

# Referees' Quarterly



A publication of the Referees Association of Michigan

Since 1984

[www.referees-association.org](http://www.referees-association.org)

PRESIDENT, KENNETH D. RANDALL  
EDITOR, DEBORAH L. MCNABB

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## RAM HOLIDAY LUNCH, JUST DESSERTS



On December 8, 2005, a record twenty-seven referees attended RAM's holiday lunch at Waldenwoods Resort in Hartland, Michigan. The large turnout was due, perhaps in part, to the popularity of the historic resort – a lakeside retreat for men back in the day. Now Waldenwoods has been graced by not only the likes of Thomas Edison and Henry Ford, but also Jon Ferrier and Mark Sherbow! Thanks to Kathy Oemke for the suggesting this wonderful site.

Lunch was preceded by a brief board of directors meeting (minutes will be posted on our web site [www.referees-association.org](http://www.referees-association.org)). Our holiday meal, served in the main lakeside lodge, included baked parmesan chicken, garlic potatoes, green bean almandine, and caramel apple nut pie for dessert. The holiday-adorned dining room emanated a sweet aroma of wood smoke from several fieldstone fireplaces. The warm ambiance certainly enhanced our good spirits, but the true spirit of the holidays comes from somewhere else.

There is an undeniable synergy whenever referees get together. Smiles grow bigger, laughter gets louder, and eyes light up when friends walk through the door. Our holiday lunch provides such an occasion to congregate. It is a moment we make for ourselves, a time for our circle to visit old friends, welcome new friends, and celebrate our successes and good fortune. Nothing, it seems, can dampen our holiday spirit, not grinchy IV-D budget cuts nor inclement weather (the day started at minus two degrees and an ice fog).

No matter the adversity we face as a group, we know we face it together, and when we are together, we are at our best.

All RAM members are encouraged to attend as many RAM events as you can: conferences, board meetings and especially our holiday lunch. To all of you who attended RAM's 2005 holiday lunch, thank you for your banter, wisdom and good spirit! For those who could not attend, please try to next year. It's worth the drive.

Happy holidays to all!

~Ken Randall

December 8, 2005

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## What is Old is New Again...Presumptive Joint Legal Custody

I've got my prancing shoes back on, and I hope you're ready to prance along as we review what turns out to be an old chestnut, dressed in new legislative clothing: presumptive joint custody.

Proposals to provide for presumptive joint custody have come and gone in Michigan for at least the last twelve years, and probably longer. I look back to the date in 1993 when I began serving on an SCAO subcommittee to study the issue. It has certainly been a long time, but my dim recollection is that our subcommittee's recommendation (resoundingly ignored by the Legislature) was to recommend that joint custody be presumptively proper, unless there was evidence it would not work – domestic violence, unequal bargaining power between the parties, parties unable to agree on time of day, etc. Again, relying on my rusty memory, I believe our committee was talking about a presumption in favor of what has come to be known as “joint legal custody,” and not “joint physical custody,” neither of which terms, amazingly, is yet to be defined in statute, as far as I know, although we have all always acted like we know what we're talking about (differences of opinion on whether “joint physical custody” is really any different from “mucho parenting time,” aside for the moment).

Even though the Legislature experienced one of its rare spasms of wisdom in ignoring the SCAO subcommittee recommendations, proposals to *do something* in the area of presumed joint custody have risen and fallen over the intervening years, and have usually died without action, often as a result of the spirited opposition of the Family Law Section of the State Bar.

But the concept refuses to die, and term limits certainly are not helping things, what with the ritual cleansing of the Legislature's institutional memory every few years. And at least one Legislator revealed candidly that there must be a problem with the way the Courts are handling custody, or constituents would not keep complaining about it! It is this refreshing, and rather breathtaking faith in the validity of constituents' pain that keeps the presumed joint custody legislation sausage grinder running from session to session.

This session's version is HB 5267, introduced on October 6, 2005 by Representative Leslie Mortimer (R-65), *et al.*, would amend section 6a of the Child Custody Act (MCL 722.26a) beyond recognition, and in the process, obliterate section 3 (MCL 722.23, the “best interests” factors) of the Act, and the entire 35-year-old technology for deciding custody cases in

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Michigan. How would this little 3-page bill accomplish so much havoc? The new subsection 6(a)(1) would read: "In a custody dispute between parents, the court shall order joint custody unless either of the following applies: (A) the court determines by clear and convincing evidence that a parent is unfit, unwilling or unable to care for the child. (B) A parent moves his or her residence outside the school district that the child has attended during the previous 1-year period preceding the initiation of the action and is unable to maintain the child's school schedule without interruption. If a parent is unable to maintain the child's school schedule, the court shall order that the parents submit to mediation to determine a custody agreement that maximizes both parents' ability to participate equally in a relationship with their child while accommodating the child's school schedule. A parent may restore joint custody by demonstrating the ability to maintain the child's school schedule."

Subsection (2) begins with this language: "If subsection (1) does not apply in a custody dispute..." and continues with the current language of present subsection (1). However, since proposed amended subsection (1) covers the universe of possible custody decisions by the court (all decisions are for joint custody, with four exceptions), *amended subsection (1) will always apply!* So, it does not take long for this legislative proposal to veer off the tracks of logic and consistency.

As to eliminating section 3's best interest factors analysis, when the Court can only award joint custody, save in the four designated exceptions, there is never a need to conduct a best-interests analysis, despite what the remainder of proposed amended subsection (2) would require.

