MICHIGAN Child Welfare LAW JOURNAL

Official Publication of the State Bar of Michigan Children's Law Section

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Editor's Note—Spring 2015

This issue of the *Michigan Child Welfare Law Journal* includes a variety of informative pieces. And most importantly, as many of you know the *Journal* has been delayed in recent months due to funding concerns. These issues have been resolved and you should once again receive and enjoy the *Journal* on a regular basis. Thanks for your patience!

—Joseph Kozakiewicz

Editorial and Review Board

Message from the Chair

There are many months that are devoted to causes and issues. In April, the cause is Child Abuse Prevention Month. In honor of this month, Governor Snyder has issued a Certificate of Proclamation which is contained in this month's edition of the journal. Also included are some interesting Child Abuse Statistics for the State and Nation from the Children's Trust Fund. These statistics should give pause to all of us to stop and think about how we can aid in ending child abuse.

In this edition, you will also find an article written by Paula Aylward. Paula serves on the Children's Law Section as a council member. She recently received an award as "Parent Attorney of the Year" from the Foster Care Review Board. In her spare time, she has prepared an interesting article concerning the Central Registry for your review. We hope that you will take the time to enjoy it, along with an article featuring her in our edition of "Attorneys Making a Difference" by Stephanie Cardenas.

As you may have heard, the Department of Human Services has merged with the Department of Community Health. The new agency is called the Department of Health and Human Services. As more information is learned, we will pass it along to you. Please keep informed by checking out the new Children's Law Section website. New resources and information will continue to be added. We hope to use the website as a way to keep you apprised of new developments such as the merger and other interesting things happening in child welfare and juvenile justice.

I have included some Tips and Reminders for Child Interviewing this month. The goal is to assist Lawyer-Guardian Ad Litems in thinking more about how and why they are interviewing children in child abuse cases versus merely meeting a child for a brief time before hearings. Good interviews require thought and preparation. Ultimately, this will lead to better legal representation for children. Maybe, one day, child abuse prevention month can be longer than a month!

Best wishes,

Christine Piatkowski

STATE OF MICHIGAN

CERTIFICATE OF PROCLAMATION

ON BEHALF OF THE PEOPLE OF MICHIGAN

I, Rick Snyder, governor of Michigan, do hereby proclaim

April, 2015

CHILD ABUSE PREVENTION MONTH

WHEREAS, Last year, 30,953 children were abused or neglected in Michigan. That's 85 every day; and,

WHEREAS, Nationally, it is estimated that more than 1,520 children die each year from child abuse and neglect; and,

WHEREAS, Unemployment, poverty, parental drug and alcohol abuse; stress, social isolation and violent communities are identified risk factors for child maltreatment; and.

WHEREAS, Both statewide and nationally, child abuse is considered to be one of our nation's most serious public health problems with scientific studies documenting the link between the abuse and neglect of children and a wide range of medical, emotional, psychological and behavioral disorders such as depression, alcoholism, drug abuse, severe obesity and juvenile delinquency; and,

WHEREAS, Child abuse costs the nation an estimated annual direct cost of $124 billion, approximately $1,400 each year for the average American family; and,

WHEREAS, Prevention strengthens families and is cost effective. Research shows that spending for child abuse prevention programs saves dollars that would be spent for crisis-oriented programming such as; protective services, foster care, special education, and counseling. This does not take into account juvenile delinquency or adult incarceration; and,

WHEREAS, Promoting, family functioning/resiliency, social support systems, concrete supports, nurturing and attachment, and knowledge of parenting/child development all are known protective factors which prevent child maltreatment and help to strengthen families; and,

WHEREAS, Child abuse prevention is an acknowledged community responsibility, on behalf of Michigan's children, this month and each thereafter we shall commit to "The Power of One." This statewide initiative under the leadership of the Children's Trust Fund asserts that the power of one person, one community, one dollar, one action, etc., during April will help to protect children from abuse and neglect throughout Michigan.

NOW, THEREFORE, I, Rick Snyder, governor of Michigan, do hereby proclaim the month of April 2015 as Child Abuse Prevention Month in Michigan.

Rick Snyder

Governor

Child Abuse Statistics: Michigan & National

by Children's Trust Fund

Michigan[1] (FY2014)**:

- There was an increase of the complaints that were investigated: 2001, 70,784; 2009, 71,780; 2010, 78,893; 2011, 83,627; 2012, 91,159; 2013, 87,980, 2014 80,117'.
- In 2014 26% of investigations resulted in evidence of abuse or neglect.[1]
- Of the 80, 117 confirmed investigations in 2014, a total of 21,049 complaints were confirmed representing 30,953 identified victims.[1]
- 38% of victims were under the age of four. [1]
- In approximately 83.5 percent of all cases the perpetrator is the parent (biological, adoptive, putative or step-parent). [1]
- Since the first year that the Five Category Disposition data became available (FY2002), the distribution of investigation dispositions has remained consistent. Twenty-two to twenty-seven percent are category I, 11, or Ill (confirmed - preponderance of evidence), and 72 to 78 percent are category IV or V (no preponderance of evidence). In FY 2014 those percentages were 26 and 74, respectively. [1]
- In a study by Caldwell & Noor (2005), costs of child abuse in Michigan were estimated at $1,827,694,855. The costs of prevention a1·e a traction of the costs of abuse. Cost savings 1·anged from 96% to 98% depending on the prevention model tested.[2]

(*OHS Data Management Unit findings indicate that FY 2014 figures may be subject to* some *level of inaccuracy due to the change in repo11ing system from SWSS To M1SACWIS during FY 2014.)*

Nationally:[3] (FY2013)

- An estimated 679,000 children were victims of maltreatment.[3]
- An estimated 3.5 million CPS referrals representing 6.4 million children were received resulting in 2.1 million investigations or assessments.[1]
- An estimated 1,520 in 2013 (1,640 children in 2012) died from abuse or neglect. [1]
- Of the 678,932 confirmed cases of ab use in .2013, 79. 5 percent of victims experienced neglect, 18 percent were physically abused, 9 percent were sexually abused, and 10 percent of victims experienced various forms of psychological maltreatment, such as threatened abuse, parent's drug/alcohol abuse, etc. Because a victim may have suffered from more than one type of maltreatment, every maltreatment.
- type was counted, which is why the percentages total to more than 100.0.[3]
- During 2013, approximately 91*A* percent of victims were maltreated by a parent(s), and 12.9 percent were non-parents.
- The consequences of child abuse cost the country at least $124 billion annually, costing the average American family approximately $1,400 each year.[4] ◎

Endnotes

1 Ml Department of Human Services' "Children's Protective Services 2014 Trends Report Summary." Please see the report (included in the CAP Month Toolkit) for additional statewide and l1istorical data.

