

2007

The Road Goes on Forever and the Party Never Ends': A Response to Judge Tacoma's Prescription for a Return to Foster Care 'Limbo' and 'Drift'

Frank E. Vandervort

University of Michigan Law School, vort@umich.edu

Available at: <https://repository.law.umich.edu/articles/1364>

Follow this and additional works at: <https://repository.law.umich.edu/articles>



Part of the [Family Law Commons](#), [Juvenile Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Vandervort, Frank E. "'The Road Goes on Forever and the Party Never Ends' A Response to Judge Tacoma's Prescription for a Return to Foster Care 'Limbo' and 'Drift'." *Mich. Child Welfare L. J.* 10, no. 3 (2007): 43-58.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.



“The Road Goes on Forever And the Party Never Ends”¹:

A Response to Judge Tacoma’s Prescription for a Return to Foster Care “Limbo” and “Drift”

by Frank E. Vandervort, JD

Wexford County Probate Judge Kenneth Tacoma has written a thought-provoking article that brings attention to a very real problem: the excessive number of youth who are permanent wards but who have no realistic hope for adoption or other permanent plan. We should all thank him for encouraging a serious discussion about what to do about this problem. But the Judge’s prescription for addressing this important consequence of current child welfare law is ultimately

unconvincing. If his suggestions are followed—and it appears that they have been taken seriously by the Michigan Supreme Court, which quietly convened a task force to look into making recommendations for policy changes as a result of Judge Tacoma’s concerns—Michigan would most likely return to the days of foster care “limbo” and foster care “drift.”

We haven’t heard those terms much for the past two decades, but it would be wise for our policy mak-

ers to investigate and ensure that they fully understand them and their implications before forging ahead with Judge Tacoma's proposals. Judge Tacoma mentions, in passing, the concept of "limbo" but does not describe the very real problem it presented to children stuck in a foster care system that would not make a decision. He fails to even mention the problem of "drift," which was closely associated with the idea of "limbo." Much discussed in the 1970s, foster care "limbo" described the temporary status of foster children in the days before the enactment of the Adoption Assistance and Child Welfare Act of 1980, the federal government's first legislative effort to reform the nation's foster care system. "Drift," was used to describe the phenomenon of children moving from foster home to foster home or "drifting" through the system. Clearly, these phenomena still exist, but if Judge Tacoma's recommendations become law, they will be the official policy of the state of Michigan.

This article responds to Judge Tacoma's suggested changes in Michigan law. It begins with a very brief history of child welfare legislation at the federal and state levels. Next, it points out a number of errors in Judge Tacoma's understanding of the current state of Michigan's child welfare law.² It is necessary to point out these errors because it seems that his misstatements of the law form the foundation for his recommended reforms. Then it will respond point-by-point to many of Judge Tacoma's recommendations. Finally, I will offer several suggestions for addressing the problem of legal orphans that do not require legislative or policy changes, but would require that we make significant changes in the way child welfare law is practiced in this state.

A Brief History

Child welfare is an area of the law that seems to have been particularly vulnerable to pendulum swings as policymakers have tried to develop a set of rules to address an infinite variety of exceedingly complex problems of human functioning. Before 1980, children entered the foster care system and very often there they stayed. Stayed, that is, until they were someday released from foster care on their own. Perhaps at some point they were returned to the custody of their natural parents, but there was no requirement that they were to be returned or that an alternative permanent plan be made for them, and state law differed widely on these issues.

Children routinely spent their entire childhoods in "temporary" foster care. For example, in 1977 the United States Supreme Court decided *Smith v Organization for Foster Families for Equality and Reform*,³ in which it was called on to delineate the constitutional rights of foster parents who had parented foster children for many years. The children at issue in that case had lived with their foster parents for as long as 10 years. Similarly, *Santosky v Kramer*,⁴ in which the Supreme Court addressed the standard of evidence required by the constitution before a parent's rights could be terminated, involved three children. One entered foster care in November 1973, the other two in about September 1974. The state moved to terminate parental rights for the first time in September 1976, but the trial court rejected the state's effort. The state again sought termination of parental rights in October 1978. Such long stays in "temporary" foster care were not at all unusual in those days.

If these long stays in foster care were not bad enough, children were frequently moved from foster home to foster home. Our current child welfare system still struggles with stability. But in those days, before the federal government stepped in with financial incentives to stop the practice, many states moved children as a matter of policy whenever they grew emotionally close to their foster parents.

In response to children's long stays in the uncertainty of temporary foster care, the federal government enacted the Adoption Assistance and Child Welfare Act of 1980 (AACWA). The AACWA established a funding scheme that sought to achieve three main goals: 1) reducing the numbers of children entering foster care by mandating that "reasonable efforts" be made to prevent the removal of children from their natural parents' custody; 2) the expediting of children's movement through the foster care system by, among other things, requiring states to make "reasonable efforts" to reunify children with their natural parents and establishing a requirement of permanency planning hearings after the child had been in care for 18 months; and 3) providing federal funding assistance to encourage adoption of those children who could not be returned home.

In response to the AACWA, in 1988 Michigan overhauled its Juvenile Code. Those revisions were based on the findings of the Coleman Commission, which was chaired by then Supreme Court Justice

Mary Coleman, and were commonly referred to as the Stabenow legislation for then-State Senator Debbie Stabenow, the primary sponsor of the reform legislation. Among other things, the Stabenow reforms required “reasonable efforts” before children could be removed from their homes and, once removed, before the court could terminate parental rights. That legislation led Michigan to establish Families First and similar programs in an effort to preserve families and stem the tide of children entering the foster care system.

The Stabenow reforms—as was the federal law—were widely misunderstood. It became the typical interpretation that every conceivable effort to prevent foster placement or to reunify a family had to be made. As a result, many children were harmed by the reluctance to remove them from abusive and neglectful parents. On the national level, the case of Joshua DeShaney, a 4-year-old boy who was severely beaten and brain damaged at the hands of his father while the state’s child welfare workers took notes, is but one example of the way family preservation programs were misused.⁵ Some children died.⁶

Many more children remained stuck in foster care “limbo” despite efforts to move them through the foster care system and either back home to their parents or on to alternative permanent homes. In 1998, in *In re Sherman*,⁷ a panel of the Michigan Court of Appeals expressed its exasperation with the slowness of child welfare proceedings in this way:

[T]he basic facts and procedural history of this matter are part and parcel of the sadly familiar litany of parental neglect and failure, substance abuse, behavioral problems, and tortuous and prolonged legal proceedings that so often characterize parental rights termination cases. At the outset of such cases, one may well wonder whether the state is justified in proposing the ominously final step of terminating parental rights; at the conclusion, one can only wonder what took so long.

Because it believed its intent in enacting the AACWA was misunderstood, in 1997 Congress enacted the Adoption and Safe Families Act (ASFA). Broadly speaking, ASFA had the same three goals as the AACWA: to reduce the number of children entering foster care, to move children who are in the system into permanent homes in a timeframe that is consistent with children’s developmental needs, and to

promote the adoption of children from the foster care system. Additionally, Congress sought to clarify its intention with regard to the application of the “reasonable efforts” requirement making explicit that the interests of children in safety and permanency are the system’s paramount considerations.⁸ ASFA was signed into law in late 1997, and the first wave of the Binsfeld legislation was signed into law in December of that year; a second package of bills was signed into law by the governor in December of 1998. With Binsfeld, Michigan met or, in some cases, accelerated the ASFA timelines.