The only analyses required would be (1) is a parent unfit? One's guess is that the standard might be the same as in a neglect or dependency action in the

Juvenile Section of the Family Court, but the legislation is unclear; (2) is a parent unwilling? One supposes the Court has but to ask; (3) is a parent unable? At the risk of blasphemy, God knows what that would involve, except perhaps an inventory of the parent's "parenting assets," like income, housing, knowledge of children's needs and willingness to meet them; and (4) is a parent out of the school district? No-brainer.

The "snap-back" provision for "restoration" of joint custody when a parent can demonstrate ability to maintain the child's school schedule, I suspect, is thought of as a nice, labor-saving device for the parties and kids, and the Court.

Now, as Bill Safire used to say: Here's the beauty part! Under proposed amendment to subsection (4) of section 6(a), "If the court awards joint custody, the court shall include in its award a statement regarding when the child resides with each parent, and shall provide that physical custody is shared by the parents alternately for specific and substantially equal periods of time." Some refer to this arrangement as "pure" joint custody. Others may prefer the term, "madness," or "utopia," perhaps, but regardless of your views, this is a starkly anti-Platonic (reread *The Republic*) vision of parents' responsibilities as paramount, even where the best interests of their children might dictate otherwise. It certainly focuses the Court's consideration on the parents' role, and relieves the Court of going through all those factors related to the best interests. It may be that the proposal springs from a genuine desire on the part of the lawmakers to have parents, rather than the Courts, be responsible for how and who raises their children – sort of the ultimate "privatization" of child custody cases.

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But like all utopias, this dream is bound to crumble. Where once we had just "best interest" trials on the issue of custody, under this proposal we could expect "fitness trials," "unwillingness motions," "inability trials," and "move-from-district motions." And never forget, under *Lombardo v. Lombardo*, 202 Mich App 151, 507 NW2d 788 (1993), if those presumptively proper joint (legal) custodians disagree about any of those important decisions, the Court (or its poor, suffering, dom/rel or fungible Referee) is stuck with making them for them. And in case you forgot *Lombardo* was a case that involved the important decision of choice of school for a child, the proposed amendments would provide, in subsection (8)(b), "That the parents share decision-making authority as to **all** of the important decisions affecting the welfare of the child, **including, but not limited to, the child's education, religious training and medical treatment.**" (Proposed new language in boldface). Oh, my Gosh, I get to decide whether to make the child a Shi'a or Sunni Muslim; an Orthodox or a Reform Jew; a Wiccan or a Pagan! As Kent Weichmann put it, now we finally get to determine the One True Faith!!! Imagine the good you can do in your courtrooms. Start dusting off your displays of the Ten Commandments now and be ready!

Well, this has been an exhausting but exhilarating prance around our beloved Capital, and I hope you've enjoyed the ride, but please don't take my word for it that I'm not making this stuff up: read it and weep (or rejoice) yourself. Then, if you have any left, after you have reread *The Republic*, spend a little time reflecting on the conflict between parents' rights and responsibilities, and the best interests of their children that a proposal like this could nourish. And then decide if we really need any more conflict, and maybe say a prayer

for the continuing evidence of intelligent design emanating from our wise Solons.

Penumbras, emanations, Oh, My!

~Jon Ferrier, Circuit Court Referee  
17th Judicial Circuit, Kent County

## NEW PROCEDURES FOR RAM'S 2006 ELECTION

2006 is an election year for RAM. This will mark the first time we will follow new procedures outlined in the 2004 amendments to our by-laws. In the "old days," nominations and elections were held at the annual meeting at our spring conference. RAM's by-laws were amended to allow all members to vote, whether or not they attend the annual conference.

Under the new procedure, RAM will send out a request for nominations with the February 16, 2006 board minutes. Nominations must be submitted to our executive secretary, Deb McNabb, prior to or at RAM's April 20, 2006 board meeting. Written ballots will then be mailed to the general membership within seven days after our April board meeting. Members may vote for executive board officers and members-at-large by either mailing them to Deb McNabb (post dated no later than 7 days prior to our conference), or by hand delivering them to a ballot box at the conference by Thursday, May 25, 2006 - the day before our annual meeting.

All officers and five members-at-large positions are up for election. Officer positions include: president, vice president, executive secretary, recording secretary and treasurer. All positions are two year terms.

The May 2004 changes to our by-laws were made prior to the existence of RAM's web site, [www.referees-association.org](http://www.referees-association.org). Because of the considerable cost savings in postage by using the internet, our Constitution and By-Laws Committee is considering tweaking the procedure to allow for posting of ballots on our web site, if not actual elections.

~Ken Randall 11/25/05



## **Congress and Adoption**

**By Congressman David Camp**

**4th Congressional District, Michigan**

Family law is one of the toughest, least recognized, but most important segments of the legal profession. On a daily basis, Referees, Friend of the Court and Juvenile Court work to give families, and especially children, the chance to set out on a new path and get their feet back under them. Nothing is more important to our communities, to our state and our country than stable families in which children can grow.

As current Chairman of the Congressional Coalition on Adoption Institute, I share your goal and believe strongly that we must continue to do more in moving children from foster care to permanent, safe, and loving homes.

In Congress, I serve on the House Ways and Means Subcommittee on Human Resources, which has jurisdiction over much of the foster care system. I was pleased to have introduced the Adoption and Safe Families Act, which was signed into law in 1997 by President Bill Clinton. This landmark legislation for the first time created a national policy to focusing on the safety and well being of children, and contains some of the most sweeping changes in the past two decades.

The two goals of the Adoption and Safe Families Act were to 1) ensure that consideration of children's safety was paramount in child welfare decisions so that they are not returned to unsafe homes and 2) to ensure necessary legal proceedings occur quickly so that children don't linger in foster care. In the five-year period following the implementation of this legislation, the number of U.S. children adopted increased by 64 percent, and special needs child adoptions increased by 63 percent.

