Child Protective Proceedings Benchbook—Fourth Edition

A Guide to Abuse & Neglect

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Michigan Supreme Court

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This fourth edition was initially published in 2012, and the text has been revised, reordered, and updated through January 1, 2016. This benchbook is not intended to be an authoritative statement by the Justices of the Michigan Supreme Court regarding any of the substantive issues discussed.

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Although this benchbook is primarily intended for use by judges and referees presiding over child protective proceedings in the Family Division of Circuit Court, it also contains information useful to all participants in the child protection system in Michigan. It is hoped that this benchbook will be of use to anyone who participates in that system, and that this benchbook will help those dedicated to improving the lives of Michigan's children.

The **Michigan Judicial Institute** was created in 1977 by the Michigan Supreme Court. MJI is responsible for providing educational programs and written materials for Michigan judges and court personnel. In addition to formal seminar offerings, MJI is engaged in a broad range of publication activities, services, and projects that are designed to enhance the professional skills of all those serving in the Michigan court system. MJI welcomes comments and suggestions. Please send them to **Michigan Judicial Institute, Hall of Justice, P.O. Box 30205, Lansing, MI 48909. (517) 373-7171.**

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Summaries of Updates: September 2, 2015–January 1, 2016

Updates have been issued for the *Child Protective Proceedings Benchbook*. A summary of each update appears below. The updates have been integrated into the website version of the benchbook. Clicking on the links below will take you to the page(s) in the benchbook where the updates appear. The text added or changed in each update is underlined.

Chapter 4: Jurisdiction, Venue, and Transfer

4.3(G) Personal Jurisdiction

- In *In re Wangler*, 498 Mich 911, ___ (2015), the Michigan Supreme Court reversed the judgment of the Court of Appeals, 305 Mich App 438 (2014), because "it [was] unclear when the trial court issued its initial dispositional order, which [was] the first order appealable by right[,]" and held that "[u]nder the circumstances of [the] case, in which the court purported to issue dispositional orders without first adjudicating the respondent-mother, the respondent-mother's appeal should not [have been] regarded as an impermissible collateral attack on jurisdiction." *Wangler*, 498 Mich at ___, citing MCR 3.993(A); *In re Hatcher*, 443 Mich 426, 444 (1993).

Chapter 6: Establishing Paternity For Child Protective Proceedings

6.9 The Uniform Interstate Family Support Act (UIFSA)

- Effective January 1, 2016, 2015 PA 255 repealed the Uniform Interstate Family Support Act (UIFSA), MCL 552.1101 *et seq.*, and in its place created the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*, to now include guidelines and procedures for establishing and collecting foreign support

orders from foreign countries subject to the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance adopted on November 23, 2007.

Chapter 7: Petitions, Preliminary Inquiries, and Preliminary Hearings

7.7 Preliminary Hearings

- Effective September 23, 2015, ADM File No. 2014-49 amended MCR 3.961(C)(3) to "require the court to proceed against each respondent parent in accordance with MCR 3.971 or MCR 3.972 if *either* the amended *or supplemental* petition is authorized."Staff Comment to ADM File No. 2014-49.

7.7(A)(10) Preliminary Hearings

- Effective December 17, 2015, 2015 PA 228 amended MCL 712A.13a(1)(j) to expand the definition of the term *relative* to include "[a] stepparent, ex-stepparent, [and] the parent who shares custody of a half-sibling . . . for the purpose of placement[,]" and to require notification to these individuals "as described in . . . MCL 722.954a."

- Effective December 17, 2015 PA 228 added MCL 712A.13a(1)(*l*) to define the term *sibling* for purposes of the Juvenile Code, MCL 712A.13a.

7.11 Appointment of Guardians Ad Litem (GAL)

- Where the child is a ward of the state and a guardian ad litem is required in order for the case to proceed, the DHHS "is the responsible party for payment of [the guardian ad litem's] fees and expenses." *Doe v Boyle*, ___ Mich App ___, ___ (2015).

Chapter 8: Placement of a Child

8.2(A)(1) Placement Options

- Effective December 17, 2015, 2015 PA 228 amended MCL 712A.13a(1)(j) to expand the definition of the term *relative* to include "[a] stepparent, ex-stepparent, [and] the parent who shares custody of a half-sibling . . . for the purpose of placement[,]" and to require notification to these individuals "as described in . . . MCL 722.954a."

- Effective December 17, 2015 PA 228 added MCL 712A.13a(1)(*l*) to define the term *sibling* for purposes of the Juvenile Code, MCL 712A.13a.

Chapter 14: Funding

14.5(A) Guardianship Assistance

- Effective December 17, 2015, 2015 PA 227 amended MCL 722.873 to modify a child's eligibility for guardianship assistance under the Guardianship Assistance Act, MCL 722.871 *et seq*., to require a guardian to maintain a strong commitment to "permanently care for the child until the child reaches 18 years of age."

14.5(B) Guardianship Assistance

- Effective December 17, 2015, 2015 PA 227 added MCL 722.875c to authorize the Department of Health and Human Services (DHHS) to provide guardianship assistance under the Guardianship Assistance Act, MCL 722.872 *et seq*., to an eligible successor guardian appointed by the court as a result of the guardian's death or incapacitation.

- Effective December 17, 2015, 2015 PA 227 amended MCL 722.872 to define the term *successor guardian* for purposes of the Guardianship Assistance Act, MCL 722.871 *et seq*.

- Effective December 17, 2015, 2015 PA 227 amended MCL 722.874 to permit a successor guardian's receipt of guardianship assistance payments if the child meets the eligibility requirements set out under MCL 722.873.

14.5(C) Guardianship Assistance

- Effective December 17, 2015, 2015 PA 227 added MCL 722.875c(3) to permit the transfer of the preceding guardianship assistance agreement entered into between the guardian and the Department of Health and Human Services (DHHS) to a successor guardian appointed by the court.

14.5(D) Guardianship Assistance

- Effective December 17, 2015, 2015 PA 227 amended MCL 722.878(2) to require a successor guardian, receiving guardianship assistance under the Guardianship Assistance Act, MCL 722.871 *et seq*., to provide the Department of Health

and Human Services (DHHS) with all the information the DHHS requests and the successor guardian possesses for reporting purposes.

- Effective December 17, 2015, 2015 PA 227 amended MCL 722.877 to require a successor guardian, receiving guardianship assistance under the Guardianship Assistance Act, MCL 722.871 *et seq.*, to apply for and maintain medical insurance for the child for which the child is eligible.

14.5(F) Guardianship Assistance

- Effective December 17, 2015, 2015 PA 227 amended MCL 722.876(1) to authorize the Department of Health and Human Services (DHHS) to provide guardianship assistance under the Guardianship Assistance Act, MCL 722.871 *et seq.*, beyond a guardian's death if a successor guardian was appointed by the court.

14.5(G) Guardianship Assistance

- Effective December 17, 2015, 2015 PA 227 amended MCL 722.879 to permit a successor guardian, receiving guardianship assistance under the Guardianship Assistance Act, MCL 722.871 *et seq*, to appeal the Department of Health and Human Services's (DHHS) decision to modify or terminate the guardianship assistance.

14.6(A) Redirecting or Issuing Child Support Payment to Juvenile Guardian

- Effective January 1, 2016, 2015 PA 255 repealed the Uniform Interstate Family Support Act (UIFSA), MCL 552.1101 *et seq.*, and in its place created the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*, to include guidelines and procedures for establishing and collecting foreign support orders from foreign countries subject to the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance adopted on November 23, 2007.

Chapter 18: Post-Termination Review Hearings

18.5(C) Court's Options Following Post-Termination Review Hearings

- "[A]ny trial court finalizing an adoption [must] provide the following findings on the record: I have determined that any

appeal of the decision to terminate parental rights has reached disposition, that no appeal, application for leave to appeal, or motion for rehearing or reconsideration is pending, and that the time for all appellate proceedings in this matter has expired." *In re Jackson*, ___ Mich ___, ___ (2015).

Chapter 20: Review of Referee Recommendations, Rehearings, and Appeals

20.3 Appeals to the Michigan Court of Appeals

- In *In re Wangler*, 498 Mich 911, ___ (2015), the Michigan Supreme Court reversed the judgment of the Court of Appeals, 305 Mich App 438 (2014), because "it [was] unclear when the trial court issued its initial dispositional order, which [was] the first order appealable by right[,]" and held that "[u]nder the circumstances of [the] case, in which the court purported to issue dispositional orders without first adjudicating the respondent-mother, the respondent-mother's appeal should not [have been] regarded as an impermissible collateral attack on jurisdiction." *Wangler*, 498 Mich at ___, citing MCR 3.993(A); *In re Hatcher*, 443 Mich 426, 444 (1993).

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In this chapter . . .

This chapter provides an overview of the topics addressed in this benchbook. This chapter also discusses the Michigan court rules, statutes, and rules of evidence as well as the federal law and regulations that govern child protective proceedings.

Included in this benchbook, are also the following appendices:

- Appendix A, which contains a table summarizing statutes and court rules that govern procedures in child protective proceedings.
- Appendix B, which contains a table of time and notice requirements applicable to child protective proceedings.
- Appendix C, which contains a table summarizing the rules of evidence and standards of proof applicable to child protective proceedings.

In an effort to create a general overview of the procedures and applicable court forms required for child protective proceedings, the State Court Administrative Office (SCAO) created the *Child Protective Proceedings - Timeline and Court Forms (Non-Indian Children)*.

1.1 Summary of Benchbook Contents

This benchbook explains the procedures required in child protective proceedings, from reporting and investigating suspected child abuse and neglect, to required court hearings in the Family Division of the Circuit Court,[1] to appeals to the Michigan Court of Appeals and Michigan Supreme Court. Although child protective proceedings involve a complex interplay between the judicial and social services systems, detailed coverage is given only to required court procedures. The following limitations on subject matter should be noted:

- internal Department of Health and Human Services (DHHS) policies governing child protective workers, foster care workers, and supervising agency workers are cited when relevant but are not discussed in-depth;

- rules governing the regulation of foster care homes and institutions are not discussed in detail; and

- detailed treatment of the legal requirements for adoptions are discussed in the Michigan Judicial Institute's *Adoption Proceedings Benchbook*.

The organization of this benchbook is intended to follow a typical child protective proceeding. Chapter 2 explains the requirements for reporting and investigating suspected child abuse or neglect. A report of suspected abuse or neglect culminates in action by the DHHS's Children's Protective Services (CPS) Division. This action may involve either offering services and counseling to the family or filing a petition requesting formal court action.

A child may be taken into temporary protective custody following an investigation but prior to the filing of a petition in court. If the court is presented with a petition, the court must follow certain procedures when deciding whether to take jurisdiction over the child and place him or her outside of the home. These preliminary steps are explained in the following chapters:

- Chapter 3 explains the procedures for obtaining temporary protective custody of a child with or without a court order.

[1] Throughout this benchbook, "Family Division" is used to describe the Family Division of the Circuit Court. References to the probate court or "juvenile court" used in statutes, court rules, or case law may have been altered to conform to this usage. MCR 3.903(A)(4) states that "court" generally means the Family Division of the Circuit Court when used in Subchapter 3.900. In addition, MCL 600.1009 states that a reference to the former Juvenile Division of the Probate Court in any statute shall be construed as a reference to the Family Division of Circuit Court.

- Chapter 4 explains the court's authority to act when there are allegations of child abuse or neglect.

- Chapter 5 summarizes the time and notice requirements applicable to all stages of a child protective proceeding.

- Chapter 6 discusses the procedures required for identifying a child's father or determining that he cannot be found.

- Chapter 7 discusses petition requirements and the court's option of using a preliminary inquiry if the child is not in custody and custody is not requested. Chapter 7 also details the procedures required at a preliminary hearing, during which the court must decide whether to authorize the petition to be filed and whether to place the child outside of his or her home pending trial. The court may also order a child's alleged abuser out of the child's home, rather than removing the child from the home.

- Chapter 8 discusses the court's obligation to determine whether to order a child out of his or her home, or to return the child to his or her home pending a trial on the allegations in a petition. Chapter 8 also details the court's placement options.

If the court authorizes the filing of the petition, a trial will be held, unless the parent enters a plea of admission or no contest, to determine whether the court will take personal jurisdiction over the child. This stage of the proceedings, known as the "adjudicative phase," is detailed in the following chapters:

- Chapter 9 discusses pretrial conferences, discovery, and motions.

- Chapter 10 explains the procedures for taking a parent's plea of admission or no contest.

- Chapter 11 discusses common evidentiary issues in child protective proceedings.

- Chapter 12 explains the required procedures for trials in child protective proceedings.

If the court takes jurisdiction over the child, the case moves into the "dispositional phase." During the dispositional phase, the family must participate in court-ordered services and counseling designed to improve the conditions leading to court jurisdiction and, if possible, to reunify the family. If, at the initial dispositional hearing, regularly held review hearings, or a permanency planning hearing, the court determines that

the family should not be reunified, a hearing on termination of parental rights will be held. The dispositional phase is described in the following chapters of this benchbook:

- Chapter 13 discusses initial dispositional hearings.
- Chapter 14 contains an overview of funding sources that may be used to pay the costs of child protective proceedings and child placements.
- Chapter 15 explains the procedures for conducting dispositional review hearings, and for conducting emergency removal hearings when the agency supervising a child who was not removed from the home believes that the child is in immediate danger of harm.
- Chapter 16 discusses permanency planning hearings, which are held to decide upon a permanent plan for the child, and whether to proceed with a hearing on termination of parental rights.
- Chapter 17 explains in detail the procedures required for terminating parental rights to a child, either at an initial dispositional hearing or at a later hearing.
- Chapter 18 explains the post-termination review process, during which efforts to find a permanent adoptive or foster family are monitored by the court.
- Chapter 19 explains the heightened procedural requirements that must be observed in child protective proceedings involving Indian children.

The final two chapters cover matters that are applicable to all stages of child protective proceedings:

- Chapter 20 discusses appeals in child protective proceedings.
- Chapter 21 explains the court's recordkeeping obligations, confidentiality of and access to records, and the retention and destruction of records and files.

1.2 Purpose of Child Protective Proceeding

"The purpose and focus of a neglect or abuse proceeding in the [Family Division] is the protection of children. To this end, proceedings may be initiated by anyone who has information that a child is in need of the

court's protection.[2] To maximize protection of the child, and at the same time safeguard the interests of parents whose children are the subject of a petition, the court rules provide for expedited proceedings. The [trial] court's protective function is also promoted by procedure which allows for a rehearing or a new trial whenever new evidence comes to light suggesting that the child needs court protection."[3] *People v Gates*, 434 Mich 146, 161-162 (1990) (protective proceedings distinguished from criminal proceedings).

1.3 Application of Michigan Court Rules to Family Division Proceedings[4]

Subchapter 3.900 of the Michigan Court Rules governs proceedings involving child protective proceedings.

MCR 3.901(A) provides in relevant part:

> "(1) The rules in [subchapter 3.900], in subchapter 1.100 [(general provisions regarding applicability and construction of court rules)], in MCR 5.113 [(form and filing of papers)], and in subchapter 8.100 [(adoption proceedings)] govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code.
>
> (2) Other Michigan Court Rules apply to juvenile cases in the family division of the circuit court only when [subchapter 3.900] specifically provides."

See also MCR 1.103 ("Rules stated to be applicable . . . only to a specific type of proceeding apply only . . . to that type of proceeding and control over general rules.").

Statutory rules of procedure, if not in conflict with the court rules governing child protective proceedings, apply to such proceedings. See MCR 1.104 ("Rules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court."). Where a statute and court rule conflict, "the court rule prevails if it governs purely procedural matters." *Donkers v Kovach*, 277 Mich App 366, 373 (2007).

Other court rules that specifically apply to child protective proceedings are listed below:

---

[2] See Section 2.2 for a detailed discussion on reporting suspected abuse or neglect.

[3] See Section 12.11 for a detailed discussion of rehearings and new trials.

[4] See Appendix A for a table summarizing the statutes and court rules that govern procedures involving child protective proceedings.

- MCR 2.003 (disqualification of a judge);[5]
- MCR 2.004 (notice and opportunity to participate in proceedings for incarcerated parties);[6]
- MCR 2.104(A) (proof of service of a summons);[7]
- MCR 2.106(G)(1) and MCR 2.106(G)(3) (proof of service by publication);[8]
- MCR 2.107(D) (proof of service of papers other than a summons);[9]
- MCR 2.114(B) (verification of petitions);[10]
- MCR 2.117(B) (appearance of attorney);[11]
- MCR 2.119 (motion practice);[12]
- MCR 2.313 (sanctions for discovery violations);[13]
- MCR 2.401 (scope and effect of pretrial conferences, "except as otherwise provided in or inconsistent with the rules of [subchapter 3.900]");[14]
- MCR 2.406 (filing of records using facsimile communication equipment);[15]
- MCR 2.506 (service of subpoenas);[16]
- MCR 2.508-MCR 2.516, except as modified by MCR 3.911 (jury procedure in child protective cases);[17]

---

[5] See MCR 3.912(D).

[6] See MCR 3.920(A)(2).

[7] See MCR 3.920(I)(1).

[8] See MCR 3.920(I)(3).

[9] See MCR 3.920(I)(2).

[10] See MCR 3.903(A)(20).

[11] See MCR 3.915(C).

[12] See MCR 3.922(C).

[13] See MCR 3.922(A)(4).

[14] See MCR 3.922(D).

[15] See MCR 3.929.

[16] See MCR 3.920(E)(3).

[17] See MCR 3.911(C).

- MCR 2.602(A)(1)-(2) (form and signing of judgments);[18]
- MCR 2.613 (limitations on correction of error);[19]
- MCR 3.205 (manner of notice from Family Division to another Michigan court with jurisdiction over a child);[20]
- MCR 3.206(A)(4) (required information in the petition to identify other Family Division matters involving members of the same family);[21]
- MCR 3.606 (contempts committed outside the presence of the court);[22]
- MCR 5.113 (form and filing of papers);[23]
- Chapter 7 of the Michigan Court Rules, except as modified by MCR 3.993 (appeals);[24] and
- MCR 8.108 or as provided by statute (records of proceedings).[25]

MCR 2.116, which governs motions for summary disposition in civil cases, does not apply to child protective proceedings. *In re PAP*, 247 Mich App 148, 153-154 (2001).

MCR 3.902 provides for the construction and interpretation of court rules relating to child protective proceedings:

> "(A) *In General*. The rules are to be construed to secure fairness, flexibility, and simplicity. The court shall proceed in a manner that safeguards the rights and proper interests of the parties. Limitations on corrections of error are governed by MCR 2.613.
>
> (B) *Philosophy*. The rules must be interpreted and applied in keeping with the philosophy expressed in the Juvenile Code.

---

[18] See MCR 3.925(C).

[19] See MCR 3.902(A).

[20] See MCR 3.927.

[21] See MCR 3.961(B)(7).

[22] See MCR 3.928(B). Contempt of court proceedings are also governed by MCL 600.1711 (contempt committed in presence of court) and MCL 600.1715 (punishment for contempt violation).

[23] See MCR 3.901(A)(1).

[24] See MCR 3.993(C)(1).

[25] See MCR 3.925(B).

> The court shall ensure that each minor coming within the jurisdiction of the court shall:
>
> > (1) receive the care, guidance, and control, preferably in the minor's own home, that is conducive to the minor's welfare and the best interests of the public; and
> >
> > (2) when removed from parental control, be placed in care as nearly as possible equivalent to the care that the minor's parents should have given the minor."[26]

1.4 Application of the Michigan Rules of Evidence to Family Division Proceedings

"The Michigan Rules of Evidence, except with regard to privileges, do not apply to proceedings under this subchapter, except where a rule in this subchapter specifically so provides." MCR 3.901(A)(3). See also MRE 1101(b)(7) (the Michigan Rules of Evidence, other than those with respect to privileges, do not apply wherever a rule in Subchapter 3.900 states that they do not apply).

See Appendix C for the applicability of the Michigan Rules of Evidence during child protective proceedings.

1.5 Applicable Federal Law and Regulations

Several federal statutes and regulations apply to child protective proceedings in Michigan. Applicable federal statutes and regulations include the following:

- **Title IV-E of the Social Security Act, 42 USC 670 *et seq*.** This act requires courts to make certain findings regarding removal of a child from parental custody, including findings that continued custody by the parent would be "contrary to the child's welfare" and that "reasonable efforts" have been made to prevent removal or to reunify the family. The act also provides for review and permanency hearings.[27]

- **Regulations implementing Title IV-E, 45 CFR 1355.10 *et seq*.** These regulations detail required court and agency procedures.

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[26] See also MCL 712A.1(3), which contains substantially similar language.

[27] See Chapter 14 for a detailed discussion of Title IV-E.

- **Indian Child Welfare Act (ICWA), 25 USC 1901** ***et seq.*** This act sets out the procedures required when an Indian child is involved in a child protective or other custody proceeding.[28]

[28] Michigan law sets out similar provisions in the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq.* See Chapter 19 for a detailed discussion of the Indian Child Welfare Act (ICWA) and the MIFPA.

Chapter 2: Reporting & Investigating Suspected Child Abuse & Child Neglect

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2.6 Death of Child Under Court's Jurisdiction 2-45
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In this chapter. . .

This chapter covers the reporting and investigating of suspected child abuse or neglect under the Child Protection Law, MCL 722.621 *et seq*. It discusses the individuals who are required to report suspected child abuse or child neglect, the required procedures for and limitations on the Department of Health and Human Services (DHHS) when conducting investigations of child abuse or child neglect, and the DHHS's required actions following an investigation. It addresses the DHHS's access to confidential information during its investigations as well as the DHHS's required maintenance and accessibility of its central registry.[1]

[1] "'Central registry' means the system maintained at the [DHHS] that is used to keep a record of all reports filed with the [DHHS] under [the Child Protection Law] in which relevant and accurate evidence of child abuse or child neglect is found to exist." MCL 722.622(c). See MCL 722.622(o), which defines *department* as "the Department of [Health and] Human Services [(DHHS)]."

This chapter also covers a child's death while under a court's jurisdiction, and the civil and criminal immunity available under Michigan law applicable to child abuse or child neglect cases.

2.1 General Overview of the Child Protection Law

The Child Protection Law, MCL 722.621 *et seq.*, governs reporting and investigating suspected child abuse and child neglect, and provides for or requires the filing of petitions to initiate child protective proceedings under the Juvenile Code, MCL 712A.1 *et seq.*[2] Under the Child Protection Law, a *child* is "a person under 18 years of age." MCL 722.622(e).

The Child Protection Law defines *child abuse* as "harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse,[3] sexual exploitation,[4] or maltreatment, by a parent, a legal guardian, or any other person responsible for the child's health or welfare or by a teacher, a teacher's aide, or a member of the clergy."[5] MCL 722.622(f).

The Child Protection Law defines *child neglect* as "harm or threatened harm to a child's health or welfare by a parent, legal guardian, or any other person responsible for the child's health or welfare that occurs through either of the following:

> (*i*) Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care.
>
> (*ii*) Placing a child at an unreasonable risk to the child's health or welfare by failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk." MCL 722.622(j).

The definitions of *child abuse* and *child neglect* within the Child Protection Law should be construed to exclude harms not expressly listed in those definitions. *Michigan Ass'n of Intermediate Special Ed Administrators v DSS*, 207 Mich App 491, 497-498 (1994) (Court of Appeals refused to give the term "mental injury" in the definition of "child abuse" an expansive reading to include educational abuse or neglect).

---

[2] See Chapter 6 for a detailed discussion of petitions.

[3] MCL 722.622(w) defines *sexual abuse* as "engaging in sexual contact or sexual penetration as those terms are defined in . . . MCL 750.520a, with a child."

[4] "'Sexual exploitation' includes allowing, permitting, or encouraging a child to engage in prostitution, or allowing, permitting, encouraging, or engaging in the photographing, filming, or depicting of a child engaged in a listed sexual act as defined in . . . MCL 750.145c." MCL 722.622(x).

[5] MCL 722.622(*l*) defines *member of the clergy* as "a priest, minister, rabbi, Christian science practitioner, or other religious practitioner, or similar functionary of a church, temple, or recognized religious body, denomination, or organization."

A. Person Responsible for Child's Health or Welfare

A "'[p]erson responsible for the child's health or welfare' means a parent, legal guardian, person 18 years of age or older who resides for any length of time in the same home in which the child resides,[6] or, except when used in [MCL 722.627(2)(e) or MCL 722.628(8)[7]], nonparent adult; or an owner, operator, volunteer, or employee of 1 or more of the following:

> (*i*) A licensed or registered child care organization.[8]
>
> (*ii*) A licensed or unlicensed adult foster care family home or adult foster care small group home as defined in . . . MCL 400.703.
>
> (*iii*) A court-operated facility as approved under . . . MCL 400.14." MCL 722.622(u).
>
> **Note:** A *nonparent adult* is "a person who is 18 years of age or older and who, regardless of the person's domicile, meets all of the following criteria in relation to a child:
>
> > (*i*) Has substantial and regular contact with the child.
> >
> > (*ii*) Has a close personal relationship with the child's parent or with a person responsible for the child's health or welfare.
> >
> > (*iii*) Is not the child's parent or a person otherwise related to the child by blood or affinity to the third degree." MCL 722.622(t). See also MCR 3.903(C)(7), which contains substantially similar language.

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[6] Persons who reside in the child's home may include "live-in adult friends of the parent or foster parent, adult siblings and relatives, roomers, boarders, live-in sitters, housekeepers, etc." DHHS's Children Protective Services Manual (PSM), *Department Responsibilities and Operational Definitions PSM 711-5*, p 1, at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/711-5.pdf.

[7] MCL 722.627(2)(e) pertains to accessing the DHHS's central registry, and MCL 722.628(8) pertains to the DHHS interviewing a child at his or her school or other institution.

[8] "'Child care organization' means that term as defined in . . . MCL 722.111." MCL 722.622(g). MCL 722.111(1)(a) defines a *child care organization* as "a governmental or nongovernmental organization having as its principal function receiving minor children for care, maintenance, training, and supervision, notwithstanding that educational instruction may be given. Child care organization includes organizations commonly described as child caring institutions, child placing agencies, children's camps, children's campsites, children's therapeutic group homes, child care centers, day care centers, nursery schools, parent cooperative preschools, foster homes, group homes, or child care homes."

A foster parent is a person responsible for his or her foster child's health or welfare as contemplated by MCL 722.622(u). *Spikes v Banks*, 231 Mich App 341, 351 (1998).

B. Religious Exemptions Under Child Protection Law

"A parent or guardian legitimately practicing his [or her] religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian."[9] MCL 722.634.

However, "[MCL 722.634] [does] not preclude a court from ordering the provision of medical services or nonmedical remedial services recognized by state law to a child where the child's health requires it[,] nor does it abrogate the responsibility of a person required to report child abuse or neglect." MCL 722.634.

2.2 Reporting Suspected Child Abuse or Child Neglect

Any person with reasonable cause to suspect child abuse or child neglect may report the suspected child abuse or child neglect to the Department of Health and Human Services (DHHS) or a law enforcement agency. MCL 722.624. However, if the person suspecting the child abuse or child neglect is listed as a mandatory reporter under MCL 722.623(1), the person must report the suspected child abuse or child neglect. MCL 722.623(1).

The DHHS will not investigate allegations of parental substance abuse if that is the only allegation made. DHHS's Children Protective Services Manual (PSM), *CPS Intake - Special Cases PSM 712-6*, p 15, available at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/712-6.pdf. Rather, "[t]he complaint must include an allegation of child abuse and/or neglect as a result of the substance use to be appropriate for investigation[, unless the] complaint alleg[es] that methamphetamine is being smoked in a home where children reside[.]" *CPS Intake - Special Cases PSM 712-6*, *supra* at p 15.

"A complaint in which the **only** allegation involves either a parent providing home school instruction or a child failing to attend school is not [a] sufficient basis for suspecting child neglect." *CPS Intake - Special Cases PSM 712-6*, *supra* at p 14. However, "[a] complaint of alleged child abuse or neglect that **also** includes an allegation of a child's non-attendance at school is appropriate for investigation[.]" *Id.*

[9] See also MCL 722.127 (DHHS rules governing child care organizations may not authorize or require medical examination, immunization, or treatment of any child whose parent objects on religious grounds).

The DHHS will not investigate complaints that contain only allegations of domestic violence. *CPS Intake - Special Cases PSM 712-6, supra* at p 6. To be accepted for investigation, a complaint must "include information indicating the [domestic violence] has resulted in harm or threatened harm to the child."[10] *Id.* In cases involving domestic violence, the presence of any of the following factors may indicate threatened harm to a child:

- "A weapon was used or threatened to be used in the [domestic violence] incident.
- An animal has been deliberately injured or killed by the perpetrator.
- A parent or other adult is found in the home in violation of a child protection court order or personal protection order.
- There are reported behavioral changes in the child (for example, a child's teacher describes that the child used to be an involved and highly functioning student and now is withdrawn, doing poorly in coursework, or acting out with violence).
- Reported increase in frequency or severity of [domestic violence].
- Threats of violence against the child." *CPS Intake - Special Cases PSM 712-6, supra* at p 6.

A. Mandatory Reporters of Suspected Abuse or Neglect

MCL 722.623(1) requires the following individuals to report suspected child abuse or child neglect if he or she has reasonable cause to suspect that a child is being abused or neglected:

- physicians;
- dentists;
- physician's assistants;
- registered dental hygienists;
- medical examiners;

[10] For additional information on "harm or threatened harm" to a child, see DHHS's Children Protective Services Manual (PSM), *Special Investigative Situations PSM 713-08*, pp 1-2, at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/713-08.pdf.