2 Caldwell, R & Noor, I. (2005). "The Costs of Child Abuse vs. Child Abuse Prevention: A Multi-year Follow-up in Michigan."

3 U S Department of Health and Human Services' "Child Maltreatment 2013." The report can be accessed at the following URL: *http://www.acf.hhs.gov/sites/default/files/cb/cm2013.pdf#page=20*

4 U.S. Department of Health and Human Services Child Welfare Information Gateway *<https://www.childwelfare.gov/pubs/factsheets/long_term_consequences.cfm>*

* Child Help, *http://www.childhelp.org/pages/statistics*

Public Act 30 of 2014: A Small Step in the Right Direction

by Paula A. Aylward © 2014

In 1975, Michigan enacted the Child Protection Law,[1] which requires the Michigan Department of Human Services ("DHS") to maintain the Michigan Child Abuse and Neglect Central Registry,[2] a database containing information on approximately 275,000 Michigan residents accused of child abuse or neglect by the DHS Children's Protective Services.[3] The Central Registry database is a "system maintained at the DHS that is used to keep a record of all reports filed with the DHS under [the Child Protection Law] in which relevant and accurate evidence of child abuse or neglect is found to exist."[4] The Central Registry has been described "as a permanent blacklist, one that can ruin lives without giving those accused of child abuse or neglect a chance to challenge the findings of a Children's Protective Services investigation before their names are added."[5] State Representative Rose Mary Robinson has described the Central Registry as "an onerous thing" and "a terrible thing."[6]

Unfortunately, the process required to seek expunction of a record from the Central Registry database was fraught with injustice. For example, notification that an individual had been placed in the database was sent by ordinary first-class mail, which did not ensure that the person placed in the database actually received the notice. Further, though this notification was required to be sent within thirty days from the listing on Central Registry, often the notice was not sent out on a timely basis to the person listed. I have heard from some clients that they never received any notice that they had been branded child abusers until years – and sometimes decades – after they had been listed on the Registry. A related problem was that the process of obtaining an administrative hearing has been unduly obstructive and confusing; rather than allowing a person to simply request an administrative hearing regarding the allegations of abuse or neglect, the person had been required to *first* request expunction from the local county office and, in the likely event that the DHS supervisor denies the request, then submit a *second* request for an administrative hearing regarding the allegations. Prospective clients have told me that they had no idea they were entitled to an evidentiary hearing to challenge the Registry listing as they assumed that when the DHS supervisor denied their expunction request, that was the final word on the matter.

Other issues with the expunction process included evidentiary concerns. For example, information in the database would be expunged only if the investigation "fail[ed] to disclose evidence of abuse or neglect," which has been taken to mean *any* evidence of abuse or neglect no matter how incredible or tenuous. The thin reed of "any evidence" thus could maintain a person's listing on the Registry even in the face of strong countervailing evidence, or a person's innocent (and logical) explanation for the evidence, or a claimant's obvious motive to fabricate an allegation against the person being investigated.

If a person's request for expunction was denied before August 1, 1999, information in the database was required to be automatically expunged once the child alleged to have been abused or neglected reached the age of eighteen or once ten years had elapsed after the report was received by the DHS, whichever occurred later.[7] After August 1, 1999, the date the "life amendment" became effective, and until the instant amendment, information contained in the Registry database was required to be maintained until the DHS receives reliable information that the individual accused of the abuse or neglect "is dead."[8] That is, individuals placed in the database after the "life amendment" remained there *for life*.

On July 8, 2013, Michigan State Rep. Margaret O'Brien introduced House Bill 4893 to rectify some of the problems associated with the process required to seek expunction of a record of child abuse or neglect. On March 11, 2014, Governor Snyder signed the bill into law as Public Act 30 of 2014.[9] The law is to take effect 180 days after the date the bill was enacted into law, *i.e.*, on March 31, 2015.

One remedial provision of Public Act 30 is the requirement that notification that an individual has been placed in the database be sent to the individual by registered or certified mail, return receipt requested, and delivery restricted to the addressee. This provision, MCL 722.627(4), should increase the probability that the individual accused of child abuse and neglect will receive timely and actual notice that he or she has been placed in the database.

Another of the Act's remedial provisions is the provision allowing a person who is the subject of a report or record to request that DHS conduct a hearing to review the request for amendment or expunction of a report or record. Gone is the old bifurcated procedure in which a person had to first request expunction from the database and, if denied, then submit a second request for an administrative hearing regarding the allegations. This amended provision, MCL 722.627(6), may increase the probability that an individual accused of child abuse and neglect will not be confused by the old bifurcated procedure and erroneously believe that there was no further administrative remedy once the DHS denied his request for expunction. Unfortunately, the Legislature included the bitter with the sweet by requiring that any request for a hearing must be made within 180 days from the date of *service* of the notice of the right to a hearing, rather than on the date that the notice of the right to a hearing *was actually received* by the individual. MCL 722.627(6).

If the hearing request is made within the 180-day time period, the DHS is required to conduct an administrative hearing to determine by a preponderance of the evidence whether the report in whole or in part should be amended or expunged from the Central Registry. *Id*. The amendment provides that the 180-day time period can be extended an additional sixty days for "good cause." Although not specifically addressed in the Act, the import of this provision is that after the 240-day period elapses an individual is no longer entitled to request an administrative hearing ever.[10] Practitioners should be alert to this change and ensure that their clients request an administrative hearing within the 180-day period set out in the statute. *Id*.