Since passing that Act in 1997, Congress, however, has not stood idly by. With 542,000 children in foster care, 126,000 eligible for adoption, and nearly half age nine or older, I was proud to stand next to President George W. Bush when he signed into law my Adoption Promotion Act in 2003. The bill created new financial incentives for states that increase adoptions of older children. Under the new program, a state receives \$4,000 per older child adopted above a base number set specifically for that state by the Department of Health and Human Services.

Currently, I am working on finding ways to give states considerable flexibility over their programs while guaranteeing increased funds. Congress must continue to work with all parties involved: state agencies, courts, referees and caseworkers, to ensure that our country's needs are being met.

I believe states should be able to create innovative programs, using the resources like the Referees Association, to improve foster care systems. As we strive to make the next big gains in child welfare, we face an uphill battle. Financial aid is receiving extensive scrutiny, demanding that we worker harder and smarter on behalf of these children. I am confident, with the support of all of you, we can meet this challenge.



## Former Calhoun County Referee Deployed in the Aftermath of Katrina

By Sonya L. Leibowitz, LT, USCG

In 1995, I accepted a position with the Calhoun County Circuit Court, as a Family Division Referee. While I found the position incredibly fulfilling and enjoyable, as many of you know, burnout is an often inevitable consequence of working within the Family Court System. After about six years with the Family Court, and shortly after 9/11, I found my self searching on the internet for a well needed vacation; it was then that an advertisement popped-up, "Coast Guard-Jobs that Matter." In 2003, I entered the United States Coast Guard, and as you can imagine, life has been a whirlwind ever since. Of all of the experiences that I have had in the Coast Guard, the one which has left the greatest personal impact has been my deployment in the aftermath of Hurricane Katrina.

On Monday, August 29<sup>th</sup>, as Hurricane Katrina made her now notorious and disastrous journey to the Gulf Coast, many of us in our Coast Guard office were staring with unwavering vigilance not into the face of the storm, but into the TV screen and the media's uninterrupted coverage of the biggest natural disaster to ravage the United States in nearly a century. As an active duty Coast Guard Judge Advocate (JAG), assigned to the Coast Guard's Maintenance and Logistics Command Atlantic, the Coast Guard's largest legal field office, I never actually thought that I would be deployed and certainly not deployed into something that would later be described as "in theater."

On Wednesday, August 31<sup>st</sup> legal teams were formed; I was designated as a lead attorney and sent off to the "theater." The purpose of this rapidly implemented legal assistance field support was singular: take care of Coast Guard members and their families so that the members can continue with their mission. Rescuing the rescuers, is the way we envisioned our mission. To carry out our mission, we spent countless hours driving thousands of miles, often late into the night, along unfamiliar and dangerous roads. We flew aboard Coast Guard, Navy, and contract aircraft to reach our clients in locations inaccessible by car and, of course, accessed many areas by boat.

Many of the people that we counseled, during our deployment, possessed little more than what they were able to throw into their cars before evacuating from their homes. They lost their homes and everything in it and were now suddenly working and living in convention centers, hotel rooms and military evacuee housing. These folks had little time to grieve because their jobs demanded so much of them. Despite their own enormous personal losses, their total concentration and commitment to the task at hand was needed and demanded because lives were at stake. Coast Guard members throughout the region worked tirelessly saving lives, property, and the environment. No excuses. No complaints. No "high-fives." They were just doing their jobs as best they could under extreme circumstances. These were the people we were sent to help.

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During one of my first trips I was diverted to Lockport, Louisiana; not the location of a Coast Guard Station, but rather the location of the apartment complex of a young Coast Guard Petty Officer from Station Grand Isle. When it became apparent that Station Grand Isle would suffer a possible direct hit from the storm, the petty officers offered his apartment as a safe haven to his fellow “Coasties” who had no other place to go to. About 20 members of his crew took him up on his generous offer, and they ended up spending almost a week in his home. It was in the living room of this cramped, over populated apartment that I provided much-needed legal assistance and assurance to a group of young Coast Guard members suddenly made homeless by the hurricane.

However, the most memorable trip during my deployment was my first journey into the City of New Orleans. Once we reached the city limits, our team was escorted by an armed convoy through the City and into Coast Guard Station New Orleans. The military presence was overwhelming; there were literally tens of thousands of troops in encampments throughout the City. When we arrived on site, our members were living and working out of a “tent city,” but the smell they had to endure was unimaginable; it was the smell of natural gas leaking into the air, raw sewage and decay. I immediately arranged for an impromptu town meeting in a makeshift bunker.

All around us, Helicopters were landing every two minutes, taking sandbags to the levy breaks, all of which made for a dramatic setting for a legal briefing. After the briefing, I was able to counsel members individually. I heard their often heart wrenching stories and did whatever it took to lend a helping hand, from a legal perspective.

I served about a month in the impacted area before being relieved by other Coast Guard JAGs from various legal units around the country. Some of the unique legal issues I addressed included: whether a divorced parent, whose custody order prevents her from moving out of Orleans Parish, would violate that order by relocating across country, when the entire area within Orleans Parish is uninhabitable; whether a lease automatically terminates if the rental property is uninhabitable; and a very common issue was if an apartment has not been destroyed but a civil order prevents the tenant from entering the property, is the tenant still required to pay rent during that period. However, the most complex issues involved insurance companies; whereas, insurance companies would not pay claims until an adjuster assessed the damage, however, the insurance adjusters would not visit residential properties until utilities were restored, which for some areas could take many months; and when insurance adjusters did visit properties, homeowners were often informed that their damage was not from the Hurricane, but from flood damage, and thus their homeowner’s insurance policy did not cover the damage. In addition to addressing these, and many other issues, I and my fellow JAGs also fulfilled the tremendous need for revised estate planning and powers of attorney.