With only minor variations, this is where our law stands today.

Misunderstanding the Law

Before turning to the policy recommendations Judge Tacoma suggests, it is necessary to address the misunderstandings of the law reflected in his article. In a very fundamental way, his article communicates a misunderstanding of Michigan law as it relates to termination of parental rights, which leads to faulty conclusions about how to address the problem of legal orphans.

Permanency Planning Hearings After One Year

Judge Tacoma first asserts that the “one-year rule” contained in Mich. Comp. Laws § 712A.19a contributes to the excessive use of termination of parental rights. The operative provision of Section 19a is subparagraph 5. He argues that this provision of the law makes termination of parental rights “the default option” and “the mandated case plan if a child remains in foster care for one year after initial placement.”⁹

But a careful analysis of the most salient portions of that provision demonstrates that this is not the case at all. The first sentence of subsection (5) reads: “If parental rights to the child have not been terminated and the court determines at a permanency planning hearing that the return of the child to his or her parent would not cause a substantial risk of harm to the child’s life, physical health, or mental well-being, the court shall order the child returned to his or her parent.” Clearly, then, the preference articulated in the statute is not a default to termination, but the precise opposite, a default for return of the child to the parent’s custody unless the court finds a “substantial risk of harm” exists.

In a child protection case that reaches the stage that 19b(5) applies, the parent will have been shown to have abused or neglected the child. He or she will have been given as much as a year to engage in services aimed at assisting the parent to regain custody. Yet despite these efforts, the court must still find that the child would be at a “substantial risk of harm” before the court may take any action other than returning the child to parental custody. So, after having been at least once victimized by the parent and forced to uproot his or her life to live with relatives or strangers and waiting around for a period of time that might be his or her entire life, at the end of one year, the child shoulders the risk of harm unless that risk is deemed “substantial” by the court. This seems a more than fair effort to balance the interests of parents with those of their children.¹⁰

The statute goes on in an effort to level this shouldering of the burden. It provides: “In determining whether the return of the child would cause a substantial risk of harm to the child, the court shall view the failure of the parent to substantially comply with the terms and conditions of the case service plan . . . as evidence that return of the child to his or her parent would cause a substantial risk of harm to the child’s life, physical health, or mental well-being.” That is, unless the parent has made real and consistent efforts to improve his or her parenting capacity—which was previously found to be below the minimum acceptable level after the application of full due process procedures—the law will assume that the parent continues to be unfit. Where the parent has “substantially complied,” he or she has produced evidence that she is no longer unfit to parent the child.¹¹ This assumption that a parent who has not complied with the ordered services continues to be unfit seems more than reasonable given the large amount of assistance offered to the parent in the form of various treatment programs and casework services.

It is unfortunately true that some parents—perhaps many more than we are willing to admit—are simply incapable of being helped, regardless of how much assistance they are provided, in anything like a reasonable time when we take into consideration the needs of their children.¹² Anyone who has done child welfare work for any length of time has likely been involved in a case in which a parent with long-standing mental health problems (which may include numerous psychiatric hospitalizations), or a serious substance

abuse problem, insists on residing with a partner who abuses both her and her children.

These cases are often complicated by the presence of poverty. And this co-morbidity is routinely encountered in child welfare practice. How can we possibly untangle such a knot in a year—or two or three years for that matter? And what should we do with the children of these families while their parents struggle with their problems? We cannot simply place children into a state of suspended animation. They grow; they develop attachments to other adults; to ensure their well-being, children need a stable primary attachment figure and a sense of long-term stability. While our child welfare system too often falls short of our goal that children have a stable family life within a reasonable time, taking into consideration the particular child’s developmental needs, enacting many of Judge Tacoma’s suggestions into law would make these unfortunate outcomes the official *policy* of the state, a policy that has been tried and that demonstrably does not serve the interests of children.

Of course, the application of the “one-year rule” doesn’t really mean that children must wait only a year for permanency or that parents are offered only one year of services in an effort to regain custody of their children. If we assume that the child has been in care for one year and the court holds the required permanency planning hearing at that time, neither the child’s hunt for permanency nor the obligation to provide services to the parent is done. The child welfare road is long, and the child has only just begun his journey.

The *Trejo* case provides a convenient example for understanding how the system actually works. In *Trejo*, after the parent rejected the agency’s efforts to preserve her family, the agency filed a petition and the trial court held a preliminary hearing on May 2, 1995. The court authorized the petition and ordered the children removed from parental custody. Later that month, the parents entered a plea. The children were initially placed with relatives and were replaced into foster homes in October 1995. The court held various review hearings. A permanency planning hearing (PPH) was held June 12, 1996, more than 13 months after they were removed from parental custody. It took another month, until July 12, 1996, for the agency to actually file the termination petition, this was actually expeditious because under the law the agency has 42 days to file if ordered to do so at the PPH.¹³ The court

held numerous days of hearings on the petition, but not until December 2, 1996, did the court enter its order actually terminating parental rights.

These timeframes are not at all atypical, particularly in our more urban jurisdictions where the vast majority of this state's child welfare cases are heard. As this case demonstrates, the so-called "one-year rule" can regularly stretch to 18 months or two years. The Trejo children's search for a permanent home wasn't, of course, over at that point. The appeals began. In *Trejo*, the Michigan Court of Appeals issued its opinion affirming the termination of parental rights on June 12, 1998, a year-and-a-half after the termination. Fortunately, due to steps to expedite these cases, it currently takes about a year for a child welfare case to be decided by the Michigan Court of Appeals. The kids remain in "limbo" while this process takes place.¹⁴ The Michigan Supreme Court issued its opinion in *Trejo* on July 5, 2000, some five years and two months after the Trejo children's saga of "temporary" foster care placement began.

Clearly the "one year rule" doesn't mean a year for the children involved. It most often means substantially more, and it may mean their entire lifetime!

Judge Tacoma laments that the "one-year rule" requires a movement in the direction of termination "even if other options (such as continued work with the parent(s) on a case service plan, long-term foster care or long-term relative placement) might be available for consideration." I will address each of these three options in turn.

First, the mere fact that the statute may require in some cases that the agency pursue termination after one year from the child's entry into the system, does not mean that services stop at that point. Indeed, Michigan law seems to require that services continue until the court actually terminates parental rights. The Juvenile Code requires the court to put in place a treatment plan as part of the dispositional order.¹⁵ The statute also presumes that those services will be provided until the court actually terminates parental rights.¹⁶ So, "continued work with the parent(s)" after the filing of the termination petition is built into the current scheme for termination of parental rights.

Second, regarding long-term foster care, Judge Tacoma expresses concern that the court has too few options for using this means as an alternative to termination of parental rights. I disagree.