Another remedial feature of the statutory amendment is the requirement that information be expunged from the database if the investigation does not establish abuse or neglect by a preponderance of the evidence, or, if a trial court dismisses a petition based on the merits of the petition filed under the Probate Code (a child protective proceeding) because the DHS failed to establish that the child comes within the jurisdiction of the court. In light of the Legislature's replacement of the former "evidence of abuse or neglect" and "relevant and accurate information evidence of abuse or neglect" language with the new "a preponderance of the evidence" language, the DHS may no longer simply claim that the evidence of abuse or neglect is relevant and accurate. Nor may Children's Protective Services workers simply select that evidence which fits their theory while ignoring other countervailing evidence that undermines the complaint/claim of abuse or neglect. Rather, Children's Protective Services workers are required to weigh the countervailing evidence and make determinations, including credibility determinations, and (at least in theory) address why a claimant's version of abuse or neglect is more plausible or credible than the denial posed by the person accused of the abuse or neglect.

An important characteristic of Public Act 30 is the provision which purportedly reinstates the automatic expunction after ten years for some cases. Oddly, for an individual listed as a perpetrator in the database *after* September 7, 2014, however, the Act provides only that "the department shall maintain the information in the central registry for 10 years." Nowhere does the act *mandate* expunction after the ten year time period for an individual, which omission may lend itself to the argument that expunction after the ten year time period is relegated to the DHS's discretion. The same result obtains for an individual who is the subject of a report or record made *prior* to September 7, 2014, in which case "the department *may* remove the information for a person described in this subparagraph after ten years without a request for amendment or expunction." Although for such an individual the removal language is more direct, the use of the permissible verb "may" seems again to render expunction after the ten year time period discretionary with the DHS.

Note that the life-record retention policy remains in effect in cases involving:

- Severe physical injury
- Sexual abuse
- Exposure to methamphetamine production
- Abandonment
- Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate
- Battering, torture, or other severe physical abuse
- Loss or serious impairment of an organ or limb
- Life threatening injury
- Murder or attempted murder
- There is risk of harm to the child and (a) the parent's rights to another child were terminated, or (b) the parent's rights to another child were voluntarily terminated following the initiation of termination proceedings involving any one of the above-listed circumstances, voluntary manslaughter, or aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter[11]

Although Public Act 30 does take a small step in the right direction, it does not go nearly far enough. As aptly noted by State Representative Rose Mary Robinson, Public Act 30 "is a very small first step to providing minimal due process."[12] A more comprehensive set of reforms to the statute should entail pre-deprivation procedural protections and the ability to request an administrative hearing irrespective of how much time has elapsed since notice was given. Until such reforms are enacted into law, Michigan residents will continue to fall victim to being branded child abusers without ever having been heard, all under the guise of child protection.

Endnotes

1 Public Act 238 of 1975, effective Oct. 1, 1975; MCL 722.621, *et seq*.

2 MCL 722.627(1).

3 "Child abuse registry called unfair, Michigan's 'biggest civil rights violation'", Detroit Free Press, freep.com, *http://www.freep.com/article/20140324/NEWS01/303240011/* (last visited September 21, 2014).

4 MCL 722.622(c).

5 "Child abuse registry called unfair, Michigan's 'biggest civil rights violation'", Detroit Free Press, freep.com, *http://www.freep.com/article/20140324/NEWS01/303240011/* (last visited September 21, 2014).

6 "Child abuse registry called unfair, Michigan's 'biggest civil rights violation'", Detroit Free Press, freep.com, *http://www.freep.com/article/20140324/NEWS01/303240011/* (last visited September 21, 2014).

7 MCL 722.627(7).

8 *Id.*

9 Available at *http://legislature.mi.gov/doc.aspx?2013-HB-4893*

10 At least one other state permits *nunc pro tunc* appeals in exceptional circumstances. See *e.g.*, *JC v Dep't of Pub Welfare*, 720 A2d 193, 197 (Pa Cmwlth 1998) (noting that an appeal *nunc pro tunc* may be allowed "where delay in filing the appeal was caused by extraordinary circumstances involving fraud or some breakdown in the administrative process, or non-negligent circumstances related to the appellant, his counsel or a third party" and where the person seeking permission to file the appeal establishes that the appeal was filed within a short time after learning of and having an opportunity to address the untimeliness, the elapsed time period is of very short duration, and the appellee is not prejudiced by the delay).

11 This list mirrors the "aggravated circumstances" list found in MCL 712A.19a(2), MCL 722.638, and MCR 3.965(D)(2).

12 "Child abuse registry called unfair, Michigan's 'biggest civil rights violation'", Detroit Free Press, freep.com, *http://www.freep.com/article/20140324/NEWS01/303240011/* (last visited September 21, 2014).

Tips and Reminders for Lawyer-Guardian Ad Litem Interviews with Children

by Christine Piatkowski

Introduction

The Lawyer-Guardian Ad Litem (GAL) plays a special role in determining what is in the best interest of the child. Knowledge and preparation are essential to making a recommendation to the court. A crucial part of the preparation includes interviewing the child. No single interview technique will work with every child of every age in order to determine what is in their best interest. By utilizing various interview techniques, information can be obtained to advance the position and best interest of the child.

Pre-interview

It is imperative to seek out the facts of the case prior to meeting with the child. For example, ascertaining information from parents, caseworkers, counselors, and other potential witnesses will provide focus to the interview. Review of relevant court files and records will typically provide the L-GAL with the information needed to develop a plan for the client meeting.

Prior to interviewing a child, ask the adults if the child has been questioned by anyone else. If so, the child's position might be distorted or have even changed. Parents and siblings may be coercing the child into making statements that do not necessary reflect his or her point of view. Keep in mind that the child may become harmed by repeated interviews. Perhaps some information can come from a counselor, teacher, relative, social worker, or other source.

Familiarity with local services and resources helps to determine whether they are of any real benefit to the families. Some children and parents are receptive to counseling. Other families may be resistant to formal counseling, yet they may be willing to speak to a social worker or other professional. Knowing the family and where to obtain appropriate services will assist in facilitating a timely resolution to the case.

The usual setting for the client interview is in the child's home, unless this would be inappropriate. The home may be perceived as a comforting setting which will allow the child to freely disclose information. Privacy rights should be ensured during the interview. Usually, it is best to interview children outside of the presence of the parties. Adults often have a tendency to answer questions for children. Moreover, adult body language may affect the child's statements. The L-GAL who is meeting a child for the first time may be unaware of repercussions the child may suffer as a result of his or her answers. As such, client safety must always be considered. Take note of the child's home environment. Helpful information can be obtained just by looking around a person's home.

