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## Memo

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To: County Directors, County Child Welfare Directors, Director of Child Welfare Field Operations, Director of Strategic Planning

From: Rebekah Mason Visconti, Director DHS-Office of Legal Services

Date: February 8, 2013

Subject: Monthly Case Law Update – December 2012; January 2013

This update covers relevant cases issued during the months of December 2012 and January 2013, and includes reviews of five unpublished Michigan Court of Appeals opinions, and one opinion from the federal 6<sup>th</sup> Circuit Court of Appeals.

***Andrews v Hickman County, Tennessee et al.; 700 F3d 845 (CA 6, 2012)***

In this case, Plaintiff parents sued Defendants Tennessee Department of Children's Services (DCS) employees, county sheriff's department employees, and the county, alleging violations of their 4<sup>th</sup> and 14<sup>th</sup> Amendment rights stemming from the events surrounding a home visit initiated by DCS. The Court determined that Defendant reserve sheriff's officer entered the home after Plaintiff father told him to remain outside. This entry was not justified on the basis of consent. Furthermore, there was no suggestion that the father posed an immediate threat to the officer, the DCS employees, his family, or himself. A violation of the Plaintiff parent's 4<sup>th</sup> Amendment right to be free from unreasonable searches and seizures was established. An claim of exigent circumstances based on a threat to the officer's safety was determined to be without merit, thus the officer was not entitled to qualified immunity.

The *Andrews* opinion clearly makes the 4th Amendment applicable to social workers (e.g., CPS workers), and provides that warrantless entry into a home may be made with consent, in the presence of exigent circumstances, or any other "recognized exception to the warrant requirement." But, the opinion goes further into an analysis of a social worker's qualified immunity defense. The specific question before the Court was whether, "going forward," a social worker could rely on the actions of police officers in deciding whether they can enter a home – absent a warrant. In a rather nuanced discussion, the Court first determined:

"While we recognize that social workers have a duty to cooperate with police officers and, perhaps, a natural inclination to defer to their decisions, exempting social workers from the Fourth Amendment whenever they rely upon a police officer's actions is

tantamount to recognition of a ‘social worker exception’ to the Fourth Amendment requirements.” [700 F3d at 863. (Emphasis added.)]

In other words, the Court rejected a social worker’s blanket reliance on law enforcement action when making a qualified immunity defense. However, the Court went on to hold that:

“When social workers rely in good faith on information from police officers which suggests they can enter a home under an exception to the warrant requirement [e.g., the existence of an exigent condition], or can reasonably infer that an exception applies from their actions, they are entitled to rely on that information.” [700 F3d at 864.]

At first blush, this seems to directly conflict with the Court’s prior statement. But, there are key words in the second paragraph, not present in the first (e.g., “good faith”; “reasonably infer”). A plain reading of this language reasonably leads to the conclusion that before a social worker can rely on the actions of law enforcement in deciding whether a home may be entered without a warrant, the social worker must engage in a “good faith” or “reasonable” analysis of whether law enforcement action suggests the presence of an exception to the warrant requirement (and be able to demonstrate engaging in such an analysis). In other words, the social worker cannot, without more, simply acquiesce to law enforcement action and expect to be covered under qualified immunity once a lawsuit is filed.

**In the matter of Mays, unpublished opinion of the Michigan Court of Appeals, issued December 6, 2012 (Docket No. 309577)**

Respondent appealed a trial court order that continued the minor children’s placement in foster care, and denied his motion for placement with him and dismissal of the court’s jurisdiction. The order was issued during proceedings on remand following the Michigan Supreme Court’s reversal of an order terminating Respondent’s parental rights.

DHS filed a petition for temporary custody of the children in March 2009. The petition alleged that the children were living with their mother, who had left them home alone, that Respondent had stated he was unable to care for them, and that their best placement would be with their aunt. The trial court gained jurisdiction over the children in April 2009 when their mother entered a plea of admission to the allegations in the petition. A dispositional hearing was held in May 2009, with the court continuing alternative placement of the children.

In December 2009, DHS filed a petition to terminate the parental rights of both parents; at a following hearing the trial court took such action. The Michigan Court of Appeals affirmed, but the Michigan Supreme Court reversed, holding that the trial court clearly erred in concluding that a statutory basis existed for termination. Although the Supreme Court previously directed the parties to address the constitutionality of the “one-parent” doctrine (adopted in *In re CR*, 250 Mich App; 646 NW2d 506 [2002]), it ultimately declined to consider the issue.

Once the case returned to the trial court, Respondent filed a motion for termination of the court's jurisdiction, arguing that his due process rights were violated when the court applied the one-parent doctrine to take jurisdiction over the children. According to Respondent, use of this doctrine deprived him of custody without a determination of his unfitness. The trial court disagreed and denied Respondent's motion. On appeal, Respondent argued that the trial court's continued jurisdiction over the children based solely on the mother's plea, without an adjudication of his unfitness, violated his constitutional rights to due process.