- nurses;
- persons licensed to provide emergency medical care;
- audiologists;
- psychologists;
- marriage and family therapists;
- licensed professional counselors;
- social workers;
- licensed master's social workers;
- licensed bachelor's social workers;
- registered social service technicians;
- social service technicians;
- Friend of the Court (FOC) employees working in a professional capacity in any FOC office;
- school administrators;
- school counselors or teachers;
- law enforcement officers;
- members of the clergy;[11]
- regulated child care providers;
- any of the following DHHS employees:

  "(*i*) Eligibility specialist.

  (*ii*) Family independence manager.

  (*iii*) Family independence specialist.

  (*iv*) Social services specialist.

  (*v*) Social work specialist.

  (*vi*) Social work specialist manager.

[11] MCL 722.622(*l*) defines *member of the clergy* as "a priest, minister, rabbi, Christian science practitioner, or other religious practitioner, or similar functionary of a church, temple, or recognized religious body, denomination, or organization."

(*vii*) Welfare services specialist[;]" and

- "[a]ny employee of an organization or entity that, as a result of federal funding statutes, regulations, or contracts, would be prohibited from reporting in the absence of a state mandate or court order."

  Note: "[MCL 330.1707[12]] does not relieve a mental health professional from his or her duty to report suspected child abuse or neglect under . . . MCL 722.623 . . . ." MCL 330.1707(5).

Hospitals, pharmacies, and physicians are also required to report injuries caused by violence or a weapon to local law enforcement under MCL 750.411.

1. Time Requirements for Reporting and Required Content of Written Report

A mandatory reporter "who has reasonable cause to suspect child abuse or child neglect shall make immediately, by telephone or otherwise, an oral report, or cause an oral report to be made, of the suspected child abuse or child neglect to the [DHHS]." MCL 722.623(1)(a).[13] "Within 72 hours after making the oral report, the reporting person shall file a written report[.]"[14] *Id.*

> **Note:** "If the reporting person is a member of the staff of a hospital, agency, or school, the reporting person shall notify the person in charge of the hospital, agency, or school of his or her finding and that the report has been made, and shall make a copy of the written report available to the person in charge."[15] MCL 722.623(1)(a). "One report from a hospital, agency, or school is adequate to meet the reporting requirement." *Id.*

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[12] MCL 330.1707 permits a mental health professional to provide outpatient mental health services to a minor 14 years of age or older without the minor parent's, guardian's, or person in loco parentis's consent or knowledge.

[13] See also MCL 722.623(1)(b)-(c), which requires a DHHS employee listed under MCL 722.623(1)(b) and an employee described in MCL 722.623(1)(c) to report the suspected child abuse "in the same manner as required under [MCL 722.623(1)(a)]."

[14] See DHHS form DHS-3200, *Report of Actual or Suspected Child Abuse or Neglect*, at http://www.michigan.gov/documents/FIA3200_11924_7.pdf.

[15] "A notification to the person in charge of a hospital, agency, or school does not relieve the member of the staff of the hospital, agency, or school of the obligation of reporting to the [DHHS] as required by [MCL 722.623(1)]." MCL 722.623(1)(a).

MCL 722.623(2) requires "[t]he written report [to] contain the name of the child and a description of the child abuse or child neglect[,] [and] [i]f possible, . . . the names and addresses of the child's parents, the child's guardian, the persons with whom the child resides, and the child's age[,] [as well as] . . . other information available to the reporting person that might establish the cause of the child abuse or child neglect, and the manner in which the child abuse or child neglect occurred."

> **Note:** "The [DHHS] shall inform the reporting person of the required contents of the written report at the time the oral report is made by the reporting person." MCL 722.623(3).

"The written report . . . shall be mailed or otherwise transmitted to the county [DHHS] of the county in which the child suspected of being abused or neglected is found." MCL 722.623(4).

2. Duty to Report Is Based on Identity of Alleged Perpetrator

The imposition of a duty to report suspected child abuse or child neglect under MCL 722.623(1)(a) is based on the type of relationship between the child and the perpetrator rather than on the occurrence of the alleged abuse or neglect. *Doe v Doe (Doe I) (On Remand)*, 289 Mich App 211, 216 (2010). Thus, MCL 722.623(1)(a) imposes a duty to report only if the alleged perpetrator is the "parent, legal guardian, teacher, teacher's aide, clergyman 'or any other person responsible for the child's health or welfare,' including a 'nonparent adult,' as those terms are defined by MCL 722.622(u) and [MCL 722.622(t)]."[16] *Doe I*, 289 Mich App at 216 (an ambulance driver was not required to report suspected child abuse under MCL 722.623(1)(a) where he suspected his partner had sexually molested a child being transported in their ambulance).

3. Privileges Do Not Excuse Mandatory Reports of Suspected Abuse or Neglect

"Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to

[16] See Section 2.1 for the definitions of a *person responsible for the child's health or welfare* and *nonparent adult*.

be made . . . pursuant to [the Child Protection Law]." MCL 722.631.

> **Note:** "[MCL 722.631] does not relieve a member of the clergy from reporting suspected child abuse or child neglect under [MCL 722.623] if that member of the clergy receives information concerning suspected child abuse or child neglect while acting in any other capacity listed under [MCL 722.623]." MCL 722.631.

"[A] communication [between a member of the clergy and a church member] [was] within the meaning of 'similarly confidential communication' when the church member d[id] not make an admission, but ha[d] a similar expectation that the information [would] be kept private and secret." *People v Prominski*, 302 Mich App 327, 328, 336-337 (2013) (where the parishioner "went to [her pastor] 'for guidance[and] advice'" to discuss "her concerns that her husband was abusing her daughters" and "'expected that the conversation be kept private[,]'" the parishioner's communication with the pastor was a confidential communication as contemplated by MCL 722.631, and the pastor was not required to report the suspected child abuse under the mandatory reporting statute, MCL 722.623(1)(a)).

4. Child Suspected of Abuse or Neglect Taken to Hospital

"If a child suspected of being abused or neglected is admitted to a hospital or brought to a hospital for outpatient services and the attending physician determines that the release of the child would endanger the child's health or welfare, the attending physician shall notify the person in charge and the [DHHS]." MCL 722.626(1).

> **Note:** "When a child suspected of being an abused or neglected child is seen by a physician, the physician shall make the necessary examinations, which may include physical examinations, x-rays, photographs, laboratory studies, and other pertinent studies." MCL 722.626(2). "The physician's written report to the [DHHS] shall contain summaries of the evaluation, including medical test results."[17] *Id.*

The person in charge may keep the child in protective custody until the court's next regular business day. MCL 722.626(1). Once notified, the court must do one of the following:

(1) order that the child remain in the hospital or some other suitable place pending a preliminary hearing under MCL 712A.14.[18]

(2) order that the child be released to the child's parent, guardian, or custodian. MCL 722.626(1).

5. Child Surrendered Under Safe Delivery of Newborns Law

The mandatory reporting requirements contained in MCL 722.623 of the Child Protection Law do not apply to a child surrendered to an emergency service provider under the Safe Delivery of Newborns Law. MCL 712.2(2).

Note: "A hospital that takes a newborn into temporary custody under [the Safe Delivery of Newborns Law] shall have the newborn examined by a physician." MCL 712.5(2). If the examining physician determines that there is reason to suspect the newborn experienced neglect or abuse (other than the parent surrendering the child to an emergency service provider), or if the examining physician believes the child is not a newborn, the mandatory reporting requirements of MCL 722.623(1) require the examining physician to immediately report the suspected child abuse to the DHHS. MCL 712.5(2); MCL 722.623(1).

6. Failure to Report

A mandatory reporter who fails to report suspected child abuse or neglect is "civilly liable for the damages proximately caused by the failure." MCL 722.633(1). However, a mandatory reporter's civil liability under MCL 722.633(1), is limited to "claims for damages by the identified abused child about whom no report was made[,]" and "only for 'damages proximately caused by the failure [to report abuse].'" *Marcelletti v Bathani*, 198 Mich App 655, 659, 662 (1993) (defendant-physician's liability did not extend to an infant injured at the hands of his babysitter where the defendant-physician did not treat the injured infant

[17] "A hospital is required, absent a parental release, to allow access to medical information on children to [DHHS] staff conducting a protective services investigation under the Child Protection Act since allowing such access does not violate the physician-patient privilege." OAG, 1978, No 5406, p 724 (December 15, 1978), available at http://www.ag.state.mi.us/opinion/datafiles/1970s/op05406.htm.

[18] See Section 3.2(E) for a discussion of required procedures after a child is in protective custody, and Section 8.2 for a discussion of available placements.

but a different child injured by the same babysitter, and the defendant-physician's failure to report suspected child abuse of the other child was not the proximate cause of the harm suffered by the infant in the instant case).

In addition, a mandatory reporter who fails to report suspected child abuse or neglect and "who knowingly fails to do so is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both." MCL 722.633(2).

A mandatory reporter's failure to report suspected child abuse or neglect may also result in licensing or certification sanctions. *Becker-Witt v Bd of Examiners of Social Workers*, 256 Mich App 359, 362-364 (2003) (Court of Appeals upheld an administrative law judge's (ALJ) revocation of a social worker's professional license for failure to comply with MCL 722.623(1)).

"While the mandatory reporting provision [of MCL 722.633(1)] imposes liability when an individual named in the statute fails to report suspected abuse or neglect, that liability is limited by governmental immunity[;]"[19] thus, when reading the mandatory reporting statute, MCL 722.633(1), together with the governmental immunity statute, MCL 691.1407, "[i]t follows that, in order for [the mandatory reporter] to be liable [for failing to report suspected child abuse or neglect] under [MCL 722.633(1)], [the mandatory reporter's] conduct must [be] grossly negligent and *the* proximate cause of [the alleged harm]." *Jones v Bitner*, 300 Mich App 65, 68, 77 (2013) ("[the] plaintiff's claim [against the defendant-police officer for failing to report suspected neglect] [was] barred by [governmental] immunity" where "[the] defendant[-police officer's] alleged failure to report [knowing that the child's mother illegally distributed drugs from the child's home and in the child's presence] could *not* have been the proximate cause of [the child's] death" when the court record showed that "only [the child's mother's] acts or omissions were the proximate cause of the [child's] death").[20]

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[19] "'Although the [governmental tort liability act (GTLA), MCL 691.1401 *et seq.*] proclaims that it contains all the exceptions to governmental immunity, the Legislature remains free to create additional exceptions, either within the GTLA or another statute.' . . . [However,] . . . the mandatory reporting statute[, MCL 722.633,] does not provide an exception to the general statutory rule of individual governmental immunity [under MCL 691.1401]" because "the legislature has not amended the mandatory reporting statute to clearly provide that it abrogates the later-enacted governmental immunity statute." *Jones*, 300 Mich App at 76-77, quoting *State Farm Fire & Cas Co v Corby Energy Servs*, 271 Mich App 480, 485 (2006).

[20] "The [court] record reveals that [the child's] mother . . . was convicted of involuntary manslaughter following [the child's] death. It was alleged that [the child's mother] either intentionally administered a lethal amount of morphine to [the child] or allowed [the child] to come into contact with morphine pills and then [the child's mother] failed to seek assistance when she realized that [the child] had taken some of the pills off of a nightstand." *Jones*, 300 Mich App at 77-78 (internal citations omitted).

7. Constitutionality of Mandatory Reporting Law

In *People v Cavaiani*, 172 Mich App 706, 711-713 (1988), the Court of Appeals found that the mandatory reporting requirement under MCL 722.623(1) was not overbroad:

> "[The] [d]efendant[-psychologist] [] claims . . . that the Child Protection Law, MCL 722.621 *et seq.*, is unconstitutionally overbroad because it violates [the] defendant[-psychologist's] First Amendment rights to associate in legal endeavors and invades the privacy of the family and those in association to cure private family problems.
>
> * * *
>
> In the context of a family, [MCL 722.623] invades its privacy to the extent that the family members' collective desire to seek treatment for the offender and risk the continued abuse of the victim rather than initiating criminal proceedings may not be honored. However, we do not believe that this invasion constitutes a constitutionally impermissible violation of a family's First Amendment right of privacy. A family does not have a protected First Amendment right to undertake a course of action which may do little or nothing to protect the child victim from continued abuse.
>
> * * *
>
> Further, a person generally lacks standing to challenge overbreadth where his [or her] own conduct is clearly within the contemplation of the statute. This is so even where there is some marginal application which might infringe on First Amendment activities. In this case, the [9-year-old] victim told [the] defendant[-psychologist], and the victim's father did not deny, that the abuse occurred. Therefore, [the] defendant[-psychologist] had more than a 'reasonable suspicion' of its occurrence."

The Court of Appeals also found in *Cavaiani*, 172 Mich App at 713-715, that the mandatory reporting requirement under MCL 722.623(1) was not vague:

> "[The] [d]efendant[-psychologist] [] claims that the Child Protection Law is void for vagueness

> because it offers no reasonably precise standard to those charged with adhering to or enforcing the law. [The] [d]efendant[-psychologist] contends that the phrase 'reasonable cause to suspect' is not clearly defined and does not give him fair notice of what conduct the statute proscribes.
>
> * * *
>
> [The Court of Appeals] find[s] that the words 'reasonable cause to suspect' speak for themselves and provide fair notice of the conduct expected in reporting suspected child abuse. Based upon the fact that [the] defendant[-psychologist] was told by his patient, the [9-year-old] victim, that her father was fondling her breasts, the [MCL 722.623] reporting provisions are not vague."

The Court of Appeals further found in *Cavaiani*, 172 Mich App at 716, that the mandatory reporting requirement under MCL 722.623(1) did not violate the defendant-psychologist's Fourth Amendment right to privacy from unreasonable seizure of oral evidence where there was "no governmental eavesdropping or intrusion or electronic surveillance [] involved[,]" and that "[because the] defendant[-psychologist] is not an agent of the government, [] any information a patient chooses to divulge to him is not protected by the Fifth Amendment."

In addition, public policy or due process of law is not violated with the disclosure of confidential information under the mandatory reporting requirements of MCL 722.623 or usage of that information. *People v Mineau*, 194 Mich App 244, 246 (1992). In *Mineau*, *supra* at 247-249, the Court of Appeals specifically found:

> "[The] defendant[-father] and the trial court [found] 'unfair' the fact that on the basis of 'confidential' information voluntarily provided by the defendant to the counselor, the agency filed a report with the [DHHS] indicating [the] defendant[-father] was suspected of abusing his stepdaughter. Thus, in effect, [the] defendant[-father] is challenging the mandatory reporting requirement set forth in [MCL 722.623] on grounds that the reporting is generally 'unfair' when a defendant voluntarily seeks help and is contrary to public policy because it will dissuade persons such as [the] defendant[-father] from seeking help and

thus hinder the discovery and removal of children from homes where they are abused.

This argument overlooks the fact that public policy issues are best addressed by the Legislature. Given enactment of the reporting requirement, as well as the section abrogating any legally recognized privileged communications except those between attorney and client, MCL 722.631, it appears the Legislature found the public policy arguments supporting general detention, and thus likely prosecution, MCL 722.623, more compelling than those promoting self-reporting and self-sought treatment.

* * *

Although we agree that the agency erred in failing to inform [the] defendant[-father] of its duty to report suspected child abuse when specifically questioned by [the] defendant[-father] regarding the confidentiality of his treatment, we do not find any support for [the] defendant[-father's] proposed remedy—immunity from prosecution for criminal acts of sexual abuse committed against his stepdaughter.

* * *

We find no support for the trial court's holding [the] defendant[-father] absolutely immune from prosecution on the basis of some generalized notion of fairness. There was no egregious conduct. The information reported was neither coerced nor solicited from [the] defendant[-father], but was given voluntarily. Dismissal of the information charging [the] defendant[-father] was improper."

8. Mandatory Reporting Statute's Implication of Defendant's Right of Confrontation[21]

"[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial[;[22]] '[w]here no such

[21] This sub-subsection contains a very brief discussion of the Defendant's Right of Confrontation under the Sixth Amendment as it relates to the mandatory reporting statute. For a thorough discussion of the Confrontation Clause, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 10.

primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.'" *Ohio v Clark*, ___ US ___, ___ (2015) (finding that "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and [his or] her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution[;]" in this case, the child-victim's statements to his teacher identifying his abuser were not made with the primary purpose of creating evidence for prosecution, and accordingly, were not testimonial, where "[t]he teachers' questions were meant to identify the abuser in order to protect the victim from future attacks[]").

Although statements to individuals who are not law enforcement officers "are much less likely to be testimonial than statements to law enforcement officers[,]" "statements to persons other than law enforcement officers [may be] subject to the Confrontation Clause[, b]ecause at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns[.]" *Clark*, ___ US at ___ ("declin[ing] to adopt a categorical rule excluding [statements to individuals who are not law enforcement officers] from the Sixth Amendment's reach[]" and further noting that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause[]").

B. Non-Mandatory Reporters of Suspected Abuse or Neglect

"In addition to those persons required to report child abuse or neglect under [MCL 722.623], any person, including a child, who has reasonable cause to suspect child abuse or neglect may report the matter to the [DHHS] or a law enforcement agency." MCL 722.624. See also MCL 722.632 (Child Protection Law does not prohibit any person from reporting suspected abuse or neglect to law enforcement officials or the court).

C. Reasonable Cause to Suspect Child Abuse or Child Neglect

The standard of suspicion necessary to trigger the reporting requirements of the Child Protection Law is "reasonable cause to suspect child abuse or child neglect." MCL 722.623(1); MCL 722.624; MCL 722.632.

[22] For a thorough discussion of what constitutes a testimonial statement, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 10.

"[T]he pregnancy of a child less than 12 years of age or the presence of a venereal disease in a child who is over 1 month of age but less than 12 years of age is reasonable cause to suspect child abuse or child neglect has occurred." MCL 722.623(8).

A mandatory reporter who knows or has reasonable cause to suspect from the infant's symptoms that a newborn infant has any amount of alcohol, a controlled substance, or a metabolite of a controlled substance in his or her body must report the information to the DHHS, unless the reporter knows that the substance is present due to treatment of the mother or newborn. MCL 722.623a.

Determining "whether there is 'reasonable cause to suspect abuse' [does not] require[] the use of medical judgment. . . . [MCL 722.623(1)] expressly states that it applies to more than just medical doctors." *Lee v Detroit Medical Center*, 285 Mich App 51, 62 (2009).

A person required to report under MCL 722.623 is "not free to arrogate to himself [or herself] the right to foreclose the possibility of a legal investigation by the state" where he or she has a reasonable suspicion of child abuse or neglect. *Cavaiani*, 172 Mich App at 715. In *Cavaiani*, *supra* at 708-709, the defendant-psychologist was charged with a misdemeanor for failing to report suspected child abuse after his 9-year-old patient informed him that her father fondled her breasts.[23] Instead of reporting the suspected child abuse, the defendant-psychologist talked with the child's father and determined that if any touching occurred it was accidental. *Id.* at 709. The trial court dismissed the misdemeanor charge against the defendant-psychologist reasoning that the "defendant[-psychologist], in the course of exercising professional judgment, might have concluded that the information supplied to him indicating that the victim was being abused was inaccurate or some kind of fantasy." *Id.* at 715. In reversing the trial court, the Court of Appeals found that despite the defendant-psychologist's personal belief of whether child abuse occurred, he was still obligated to report the possibility of the child abuse to the DHHS to permit the state to do their own investigating. *Id.* at 715. Specifically, the Court of Appeals concluded:

> "In this case, . . .[the] [d]efendant[-psychologist] had reasonable suspicion of child abuse, but concluded that his suspicions were not factually founded. With respect to [the] defendant[-psychologist's] legal obligations under [MCL 722.623], it was not for him to make this determination, but for the responsible investigative agencies, such as the [DHHS], to make. While [the]

[23] "The victim's mother initiated family therapy with [the] defendant[-psychologist] after suspecting that her husband had sexually molested their 9-year-old daughter." *Cavaiani*, 172 Mich App at 708-709.

> defendant[-psychologist] is free to decide that the victim's allegations are untrue for purposes of rendering professional treatment, he is not free to arrogate to himself [or herself] the right to foreclose the possibility of a legal investigation by the state. The state has different interests, and its sovereignty is offended by child abuse." *Cavaiani*, 172 Mich App at 715.

See also *Lee*, 285 Mich App at 62-63 (medical doctors are required to immediately report when there is any reasonable cause to suspect a child is being abused or neglected; it is up to Child Protective Services (CPS) to investigate and "determine the validity of the information provided"); *Williams v Coleman*, 194 Mich App 606, 617-620 (1992) (foster care workers who had reasonable cause to suspect the neglect of a child, who was not under court jurisdiction, were required to refer the case to the Children's Protective Services (CPS) rather than determine the credibility of the information received).

D. False Report

"A person who intentionally makes a false report of child abuse or neglect under [the Child Protection Law] knowing that the report is false is guilty of a crime as follows:

> (a) If the child abuse or neglect reported would not constitute a crime or would constitute a misdemeanor if the report were true, the person is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $100.00, or both.
>
> (b) If the child abuse or neglect reported would constitute a felony if the report were true, the person is guilty of a felony punishable by the lesser of the following:
>
> > (*i*) The penalty for the child abuse or neglect falsely reported.
> >
> > (*ii*) Imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both." MCL 722.633(5).

2.3 Investigating Allegations of Child Abuse or Child Neglect

Any person who suspects child abuse or neglect may report the matter to the Department of Health and Human Services (DHHS), a law enforcement agency, or the court.[24] MCL 712A.11(1); MCL 722.624; MCL

722.632. Once reported to the DHHS, the DHHS has 24 hours to either commence its own investigation or refer the case to the prosecuting attorney and the local law enforcement agency.[25] MCL 722.628(1). Following the investigation, either a Children's Protective Services (CPS) worker or a prosecuting attorney acting on behalf of the DHHS drafts and files a petition seeking court jurisdiction over a child suspected of being abused or neglected.[26] See MCL 712A.11(1); MCL 712A.17(5); MCR 3.914(C).

> **Note:** Within 24 hours of receiving a report for suspected child abuse or neglect, the DHHS "shall refer the report to the prosecuting attorney and the local law enforcement agency if the report meets the requirements of [MCL 722.628(3)(a), MCL 722.628(b), or MCL 722.628(c)] or [MCL 722.623(6) or MCL 722.623(9)] or shall commence an investigation of the child suspected of being abused or neglected." MCL 722.628(1).
>
> Within 24 hours of receiving a report for suspected child abuse or neglect from a reporting person or the DHHS, "the local law enforcement agency shall refer the report to the [DHHS] if the report meets the requirements of [MCL 722.623(7)] or shall commence an investigation of the child suspected of being abused or neglected or exposed to or who has had contact with methamphetamine production."[27] MCL 722.628(1).

In the course of an investigation, the DHHS must:

- determine whether the child is abused or neglected;
- "cooperate with law enforcement officials, courts of competent jurisdiction, and appropriate state agencies providing human services in relation to preventing, identifying, and treating child abuse and neglect;"

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[24] See Section 2.2 for a detailed discussion of reporting suspected child abuse or child neglect, including a list of individuals who are required to report suspected child abuse or child neglect under MCL 722.623(1).

[25] For additional information on the DHHS's responsibility to receive and investigate complaints, see DHHS's Children Protective Services Manual (PSM), *Responsibility to Receive and Investigate Complaints PSM 711-6*, at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/711-6.pdf.

[26] See Section 6.2 and Section 6.4 for a detailed discussion of petitions, including when the DHHS must submit a petition seeking the court's jurisdiction over a child suspected of being abused or neglected.

[27] "If the child suspected of being abused or exposed to or who has had contact with methamphetamine production is not in the physical custody of the parent or legal guardian and informing the parent or legal guardian would not endanger the child's health or welfare, the agency or the [DHHS] shall inform the child's parent or legal guardian of the investigation as soon as the agency or the [DHHS] discovers the identity of the child's parent or legal guardian." MCL 722.628(1).

- "provide, enlist, and coordinate the necessary services, directly or through the purchase of services from other agencies and professions;" and

- "take necessary action to prevent further abuses, to safeguard and enhance the child's welfare, and to preserve family life where possible."[28] MCL 722.628(2).

"In conducting its investigation, the [DHHS] shall seek the assistance of and cooperate with law enforcement officials within 24 hours after becoming aware that 1 or more of the following conditions exist:

(a) Abuse or neglect is the suspected cause of a child's death.

(b) The child is the victim of suspected sexual abuse or sexual exploitation.

(c) Abuse or neglect resulting in severe physical injury to the child. For purposes of this subdivision and [MCL 722.637], 'severe physical injury' means an injury to the child that requires medical treatment or hospitalization and that seriously impairs the child's health or physical well-being.

(d) Law enforcement intervention is necessary for the protection of the child, a [DHHS] employee, or another person involved in the investigation.

(e) The alleged perpetrator of the child's injury is not a person responsible for the child's health or welfare.[29]

(f) The child has been exposed to or had contact with methamphetamine production."[30] MCL 722.628(3).

Note: "Involvement of law enforcement officials [in an investigation] does not relieve or prevent the [DHHS] from proceeding with its investigation or treatment if there is reasonable cause to suspect that the child abuse or neglect was committed by a person responsible for the child's health or welfare." MCL 722.628(5).

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[28] For additional information on the overview of the investigation process, see DHHS's Children Protective Services Manual (PSM), *CPS Overview PSM 711-2*, at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/711-2.pdf.

[29] For the definition of *person responsible for the child's health or welfare*, see Section 2.1(A).

[30] For additional information on the DHHS's coordination with the prosecuting attorney and law enforcement, see DHHS's Children Protective Services Manual (PSM), *Coordination With Prosecuting Attorney and Law Enforcement PSM 712-3*, at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/712-3.pdf.

MCL 722.628e(1) requires the DHHS to "implement an investigation checklist to be used in each investigation of suspected abuse and neglect handled by the [DHHS]."[31] The DHHS must not close the investigation until the checklist is complete. MCL 722.628e(2).

On completion of an investigation, "the law enforcement agency or the [DHHS] may inform the person who made the report as to the disposition of the report." MCL 722.628(13). "If the person who made the report is mandated to report under [MCL 722.623], upon completion of the investigation by the [DHHS], the [DHHS] shall inform the person in writing as to the disposition of the case and shall include in the information at least all of the following:

> (a) What determination the [DHHS] made under [MCL 722.628(12)] and the rationale for that decision.[32]
>
> (b) Whether legal action was commenced and, if so, the nature of that action.
>
> (c) Notification that the information being conveyed is confidential." MCL 722.628(14).

"[The Child Protection Law] does not preclude or hinder a hospital, school, or other agency from investigating reported claims of child abuse or neglect by its employees or from taking disciplinary action based upon that investigation against its employees." MCL 722.632a. Moreover, "[i]f there is reasonable cause to suspect that a child in the care of or under the control of a public or private agency, institution, or facility is an abused or neglected child, the agency, institution, or facility shall be investigated by an agency administratively independent of the agency, institution, or facility being investigated[, and] [i]f the investigation produces evidence of a violation of . . . MCL 750.145c [(child sexually abusive material or activity)], and [MCL] 750.520b[–MCL] 750.520g [(criminal sexual conduct)], the investigating agency shall transmit a copy of the results of the investigation to the prosecuting attorney of the county in which the agency, institution, or facility is located." MCL 722.628(7).

A. Investigation Involves Indian Child

> "In every investigation of alleged child abuse or neglect, the family must be asked whether the child is known to have American Indian heritage[;] [t]his inquiry must be documented in the case record and

[31] For additional information on the DHHS's investigation checklist, see DHHS's Children Protective Services Manual (PSM), *CPS Investigation Report PSM 713-10*, at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/713-10.pdf.

[32] MCL 722.628(12) requires the DHHS to "determine in which single category, prescribed by [MCL 722.628d], to classify the allegation of child abuse or neglect." See Section 2.3(D) for additional information.

appropriate action taken." DHHS's Children Protective Services Manual (PSM), *Special Case Situations - American Indian Child PSM 716-1*, p 1, available at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/716-1.pdf.

"A complaint of suspected child abuse or neglect of an American Indian child **who resides or is domiciled on lands within exclusive jurisdiction of the tribe** must not [] be investigated by the [DHHS] unless a special written agreement exists between the tribe and the [DHHS] for responding to after hours and weekend emergencies." *Special Case Situations - American Indian Child PSM 716-1, supra* at p 1.

"A complaint of suspected child abuse or neglect involving an American Indian child **who resides off the reservation** requires that the [DHHS] worker take affirmative steps to determine at this initial stage whether an American Indian child is involved." *Special Case Situations - American Indian Child PSM 716-1, supra* at p 1.

B. Interviewing Abused or Neglected Child

1. Interview Child Outside Presence of Suspected Abuser

"During an investigation of suspected child abuse or neglect, the child reported to have been abused or neglected shall not be interviewed in the presence of an individual suspected to have perpetrated the abuse." MCL 722.628c.