The Juvenile Code specifically grants the court substantial authority to extend foster care placement

when doing so will serve a child's interests:

If the court determines that it is in the child's best interests based upon compelling reasons, the child's placement in foster care may continue on a long-term basis.¹⁷

This language is designed to comport with the language of the Adoption and Safe Families Act (ASFA).¹⁸ ASFA generally requires the state to pursue termination of parental rights when a child has been in foster care for 15 of the most recent 22 months.¹⁹ The federal statute, however, provides three broad exceptions to this requirement: 1) where the child is being cared for by a relative, 2) where a "compelling reason" has been documented that filing a petition to terminate parental rights "would not be in the best interests of the child,"²⁰ and 3) where the state has not provided adequate services to meet the reasonable efforts requirement. Moreover, ASFA specifically grants state courts broad authority to take whatever action would serve the child's interests in individual cases, without suffering any negative federal funding consequences, even if the state's child welfare agency does not agree with the action. Thus, 42 U.S.C. § 678 provides:

Nothing in this part [Title IV-E of the social security act] shall be construed as precluding the State courts from exercising their discretion to protect the health and safety of children in individual cases, including cases other than those described in section 671(a)(15)(D).²¹

Moreover, Michigan's Juvenile Code specifically provides for permanent foster family placement when that placement would serve the interests of a child who is 14 years of age or older.²² A child who is placed pursuant to a permanent foster family agreement remains under the court's jurisdiction, and the court must conduct review hearings at six-month intervals.²³ Plainly, the permanent foster family agreement provision establishes, for some children, that foster care is a permanent placement. Used wisely, these various provisions of law provide the court(s) with broad discretion to maintain a child in a foster home or other non-relative foster care placement.

Judge Tacoma's third concern has to do with inadequate statutory authorization to use long-term relative placement when doing so would serve the child's interests. Again, I disagree.

As already noted, if the child is placed with a relative, ASFA does not mandate that the Depart-

ment of Human Services file a termination petition, even where the child has been in foster care for 15 of the most recent 22 months,²⁴ and it grants the court broad decision-making authority with regard to the child's placement.²⁵ So there is no federal funding prohibition against the extension of "temporary" placement with a relative.

Michigan law is consistent with the federal law. The Juvenile Code, court rules,²⁶ and Department of Human Services policy²⁷ all strongly favor relative placement. Moreover, the legislature has recently expanded the definition of a "relative" to open additional placement resources for children.²⁸

In the appropriate case, the court has the authority to grant legal guardianship to a relative or to another adult whom the court determines can provide adequately for the child.²⁹ To ensure maximum flexibility in ensuring the child's safety, the statute specifically permits the court to dismiss the child protection proceeding when guardianship has been granted or to keep the child protection proceeding open.³⁰

Even if a case is not resolved by granting a guardianship to a relative, the Juvenile Code contemplates that relative placement under the court's supervision may constitute a permanent placement. Thus, the statute provides: "If a child is under the care and supervision of the agency and is . . . placed with a relative and the placement is intended to be permanent . . . the court shall hold a review hearing not more than" every six months.³¹

Taken together with the court's broad authority to amend or supplement its orders "within the authority granted to the court in section 18"³² of the Juvenile Code, the court has a great deal of flexibility to craft a dispositional order that will both provide permanency to each child and consider the special circumstances of his or her particular case. In those cases in which none of these options are suitable, the court may need to proceed to hearing on a termination of parental rights petition. But, again, Judge Tacoma seems to misunderstand the law's requirements.

Section 19b(5) and Trejo

Judge Tacoma's second major misstatement of the law involves his understanding of the purpose and methods of Mich. Comp. Laws § 712A.19b(5)³³ and the Michigan Supreme Court's *Trejo*³⁴ decision. His article repeatedly refers to these sources of law as creat-

ing a "statutory presumption requiring termination." This is simply wrong. The court in *Trejo* repeatedly rejected the argument that subsection 19b(5) establishes a presumption in favor of termination. The majority explained:

reading subsection 19b(5) in its entirety, we conclude that subsection 19b(5) preserves to the court the opportunity to find that termination is "clearly not in the child's best interests" despite the establishment of one or more grounds for termination.

We reject *Hall-Smith's* characterization of subsection 19b(5) as creating a rebuttable presumption. . . .³⁵

Rather than create a presumption as Judge Tacoma asserts, the court elaborated on the purpose of subsection 19b(5), explaining that it "attempts to strike the difficult balance between the policy favoring the preservation of the family unit and that of protecting a child's right and need for security and permanency."³⁶ Later in its opinion the court reiterated its conclusion that subsection 19b(5) creates no presumption:

We conclude that . . . the subsection 19b(5)'s [sic] best interest provision, in fact, provides an opportunity for the court to find that termination is clearly not in the child's best interest, despite the establishment of one or more grounds for termination.³⁷

A careful reading of the *Trejo* case demonstrates that while courts have less discretion today in determining not to terminate parental rights than they had before the 1994 addition of subsection 19b(5), they retain considerable discretion in making the final decision whether to terminate parental rights.³⁸ It must, of course, be remembered that before the enactment of subsection 19b(5), judges had the very sort of broad discretion for which Judge Tacoma again advocates. It was their failure to exercise that discretion wisely—which led to vast numbers of children lingering in the impermanency of "temporary" foster care for years—that caused the legislature to rein in their discretion.

The judge relies on a related misunderstanding regarding subsection 19b(5). He asserts that the law currently shifts the burden to prove the child's best interest to the parents or to the children who are the subject of a request for termination of parental rights. This, again, is a misreading of subsection 19b(5) as

interpreted by the court in *Trejo*. Indeed, the court explicitly rejected the suggestion that subsection 19b(5) shifts the burden of proof to the parent or, by implication, to the child. The majority wrote:

we hold that under subsection 19b(5), the court may consider evidence introduced by any party when determining whether termination is clearly not in the child's best interest. . . . Thus, we expressly reject the dicta of *In re Boursaw*, 239 Mich. App. 161, 180 . . . (2000), that, "if the parent does not put forth any evidence addressing the issue [of the child's best interests], termination is automatic."³⁹

Later in its opinion, the court reemphasized this point: "Rather than imposing an impermissible burden on respondent, the best interest provision of subsection 19b(5) actually provides an opportunity to avoid termination, despite the establishment of one or more grounds for termination."⁴⁰

Mandatory Petitions to Terminate Parental Rights

Judge Tacoma asserts that a third provision of the law contributes to the excessive use of termination of parental rights, the mandatory filing provisions contained in the Child Protection Law.⁴¹ While he recognizes that "in most cases the presence of the kinds of abuse or neglect enumerated in the statute justifies and should require termination of parental rights," he objects to the legislature's removal of discretion "from professionals."⁴² I will make two points in regard to this argument.

First, the law does not remove discretion from "professionals." Rather, it shifts discretion from child welfare professionals employed by the executive branch of government to the judicial branch. Nothing in the Child Protection Law or the Juvenile Code requires the court to terminate parental rights in response to a mandatory petition. Indeed, nothing in the law requires that the court even authorize such a petition or approve the request for termination of parental rights at the initial disposition. In many cases in which a mandatory termination petition is filed, the protective services worker states at the preliminary hearing that he or she would not have made the request for termination but for the statutory mandate, and the court simply proceeds on the petition as though it requested temporary custody.

Secondly, it is critical to recall why our Child Protection Law requires the state child welfare agency

to file these mandatory petitions to terminate parental rights. The Binsfeld Commission's report articulated numerous reasons why legislation mandating petitions requesting termination of parental rights at the first disposition was necessary.⁴³ Among those were the lack of any mechanism within the agency to identify cases to which the reasonable efforts were not necessary,⁴⁴ the agency routinely misapplied the reasonable efforts required so that children were endangered,⁴⁵ a lack of access to legal counsel on the part of agency workers; a lack of training for both agency workers and prosecutors regarding when termination at an initial dispositional hearing is appropriate, and poor coordination between prosecutors and social workers resulted in improper preparation and presentation of cases.