The Court of Appeals clearly recognized that a parent's interest in his children warrants deference and protection, absent a powerful, countervailing State interest. Conversely, the State has a legitimate interest in protecting children who are neglected or abused by their parents. According to the Court, a parent is constitutionally entitled to a hearing on his fitness before his children are removed from his custody. A due process violation occurs when a State-required breakup of a natural family is founded solely on a best interests analysis that is not supported by the required proof of parental unfitness.

The Court went on to provide an excellent overview of the child protection process provided under Michigan statutes and court rules. The Court then recognized that there was no dispute that Respondent was provided with all required procedural safeguards prior to the adjudication. However, he was never adjudicated as unfit; only the mother was adjudicated as unfit. The validity of this practice was upheld in *In re CR*: A family court's jurisdiction is tied to the children and DHS is not required to file a petition and sustain the burden of proof at adjudication regarding every parent of the children involved in a protective proceeding before the court can act in its dispositional capacity. If the court acquires jurisdiction by a plea from one parent, it can take measures against any adult and order the nonadjudicated parent to engage in services without alleging and proving that the nonadjudicated parent was abusive or neglectful – this is the essence of the one-parent doctrine.

In rejecting Respondent's due process argument, the Court concluded that if a child comes within the scope of MCL 712A.2(b), as the children in this case did via the mother's plea, the trial court acquires jurisdiction and can then act in its dispositional capacity – it is at the dispositional hearing that the court determines what measures it will take with respect to the child. Each parent is entitled to notice of the initial dispositional hearing, any dispositional reviews, and permanency planning hearings, with an opportunity to participate in each. The Court held that these provisions, taken together, satisfy due process requirements. Therefore, the trial court did not violate Respondent's due process rights by continuing to exercise jurisdiction over the children without subjecting him to an adjudication regarding his fitness.

***In the matter of Smith, unpublished opinion of the Michigan Court of Appeals, issued December 6, 2012 (Docket No. 308819)***

Respondent-mother appealed the order terminating her parental rights to three minor children. The trial court determined that: (1) DHS made reasonable efforts to reunify Respondent with her children; (2) the Juvenile Code provided statutory grounds for terminating Respondent's parental rights; and (3) termination was in the children's best interests. The Michigan Court of Appeals reversed and remanded after concluding the trial court clearly erred in finding that DHS made reasonable efforts to reunify Respondent with her children.

In September 2007, DHS petitioned for temporary custody over the minor children. At that time, Respondent admitted that she overdosed on Xanax – for which she had a prescription – and passed out in a restaurant where her children were without proper care. The trial court ordered Respondent to participate in counseling, to participate in drug screens, and maintain suitable housing. In June 2008, the children were returned to Respondent and the case was dismissed in November 2008. In July 2009, DHS again filed a petition alleging that Respondent passed out at home; the petition sought protective custody on the basis of “substance abuse.” At the eventual termination hearing, the trial court found that DHS offered Respondent adequate services, but that “she did not comply with or benefit from the service plan.” The court also found that there was clear and convincing evidence that Respondent engaged in substance abuse.

On appeal, the Court of Appeals recognized that the purpose of a service plan is to facilitate returning the children to their parents; accordingly, the service plan must address the problems that brought the children into care. In a lengthy rendition of the factual and procedural development of the case, the Court noted that contrary to repeated comments by both DHS and the trial court, Respondent never admitted that she abused her prescription medications. Still, the trial court continued to “repeatedly and improperly” chastise Respondent for refusing to acknowledge her “so-called admission” (in the Macomb trial court) that she abused substances, “when she made no such admission.” While it was clear from the record that Respondent only attended about 25% of her drug screens, it was not clear to the Court how those screens could address the condition that caused removal of Respondent’s children.

According to the Court, DHS “vehemently opposed” re-evaluating the substance abuse portion of Respondent’s service plan, even after she provided documentation from her physicians indicating that she had been misdiagnosed and that she did not have a substance abuse problem (it was well established that Respondent suffered from a seizure disorder). The Court then went on to determine that DHS did not make reasonable efforts to reunify Respondent with her children because the agency failed to address the problem that brought this case into the trial court’s jurisdiction. The Court reiterated that DHS refused to re-evaluate Respondent’s substance abuse-focused service plan in light of the medical evidence that she suffered from a medical condition. (Based on the same reasoning, the Court determined that there were no statutory grounds on which to terminate Respondent’s parental rights.)