2. Required Procedures for Contacting Child at School

"A school or other institution shall cooperate with the [DHHS] during an investigation of a report of child abuse or neglect." MCL 722.628(8).[33] "Cooperation includes allowing access to the child without parental consent if access is determined by the [DHHS] to be necessary to complete the investigation or to prevent abuse or neglect of the child."[34] *Id.*

> **Note:** In OAG, 1995, No 6869, p 92 (September 6, 1995),[35] the Attorney General found that a school administration may not impose conditions upon a

[33] "Lack of cooperation by the school does not relieve or prevent the [DHHS] from proceeding with its responsibilities under [the Child Protection Law]." MCL 722.628(9)(c).

[34] Before and after contact with the child at school, the DHHS investigator must meet with a designated school staff person to review investigation procedures, formulate a course of action based on the contact with the child, and may share information, within the confidentiality provisions of the Child Protection Law. MCL 722.628(9)(a)-(b).

[35] OAG, 1995, No 6869 (September 6, 1995), is available at http://www.ag.state.mi.us/opinion/datafiles/1990s/op06869.htm.

> Children's Protective Services (CPS) worker's interview of a child at school, and the school may not deny access to a child, require that the CPS worker establish in writing the need to interview the child, require that a school employee be present during the interview, or require parental consent before allowing access to the child.

"The [DHHS] shall notify the person responsible for the child's health or welfare about the [DHHS's] contact with the child at the time or as soon afterward as the person can be reached." MCL 722.628(8). The DHHS may delay notifying the person responsible for the child's health or welfare about the DHHS's contact with the child "if the notice would compromise the safety of the child or child's siblings or the integrity of the investigation, but only for the time 1 of those conditions exists." *Id.*

> **Note:** The DHHS is not required to notify a nonparent adult[36] after interviewing a child at a school or other institution. See MCL 722.622(u) (excluding a nonparent adult from its definition of a "[p]erson responsible for the child's health and welfare" when that term appears in MCL 722.628(8)).

Unless the DHHS has obtained a court order,[37] "[a] child shall not be subjected to a search at a school that requires the child to remove his or her clothing to expose his buttocks or genitalia or her breasts, buttocks, or genitalia[.]" MCL 722.628(10).

3. Videorecording a Child's Statement

A DHHS employee, an investigating law enforcement agency, a prosecuting attorney or assistant attorney general, or another person designated to do so under a county protocol established under MCL 722.628(6) may take a child's videorecorded statement. MCL 712A.17b(5). The child must be "an alleged victim of [child abuse or neglect, MCL 712A.17b(2)(b),]" who is under 16 years of age or over age 16 and developmentally disabled.[38] MCL 712A.17b(1)(d).

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[36] See Section 2.1(A) for a definition of *nonparent adult*.

[37] See Section 2.3(D) for a detailed discussion of using court orders in investigating suspected abuse or neglect.

[38] See Section 11.8 for additional information on using videorecorded statements as an alternative procedure to obtain a child's testimony, including the definition of *developmental disability*.

> **Note:** MCL 712A.17b(7) permits "[a] custodian of the videorecorded statement[39] [to] release or consent to the release or use of a videorecorded statement or copies of a videorecorded statement to a law enforcement agency, an agency authorized to prosecute the criminal case to which the videorecorded statement relates, or an entity that is part of county protocols established under . . . MCL 722.628."

"The videorecorded statement shall state the date and time that the statement was taken; shall identify the persons present in the room and state whether they were present for the entire videorecording or only a portion of the videorecording; and shall show a time clock that is running during the taking of the statement." MCL 712A.17b(5).

In addition, the questioning of a child during a videorecorded statement "should be full and complete; shall be in accordance with the forensic interview protocol implemented as required by . . . MCL 722.628; and, if appropriate for the witness's developmental level, shall include, but need not be limited to, all of the following areas:

> (a) The time and date of the alleged offense or offenses.
>
> (b) The location and area of the alleged offense or offenses.
>
> (c) The relationship, if any, between the witness and the respondent.
>
> (d) The details of the offense or offenses.
>
> (e) The names of other persons known to the witness who may have personal knowledge of the offense or offenses." MCL 712A.17b(6).

"MCL 712A.17b(5) requires a trial court to admit videorecordings of a child's forensic interview during a non-adjudicatory stage," rather than a "forensic [interviewer's] interpretation of [the child's] statements." *In re Brown/Kindle/Muhammad Minors*, 305 Mich App 623, 632, 633 (2014).

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[39] MCL 712A.17b(1)(a) defines *custodian of the videorecorded statement* as "the [DHHS], investigating law enforcement agency, prosecuting attorney, or department of attorney general or another person designated under the county protocols established as required by . . . MCL 722.628."

To protect a child's privacy, a court must enter a protective order regarding a videorecorded statement that has become part of a court record. MCL 712A.17b(10).

MCL 712A.17b(11) provides that a videorecorded statement:

- "shall not be copied or reproduced in any manner except as provided in [MCL 712A.17b].
- is exempt from disclosure under the freedom of information act[.]
- is not subject to release under another statute[.]
- is not subject to disclosure under the Michigan court rules governing discovery." (Bullets added).

MCL 712A.17b(11) "does not prohibit the production or release of a transcript of a videorecorded statement."

C. Physician Suspecting Child Abuse or Child Neglect

When a physician sees a child suspected of being abused or neglected, the physician must conduct the necessary examinations and include summaries of those evaluations, including medical test results, in a written report[40] to the DHHS.[41] MCL 722.626(2).

> **Note:** MCL 722.623(1) requires a physician to report suspected child abuse or child neglect to the DHHS. In addition, MCL 722.626(1) requires an attending physician to notify the person in charge and the DHHS when a child suspected of being abused or neglected is brought to a hospital for outpatient services or admitted to a hospital as an inpatient, and the attending physician determines that releasing the child would endanger the child's health or welfare.

"If a report is made by a person other than a physician, or if the physician's report is not complete, the [DHHS] may request a court order for a medical evaluation of the child."[42] MCL 722.626(3). "The

[40] See Section 2.1(A) for additional information on mandatory reporters filing a written report.

[41] "A hospital is required, absent a parental release, to allow access to medical information on children to [DHHS] staff conducting a protective services investigation under the Child Protection Act since allowing such access does not violate the physician-patient privilege." OAG, 1978, No 5406, p 724 (December 15, 1978), available at http://www.ag.state.mi.us/opinion/datafiles/1970s/op05406.htm.

[42] See Section 2.3(D) for additional information on using court orders in investigating suspected child abuse or child neglect.

[DHHS] shall have a medical evaluation made without a court order if either of the following occurs:

> (a) The child's health is seriously endangered and a court order cannot be obtained.
>
> (b) The child is displaying symptoms suspected to be the result of exposure to or contact with methamphetamine production." MCL 722.626(3).
>
> > **Note:** The court, a child placing agency, or the DHHS may consent to routine, nonsurgical medical care, or emergency medical and surgical treatment *if the minor is placed outside the home*. MCL 722.124a(1). See Section 3.3 for a detailed discussion of ordering medical treatment for a child.

See *Lavey v Mills*, 248 Mich App 244, 256 (2001) (police officer and CPS worker violated MCL 722.626(3) by taking a child to a doctor's office and authorizing a gynecological examination without a court order and without evidence that the child's health was seriously endangered).

D. Use of Court Orders in Investigating Suspected Child Abuse or Child Neglect

After a petition is filed initiating child protective proceedings, the court may make orders to further investigate the allegations of abuse or neglect, including an evaluation or examination of a child or a parent, guardian, or legal custodian by a physician, dentist, psychologist, or psychiatrist. MCL 712A.12; MCR 3.923(B).[43]

> **Note:** A request for court action to protect a child must be by petition, unless exigent circumstances exist. MCR 3.961(A). See Chapter 3 for a detailed discussion of protective custody of a child, and Chapter 6 for a detailed discussion of petitions.

E. Category Classifications and DHHS Required Response Following Investigation

After completing the investigation and based on the results of that investigation, the DHHS must classify the allegation of child abuse or

[43] MCL 712A.12 specifically indicates that the court may order further investigation after a petition has been filed. MCR 3.923(B) does not require the filing of a petition prior to the court ordering "a minor or a parent, or legal custodian be examined or evaluated by a physician, dentist, psychologist, or psychiatrist."

neglect within one of the categories listed under MCL 722.628d.[44] MCL 722.628(12).

The categories, and the required DHHS response, listed under MCL 722.628d are as follows:

> "(a) Category V—services not needed. Following a field investigation, the [DHHS] determines that there is no evidence of child abuse or child neglect.
>
> (b) Category IV—community services recommended. Following a field investigation, the [DHHS] determines that there is not a preponderance of evidence of child abuse or child neglect, but the structured decision-making tool indicates that there is future risk of harm to the child. The [DHHS] shall assist the child's family in voluntarily participating in community-based services commensurate with the risk to the child.
>
> (c) Category III—community services needed. The [DHHS] determines that there is a preponderance of evidence of child abuse or child neglect, and the structured decision-making tool indicates a low or moderate risk of future harm to the child. The [DHHS] shall assist the child's family in receiving community-based services commensurate with the risk to the child. If the family does not voluntarily participate in services, or the family voluntarily participates in services, but does not progress toward alleviating the child's risk level, the [DHHS] shall consider reclassifying the case as category II.
>
> (d) Category II—child protective services required. The [DHHS] determines that there is evidence of child abuse or child neglect, and the structured decision-making tool indicates a high or intensive risk of future harm to the child. The [DHHS] shall open a protective services case and provide the services necessary under [the Child Protection Law]. The [DHHS] shall also list the perpetrator of the child abuse or child neglect, based on the report that was the subject of the field investigation, on the central registry as provided in [MCL 722.627(7)],[45] either by name or as 'unknown' if the perpetrator has not been identified.

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[44] For additional information on the categories listed under MCL 722.628d, see DHHS's Children Protective Services Manual (PSM), *Post-Investigative Services PSM 714-1*, at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/714-1.pdf.

(e) Category I—court petition required. The [DHHS] determines that there is evidence of child abuse or child neglect and 1 or more of the following are true:

(*i*) A court petition is required under another provision of [the Child Protection Law].

(*ii*) The child is not safe and a petition for removal is needed.

(*iii*) The [DHHS] previously classified the case as category II and the child's family does not voluntarily participate in services.

(*iv*) There is a violation, involving the child, of [MCL 750.520g (assault with intent to commit criminal sexual conduct), felonious attempt or felonious conspiracy to commit criminal sexual conduct, a felonious assault, or MCL 750.145c (child sexually abusive material or activity),] or of child abuse in the first or second degree as prescribed by . . . MCL 750.136b." MCL 722.628d(1).

Note: The DHHS uses a "structured decision-making tool" to measure the risk of future harm to a child.[46] MCL 722.622(z).

"In response to a category I classification, the [DHHS] shall do all of the following:

(a) If a court petition is not required under another provision of [the Child Protection Law], submit a petition for authorization by the court under . . . [MCL 712A.2(b)].

(b) Open a protective services case and provide the services necessary under [the Child Protection Law].

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[45] "'Central registry' means the system maintained at the [DHHS] that is used to keep a record of all reports filed with the [DHHS] under [the Child Protection Law] in which relevant and accurate evidence of child abuse or child neglect is found to exist." MCL 722.622(c). See MCL 722.622(o), which defines *department* as "the Department of [Health and] Human Services [(DHHS)]." See Section 2.5 for additional information on the central registry.

[46] "The [DHHS] is not required to use the structured decision-making tool for a nonparent adult who resides outside the child's home who is the victim or alleged victim of child abuse or child neglect or for an owner, operator, volunteer, or employee of a licensed or registered child care organization or a licensed or unlicensed adult foster care family home or adult foster care small group home as those terms are defined in . . . MCL 400.703." MCL 722.628d(3). If the investigation reveals "that there is a preponderance of the evidence that an individual listed in subsection (3) was the perpetrator of child abuse or child neglect, the [DHHS] shall list the perpetrator of the child abuse or child neglect on the central registry as provided by [MCL 722.627(7)]." MCL 722.628d(4). See Section 2.5 for additional information on the central registry.

> (c) List the perpetrator of the child abuse or child neglect, based on the report that was the subject of the field investigation, on the central registry as provided by [MCL 722.627(7)],[47] either by name or as 'unknown' if the perpetrator has not been identified." MCL 722.628d(2).

The DHHS must refer a central registry case to the prosecuting attorney[48] where the child is located if the:

- "central registry case involves a child's death, serious physical injury of a child, or sexual abuse or exploitation of a child[.]" MCL 722.628b(1).
- "central registry case involves a child's exposure to or contact with methamphetamine production[.]" MCL 722.628b(2).

> **Note:** MCL 722.622(d) defines a *central registry case* as "a child protective services case that the [DHHS] classifies under [MCL 722.628(8)] and [MCL 722.628d] as category I or category II."[49]

2.4 DHHS Access to Confidential Records to Investigate Suspected Child Abuse or Child Neglect

"Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy[50] in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds . . . for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to [the Child Protection Law]."[51] MCL 722.631.

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[47] "'Central registry' means the system maintained at the [DHHS] that is used to keep a record of all reports filed with the [DHHS] under [the Child Protection Law] in which relevant and accurate evidence of child abuse or child neglect is found to exist." MCL 722.622(c). See MCL 722.622(o), which defines *department* as "the Department of [Health and] Human Services [(DHHS)]." See Section 2.5 for additional information on the central registry.

[48] "The prosecuting attorney shall review the investigation of the case to determine if the investigation complied with the protocol adopted as required by [MCL 722.628]."MCL 722.628b(1); MCL 722.628b(2).

[49] "For a child protective services case that was investigated before July 1, 1999, central registry case means an allegation of child abuse or child neglect that the [DHHS] substantiated." MCL 722.622(d). See MCL 722.622(o), which defines *department* as "the Department of [Health and] Human Services [(DHHS)]."

[50] MCL 722.622(*l*) defines *member of the clergy* as "a priest, minister, rabbi, Christian science practitioner, or other religious practitioner, or similar functionary of a church, temple, or recognized religious body, denomination, or organization."

[51] See Section 11.3 for a discussion of the abrogation of evidentiary privileges in child protective proceedings.

A. Medical Records

"A hospital is required, absent a parental release, to allow access to medical information on children to [DHHS] staff conducting a protective services investigation under the Child Protection Act since allowing such access does not violate the physician-patient privilege." OAG, 1978, No 5406, p 724 (December 15, 1978).[52] In addition, when a physician sees a child suspected of being abused or neglected, the physician must conduct the necessary examinations and include summaries of those evaluations, including medical test results, in a written report to the DHHS.[53] MCL 722.626(2).

> **Note:** MCL 722.623(1) requires a physician to report suspected child abuse or child neglect to the DHHS. In addition, MCL 722.626(1) requires an attending physician to notify the person in charge and the DHHS when a child suspected of being abused or neglected is brought to a hospital for outpatient services or admitted to a hospital as an inpatient, and the attending physician determines that releasing the child would endanger the child's health or welfare.

The DHHS may obtain access to otherwise confidential records of the Michigan Department of Public Health under MCL 333.2640(2):

> "[I]f there is a compelling need for medical records or information to determine whether child abuse or neglect has occurred or to take action to protect a child where there may be a substantial risk of harm, the [D]epartment [of Public Health] shall give access to a [DHHS] caseworker or administrator directly involved in the investigation to the child's medical records and information that are pertinent to the child abuse or neglect investigation. Medical records or information disclosed under this section shall include the identity of the individual to whom the record or information pertains."

> **Note:** The Department of Public Health must provide access to the records or information within 14 days of receiving a written request from a DHHS caseworker or administrator directly involved in the investigation. MCL 333.2640(3).

[52] OAG, 1978, No 5406 (December 15, 1978), is available at http://www.ag.state.mi.us/opinion/datafiles/1970s/op05406.htm.

[53] See Section 2.3(C) for additional information on physicians suspecting child abuse or child neglect.

> Consent to release the records or information is not required. *Id.*

The DHHS may obtain access to the records of a licensee or registrant of the Michigan Department of Public Health under MCL 333.16281(1):

> "If there is a compelling need for records or information to determine whether child abuse or child neglect has occurred or to take action to protect a child where there may be a substantial risk of harm, a [DHHS] caseworker or administrator directly involved in the child abuse or neglect investigation shall notify a licensee or registrant that a child abuse or neglect investigation has been initiated regarding a child who has received services from the licensee or registrant and shall request in writing the child's medical records and information that are pertinent to that investigation. Upon receipt of this notification and request, the licensee or registrant shall review all of the child's medical records and information in the licensee's or registrant's possession to determine if there are medical records or information that is pertinent to that investigation. Within 14 days after receipt of a request made under this subsection, the licensee or registrant shall release those pertinent medical records and information to the caseworker or administrator directly involved in the child abuse or neglect investigation."
>
> > **Note:** See also 45 CFR 164.512(b)(1)(*ii*) (under the Health Insurance Portability & Accountability Act of 1996, PL 104-191, a "covered entity" may disclose "protected health information" to a governmental agency charged with receiving reports of child abuse or neglect); MCL 333.16648(1), (2)(h) (disclosure requirements apply to dentists); MCL 333.18117 (disclosure requirements apply to licensed professional counselors and limited licensed counselors); and MCL 333.18237 (disclosure requirements apply to psychologists).

The following privileges do not apply to a licensee or registrant releasing medical records or information for purposes of investigating alleged child abuse and neglect:

- the physician-patient privilege under MCL 600.2157;
- the dentist-patient privilege under MCL 333.16648;

- the licensed professional counselor-client privilege, and the limited licensed counselor-patient privilege under MCL 333.18117;

- the psychologist-patient privilege under MCL 333.18237; and

- any other health professional-patient privilege created or recognized by law. MCL 333.16281(2).

B. School Records

"A school or other institution shall cooperate with the [DHHS] during an investigation of a report of child abuse or neglect." MCL 722.628(8). However, MCL 600.2165 prohibits school employees from disclosing records or confidences without the child's consent if he or she is 18 years of age or older, or a child's parent's or legal guardian's consent if the child is under 18 years of age.

C. Records of Drug Counseling

Records of the identity, diagnosis, prognosis, or treatment of any patient in any federal drug or alcohol abuse prevention program are confidential. 42 USC 290dd—2(a). However, disclosure is permissible under the following situations:

- the patient consents in writing. 42 USC 290dd–2(b)(1).

- a court may order disclosure of any or all portions of the record it deems necessary on a showing of good cause. 42 USC 290dd–2(b)(2)(C).

  Note: "In assessing good cause[,] the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services." 42 USC 290dd–2(b)(2)(C). "Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure." *Id.*

- by court order authorizing disclosure of confidential communications made by a patient where disclosure is necessary to protect against an existing threat to life, or a threat of serious bodily injury, including circumstances that constitute suspected child abuse or neglect and verbal threats against third parties, or if disclosure is necessary to investigate or prosecute child abuse or neglect. 42 CFR 2.63(a)(1)-(2).

A court order is required to initiate or substantiate criminal charges against a patient or to conduct any investigation of the patient based on a record of identity, diagnosis, prognosis, or treatment. 42 USC 290dd–2(c).

In *In re Baby X*, 97 Mich App 111 (1980), the Court of Appeals addressed the conflict between the federal law mandating confidentiality of drug and alcohol treatment records and state law mandating disclosure of suspected child abuse or neglect. Specifically, the Court of Appeals found:

> "[I]n neglect proceedings[,] confidentiality must give way to the best interests of the child. Where treatment records are found to be 'necessary and material' to the state's proof of neglect, a court of competent jurisdiction may authorize disclosure. Alleged drug or alcohol dependence (here, the alleged heroin addiction of [the baby's mother]) which causes a baby's withdrawal and failure to thrive is sufficient 'good cause' as required by the Federal statute (and sufficient under the state statute as well) to order production of the records." *In re Baby X*, 97 Mich App at 120 (internal citation omitted).

D. Mental Health Records

"Records are public except as otherwise indicated in court rule or statute." MCR 5.731.

Information in the records of a recipient of mental health services is confidential and may only be disclosed under MCL 330.1748 or MCL 330.1748a. MCL 330.1748(1). Confidential information may be disclosed when necessary to comply with another provision of law (such as the duty to report suspected child abuse or neglect) or pursuant to court order, unless protected by privilege. MCL 330.1748(5)(a); MCL 330.1748(5)(d). See OAG, 1998, No 6976 (March 26, 1998) (CPS workers are entitled to access community mental health records of the involved children and relevant records of other recipients of community mental health services).[54]

The DHHS may obtain access to the records of a mental health professional under MCL 330.1748a(1):

> "If there is a compelling need for mental health records or information to determine whether child abuse or child neglect has occurred or to take action to protect a

[54] OAG, 1998, No 6976 (March 26, 1998), is available at http://www.ag.state.mi.us/opinion/datafiles/1990s/op10046.htm.

> minor where there may be a substantial risk of harm, a [DHHS] caseworker or administrator directly involved in the child abuse or neglect investigation shall notify a mental health professional that a child abuse or neglect investigation has been initiated involving a person who has received services from the mental health professional and shall request in writing mental health records and information that are pertinent to that investigation. Upon receipt of this notification and request, the mental health professional shall review all mental health records and information in the mental health professional's possession to determine if there are mental health records or information that is pertinent to that investigation. Within 14 days after receipt of a request made under this subsection, the mental health professional shall release those pertinent mental health records and information to the caseworker or administrator directly involved in the child abuse or neglect investigation."

The following privileges do not apply to a mental health professional releasing mental health records or information:

- the physician-patient privilege under MCL 600.2157;
- the dentist-patient privilege under MCL 333.16648;
- the licensed professional counselor-client privilege, and the limited licensed counselor-patient privilege under MCL 333.18117;
- the psychologist-patient privilege under MCL 333.18237; and
- any other health professional-patient privilege created or recognized by law. MCL 330.1748a(2).

E. Friend of the Court Records

"Friend of the court [(FOC)] records are not subject to a subpoena issued under these Michigan Court Rules. Unless another rule specifically provides for the protection or release of [FOC] records, this rule governs." MCR 3.218(A).

If the DHHS is investigating a suspected abused or neglected child and determines that there is an open FOC case regarding the child,[55] the DHHS must "notify the office of the [FOC] in the county in which the [FOC] case is open that there is an investigation being conducted

under [the Child Protection Law] regarding that child[.]" MCL 722.628(19).

> **Note:** "The [DHHS] shall determine whether there is an open [FOC] case regarding a child who is suspected of being abused or neglected if a child protective services investigation of child abuse and neglect allegations result in any of the following dispositions:
>
> > (a) A finding that a preponderance of evidence indicates that there has been child abuse and neglect.
> >
> > (b) Emergency removal of the child for child abuse and neglect before the investigation is completed.
> >
> > (c) The family court takes jurisdiction on a petition and a child is maintained in his or her own home under the supervision of the [DHHS].
> >
> > (d) If 1 or more children residing in the home are removed and 1 or more children remain in the home.
> >
> > (e) Any other circumstances that the [DHHS] determines are applicable and related to child safety." MCL 722.628(18).

"Unless the release is otherwise prohibited by law, a[n] [FOC] office must provide access to all nonconfidential and confidential records[56] to . . . [t]he [DHHS], as necessary to report suspected abuse or neglect or to allow the [DHHS] to investigate or provide services to a party or child in the case."[57] MCR 3.218(C)(2). The court rule requires the FOC to provide access to other entities, as well. See MCR 3.218(C) for a complete list.

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[55] If the DHHS determines that there is an open FOC case involving a child suspected of being abused or neglected, the DHHS must provide the child's noncustodial parents with a form explaining how to change a court order regarding custody or parenting time. MCL 722.628(21).

[56] For purposes of MCR 3.218, "'records' means any case-specific information the friend of the court office maintains in any media[,]" and "'access' means inspection of records, obtaining copies of records upon receipt of payment for costs of reproduction, and oral transmission by staff of information contained in friend of the court records[.]" MCR 3.218(A)(1)-(2).

[57] Note, however, that "[a FOC] office may refuse to provide access to a record in the [FOC] file if the [FOC] did not create or author the record. On those occasions, the requestor may request access from the person or entity that created the record." MCR 3.218(E).

F. Access to Information on the Law Enforcement Information Network (LEIN)

A state or county employee engaged in the enforcement of the child protection laws or rules of this state must be ensured access to information on the Law Enforcement Information Network (LEIN) concerning an individual being investigated. MCL 28.214(1)(a)(*ii*). The DHHS must do a LEIN check regarding "all parents, person(s) responsible for the health and welfare of the child, and all household members for all sexual abuse, physical abuse, suspected caretaker substance abuse, drug exposed infant cases, methamphetamine production allegations, and cases where domestic violence allegations may be present." DHHS's Children Protective Services Manual (PSM), *Law Enforcement Information Network (LEIN) PSM 713-02*, p 2, available at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/713-02.pdf.

2.5 DHHS Central Registry of Reports of Child Abuse or Child Neglect

The DHHS is required to maintain a statewide electronic registry to carry out the purposes of the Child Protection Law. MCL 722.627(1). The *central registry* contains "a record of all reports filed with the [DHHS[58]] under [the Child Protection Law] in which relevant[59] and accurate evidence of child abuse or child neglect is found to exist." MCL 722.622(c).

The DHHS must classify an allegation of child abuse or neglect within one of the categories listed under MCL 722.628d after completion of its investigation.[60] MCL 722.628(12). "If the [DHHS] classifies a report of suspected child abuse or child neglect as a central registry case, the [DHHS] shall maintain a record in the central registry[.]" MCL 722.627(4). A *central registry case* is "a child protective services case that the [DHHS] classifies under [MCL 722.628 and MCL 722.628d] as category I or category II."[61] MCL 722.622(d).

"If a preponderance of evidence of abuse or neglect exists, or if a court takes jurisdiction of the child under [MCL 712A.2(b)], the [DHHS] shall maintain the information in the central registry as follows:

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[58] See MCL 722.622(o), which defines *department* as "the Department of [Health and] Human Services [(DHHS)]."

[59] "'Relevant evidence' means evidence having a tendency to make the existence of a fact that is at issue more probable than it would be without the evidence." MCL 722.622(v).

[60] See Section 2.3(E) for a detailed discussion of the category classifications.

[61] "For a child protective services case that was investigated before July 1, 1999, central registry case means an allegation of child abuse or child neglect that the [DHHS] substantiated." MCL 722.622(d).

> (a) Except as provided in subdivision (b), for a person listed as a perpetrator in category I or II under [MCL 722.628d], either as a result of an investigation or as a result of the reclassification of a case, the [DHHS] shall maintain the information in the central registry for 10 years.
>
> (b) For a person listed as a perpetrator in category I or II under [MCL 722.628d] that involved any of the circumstances listed in [MCL 722.637(1)] or [MCL 722.638(1)], the [DHHS] shall maintain the information in the central registry until the [DHHS] receives reliable information that the perpetrator of the abuse or neglect is dead. For the purpose of this subdivision, 'reliable information' includes, but is not limited to, information obtained using the United States social security death index database.
>
> (c) For a person who is the subject of a report or record made under this act before [March 31, 2015[62]], the following applies:
>
> > (*i*) Except as provided in subparagraph (*ii*), for a person listed as perpetrator in category I or II under [MCL 722.628d] either as a result of an investigation or as a result of the reclassification of a case, the [DHHS] may remove the information for a person described in this subparagraph after 10 years without a request for amendment or expunction.
> >
> > (*ii*) For a person listed as a perpetrator in category I or II under [MCL 722.628d] that involved any of the circumstances listed in [MCL 722.637(1)] or [MCL 722.638(1)], the [DHHS] shall maintain the information in the central registry until the [DHHS] receives reliable information that the perpetrator of the child abuse or child neglect is dead. For the purpose of this subparagraph, 'reliable information' includes, but is not limited to, information obtained using the United States social security death index database." MCL 722.627(7).

If the DHHS finds by a preponderance of the evidence that a nonparent adult who lives outside the child's home, an owner, operator, volunteer, or employee of a child care organization, or an employee of an adult foster care home in which a child is placed has abused or neglected a child, the perpetrator must be placed on the DHHS's central registry as set out under MCL 722.627(7). MCL 722.628d(3)-(4). This also applies to licensed foster parents. DHHS's Children Protective Services Manual

[62] Effective date of 2014 PA 30, which added MCL 722.627(7)(c)(*i*)-(*ii*).

(PSM), *CPS Legal Requirements and Definitions PSM 711-4*, p 4, available at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/711-4.pdf.

A. Notification Requirement

Within 30 days of the DHHS classifying an allegation of child abuse or neglect within one of the categories listed under MCL 722.628d, the DHHS "shall notify in writing each person who is named in the record as a perpetrator of the child abuse or child neglect." MCL 722.627(4). "The notice shall be sent by registered or certified mail, return receipt requested, and delivery restricted to the addressee." *Id.*

The notice must "set forth the person's right to request expunction of the record and the right to a hearing if the [DHHS] refuses the request[, and] . . . shall state that the record may be released under [MCL 722.627d]." MCL 722.627(4). "The notice shall not identify the person reporting the suspected child abuse or child neglect." *Id.*

B. Amendment of Record

"A person who is the subject of a report or record made under [the Child Protection Law] may request the [DHHS] to amend an inaccurate report or record from the central registry and local office file."[63] MCL 722.627(5).

"A person who is the subject of a report or record made under [the Child Protection Law] may, within 180 days from the date of service of notice of the right to a hearing, request the [DHHS] hold a hearing to review the request for amendment . . . . If the hearing request is made within 180 days of the notice, the [DHHS] shall hold a hearing to determine by a preponderance of the evidence whether the report or record in whole or in part should be amended . . . from the central registry."[64] MCL 722.627(6). "The [DHHS] may, for good cause, hold a hearing under [MCL 722.627(6)] if the [DHHS] determines that the person who is the subject of the report or record submitted the request for a hearing within 60 days after the 180-day notice period expired." *Id.*

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[63] For additional information on "amend[ing] an inaccurate report or record from the central registry and local office file[,]" see DHHS's Children Protective Services Manual (PSM), *Amendment or Expunction PSM 717-2*, at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/717-2.pdf.