If it is not appropriate to interview a child in their home, interviews might take place in a neutral location, such as an office, restaurant or school. If the L-GAL chooses to interview a child in an alternative setting, an appointment to visit the home should still be arranged so that the home can be viewed. A neutral environment may be preferable when it appears that caregivers are attempting to influence the child; or, if a child is fearful of disclosing sensitive information in the family setting. Each case will depend upon the facts presented.

A decision will need to be made regarding whether siblings will be interviewed together or separately. Depending on the facts of the case, it may be acceptable to interview more than one child at a time. If this

is done, be aware that children may be reluctant to depart from the opinion of a brother or sister. Further, if there are facts of a sensitive nature involved, there is a risk of one sibling notifying the caregiver or alleged perpetrator of comments made by the other. In cases involving physical and sexual abuse, it may be best to question each child separately.

It is just as important to observe children as it is to talk to them. Just like observing a person's home, much can be learned from looking at a person. For example, if a child is dressed inappropriately for the weather in a heavy sweatshirt on a warm day, the child could be hiding evidence of physical abuse. If a child is an infant and/or unable to communicate verbally, the caregiver can be present at the interview to provide answers to necessary questions. This is an excellent opportunity for the L-GAL to witness the interaction between the caregiver and the child. What does the caregiver know about the care of the child? Is the caregiver familiar with the child's medical history? Are there other adults that care for the child? If so, how frequently? Are the babysitters appropriate?

Interview

MCL 712A.17d(1)(d) requires a L-GAL to meet with and observe the child before each proceeding or hearing to assess the child's needs and wishes regarding the representation and issues. At an initial visit, an explanation of the role of the L-GAL should be provided to the child. This explanation shall include discussion surrounding the L-GAL's responsibilities to report to the court, investigate the facts of the case, and make recommendations that are in the child's best interest. The child should be informed that the L-GAL is not acting solely as the child's attorney and, if a conflict is identified, another attorney may be appointed by the court to advance the child's position. The L-GAL has an obligation to notify the court of the child's position, even if the L-GAL does not believe that the child's position is in his or her best interest.

Establish a rapport with the child. Questions and discussion should be intermingled.

Children who are verbal can provide a great deal of information. What is ascertained will depend upon how the child is questioned. It is important that the child is made to feel comfortable at the beginning of the interview. Greet the child and attempt to identify and discuss the child's interests. School activities, music, television shows and current events significant to the child's age group will be successful springboards for initiating the interview. These topics may also assist in facilitating information gathering.

Use language appropriate to the child's age; however, do not talk "down" to the child. Children can sense if they are being patronized and will be resentful of these efforts. Encourage the child to ask questions and participate in the interview process. Allow the child to discuss issues affecting him or her as they come up during the interview rather than adhering to a rigid specific interview plan.

General questions are preferred over specific questions. Open-ended questions accurately gauge the child's feelings on sensitive subjects.

Occasionally, a child will feel uncomfortable with an adult who writes notes while they are speaking. At the onset of the interview, discuss the necessity of writing down some of the child's information. If it is essential to write down information as the child is talking, ask for the child's permission.

Sometimes, children will not want to discuss sensitive subjects. Creative interview techniques such as the use of pictures, games, dolls and books may assist in producing the necessary information. One technique is to have the child draw a picture of his or her family. Ask the child to explain and describe the family members. If a family member is omitted, ask the child why they have excluded that member. Perhaps it will be disclosed that the omitted person is not close to the child, frightens the child, has abused the child, or is absent. The same can be done with a drawing of their home. This may lead the L-GAL to discuss where abuse occurred in the home, where parents sleep, their concerns about foster care, etc.

Be aware of the fact that children involved in child welfare and custody disputes often perceive that they are responsible for making decisions such as placement. These decisions are, of course, not for the child to make. The child should be informed that the court will ultimately decide where they will live. Do not guarantee that the child will be placed with a particular caregiver.

Children may perceive the role of the Lawyer-Guardian Ad Litem as an unwelcome role because the L-GAL is associated with the "court." It may be necessary to visit and interview children on more than one occasion to establish rapport and obtain needed information. Children involved in child welfare proceedings are typically having a difficult time. Therefore, the tone that is set at the initial meeting may determine future dealings with the child.

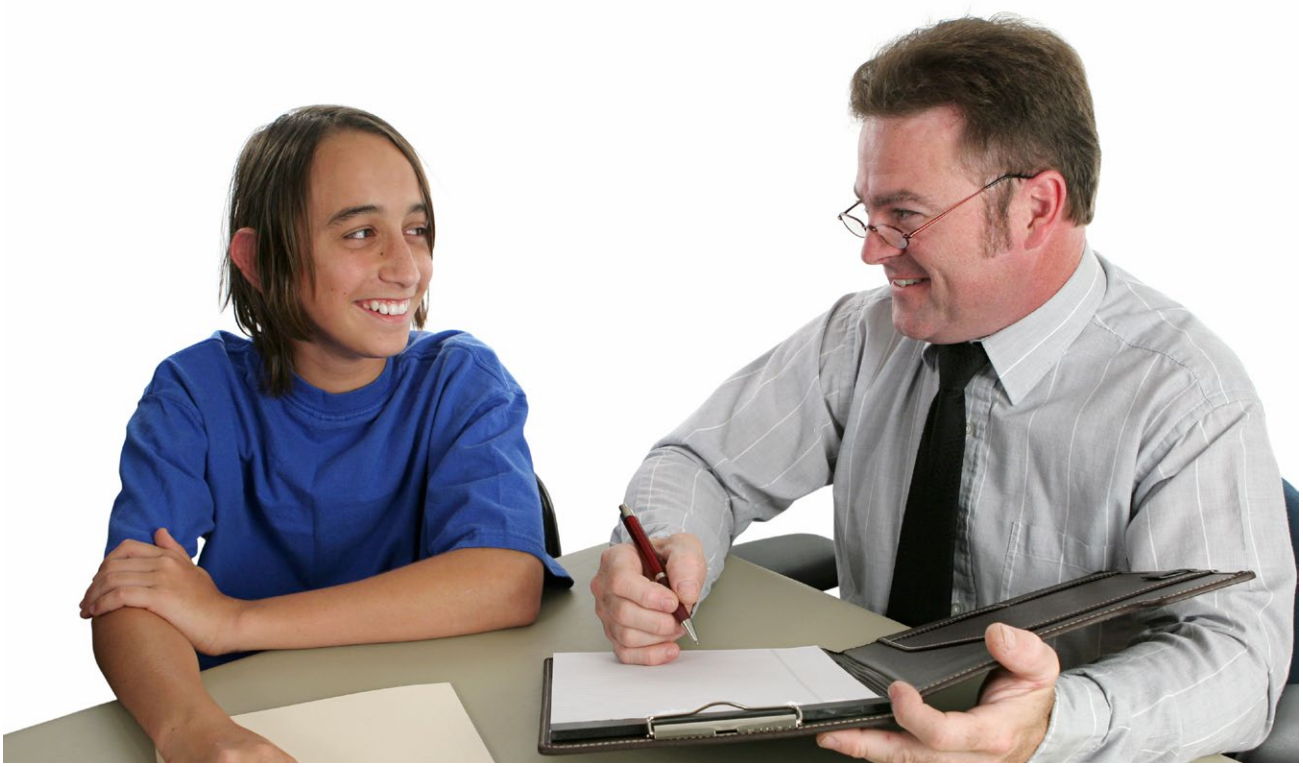
In instances involving very young children and, in some cases, special needs children, there could be a problem soliciting information. The Lawyer-Guardian Ad Litem may have to rely upon observations. Some items to note include: health and well-being, observable physical marks or bruises, general cleanliness, and interaction with caregivers. Does the caregiver interact appropriately with the child? Does the child tense up or shrink from the caregiver? Does it appear that the child's needs are being met? Do the child and caregiver appear to be bonded? Is the foster care situation adversely affecting the child?

