

# Reflections on Representing Children

By Jennifer Pilette and Bill Ladd



Having been continuously engaged in the practice of what was once labeled “kiddie law” or “criminal law lite” for four decades allows us to reflect on the transitions in both the child welfare and juvenile delinquency contexts.

Historically, there was little guidance for practitioners and the trial courts in child welfare cases. Courts generally operated with a sense of placing the interests of the child first, yet the practice was often ad hoc and dependent on the professional rigor of the individual actors. Witness the tragedy of *In re AMB*, where the Court of Appeals held that the trial court had erred by withdrawing life support from a seriously ill newborn child without notice to the parents or the child’s

assigned counsel.<sup>1</sup> *AMB* demonstrated the dangers of the informality of practice in juvenile court proceedings.

In 2008, the federal courts became actively involved with child welfare issues as the Eastern District of Michigan took over supervision of many Michigan Department of Health and Human Services (DHHS) practices with the settlement agreement in *Dwayne B. v Granholm*, which later became known as *Dwayne B. v Snyder*.<sup>2</sup> The most recent report of the court-appointed monitor indicates that DHHS had met only 13 of the 74 required performance standards evaluated in 2017.<sup>3</sup> These results highlight the need for trained, experienced counsel to ensure that the terms of the settlement are enforced statewide. Still, too often the lawyer-guardian



## At a Glance:

Former SBM Children's Law Section chairs Jennifer Pilette and Bill Ladd share their reflections after four decades of involvement with children's law.

ad litem is expected to serve the needs and wishes of the court, DHHS, or both. Moreover, unlike adult criminal counsel, there is still no statewide system of child representation or any standard for proper payment, leaving children's counsel underpaid and overworked.<sup>4</sup>

On June 12, 2019, the Supreme Court in *In re Ferranti*<sup>5</sup> reversed its longstanding opinion in *In re Hatcher*.<sup>6</sup> In so doing, Michigan now explicitly allows collateral challenges to claimed errors in the adjudication stage after parental rights termination. Although a clear victory for parents, this means that many children awaiting adoption will be placed in legal limbo for an extended period.

In our past 40 years of practice, with the exception of United States Supreme Court decisions regarding juvenile life sentences,<sup>7</sup> there has been a steady march toward treating delinquent children like adult criminals. Fears of "super predators"<sup>8</sup> and child "wilding"<sup>9</sup> altered our kinder, gentler, and relatively rare Michigan juvenile waiver process. While the historic discretion of a seasoned juvenile jurist remains present in the traditional waiver context,<sup>10</sup> the rise of automatic waiver (ceding to the prosecution the role of gatekeeper in certain aspects of waiver<sup>11</sup>) and designation proceedings (the practice of trying children as adults in the juvenile court itself<sup>12</sup>) have contributed to the criminalization of Michigan's children.

So, too, in juvenile competency to stand trial, we have recently gazed through a more adult lens in viewing children's comprehension of their own role in the delinquency process. The Michigan Juvenile Competency Statute<sup>13</sup> evaluates questions of juvenile competency by juvenile rather than adult norms, yet still fashions Michigan's concept of children's legal comprehension akin to the adult competency standard.

When teaching law school, we stress that the legal system "treats children as children when it benefits us as adults and treats them as adults when it benefits us as adults." Nowhere is this more apparent than in the area of juvenile confessions where we evaluate children's statements by the same legal standard as we evaluate those of adults,<sup>14</sup> often with disastrous consequences.<sup>15</sup>

We teach law school with the hope that this area of legal practice is finally coming of age, ripe for a new generation of children's counsel. ■



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*Bill Ladd, a 1979 graduate of the University of Detroit School of Law, practiced with the Juvenile Defender Office and the Michigan Children's Law Center. As counsel on many Michigan legal battles involving children, he received the Children's Attorney of the Year Award from the SBM Children's Law Section in 2009 and the SCAO Foster Care Review Board in 2016, and is the "next friend" on Dwayne B. v Snyder. He retired in 2018.*

## ENDNOTES

1. *In re AMB*, 248 Mich App 144; 640 NW2d 262 (2001).
2. *Dwayne B. by Stempfle v Granholm*, memorandum opinion of the United States District Court for the Eastern District of Michigan, signed October 24, 2008 (Case No. 06-13548); slip op at \*1 and *Dwayne B. by Stempfle v Snyder*, memorandum opinion of the United States District Court for the Eastern District of Michigan, signed July 25, 2017 (Case No. 06-13548); slip op at \*1. The two cases cited and their subsequent orders were based in the same complaint, hence the identical docket number for each. The changed defendants merely reflect the transition from Governor Jennifer Granholm (2003-2011) to Governor Rick Snyder (2011-2019).
3. Progress of the Michigan Department of Human Services, Monitoring Report for *Dwayne B. v Snyder*, Public Catalyst (March 13, 2019), p 4, available at <[https://www.michigan.gov/documents/mdhhs/Dwayne\\_B.\\_v.\\_Snyder\\_ISEP\\_Period\\_12-13\\_Report\\_649087\\_7.pdf](https://www.michigan.gov/documents/mdhhs/Dwayne_B._v._Snyder_ISEP_Period_12-13_Report_649087_7.pdf)> [<https://perma.cc/K22K-5SMT>]. All websites cited in this article were accessed October 1, 2019.
4. Compare indigent criminal defense services standards 5, 6, and 8, MIDC, available at <<https://michiganidc.gov/standards/>> [<https://perma.cc/3PUL-GLAB>].
5. *In re Ferranti* \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2019).
6. *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993).
7. *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005) and *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012).
8. Dilulio, *The Coming of the Super-Predators*, Washington Examiner (November 27, 1995), available at <<https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators>> [<https://perma.cc/N54L-RY7L>].
9. Mexal, *The Roots of "Wilding": Black Literary Naturalism, the Language of Wilderness, and Hip Hop in the Central Park Jogger Rape*, 46 African American Rev 1 (2013), available at <[https://www.jstor.org/stable/23783604?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/23783604?seq=1#metadata_info_tab_contents)> [<https://perma.cc/DLT6-EK75>].
10. MCL 712A.4.
11. MCL 764.1f.
12. MCL 712A.2d.
13. MCL 712A.18n to MCL 712A.18s.
14. *People v Good*, 186 Mich App 180; 463 NW2d 213 (1990).
15. *When They See Us* (Netflix, 2019) and *The Central Park Five* (PBS, 2012).