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As anticipated by the Coast Guard's legal division, legal concerns and issues affecting the area have now turned from that of a first-responder to a higher degree of legal assistance that may ultimately result in litigation involving complex environmental, property, insurance and contract law. Regardless of the future legal direction taken by the course of events, Coast Guard JAGs remain *Semper Paratus—the Coast Guard's motto—always ready*. For those of us fortunate enough to have served on these first-response legal assistance teams, the experience gained from working in the field, supporting our teammates, was invaluable and unforgettable.



**LT Sonya L. Leibowitz:** LT Leibowitz was admitted to the Michigan State Bar Association in 1991, and is a Past President of the Calhoun County Bar Association. In 1995, LT Leibowitz was appointed to the Family Court Bench, as a Family Court Referee, in Calhoun County, Michigan. LT Leibowitz entered the Coast Guard in August 2003. She currently serves as a staff attorney at the Maintenance and Logistics Command Atlantic, the Coast Guard's largest legal field office in the country. LT Leibowitz regularly instructs the Child Custody and Child Support classes at the U.S. Army JAG School, and has authored sections of the Army JAG's Legal Assistance Course Book.

## RAM Scrapbook—Pictures from the Holiday Luncheon Meeting



Lynne Jakubiak and Elizabeth Belanger



Paul Jakes (Macomb County) & Erin Magley (Ottawa County)



## Celebrating a new tradition in Michigan: Adoption Day, November 22

By Marianne Udow, Director

Michigan Department of Human Services

Michigan children, families, loved ones, courts and state agencies came together Nov. 22 to celebrate one of Michigan's newest and most endearing traditions – **Michigan Adoption Day**. This was a day when state family court judges finalized adoptions for hundreds of families, realizing the opportunity to permanently unite children with new loving families.

This year, on the forty-second anniversary of President John F. Kennedy's assassination, as we reflected on a tragic day in our history, we also looked with hope and celebration to our future as 270 adoptions were finalized in family courts around the state.

The Michigan Supreme Court and Michigan Department of Human Services (DHS) started Michigan Adoption Day in 2002. They founded the event – which is part of a national celebration – to educate the public about the adoption process. This year's event was the largest Adoption Day in the nation – for the third consecutive year. The event is held annually on the Tuesday before Thanksgiving, reflecting the theme, "Giving thanks for families."

This year, Governor Jennifer M. Granholm proclaimed **November as Michigan Adoption Month** and the Michigan Supreme Court issued a resolution declaring Nov. 22 as Michigan Adoption Day. In collaboration with local DHS offices and private adoption agencies, courts in participating counties finalized adoptions and held celebratory receptions for adoptive families. Media outlets around the state joined the celebrations by running stories about the union of new loving families. Some counties where no adoptions were finalized participated by holding educational events about adoption and foster care.

Why is Adoption Day important? Because the stakes are so high for abused and neglected children in Michigan. While the Department of Human Services and state courts strive to reunite children with their birth parents, doing so is not always in the child's best interest. Courts may terminate parental rights in cases of child abuse and neglect. There are more than 4,000 children with parental rights terminated who are either waiting for their adoption to be finalized or waiting for an adoptive family to be identified. Most children who are waiting for a family are older, minorities, or members of sibling groups - which are the hardest to place.

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Adoption represents one of the most important functions of government: connecting children with permanent, loving families. This day helps demonstrate our collective belief that every child deserves a forever family.

Please visit these Web sites for more information about Michigan Adoption Day or children awaiting adoption in Michigan:

Michigan Adoption Resource Exchange: [www.mare.org](http://www.mare.org)

Michigan Supreme Court/Michigan Adoption Day

<http://www.courts.michigan.gov/supremecourt/Press/MichiganAdoptionDayindex.htm>

Michigan Department of Human Services: <http://www.michigan.gov/dhs>

## **CONGRESS CUTS IV-D FUNDING**

On November 18, by a vote of 217-215, the U.S. House of Representatives passed a \$50 billion reduction in government spending that greatly reduces IV-D funding to both families and child support enforcement workers (including referees). The impact in Michigan would be extreme. The funding loss would be in excess of \$60 million in the first year – 23% of the total child support enforcement program. Fifty-five thousand people would lose their food stamp eligibility. Friend of the Court offices would be gutted, and many families already teetering on financial disaster will be forcefully pushed over the edge.

The budget reconciliation bill, H.R. 4241, was opposed by Governor Granholm, Chief Justice Taylor and Attorney General Cox, Office of Child Support Director Marilyn Stephen, as well as a very vocal Friend of the Court Association. Some congressional supporters of the bill apparently did not understand that these "cuts" actually cost more money in the long run. According to a 1999 national study, every \$4 spent on child support enforcement saves a total of \$5 in TANF, food stamps, Medicaid and housing subsidies.

Cuts would include a reduction in reimbursement from 66% down to 50% at 4% per annum increments. Passage of the bill also means that Michigan cannot draw federal reimbursement for incentives. In 2004, incentives were \$29 million.

The good news is that the budget process is not over. The U.S. Senate passed its own budget that did not include the draconian cuts contained in H.R. 4241. On December 15 the Senate voted in favor of Senator Kohl's motion to instruct conferees to reject cuts in the child support enforcement budget (which partially funds FOC referees). Both Michigan Senators Levin and Stabenow voted "yes," and the over all motion carried by a vote of 75 to 16. This vote does not guarantee support for NO cuts or restrictions in the IV-D child support enforcement budget, but it's a giant step in the right direction.