[64] "The hearing shall be held before a hearing officer appointed by the [DHHS] and shall be conducted as prescribed by the administrative procedures act . . . MCL 24.201 to [MCL] 24.328." MCL 722.627(6).

C. Expungement of Record

"A person who is the subject of a report or record made under [the Child Protection Law] may request the [DHHS] to expunge[65] from the central registry a report or record by requesting a hearing under [MCL 722.627(6)]."[66] MCL 722.627(5). "The plain language of [MCL 722.627] grants exclusive jurisdiction to [the] DHHS} to control expunction from the central registry." *In re Harper*, 302 Mich App 349, 353, 355, 361 (2013) ("trial court did not have jurisdiction to enter an order removing [the respondent-mother] from the central registry" where "[the] respondent[-mother] failed to exhaust her administrative remedies before seeking judicial intervention").

> **Note:** A court has no authority to order the expunction of a person's name from the central registry until after the person has exhausted his or her administrative remedies. See MCL 24.301.

A person who is the subject of a report or record made under [the Child Protection Law] may, within 180 days from the date of service of notice of the right to a hearing, request the [DHHS] hold a hearing to review the request for . . . expunction. If the hearing request is made within 180 days of the notice, the [DHHS] shall hold a hearing to determine by a preponderance of the evidence whether the report or record in whole or in part should be . . . expunged from the central registry."[67] MCL 722.627(6)."The [DHHS] may, for good cause, hold a hearing under [MCL 722.627(6)] if the [DHHS] determines that the person who is the subject of the report or record submitted the request for a hearing within 60 days after the 180-day notice period expired." *Id*

"If the investigation of a report conducted under [the Child Protection Law] does not show child abuse or child neglect by a preponderance of evidence, or if a court dismisses a petition based on the merits of the petition filed under [MCL 712A.2(b)], because the petitioner has failed to establish that the child comes within the jurisdiction of the court, the information identifying the subject of the report shall be expunged from the central registry." MCL 722.627(7). However, "[i]f a preponderance of evidence of abuse or neglect exists, or if a court takes jurisdiction of the child under [MCL 712.2(b)], the [DHHS] shall maintain the information in the central registry as follows:

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[65] "'Expunge' means to physically remove or eliminate and destroy a record or report." MCL 722.622(q).

[66] For additional information on "expung[ing] from the central registry a report or record[,]" see DHHS's Children Protective Services Manual (PSM), *Amendment or Expunction PSM 717-2*, at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/717-2.pdf.

[67] "The hearing shall be held before a hearing officer appointed by the [DHHS] and shall be conducted as prescribed by the administrative procedures act . . . MCL 24.201 to [MCL] 24.328." MCL 722.627(6).

(a) Except as provided in subdivision (b), for a person listed as a perpetrator in category I or II under [MCL 722.628d[68]], either as a result of an investigation or as a result of the reclassification of a case, the [DHHS] shall maintain the information in the central registry for 10 years.

(b) For a person listed as a perpetrator in category I or II under [MCL 722.628d] that involved any of the circumstances listed in [MCL 722.637(1)] or [MCL 722.638(1)], the [DHHS] shall maintain the information in the central registry until the [DHHS] receives reliable information that the perpetrator of the abuse or neglect is dead until the [DHHS] receives reliable information that the perpetrator of the abuse or neglect is dead. For the purpose of this subdivision, 'reliable information' includes, but is not limited to, information obtained using the United States social security death index database.

(c) For a person who is the subject of a report or record made under this act before [March 31, 2015[69]], the following applies:

(*i*) Except as provided in subparagraph (*ii*), for a person listed as perpetrator in category I or II under [MCL 722.628d] either as a result of an investigation or as a result of the reclassification of a case, the [DHHS] may remove the information for a person described in this subparagraph after 10 years without a request for amendment or expunction.

(*ii*) For a person listed as a perpetrator in category I or II under [MCL 722.628d] that involved any of the circumstances listed in [MCL 722.637(1)] or [MCL 722.638(1)], the [DHHS] shall maintain the information in the central registry until the [DHHS] receives reliable information that the perpetrator of the child abuse or child neglect is dead. For the purpose of this subparagraph, 'reliable information' includes, but is not limited to, information obtained using the United States social security death index database." MCL 722.627(7).

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[68] See Section 2.3(E) for a detailed discussion of the category classifications.

[69] Effective date of 2014 PA 30, which added MCL 722.627(7)(c)(*i*)-(*ii*).

"A person who willfully maintains a report or record required to be expunged under [MCL 722.627] is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $100.00, or both." MCL 722.633(4).

D. Access to DHHS's Central Registry

A brief discussion of accessing the DHHS's central registry is contained in this subsection. For a detailed discussion, see the DHHS's Service Requirements Manual (SRM), *Confidentiality SRM-131*, available at http://www.mfia.state.mi.us/olmweb/ex/srm/131.pdf.

"Unless made public as specified information[70] released under [MCL 722.627d], a written report, document, or photograph filed with the [DHHS] is a confidential record available only to [certain persons or entities.]"[71] MCL 722.627(2).

"Except for records available under [MCL 722.627(2)(a), MCL 722.627(2)(b), and MCL 722.627(2)(n)[72]], the identity of a reporting person is confidential subject to disclosure only with the consent of that person or by judicial process." MCL 722.625.

The DHHS must not include a police report related to an ongoing investigation of suspected child abuse or child neglect when releasing information to authorized persons or entities. MCL 722.627(8). The DHHS may, however, release reports of a person's convictions of crimes related to child abuse or child neglect. *Id.*

1. Persons or Entities With Access to DHHS Central Registry

MCL 722.627(2) lists the persons or entities who have access to the DHHS's central registry:

> "(a) A legally mandated public or private child protective agency investigating a report of known or suspected child abuse or child neglect or a legally mandated public or private child protective agency or foster care agency prosecuting a disciplinary action against its own employee

[70] "'Specified information' means information in a children's protective services case record related specifically to the [DHHS's] actions in responding to a complaint of child abuse or child neglect." MCL 722.622(y).

[71] See Section 2.5(D)(1) for a list of persons or entities who have access to the DHHS central registry.

[72] MCL 722.627(2)(a)-(b) refer to public or private child protective agencies and law enforcement agencies investigating suspected abuse or neglect, and MCL 722.627(n) refers to the Children's Ombudsman.

involving child protective services or foster records.

(b) A police or other law enforcement agency investigating a report of known or suspected child abuse or child neglect.

(c) A physician who is treating a child whom the physician reasonably suspects may be abused or neglected.

(d) A person legally authorized to place a child in protective custody when the person is confronted with a child whom the person reasonably suspects may be abused or neglected and the confidential record is necessary to determine whether to place the child in protective custody.

(e) A person, agency, or organization, including a multidisciplinary case consultation team, authorized to diagnose, care for, treat, or supervise a child or family who is the subject of a report or record under [the Child Protection Law], or who is responsible for the child's health or welfare.[73]

(f) A person named in the report or record as a perpetrator or alleged perpetrator of the child abuse or child neglect or a victim who is an adult at the time of the request, if the identity of the reporting person is protected as provided in [MCL 722.625].

(g) A court for the purposes of determining the suitability of a person as a guardian of a minor or that otherwise determines that the information is necessary to decide an issue before the court, or in the event of a child's death, a court that had jurisdiction over that child under [MCL 712A.2(b).]

(h) A grand jury that determines the information is necessary to conduct the grand jury's official business.

(i) A person, agency, or organization engaged in a bona fide research or evaluation project. . . . The [DHHS] director may authorize the release of

[73] See Section A. for the definition of "person responsible for the child's health or welfare" as defined under MCL 722.622(u). However, MCL 722.622(u) limits a nonparent adult's access to information on the DHHS's central registry.

information to a person, agency, or organization described in this subdivision if the release contributes to the purposes of [the Child Protection Law] and the person, agency, or organization has appropriate controls to maintain the confidentiality of personally identifying information for a person named in a report or record made under [the Child Protection Law].[74]

(j) A lawyer-guardian ad litem or other attorney appointed as provided by [MCL 722.630].

(k) A child placing agency licensed under . . . MCL 722.111 to [MCL] 722.128, for the purpose of investigating an applicant for adoption, a foster care applicant or licensee or an employee of a foster care applicant or licensee, an adult member of an applicant's or licensee's household, or other persons in a foster care or adoptive home who are directly responsible for the care and welfare of children, to determine suitability of a home for adoption or foster care. The child placing agency shall disclose the information to a foster care applicant or licensee under . . . MCL 722.111 to [MCL] 722.128, or to an applicant for adoption.

(*l*) Family division of circuit court staff authorized by the court to investigate foster care applicants and licensees, employees of foster care applicants and licensees, adult members of the applicant's or licensee's household, and other persons in the home who are directly responsible for the care and welfare of children, for the purpose of determining the suitability of the home for foster care. The court shall disclose this information to the applicant or licensee.

(m) Subject to [MCL 722.627a], a standing or select committee or appropriations subcommittee of either house of the legislature having jurisdiction over child protective services matters.

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[74] "The person, agency, or organization shall not release information identifying a person named in the report or record unless that person's written consent is obtained. The person, agency, or organization shall not conduct a personal interview with a family without the family's prior consent and shall not disclose information that would identify the child or the child's family or other identifying information." MCL 722.627(2)(i).

(n) The children's ombudsman appointed under the children's ombudsman act, . . . MCL 722.921 to [MCL] 722.935.

(o) A child fatality review team established under [MCL 722.627b] and authorized under that section to investigate and review a child death.

(p) A county medical examiner or deputy county medical examiner appointed under . . . MCL 52.201 to [MCL] 52.216, for the purpose of carrying out his or her duties under that act.

(q) A citizen review panel established by the [DHHS]. Access under this subdivision is limited to information the department determines is necessary for the panel to carry out its prescribed duties.

(r) A child care regulatory agency.

(s) A foster care review board for the purpose of meeting the requirements of . . . MCL 722.131 to [MCL] 722.139a.

(t) A local friend of the court office.

(u) A [DHHS] employee actively representing himself or herself in a disciplinary action, a labor union representative who is actively representing a [DHHS] employee in a disciplinary action, or an arbitrator or administrative law judge conducting a hearing involving a [DHHS] employee's dereliction, malfeasance, or misfeasance of duty, for use solely in connection with that action or hearing. Information disclosed under this subdivision shall be returned not later than 10 days after the conclusion of the action or hearing. A recipient shall not receive further disclosures under this subdivision while he or she retains disclosed information beyond the deadline specified for return."

2. Dissemination of Information

"Subject to [MCL 722.627(9)], a person or entity to whom information described in [MCL 722.627(2)] is disclosed shall make the information available only to a person or entity described in [MCL 722.627(2)]." MCL 722.627(3).

> **Note:** MCL 722.627(9) provides that "[a] member or staff member of a citizen review panel[75] shall not disclose identifying information about a specific child protection case to an individual, partnership, corporation, association, governmental entity, or other legal entity."

"Except as provided in [MCL 722.627], a person who disseminates, or who permits or encourages the dissemination of, information contained in the central registry and in reports and records made as provided in [the Child Protection Law] is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $100.00, or both, and is civilly liable for the damages proximately caused by the dissemination." MCL 722.633(3). See *Zimmerman v Owens*, 221 Mich App 259 (1997) (attorney in divorce proceeding could not be held civilly liable for attaching protective services report to a motion in a divorce case because former MCL 722.627(1)(g) (now MCL 722.627(2)(g)) allowed disclosure where the court determined the information was "relevant and necessary to the issues of custody and visitation[,]" and the plaintiff failed to show any damages proximately caused by the dissemination where no one saw the protective services report during the 14 days it sat in a court file not under seal).

"Documents, reports, or records authored by or obtained from another agency or organization shall not be released or open for inspection under [MCL 722.627(2)] unless required by other state or federal law, in response to an order issued by a judge, magistrate, or other authorized judicial officer, or unless the documents, reports, or records are requested for a child abuse or child neglect case or for a criminal investigation of a child abuse or child neglect case conducted by law enforcement." MCL 722.627(10).

2.6 Death of Child Under Court's Jurisdiction

If a child dies while under the court's jurisdiction under MCL 712A.2(b), the DHHS must notify the court in writing or electronically within one business day of the child's death.[76] MCL 722.627k(1). The DHHS must

[75] MCL 722.622(k) defines *citizen review panel* as "a panel established as required by . . . the child abuse prevention and treatment act, 42 USC 5106a." MCL 722.627b requires a "citizen review panel [to] review each child fatality that involves allegations of child abuse or neglect for each child who, at the time of death or within 12 months preceding the death, was under the court's jurisdiction under . . . MCL 712A.2[(b)]." MCL 722.627b(6).

[76] The DHHS must also notify "the state senator and state representative who represent the district in which that court is located, and the children's ombudsman." MCL 722.627k(1).

also notify the children's ombudsman within one business day of a child's death when any of the following apply:

> "(a) The child died during an active child protective services investigation or an open child protective services case.
>
> (b) The [DHHS] received a prior child protective services complaint concerning the child's caretaker.
>
> (c) The child's death may have resulted from child abuse or neglect." MCL 722.627k(2).
>
> > **Note:** MCL 722.627b requires a "citizen review panel[77] [to] review each child fatality that involves allegations of child abuse or neglect for each child who, at the time of death or within 12 months preceding the death, was under the court's jurisdiction under . . . [MCL 712A.2(b)]." MCL 722.627b(6).

The DHHS must also "establish and maintain a registry of statistical information regarding children's deaths that shall be accessible to the public." MCL 722.627b(11). "The registry created in [MCL 722.627b] shall not disclose any identifying information and shall only include statistical information covering all of the following:

> (a) The number of children who died while under court jurisdiction for child abuse or neglect regardless of placement setting.
>
> (b) The number of children who died as a result of child abuse or neglect after a parent had 1 or more child protective services complaints within the 2 years preceding the child's death and the category dispositions of those complaints.[78]
>
> (c) The total number of children as identified in subdivisions (a) and (b) who died in the preceding year.
>
> (d) The child protective services disposition of the child fatality." MCL 722.627b(11).

2.7 Civil and Criminal Immunity Under Michigan Law

This section provides a general overview of civil and criminal immunity under Michigan law in the context of a child abuse or neglect case.

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[77] MCL 722.622(k) defines *citizen review panel* as "a panel established as required by . . . the child abuse prevention and treatment act, 42 USC 5106a."

[78] See Section 2.3(E) for a detailed discussion of the category classifications.

Immunity of state and local agencies and their agents under 42 USC 1983 is beyond the scope of this benchbook.

A. Immunity Under the Child Protection Law

MCL 722.625, in part, provides for immunity under the Child Protection Law in certain circumstances:

> "A person acting in good faith who makes a report,[79] cooperates in an investigation, or assists in any other requirement of [the Child Protection Law] is immune from civil or criminal liability that might otherwise be incurred by that action. A person making a report or assisting in any other requirement of [the Child Protection Law] is presumed to have acted in good faith. This immunity from civil or criminal liability extends only to acts done according to [the Child Protection Law] and does not extend to a negligent act that causes personal injury or death or to the malpractice of a physician that results in personal injury or death."

"[MCL 722.625] clearly and unambiguously provides immunity to persons who file a child abuse report in good faith." *Awkerman v Tri-County Orthopedic Group, PC*, 143 Mich App 722, 726-727 (1985) (where a child abuse report was not made in bad faith, MCL 722.625 precluded a mother and child from recovering damages against the child's physicians when the child's physicians misdiagnosed the cause of his frequent bone fractures and erroneously filed a child abuse report against his mother).

"[I]mmunity extends to reports of 'suspected' child abuse regardless of the outcome of a subsequent investigation." *Warner v Mitts*, 211 Mich App 557, 559 (1995). Specifically, the Court of Appeals held:

> "Reading [MCL 722.624[80] and MCL 722.625] together, it is apparent a person who has 'reasonable cause to suspect child abuse' is by definition 'acting in good faith' when reporting the suspicions. Thus, immunity extends to reports of 'suspected' child abuse regardless of the outcome of a subsequent investigation. The

[79] By providing immunity under the Child Protection Law for persons who report suspected child abuse or neglect in good faith, "the Legislature intended to abrogate established immunity rules of the common law related to persons required to report abuse and neglect." *Williams v Coleman*, 194 Mich App 606, 615-616 (1992).

[80] MCL 722.624 provides that any person with "reasonable cause to suspect child abuse or neglect may report the matter to the [DHHS] or a law enforcement agency." See Section 2.2(C) for a discussion of "reasonable cause to suspect child abuse or neglect."

> purpose of the immunity is to facilitate the public policy behind the act, which is to encourage reporting of suspected child abuse.
>
> Here, whether [the] defendant[-reporter] learned of [the plaintiff-father's] sexual abuse of his daughter from her husband or from [the plaintiff-father] himself is irrelevant to the question of [the] defendant[-reporter's] 'reasonable cause to suspect child abuse.' Either source of the information would be sufficient to constitute reasonable cause. [The Court of Appeals] agree[d] with the trial court that [the] defendant[-reporter's] alleged animosity toward [the] plaintiff[-father] did not render [the] defendant[-reporter's] reporting one of bad faith. . . . '[G]ood faith' pertains to the existence of a reasonable suspicion, not the motive behind the decision to report." *Warner*, 211 Mich App at 559-560.

"Immunity [under MCL 722.625] extends not only to the making of [a] report [of child abuse or neglect,] but also to a party's cooperation in [the] investigation." *Warner*, 211 Mich App at 560. See also *Lavey v Mills*, 248 Mich App 244, 252-254 (2001) (despite no charges being filed against the child's parents, the school principal was entitled to immunity under MCL 722.625 where she, in good faith, reported her suspicions that one of her students was being sexually abused to the police and county prosecutor, and then at the direction of the police, the school principal transported the student to a doctor's office for a gynecological examination without first obtaining the child's parent's consent).

However, immunity under MCL 722.625 does not extend to good-faith acts that violate other requirements set out under the Child Protection Law. *Lavey*, 248 Mich App at 255-257 (police officer and CPS worker were not entitled to immunity under MCL 722.625 where they violated MCL 722.626(3)[81] by taking a child to a doctor's office and authorizing a gynecological examination without a court order and without evidence that the child's health was seriously endangered).

B. Immunity under the Safe Delivery of Newborns Law

An employee or agent of a hospital or child placing agency, and an employee or contractor of a fire department or police station is immune from damages arising in a civil action for an act or omission

[81] MCL 722.626(3) permits a child's medical evaluation by court order or without a court order if "[t]he child's health is seriously endangered and a court order cannot be obtained[or] [t]he child is displaying symptoms suspected to be the result of exposure to or contact with methamphetamine production."

in accepting or transferring a newborn under the Safe Delivery of Newborns Law.[82] MCL 712.2(4).

> **Note:** To the extent the Governmental Liability for Negligence Act, MCL 691.1401 *et seq.*, does not protect a fire department's or police station's employee or contractor, MCL 712.2(4) extends the same immunity to them that a hospital's or child placing agency's employee or agent receives.

However, an employee, agent, or contractor is not immune from damages when the act or omission constitutes "gross negligence or willful or wanton misconduct." MCL 712.2(4).

> **Note:** *Gross negligence* is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results," MCL 712.1(2)(h), whereas, *willful misconduct* is "conduct or a failure to act that was intended to harm the plaintiff" and *wanton misconduct* is "conduct or a failure to act that shows such indifference to whether harm will result as to be equal to a willingness that harm will result." M Civ JI 14.11; M Civ JI 14.12.

C. Governmental Immunity Act

MCL 691.1407(5) grants a judge immunity "from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial . . . authority."

"A guardian ad litem is immune from civil liability for an injury to a person or damage to property if he or she is acting within the scope of his or her authority as guardian ad litem." MCL 691.1407(6).

"Except as otherwise provided in [the Governmental Liability for Negligence Act], a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). "[E]ach officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member

[82] MCL 712.5 requires a physician to report to the DHHS if he or she "examines [a] newborn [and] determines that there is reason to suspect the newborn has experienced child abuse or neglect, other than being surrendered to an emergency service provider under [MCL 722.623], or comes to a reasonable belief that the child is not a newborn[.]" See Section 2.2 for a detailed discussion of reporting suspected child abuse or child neglect.

while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause[83] of the injury or damage."[84] MCL 691.1407(2).

MCL 691.1407(2) does not apply to intentional torts committed by an individual government employee. *Lavey*, 248 Mich App at 257, citing *Sudul v Hamtramck*, 221 Mich App 455, 458, 481 (1997).

Social workers and private organizations contracting with the DHHS to provide child protective services are entitled to absolute immunity in initiating and monitoring court-supervised child placements. *Martin v Children's Aid Society*, 215 Mich App 88, 95-98 (1996). See also *Beauford v Lewis*, 269 Mich App 295, 298-302 (2005) (social worker was entitled to absolute immunity after she investigated allegations of child abuse and recommended that the child's mother's parental rights be terminated); *Spikes v Banks*, 231 Mich App 341, 343-344, 346-347 (1998) (child care organization was entitled to absolute immunity for its placement and supervision of a 15-year-old child placed in a foster care home where the child became pregnant by the foster parent's 23-year-old nephew who lived in the home without the organization's permission and had pending criminal sexual conduct charges).

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[83] "The Michigan Supreme Court has held that the phrase, '*the* proximate cause,' in [MCL 691.1407(2)] does not mean '*a* proximate cause,' as is usually the case in tort law, but rather 'the one most immediate, efficient, and direct cause of the injury or damage.'" *Jasinski v Tyler*, 729 F3d 531, 544-545 (CA 6, 2013) ("CPS employees' [mishandling of a child protective case that left a minor child with his father after confirming the father had abused the minor child's two older siblings] cannot be said to be the 'most, immediate, efficient, and direct cause'" of the minor child's death where the father caused the minor child's death through murder-suicide), quoting *Robinson v City of Detroit*, 462 Mich 439, 461-462 (2000).

[84] This provision applies unless otherwise provided and "without regard to the discretionary or ministerial nature of the conduct in question[.]" MCL 691.1407(2).

D. Immunity for Persons Providing Information in Response to a Court's Request

MCR 3.924 provides immunity to persons or agencies who provide information to the court in response to a request from the court:

> "Persons or agencies providing testimony, reports, or other information at the request of the court, including otherwise confidential information, records, or reports that are relevant and material to the proceedings following authorization of a petition, are immune from any subsequent legal action with respect to furnishing the information to the court."

E. Immunity for Foster Parent and Legal Guardian

MCL 722.163 bars a negligence action against a foster parent or legal guardian under certain circumstances. MCL 722.163 specifically allows "[a] foster child [to] maintain an action against his or her [licensed] foster parent . . . , and a child [to] maintain an action against his or her legal guardian[85] for injuries suffered as a result of the alleged ordinary negligence of the foster parent or legal guardian[,]" unless "the alleged negligent act involves an exercise of reasonable parental authority over the child[or] [] the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."

To determine whether a foster parent or legal guardian is entitled to immunity from a negligence action, "the question to be answered is not whether the defendant acted negligently, but whether the alleged act reasonably fell within one of the [MCL 722.163] exceptions." *Spikes*, 231 Mich App at 348-349, 350-354 (15-year-old foster child's allegations that the child's foster parent permitted her 23-year-old nephew, who had pending criminal sexual assault charges, to reside in the foster home without the child care organization's permission, and that the nephew committed repeated criminal sexual conduct with the foster child resulting in the foster child's pregnancy, of which the foster parent should have known, sounded in child neglect rather than negligent supervision, "which as a matter of law is not a reasonable exercise of parental discretion[,]" and thus, provision of foster parent immunity statute which protects reasonable exercises of parental authority did not provide the child's foster parent with immunity with respect to the foster child's claims).

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[85] MCL 722.163(2) defines a *legal guardian* as "a person appointed by a court of competent jurisdiction to exercise care and custody decisions over a minor."

Chapter 3: Obtaining Protective Custody and Ordering Medical Treatment for a Child

3.1 Acquiring Physical Custody of a Child 3-2
3.2 Required Procedures..... 3-10
3.3 Ordering Medical Treatment for a Child 3-15

In this chapter. . .

This chapter discusses taking temporary protective custody of a child pursuant to the Juvenile Code, the Child Protection Law, the Safe Delivery of Newborns Law, and related court rules. It includes discussions of the procedures required before a child is placed with relatives pending a preliminary hearing, for temporarily placing the child pending a preliminary hearing, and after a child has been placed in protective custody.

This chapter also sets forth law governing a child's medical treatment and medical examinations, withdrawal of life support, religious objections to a child's medical examination or treatment, and consent to and use of psychotropic medications.

For a more complete discussion of placements, see Chapter 8. For a discussion of the emergency removal of a child who was not initially placed outside the home or who was returned home from foster care, see Section 15.8.

3.1 Acquiring Physical Custody of a Child

A request for court action to protect a child must be by petition, unless exigent circumstances exist. MCR 3.961(A). See Chapter 7 for a detailed discussion of petitions.

In an effort to provide trial courts with a quick practical guide through the process of issuing orders for protective custody, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys:Order for Protective Custody (Child Not Under Court Jurisdiction)*. This toolkit is accessible at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/CWSToolkit/Documents/BC_Protective_Custody_Hearing.pdf.

A. Custody of a Child With Court Order

A judge or referee does not always receive a petition at the time a request for removal is made. In emergency situations, the court's permission may be sought for a child's removal before the petition is filed.

1. Court Order

"The court may issue a written order,[1] electronically or otherwise, authorizing a child protective services worker, an officer, or other person deemed suitable by the court to immediately take a child into protective custody when, after presentment of a petition or affidavit of facts to the court, the court has reasonable cause to believe that all the following conditions exist, together with specific findings of fact:[2]

> (a) The child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child's immediate removal from those surroundings is necessary to protect the child's health and safety. If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the child is subject to the exclusive jurisdiction of the tribal court. However, the state court may enter an order for protective custody of that child when it is

[1] See SCAO form JC 05b, *Order to Take Child(ren) Into Protective Custody (Child Protective Proceedings)*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc05b.pdf.

[2] MCL 712A.14b(2) requires the "ex parte order [to] be supported by *written* findings of fact." (Emphasis added).

> necessary to prevent imminent physical damage or harm to the child.
>
> (b) The circumstances warrant issuing an order pending a hearing in accordance with:
>
> > (*i*) MCR 3.965[3] for a child who is not yet under the jurisdiction of the court, or
> >
> > (*ii*) MCR 3.974(C)[4] for a child who is already under the jurisdiction of the court pursuant to MCR 3.971 or [MCR] 3.972.[5]
>
> (c) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.
>
> (d) No remedy other than protective custody is reasonably available to protect the child.
>
> (e) Continuing to reside in the home is contrary to the child's welfare." MCR 3.963(B)(1). See also MCL 712A.14b(1), which contains substantially similar language.

The court may include in the written order its authorization for entry of certain premises to remove the child. MCR 3.963(B)(2).

2. Title IV-E Funding

The court must make a finding that it is *contrary to a child's welfare* to remain in the home in order to establish a child's eligibility for federal participation in the costs of foster care under Title IV-E of the Social Security Act, 42 USC 670 *et seq*. 42 USC 672(a)(1)-(2). See Chapter 14.

According to MCR 3.903(C)(4), *contrary to a child's welfare* "includes, but is not limited to, situations in which the child's life, physical health, or mental well-being is unreasonably placed at risk." Specifically, 45 CFR 1356.21(c)-(d) indicates:

> "(c) *Contrary to the welfare determination*. Under [42 USC 672(a)(1)], a child's removal from the home must have been the result of a judicial

[3] See Section 7.7 for a discussion of MCR 3.965 (preliminary hearings).

[4] See Section 15.8(B) for a discussion of MCR 3.974(C) (dispositional review hearings following emergency removal).

[5] See Chapter 10 for a discussion of MCR 3.971 (pleas of admission or no contest), and Chapter 12 for a discussion of MCR 3.972 (trials).

> determination (unless the child was removed pursuant to a voluntary placement agreement) to the effect that continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interest, of the child. The contrary to the welfare determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from home. *If the determination regarding contrary to the welfare is not made in the first court ruling pertaining to removal from the home, the child is not eligible for title IV-E foster care maintenance payments for the duration of that stay in foster care.*
>
> (d) *Documentation of judicial determinations.* The judicial determination[] regarding contrary to the welfare . . . must be explicitly documented and must be made on a case-by-case basis and so stated in the court order.
>
>> (1) If the . . . contrary to the welfare judicial determination[is] not included as required in the court orders identified in paragraph[] . . . (c) of this section, a transcript of the court proceedings is the only other documentation that will be accepted to verify that [this] required determination[has] been made.
>>
>> (2) Neither affidavits nor nunc pro tunc orders will be accepted as verification documentation in support of . . . contrary to the welfare judicial determinations[.]
>>
>> (3) Court orders that reference State . . . law to substantiate judicial determinations are not acceptable, even if [State] law provides that a removal must be based on a judicial determination that remaining in the home would be contrary to the child's welfare . . . ." (Emphasis added).