At the end of an interview, it is best practice to ask the child whether or not they would like to ask the L-GAL questions or tell the L-GAL anything additional. The L-GAL should also make sure that the child and caregiver have contact information for the attorney.

Conclusion

Knowledge and preparation are essential to the child interview process and will assist in the Lawyer-Guardian Ad Litem's efforts to make recommendations to the court. Interviewing children is a skill that is learned over time. Trainings are going on around the State concerning child and adolescent development, cultural sensitivity, trauma, among other topics. There are numerous resources available to assist L-GAL's with interview techniques. The State of Michigan has a Forensic Interviewing Protocol and a Lawyer Guardian Ad Litem Protocol that can be reviewed for more specific information. Although it is not a L-GAL's role to conduct a forensic interview, this manual can assist with questions that have likely already been asked of the child by other professionals to avoid unnecessary duplication.

Some of the most difficult decisions made by the Lawyer-Guardian Ad Litem are those that affect the child's future. Therefore, particular attention should be given to the child's desires and statements when forming recommendations. Moreover, if the L-GAL has met with the child and significant others in the child's life, the L-GAL will be in a better position to ask the court to entertain motions or enter orders that are needed to protect the child.



Choosing Subsidized Juvenile Guardianship as a Permanency Plan

by Tobin Miller

Introduction

Child protection agencies and courts have used minor guardianships under the Estates & Protected Individuals Code (EPIC) to divert cases from the child welfare system for many years. Michigan Department of Health & Human Services (MDHHS) policy instructs children's protective services (CPS) workers to allow parents and interested persons to establish minor guardianships during a CPS complaint investigation, as long as CPS completes its investigation, reaches appropriate conclusions based upon the evidence, and, if appropriate, files a petition seeking court jurisdiction.[1] Establishing a minor guardianship under EPIC is a dispositional option available to courts in cases under the juvenile code.[2]

In 1997, the federal government established legal guardianship as a permanency goal for children in foster care.[3] Often the feasibility of guardianship as a foster child's permanency goal hinges on the availability of continuing financial support for the proposed guardian. Prior to 2008, persons appointed as minor guardians under EPIC were not eligible for an ongoing monthly payment from MDHHS to support the guardianship. In 2008, the federal government established the Guardianship Assistance Program (GAP) for relatives appointed as guardians of children in foster care.[4] In response, the Michigan Legislature enacted statutes giving courts authority to establish "juvenile guardianships" for children in foster care with both relatives and non-relatives, and giving MDHHS authority to provide those guardians with a monthly assistance payment.[5]

Despite formal recognition of juvenile guardianship as an appropriate permanency plan for children in foster care and the availability of financial assistance to support such guardianships, the use of juvenile guardianship as a permanency goal in Michigan remains problematic. Determining whether juvenile guardianship is appropriate for a child is difficult in itself. In general, juvenile guardianship is appropriate where ongoing court and agency supervision and support is not necessary because parental contact will not endanger the child and the guardian has the ability and demonstrated desire to make educational, health care, and other decisions affecting the child; the child has resided with the guardian for an extended period of time and has a psychological or emotional attachment to the guardian; and there is no basis for or need to radically alter the child's family structure.

Moreover, the difficulty of this decision is exacerbated by MDHHS central office's ability to deny financial assistance to the guardian because it or the child's caseworker disagrees with the proposed permanency goal. Because many prospective juvenile guardians require financial assistance to act as a juvenile guardian, determining GAP eligibility effectively determines whether a juvenile guardianship will be a child's permanency goal in many cases.[6]

In this article, I first sketch procedures for establishing juvenile guardianship as a child's permanency goal and applying for guardianship assistance payments. I then discuss the criteria that courts may apply when determining whether juvenile guardianship is appropriate for a given child. Finally, I examine the requirement that reunification and adoption be "ruled out" as appropriate permanency goals before a juvenile guardianship is implemented. Although this "rule out" requirement pertains to GAP eligibility and not the guardianship itself, such eligibility effectively determines whether a juvenile guardianship will be ordered in many cases, and I urge courts and attorneys to consider applicable policy examples when deciding whether juvenile guardianship is appropriate in a given case.

Establishing a Juvenile Guardianship

A juvenile guardianship is a permanency goal for a child who is under the court's jurisdiction pursuant to MCL 712A.2(b) or the Michigan Children's Institute (MCI) superintendent's jurisdiction pursuant to MCL 400.203. As with any permanency plan, a juvenile guardianship "is intended to be permanent and self sustaining . . . ."[7] A juvenile guardianship "may continue until the child is emancipated."[8]

Any interested person may be appointed as the juvenile guardian for a child in foster care.[9] To be eligible for guardianship assistance payments, the guardian must be the child's relative or legal custodian[10] and licensed as a foster parent.