~Ken Randall

## RAM Members Enjoy the Holiday Luncheon at Waldenwoods



Kathy Oemke (Livingston) & Mark Sherbow (Oakland)

### Join Our Listserv!



If you are not already a member, please consider joining the RAM Listserv. Its purpose is to provide a confidential forum for our members to discuss issues relevant to Michigan referees. This listserv is private and limited to member referees. It is secure from the eyes of non-referees (except, of course, the IT department of your County!). Only those persons who are current members of RAM and who have been approved by the list moderator may participate in the listserv. I encourage you to take advantage of this valuable resource today! Just send an email to [pjacokessr@yahoo.com](mailto:pjacokessr@yahoo.com) for instructions on how to join!

### GET INVOLVED!

ATTEND ONE OR ALL OF  
RAM'S UPCOMING BOARD  
MEETINGS



**Thursday, February 16, 2006, 10:00 a.m.**  
**State Bar Building, Lansing**

**Thursday, April 20, 2006**  
**State Bar Building, Lansing**

### *Past Presidents of the Referees Association of Michigan*

Wayne Kristal, Jon Ferrier, Ronald Foon, Marie Johnson, Hon. Linda Hallmark, Wendlyn Machnik, Karen Liwien-ski, Vincent Welicka, Philip Ingraham, Zaira Maio, Mark D. Sherbow, Deborah L. McNabb



## Observations of a Family Law Practitioner

By Carlo J. Martina

I was asked to give RAM members feedback on what qualities a family law practitioner can expect from a good Referee, and what pitfalls to avoid. As to the first, I'd hope that all Referees would aspire to the qualities Socrates felt was required of a jurist: ". . . to hear courteously, to answer wisely, to consider soberly, and to decide impartially." As to the foreseeable pitfalls, and how to avoid them, I feel it necessary to preface my suggestions with the recognition that as a family law practitioner, I have the luxury of being able to advocate, without having to make decisions, one after the other, on disputes brought before me. On the half dozen or so times a year I sit as an arbitrator, frankly, I find it a difficult and awesome responsibility to make such weighty decisions, and I am only dealing with one set of litigants that morning. Referees, on the other hand, must often decide numerous family law matters on motion day, with but a few minutes to hear each side's arguments of fact and law, and little to no time for the luxury of reflection. The attorneys and the parties typically expect an opinion immediately. This is a daunting task, even if blessed with Solomonic wisdom. That being said, I would offer the following:

Most practitioners recognize the tremendous time constraints Referees face while trying to understand and make decisions on the numerous cases before them. Particularly on Motion day. It's a great responsibility, given the stakes. Decisions of the family court have a profound effect on the citizens of Michigan; more so than any other area of law. Over half of those who marry will be divorced at some point in their lives. Those who may not have ever been divorced, may become the spouse or significant other of someone who has been divorced. As a result, an increasing majority of Michigan's children will be, in one way or another, directly affected by divorce. Another large segment of Michigan's children are born to single parents. All these adults and their children will be, to varying degrees, involved with the Friend of the Court. Your decisions will not only affect the litigants and their children before you, they may have an impact on their extended family, as well as how the children learn, grow, and evolve into their own adult relationships and parenting responsibilities. If it's clear that the situation addressed in a motion is too complex to make a sound decision on the spot, set the matter for an evidentiary hearing, or ask the parties to come back to give you further information relating to their motion. While the vast majority of motions require, and are capable of being decided as they are called before you, if the issue is important enough, don't be reluctant to give it additional time.

So too, if you feel you have insufficient factual information or legal citations to render your opinion for a recommended order, don't be reluctant to ask the attorneys for additional facts or law on the matter. On complex or novel matters, you need to make the right decision. Many people can't afford to take a de novo appeal to the judge, or may feel it's futile. Few judges want to regularly second guess their Referee's decision. In any case, your recommended opinion often ultimately decides the issue. That is a profound responsibility. There is nothing injudicious in saying you need more information before you can decide an issue. If anything, just the opposite is true. I can recall years ago, a

young, newly appointed Wayne County Family Court Judge telling a colleague and I, he hadn't much experience with family law. He was interested in knowing and understanding the facts and law involved in our rather complex case, and asked us to provide him additional information to guide his evaluation of the options available. He expressed the heartfelt desire to do the right thing by the parties, but felt he needed more information regarding the facts and applicable law to do so. Neither counsel thought less of him. I recall telling colleagues how impressed I was with his candor and desire to do the right thing. He went on to become a respected Court of Appeals judge and the principle author of the thoughtful, long overdue template for defining proper cause and change of circumstances, Vodvarka v Grasmeyer, 259 Mich App 499, 675 NW2d 847 (2004).

When you render a decision, particularly on complex issues, it is important that the litigants understand your rationale. That adds immeasurably to the legitimacy of your decision. Just as with our own children, it's not always sufficient to say yes or no to something they request. They need to hear the logic behind our decision. Litigants are often no different. They might not agree with your decision, but hopefully, over time, they will come to understand it. Providing your rationale, I believe, helps reduce the likelihood of subsequent "misunderstandings" as to their rights and responsibilities, thus reducing the likelihood of them coming back on similar issues.

I'm sure all of you have had litigants who repeatedly find their way onto your docket. You've seen and heard enough to form opinions regarding the parties' character and motives, and may feel it necessary to tell one litigant or the other your opinion of them. Please do so with caution. While that may be appropriate on cases with which you are familiar, things aren't always as they initially appear. Oftentimes in relationships, there has been a disparity in power. One party may have been a provocateur throughout the marriage. The issue before you however, may be the result of the less manipulative/non bullying partner accused of a gaffe, which results in the motion. That person's actions may, however, pall in comparison to the aggressive, obnoxious behavior of the other party throughout the marriage. Nothing makes a bully, or manipulator, more emboldened than having the target of their enmity chastised in open court. Be careful not to inadvertently make a bad situation worse.