As a matter of public policy, it makes little sense to expend our very limited resources attempting to rehabilitate parents who rape, batter, torture, kill, or attempt to kill their children, for this is the very group of parents least likely to meaningfully benefit from the application of human services.⁴⁶ In those rare cases of this sort in which the parent may benefit from those services, the court retains discretion to refrain from terminating parental rights.

Having addressed the three provisions of the law that Judge Tacoma expresses concern about, I will next consider his suggested remedies.

Suggestions for Change

Judge Tacoma makes a number of suggestions for changes to the law to address what he has identified as disconcerting. I agree with some of his suggestions; others are unwise. I will first make a few general observations and will then address a number of the specific recommendations.

It is important to recognize that no statute, policy, or practice will solve all the problems presented by child welfare practice. Even the seemingly simplest child welfare case is infinitely complex because human emotions and relations, as the Judge suggests, are infinitely complex. But it is important to recognize that every change will have consequences that we do not intend or that are predictable but undesirable. The admittedly excessive number of legal orphans in Michigan's foster care system is one predictable but undesirable consequence. So we must make our policy choices wisely, understanding that there will always be cases that do not turn out as we would hope.

Unlike Judge Tacoma, I believe that the statutory structure of our child welfare system currently

provides sufficient discretion to judges to address this problem. Conversely, adopting the reforms Judge Tacoma advocates would predictably result in even larger numbers of children stuck in an unending “limbo” of the foster care system, “drifting” from placement to placement, rootless and with no hope of ever having a family connection.

In his article, the judge relates a number of anecdotes to illustrate his concerns. In each case, he suggests that termination of parental rights was not the answer. Perhaps he is correct in some of those specific cases; he certainly knows those cases much better than I. But in none of those cases does he suggest an outcome that would actually improve the child’s chance for a permanent family, that would ensure reunification with a parent who is even minimally fit to care for the child, or a standard that would result in an alternative permanent home for the child. In each illustration, the result of what he advocates would be a child stuck in the “limbo” of “temporary” foster care. Let me now comment on a number of the judge’s specific recommendations.

The “One-Year Rule”

I have already addressed how the “one-year rule” really isn’t, but is instead a much longer period of time during which the child must wait for permanency and the parent must be provided services. I am deeply troubled by Judge Tacoma’s rationale for eliminating the rule. He writes:

Often the rule is implicated in cases where the child(ren) are the subject of neglect (such as a parent’s persistent, treatment resistant drug abuse or instability from transient meretricious relationships by a young mother so typical in these cases) rather than active abuse, in which the long term likelihood of building a successful family should be considered on a case-by-case basis.⁴⁷

There are two major flaws in the judge’s reasoning. First, as a technical matter, nothing in the current law prohibits the court from considering those circumstances in a given case, so a change in the law is unnecessary. Indeed, at both the permanency planning hearing and at a termination of parental rights hearing these may be legitimate considerations.

Second, and more concerning on a policy level, an utter lack of a statutory ending date for the application of services aimed at reunification is a prescription for a return to the days of unending foster

care “limbo.” I find particularly concerning the two categories of cases the judge suggests illustrate the need for a policy change: recalcitrant substance abuse and parental immaturity. The first of these may very well be a lifelong struggle for the parent, and if the problem is so severe that the state has stepped in to remove the parent’s children, it will almost always take years for the parent to establish sobriety and stability. The only prescription for the second is waiting while the parent matures and is able to function psychologically as a responsible adult, which, of course, may never happen. But as I’ve already said, children don’t wait in a state of suspended animation. They grow and develop. For an adult, a year seems a short time, but a child’s sense of time is very different, and a year may feel like an eternity to him or her.

Beyond these concerns, Judge Tacoma makes a mistake that lawyers and judges often make—the attitude that “it’s just neglect” so we should give parents more time. Legal professionals almost routinely discount the impact of neglect on children.⁴⁸ But neglect is very often the most difficult form of child maltreatment to respond to. As the judge’s examples make clear, many different parenting problems fall under the “neglect” rubric. A parent who is developmentally delayed, mentally ill, substance addicted, and has lived in a series of violent relationships and who cannot care for his or her child as a result is said to have “neglected” his or her child.⁴⁹ Obviously, co-morbidity of this sort, which is very often present in cases of neglect, presents extreme challenges for treatment providers.⁵⁰ Moreover, because most parents who neglect their children were themselves neglected as children, they disproportionately consume limited public resources.⁵¹

More important than the difficulty of responding adequately to a parent who “neglects” her child is the impact of parental neglect on children. What we label “neglect” may have devastating consequences for children. First, more children die each year as a result of neglect than die as a result of abuse.⁵² Even when it doesn’t result in death, neglect may have devastating impacts on children’s development.⁵³ For example, neglect may negatively impact a child’s brain development and may cause delays in “cognitive, language and academic skills.”⁵⁴

Changing the 19b(5) “Presumption”

Judge Tacoma asserts that “the current presumption insisting on termination if the statutory grounds

are proven should be reversed.”⁵⁵ Because, in my view, the court retains the necessary authority to decline to terminate parental rights, I do not see a need to change the current statutory scheme as it was interpreted in *Trejo*. If the lawyers are doing their jobs properly—that is, zealously representing their clients—the court will be fully informed regarding the relevant issues in the case.

In analyzing whether we should change subsection 19b(5), it is important to understand what a child in such a case will have experienced by the time the case reaches this point in the proceeding. A child who sits on the threshold of termination of parental rights has already suffered abuse, or, more likely, long-term, serious neglect at the hands of his or her parent. That parent and child should typically have received in-home services in the form of Family First, or a related program, to preserve the family before a petition is filed with the court.⁵⁶ After a petition is filed, the parent will have admitted or the court will have found, through the application of procedures meeting due process standards, that the parent was in fact abusive or neglectful. The court and agencies will have expended at least a year attempting to redress the issues that brought the child to the court’s attention.

At this posture in the case, when parental unfitness has been demonstrated and parental inability or unwillingness to engage in a serious way in services aimed at rehabilitation, adding an affirmative best interest element to the petitioner’s burden will not improve the quality of judicial decision-making for the child. Moreover, such an added element, without regard to whatever specific best interest factors the legislature or appellate courts might require be examined, will ultimately not remove the subjective nature of the decision. As *Trejo* makes clear—and as is equally clear under the Child Custody Act best interest scheme—the final decision on best interests will be subjective. Giving judges the ability to postpone the crucial decisions to be made will end up hurting more children than it helps.

What we should glean from our experience in child welfare over the past three decades is that 1) it is difficult for people to change, and 2) the Department of Human Services and courts make poor parents. At the same time, children need stability and, to the extent possible, a single set of caregivers. Thus, children will generally be best served if their parents are provided a time-limited opportunity to regain

custody of them, and when that time expires, a judge is required to make a series of very difficult decisions about that child’s future. Changing the law so that judges can delay making these very difficult decisions will take the pressure off judges. But it will not serve the interests of the largest number of children who are in the foster care system. Adding an affirmative best-interest element to the burden on the petitioner will predictably result in many more children spending years marking time in the foster care system while their parents continue to be incapable of caring for them. Many of the children so afflicted will become unadoptable or ineligible for another permanent resolution of their situation *because* they’ve waited too long for permanency.