If parental rights have not been terminated, a court may appoint a juvenile guardian following a permanency planning hearing (PPH). The court must determine that the child should not be returned to his or her parent, but that the agency should not request termination of parental rights, and that it is in the child's best interests to appoint a guardian for the child.[11] If parental rights have been terminated, a juvenile guardian may be appointed if the court determines that it is in the best interests of the child, and if the MCI superintendent or his designee consents to the juvenile guardianship.[12] The MCI superintendent must consult with the child's lawyer-guardian ad litem (LGAL) on the issue.[13] In any case, a court may appoint a juvenile guardian only after it holds a PPH.[14]

A court is not bound by an agreement between the parties that juvenile guardianship is an appropriate permanency plan.[15] Parental consent to a juvenile guardianship is not required but may contribute to the stability and longevity of the guardianship because a parent whose parental rights were not terminated "has the ability to seek termination of the guardianship."[16]

Supervising agencies must conduct criminal background checks, central registry clearances, and home studies (completed within the last year) on all prospective juvenile guardians.[17]

Establishing Guardianship Assistance Eligibility

A prospective juvenile guardian may be eligible to receive a regular assistance payment on behalf of the child. Eligibility for this form of assistance is determined by MDHHS subsidy office (within MDHHS central office in Lansing). The program is funded by federal title IV-E and state funds.[18] MDHHS subsidy office must certify eligibility for assistance and the assistance agreement must be signed before the court appoints a juvenile guardian.

The Juvenile Guardianship Assistance Act contains two sets of eligibility criteria, one for children and one for prospective juvenile guardians. The criteria for children are:

(a) The child has been removed from his or her home as a result of a judicial determination that allowing the child to remain in the home would be contrary to the child's welfare.

(b) The child has resided in the home of the prospective guardian for, at a minimum, 6 consecutive months.

(c) Reunification or placing the child for adoption is not an appropriate permanency option.

(d) The child demonstrates a strong attachment to the prospective guardian and the guardian has a strong commitment to caring permanently for the child.

(e) If the child has reached 14 years of age, he or she has been consulted regarding the guardianship arrangement."[19]

The criteria for prospective juvenile guardians are:

(a) The guardian is the eligible child's relative or legal custodian.

(b) The guardian is a licensed foster parent and approved for guardianship assistance by the department. . . .

(c) The eligible child has resided with the prospective guardian in the prospective guardian's residence for a minimum of 6 months before the application for guardianship assistance is received by the department."[20]

The foster care maintenance payment rate for the child establishes the maximum permissible amount for the juvenile guardianship assistance payment rate.[21]

Determining Whether Juvenile Guardianship Is in a Child's Best Interests

In *In re COH,*[22] the Michigan Supreme Court addressed whether the statutory preference for relative-foster care placement applies to a post-termination of parental rights juvenile guardianship, whether a court may compare the suitability of a relative who seeks

juvenile guardianship of the children and a licensed foster parent who seeks to adopt the children, and whether the "best interest factors" in the Child Custody Act apply to the determination.

The *COH* Court held that the statutory preference for placement of children with a relative foster parent does not apply to the decision to appoint a juvenile guardian after termination of parental rights.[23] Although not directly addressed by the Court, the relative placement preference likely does not apply to pre-termination of parental rights juvenile guardianship decisions either. The Court concluded that the relative placement preference applies during the first 90 days following a child's removal from home and during the time for any review of the agency's placement decision under what is now MCL 722.954a(6), but a pre-termination of parental rights juvenile guardianship is typically addressed after this period has expired. Despite the lack of a preference for juvenile guardianship for relatives, family ties may be a factor in a decision to grant or deny a juvenile guardianship.[24]

As noted above, a court may appoint a juvenile guardian for a child if the court determines that it is in a child's best interests to do so. Courts have broad discretion "regarding how to determine what is in the child's best interests depending on the case-specific circumstances."[25] When determining whether appointing a juvenile guardian is in a child's best interests, a court may rely on the "best interest" factors in the Child Custody Act, the Adoption Code, or any other relevant factor.[26] The Adoption Code factors are "a logical decision-making tool when only one party petitions for guardianship, because the court need not compare the petitioning party to any other party."[27] (The Adoption Code factors also contain a provision concerning siblings, which the Child Custody Act does not contain.) This implies that the Child Custody Act factors are more appropriate for cases involving two or more juvenile guardianship petitioners, or where one party has petitioned for juvenile guardianship and one party has applied to adopt the children, as in *COH.* However, the similarity of the various statutory lists of factors and the broad judicial discretion to apply any relevant factor in a case lessen the importance of this distinction.

In *COH,* the trial court addressed a juvenile guardianship petition by a paternal grandparent of three of the children. The paternal grandparent, who resided in Florida, was not considered for initial placement. The children had been placed with licensed foster parents for almost two years when the court denied the paternal grandparent's juvenile guardianship petition. The children's foster parents had applied to adopt the children. The trial court relied on the following "best interest" factors:

- The children's bond with the foster parents. Only one child displayed a bond with the relative.
- The foster parents' demonstrated capacity to give the children love and guidance.
- Although the relative had greater financial resources than the foster parents did, the foster parents had sufficient income to support the children.
- The children's stated preference to remain with their foster parents. One of the children was agreeable to placement in either home.
- The children's interest in placement stability favored their placement with the foster parents.
- The Michigan Supreme Court found no fault with the trial court's consideration or application of these factors, which are reflected in the Michigan Adoption Code and Child Custody Act.

The decision in *COH* demonstrates the importance of a factor listed in all of the statutory "best interest" lists,[28] addressed in other relevant case law, [29] and stated explicitly in MDHHS policy[30]: placement stability and continuity of care. If a child has been placed with a caregiver for a considerable period of time, the child has bonded to that caregiver, and the caregiver desires to care for the child during his or her minority, the child's interest in stability is typically given considerable weight when making permanency decisions for that child. When considering a pre-termination of parental rights petition for juvenile guardianship, important factors include the desirability of maintaining a parent-child relationship and the child's need for certainty and stability.[31]

MDHHS Policy Factors on "Ruling Out" Adoption

One of the issues discussed at oral argument in *COH* was whether applicable law set forth a hierarchy of permanency goals—whether the adoption of a child is always to be preferred over guardianship or perma-

nent relative foster care placement, for example. No such hierarchy is explicitly stated in law,[32] but federal law and Michigan's Guardianship Assistance Act[33] require the MDHHS to "rule out" reunification and adoption as appropriate permanency goals for a child before approving guardianship assistance payments to a guardian on behalf of the child. The requirement to "rule out" reunification may presumably be met by a court's determination, during a permanency planning hearing, "that a return to the parent would cause a substantial risk of harm to the child's life, physical health, or mental well-being."[34]