It takes a conscious effort for all of us to avoid applying assumptions, rote, to one gender of parent or the other. The roles of parents, and the responsibilities they have to their children, have evolved considerably over the last several decades. Please always remember this when forming judgments and opinions of the parental competence of the litigants before you.

Be mindful that some of the most indelible assumptions the parties form regarding their rights and responsibilities, and their perception of the legitimacy of the court in addressing them now and in the future, will be gained from their initial contacts with you. Many litigants have little idea what to expect. They need to respect the legitimacy of the process, if excessive litigation is to be avoided. Particularly useful are early intervention conferences or early stage pretrial/case management conferences run by Referees. That gives the Referee an opportunity, early on, to educate the parties on their rights and responsibilities, while keeping them mindful of the impact their actions have on their children. You can discuss the alternative remedies for resolving disputes available to them. It gives the parties a chance to hear directly from you the benefits of cooperating to reach a mutually acceptable understanding on issues, as they arise, both now and in the future. It allows you to address the potential consequences for unreasonable behavior. It also provides you an early opportunity to discover potential problems or disruptive conduct caused by one or both of the parties that may need to be addressed early on. The initial tenor of a case is so important. More times than not, the tenor can be

affected by what the parties learn from their first interactions with you, be it at an early intervention or pretrial conference, or a motion hearing. Using programs such as S.M.I.L.E., or Kids First, can also reinforce that message, and should be attended by both parties at the outset of the case.

This raises yet another issue. At a certain point, you may learn that one party is conducting an unrelenting attack on the other, without merit or justification, or causing the parties to be brought before the court on picayune issues, the only practical purpose of which is to harass the other party emotionally or financially. If this becomes clear, don't be reluctant to recommend awarding the party with inadequate resources, attorney's fees, and/or if necessary, recommending attorney's fees as sanctions. Reserving decisions on attorney's fees until the end of the case, generally proves to be a toothless threat. Assuming the parties are ultimately able to resolve their substantive issues, it's difficult to recommend going to trial on the sole issue of attorney's fees. It then becomes a fulcrum to the success or failure of a negotiated settlement. Drop the attorney's fees, and we have a deal. That only rewards litigants and litigators who engage in unnecessary, or unprofessional litigation strategies, often on a serial basis.

Practitioners recognize that to no small degree, some Referees take their direction regarding policy issues from the judge(s) they are assigned to assist. Although a judge's template for handling certain kinds of problems may make sense the vast majority of the time, and even simplify and make predictable the process, there are circumstances that present themselves which require a deviation from that template. Please remain open to requests for relief which require a responsible but novel approach to the problem.

The court rules, and common sense, dictates that litigants first seek concurrence of the other party, prior to bringing a motion. Often that doesn't happen. When presented with a motion containing a slew of issues, if it appears as though the attorneys haven't attempted to at least resolve some of them prior to your hearing the case, for the sake of those litigants and counsel waiting to be called, as well as your own peace of mind, instruct the parties and the attorneys that you will pass the matter until the attorneys can assure you that they have at least attempted to discuss and resolve the issues they are asking you to decide.

Lastly, be sure that your written recommended order adequately expresses your findings and opinion. Recently, the presiding judge of the Family Court in Wayne County, Hon. Lita Popke, formed a Committee which designed a form not only for the Referees opinion, but also for a summary of the litigants objections, if any. This gives the litigants the opportunity to ensure the sum and substance of the recommendation is adequately spelled out, as well as applicable objections, so as to avoid disputes later on.

I have profound respect for those who have dedicated their professional careers to deciding family law disputes. With limited resources, and an ever growing docket, it is a very demanding role. Family Law practitioners can help by using various types of mediation, initiated early on, to get the parties through many thorny issues without referee involvement. Collaborative law holds great promise as well. It's working in numerous states across the country. Additionally, family law practitioners can ethically and competently continue to represent clients, while seeking to avoid unnecessary litigation, by counseling our clients with suggestions on ways to pursue justice while promoting respectful,

considerate conduct. Hopefully, as the Family Court continues to evolve into a more civil and humane system for resolving disputes within Michigan's families, the professionals involved in this process can further mitigate the harm the dissolution of relationships causes to litigants, their children, and our community.

*Carlo J. Martina, of Plymouth, Michigan, is currently an Executive Board Member of the State Bar Family Law Council and Chair of its Family Support Committee. He is immediate past President of the Wayne County Family Law Bar Association, and has represented both organizations in hearings before the Michigan Supreme Court. He lectured at ICLE and Family Law Section seminars, and written for ICLE, the Michigan Family Law Journal, and Latches. He has a multi-county family law practice in southeast Michigan, and also does private mediation and arbitration.*

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## On Call Duties, Emergency Calls After Hours

By Kathleen Oemke, Juvenile Referee,  
Livingston County

Many judges are changing their procedures due to a Memo from Anne Boomer of the State Court Administrative Office. Judges are now carrying pagers and testing out FAX Machines in their homes. Recently, these changes have occurred in response to the memo in order to protect the referees who are called upon in emergency situations. There is a requirement that court orders be signed by a judge contemporaneous with the removal of a child from his/her home.

The State Court Administrative Office has confirmed what many may have suspected. Only Judges have the authority to remove children from their home. This came to light in the recent memo<sup>1</sup> which thoroughly discusses the statutory requirements and the duties of Juvenile Referees. Two recent cases have been decided which gave rise to the need for such a memo. These cases are: *In re AMB*, 248 Mich. App. 144 (2000) and *O'Donnell v Brown et al.* 335 F Supp2d 787 (W. D. Mich., 2004). Both of these cases accentuate the fact that referees are not authorized to sign court orders. All Judges do not share the conclusions addressed in the memo.