B. Custody of a Child Without Court Order

An officer may immediately take a child into protective custody without a court order if:

- "there is reasonable cause to believe that [the] child is at substantial risk of harm or is in surroundings that present an imminent risk of harm[,]" and
- "the child's immediate removal from those surroundings is necessary to protect the child's health and safety[.]" MCL 712A.14a(1). See also MCR 3.963(A)(1), which contains substantially similar language.

Note: "If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the officer may take the child into protective custody only when necessary to prevent imminent physical damage or harm to the child." MCR 3.963(A).

"An officer who takes a child into protective custody under [MCL 712A.14a or MCR 3.963(A)] shall immediately notify the [DHHS]."[6] MCL 712A.14a(1); MCR 3.963(A)(2). "While awaiting the arrival of the [DHHS], the child shall not be held in a detention facility." MCL 712A.14a(1); MCR 3.963(A)(2).

"If a child taken into protective custody under [MCR 3.963(A)] is not released, the [DHHS] shall immediately contact the designated judge or referee as provided in [MCR 3.963(D)] to seek an ex parte court order for placement of the child pursuant to [MCR 3.963(B)(4)]."[7] MCR 3.963(A)(3).

For purposes of MCL 712A.14a, an *officer* means a "local police officer, sheriff or deputy sheriff, state police officer, or county agent or probation officer of a court of record." MCL 712A.14a(4). See also MCR 3.903(A)(17), which defines an *officer* as "a government official with the power to arrest or any other person designated and directed by the court to apprehend, detain, or place a minor."

Note: A Children's Protective Services (CPS) worker is not included under the definition of an officer under MCR 3.903(A)(17), nor does a CPS worker have authority under MCL 712A.14a(1) to remove a child from his or her home. Thus, a CPS worker must not remove a child from his or her home or arrange placement of a child outside the home without a court order. See the DHHS's Children's Protective Services

[6] MCL 712A.14a(2) requires "the officer or the [DHHS] [to] immediately contact the designated judge or referee as provided in [MCL 712A.14a(3)], to seek a court order for placement of the child pending a preliminary hearing." MCL 712A.14a(2). See Section 3.2(C) for a detailed discussion.

[7] See Section 3.2(A) for information on ex parte placement orders under MCR 3.963(B)(4), and Section 3.2(D) for information on the court's designation of a judge or referee under MCR 3.963(D).

Manual (PSM), *Removal and Placement of Children PSM 715-2*, p 1, available at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/715-2.pdf.

C. Custody of a Child Admitted to a Hospital

When a child suspected of being abused or neglected is brought to a hospital for outpatient services or admitted to a hospital as an inpatient, and the attending physician determines that releasing the child would endanger the child's health or welfare, the attending physician must notify the person in charge and the DHHS. MCL 722.626(1). The person in charge may keep the child in protective custody until the court's next regular business day. *Id.*

Once notified, the court must do one of the following:

(1) order that the child remain in the hospital or some other suitable place.

(2) order that the child be placed in custody pending a preliminary hearing under MCL 712A.14. See Section 3.2(E) for a discussion of required procedures after a child is in protective custody, and Section 8.2 for a discussion of available placements.

(3) order that the child be released to the child's parent, guardian, or custodian. MCL 722.626(1).

Note: When a physician sees a child suspected of being abused or neglected, the physician must conduct the necessary examinations and include summaries of those evaluations in a written report to the DHHS. MCL 722.626(2). See Section 2.3(C) for a detailed discussion.

D. Custody of a Child Under the Safe Delivery of Newborns Law

The Safe Delivery of Newborns Law permits a parent to surrender custody of a newborn and leave the newborn with an emergency service provider without expressing any intent of returning for the newborn. See MCL 712.1(2)(n). The Safe Delivery of Newborns Law, MCL 712.1 *et seq.*, governs the procedures for surrendering a newborn. According to MCL 712.1(2)(k), a *newborn* is "a child who a physician reasonably believes to be not more than 72 hours old."

Note: See Section 4.2(D) for the court's jurisdiction over a newborn child surrendered to an emergency service

provider, Section 7.9(A) for appointment of a Lawyer-Guardian Ad Litem, and Section 8.14 for information on the placement of a child under the Safe Delivery of Newborns Law.

An emergency service provider is any of the following:

(1) A uniformed or otherwise identifiable on-duty fire department employee or contractor located inside the premises.

(2) A uniformed or otherwise identifiable on-duty hospital employee or contractor located inside the premises.

(3) A uniformed or otherwise identifiable on-duty police station employee or contractor located inside the premises.

(4) A paramedic responding to a 9-1-1 emergency call.

(5) An emergency medical technician responding to a 9-1-1 emergency call. MCL 712.1(2)(f).

1. Emergency Service Provider's Responsibilities

When a parent surrenders a child to an emergency service provider, the emergency service provider must assume the child is a newborn and immediately take temporary custody of the child. MCL 712.3(1). The emergency service provider need not have a court order to accept the child. *Id.*

Once an emergency service provider accepts a child, he or she must make a reasonable effort to do all of the following:

(1) Protect the newborn's physical health and safety.

(2) Inform the parent that in surrendering the newborn he or she is releasing the newborn to a child placing agency for adoption.

(3) Inform the parent that he or she has 28 days to petition the court to regain custody of the newborn.

(4) Provide the parent with DHHS material, which includes at least all of the following statements:

> (a) In surrendering a newborn, the parent is releasing the newborn to a child placing agency for adoption.
>
> (b) After surrendering a newborn, the parent has 28 days to petition the court to regain custody of the newborn.
>
> (c) Once the 28-day period elapses, a court hearing is held to determine and terminate parental rights.
>
> (d) There will be public notification of the court hearing, but it will not contain the parent's name.
>
> (e) The parent will not receive personal notice of the court hearing.
>
> (f) Any information the parent provides to an emergency service provider will not be made public.
>
> (g) A parent may contact the safe delivery hotline for additional information.[8] MCL 712.3(1)(a)-(d).

An emergency service provider must also make a reasonable attempt to do all of the following:

> (1) Encourage the parent to provide relevant family and medical information.[9]
>
> (2) Provide the parent with the DHHS's pamphlet on the Safe Delivery of Newborns Program.[10]
>
> (3) Inform the parent that he or she may receive counseling or medical attention.
>
> (4) Inform the parent that information he or she provides will not be made public.

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[8] The Michigan Department of Community Health (MDCH) and the DHHS operate a safe delivery of newborns program. See MCL 712.20. For additional information on the safe delivery of newborns program, see http://www.michigan.gov/dhs/0,1607,7-124-5452_7124_7200---,00.html.

[9] See DHHS form DHS-4819, *Confidential Voluntary Medical Background Form for a Surrendered Newborn*, at http://mi.gov/documents/FIA-4819_9284_7.pdf.

[10] The Michigan Department of Community Health (MDCH) and the DHHS operate a safe delivery of newborns program. See MCL 712.20. For additional information on the safe delivery of newborns program, see http://www.michigan.gov/dhs/0,1607,7-124-5452_7124_7200---,00.html.

(5) Ask the parent for his or her name.

(6) Ask the parent to identify the other parent, informing him or her that a newborn cannot be placed for adoption until a reasonable effort has been made to identify both parents.

(7) Inform the parent that confidential services are available through the child placing agency.

(8) Inform the parent that he or she may sign a release for the newborn that could be used at the termination of parental rights hearing.[11] MCL 712.3(2)(a)-(g).

An emergency service provider taking temporary protective custody of a newborn must transfer the newborn to a hospital, unless the emergency service provider is an on-duty hospital employee or contractor. MCL 712.5(1).

Although MCL 722.623 requires that suspected child abuse or child neglect be reported to the DHHS, the reporting requirements do not apply to a newborn solely on the basis of its surrender to an emergency service provider who is transferring the newborn to a hospital. MCL 712.2(2).

2. Hospital's Responsibilities

A hospital must accept an emergency service provider's transfer of a newborn. MCL 712.5(1). A hospital that accepts a newborn into temporary protective custody must have the newborn examined by a physician. MCL 712.5(2).

If the examining physician determines that there is reason to suspect the newborn experienced neglect or abuse (other than its surrender to an emergency service provider), or if the examining physician believes the child is not a newborn, the physician must immediately report the information to the DHHS. MCL 712.5(2). However, when the examining physician does not suspect child abuse or neglect, the hospital must inform a child placing agency that it has taken a newborn into temporary protective custody. MCL 712.5(3).

[11] See DHHS form DHS-4820, *Voluntary Release for Adoption of a Surrendered Newborn by Parent*, at http://mi.gov/documents/FIA-4820_9285_7.pdf.

E. Newborns Under the Born Alive Infant Protection Act

A newborn as defined in the Born Alive Infant Protection Act, MCL 333.1071 *et seq.*, who is born in or transferred to a hospital, is a newborn for purposes of the Safe Delivery of Newborns Law. MCL 333.1073(1); MCL 712.3(3). When an emergency service provider receives a newborn under the Born Alive Infant Protection Act, he or she must comply with MCL 712.3(1)-(2) "to obtain information from or supply information to the surrendering parent by requesting the information from or supplying the information to the attending physician who delivered the newborn." MCL 712.3(3)(a). See also MCL 333.1073(5).

An emergency service provider must not attempt to directly contact the newborn's parent or parents. MCL 712.3(3)(b).

Additional requirements and statutory provisions apply to newborns described in the Born Alive Infant Protection Act who are considered surrendered under the Safe Delivery of Newborns Law. See MCL 333.1073; MCL 712.3(3)(c). A detailed discussion of the Born Alive Protection Act is outside the scope of this benchbook.

3.2 Required Procedures

A. Ex Parte Placement Order

"If an officer has taken a child into protective custody without court order under [MCR 3.963(A)], or if the [DHHS] is requesting the court grant it protective custody and placement authority, the [DHHS] shall present to the court a petition or affidavit of facts and request a written ex parte placement order." MCR 3.963(B)(4).

"If a judge finds all the factors in [MCR 3.963(B)(1)(a)-(e)] are present, the judge may issue a placement order; if a referee finds all the factors in [MCR 3.963(B)(1)(a)-(e)] are present, the referee may issue an interim placement order pending a preliminary hearing.[12] The written order shall contain specific findings of fact. It shall be communicated, electronically or otherwise, to the [DHHS]." MCR 3.963(B)(4). For the list of factors set out in MCR 3.963(B)(1)(a)-(e), see Section 3.1(A)(1).

[12] "[E]ither an attorney or a nonattorney referee may issue an ex parte placement order under MCR 3.963(B)." MCR 3.913(A)(2)(b).

B. Before Placing a Child With Relatives Pending Preliminary Hearing

When authorizing a child's placement, "[t]he court shall inquire [of the person requesting placement] whether a member of the child's immediate or extended family is available to take custody of the child pending a preliminary hearing, or an emergency removal hearing if the court already has jurisdiction over the child under MCR 3.971 or MCR 3.972[.]" MCR 3.963(B)(3). The court must also inquire whether a central registry clearance has been obtained, and whether a criminal history check has been initiated. *Id.* See Section 2.5 for information on the DHHS central registry, and Section 2.4(F) for information on the Children's Protective Services (CPS) LEIN checks.

> **Note:** In all cases, when a child must be removed from his or her home, the DHHS seeks to place the child with a noncustodial parent or a relative caregiver. See the DHHS's Children's Protective Services Manual (PSM), *Removal and Placement of Children PSM 715-2*, p 7, available at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/715-2.pdf. In addition to the required central registry and criminal background clearances, the DHHS will immediately conduct risk and needs assessments of a noncustodial parent's household. *Removal and Placement of Children PSM 715-2*, *supra* at p 7. To maintain placement of a child initially placed in their homes, relative caregivers must agree to be licensed as foster parents or waive licensure in writing. DHHS's Children's Foster Care Manual (FOM), *Placement Selection and Standards FOM 722-03*, p 10, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/722-03.pdf. The DHHS will allow a relative to waive licensure when it is determined that it is in a child's best interest to be placed or remain with an unlicensed relative and exceptional circumstances exist.[13] *Placement Selection and Standards FOM 722-03*, *supra* at p 15.

C. Temporary Placement of a Child Pending Preliminary Hearing

Once a child is taken into protective custody, with or without a court order, the officer or other person who took the child into custody must "immediately bring the child to the court for [a] preliminary hearing, or immediately contact the court for instructions regarding

[13] For additional information on relative licensing waivers, including a list of exceptional circumstances that must exist to forgo licensing, see the DHHS's Children's Foster Care Manual (FOM), *Placement Selection and Standards FOM 722-03*, pp 15-16, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/722-03.pdf.

placement [of the child] pending the hearing[.]" MCR 3.963(C)(3). See Chapter 8 for a detailed discussion of placements.

> **Note:** MCR 3.903(C)(10) defines *placement* as a "court-approved transfer of physical custody of a child to foster care, a shelter home, a hospital, or a private treatment agency." However, MCL 712A.15(4) prevents a child taken into protective custody from being placed in a secure facility that is designed to physically restrict the movements or activities of juvenile offenders or incarcerated adults.[14] See also *Dwayne B v Granholm*, settlement agreement of the United States District Court for the Eastern District of Michigan, filed July 3, 2008 (Docket No. 2:06-cv-13548), which prohibits the DHHS from placing a child taken into protective custody in a jail, correctional facility, or detention facility.[15]

For a child in protective custody following an emergency removal under MCL 712A.14a, MCL 712A.14a(2) requires "the officer[16] or the [DHHS] [to] immediately contact the designated judge or referee as provided in [MCL 712A.14a(3)], to seek a court order for placement of the child pending a preliminary hearing." MCL 712A.14a(2). MCL 712A.14a(3) requires a "judge or referee [to] be designated as the contact when a placement order is sought for a child in protective custody under [MCL 712A.14a]."

"[I]f the court is not open, [the] DHHS must contact the person designated under [MCR 3.963(D)[17]] for permission to place the child pending the hearing." MCR 3.963(C)(4).

D. Designated Court Contact

"When the [DHHS] seeks a placement order for a child in protective custody under [MCR 3.963(A)] or [MCR 3.963(B)], [the~~]~~ DHHS] shall contact a judge or referee designated by the court for that purpose."[18] MCR 3.963(D)(1).

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[14] MCL 712A.14a(1) also prevents a child, taken into protective custody, from being held in a detention facility while awaiting the arrival of the DHHS.

[15] The settlement agreement, in its entirety, is available at http://www.childrensrights.org/wp-content/uploads//2008/09/22008-07-03_mi_signed_settlement.pdf. See also http://www.childrensrights.org/reform-campaigns/legal-cases/michigan/ for a summary of the action taken since Governor Snyder took office.

[16] For purposes of MCL 712A.14a, an *officer* means a "local police officer, sheriff or deputy sheriff, state police officer, or county agent or probation officer of a court of record." MCL 712A.14a(4).

[17] See Section 3.2(D) for information on the court's designation of a judge or referee under MCR 3.963(D).

[18] See Section 3.1(A) for information on MCR 3.963(B), taking custody of a child with a court order, and Section (B) for information on MCR 3.963(A), taking custody of a child without a court order.

"If the court is closed, the designated judge or referee may issue an ex parte order for placement upon receipt, electronically or otherwise, of a petition or affidavit of facts.[19] The order must be communicated in writing, electronically or otherwise, to the appropriate county DHHS office and filed with the court the next business day." MCR 3.963(D)(2). See also MCL 712A.14a(3), which contains substantially similar language for a child in protective custody following an emergency removal under MCL 712A.14a.

Note that "[w]hen a placement order is issued by a designated referee, the order shall take effect as an interim order pending a preliminary hearing." MCL 712A.14a(3).

E. After a Child Is in Protective Custody

1. Notification

An officer or other person who takes a child into protective custody must immediately attempt to notify the child's parent, guardian, or legal custodian of the protective custody. MCR 3.963(C)(1).

The parent, guardian, or legal custodian must also be informed of the date, time, and location of the scheduled preliminary or emergency removal hearing. MCR 3.963(C)(2).

> **Note:** MCR 3.903(A)(11) defines a *guardian* as "a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or [MCL] 700.5205, by a court of another state under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202, or a juvenile guardian appointed pursuant to MCL 712A.19a or MCL 712A.19c."
>
> MCR 3.903(A)(13) defines a *juvenile guardian* as "a person appointed guardian of a child by a Michigan court pursuant to MCL 712A.19a or MCL 712A.19c. A juvenile guardianship is distinct from a guardianship authorized under the Estates and Protected Individuals Code."
>
> MCR 3.903(A)(14) defines a *legal custodian* as "an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a

[19] "[E]ither an attorney or a nonattorney referee may issue an ex parte placement order under MCR 3.963(B)." MCR 3.913(A)(2)(b).

> comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. It also includes the term 'Indian custodian' as defined in MCR 3.002(15)."[20]

2. Preliminary Hearing

The preliminary hearing must begin within 24 hours of a child being taken into protective custody unless the preliminary hearing is adjourned for good cause, or the child must be released. MCL 712A.14(2);[21] MCR 3.965(A)(1). The 24-hour time period does not include Sundays or holidays. MCR 3.965(A)(1). See Chapter 7 for a detailed discussion of preliminary hearings.

During the preliminary hearing on the status of the child, the judge or referee must authorize the filing of a complaint[22] or the child must be released to his or her parents, guardian, or custodian. MCL 712A.14(2).

> **Note:** The "'[p]etition authorized to be filed' refers to written permission given by the court to file the petition containing the formal allegations against the . . . respondent with the clerk of the court." MCR 3.903(A)(21).

3. Petition

The officer or other person who took the child into protective custody must make sure that the petition is prepared and submitted to the court. MCR 3.963(C)(5). See Chapter 7 for a detailed discussion of petitions.

> **Note:** A *petition* is "a complaint or other written allegation, verified in the manner provided in MCR 2.114(B), that a parent, guardian, nonparent adult, or legal custodian has harmed or failed to properly care for a child . . . ." MCR 3.903(A)(20).

---

[20] An "'Indian custodian' means any Indian person who has custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody, and control have been transferred by the child's parent." MCR 3.002(15) (formerly MCR 3.002(7)).

[21] MCL 712A.14(2) requires that the preliminary hearing be held "immediately" if a child is not released. The statute does not set forth the 24-hour limit contained in MCR 3.965(A)(1).

[22] *Petition* includes "a complaint or other written allegation." See MCR 3.903(A)(20).

4. Custody Statement

The officer or other person who took the child into custody must also "file a custody statement with the court that includes:

> (a) a specific and detailed account of the circumstances that led to the emergency removal, and
>
> (b) the names of persons notified and the times of notification or the reason for failure to notify."[23] MCR 3.963(C)(6).

3.3 Ordering Medical Treatment for a Child

A. Consent to a Child's Treatment

When a child is placed outside the home, a child placing agency, the DHHS, or the court may consent to "routine, nonsurgical medical care, or emergency medical and surgical treatment" of a child. MCL 722.124a(1).

> **Note:** The court may also enter a dispositional order to provide a child with appropriate "medical, dental, surgical, or other health care" it considers necessary after the court takes jurisdiction over the child. See MCL 712A.18(1)(f); *In re AMB*, 248 Mich App 144, 176-177 (2001).

Where the child is placed with a child care *organization*, the child placing agency, the DHHS, or the court must execute a written instrument that grants the organization authority to consent to the child's emergency medical and surgical treatment. MCL 722.124a(1). The DHHS may also execute a written instrument granting the child care organization the authority to consent to the child's routine, nonsurgical medical care. *Id.*

> **Note:** A child care *organization* is "a governmental or nongovernmental organization having as its principal function receiving minor children for care, maintenance, training, and supervision, notwithstanding that educational instruction may be given. Child care organization includes organizations commonly

[23] See SCAO form JC 02, *Complaint (Request for Action, Child Protective Proceedings)*, at http://courts.michigan.gov/scao/courtforms/juvenile/jc02.pdf, and SCAO form JC 05b, *Order to Take Child(ren) Into Protective Custody (Child Protective Proceedings)*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc05b.pdf.

> described as child caring institutions, child placing agencies, children's camps, children's campsites, children's therapeutic group homes, child care centers, day care centers, nursery schools, parent cooperative preschools, foster homes, group homes, or child care homes." MCL 722.111(1)(a).

Where the child is placed with a child caring *institution*, the child placing agency, the DHHS, or the court must, in addition to emergency medical and surgical treatment, execute a written instrument that grants the institution authority to consent to the child's routine, nonsurgical medical care. MCL 722.124a(1).

> **Note:** A child caring *institution* is "a child care facility that is organized for the purpose of receiving minor children for care, maintenance, and supervision, usually on a 24-hour basis, in buildings maintained by the child caring institution for that purpose, and operates throughout the year. . . . Child caring institution also includes institutions for developmentally disabled or emotionally disturbed minor children." MCL 722.111(1)(b).

B. Ordering Emergency and Nonemergency Treatment

MCL 722.124a(1) is not tied to any particular phase of a child protective proceeding. *In re AMB*, 248 Mich App at 178-179. Rather, once a placement order is issued for out-of-home care, "[the court] has statutory authority to order medical or surgical treatment in an emergency, or routine, nonsurgical treatment even when there is no emergency." *In re AMB*, *supra* at 179.

Even if a child has yet to live with a foster family or the DHHS still needs to arrange for a foster family to be involved in the child's care while in the hospital, in cases where the child has a medical emergency the court has the authority to order medical or surgical treatment of a child under MCL 722.124a(1) once the placement order is issued for out-of-home care. *In re AMB*, 248 Mich App at 180-182.

The court may order an evaluation or examination of a child by a physician, dentist, psychologist, or psychiatrist. MCR 3.923(B). Similarly, MCL 712A.12 permits the court to order an examination of a child by a physician, dentist, psychologist, or psychiatrist after a petition is filed and during the course of additional investigation. The court may also permit photographing of a child after a petition has been filed. MCR 3.923(C).

> **Note:** The Court of Appeals has defined psychological evaluations as routine care for emotionally disturbed

children in temporary custody. *In re Trowbridge*, 155 Mich App 785, 787-788 (1986).

A parent's failure to provide a child with medical treatment on the basis of his or her religious beliefs does not preclude a court from ordering medical or nonmedical treatment where necessary. MCL 722.634.

C. Withdrawal of Life Support

1. Court's Authority to Order Cessation of Treatment

The court has the authority to order the cessation of treatment under MCL 722.124a(1) when treatment becomes futile. *In re AMB*, 248 Mich App at 182. However, judicial intervention on behalf of a minor or other incompetent patient is only warranted in the decision to withdraw life support when the parties disagree about treatment or where other appropriate reasons exist. *In re Rosebush*, 195 Mich App 675, 687 (1992).

In *In re AMB*, the child was born with severe heart and other defects that required her to remain on life support systems. *In re AMB*, 248 Mich App at 149, 151-152. She had a poor prognosis for long-term survival. *In re AMB*, *supra* at 149. The child's putative father was also the father of the child's mother, who was 17 years old at the time and allegedly developmentally delayed.[24] *Id*. at 150. The DHHS filed an original petition alleging the sexual abuse of the child's mother and the mother's inability to care for the child. *Id*. at 152. Following a preliminary hearing, a referee entered an order authorizing the petition, requiring that the child receive all necessary treatment to sustain her life, and placing the child in foster care or with a relative. *Id*. at 152-153. Four days later, the DHHS filed an amended petition alleging that the child was being kept alive by life support systems, that the child's mother was incapable of making an informed decision regarding the child's condition, and that the DHHS was requesting the court to make a determination of the child's best interests. *Id*. at 154-156. Following a second preliminary hearing (where the court received testimony from a treating physician indicating that the life support measures had ceased to be treatment and were futile), the referee entered an order authorizing the hospital to end life support. *Id*. at 156-161, 182. The Court of Appeals found that the lower court had statutory grounds to authorize the hospital's removal of life support, but warned that the lower court's authority to

[24] Separate criminal and termination of parental rights proceedings were instituted against the father and his wife. *In re AMB*, 248 Mich App 144, 150 (2001).

withdraw life support "depend[ed] on the circumstances of each case. . . . [Alt]hough MCL 722.124a(1) enabled the family court to act in this case even before holding an adjudication, [the Court] stress[ed] that parties and family courts involved in protective proceedings must make *every* possible effort to hold an adjudication before authorizing withdrawal of life support." *In re AMB*, 248 Mich App at 182.

> **Note:** The Child Abuse Prevention and Treatment and Adoption Reform Act (CAPTA), 42 USC 5101 *et seq.*, does not prevent the DHHS from seeking an order to withdraw life support where a treating physician indicates a child's life support measures cease to be treatment and are futile. 42 USC 5106g(6)(B)-(C); *In re AMB*, 248 Mich App at 185-186.

2. Parent's or Surrogate's Decision to Withdraw Life Support

The court may permit a parent or surrogate to make serious medical decisions for a minor or an incompetent patient, including the decision to withdraw life support. *In re Rosebush*, 195 Mich App at 682-683.The court may also intervene in a decision to withdraw life support if "'the parties directly concerned disagree about treatment, or other appropriate reasons' exist." *In re AMB*, 248 Mich App at 171, quoting *Rosebush*, *supra* at 687.

> **Note:** It may be appropriate for a court to intervene when a parent has a conflict of interest regarding withdrawal of life support that may interfere with his or her ability to act in the child's best interests. "[T]he parent accused of causing the injury may face more severe criminal penalties should the child die rather than surviving for some time in a severely impaired or vegetative state. Medical providers may have significant concerns regarding the parent's ability to act in the child's best interest. When this situation presents itself, doctors will look to institutional ethics committees and the courts for guidance regarding end of life and other critical medical decisions." Paulsci and Stoika, *End of Life Decisions in Children With Concerns of Child Maltreatment*, 5 Mich Child Welfare L J 25 (2001). It is well established that a patient's removal from life support is not an intervening cause of the patient's death absolving a criminal defendant from

criminal liability. See *People v Bowles*, 461 Mich 555, 559-560 (2000).

3. Standards for Withdrawing Life Support

Before a court enters an order permitting the withdrawal of life-sustaining medical care, the following standards must be applied:

(1) The court must determine whether the patient is competent because a competent patient has an absolute right to make medical decisions (including the right to decline medical intervention). *In re AMB*, 248 Mich App at 198-199.

Note: Neither the patient's youth nor his or her involvement in a child protective proceeding conclusively resolves the issue of competence. *In re AMB*, 248 Mich App at 199, citing *In re Rosebush*, 195 Mich App at 681-682. If the facts do not conclusively determine the issue of competence, the trial court should conduct an evidentiary hearing. *In re AMB*, *supra* at 199.

(2) If the patient is incompetent, the court must determine which of the following legal standards to apply:

(a) The *substituted judgment standard*, which "seeks to fulfill the expressed wishes of a previously competent patient, including a 'minor of mature judgment.'" *In re AMB*, 248 Mich App at 199.

(b) The *limited-objective substituted judgment standard* used in Michigan, which "requires "'some trustworthy evidence that the patient would have refused the treatment, and the decision[]maker is satisfied that it is clear that the burdens outweigh the benefits of that life for'" the patient." *In re AMB*, 248 Mich App at 199-200.

(c) The *best interests standard*, which "applies when the patient has never been competent or has not expressed [his or] her wishes concerning medical treatment." *In re AMB*, 248 Mich App at 200.

Note: In applying the best interests standard, the court may examine "'[e]vidence about the patient's present level of physical, sensory, emotional, and cognitive functioning; the degree of physical pain resulting from the medical condition, treatment, and termination of the treatment, respectively; the degree of humiliation, dependence, and loss of dignity probably resulting from the condition and treatment; the life expectancy and prognosis for recovery with and without treatment; the various treatment options; and the risks, side effects, and benefits of each of those options.'" *In re AMB*, 248 Mich App at 200, citing *In re Rosebush*, 195 Mich App at 690 (additional citations omitted).

(3) The trial court may appoint a guardian ad litem for a child-patient, depending upon the seriousness of the medical condition and the time allowed for the decision. *In re AMB*, 248 Mich App at 202-203.

(4) If the surrogate decisionmaker is allegedly incompetent to make a decision on withdrawing life support from an incompetent patient, the court must receive evidence on the issue. *In re AMB*, 248 Mich App at 204. The evidence must:

(a) establish "that the person who would otherwise act as the surrogate decisionmaker for the incompetent patient is also incompetent to make the critical medical decision at issue[]"; and

(b) be clear and convincing that an incompetency actually exists that prevents a parent or other surrogate from making a decision concerning the patient's care. *In re AMB*, 248 Mich App at 204-206.

Note: According to *In re AMB*, "jurisdiction over the child *alone* is not reason enough for a court to make a decision to withdraw life support. Rather, the record *must* provide clear and convincing evidence to support the

court's determination that it, not a parent or other surrogate, must make the decision to withdraw life support." *In re AMB*, 248 Mich App at 206.

(5) When requesting withdrawal of life support, the petitioner must "provide a second opinion from an independent physician or establish why this second opinion is not necessary." *In re AMB*, 248 Mich App at 208. The court may weigh the "presence or absence of medical consensus, the factors that contributed to medical disagreement or agreement, and the factors that make any independent physician opinion more or less relevant to the ultimate decision to withdraw life support." *In re AMB*, *supra* at 208.

Note: Independent physician confirmation is inappropriate in cases involving a competent or formerly competent patient who expressed his or her wishes "no matter the degree of medical consensus." *In re AMB*, 248 Mich App at 208 n 149, citing *In re Martin (Michael)*, 450 Mich 204, 221-222 (1995).