Expand Alternatives

By this point, it should be obvious that Judge Tacoma and I view these matters very differently, so it is gratifying to find common ground. I wholeheartedly agree that we should constantly endeavor to find programs and processes that produce better outcomes for children and families. The Permanency Planning Mediation Pilot program is one such program.⁵⁷ Other helpful programs include family-group decision-making, and team decision-making meetings now employed by the Department of Human Services. Additionally, a bill currently pending before the legislature could establish another useful option in that it would provide for financial assistance to a relative who becomes a child’s guardian.⁵⁸ Illinois has, for several years pursuant to a Title IV-E waiver, provided for permanent, subsidized guardianship for a child in the foster care system for whom the court has determined that adoption is not an available option.⁵⁹

Best Interest Factors

Judge Tacoma asserts the need for a listing of best interest factors similar to those applicable under the Child Custody Act and to guardianship proceedings. He would prefer that the legislature or appellate courts instruct the judges of this state what factors are relevant to the best interest determination; I believe the determination of what is relevant to the child’s best interests in a particular case should be left to the individual judge and made on a case-by-case basis. Lawyers and judges should receive training regarding the complexity of the best interest determination in the context of child protective proceedings. That train-

ing should include, at a minimum, information about the normal course of child development and a child's various needs at each stage in the process, information about the confounding and counterintuitive nature of children's behavior in the child welfare context,⁶⁰ and information about the need for interdisciplinary collaboration in determining what legal outcomes would best serve a particular child's interests. In addition to this overarching criticism of the need for a set of articulated best interest factors, I have both general and specific concerns about the use of best interest factors in child protection cases.

In general, I do not see the need for a list of factors to be established by either the legislature or appellate courts when a trial court may look to the "whole record" in determining what will best serve a particular child. One concern is that if a judge fails to articulate a rationale regarding one such factor, appellate courts will reverse or remand cases to the trial court to give them the opportunity to address the factor.⁶¹ While the Child Custody Act has contained a list of best interest factors for decades, trial courts from time-to-time still simply fail to address the factors.⁶² In a child protection case in which the child resides in temporary care with no viable parent, such an outcome would further delay the child's search for a permanent and stable family and would be seriously damaging to the child. Moreover, having a set of factors that trial courts must address does nothing to ensure that judges will actually exercise their discretion wisely.⁶³ In several places in this article I take issue with Judge Tacoma's interpretation of facts as they relate to a child's best interests. No set of best interest factors will prepare a judge to confront the sometimes bewildering behavior of abused and neglected children—the horribly abused child who professes undying love and commitment to his abuser, the sexually abused child who runs joyfully into the arms of the perpetrator.

Having registered general objections to the establishment of a list of factors, for the most part I think that Judge Tacoma's list of proposed factors are relevant and should typically be addressed by counsel for each of the parties to a termination of parental rights petition and by the court. I will very briefly address each of his proposed factors.

The Age of the Child

First, regarding the age of the child, I fully agree that the age of the child should be considered in every

termination proceeding. Nothing in the current law prohibits the court from doing so. I disagree that a child who is 14 years of age or older should be permitted to veto a termination request as Judge Tacoma advocates. I find his reference to the common law's infancy rule in criminal cases entirely unpersuasive in this context. I do agree that the expressed desires of an older, and presumably more mature, minor should be carefully considered, not least because under our Adoption Code a child over 14 years of age must consent to be adopted.⁶⁴ I leave room, however, for the possibility that termination of parental rights may serve the interests of an older youth even if he or she does not wish to be adopted. I have been involved in cases, for instance, in which mental health professionals have testified that termination is necessary, even when the child does not want such a result, to permit the child to make progress psychologically. While these cases are admittedly rare, it is certainly not rare that adolescents cannot know what is best for them.

The Child's Attitude Toward Termination

Judge Tacoma's second factor would be the child's attitude toward termination. Again, as a general matter, I agree. Children's expressed wishes should be taken into consideration.⁶⁵ Where I part company with Judge Tacoma is the weight to be accorded the statements of young children and how children's behavior and statements should be interpreted. In arguing for this factor, Judge Tacoma cites a case in which an 8-year-old child threatened to sabotage adoption and to physically harm the judge by shooting him and cutting his throat for terminating the rights of the parent.⁶⁶ Judge Tacoma concludes that this boy's reaction is evidence that termination of parental rights was the wrong decision for the boy. But in my view, this case does not illustrate why the case should not have resulted in termination of parental rights. Rather, it in fact supports the court's termination decision. Moreover, it illustrates how weighing children's statements—and related behavior—about termination can be confounding and contrary to their own best interests. Children who have been abused and neglected for years—the boy to which Judge Tacoma refers was seven at the time he came to the court's attention and eight at the time of termination—can learn to *model* the parent's unacceptable behavior and/or form *traumatic bonds* with their abusive or neglectful parents. As Dr. Judith Cohen and Anthony Mannarion,

Ph.D., leading researchers on the impact of trauma on children have recently explained:

Modeling occurs when children who grow up in abusive or violent homes and communities have many opportunities to observe and learn maladaptive behaviors and coping strategies. They may also see those behaviors being rewarded repeatedly. For example, a child who experiences physical abuse and domestic violence may erroneously conclude that anger and abuse are accepted ways of coping with frustration.⁶⁷

Similarly, the fact that a child has a strong attachment to an abusive parent does not mean that that attachment is healthy or that termination of parental rights would not serve the child's long-term interests. Again, Drs. Cohen and Mannarino explain:

Traumatic bonding involves both modeling of inappropriate behaviors and maladaptive attachment dynamics. It also involves acceptance of inaccurate explanations for inappropriate behaviors. It has been described in the psychoanalytic literature as identification with the aggressor and in law enforcement as the Stockholm syndrome. . . . Such children may bond with the violent parent out of self-preservation. To manage the guilt and cognitive dissonance associated with turning against the victimized parent, these children may adopt the violent parent's views, attitudes, and behaviors toward the victimized parent and become abusive or violent themselves.⁶⁸

Obviously, I am not a mental health professional and no credible mental health professional would suggest that these dynamics are at work in the case the judge uses to illustrate his point without a comprehensive evaluation. My point is this: children's reactions to those who step in to help them overcome the damage done by their abusive and neglectful life experiences can be difficult to understand and counterintuitive. Lawyers and judges should always seek the advice of competent mental health professionals when seeking to understand children's behavior and statements in context.

The Type and Extent of Abuse or Neglect

Obviously, this should be considered. Again, nothing in current law prohibits the court from considering it as part of "the whole record."⁶⁹ The case that

Judge Tacoma posits to illustrate the need to ensconce this factor into law involves a young mother who cannot maintain a home that is physically minimally suitable or who lacks the ability to leave a "pernicious" companion. That is, he laments the need to terminate parental rights where a parent is merely neglectful. As I have discussed earlier, in such a case, the mother would have already been provided both in-home services to prevent the need for removal and a year's worth of services to address her problems in functioning after the child entered foster care. I have already addressed the devastating consequences that can flow from this sort of neglect. Reasonable questions would be, "If this mother cannot maintain a clean house or leave an abusive boyfriend, how is she going to be even minimally successful at raising this child in a reasonably healthy way? If she can't do it now, when will she be able to? How long must her children wait for her to become more responsible? Will she ever?"