This issue arises particularly when the court is closed. The emergency calls are received from law enforcement or DHS by an "on call referee". It is necessary to notify the Judge, if there is a request for removal from the home. How this is accomplished and what procedure will be put into place is a policy for each jurisdiction to establish. Many courts may want to address the delegation of these emergency responsibilities in their family court plan. Delegation of this duty to the referee is not possible.

The concern for referees is one of liability. Because there is no statutory authority to enter orders, if any order (oral or written) is relied upon; there may be no protection of immunity for quasi-judicial officers who may be acting beyond their authority.

According to Anne Boomer of State Court Administrative Office, Trial Court Services; she believes that there is no problem regarding Title IV E funding as no error cases have been reported with referee's authority as an issue as a reason to deny funding<sup>2</sup>. Title IV E requires the determination to be made by a judicial officer, and apparently a referee is sufficient.

The statutes reviewed in the memo are MCL 712.A 2c, 712A.14, and 712A.15 and MCR 3.963 and 3.964 as well as 42 USCS 1983, CFP 715-2.

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<sup>1</sup> Memorandum dated August 19, 2005 entitled: [The Role of Referees and Judges in the Family Division of Circuit Court and Title IV-E Implications](#)

<sup>2</sup> So long as, the contrary to the welfare findings are made along with the findings regarding reasonable efforts to prevent the out of home placement.

# “How I Decide Cases”

By Referee Jon T. Ferrier

17th Circuit Court, Family Division

This is an article about you, a Family Division Referee and member of the Judicial Branch of Government. That is because, despite the somewhat misleading title, the intention of this article is to put *you* into the title as the “I” who is pondering the process of deciding the cases coming before you (me). Thus, as former Kent County Friend of the Court, William D. Camden once famously explained: “When I say ‘I,’ I mean ‘Mike [Assistant FOC Mike Prange] and me!’”, my hope is that when you read about how I make decisions, you are led to undertake a self-examination of your own methods. You are also welcome to use anything here that you find valuable, to reject anything you consider to be hogwash, and to let me (and other Referees) know what you think.

When RAM President, Ken Randall, asked me to write a couple of articles for the upcoming *RAM Quarterly*, the nomination of Judge Alito to the U.S. Supreme Court had just been announced, and I found myself thinking, what would I ask Judge Alito, were I on the Senate Judiciary Committee during the confirmation hearings?

Now, I am not privy to the questionnaire that was reportedly sent back to White House Counsel, Harriet Myers, for a “do-over,” prior to the withdrawal of her nomination to fill Justice O’Connor’s seat, but I wondered if somewhere in there, or in the questioning in the Senate, someone will think to ask, “Judicial Nominee, please describe the process you undertake to decide a case: how do you plan to decide the cases that come before you?” It seems to me that one question provides a real tell-it-all opportunity for the nominee to explain to the advising, consenting Senators how the nominee’s judicial brain and heart and soul would work if confirmed. Questions about judicial “philosophy,” themselves abstract, invite abstract answers that might mean little, or could be interpreted differently by different listeners or questioners. But asking a person how they (would) decide cases coming before them, I believe, seeks concrete responses, which might actually be helpful in determining whether the nominee should sit on our nation’s highest court.

Like probably every lawyer, even Paul Newman’s character in *The Verdict*, I suspect, I briefly fantasize from time to time about getting that call from Karl Rove (or whoever): “Jon, we’ve heard great things about you; you appear to have a good heart. We’d like you to sit on the United States Supreme Court!” These fantasies are truly fleeting, however, since it does not take long to recall that the odds of that happening are even longer than on my being selected Pope – I simply have not lived my life in the right way to allow either of those possibilities.

But, even if I never am asked what I think is an essential question at my confirmation hearing, it seemed like an interesting exercise to prepare my answer on the off-chance. And suddenly, it came to me: it might be helpful, as a Referee, to tell myself how I decide cases, to really think it through and write it down, and then I would have a stick with which to measure myself and the decisions I make – sort of a not-for-publication “mission statement,” although I publish this one for your amusement.

So, how do I decide cases?

Over twenty-five years of Refereeing, I have learned that there is a law or court rule covering just about everything in the Family Division – it is a matter of continual amazement to me what the Legislature and Supreme Court have considered before us. We truly stand on the shoulders of giants, who have passed down wonderful books full of rules and definitions and procedures which, like precious gifts, are given to us for our assistance, to answer our questions, to comfort us. It is churlish not to take advantage of this collected wisdom of at least two branches of the government. More important, ignoring law and rule is a speedy ticket to error, if appellate decisions are any guide. And so, the first thing I try to do, when I confront an issue to decide in a case, is to try to remember or see if there's an apposite statute or rule.

How do I know what the issue is? Whenever possible, I try to read the file before I even start to decide the case – this goes for *pro con* divorces, which Referees hear, in my jurisdiction. If a Referee does not know what is in the file, there is a risk of being thrown off-balance during a hearing, which can impede good decision making. Knowing the file as well or better than the parties gives the Referee a fighting chance of not being taken by surprise – another luxury we should afford ourselves, you and I, when we have the chance.

How do I know whether there is a law or court rule applicable to the issue before me? I try to flush it out of the index, if I do not know the applicable law or rule. If I cannot find it in the index, and I have a hearing where counsel appear (as most Referees know, domestic relations cases often feature unrepresented parties in court), I will often ask counsel for the applicable law or rule, by asking them to cite me applicable authority for the position they assert. Often, the decision is as simple as determining that the Court has or does not have authority to do what is being asked.