If the child's caseworker believes that juvenile guardianship is the appropriate permanency goal, MDHHS policy requires the caseworker to document in the case service plan a reason why reunification and adoption are not appropriate permanency goals for a child. The policy lists the following broadly stated examples:

- "Strong cultural beliefs that are in opposition to termination of parental rights.
- "It is in the child's best interest to maintain the parental rights of the birth parent(s) because the child and parent(s) have a meaningful relationship as evidenced by attachment and regular visitation. However, the parent, due to physical, medical or mental health disabilities is unable to provide day-to-day supervision and care for the child. The guardianship would allow the child to be cared for by a guardian on a permanent basis and maintain a relationship with the birth parent.[35]
- "In the case of a youth age 14 or older who has been provided information and counseling concerning permanency options and outcomes, the youth may choose not to be adopted but is willing to enter into a juvenile guardianship relationship.[36]
- "A relative is willing to provide a permanent home for the child but does not want to change the legal relationship (for example, grandparent or aunt) to the child.[37]
- "There are obstacles to adoption by a relative who has been determined to be the best placement for the child.
- "Based on a long term placement with a foster family that has decided not to adopt, the placement is the best choice to provide a permanent family for the child through a juvenile guardianship."[38]

MDHHS subsidy office (which is within the agency's central office in Lansing) determines eligibility for guardianship assistance payments. Subsidy office may deny a child's eligibility for guardianship assistance because it or the agency caseworker disagrees that juvenile guardianship is an appropriate permanency plan. "A child is eligible to receive guardianship assistance *if the department determines* that . . . [r]eunification or placing the child for adoption is not an appropriate permanency option." (Emphasis added.)[39] Michigan's Guardianship Assistance Program is funded in part by federal title IV-E funds, and the federal government assigns a state's "title IV-E agency" the authority to determine whether reunification and adoption have been properly "ruled out."[40] MDHHS is Michigan's "title IV-E agency."

Denial of GAP eligibility effectively eliminates juvenile guardianship as a permanency option in many cases. [41] To lessen the possibility of the caseworker or subsidy office disagreeing with a court about whether juvenile guardianship is an appropriate permanency goal for a child, courts and attorneys should address the policy factors listed above and ensure that the case falls within one of the policy categories. Although the policy does not have the force of law, subsidy office relies on these policy factors when determining GAP eligibility, and it appears that that office has the legal authority to deny eligibility when it believes that reunification and adoption have not been properly ruled out.

Conclusion

Courts have considerable discretion to make the difficult, fact-specific determination of whether juvenile guardianship is in a child's best interests. In addition to carefully considering criteria applicable to the determination of whether a juvenile guardianship is in a child's best interests, if a prospective guardian seeks guardianship assistance payments, courts should carefully consider whether reunification and adoption have been "ruled out" as an appropriate permanency goals for a child. If the child's caseworker or MDHHS subsidy office determines that adoption is the more appropriate permanency goal for the child, the prospective guardian will not be eligible for assistance

payments, and in many cases, this will eliminate juvenile guardianship as a possible permanency goal for the child.

Endnotes

1 PSM 713-08, p. 12.

2 MCL 712A.18(1)(h). The court may dismiss the child protection petition after the guardianship is established. The family division of circuit court has ancillary jurisdiction over proceedings under EPIC. MCL 600.1021(2)(a).

3 Adoption & Safe Families Act of 1997, P.L. 105-89, sec. 302, amending 42 USC 675(5)(C).

4 Fostering Connections to Success & Increasing Adoptions Act of 2008, P.L. 110-351, sec. 101.

5 2008 PA 200, amending MCL 712A.19a (pre-termination of parental rights juvenile guardianship); 2008 PA 203, amending MCL 712A.19c (post-termination of parental rights juvenile guardianship); and 2008 PA 260, adding the Juvenile Guardianship Assistance Act, MCL 722.871 et seq.

6 See, e.g., *In re Brown,* unpublished opinion per curiam of the Court of Appeals, issued February 12, 2015 (Docket No. 323040).

7 42 USC 675(7). See also MCL 722.875b. Parental rights are transferred to the guardian. A juvenile guardian has the same authority and duties as an EPIC minor guardian. MCL 712A.19a(8) and MCL 712A.19c(7).

8 MCL 712A.19a(7)(c).

9 MCL 722.872(d).

10 A licensed foster parent or "fictive kin" with placement under court order. MCL 722.872(f).

11 MCL 712A.19a(6) and (7)(c).

12 MCL 712A.19c(2)-(3) and MCL 400.209(1).

13 MCL 712A.19c(3).

14 *In re TK,* 306 Mich App 698, 707 (2014).

15 *In re McGowan,* unpublished opinion per curiam of the Court of Appeals, issued May 17, 2011 (Docket No. 300309).

16 *TK, supra* at 705 (citing MCR 3.979(F)(1)(b), which permits a "juvenile guardian or other interested person" to seek termination of a juvenile guardianship).

17 MCL 712A.19a(9) and MCL 712A.19c(8).

18 Federal title IV-E funding of guardianship assistance payments is limited to relatives. The eligibility criteria for federal funding differ slightly from the criteria applicable to state-funded guardianship assistance. See MCL 722.874(2). In addition, if a prospective guardian is eligible for federal funding, a child's siblings are categorically eligible to receive assistance. In state-funded cases, each sibling must meet eligibility requirements. MCL 722.874(3).

19 MCL 722.873.

20 MCL 722.874(1).

21 MCL 722.875(6).

22 *In re COH,* 495 Mich 184 (2014).

23 *COH, supra* at 198. The relative preference is contained in MCL 722.954a(5).

24 *COH, supra* at 203, n 10.

25 *COH, supra* at 202.

26 *COH, supra* at 203. In *COH,* the court did not refer to the "best interest" factors in EPIC, which apply to minor guardianships under that act. It seems that the EPIC factors would be more relevant to the decision to order a juvenile guardianship. In any event, the EPIC "best interest" factors are similar to the factors listed in the Child Custody Act and Michigan Adoption Code.