(6) As a matter of procedural due process, parents must be given notice of and an opportunity to be heard at any hearing related to a request to withdraw life support from their child. *In re AMB*, 248 Mich App at 211-213.

(7) Although a referee may conduct hearings relevant to a request to withdraw life support and make recommended findings of fact and conclusions of law, a judge, not a referee, must enter the order allowing withdrawal of life support. MCL 712A.10(1); *In re AMB*, 248 Mich App at 216-217.

D. Psychotropic Medications

It may be beneficial for a child who suffers from emotional or behavioral disorders to use psychotropic medications as part of a mental health plan. However, psychotropic medications must not be used to discipline or control a child. *Dwayne B v Granholm*, settlement agreement of the United States District Court for the Eastern District of Michigan, filed July 3, 2008 (Docket No. 2:06-cv-13548).[25]

A child's parent must consent to the child's use of psychotropic medication. *Dwayne B, supra*. If a child's parent is not available, the DHHS must seek consent from the court. *Id*.

For additional information on the administration of psychotropic medication to children in foster care, see the DHHS's Children's Foster Care Manual (FOM), *Psychotropic Medication in Foster Care FOM 802-1*, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/802-1.pdf, and the American Bar Association Center on Children and the Law, *Psychotropic Medication and Children in Foster Care: Tips for Advocates and Judges*, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/Psychotropic-Medication-and-Children-in-Foster-Care-Tips-for.pdf.

[25] The settlement agreement, in its entirety, is available at http://www.childrensrights.org/wp-content/uploads//2008/09/22008-07-03_mi_signed_settlement.pdf. See also http://www.childrensrights.org/reform-campaigns/legal-cases/michigan/ for a summary of the action taken since Governor Snyder took office.

Chapter 4: Jurisdiction, Venue, and Transfer

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In this chapter. . .

This chapter outlines the authority of the Family Division of Circuit Court to act when child abuse or child neglect is alleged against a parent, guardian, juvenile guardian, nonparent adult, or legal custodian. This chapter also includes a discussion on venue and jurisdiction in intrastate, interstate, and international cases. However, this chapter does not contain an exhaustive discussion of jurisdiction in all circumstances. See Chapter 19 for a detailed discussion of jurisdiction over Indian children, and Chapter 20 for a detailed discussion of jurisdiction over appeals in child protective proceedings.

4.1 Venue

A. Proper Venue

In child protective proceedings, venue is proper in the county where the child is found. MCL 712A.2(b). A *child is found* in the county where the offense against the child occurred or where the child is physically located. MCR 3.926(A).

> **Note:** An *offense against a child* occurs when a parent, guardian, nonparent adult, or legal custodian acts or fails to act. MCR 3.903(C)(9).

B. Change of Venue

1. Motion for Change of Venue

The court may change venue on a party's motion. MCR 3.926(D). Once a party files a motion for change of venue, the court may grant the motion for the convenience of the parties and witnesses or when an impartial hearing cannot be had where the action is pending. *Id.* The judge in the county to which the case is to be transferred must agree to hear the case. *Id.*

Where a change of venue is ordered, the court ordering the change of venue must send the original record or a certified copy of the original record to the receiving court without charge. MCR 3.926(F). The court ordering the change of venue must also bear all the costs of the proceeding. MCR 3.926(D).

2. Transfer of Case to County of Residence

If a child is brought before the court in a county other than the county where the child resides, the court may, before a hearing, enter an order transferring jurisdiction over the matter to the court of the county of residence. MCR 3.926(B). The transfer may occur before trial. *Id.*

Where a change of venue is ordered, the court ordering the change of venue must send the original record or a certified copy of the original record to the receiving court without charge. MCR 3.926(F).

a. Presumption of Child's County of Residence

A county is presumed to be a child's county of residence when:

(1) Both parents reside in the same county; or

(2) The child resides in the county with:

(a) a parent having legal custody of the child;

(b) a guardian;

(c) a legal custodian; or

(d) the child's sole legal parent. MCR 3.926(B)(1).

If a child is placed in a county by court order or by an agency's placement, the child must not be considered a resident of that county unless the placement is for adoption purposes. MCR 3.926(B)(3). See *In re BZ*, 264 Mich App 286, 292-293 (2004), where the Court found that a transfer of a child protective proceeding to the county where the child currently resided with relatives was not warranted when the child had been placed with the relatives following neglect allegations.

Note: In *In re BZ*, the child protective proceedings were initiated in Kent County where both parents and the child resided and where the alleged abuse occurred. *In re BZ*, 264 Mich App at 292. After the child was placed in a guardianship with a relative in another county, the court dismissed the petition. When the respondent-mother failed to comply with the family plan, the guardian filed a supplemental petition in Kent County requesting termination of the mother's parental rights. The respondent-mother moved to transfer the case to the county where the child currently resided with the guardian. The referee denied the request, and the respondent-mother appealed. In affirming the referee's ruling, the Court of Appeals held that the child was properly found within Kent County for purposes of subsequent proceedings when, pursuant to MCR 3.926, the neglect alleged in the original petition occurred in Kent County, the child was not considered a resident of the other county where he resided with his guardian, and Kent County had continuing jurisdiction over the child. *In re BZ*, *supra* at 290-293.

b. Criteria to Determine County of Residence

Where there is no presumption of county residence, the court must consider the following factors when determining a child's county of residence:

> (1) The parent's, guardian's, or legal custodian's county of residence.
>
> (2) Length of time a child has lived in a county, if ever he or she lived in the county.
>
> (3) A parent's move to another county since inception of the case.
>
> (4) Another court's previous continuing jurisdiction over the child.
>
> (5) Existence of a court order that places a child in a county for purposes of adoption.
>
> (6) A child's intent to live in a county.
>
> (7) Any other factor the court deems relevant. MCR 3.926(B)(2).

3. Bifurcated Proceedings

Upon the agreement of the transferring court and the receiving court, a case may be bifurcated between the two courts to permit adjudication in the transferring court and disposition in the receiving court. MCR 3.926(E).

Immediately after the transferring court enters its order of adjudication, the case may be returned to the receiving court. MCR 3.926(E). The transferring court must also send any supplemental pleadings and records or a certified copy of the supplemental pleadings and records to the receiving court. MCR 3.926(F).

C. Responsibility for Costs of Disposition

When disposition is ordered by a court that is not located in the county where the child resides, the court ordering disposition is responsible for any costs incurred in connection with the order. MCR 3.926(C). However, the court in the county where the child resides may agree to pay such dispositional costs. *Id.*

4.2 Subject Matter Jurisdiction

A court's assumption of subject matter jurisdiction should be distinguished from the court's exercise of jurisdiction over the child (personal jurisdiction). Subject matter jurisdiction is a court's authority to exercise judicial power over a particular class of cases (e.g., child protection cases). *In re AMB*, 248 Mich App 144, 166 (2001). However, personal jurisdiction may be exercised only after the court makes a determination regarding the specific facts of a case. *In re Brock*, 442 Mich 101, 108-109 (1993).

The Michigan Supreme Court found in *In re Hatcher*, 443 Mich 426, 437 (1993), that subject matter jurisdiction is established if:

> "the action is of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous. The valid exercise of the [Family Division's] statutory jurisdiction is established by the contents of the petition after the [Family Division] judge or referee has found probable cause to believe that the allegations contained within the petitions are true."[1]

A. Exclusive Jurisdiction

The Family Division of the Circuit Court has exclusive jurisdiction over child protective proceedings. MCL 600.1021(1)(e); MCL 712A.2(b).

> **Note:** Prior to January 1, 1998, the Juvenile Division of the Probate Court had jurisdiction over child protective proceedings. Thus, any reference to the former Juvenile Division of the Probate Court in any statute must be construed as a reference to the Family Division of the Circuit Court. MCL 600.1009.
>
> See also MCR 3.903(A)(4) where *court* means Family Division of the Circuit Court when used within subchapter 3.900 of the court rules.

A *child protective proceeding* is a "proceeding concerning an offense against a child." MCR 3.903(A)(2). Specifically, an *offense against a child* means "an act or omission by a parent, guardian, nonparent adult, or legal custodian asserted as grounds for bringing the child within the

[1] This probable cause determination occurs at a preliminary inquiry or a preliminary hearing. See Section 7.6 for a detailed discussion of preliminary inquiries, and Section 7.7 for a detailed discussion of preliminary hearings.

jurisdiction of the court pursuant to the Juvenile Code." MCR 3.903(C)(9).

However, child protective proceedings are not criminal proceedings. MCL 712A.1(2). See generally, *People v Gates*, 434 Mich 146, 161–165 (1990) (because the purposes of criminal and child protective proceedings differ, application of collateral estoppel to bar a criminal proceeding after a jury has found that a child does not come within the court's jurisdiction in a child protective proceeding would be contrary to public policy).

Because MCL 712A.2(b) specifically grants the Family Division of the Circuit Court subject matter jurisdiction over cases concerning children under the age of eighteen, the family courts have jurisdiction over a large area of cases involving children. *In re AMB*, 248 Mich App 144, 167 (2001). In *In re AMB*, the trial court had subject matter jurisdiction over the child protective proceeding based on the original petition alleging that a critically-ill premature infant's mother was not able to provide her infant with proper custody or a fit home.[2] *In re AMB*, *supra* at 168. After the infant's health dramatically changed and doctors recommended changing her treatment from sustentation of life to withdrawal of life support, an amended petition was filed requesting the trial court render a decision in the infant's best interests. *Id.* at 168-170. The infant's attorney argued on appeal that the trial court was stripped of its subject matter jurisdiction when the amended petition changed the focus from protecting the infant to ending her life. *Id.* at 165-166. The Court of Appeals disagreed and found that

> "The amended petition raised questions of fact and law that depended entirely on the statutory bases for subject-matter jurisdiction in this case. While [the infant's] health status may have been changing, her underlying need to have someone make decisions for her and to care for her remained the same throughout the proceedings. Thus, this request for a best interests ruling still was within the 'class' of cases or issues concerning which the family court may make a decision.
>
> Though [the infant's attorney] attempts to distinguish between the family court's responsibility to protect children and the effect of removing life support, the request for relief in the amended petition, at least arguably, did not ask the family court to abandon its

[2] Separate criminal and termination of parental rights proceedings were instituted against the father and his wife. *In re AMB*, 248 Mich App 144, 150 (2001).

duty to protect [the infant]. Rather, the amended petition asked for a ruling on what course of conduct would be in [the infant's] best interests." *In re AMB*, 248 Mich App at 170-171.

Note: See Section 3.3 for a detailed discussion of the court's authority to order medical treatment or cessation of treatment for a child.

B. Jurisdiction of Proceedings Involving "Dependent" Juveniles

The Family Division of the Circuit Court has jurisdiction over "proceedings concerning a juvenile under 18 years of age" if "the juvenile is dependent and is in danger of substantial physical or psychological harm[]" under certain circumstances. MCL 712A.2(b)(3). "The juvenile may be found to be dependent when any of the following occurs:

> (A) The juvenile is homeless or not domiciled with a parent or other legally responsible person.
>
> (B) The juvenile has repeatedly run away from home and is beyond the control of a parent or other legally responsible person.
>
> (C) The juvenile is alleged to have committed a commercial sexual activity as that term is defined in . . . MCL 750.462a[,] or a delinquent act that is the result of force, fraud, coercion, or manipulation exercised by a parent or other adult.
>
> (D) The juvenile's custodial parent or legally responsible person has died or has become permanently incapacitated and no appropriate parent or legally responsible person is willing and able to provide care for the juvenile." MCL 712A.2(b)(3)(A)-(D).

C. Ancillary Jurisdiction of Guardianship Proceedings

The Family Division of the Circuit Court has ancillary jurisdiction of guardianship proceedings under Article 5 of the Estates and Protected Individuals Code (EPIC), MCL 700.5101 *et seq*. MCL 600.1021(2)(a). See Section 4.6 for information on the court's authority to take jurisdiction over a child following the appointment of a guardian, and Section 13.9(A) for information on the appointment of a guardian.

D. Safe Delivery of Newborns Law

The Family Division of the Circuit Court has jurisdiction over a newborn child who has been surrendered to an emergency service provider as provided in the Safe Delivery of Newborns Law. MCL 712.1(2)(b); MCL 712.2(1). See Section (D) for information on the custody of a child under the Safe Delivery of Newborns Law, and Section 8.14 for information on the placement of a child under the Safe Delivery of Newborns Law.

The court may appoint a lawyer-guardian ad litem to represent the newborn's interests. MCL 712.2(1). See Section 7.9 for information on a lawyer-guardian ad litem's powers and duties.

4.3 Personal Jurisdiction

A court's assumption of subject matter jurisdiction should be distinguished from the court's exercise of jurisdiction over the child (personal jurisdiction). Subject matter jurisdiction is a court's authority to exercise judicial power over a particular class of cases (e.g., child protection cases). *In re AMB*, 248 Mich App 144, 166 (2001). However, personal jurisdiction may be exercised only after the court makes a determination regarding the specific facts of a case. *In re Brock*, 442 Mich 101, 108-109 (1993). The petition to initiate a child protective proceeding must contain "[a] citation to the section of the Juvenile Code relied on for jurisdiction." MCR 3.961(B)(4).

In protective proceedings, jurisdiction cannot be conferred on the Family Division by consent of the parties. *In re Youmans*, 156 Mich App 679, 684 (1986). Rather, jurisdiction over the child may be established only after parties have received proper notice[3] and the finder of fact determines that the child comes within the court's jurisdiction under MCL 712A.2(b). MCL 712A.18(1); MCR 3.972(E); *In re Youmans*, *supra* at 684-685. However, the petitioner cannot create the circumstances that vest the court with jurisdiction. *In re B & J*, 279 Mich App 12, 19-20 (2008) (the DHHS could not seek termination of parental rights of illegal immigrant parents based upon the parents' absence from the state when the parents were deported after the DHHS reported the illegal immigrant parents to the United States Immigration and Customs Enforcement (ICE)).

A determination that the Family Division has jurisdiction over the child under MCL 712A.2(b) is made following a plea or trial.[4] See MCL 712A.18(1); *In re Brock*, 442 Mich at 108-109. MCR 3.903(A)(27), which

[3] For additional information on issuance and service of summons in child protective proceedings, see Section 5.1.

[4] See Chapter 10 for additional information on pleas, and Chapter 12 for additional information on trials.

defines trial as "the fact-finding adjudication of an authorized petition to determine if the minor comes within the jurisdiction of the court[, and to] also mean[] a specific adjudication of a parent's unfitness to determine whether the parent is subject to the dispositional authority of the court." "An adjudication finding that the court may take jurisdiction over a minor child does not involve an order authorizing any specific consequences for the respondent."*In re Wangler*, 305 Mich App 438, 445 (2014), rev'd on other grounds 498 Mich 911 (2015). Once the court establishes personal jurisdiction over a child, it may enter a dispositional order. MCL 712A.18(1); MCR 3.973(A). "The dispositional phase of the proceedings concerns the consequences arising from the fact of the adjudication[, and d]uring the dispositional phase of the proceedings, the court can order placement of a minor child, visitation, services, or any other specific action involving the respondent and the minor child that is under the court's jurisdiction."*In re Wangler*, 305 Mich App at 445, rev'd on other grounds 498 Mich 911 (2015). See Chapter 13 for a detailed discussion of the dispositional phase.

"[C]ourts may assume jurisdiction over a child on the basis of the adjudication of one parent."[5] *In re Sanders*, 495 Mich 394, 412-413 n 8 (2014). However, "[a]djudication protects the parents' fundamental right to direct the care, custody, and control of their children, while also ensuring that the state can protect the health and safety of the children." *Id.* at 422. Accordingly, "[w]hen the state is concerned that *neither* parent should be entrusted with the care and custody of their children, the state has the authority—and the responsibility—to protect the children's safety and well-being by seeking an adjudication against *both* parents." *In re Sanders*, 495 Mich at 421-22 (2014). "[W]hen the state seeks only to deprive *one* parent of the right to care, custody[,] and control, the state is only required to adjudicate *that* parent." *Id.* at 422.

After it is determined that the child is within the court's jurisdiction under MCL 712A.2(b), the court has the authority to conduct a hearing to determine whether parental rights to the child should be terminated. See MCL 712A.19b; MCR 3.973(A); MCR 3.977(E)(2); *In re Taurus F*, 415 Mich 512, 526-527 (1982).

If the court finds that a child is within its jurisdiction, the court also has the authority to enter orders concerning the child's parents and other adults. But see *In re Sanders*, 495 Mich 394, 414 n 10 (2014), finding that "the court's authority during the dispositional phase is limited by the fact

[5] Note, however, that "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights." *In re Sanders*, 495 Mich at 412-13, n 8, 415 (finding unconstitutional the one-parent doctrine, which permitted the court to "enter dispositional orders affecting parental rights of *both* parents" once "jurisdiction [was] established by adjudication of only *one* parent"). For additional information on the procedural due process rights of the unadjudicated parent, see Section 4.3(E)(2). Further note that the *Sanders* decision applies retroactively "to all cases pending on direct appeal at the time [*Sanders*] was decided." *In re Kanjia*, 308 Mich App 660, 674 (2014).

that the state must overcome the presumption of parental fitness by proving the allegations in the [child protective] petition." "[N]either the admissions made by [the adjudicated parent] nor [the unadjudicated parent's] failure to object to those admissions constituted an adjudication of [the unadjudicated parent's] fitness[.]" *In re SJ Temples*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2015 (Docket No. 323246)[6] (finding that the trial court violated the unadjudicated parent's "due process rights by subjecting him to dispositional orders without first adjudicating him as unfit[]"). See Section 4.10 for a discussion of this authority.

Additionally, "[i]n a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court may issue orders affecting a party as necessary[until] . . . May 1, 2018." MCL 712A.2(i). For purposes of child protective proceedings, MCL 712A.2(i)(*ii*) defines *party* as "the petitioner, [DHHS], child, respondent, parent, guardian, or legal custodian, and any licensed child caring institution or child placing agency under contract with the [DHHS] to provide for a juvenile's care and supervision."

A. Statutory Bases of Personal Jurisdiction

To establish personal jurisdiction, the court must determine by a preponderance of the evidence that a child comes within the statutory requirements of MCL 712A.2(b). *In re Brock*, 442 Mich at 108-109. Accordingly, MCL 712A.2(b) provides the Family Division with personal jurisdiction over a child under 18 years of age if the child is found within the court's county and one of the following apply:

> (1) A child's parent[7] or other person legally responsible for the child's care and maintenance (when able to do so) neglects or refuses to provide proper or necessary support, education,[8] medical, surgical, or other care necessary for the child's health or morals, MCL 712A.2(b)(1);
>
> > **Note:** MCL 712A.2(b)(1)(A) defines education as "learning based on an organized educational

[6] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

[7] "'Parent' means the mother, the father as defined in MCR 3.903(A)(7), or both, of the minor. It also includes the term 'parent' as defined in MCR 3.002(20)." MCR 3.903(A)(18). MCR 3.002(20) defines an Indian child's *parent* as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the putative father if paternity has not been acknowledged or established." MCR 3.002(20) was formerly MCR 3.002(10).

[8] Because it is often difficult to distinguish between educational neglect and truancy, a preliminary inquiry may be held to determine whether to proceed under the child protective proceedings provisions or the delinquency proceedings provisions of the Juvenile Code. See MCL 712A.2(a)(4) (jurisdiction over truants).

program that is appropriate, given the age, intelligence, ability, and psychological limitations of a juvenile, in the subject areas of reading, spelling, mathematics, science, history, civics, writing, and English grammar." Also, proper home schooling may satisfy the requirements for an educational program sufficient to avoid an allegation of educational neglect. See MCL 380.1561(3)(f).

(2) A child is exposed to a substantial risk of harm to his or her mental well-being, MCL 712A.2(b)(1);

(3) A child is abandoned by his or her parents, guardian,[9] or other custodian,[10] MCL 712A.2(b)(1);

(4) A child is without proper custody or guardianship, MCL 712A.2(b)(1);

Note: "'Without proper custody or guardianship' does not mean a parent has placed the [child] with another person who is legally responsible for the care and maintenance of the [child] and who is able to and does provide the [child] with proper care and maintenance." MCL 712A.2(b)(1)(B).

(5) A child's home or environment is an unfit place for the child to live due to neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult,[11] or other custodian, MCL 712A.2(b)(2);

(6) The child "is dependent and in danger of substantial physical or psychological harm[,]" MCL 712A.2(b)(3).

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[9] MCR 3.903(A)(11) defines a *guardian* as "a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or 700.5205, by a court of another state under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202, or a juvenile guardian appointed pursuant to MCL 712A.19a or MCL 712A.19c."

[10] "'Legal Custodian' means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. It also includes the term 'Indian custodian' as defined in MCR 3.002(15)." MCR 3.903(A)(14). An *Indian custodian* is "any Indian person who has custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody, and control have been transferred by the child's parent." MCR 3.002(15) (formerly MCR 3.002(7)).

[11] A *nonparent adult* is a person 18 years old or older who, regardless of the person's domicile, meets all of the following criteria in relation to a child over whom the court takes jurisdiction under MCL 712A.2(b): (1) The person has substantial and regular contact with the child; (2) The person has a close personal relationship with the child's parent or with a "person responsible for the child's health or welfare"; and (3) The person is not the child's parent or a person otherwise related to the child by blood or affinity to the third degree. MCL 712A.13a(1)(h)(*i*)-(*iii*); MCR 3.903(C)(7)(a)-(c).

Note: A child "may be found to be dependent when any of the following occurs:

> (A) [The child] is homeless or not domiciled with a parent or other legally responsible person.
>
> (B) [The child] has repeatedly run away from home and is beyond the control of a parent or other legally responsible person.
>
> (C) [The child] is alleged to have committed a commercial sexual activity as that term is defined in . . . MCL 750.462a[,] or a delinquent act that is the result of force, fraud, coercion, or manipulation exercised by a parent or other adult.
>
> (D) [The child's] custodial parent or legally responsible person has died or has become permanently incapacitated and no appropriate parent or legally responsible person is willing and able to provide care for the [child]." MCL 712A.2(b)(3)(A)-(D).

(6) A child's parent substantially failed, without good cause, to comply with a limited guardianship placement plan described in MCL 700.5205 regarding the child, MCL 712A.2(b)(4); or

(7) A child's parent substantially failed, without good cause, to comply with a court-structured guardianship placement plan described in MCL 700.5207 or MCL 700.5209 regarding the child, MCL 712A.2(b)(5).

In addition, MCL 712A.2(b)(6) provides the Family Division with personal jurisdiction over a child under 18 years of age if the child has a guardian under the Estates and Protected Individuals Code (EPIC) and the child's parent meets both of the following criteria:

(1) The parent failed to provide regular and substantial support for the child for two or more years despite having the ability to support the child, or the parent failed to substantially comply with a support order for two or more years; and

(2) Without good cause, the parent, having the ability to do so, regularly and substantially failed to visit, contact, or communicate with the child for two or more years.

1. Neglect: Failure or Refusal to Provide Support or Care

The following cases construe that portion of MCL 712A.2(b)(1) that allows for assumption of jurisdiction when a parent or other person legally responsible for the care and maintenance of a child is able to provide proper or necessary support or care and neglects or refuses to do so. See *In re Sterling*, 162 Mich App 328, 338–339 (1987), for an explanation of the importance of the phrase "when able to do so." According to the *Sterling* Court:

> "[I]t is clear that the culpability implied in the term 'when able to do so' refers only to the failure-to-provide-support type of neglect . . . and cannot reasonably be applied to the unfit-home type of neglect[.]" *In re Sterling*, 162 Mich App at 339.

- *In re Waite*, **188 Mich App 189, 195 (1991), abrogated on other grounds** *In re Hatcher*, **443 Mich 426 (1993), overruling** *Fritts v Krugh*, **354 Mich 97 (1958), on which** *In re Waite*, *supra* **at 203-205, relied:** where the child's parent placed the child in the temporary care of a friend who had two children of her own and about whom the parent had "[no] basis to believe that her friend either would not or could not provide proper care[,]" and where the child was injured while in the friend's custody, the trial court erred in finding sufficient facts to support taking jurisdiction of the child.

- *In re Nash*, **165 Mich App 450, 454-456 (1987):** where the parent appeared to be intoxicated during visits by social workers, threatened the children, and failed to provide adequate food, where the children had been previously made temporary wards for educational neglect, and where one child showed symptoms of drug withdrawal soon after birth, the trial court properly found that sufficient evidence was presented to support taking jurisdiction of the children.

- *In re Adrianson*, **105 Mich App 300, 311-315 (1981), abrogated on other grounds** *In re Gazella*, **264 Mich App 668 (2005),superseded in part on other grounds** *In re Hansen*, **285 Mich App 158 (2009), vacated 486 Mich 1037 (2010):** where the parent failed to provide adequate medical care, the children had poor school attendance, and the parent was incarcerated for a short period, the trial court properly took jurisdiction; however, allegations that there was debris on the front porch and that the parent had a personality

conflict with one child were insufficient by themselves to establish jurisdiction.

- *In re Franzel*, **24 Mich App 371, 373-375 (1970):** where the mother showed a marked preference for her older child, which led to her failure to meet the physical and emotional needs of the younger child, the evidence was sufficient to find the younger child within the court's jurisdiction.

2. Emotional Neglect: Risk of Harm to a Child's Mental Well-Being

The following cases construe that part of MCL 712A.2(b)(1) that allows the court to take jurisdiction over a child who is "subject to substantial risk of harm to his or her mental well-being."

- *In re SR*, **229 Mich App 310, 315 (1998):** after the father attempted to kill the child and commit suicide, he was found guilty of second-degree child abuse and sentenced to prison. The Court of Appeals held that the lower court erred in refusing to assume jurisdiction on the basis of a substantial risk of harm to the child's mental well-being. The Court stated that the parent's incarceration did not eliminate the emotional impact on the child of the previous events.

- *In re Middleton*, **198 Mich App 197, 199-200 (1993):** the mother was developmentally disabled and under plenary guardianship. Under the Mental Health Code, a plenary guardian may be appointed only where a court finds "'by clear and convincing evidence that the respondent is developmentally disabled and is *totally without capacity to care for himself or herself* . . . .'" The Court of Appeals held that, in such circumstances, the mother's status, by itself, gave rise to the presumption that her newborn daughter was both at "'substantial risk of harm to . . . her mental well-being'" and "'without proper custody or guardianship.'"

- *In re Arntz*, **125 Mich App 634, 636-638 (1983), rev'd on other grounds 418 Mich 941 (1984):** in 1979, the respondent placed her two children with their paternal grandparents and had the grandparents appointed as legal guardians. In 1981, respondent dissolved the guardianship and attempted to have her children returned to her. The Department of Health and Human Services (DHHS) then filed a child protective proceedings action against respondent, alleging emotional neglect.[12] The Court

of Appeals found that the assumption of jurisdiction was proper because the mother's failure to visit frequently during the guardianship temporarily deprived the children of emotional well-being. See also *In re Mathers*, 371 Mich 516, 527–529 (1963) (failure of parents to visit for one year or provide support was sufficient to establish jurisdiction).

- *In re Kurzawa*, **95 Mich App 346, 354-357 (1980), receded from in part on other grounds** *In re Riffe*, **147 Mich App 658 (1985):** the petitioner alleged that respondents' five-year-old child was deprived of his emotional well-being by the parents' failure to control the child's violent and antisocial behavior. The Court of Appeals found that the allegation did not constitute neglect, as the court below based its assumption of jurisdiction on the behavioral problems and treatment needs of the child rather than on the parents' culpability in failing to provide for the emotional well-being of the child.

3. Abandonment

The following cases construe that portion of MCL 712A.2(b)(1) that allows the court to take jurisdiction over a child who is abandoned by his or her parents.

- *In re Nelson*, **190 Mich App 237, 240-241 (1991):** the Court found that the mother's leaving the child with a grandparent without providing monetary support was insufficient to allow assumption of jurisdiction. Instead, placing a child with a relative who will provide proper care evidences concern for the child's welfare.[13]

- *In re Youmans*, **156 Mich App 679, 685 n 2 (1986):** a mother's statement that she had left home and would not return was insufficient to establish abandonment by both parents, as there was no evidence presented that the father would be unable to care for the children.

[12] At the time of this case, the Legislature had not yet enacted the statutory section that permits the court to take jurisdiction on the grounds that a parent has failed to substantially comply with a limited guardianship placement plan. See Section 4.6.

[13] But see Section 4.3(A) for a discussion of the requirements for leaving a child in the temporary custody of a relative.

4. Without Proper Custody or Guardianship

Placement of a child by a parent with another person who is legally responsible for the care and maintenance of the child and who provides the child with proper care and maintenance does not establish that the child is "without proper custody or guardianship." MCL 712A.2(b)(1)(B). Such placement is often in the home of a relative. See *In re Nelson*, 190 Mich App 237, 241 (1991); *In re Ward*, 104 Mich App 354, 358-360 (1981); *In re Curry*, 113 Mich App 821, 823–826 (1982).

The following cases construe that portion of MCL 712A.2(b)(1) that allows the court to take jurisdiction over a child who is determined to be "without proper custody or guardianship."