Probability that the Child Will Be Adopted

The clinic in which I work was recently involved in a termination case, filed because the court ordered the petition at the conclusion of the permanency planning hearing, in which the children were 14 and 15 years old. The 14-year-old girl had behavioral problems that resulted in her placement in a residential treatment facility. Similarly, her 15-year-old brother was residing in a residential sex offender treatment program. The only viable parent was a father who had been mostly absent for the children's entire lives but expressed an interest in continuing to work toward regaining custody of his children. The girl had repeatedly indicated she did not want to see her father, but a mental health expert explained that she had been abandoned by everyone who should have loved and cared for her, and her rejection of her father before he could fully reject her was a means of protecting herself from the pain of yet another outright rejection. After hearing the evidence, the judge wisely determined that termination was clearly not in the children's best interests, in part because the children had no viable hope for adoption.

I fully believe the court made the correct decision in this case. Obviously, the court did so under the current regime governed by subsection 19b(5) and *Trejo*. In such a case, it is critical for the lawyers to do their jobs: investigate the case fully, develop a coherent theory of the case, present testimony to support

the theory of the case, and make the most compelling argument for the position taken. But when the court is not satisfied that the lawyers have done so, family court judges should not hesitate to use their extraordinary authority to fully develop the facts of the case to make a fully informed decision.⁷⁰

Economic Factors

While the case Judge Tacoma uses to illustrate his perceived need for this factor is an aberration, I don't necessarily disagree with his suggestion that economic impacts of termination on the children should be considered. Current law permits this. I would caution practitioners to consider this factor very carefully for two reasons. First, in the vast majority of cases, children will be better off financially if their natural parents' rights are terminated and they are adopted. We should not ignore the fact that in most situations, the children we remove come from poor families and are placed with more middle-class families. Also, most children who are adopted from the foster care system are eligible for an adoption subsidy. A related question is, "Who pays?" When a child is adopted and receives both a support and medical subsidy, it is still cheaper for the state than maintaining a child in temporary foster care, so the state will typically benefit economically when a parent's rights are terminated and the child adopted. These factors taken together may suggest a financial reason to favor termination.

My second concern has to do with the potential distorting impact of economic considerations on judicial decision-making. Some years ago, before the existence of subsection 19b(5), while working for a legal aid office in Detroit, I was involved in a case in which I represented a 10-year-old girl. The girl's mother suffered from long-standing and severe mental health problems that were exacerbated by an addiction to drugs. The girl's grandfather had established a \$30,000 trust fund for her that became effective upon his death. The court refused to terminate the mother's rights—the girl had no legal father—despite the passage of nearly three years and the filing of two termination petitions. When I left the job with legal aid, the child was still a temporary ward with no realistic hope to return to her mother, no hope of a new, permanent family, not because she was unadoptable (her foster parents wished to adopt), but because the court would not terminate parental rights and extinguish the child's rights to the trust fund. I don't know

if or how the case was resolved. I do know this: that \$30,000, if she ever got it, cost that child a lot.

Some Recommendations

Having disagreed with Judge Tacoma's general thesis and many of his specific recommendations, I feel constrained to offer some suggestions that I think may address the problem of legal orphans, which, as I have said, I agree with Judge Tacoma, is a very real problem. While none of the suggestions I offer require changes in policy or statute, they do require substantial changes in practice.

First, we lawyers and judges handling child protection cases must educate ourselves in the very complex medical and social welfare issues that are presented by these cases. Throughout this article, I have attempted to point out that these cases present complicated human reactions to very unusual circumstances. We must try to understand these issues so that we do not jump to conclusions that make common sense, but that are in fact wrong and potentially very damaging.

Specifically, we must focus on the impact of complex trauma on children's development. Most of the children entering the child welfare system have experienced more than a single traumatic event and more than one type of trauma (e.g., abuse, neglect, parental substance abuse, exposure to domestic violence between adults in the home), and we must try to understand the effects these multiple traumas have on the individual child.⁷¹ By educating ourselves as much as possible about these allied fields, we can learn to ask the right questions and to know when we should bring in other professionals to assist us in our decision-making.

No matter how hard we work to understand the intricate nature of the harm done to children by abuse and neglect, we cannot hope to know in depth all the medical and social welfare issues that even a relatively straightforward case of child maltreatment presents. So, my second suggestion is that communities develop and use trauma-informed multidisciplinary teams (MDTs) to assess cases of child maltreatment.⁷² Michigan's Child Protection Law has long required the use of MDTs by the Department of Human Services, but they are rarely used in practice.⁷³ For this reason, courts should take the lead in their communities in developing these teams and insisting on their use. MDTs bring together professionals from a num-

ber of disciplines—e.g. medicine, law, social work, psychology, psychiatry, education, and occupational therapy—into a single body, which provides a multitude of perspectives on a particular case. Their use can insulate decision-making from bias or prejudice and can suggest new or different service needs presented by a particular case. MDTs can assist courts in case decision-making. MDTs should be used early in the handling of cases (before the court becomes involved or immediately upon the filing of a petition) and at crucial decision-making points such as permanency planning hearings. A recent study—conducted at the Family Assessment Clinic at the University of Michigan School of Social Work—of the use of an MDT as soon as protective services got involved in cases provides encouraging evidence that early application of MDT services can keep children safely in their homes longer and can help with expediting return of children to their homes when removal is necessary.⁷⁴

My third recommendation dovetails with my second, and is not inconsistent with my next two recommendations, although on first impression that may seem to be the case. When any petition is filed, all dispositional options should be on the table. If we have conducted the sort of comprehensive evaluations I have advocated for in recommendation number 2, and conducted them early in CPS's contact with the family, the result should be a greater application of services to the family before the case is brought to the court, and more effort to maintain the family unit.

Once a petition is filed, we should seriously question the parents' ability and willingness to use services and to benefit from them. I firmly believe that some parents—many more than we are probably willing to admit—simply cannot be habilitated or rehabilitated in anything like a timeframe to meet the needs of their children. But their children are our paramount concern. Thus, in some substantial number of cases, if we have comprehensive, early, multidisciplinary evaluations, we will learn that regardless of what services we offer, we will not see the change necessary to safely reunify the family. In those cases, we should focus exclusively on the needs of the children for permanency and should use the provisions of Michigan law that allow termination of parental rights (or other permanency options) at the first dispositional hearing.⁷⁵

Too often we engage in a year(s)-long, empty exercise of offering services to families that, if we were honest with ourselves, we would recognize either

cannot or will not benefit from those services. This wastes our very limited resources and deprives families that could benefit from more intensive application of professional attention. This helps nobody and actively hurts some children. While we go through the steps of providing services to parents we can reasonably predict will not benefit from them, their children grow older, develop more problems from the instability of foster care, and too many *become* unadoptable in the process.

Fourth, the time to think seriously about the consequences of subsection 19b(5), *Trejo*, and the one-year permanency planning rule is not at the time of the permanency planning hearing or the time the termination petition is filed, but at the time the petition seeking temporary jurisdiction is filed, and at every hearing following the filing.