27 *COH, supra* at 202. The Adoption Code factors, which are listed in MCL 710.22(g), are as follows:

(g) "'Best interests of the adoptee' or 'best interests of the child' means the sum total of the following factors to be considered, evaluated, and determined by the court to be applied to give the adoptee permanence at the earliest possible date:

"(i) The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee or, in the case of a hearing under section 39 of this chapter, the putative father and the adoptee.

"(ii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father to give the adoptee love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.

"(iii) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, the putative father, to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

"(iv) The length of time the adoptee has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

"(v) The permanence as a family unit of the proposed adoptive home, or, in the case of a hearing under section 39 of this chapter, the home of the putative father.

"(vi) The moral fitness of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, of the putative father.

"(vii) The mental and physical health of the adopting individual or individuals or, in the case of a hearing under section 39 of this chapter, of the putative father, and of the adoptee.

"(viii) The home, school, and community record of the adoptee.

"(ix) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court considers the adoptee to be of sufficient age to express a preference.

"(x) The ability and willingness of the adopting individual or individuals to adopt the adoptee's siblings.

"(xi) Any other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody."

28 MCL 710.22(g)(*iv*), MCL 722.23(d), and MCL 700.5101(a)(*iv*).

29 *In re BZ,* 264 Mich App 286, 301 (2004) and *In re McIntyre,* 192 Mich App 47, 52-53 (1992).

30 "If a child resides with licensed foster parent(s), the psychological attachment of a child to the foster parents must always be considered before replacing the child to a different adoptive home. The child's age, developmental stage and frequency and number of replacements must all be considered in relationship to the length of time the child has resided in the foster home." ADM 610, p 2.

31 See, e.g., *TK, supra* at 709-10.

32 42 USC 675(5)(c) is frequently cited as support for the existence of a permanency goal hierarchy. This provision requires state agencies to state in the "case plan" their efforts toward achieving one of the listed permanency goals, but this provision does not explicitly rank those goals. See also MCR 3.976(A). However, adoption is, by its terms, more permanent or stable than guardianship since a guardian or other party may terminate the guardianship by filing a petition in court. MCL 712A.19a(14) and MCL 712A.19c(12).

33 42 USC 673(d)(3)(A)(ii) and MCL 722.873(c).

34 MCL 712A.19a(5).

35 Cf. *BZ, supra* and *In re Hardenburg,* unpublished opinion per curiam of the Court of Appeals, issued February 11, 2014 (Docket No. 316158).

36 Children age 14 or older must consent to their adoptions. MCL 710.43(2).

37 Relative foster care placement weighs against termination of parental rights. *In re Olive/Metts,* 297 Mich App 35, 43 (2012).

38 GDM 600, pp. 2-3.

39 MCL 722.873(c).

40 Child Welfare Policy Manual, 8.5B, Guardianship Assistance Program, Eligibility, Question 5 (the "title IV-E agency" must rule out reunification and adoption before a child is eligible for guardianship assistance).

41 If MDHHS denies GAP eligibility, the prospective guardian may request an administrative hearing, MCL 722.879.

Attorneys Making a Difference: Paula Aylward

by Stephanie Cardenas

"I'm sorry but you are on Central Registry. We can't hire you." If this statement was said to you, you may want to call Paula Aylward. Paula Aylward has been practicing law tor 25 years but began practicing law in Michigan in 2000. She opened up her own law practice in 2006, in the town of Marshall, and found there was actually a strong need for attorneys that would represent people on the Department of Human Services Central Registry and needed recourse. Ms. Aylward knows the purpose of the Central Registry and that there is a need for it but she also knows there are people placed on the Central Registry that should have their names expunged from the list. She has heard from clients that didn't know their name was on the list and then found out ten years later when applying for their Masters in Social Work or after going to school for years to become a schoolteacher and being denied. Ms. Aylward would like to see the rules and laws concerning Central Registry changed to include more due process for the people being placed on the list.

In addition to her Central Registry work, Ms. Aylward also uses her expertise to pursue her own cases handling Section 45 hearings, Foster Care license revocation and day care licensure revocation appeals. She readily lends her expertise to other attorneys trying to handle these tough issues in their own family law and juvenile law cases. Her vast knowledge of the subjects has helped her on the Foster Care Review Board as one of the volunteer committee members that developed parent and child visitation recommendations when the children are placed foster care. Ms. Aylward also provides pro bona legal services to veterans through the Thomas M. Cooley Law School "Service to Soldiers" Program and the University of Detroit Mercy School of Law's program "Project SALUTE." She is also an active member of the State Bar of Michigan Parents, Appellate, Family and Children's Law Section. She is currently an active member on the Children's Law Section Committee. When Ms. Alywand is not practicing law she is trying to spend as much time with her family- her number one priority.

Upcoming Events

The Children's Law Section invites all members to actively participate in our events and meetings. We also welcome members to notify us of announcements and items of interest to our membership. If you would like something included in future editions, please notify the section chairperson.

Council Meetings

Meetings are held on the third Thursday of each month.

All meetings are held at the State Bar of Michigan, 306 Townsend, Lansing, MI unless otherwise announced. Changes will be posted on the State Bar of Michigan Children's Law Section website in advance when made.

Meetings start at 5:00 p.m.

Children's Law Section members who are not Council members are welcome to attend all Council meetings. If you are not a Council member and wish to attend, please contact the Chairperson, Christine Piatkowski, at piatkowski.law@chartermi.net, in advance so that appropriate accommodations can be made for space and food.

Annual Meeting

The Children's Law Section will be hosting its annual business meeting on Friday, October 9, 2015 at the State Bar Annual Meeting in Novi. Everyone is invited to attend. The event is currently scheduled from 9:00 a.m. until 11:00 a.m. Stay tuned for more details.

Upcoming Events Around Town

- **April 6-7, 2015,** Youth Behind Bars Capitol Forum, sponsored by Michigan Council on Crime and Delinquency (MCCD), registration is found on-line by going to the MCCD website.
- **July 22-23, 2015**, 4th ABA National Parent Attorney Conference-Contact the American Bar Association Center on Children and the Law at (202) 662-1720 or on-line for more information.
- **July 24-25, 2015**, 16th ABA Annual Conference on Children and the Law-Contact the American Bar Association Center on Children and the Law at (202) 662-1720 or on-line for more information.