- *In re Systma*, **197 Mich App 453, 454-457 (1992):** respondent-father had not kept in contact with his children for several years after respondent's divorce from the children's mother. The mother became very ill and was admitted into a hospital. Because the respondent was in prison at the time, the mother contacted the DHHS and voluntarily placed the children in foster care. The DHHS temporarily placed the children with relatives until the mother died two weeks later. The DHHS then filed a petition in juvenile court, asking for jurisdiction on the ground that the children were "without proper custody or guardianship." The children had no legal guardian at the time their mother died and there were indications that "relatives were either unwilling or unable to care for [the children]." The Court of Appeals affirmed the granting of jurisdiction, and held that although temporary placement with a relative is "proper custody," it is only so when the custodial parent placed the children with the relative. Because the children were without proper custody or guardianship when the mother died, the father could not argue that the court was without jurisdiction.

- *In re Webster*, **170 Mich App 100, 105-106 (1988):** the DHHS filed a neglect petition against respondent, an unwed mother, alleging that respondent's one-year-old child was "without proper custody or guardianship." On the same date that the petition was filed, respondent executed a power of attorney delegating her parental powers to the natural father of the child. The natural father had lived with the mother and their child since the child's birth but had not acknowledged paternity. The Court of Appeals affirmed the Probate Court's assumption of jurisdiction, holding that the execution of the power

of attorney did nothing to change the child's environment, and that the child was still "without proper custody or guardianship."

- *In re Hurlbut*, **154 Mich App 417, 421-422 (1986):** respondent-father, who was serving a life sentence in prison for first-degree murder, appealed the termination of his parental rights to a three-year-old child, whom he had never seen. Respondent argued that the Probate Court improperly assumed jurisdiction after the child's mother died because the mother had named a testamentary guardian in her will. Therefore, the respondent argued, the child was not "without proper custody or guardianship" at the time of the mother's death. The Court of Appeals disagreed, holding that no proper guardianship was established, as a testamentary guardianship requires both parents to be deceased or the surviving parent to be legally incapacitated, and the named guardians did not petition for full guardianship prior to the termination hearing.

- *In re Pasco*, **150 Mich App 816, 822-823 (1986):** where the mother abandoned her seriously ill infant in a hospital and three months later suggested that the child's grandmother care for the infant during the day while the mother attended school, the court did not err in taking jurisdiction of the child.

- *In re Ernst*, **130 Mich App 657, 662-664 (1983):** where the parent failed to make specific arrangements regarding the child's care, or to maintain contact with or be accessible to the grandparent with whom the child was placed, the court did not err in taking jurisdiction over the child.

5. Unfit Home Environment

The following cases construe MCL 712A.2(b)(2), which allows for assumption of jurisdiction if the child's home is an unfit place to live.

- *In re MU*, **264 Mich App 270, 279 (2004):** where the father was suspected of murdering his wife, the mother of their two children, but had not been charged with or convicted of the murder at the time a petition was filed in a child protective proceeding, the trial court erred in not taking jurisdiction of the children. The Court of Appeals held that a criminal conviction was not a prerequisite to the court's

assumption of jurisdiction on grounds that a parent's criminality renders a child's home environment unfit.

Note: In *In re MU*, the respondent-father also argued that a finding of criminality based upon the death of the children's mother, in the absence of a criminal conviction, violated his due process rights. The trial court agreed with the respondent-father and prohibited the petitioner from introducing evidence of the alleged murder at the trial. On appeal, the Court of Appeals indicated that during the adjudicative phase of child protective proceedings, the parent's liberty interest at stake is the interest in managing his children and the governmental interest at stake is the children's welfare. The Court of Appeals overturned the trial court's findings and stated:

> "Rather than appropriately balancing the factors stated in *Mathews* [*v Eldridge*, 424 US 319, 335 (1976)], the trial court focused on the harm the children would suffer if deprived of their father and the potential bias the respondent might incur in the subsequent criminal proceedings. As stated above, however, the children's interest in maintaining a relationship with their father exists only to the extent that it would not be harmful to them. [*In re*] *Brock*, [442 Mich 101, 113 n 19 (1993)]. Their welfare is of the utmost importance in these proceedings, *id*. at 115, and due process is not offended by determining whether the trial court has jurisdiction to decide whether the relationship with their father should continue. Procedural due process seeks to protect the children from an *erroneous* termination of their relationship with their father, not a statutorily proper termination. See *id*. at 113." *In re MU*, 264 Mich App at 282.

The Court of Appeals indicated that the trial court provided no specific reason for excluding evidence of the murder, suggesting only that evidence of the murder would violate the respondent's due process rights. The Court of Appeals reversed and stated "whether the respondent killed [the children's mother] is highly relevant to the issue whether 'criminality' renders the children's home

or environment unfit." *In re MU*, 264 Mich App at 284.

- *In re Brimer*, **191 Mich App 401, 408 (1991):** where the mother's boyfriend's physical and sexual abuse of the mother's child rendered the home unfit, the trial court did not err in taking jurisdiction over the mother's child.

- *In re Miller (Julie)*, **182 Mich App 70, 74, 82 (1990):** where the children's mother returned to the home with the children from a domestic assault shelter after the father had beaten the children, and where neither parent sought needed medical attention for one child, the trial court did not err in taking jurisdiction of the children.

- *In re Jacobs*, **433 Mich 24, 40-42 (1989):** where respondent-mother suffered a stroke that severely limited her ability to care for the children, and where the children's father was caring for and living with his mother who was recovering from surgery, the trial court did not err in taking jurisdiction over the children.

- *In re Brown (Abijah)*, **171 Mich App 674, 677-678 (1988):** where the evidence showed that the respondent pleaded nolo contendere to the allegation that she beat one of her children with a belt, the trial court did not err in taking jurisdiction over all of respondent's children on grounds that the respondent's home was unfit.

- *In re Youmans*, **156 Mich App 679, 685 (1986):** although the evidence showed that the home was dirty, that one child suffered severe diaper rash, and that one child got into a container of valium, the trial court erred in taking jurisdiction of the children, "[because] there [we]re no statements that respondents neglected or refused to provide proper or necessary support, education or medical care, that the children were deprived of emotional well-being or that respondents had abandoned them."

- *In re Curry*, **113 Mich App 821, 827-830 (1982):** where both parents were in prison, but where the children were in the custody of their grandparents, the parents' criminality alone did not indicate that the grandparents' home was unfit and therefore, the evidence presented was insufficient to support taking jurisdiction.

- *People v Brown (Mae)*, **49 Mich App 358, 365 (1973):** where the mother engaged in a lesbian relationship without evidence that the relationship rendered the children's home environment unfit, the allegations were insufficient to establish jurisdiction.

B. Temporary Neglect Sufficient for Jurisdiction

The Michigan Supreme Court has attempted to set forth the quantum of neglect necessary for a trial court to take temporary or permanent custody[14] of a child:

> "[W]e hold that, while evidence of temporary neglect may suffice for entry of an order taking temporary custody, the entry of an order for permanent custody due to neglect must be based upon testimony of such a nature as to establish or seriously threaten neglect of the child for the long-run future." *Fritts v Krugh*, 354 Mich 97, 114 (1958), overruled on other grounds by *In re Hatcher*, 443 Mich 426 (1993).

In *Fritts*, the father left his wife and their two children following an argument. The mother testified that her husband left them a small amount of money, but that she had to borrow money temporarily for milk for the children. Two weeks later the mother initiated voluntary adoption proceedings. Before any hearing on the petition occurred, but after the children were placed in foster care, the parents reconciled and sought to reclaim their children. The trial court terminated parental rights, but the Michigan Supreme Court reversed, finding that the proofs did not support even the assumption of temporary jurisdiction over the children. *Fritts*, 354 Mich at 101-109, 114-115. "[Parental] rights are not subject to termination as a result of a brief marital dispute, or even by a temporary period of desertion by one of the parents." *Fritts, supra* at 116.

See also *In re Baby X*, 97 Mich App 111, 115-116 (1980), where the Court of Appeals held that "a permanent custody order must be based on circumstances which 'establish or seriously threaten neglect of the child for the long-run future' [and] [t]he quantum of neglect sufficient for temporary custody or merely establishing jurisdiction implicitly must be less, i.e., temporary neglect."

[14] A court may take temporary or permanent custody of a child at disposition. If the court takes permanent custody of a child, all parental rights are terminated. MCL 712A.20.

C. Parental Culpability Not Required for Jurisdiction in Unfit Home

Culpable neglect is not required for the court to take jurisdiction of a child under MCL 712A.2(b)(2). *In re Jacobs*, 433 Mich 24, 27, 41 (1989). In *In re Jacobs*, the Court distinguished between neglect as defined in MCL 712A.2(b)(1), which, by its terms, requires parental culpability, and neglect as defined in MCL 712A.2(b)(2), which does not require culpability. *In re Jacobs*, *supra* at 33-34.

> **Note:** In *In re Jacobs*, the mother of two children suffered a stroke that left her physically impaired and unable to establish a permanent home for the children, and jurisdiction was taken under MCL 712A.2(b)(2). *In re Jacobs*, 433 Mich at 27-29.

Under MCL 712A.2(b)(1), jurisdiction is proper when a parent or other person legally responsible for the care and maintenance of a child is able to provide proper or necessary support or care and neglects or refuses to do so. See *In re Kurzawa*, 95 Mich App at 354–357, receded from in part on other grounds *In re Riffe*, 147 Mich App 658 (1985), where the Court of Appeals held that culpability ("proof of seriously neglectful parents") is required for the trial court to take jurisdiction of a child for emotional neglect.

However, under MCL 712A.2(b)(2), the child's home may be unfit without a finding that the parent is to blame for that unfitness. See *In re Jacobs*, 433 Mich at 33-34. Culpable neglect is not required in cases involving allegations of an unfit home since the purpose of the Juvenile Code is to protect children from such homes, "not to punish bad parents." *Id.* at 41, quoting *In re Sterling*, 162 Mich App at 339.

> **Note:** MCL 712A.2(b)(2) indicates that the unfit condition of the child's home must be a result of "neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian[.]" Culpability of a specific person living in the home is required, it is just not squarely placed on the child's parent.

D. Anticipatory Neglect or Abuse Sufficient for Jurisdiction

Since a parent's treatment of one child is probative of how the parent will treat a second child, the court may be able to take jurisdiction over a second child based on anticipatory future neglect or abuse. See *In re Foster (Tommy)*, 285 Mich App 630, 631 (2009) (conditions that existed at the time of previous adjudication were likely to continue during subsequent child's presence in the parents' home); *In re*

LaFlure, 48 Mich App 377, 392 (1973). When there are mere allegations that another child had been abused, the court may assume jurisdiction based on the anticipatory future neglect of a second child. *In re Dittrick*, 80 Mich App 219, 222 (1977).

"[D]rug use alone, in the absence of any connection to abuse or neglect, cannot justify termination solely through operation of the doctrine of anticipatory neglect." *In re LaFrance*, 306 Mich App 713, 731-732 (2014) (while the "respondents' continued substance-abuse issues . . . heighten[ed] the risk that [they] might . . . fail to appreciate the special needs and vulnerabilities of their infant daughter[,] . . . no such special needs or vulnerabilities exist[ed] in relation to [their] three older children, . . . [and] the trial court erred by invoking anticipatory neglect to extend those concerns to them as well[]").

The doctrine of anticipatory neglect or abuse is not limited to a parent abusing his or her own child. MCL 712A.19b(3)(b)(*i*); *In re Jenks*, 281 Mich App 514 (2008). The doctrine of anticipatory neglect applies to any individual whose abuse of a child's sibling or half-sibling or step-sibling indicates that another related child is at risk of abuse by that same individual. *Jenks*, *supra* at 517 n 2. Specifically, MCL 712A.19b(3)(b)(*i*) "clarifi[es] that grounds for termination are established when the parent against whom termination is sought is responsible for the physical injury or physical or sexual abuse of a sibling of the minor child, regardless of whether that parent is also a parent of the injured or abused sibling." *Jenks*, *supra* at 517 n 2. See also *In re Powers (Kayla)*, 208 Mich App 582, 589-593 (1995) (even before MCL 712A.19b(3)(b)(*i*) was amended, the Court extended the doctrine of anticipatory neglect or abuse to a live-in boyfriend based on allegations that he was likely to abuse his daughter based on his past abuse of his girlfriend's son, who was his daughter's half-brother).

Additionally, the doctrine of anticipatory neglect or abuse alone is sufficient for the court to assume jurisdiction over a child. *In re Gazella*, 264 Mich App 668, 680-681 (2005), superseded in part on other grounds *In re Hansen*, 285 Mich App 158 (2009), vacated 486 Mich 1037 (2010). In *In re Gazella*, the Court of Appeals held that where a mother's parental rights to previous children were involuntarily terminated based upon abandonment and her parental rights to other previous children were voluntarily terminated after child protective proceedings were initiated, it was not error for the court to find jurisdiction based upon the doctrine of anticipatory neglect alone. The Court rejected the mother's argument that "[p]ast conduct is not a statutory ground for asserting jurisdiction, there must be some current physical harm or threat of serious emotional harm." *Id.* at 680. The *Gazella* Court stated:

"A child may come within the jurisdiction of the court solely on the basis of a parent's treatment of another child. Abuse or neglect of the second child is not a prerequisite for jurisdiction of that child and application of the doctrine of anticipatory neglect." *In re Gazella*, 254 Mich App at 680-681.

Note: In an unpublished opinion,[15] the Court of Appeals held that the trial court did not err in taking judicial notice of its file from a previous termination of parental rights proceeding in order to establish jurisdiction over the current children. *In re McCoy*, unpublished opinion per curiam of the Court of Appeals, issued April 18, 2000 (Docket No. 217459). Moreover, the Court of Appeals in *In re McCoy*, asserted in a footnote that "[t]he fact that respondent-appellant's parental rights to three older children had been involuntarily terminated for neglect was sufficient to support the trial court's assumption of jurisdiction over the minor children." *Id.*, citing *In re Dittrick*, 80 Mich App at 222-223; *In re Powers (Kayla)*, 208 Mich App at 588; *In re Baby X*, 97 Mich App at 116; *In re LaFlure*, 48 Mich App at 392 (1973).

1. Unborn Child

Although the Family Division may not assert jurisdiction over an unborn child, the doctrine of anticipatory neglect or abuse may allow the court to assume jurisdiction of the infant immediately after he or she is born. *In re Dittrick*, 80 Mich App at 222-223. In *In re Dittrick*, the mother's parental rights to her first child were terminated due to physical and sexual abuse. Just prior to the termination hearing, the mother became pregnant again, and the DHHS petitioned the court to take jurisdiction before the baby was born. The Court of Appeals found that the court could not assume jurisdiction over an unborn person, as it is not a child for purposes of MCL 712A.2(b).

2. Prenatal Treatment

Since a mother's prenatal treatment is probative of how she will treat her child, the court may take jurisdiction over a newborn suffering from symptoms of narcotics withdrawal based on anticipatory neglect or abuse.[16] *In re Baby X*, 97 Mich App at 116.

[15] Unpublished opinions are not precedentially binding. MCR 7.215(C)(1).

In *In re Baby X*, the court assumed jurisdiction after a newborn began to exhibit symptoms of drug withdrawal within 24 hours of birth. The Court of Appeals found that the court could assume jurisdiction over the newborn. Specifically, the Court indicated that:

> "Since prior treatment of one child can support neglect allegations regarding another child, we believe that prenatal treatment can be considered probative of a child's neglect as well. [The Court] hold[s] that a newborn suffering narcotics withdrawal symptoms as a consequence of prenatal maternal drug addiction may properly be considered a neglected child within the jurisdiction of the probate court." *In re Baby X*, 97 Mich App at 116.

E. Jurisdiction Over Child Once Allegations Adjudicated

Although "courts may assume jurisdiction over a child on the basis of the adjudication of one parent[,]" procedural "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights." *In re Sanders*, 495 Mich 394, 407, 412-413 n 8, 415, 422 (2014) (finding unconstitutional the one-parent doctrine, which permitted the court to "enter dispositional orders affecting parental rights of *both* parents" once "jurisdiction [was] established by adjudication of only *one* parent").[17] "[N]either the admissions made by [the adjudicated parent] nor [the unadjudicated parent's] failure to object to those admissions constituted an adjudication of [the unadjudicated parent's] fitness[.]" *In re SJ Temples*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2015 (Docket No. 323246)[18] (finding that the trial court violated the unadjudicated parent's "due process rights by subjecting him to dispositional orders without first adjudicating him as unfit[]").

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[16] See also Section 2.2(C) (presence of controlled substance in newborn's body is reasonable cause to suspect child abuse).

[17] Where "a minor faces an *imminent* threat of harm, . . . the state may take the child into custody without prior court authorization or parental consent[;] . . . [s]imilarly, upon the authorization of a child protective petition, the trial court may order *temporary* placement of the child into foster care pending adjudication if the court finds that placement in the family home would be contrary to the welfare of the child." *In re Sanders*, 495 Mich at 416-17 n 12 (limiting the requirement for adjudication over each parent to "the court's exercise of its postadjudication dispositional authority"). See Chapter 3 for additional information on taking temporary protective custody over a child, and Chapter 8 for additional information on temporary placements pending adjudication.

[18] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

For a discussion on the dispositional phase of child protective proceedings, see Chapter 13.

1. Jurisdiction Cannot Be Obtained Unless Trial Is Held or Respondent Tenders Valid Plea

The court does not obtain jurisdiction over a child under MCL 712A.2(b) unless a trial is held or the *respondent* tenders a valid plea to the allegations in a petition.[19] *In re SLH*, 277 Mich App 662, 671 (2008). In *In re SLH*, the petition alleged that the mother found the respondent sexually abusing one of their children and that the respondent admitted to her he was having sex with the child. At the pretrial hearing, the mother admitted to finding the respondent having sex with their child. *In re SLH*, *supra* at 664. Based on its conclusion that there was an implication that the mother failed to protect her children, the court accepted the mother's plea and exercised jurisdiction over the children. *Id.* at 665. At the subsequent dispositional hearing, the court terminated the respondent-father's parental rights. *Id.* at 667. The Court of Appeals set aside the order terminating the respondent-father's parental rights because the trial court never obtained jurisdiction over the children. *Id.* at 674. Because the petition did not allege any wrongdoing on the mother's part, the mother was not a respondent and could not enter a plea, and the court was without jurisdiction over the children or the respondent-father. *Id.* at 670-671.

Additionally, where a petition contains no allegations against a mother, she cannot consent to the court's jurisdiction over her children or plead to allegations in a petition against her husband. *In re Bechard*, 211 Mich App 155, 160-161 (1995). In *In re Bechard*, the petition alleged that the respondent-father sexually abused one of his children but contained no allegations against the children's mother. At a preliminary inquiry, the father refused to enter a plea and requested an attorney. The mother then "consented to the court's jurisdiction." The court proceeded to conduct a dispositional hearing and terminated the respondent-father's parental rights. *In re Bechard*, *supra* at 157-158. The Court of Appeals set aside the order terminating the respondent-father's parental rights and remanded the case to the trial court for an adjudicative hearing. The Court of Appeals first rejected the petitioner's argument that the father was barred from collaterally attacking the trial court's adjudicative order, finding that no adjudicative order could have been entered since the trial court only conducted a preliminary inquiry before

[19] See Chapter 10 for a detailed discussion of pleas, and Chapter 12 for a detailed discussion of trials.

proceeding to the termination hearing. The Court of Appeals then found that the father was entitled to an adjudicative hearing on the petition. Because the petition contained no allegations against the mother, she could not "consent to the court's jurisdiction" over the children or plead to the allegations in the petition. *Id.* at 160-161.

2. Procedural Due Process

"'Parents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process.'" *In re Sanders*, 495 Mich 394, 409 (2014), quoting *In re JK*, 468 Mich 202, 210 (2003). However, "[a] parent's right to control the custody and care of [his or] her children is not absolute, as the state has a legitimate interest in protecting 'the moral, emotional, mental, and physical welfare of the minor[,]' and in some circumstances 'neglectful parents may be separated from their children.'" *In re Sanders*, 495 Mich at 409-410, quoting *Stanley v Illinois*, 405 US 645, 652 (1972).

"[D]ue process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship." *In re Sanders*, 495 Mich at 422. Accordingly, "all parents 'are constitutionally entitled to a hearing on their fitness before their children are removed from their custody.'"[20] *In re Sanders*, 495 Mich at 412, 422 (quoting *Stanley*, 405 US at 658, and concluding that the one-parent doctrine[21] violated the nonadjudicated parent's constitutional due process rights "[b]ecause [it] allow[ed] the court to deprive a parent of th[e] fundamental right [to the care, custody and control of his or her children] without any finding that he or she [was] unfit").[22] "[N]either the admissions made by [the adjudicated parent] nor [the unadjudicated parent's] failure to object to those admissions constituted an adjudication of [the unadjudicated parent's] fitness[.]" *In re SJ Temples*, unpublished opinion per curiam of the Court of Appeals, issued March 12,

[20] Where "a minor faces an *imminent* threat of harm, . . . the state may take the child into custody without prior court authorization or parental consent[;] . . . [s]imilarly, upon the authorization of a child protective petition, the trial court may order *temporary* placement of the child into foster care pending adjudication if the court finds that placement in the family home would be contrary to the welfare of the child." *In re Sanders*, 495 Mich at 416-17 n 12 (limiting the requirement for adjudication over each parent to "the court's exercise of its postadjudication dispositional authority"). See Chapter 3 for additional information on taking temporary protective custody over a child, and Chapter 8 for additional information on temporary placements pending adjudication.

[21] The one-parent doctrine permitted the court to "enter dispositional orders affecting parental rights of *both* parents" once "jurisdiction [was] established by adjudication of only *one* parent." *In re Sanders*, 495 Mich at 407.

[22] For a discussion on the dispositional phase of child protective proceedings, see Chapter 13.

2015 (Docket No. 323246)[23] (finding that the trial court violated the unadjudicated parent's "due process rights by subjecting him to dispositional orders without first adjudicating him as unfit[]").

> **Note**: The Supreme Court's conclusion that the one-parent doctrine violates a nonadjudicated parent's due process rights, *In re Sanders*, 495 Mich 394, 412, 422 (2014), applies retroactively "to all cases pending on direct appeal at the time [*Sanders*] was decided." *In re Kanjia*, 308 Mich App 660, 674 (2014).

F. Termination of Jurisdiction

1. Child Reaches 18 Years of Age

The court's ability to take jurisdiction over a child terminates once the child reaches the age of 18. MCL 712A.5. However, if the court has exercised personal jurisdiction over a child pursuant to MCL 712A.2(b) prior to the child's 18th birthday, jurisdiction may continue until the child reaches age 20 unless the court terminates jurisdiction sooner. MCL 712A.2a(1).

> **Note:** The term *child* is used to refer to a person alleged or found to be within the jurisdiction of the Family Division under MCL 712A.2(b). MCR 3.903(C)(3). The term minor may be used to describe a person over the age of 18 and over whom the court has continuing jurisdiction under MCL 712A.2a. MCR 3.903(A)(16). See also MCL 722.111(1)(o)(*iii*).

If a child is placed in a foster home or foster care facility prior to his or her 18th birthday, that placement may continue after the child's 18th birthday. MCL 722.111(1)(o)(*iii*). If a child has been committed to the Michigan Children's Institute (MCI), the child may remain a state ward until his or her 19th birthday. MCL 400.203(1).

"If the court has appointed a [juvenile] guardian under [MCL 712A.19a] or [MCL 712A.19c] for a youth age 16 or older, the court shall retain jurisdiction of the youth until the [DHHS] determines the youth's[24] eligibility to receive extended

[23] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

[24] For purposes of the Juvenile Code, the term *youth* "applies to a person 18 years of age or older concerning whom proceedings are commenced in the court under [MCL 712A.2] and over whom the court has continuing jurisdiction under [MCL 712A.2a(1)-(6)]." MCL 712A.2a(8).

guardianship assistance under the young adult voluntary foster care act[(YAVFCA)], . . . MCL 400.641 to [MCL] 400.671, that shall be completed within 120 days of the youth's eighteenth birthday. If the [DHHS] determines the youth will receive extended guardianship assistance, the court shall retain jurisdiction of the youth until that youth no longer receives guardianship assistance."[25] MCL 712A.2a(4). If the DHHS provides the court with notice that it is extending guardianship assistance to a youth beyond the age of 18 under the YAVFCA, the court must also "retain [its] jurisdiction over the guardianship until that youth no longer receives extended guardianship assistance."[26] MCR 3.979(C)(1).

2. Termination of Parental Rights

If parental rights have been terminated, the court must continue to review the case while a child is in placement or under the jurisdiction, supervision, or control of the MCI. MCL 712A.19c(1), (14); MCR 3.978(A).

> **Note:** A commitment to the DHHS is irrevocable. *In re Keast*, 278 Mich App 415, 421-422 (2008). Furthermore, once committed to the MCI, the MCI Superintendent is responsible for decisions regarding the child's placement and care.[27] *In re Keast*, *supra* at 423. See the SCAO Publication, *Conducting Effective Post-Termination Review Hearings*, F(b), at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/PTRH.pdf.

The court's jurisdiction over the child protective proceeding may terminate once:

> (1) the rights of the entity with legal custody are terminated and the child is placed for adoption;[28] or

[25] See also MCL 400.669(1), which requires the court to retain its jurisdiction "of a youth receiving, or a youth for whom the [DHHS] is determining eligibility for receiving, extended guardianship assistance until that youth no longer receives guardianship assistance."

[26] See Section 4.6 for a discussion of juvenile guardianship appointments, Section 14.5(l) for additional information on the extension of guardianship assistance under MCL 400.665, and Section 16.9 for a discussion of the Young Adult Voluntary Foster Care Act (YAVFC).

[27] See Chapter 8 for a detailed discussion of placements.

[28] See the Michigan Judicial Institute's *Adoption Proceedings Benchbook*.

(2) a juvenile guardian is appointed after a post-termination review hearing is held.[29] MCR 3.978(D)(1)-(2).

Note: The court's jurisdiction over the guardianship continues until released by court order.[30] MCL 712A.19a(11); MCL 712A.19c(10); MCR 3.979(C)(1).[31]

But see MCL 712A.2a(4), which requires the court to retain its jurisdiction over a youth 16 years of age or older who was appointed a juvenile guardian under MCL 712A.19a or MCL 712A.19c until the DHHS determines whether the youth[32] is eligible to receive extended guardianship assistance under the Young Adult Voluntary Foster Care Act (YAVFCA), MCL 400.641 *et seq*.[33] If the DHHS determines the youth is eligible for extended guardianship assistance under the YAVFCA, the court must retain jurisdiction until the youth no longer receives the guardianship assistance.[34] If the DHHS provides the court with notice that it is extending guardianship assistance to a youth beyond the age of 18 under the YAVFCA, the court must also "retain [its] jurisdiction over the guardianship until that youth no longer receives extended guardianship assistance."[35] MCR 3.979(C)(1).

3. Parental Deportation

A court should not continue its jurisdiction over a child after his or her parents are deported if doing so would constitute an

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[29] See Chapter 18 for a detailed discussion of juvenile guardians and post-termination review hearings.

[30] If the Department of Health and Human Services (DHHS) provides the court with notice that it is extending guardianship assistance to a youth beyond the age of 18 under the Young Adult Voluntary Foster Care Act, MCL 400.665 *et seq*, the court must "retain [its] jurisdiction over the guardianship until that youth no longer receives extended guardianship assistance." MCR 3.979(C)(1). See Section 4.9 for additional information on the court's jurisdiction following appointment of a juvenile guardian, and Section 14.5(l) for additional information on extension of guardianship assistance under MCL 400.665.

[31] The procedures of MCL 712A.19a pertain to the pretermination of parental rights, while the procedures of MCL 712A.19c pertain to the post-termination of parental rights.

[32] For purposes of the Juvenile Code, the term *youth* "applies to a person 18 years of age or older concerning whom proceedings are commenced in the court under [MCL 712A.2] and over whom the court has continuing jurisdiction under [MCL 712A.2a(1)-(6)]." MCL 712A.2a(8).

[33] The DHHS must determine the youth's eligibility to receive extended guardianship assistance under the YAVFCA "within 120 days of the youth's eighteenth birthday." MCL 712A.2a(4).

[34] See also MCL 400.669(1), which requires the court to retain its jurisdiction "of a youth receiving, or a youth for whom the [DHHS] is determining eligibility for receiving, extended guardianship assistance until that youth no longer receives guardianship assistance."

[35] See Section 4.6 for a discussion of juvenile guardianship appointments, Section 14.5(l) for additional information on the extension of guardianship assistance under MCL 400.665, and Section 16.9 for a discussion of the Young Adult Voluntary Foster Care Act (YAVFC).

improper *de facto* termination of parental rights. *In re B & J*, 279 Mich App 12, 22-24 (2008). In *In re B & J*, after the respondents were involuntarily deported and separated from their children, the trial court, because it retained jurisdiction over the children after the deportation, terminated the respondents' parental rights based on the respondents' failure to provide proper care or custody of the children. The result of the trial court's continued jurisdiction was an improper *de facto* termination of respondents' parental rights based only on the preponderance of the evidence necessary to support the court's continued jurisdiction. Accordingly, the Court of Appeals held:

> "If the family court had not continued to exercise jurisdiction over the children in this case, respondents would have been able to take the children with them to Guatemala, and there would have arisen no cause for termination of parental rights. However, the court's continued exercise of jurisdiction made it all but certain that respondents would be permanently separated from their children and that respondents would become unable to provide proper care and custody. In other words, the family court's continued exercise of jurisdiction—based only on a preponderance of the evidence—constituted a de facto termination of respondents' parental rights. This de facto termination of parental rights, which was based on less than clear and convincing evidence of parental unfitness, violated respondents' substantive due process rights. Under the unique and particular facts of this case, we conclude that the family court's continued exercise of jurisdiction over the children was unconstitutional." *In re B & J*, 279 Mich App at 23-24 (internal citations omitted).