Before I go into the courtroom, I try to remember to repeat a helpful mantra to myself: “This is not about me, it is about them.” Like any good mantra, this mental message to myself slows me down, takes me out of myself, and places me more into the position I am supposed to occupy: that of a neutral, hopefully fair decision maker. The idea here is to cleanse myself of my normal background noise of employee disgruntlement that my masters are so stupid, that the public is so damned demanding, that I am not paid anything *like* what I am worth – you may know the drill (if not, hang around for another few years). If it works, I walk into the courtroom ready to listen, observe, and rule when required. I am able better to focus on the task of finding the facts, applying the law, and deciding the issue. It also helps me to remember one of the most valuable realizations of my entire career: The more I talk, the worse it gets.

That brings me to the conduct of hearings, as it relates to how issues are decided. I strive to be a listener, and not a cutter-offer. Referees know as well as anyone in our Branch that folks say a lot of stuff in hearings that is unnecessary and often counter-productive – and I do not mean just the attorneys!

Over the years I have concluded that if I cut someone off prematurely, even where they are going far afield of any issues I have been able to discern, I end up inadvertently extending the hearing, or necessitating return trips to the courthouse until the party is able to make the statement I would not allow. This is distinguished, of course, from ruling on objections, ending obstreperous or disorderly ranting, and not allowing the parties to continue bouncing the ping-pong ball of the issues back and forth more than a couple of times before me, ideally.

Sometimes, it is helpful to reflect back to the parties what I have heard in what they have said. It has always been helpful, and now, required under the newly amended version of MCR 3.215, the Domestic Relations Referees court rule, (see MCR 3.215(E)(1)(a) ) to articulate the facts on which my decision is made, and to indicate the law or rule which applies, in my opinion. This has the double advantage of forcing me to examine my decision by what I believe should be the most important standard for a Referee: does it hold up under the law, or does it rest on personal bias; and it allows the parties

or and the Judge at review to know on what I based my decision and recommended order.

I believe it is critical to make my decision on the record, with the parties and counsel in front of me whenever possible, although that can be difficult for a variety of reasons: sometimes I need some distance from the heat of the moment before I feel comfortable stating my conclusion; sometimes I honestly do not know what to decide until I have mulled things over awhile; and sometimes, the parties have behaved in such a way as to cause me to conclude that it is safer for all of us if I send them my decision in the mail. But if I can, I want to give them the answer right then and there, at the conclusion of our hearing: it allows all of us to get on with our lives faster, and it allows the parties to ask questions to clarify what I have decided, to point out any omissions or errors, and to vent a bit more before reentering the real world.

Finally, I observe the Referee decision time-limit in the court rule as religiously as I observe anything. That is, in domestic relations cases, I make sure that I get my decision out within 21 days if at all possible, if I have not made it on the bench, or if I have. The parties have a right to expect me to follow the Court's rules, since I am part of the Court, and I have missed this deadline only a handful of times in my Referee lifetime. It turns out that the deadline *can* be met, and meeting it deprives the parties of one more thing to complain about me or the system I represent, the Branch of which I am but a Twig.

So, to all you fellow-Twigs, I extend my hope that these observations have been of some use to you, and that this article inspires you to do your own auto-psychoanalysis of thinking about how you decide cases. Who knows, maybe Karl Rove is looking up your number right now!

## More Holiday Snapshots from the Luncheon



**Referees' Association of Michigan  
22nd Annual Conference  
Petoskey, Michigan**

**May 24, 25, 26, 2006**



The Referees' Association of Michigan is pleased to announce the location of the 22nd Annual Conference. The Conference will be held at the *Stafford's Perry Hotel* located in the historic Gaslight district of Petoskey, Michigan. The *Perry Hotel's* turn-of-the-century charm offers phenomenal views of Lake Michigan and is set against the Little Traverse Bay.

The 22nd Annual RAM Conference will be packed with key speakers and useful information for both Juvenile Referees and Domestic Relations Referees. Detailed information about Conference Registration, Agenda and Speakers will be announced on the RAM Website and in future editions of the Referees Quarterly. Plan ahead and put the dates of the Conference into your day timer, calendar or palm pilot today!

Not only will the 22nd Annual RAM Conference offer legal updates and feature keynote speakers, but the Conference will be held in the picturesque town of Petoskey, Michigan, where there is plenty to see and do.

The *Stafford's Perry Hotel* is located across the street from Lake Michigan which boasts 30 miles of hiking and biking trails to Harbor Springs and Charlevoix. Some of the best golfing in the country is located within a few miles of the hotel. For more active exercise, there are tennis courts and an outdoor fitness parcourse located half a block from the hotel. For an extra workout, try climbing the steps to the bluff at Sunset Park for a panoramic overlook towards Harbor Springs.

For shopping enthusiasts, the *Stafford's Perry Hotel* is located within walking distance of Petoskey's signature shops and unique art galleries. There are also many coffee houses, restaurants, ice cream/desserts shops and pubs that line the streets.

For those who are looking for a little "rest and relaxation", the lovely Pennsylvania Park located near the *Stafford's Perry Hotel* is a peaceful spot to sit, people watch, picnic or read your conference materials. Too much to eat? Try strolling the streets and meander through acres of "gingerbread houses" located in the historic Little Traverse Bay.

If you are feeling lucky, you can hop aboard a shuttle bus to test your luck at The Victories Casino, which is located only a few miles from the *Stafford's Perry Hotel*.

The *Stafford's Perry Hotel* has offered attendees of the 2006 Annual RAM Conference a phenomenal room rate of **\$75.00 per night** plus tax, single or double occupancy. Check out the hotel website at: [www.the.perryhotel.com](http://www.the.perryhotel.com)  
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