**In the matter of Perkins, unpublished opinion of the Michigan Court of Appeals, issued December 13, 2012 (Docket No. 310663)**

In this case, the minor children were removed from Respondent-parents’ care based on allegations that the parents were smoking marijuana and crushing and snorting narcotic pain killers in the children’s presence, and had lost their housing. Respondents entered a plea consenting to jurisdiction. Following numerous dispositional hearings, a termination hearing was held and the trial court denied DHS’s request to terminate parental rights. Nevertheless, on the date of a subsequent dispositional review hearing, Respondents informed the trial court of their desire to release their parental rights. Respondents executed a release for each child, which their respective attorneys also signed.

On appeal, Respondent mother contended that the trial court erred in failing to inquire about whether she released her parental rights in reliance on promises and assurances by DHS. According to Respondent mother, the trial court should have applied the requirements of a release under the Adoption Code, MCL 710.21 *et seq.* An initial flaw in this argument was that the release signed by Respondent mother was one used under the Adoption Code; the form actually cited three provisions of the code in the bottom right corner. The Court of Appeals determined that, although the release occurred in the context of a termination hearing, it occurred on the initiative of both Respondents. There was no evidence that Respondent mother released her rights because of recognition that the trial court would find a statutory basis to terminate her rights under the Juvenile Code since the trial court expressly declined to do so at an earlier time.

Recognizing that the release in this matter was most appropriately considered under the Adoption Code, the Court stated that certain conditions must be met to effectuate a proper release. One such condition is the requirement of a verified statement signed by a respondent, which includes the phrase “[t]hat the validity and finality of the release is not affected by any collateral or separate agreement between the parent or guardian and the agency[.]” There was no verified statement in this case. The Court determined, however, that the trial court’s failure to follow Adoption Code procedures did not support Respondent mother’s claim. Here, there was simply no evidence that any such agreements actually existed in this case, or that Respondent mother was induced to release her parental rights because of any agreements. Finally, there was no evidence that supported Respondent mother’s claim that her release was not made voluntarily. The Court thus found no plain error affecting her substantial rights. (The Court also concluded that the trial court committed no error in finding that termination of the parental rights of both Respondents was in the children’s best interests.)

***In the matter of D. D. MacDonald, unpublished opinion of the Michigan Court of Appeals, issued December 27, 2012 (Docket No. 310563)***

Respondent appealed the trial court’s order denying her motion to set aside an order requiring Respondent to have her daughter, J.M., visit with her son, D.M. (both biological and adoptive siblings). By October 2010, D.M. had become aggressive in Respondent’s home; Respondent ordered D.M. out of the house because she feared for the safety of herself, J.M., and her other foster children. A neglect petition was filed naming both D.M. and J.M., but J.M. was never removed from Respondent’s home, the trial court concluding that Respondent’s home was the proper placement for J.M. The trial court took jurisdiction over D.M. and he remained an out-of-home placement. Eventually, DHS changed the goal from reunification to emancipation.

Respondent opposed D.M. having any contact with J.M.; it was also Respondent’s position that the trial court lacked jurisdiction over J.M. and so it could not order visitation between the two children. The trial court disagreed and concluded that because it had jurisdiction over Respondent, it could order her to facilitate supervised visitation.

The Court of Appeals reversed and remanded, finding that “under the particularly unique facts of this case,” the trial court’s order was not authorized by either statute or court rule. Here, the trial court relied on MCL 712A.6, part of the Juvenile Code, and MCR 3.973(A) to enforce its order requiring visitation between J.M. and D.M. According to the Court, this authority

provides that the trial court may issue any order that it determines necessary for the physical, mental, or moral well-being of a child under its jurisdiction. Although the trial court in this case had this power concerning D.M. and Respondent, the court's order exceeded the scope of its powers and interfered with Respondent's right to parent J.M.

**In the matter of Welsh/McGowan, unpublished opinion of the Michigan Court of Appeals, issued January 3, 2013 (Docket No. 309827)**

Respondent parents appealed the termination of their parental rights to their minor children. The children were brought to the attention of the trial court on allegations that Respondent father sexually abused one of Respondent mother's daughters; there were additional allegations that he also sexually abused one of his own daughters, as well as a 4-year-old daughter that Respondents had in common, C.M. On appeal, Respondents argued that the trial court erred by admitting C.M.'s out-of-court hearsay statements because the circumstances surrounding these statements did not provide adequate indicia of reliability, and were therefore not admissible under the "tender years" exception provided under MCR 3.972(C).

According the Court of Appeals, MCR 3.972(C)(2)(a) requires a child's out-of-court statements to have adequate indicia of trustworthiness before they can be admitted at trial. In making this determination, the trial court must look to the totality of the circumstances surrounding the making of the statement. Circumstances indicating the reliability of a hearsay statement may include spontaneity, consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of a similar age, and lack of a motive to fabricate. The Court's review of the tender years hearing held in this case revealed sufficient indicia of trustworthiness. Thus, the trial court did not abuse its discretion in admitted these statements. (The Court further affirmed the trial court's findings that statutory grounds existed for termination of Respondents' parental rights and that termination was in the children's best interests.)