Preliminary hearings have too often become pro forma proceedings the results of which are a foregone conclusion. They are too often seen as an opportunity to see that the correct boxes on a form order are checked to ensure that federal dollars continue to flow into our child welfare system. This is not their purpose. At the preliminary hearing, we should be thinking very carefully about the case before the court. The court should be demanding at these hearings that the agency filing the petition be able to explain what "reasonable efforts" were made to prevent the removal of the children from the home. We should think carefully about whether removal from the parent's home is really necessary, and should also take more seriously the question whether custody of the child by the parent is truly "contrary to the welfare" of the child.⁷⁶ "What is the permanency plan for the children who are the subject of the petition?" is a question we—and the court—should ask at every preliminary hearing. When reunification is the articulated goal, the court should carefully scrutinize the treatment plan and reject the sort of boilerplate treatment plans that are so prevalent. Are there services that could keep the child safely in the home? Can the court render the child's home safe by ordering the offending person from the home?⁷⁷ In short, courts should focus more closely on whether reasonable efforts have in fact been made before determining that children should be removed.

Finally, courts should consider whether asserting jurisdiction over children but maintaining them in their family home subject to "reasonable terms and conditions" is the best option in a particular case.⁷⁸ Similarly, in some cases it may make sense to return

children to their parents' custody knowing that the family will continue under court supervision for an extended period of time.⁷⁹ In short, lawyers, courts, caseworkers, and agencies must get more creative at crafting dispositions that will keep children safe, will nurture their well-being, and which will seek to rely less reflexively on out-of-home care.

Conclusion

Judge Kenneth Tacoma has identified a real problem of current child welfare practice in Michigan. The excessive number of legal orphans. His prescription, however, runs the very real risk of causing even more severe problems for a larger number of children in the foster care system, a return to the never-ending road of foster care "limbo" and foster care "drift." While our current statutory structure is far from perfect, every change in it will inevitably have unexpected consequences and predictable but unfortunate consequences for the young people it is designed to serve. Although imperfect, Michigan's current law provides practicing judges and lawyers enough flexibility to craft a response to each case that can meet the needs of the children who come to the court's attention. Developing such case-specific planning will require leadership by courts and a refocusing of the use of our resources. To best serve children and families, we must use all of the tools afforded us in the relevant statutes and court rules, and we must train lawyers and judges to use the right tool at the right time. ©

Endnotes

- 1 I want to thank Donald N. Duquette and Vivek Sankaran for their helpful comments on an earlier draft of this article.
Robert Earl Keen, Jr., *The Road Goes on Forever and the Party Never Ends*, on NO. 2 LIVE DINNER, (Sugar Hill Records, 1996).
- 2 Michigan's Child Protection Law, Mich. Comp. Laws §§ 722.621-738 and Juvenile Code, Mich. Comp. Laws §§ 712A.1-32.
- 3 431 U.S. 816 (1977).
- 4 455 U.S. 745 (1982).
- 5 See *DeShaney v Winnebago County Department of Social Services*, 489 U.S. 189 (1989).
- 6 See generally, Richard Gelles, *The Book Of David: How Preserving Families Can Cost Children's Lives* (Basic Books 1997). Gelles was an early proponent of the family preservation movement. But after more than a decade of misuse of family preservation programs, the death of numerous children, and empirical evidence demonstrating that the efficacy of family preservation programs had been overrated, he spoke out against their misuse.
- 7 585 N.W.2d 326 (Mich. Ct. App. 1998).
- 8 42 U.S.C. 671(A)(15).
- 9 See Kenneth L. Tacoma, *Lost And Alone On Some Forgotten Highway: ASFA, Binsfeld, and the Law of Unintended Consequences*, which appears earlier in this issue of the *Michigan Child Welfare Law Journal*.
- 10 See *In re Trejo*, 612 N.W.2d 407, 414 (Mich. 2000)("Subsection 19b(5) attempts to strike the difficult balance between the policy favoring the preservation of the family unit and that of protecting a child's right and need for security and permanency.>").
- 11 See generally, *In re JK*, 661 N.W.2d 216, 223 (Mich. 2003)("the parent's compliance with the parent-agency agreement is evidence of her ability to provide proper care and custody"); see also *In re Gazella*, 692 N.W.2d 708 (Mich. Ct. App. 2005)(parent must benefit from services and not merely comply).
- 12 See David P.H. Jones, *The Untreatable Family*, 11 Child Abuse & Neglect 409 (1987)(discussing in depth the substantial numbers of parents in child protection cases that cannot benefit from treatment); Anne Harris Cohn & Deborah Daro, *Is Treatment Too Late: What Ten Years of Evaluative Research Tells Us*, 11 Child Abuse & Neglect 433 (1987)(noting that one-third of parents in treatment for child abuse reabuse their children while in treatment and that "over one-half of the families served continued to be judged likely to mistreat their children following termination [of treatment]").
- 13 Mich. Comp. Laws § 712A.19a(6).
- 14 See *In re JK*, 661 N.W.2d 216 (Mich. 2003)(prohibiting agencies and courts from proceeding with adoption proceedings after termination of parental rights until appeals are exhausted).
- 15 Mich. Comp. Laws § 712A.18(4) Before the resolution of the allegations in the petition alleging child maltreatment, the parent's participation in a treatment plan is voluntary unless the court orders otherwise. Mich. Ct. R. 3.965(E)(2).
- 16 Mich. Comp. Laws § 712A.19b(5) provides: "If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made. . . ."
- 17 Mich. Comp. Laws § 712A.19a(7)(b).
- 18 See 42 U.S.C. § 675(1)(E).
- 19 *Id.*
- 20 *Id.*

