore the law**. You have a special role in correcting error, which means not only identifying when the trial judge has not followed the law, but also implementing a remedy when that happens. Too many times, appellate judges will hold that the trial judge made a variety of legal errors, but then conclude that the error was harmless. In cases involving children, there are limited circumstances when legal errors by the trial judge would actually amount to "harmless error." Think about *O'Brien v D'Annunzio*, just as one of many examples of why wrong legal decisions are not "harmless".

7 When appellate judges see trial judges who are "repeat offenders" by not following the law in child-related cases, then it is time to **make a bigger statement**.

The appellate courts can remand the case to a different judge, which the Supreme Court did in *O'Brien* and the Court of Appeals did in *Jacobs v Jacobs*.

NEXT STEPS – JUDGES & JUSTICES!

COA Judges & Supreme Court Justices:

Appellate courts can also retain jurisdiction, which means that the appellate court can ensure that the trial judge follows its instructions on remand. Retaining jurisdiction also allows the parties to immediately challenge what happened on remand with supplemental briefing, without having to go through the expense and delay of a new appeal.

You may even need to refer a judge to the Judicial Tenure Commission.

NEXT STEPS – JUDGES & JUSTICES!

Supreme Court & SCAO:

8

If you are a Supreme Court justice, and you see that the Court of Appeals makes a legally incorrect decision in a family law case, **don't just let it slide** on the theory that family law cases are "fact specific." The Supreme Court very rarely weighs in on child-related cases, which means there are lots of appellate decisions, some of them questionable, which are being used by attorneys, trial judges, and appellate judges to maintain the status quo of the law.

9

The Supreme Court should issue more opinions in family law cases. Too many times, particularly with child-related cases, the Supreme Court has decided a family law case with an order, not an opinion.

There have been several orders that benefit family law, but orders do not get the attention of the bench and bar as much as opinions do.

NEXT STEPS – JUDGES & JUSTICES!

Supreme Court & SCAO:

10

If you are a Supreme Court justice, you should instruct SCAO to do a better job of **tracking judges who are being reversed** for erroneous family law decisions.

This information should be publicly available because voters have the right to know if judges who are elected or retained by voters after an appointment are following the law or not.

11

If you are a Supreme Court justice, you should **actively work with respected family law attorneys** to improve court rules that impact families and children. Unlike other practice areas, most family law attorneys represent a variety of litigants within the family law context.

12

If you are on the Supreme Court, then you should **appoint family law attorneys** to represent that segment in various state bar committees and work groups under the control of the Supreme Court. You should garner input from family law attorneys on issues that will affect families and children, even if only indirectly.

Considering how many family law cases occupy the judicial dockets in this state, family law attorneys are woefully underrepresented in important committees and work groups such as the Access to Justice Committee, the Judicial Qualifications Committee and the Michigan Judicial Council.

NEXT STEPS – JUDGES & JUSTICES!

Supreme Court & SCAO:

13

If you are a Supreme Court justice, you are charged with approving family court plans. Family court is handled differently around the state, so there is no consistency. These plans have permitted the counties to not have a dedicated family law seat or seats. It has enabled persons running for one position, such as district judge, then be assigned to the family law seat. It means that in some counties, the family law judge is a probate judge while in other counties, the family law judge is a circuit judge. There is no effective way for all of these family law judges to communicate and learn from each other. **Please scrutinize family court plans that are presented to you.**

THE GUIDEBOOK

PREPARED BY:
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