- 21 The cases excepted from application of this provision, those addressed in 42 U.S.C. § 671(a)(15)(D), is that narrow group of cases in which the ASFA mandates that the state make no efforts to reunify the family and instead immediately pursue termination of parental rights.
- 22 Permanent foster family agreements are defined in Mich. Comp. Laws § 712A.13a(1)(i).
- 23 Mich. Comp. Laws § 712A.19(4).
- 24 42 U.S.C. § 675(1)(E).
- 25 42 U.S.C. § 678.
- 26 E.g., the juvenile court rules require that the court inquire at the preliminary hearing whether relatives are available to take placement of a child whom the court orders removed. Mich. Ct. R. 3.965(B)(13). See also Mich. Comp. Laws § 954a(2)(a) provision of the Foster Care and Adoption Services Act which requires the state or its contract agencies to identify and evaluate relatives for placement within 30 days of the child's placement.
- 27 See CFF 722-3 at p. 5; available at: www.mfia.state.mi.us/olmwed/ex/cff/722-3.pdf
- 28 See Mich. Comp. Laws § 712A.13a(1)(j) (defining "relative" for placement purposes at the preliminary hearing) and Mich. Comp. Laws § 712A.18(1)(b) (defining those who are "related" to a child for purposes of dispositional order).
- 29 Mich. Comp. Laws § 712A.18(1)(h).
- 30 *Id.*
- 31 Mich. Comp. Laws § 712A.19(4).
- 32 Mich. Comp. Laws § 712A.19(1).
- 33 I note a minor error in Judge Tacoma's article which, I think, illustrates a broader misunderstanding of the history of child welfare law in Michigan. He implies by the subtitle of his article, "ASFA, Binsfeld, and the Law of Unintended Consequences," that the provisions of Mich. Comp. Laws § 712A.19b(5) to which he objects were part of Michigan's Binsfeld legislation and a part of the response to federal Adoption and Safe Families Act (ASFA). The ASFA was signed into law in November 1997. Most of the Binsfeld provisions were enacted in two waves, the first in December 1997 and the second in December 1998. Section 19b(5), however, was enacted in 1994 in response to different pressures.
- 34 *In re Trejo*, 612 N.W.2d 407 (Mich. 2000).
- 35 *Id.* at 413. See *In re Hall-Smith*, 564 N.W.2d 156 (Mich. Ct. App. 1997).
- 36 *Trejo* at 414.
- 37 *Id.*
- 38 *Id.*
- 39 *Id.* at 413.
- 40 *Id.* at 415.
- 41 See Mich. Comp. Laws § 722.638.
- 42 Tacoma, *supra*.
- 43 See *In Our Hands: Report Of The Binsfeld Children's Commission 36-37* (1996).
- 44 Michigan law has long provided that any petition in a child protection proceeding can request termination of parental rights at the first dispositional hearing. Mich. Comp. Laws § 712A.19b(4).
- 45 The *DeShaney* case is but one example of how the "reasonable efforts" requirement was distorted in the 1980s and much of the 1990s. In practice, "reasonable efforts" was interpreted as "every conceivable effort." In one case handled by the Legal Aid and Defender Association of Detroit in the early 1990s, the agency refused to remove the children from the home so the court ordered "in home" services. Those "in home" services were actually being provided at a local fast food restaurant because the agency determined that the family home was too dangerous for its workers to enter. But they insisted it was not too dangerous for the toddlers who were the subjects of the case to be left in.
- 46 See Jones, *The Untreatable Family*, *supra* note 12.
- 47 Tacoma *supra*.
- 48 See, e.g., Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 Nevada L. Rev. 805 (2006); Sarah H. Ramsey, *The United States Child Protective System—A Triangle of Tensions*, 13 Child And Family L. Q. 25, 27-28 (2001).
- 49 For a brief but helpful discussion of the challenge of co-morbidity in child welfare practice, see Department Of Health And Human Services, *Blending Perspectives And Building Common Ground: A Report To Congress On Substance Abuse And Child Protection 59-62* (1999) (discussing the high rates of co-morbidity of parental substance abuse, mental illness and domestic violence); see also, Carol T. Mowbray, et al, *Women With Severe Mental Disorders: Issues and Service Needs*, in *Women's Mental Health Services: A Public Health Perspective 175* (Bruce Lobutsky Levin, Andrea K. Blanche & Ann Jennings, Eds., 1998) (discussing numerous social problems that are often co-morbid with mental illness).
- 50 *Id.*
- 51 Hendrika B. Cantwell, *The Neglect of Child Neglect*, in *The Battered Child 347, 363-367* (Mary Edna Helfer, Ruth S. Kempe & Richard D. Krugman, eds., 1997) (discussing the treatment needs of neglectful parents).
- 52 *Id.* at 347 ("It must be emphasized that more children in the United States die from neglect than from physical abuse."); see also Michigan Child Death State Advisory Team Fifth Annual Report, *Child Deaths in Michigan 2005 142* ("In 2002, NCANDS reported that child maltreatment fatalities were most often the result of neglect (38%) followed by physical abuse (30%) and then a combination of maltreatment types (29%)).

- 53 See, e.g., Michael D. DeBellis, *The Psychobiology of Neglect*, 10 Child Maltreatment 150 (2005) (“neglected children may suffer from various subtypes of neglect and many other adversities, which may contribute to adverse brain development and compromised neuropsychological and psychosocial outcomes”).
- 54 Tiffany Watts-English, et al., *The Psychobiology of Maltreatment in Childhood*, 62 J. Of Social Issues, 717, 728 (2006).
- 55 Tacoma, *supra*. I have already discussed the judge’s assertion that subsection 19b(5) creates a presumption and will not repeat that argument in the body of the text here.
- 56 It is, of course, the court’s responsibility to ensure that “reasonable efforts” to preserve the family have been made in most cases. Mich. Ct. R. 3.965(D)(1).
- 57 See Gary R. Anderson & Peg Whalen, *Permanency Planning Mediation Pilot Program: Evaluation Final Report* (2004).
- 58 See Senate Bill 170. Available at www.michiganlegislature.org.
- 59 705 ILCS 405/2-27.
- 60 See discussion *infra*.
- 61 See *Arndt v Kasem*, 353 N.W.2d 497 (Mich. Ct. App. 1984) (“It is well settled that when deciding a custody matter the trial court must evaluate each of the factors contained in the Child Custody Act . . . and state a conclusion on each, thereby determining the best interests of the child. The failure to make such specific findings is reversible error.”)(citations omitted).
- 62 See, e.g., *Harvey v Harvey*, 680 N.W.2d 835 (Mich. 2004)(where the parties agreed to binding arbitration regarding a child custody dispute and the court, pursuant to the arbitration, entered a custody order, the case was remanded for finding regarding the child custody factors).
- 63 See, e.g., *Foskett v Foskett*, 634 N.W.2d 363 (Mich. Ct. App. 2001)(where the court made custody decision based on mere allegations that were not supported by evidence and which was later reversed by the appellate court).
- 64 Mich. Comp. Laws § 722.43(2).
- 65 Of course, the minor’s lawyer-guardian ad litem is generally required to communicate to the court the child’s expressed wishes. Mich. Comp. Laws § 712A.17d(1)(i). Also, the court may appoint an “attorney” to represent the child’s expressed wishes when they conflict with the lawyer-guardian ad litem’s understanding of what would best serve the child’s interests. Mich. Comp. Laws § 712A.17d(2).
- 66 See Judge Tacoma’s article, footnote 21 and accompanying text.
- 67 Judith A. Cohen, Anthony P. Mannarino & Ester Deblinger, *Treating Trauma And Traumatic Grief In Children And Adolescents* 9 (2006).
- 68 *Id* at 10.
- 69 *Trejo*, 612 N.W.2d at 415.
- 70 Mich. Ct. R. 3.923(A) permits the court to question witnesses, call witnesses, or adjourn a case to subpoena additional witnesses or for the purposes of producing evidence (e.g., additional evaluations of the children or parents).
- 71 See *Traumatic Stress/Child Welfare, Volume 21 Focal Point* (2007). *Focal Point* is the newsletter of the Research & Training Center on Family Support and Children’s Mental Health, Portland State University, Portland, Oregon. The Winter 2007 volume of the newsletter addresses traumatic stress in the child welfare system and can be accessed at: www.rtc.pdx.edu/pgFP-W07TOC.php
- 72 See Elena Cohen, Dona T. Hornsby & Steven Priester, *Assessment of Children, Youth, and Families in the Child Welfare System, in Child Welfare For The 21st Century: A Handbook Of Practice, Policies, And Programs* 87 (2005).
- 73 See Mich. Comp. Laws § 722.629(1).
- 74 Kathleen Coulborn Faller, Mary B. Ortega & Elaine Pomeranz, *Can Early Assessment Make a Difference in Child Protection? Results From a Pilot Study*, J. Of Public Child Welfare (forthcoming 2007).
- 75 See Mich. Comp. Laws § 712A.19b(4).
- 76 Mich. Ct. R. 3.965(C)(2).
- 77 Mich. Comp. Laws § 712A.13a(4).
- 78 Mich. Ct. R. 3.965(B)(12)(a).
- 79 Mich. Ct. R. 3.974.