G. Challenging a Court's Exercise of Jurisdiction

"[A] respondent may not challenge the trial court's adjudication, meaning its exercise of jurisdiction, 'when a termination occurs following the filing of a supplemental petition for termination after the issuance of the dispositional order.'"*In re Wangler*, 305 Mich App 438, 445 (2014), rev'd on other grounds 498 Mich 911 (2015), quoting *In re SLH*, 277 Mich App 662, 668 (2008). "However, '[i]f termination occurs at the initial disposition as a result of a request for termination contained in the original, or amended, petition for jurisdiction, then an attack on the adjudication is direct and not collateral, as long as the appeal is from an initial order of disposition containing both a finding that an adjudication was held and a finding that the children came

within the jurisdiction of the court.'"*In re Wangler*, 305 Mich App at 445-446, rev'd on other grounds 498 Mich 911 (2015), quoting *In re SLH*, 277 Mich App at 668-669.

~~**Collateral Attack on Court's Jurisdiction.** The respondent-mother's appeal challenging the court's exercise of jurisdiction was an impermissible collateral attack where the trial court's order "formally exercis[ing] its jurisdiction over the minor children [pursuant to a mediation agreement[36]] and [entry of a dispositional order] plac[ing] the minor children under the supervision of [the DHS] . . . constituted an order that was appealable [to the Court of Appeals] as of right under MCR 3.993(A)(1)."[37]*In re Wangler*, 305 Mich App 438, 447 (2014). Accordingly, the respondent-mother "was required to raise her jurisdictional challenges in an appeal of [that] order[, but] [] [the] respondent instead waited until after the filing of a supplemental petition seeking termination, a termination hearing, and an order terminating her parental rights before challenging the trial court's exercise of jurisdiction[.]" *In re Wangler*, 305 Mich App at 447.~~

No Collateral Attack on Court's Jurisdiction. "[A] *Sanders*[38] challenge, raised for the first time on direct appeal from an order of termination, does not constitute a collateral attack on jurisdiction, but rather a direct attack on the trial court's exercise of its dispositional authority." *In re Kanjia*, 308 Mich App 660, 669 (2014). In *In re Kanjia*, after the trial court found grounds for jurisdiction over the child on the basis of only the mother's plea, the respondent-father was ordered to "comply with a parent-agency treatment plan [,]" and his parental rights were later terminated. *Id*. at 667. On appeal, the respondent-father argued that his due process rights were violated when his parental rights were terminated after never being adjudicated as unfit. *Id*. at 670. The Court of Appeals concluded that the respondent-father was "entitled to raise his *Sanders* challenge on direct appeal from the trial court's order of termination, notwithstanding the fact

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~~[36] "During [a court-ordered child protective] mediation, the [DHS and the respondent-mother] negotiated an agreement that was signed by all participants, including [the] respondent[-mother]. . . . The agreement [] state[d] that [the] respondent[-mother] admits [to] several paragraphs of the [child protective] petition[, but] . . . [the] respondent[-mother's] plea of admission and the court's exercise of jurisdiction would 'be held in abeyance,' while [the] respondent[-mother] participated in services. Accordingly, the agreement authorized dispositional proceedings to begin before formal adjudication. . . . As the case progressed, it became clear that [the] respondent[-mother] was not making significant progress, and eventually, the trial court accepted [the] respondent[-mother's] plea of admission and took formal jurisdiction over the minor children following a dispositional review hearing[.]" *In re Wangler*, 305 Mich App at 438.~~

~~[37] MCR 3.991(A)(1) provides that "an order of disposition placing a minor under the supervision of the court or removing the minor from the home" is an order "appealable to the Court of Appeals by right[.]"~~

[38] In *In re Sanders*, 495 Mich 394, 408, 412, 422 (2014), the Supreme Court concluded that the one-parent doctrine, which allowed a trial court to establish jurisdiction over a child, and then subject both parents to its dispositional authority, after it adjudicated only one parent, violated the nonadjudicated parent's due process rights. The *Sanders* holding applies retroactively "to all cases pending on direct appeal at the time [*Sanders*] was decided." *In re Kanjia*, 308 Mich App 660, 674 (2014).

that he never appealed the initial order of adjudication." *Id*. at 670-671 (noting that under the facts of this case, "it would have been exceedingly difficult, if not effectively impossible, for [the] respondent[-father] to have challenged the trial court's exercise of jurisdiction in a direct appeal from the order of adjudication[]" where he was never adjudicated, was not named as a respondent in the adjudication order, and he did not have an attorney at the time the trial court entered the order).

For additional information on filing an appeal with the Michigan Court of Appeals, see Section 20.3.

4.4 Concurrent Jurisdiction

The Family Division of the Circuit Court has exclusive jurisdiction over neglect and abuse cases. MCL 600.1021(1)(e).

> **Note:** Whenever practicable, two or more matters within the Family Division's jurisdiction pending *in the same judicial circuit* and involving members of the same family must be assigned to the judge who was assigned the first matter. MCL 600.1023.

If a petition is filed in the Family Division alleging that the court has jurisdiction over the child under MCL 712A.2(b) and the custody of the child is subject to the prior or continuing order of another court of record of this state, the manner of the required notice and the authority of the Family Division to proceed are governed by MCR 3.205. MCL 712A.2(b); MCR 3.205.[39] See generally, *In re Brown (Abijah)*, 171 Mich App 674, 676–677 (1988) (where custody of respondent's children was previously awarded to respondent in a divorce proceeding, the Probate Court did not err in taking jurisdiction over respondent's children, after giving the required notice to the Circuit Court, on grounds that their home was unfit).

Furthermore, a judge presiding over a juvenile matter may consider related actions under the Child Custody Act (CCA) ancillary to making determinations under the juvenile code. *In re AP*, 283 Mich App 574, 578 (2009). In doing so, the judge must follow relevant procedural and substantive requirements of the CCA. *Id*. In *In re AP*, the Court of Appeals noted:

> "There is no authority to preclude a circuit judge from determining custody pursuant to the CCA ancillary to

[39] MCR 3.927 provides that the manner of notice to the other court and the authority of the Family Division to proceed are governed by MCR 3.205.

> making determinations under the juvenile code. . . . To the contrary, the RJA [(Revised Judicature Act)], as amended by 1996 PA 388, specifically permits a judge presiding over a juvenile matter to consider related actions under the CCA.
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> * * *
>
> If a court presiding over a juvenile proceeding finds itself in a position in which the matter before it has been consolidated with a related custody matter, it must make clear that it is exercising jurisdiction pursuant to [MCL 600.1021(3)]." *In re AP*, 283 Mich App at 598-599, 607.

A. Waiver of Jurisdiction in Divorce Proceedings

The Family Division may obtain jurisdiction of a child protective proceeding where the Circuit Court, in a divorce proceeding, has previously waived jurisdiction over the child:

> (1) in a temporary order for custody related to a complaint for divorce or upon a motion related to a complaint for divorce by the prosecuting attorney;
>
> (2) in a divorce judgment dissolving a marriage between the child's parents; or
>
> (3) by an amended judgment relative to the custody of the child in a divorce. MCL 712A.2(c).

In order for the prior court to effectively waive jurisdiction, it must hold a hearing and make a preliminary finding that the child is abused or neglected. *In re Robey*, 136 Mich App 566, 572-574 (1984).

> **Note:** Waiver does not automatically confer jurisdiction in the protective proceeding but acts only to provide the court with information upon which the court may authorize the filing of a petition. *In re Robey*, 136 Mich App at 578–579. See MCL 712A.11(1) (after a person gives information to the court concerning a child, the court may conduct a preliminary inquiry to determine an appropriate course of action).

However, the subsequent court is not required to obtain a waiver of jurisdiction by the prior court in order to exercise its own jurisdiction where the subsequent court is statutorily granted jurisdiction. *Krajewski v Krajewski*, 420 Mich 729, 734 (1984); MCR 3.205(A). In *Krajewski*, even though the Circuit Court retained continuing jurisdiction over the child upon entry of a custody order in connection with the child's parents' divorce decree, the Probate Court would properly exercise its jurisdiction without obtaining a waiver

from the Circuit Court because a petition filed under MCL 712A.2(b) alleged neglect and sought termination of parental rights. *Krajewski*, *supra* at 734.

> **Note:** MCL 712A.2(b) provides a court with jurisdiction over a child when the parents fail or refuse to provide proper support. See Section 4.3.

B. Notice to the Other Court

A party that initiates a subsequent proceeding involving the same minor must mail written notice of the proceeding to the court clerk or register of the prior court, and the appropriate official.[40] MCR 3.205(B)(2)(a)-(b).[41]

> **Note:** MCR 3.205(B)(1) defines an *appropriate official* as "the friend of the court, juvenile officer, or prosecuting attorney, depending on the nature of the prior or subsequent court action and the court involved."

The notice must be mailed at least 21 days before the subsequent proceeding's hearing date. MCR 3.205(B)(3). If the prior court's order or judgment for continuing jurisdiction was not known 21 days before the subsequent proceeding's hearing date, then the initiating party must mail the notice as soon as it becomes known. *Id*. However, the notice requirement is not jurisdictional and therefore, does not prevent the subsequent court from entering interim orders that are in the child's best interests before the 21-day period expires. MCR 3.205(B)(4). See also *Krajewski*, 420 Mich at 734 (subsequent court may enter temporary or permanent orders).

Failure to give notice of the subsequent court proceeding does not deprive a subsequent court of its jurisdiction. *In re DaBaja*, 191 Mich App 281, 290 (1991).

C. Prior and Subsequent Orders

A prior court's order remains in effect until a subsequent court order supersedes, changes, or terminates the prior court's order. MCR 3.205(C)(1).

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[40] Although MCR 3.205(B) states that the plaintiff or other initiating party must mail the required notice, as a practical matter, the deputy register often sends the notice. See SCAO form MC 28, *Notice to Prior Court of Proceedings Affecting Minor(s)*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/general/mc28.pdf, which requires the signature of the court clerk, register, or deputy register.

[41] MCR 3.927 provides that the manner of notice to the other court and the authority of the Family Division to proceed are governed by MCR 3.205.

However, a subsequent court must give due consideration to a prior court's order, and may not enter any orders that are contrary to or inconsistent with a prior court's order unless permitted to do so by law. MCR 3.205(C)(2). Where a juvenile court assumes jurisdiction over a child and the child becomes a court ward under the juvenile code, the juvenile court's orders supersede all previous custody orders, even if inconsistent or contradictory, while the juvenile matter is pending. *In re AP*, 283 Mich App 574, 594 (2009). Specifically,

> "[U]pon entry of a child custody order under the CCA, a child's parents, or other custodians, must abide by the terms of the custody order. However, once a juvenile court assumes jurisdiction over a child and the child becomes a ward of the court under the juvenile code, the juvenile court's orders supersede all previous orders, including custody orders entered by another court, even if inconsistent or contradictory. In other words, the previous custody orders affecting the minor become dormant, in a metaphoric sense, during the pendency of the juvenile proceedings, but when the juvenile court dismisses its jurisdiction over the child, all those previous custody orders continue to remain in full force and effect. . . . [T]he juvenile court's orders function to supersede, rather than modify or terminate, the custody orders while the juvenile matter is pending because the juvenile orders are entered pursuant to a distinct statutory scheme that takes precedence over the CCA. We note that during the duration of the juvenile proceedings, while the parties subject to the custody order can move to modify the custody order, any modification would remain superseded by the juvenile court's orders." *In re AP*, 283 Mich App at 593-594 (internal citations omitted).

When a subsequent court enters an order, the subsequent court must file notice of the order with the prior court. MCL 712A.3a. A copy of the notice must also be served, personally or by registered mail, to the minor child's parents, guardian, or persons *in loco parentis*, and the prosecuting attorney. *Id.*

> **Note:** The notices must not disclose the allegations or findings of facts set forth in the petitions or orders, or reveal any individual's or organization's name. MCL 712A.3a. However, at the prosecuting attorney's request, or by court order, the confidential information may be disclosed directly to the prosecuting attorney. *Id.*

D. Duties of Prior and Subsequent Courts

Once a prior court receives notice of subsequent proceedings, the appropriate official must provide the subsequent court with copies of all relevant records, reports, and orders that remain in effect. MCR 3.205(D)(1)(a). The appropriate official from the prior court may also appear in person at subsequent proceedings when the welfare of the minor and the interests of justice require. MCR 3.205(D)(1)(b).

At the prior court's request, the subsequent court must notify the prior court of all subsequent proceedings, and the subsequent court must send copies to the prior court of all subsequent orders entered. MCR 3.205(D)(2). Upon receipt of an order from the subsequent court, the appropriate official of the prior court must take necessary steps to implement the order in the prior court. MCR 3.205(D)(4).

4.5 Interstate Cases

This section provides general guidance as to when a Michigan court may exercise jurisdiction in a child protective proceeding under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*.

The UCCJEA, MCL 722.1101 *et seq.*, governs the procedures in child custody proceedings when one or both of a child's parents reside outside of Michigan.[42] It also provides for enforcement and modification of out-of-state custody decrees, judgments, or orders. The UCCJEA does not apply to proceedings involving adoption or the authorization of emergency medical care for a child. MCL 722.1103.[43]

> **Note:** The UCCJEA contains provisions regarding filing and registering a state's custody decrees, judgments, and orders; communication between courts of different states; petition requirements; notice and service of process; evidence; and enforcement of another state's decree, judgment, or order.

The UCCJEA defines a *child custody proceeding* as "a proceeding in which legal custody, physical custody, or parenting time with respect to a child is an issue." MCL 722.1102(d). Child custody proceedings include cases involving:

(1) divorce, separate maintenance, and separation;

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[42] In 2002, the Michigan Legislature adopted the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*., and repealed the Uniform Child Custody Jurisdiction Act, MCL 600.651 *et seq*. MCL 722.1406(1). The UCCJEA took effect April 1, 2002. MCL 722.1406(2).

[43] See Section 3.3 for a detailed discussion of ordering emergency medical treatment for a child.

(2) neglect, abuse, and dependency;

(3) guardianship matters;

(4) paternity and termination of parental rights; and

(5) protection from domestic violence. MCL 722.1102(d).

An interstate proceeding involving an Indian child is governed by the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA). MCL 722.1104(1). See Chapter 19. However, Indian tribes of other states are treated as states for purposes of the UCCJEA. MCL 722.1104(2). An Indian tribe's custody determination must be recognized and enforced under the UCCJEA if it was made in substantial conformity with the UCCJEA. MCL 722.1104(3).

Note: Subject to its provisions, MCR 2.615 recognizes tribal court judgments as having the same effect as other judicial acts in any other Michigan court. MCR 2.615(A). However, MCR 2.615(D) provides that "[MCR 2.615] does not apply to judgments or orders that federal law requires be given full faith and credit." MCR 2.615(D).

For purposes of child protective proceedings, a Michigan court may exercise temporary emergency jurisdiction over a child. A Michigan court obtains temporary emergency jurisdiction when:

(1) There is an abandoned child in Michigan; or

(2) A child, the child's sibling, or the child's parent is being mistreated or abused or being threatened with mistreatment or abuse. MCL 722.1204(1).

A Michigan court may issue an order to take a child into custody if it appears likely that a child will suffer imminent physical harm or will be removed from the state. MCL 722.1310(1). If a proceeding has been commenced in or a custody determination has been made by another state's court, a Michigan court's order must specify a time period during which it will remain in effect. MCL 722.1204(3). The time period must be adequate to allow a person to seek an order from the other state's court. *Id*. In such circumstances, the Michigan court must immediately communicate with a court in the other state in order to "resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order." MCL 722.1204(4).

If there is no previous child custody determination or no commencement of a child custody proceeding, entry of a court's order during the temporary emergency will remain in effect until entry of an order by another court having jurisdiction. MCL 722.1204(2). If a child-custody proceeding has not been, and is not, commenced in another state's court

with jurisdiction over the matter, the determination made by the Michigan court during the temporary emergency becomes the final child-custody determination, if the Michigan court intends its determination to be final and Michigan becomes the child's home state. *Id.*

4.6 Jurisdiction Following Appointment of Guardian

The Probate Court has jurisdiction over guardianship proceedings, and may appoint a full or limited guardian for a child.[44] MCL 600.841(1)(a); MCL 700.1302(c); MCL 700.5204(2); MCL 700.5205(1). The Probate Court also has the authority to order a court-structured placement plan when conditions identified after a guardianship review hearing must be resolved, or, where a limited guardian is appointed, the court must approve, disapprove, or modify a limited guardianship placement plan developed by the parent(s) and proposed limited guardian. See MCL 700.5205(2); MCL 700.5206(1); MCL 700.5207(3)(b).

Once a guardian is appointed, the Family Division of the Circuit Court has ancillary jurisdiction of guardianship proceedings under Article 5 of the Estates and Protected Individuals Code (EPIC),[45] MCL 700.5101 *et seq*. MCL 600.1021(2)(a). The three statutory grounds authorizing the Family Division of the Circuit Court to exercise ancillary jurisdiction over a child arise when:

> (1) A parent has substantially failed, without good cause, to comply with a limited guardianship placement plan described in MCL 700.5205 regarding the child. MCL 712A.2(b)(4);
>
> (2) A parent has substantially failed, without good cause, to comply with a court-structured guardianship plan described in MCL 700.5207 or MCL 700.5209 regarding the child. MCL 712A.2(b)(5) ; or
>
> (3) A child has a guardian and the child's parent:
>
> > (a) having the ability to support or assist in supporting the child,
> >
> > > (i) has failed or neglected, without good cause, to provide regular and substantial support for the

[44] The Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA) apply to guardianships involving Indian children. See Chapter 19.

[45] A court-ordered guardianship is not required for a child to be in the proper custody of a person other than a parent. See Section 4.3(A) for a discussion of the Family Division of the Circuit Court taking jurisdiction over children who are without proper custody or guardianship.

child for two or more years before the filing of the petition; or

(ii) if a support order has been entered, has failed to substantially comply with the order for two or more years before the filing of the petition; and

(b) having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected, without good cause, to do so for two or more years before the filing of the petition. MCL 712A.2(b)(6).

A. Limited Guardianship Placement Plans

A limited guardianship placement plan is a consensual arrangement that is agreed to by the custodial parent, the proposed limited guardian, and the judge of the Probate Court who is assigned to the case. MCL 700.5205(1)-(2); MCL 700.5206(1). Once appointed, the limited guardian has the same powers and duties as a full guardian with the exception of the ability to consent to a child's adoption, release for adoption, or marriage. MCL 700.5206(4).

A limited guardianship is initiated by a custodial parent,[46] and the custodial parent may petition the court for termination of the guardianship at any time.[47] MCL 700.5205(1); MCL 700.5206(3); MCL 700.5208(1). After notice and hearing on the custodial parent's petition for termination, the court must terminate the guardianship if it finds that the custodial parent has substantially complied with the limited guardianship placement plan.[48] MCL 700.5209(1). However, if the custodial parent substantially fails, without good cause, to comply with the limited guardianship plan, the Family Court may assume jurisdiction over the child in a child protective proceeding.[49] MCL 712A.2(b)(4).

Note: The limited guardianship placement plan form must contain a notice that informs the parent that substantial failure to comply with the plan without good cause may result in termination of the parent's parental rights. MCL 700.5205(2).

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[46] See SCAO form PC 650, *Petition for Appointment of Limited Guardian of Minor*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/guardian-conservator/pc650.pdf.

[47] See SCAO form PC 675, *Petition to Terminate/Modify Guardianship*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/guardian-conservator/pc675.pdf.

[48] "The court may enter orders to facilitate the minor's reintegration into the home of the parent or parents for a period of up to 6 months before the termination." MCL 700.5209.

[49] See SCAO form PC 657, *Order Following Hearing to Terminate Minor Guardianship*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/guardian-conservator/pc657.pdf.

Specifically, the limited guardianship placement plan[50] must include all of the following:

> (1) Why the parent is requesting the court to appoint a limited guardian for the child;
>
> (2) When and how the parent intends to sufficiently maintain the parent-child relationship;
>
> (3) The length of the limited guardianship;
>
> (4) Financial support for the child; and
>
> (5) Any other provisions agreed upon by the parties for inclusion in the plan. MCL 700.5205(2)(a)-(e); MCR 5.404(E)(1).

The limited guardianship placement plan may also include a schedule of services the parent, child, or guardian should follow and any other additional provisions the court deems necessary. MCR 5.404(E)(2).

A limited guardianship placement plan may be modified under MCR 5.404(E)(3)(a)-(d), which provides:

> "(a) The parties to a limited guardianship placement plan may file a proposed modification of the plan without filing a petition. The proposed modification shall be substantially in the form approved by the state court administrator.
>
> (b) The court shall examine the proposed modified plan and take further action under subrules (c) and (d) within 14 days after the filing of the proposed modified plan.
>
> (c) If the court approves the proposed modified plan, the court shall endorse the modified plan and notify the interested persons of its approval.
>
> (d) If the court does not approve the modification, the court either shall set the proposed modification plan for a hearing or notify the parties of the objection of the court and that they may schedule a hearing or submit another proposed modified plan."

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[50] See SCAO form PC 652, *Limited Guardianship Placement Plan*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/guardian-conservator/pc652.pdf.

B. Full Guardianship Placement Plans

A child 14 years of age or older or a person interested in the child's welfare may file a petition requesting appointment of a full guardianship over the child.[51] MCL 700.5204(1); MCR 5.402(B). The court may order the DHHS or a court employee to conduct an investigation of the proposed guardianship and file a written report on the investigation.[52] MCL 700.5204(1).

The Probate Court may appoint a full guardian for an unmarried minor if the court finds at least one of the following:

> (1) The parental rights of both parents or the surviving parent are terminated or suspended by:
>
> > (a) a prior court order;
> >
> > (b) a judgment of divorce or separate maintenance;
> >
> > (c) a parent's death;
> >
> > (d) a judicial determination of mental incompetency;
> >
> > (e) a parent's disappearance; or
> >
> > (f) a parent's confinement in a place of detention.
>
> (2) The parent permits the child to reside with another person without providing that person with legal authority over the child's care and maintenance, and the child is not residing with his or her parent at the time the petition is filed.
>
> (3) The child's biological parents never married, the parent with custodial rights over the child dies or is missing, the other parent does not have court-ordered legal custody, and the petition requests a relative "within the fifth degree by marriage, blood, or adoption[]" be appointed as the child's guardian. MCL 700.5204(2)(a)-(c).

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[51] See SCAO form PC 651, *Petition for Appointment of Guardian of Minor*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/guardian-conservator/pc651.pdf.

[52] See SCAO form PC 635, *Order Appointing Person to Review / Investigate Guardianship*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/guardian-conservator/pc635.pdf.

C. Court-Structured Guardianship Placement Plans

The court-structured placement plan must include at least all of the following:[53]

> "(a) visitation and contact with the minor by the parent or parents sufficient to maintain a parent and child relationship;
>
> (b) the duration of the guardianship; [and]
>
> (c) financial support for the minor . . . ." MCR 5.404(E)(1)(a)-(c).

The court-structured placement plan may also include a schedule of services the parent, child, or guardian should follow and any other additional provisions the court deems necessary. MCR 5.404(E)(2).

> **Note:** Although it is not specifically required by statute, the court-structured plan should contain a notice to the parents that failure to comply with the plan may result in the termination of their parental rights.

4.7 Review Hearings For Limited Guardianship and Court-Structured Guardianship Placement Plans

Once the Probate Court grants a petition for a full or limited guardianship, it may review the guardianship at any time it deems necessary. MCL 700.5207(1). However, if the child is under the age of six, the court must review the guardianship annually. *Id.*

A. Guardianship Review

The court itself may conduct the review or it may order the DHHS or a court employee or agent to conduct an investigation of the guardianship and provide the court with a written report of the factors that must be considered in conducting the review. MCL 700.5207(1)-(2).

The following factors must be considered when reviewing a guardianship:

> "(a) The parent's and guardian's compliance with either of the following, as applicable:
>
> (*i*) A limited guardianship placement plan.

[53] Court-structured placement plans share some requirements with limited guardianship placement plans.

(*ii*) A court-structured plan under [MCL 700.5207(3)(b)(*ii*)(B)] or [MCL 700.5209(2)(b)(*ii*)].

(b) Whether the guardian has adequately provided for the minor's welfare.

(c) The necessity of continuing the guardianship.

(d) The guardian's willingness and ability to continue to provide for the minor's welfare.

(e) The effect upon the minor's welfare if the guardianship is continued.

(f) Any other factor that the court considers relevant to the minor's welfare." MCL 700.5207(1)(a)-(f).

B. Completion of Guardianship Review

After the guardianship review is completed, the court may take either of the following actions:

"(a) Continue the guardianship.

(b) Schedule and conduct a hearing on the guardianship's status and do any of the following:

(*i*) If the guardianship is a limited guardianship, do either of the following:

(A) Continue the limited guardianship.

(B) Order the parties to modify the limited guardianship placement plan as a condition to continuing the limited guardianship.

(*ii*) If the guardianship was established under [MCL 700.5204],[54] do either of the following:

(A) Continue the guardianship.

(B) Order the parties to follow a court-structured plan designed to resolve the conditions identified at the review hearing.

(*iii*) Take an action described in [MCL 700.5209(2)]."[55] MCL 700.5207(3)(a)-(b).

[54] MCL 700.5204 permits a person interested in the child's welfare or the child, if 14 years of age or older, to petition for a court-appointed guardian.

4.8 Termination of Guardianships Involving Limited Guardianship and Court-Structured Guardianship Placement Plans

When a child has lived with the guardian for at least one year and a petition is filed in the Probate Court to terminate a full or limited guardianship because of a parent's failure to comply with a placement plan, the Probate Court may appoint an attorney to represent the minor child or refer the matter to the DHHS. MCL 700.5209(2)(c)-(d). Following the appointment or referral, the attorney or the DHHS may file a petition seeking Family Court jurisdiction under MCL 712A.2(b). MCL 700.5209(2)(d). The attorney or the DHHS must report to the Probate Court, within 21 days of the attorney's appointment or the DHHS referral, whether a petition seeking Family Court jurisdiction was filed. MCR 5.404(H)(3).

Once the attorney or the DHHS files a petition with the Family Court and the Family Court authorizes the petition under MCL 712A.11, the guardianship is terminated. MCR 5.404(H)(3)(b). However, the Family Court may continue the guardianship if it deems the guardianship necessary for the child's well-being. *Id.*

> **Note:** If the attorney or the DHHS does not file a petition seeking Family Court jurisdiction, the Probate Court must take such further action as is necessary. MCR 5.404(H)(3)(a). However, the guardianship cannot continue for more than one year after the hearing on the petition to terminate. *Id.*

A. Failure to Comply With Placement Plan

The Family Division has jurisdiction over a child protective proceeding when a parent substantially fails, without good cause, to comply with a court-structured plan. MCL 712A.2(b)(5).

A parent must comply with a placement plan even if the neglect petition is dismissed due to a child's placement with a guardian, and failure to comply with the placement plan will provide a court with jurisdiction under MCL 712A.2(b)(5).[56] *In re BZ*, 264 Mich App 286, 295-296 (2004). In *In re BZ*, the respondent-mother argued on appeal that no grounds for jurisdiction existed because the neglect petitions regarding the two children had been dismissed after the guardianships were established, and placement with the guardians meant that the children were not without proper custody or

[55] MCL 700.5209(2) specifies conditions under which the guardianship may be terminated and the child may be reintegrated into his or her home.

[56] Formerly MCL 712A.2(b)(4).

guardianship under MCL 712A.2(b)(1)(B).[57] In rejecting this argument, the Court of Appeals indicated that although the original neglect petition was dismissed, the respondent-mother was still subject to the requirements of the placement plan, and her failure to substantially comply with those requirements provided the court with jurisdiction under MCL 712A.2(b)(5). *In re BZ*, *supra* at 294-295.

B. Failure to Support or Communicate With Child Who Has Guardian

The Family Division may assume jurisdiction over a child protective proceeding if a child has a guardian and there is no placement plan in place, if the child's parent:

> (1) having the ability to support or assist in supporting the child,
>
> > (a) has failed or neglected, without good cause, to provide regular and substantial support for the child for two or more years before the filing of the petition; or
> >
> > (b) if a support order has been entered, has failed to substantially comply with the order for two or more years before the filing of the petition; and
>
> (2) having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected, without good cause, to do so for two or more years before the filing of the petition. MCL 712A.2(b)(6).

4.9 Jurisdiction Following Appointment of Juvenile Guardian

The court may appoint a juvenile guardian if it determines at a post-termination review hearing or a permanency planning hearing that it is in the child's best interests.[58] MCR 3.979(A). During the process of appointing a juvenile guardian, the court must order the DHHS to:

> (1) submit to the court within seven days a criminal record check and a central registry clearance of the residents in the home; and

[57] See Section 4.3(A).

[58] See SCAO form JC 91, *Order Appointing Juvenile Guardian*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc91.pdf.

(2) perform a home study and submit it to the court within 28 days or submit a copy of a home study conducted within the last 365 days. MCR 3.979(A)(1).

Note: If the child is in foster care, the court must continue the foster care placement. MCR 3.979(A)(2).

If the court finds it to be in the child's best interests, the court may appoint a juvenile guardian once the DHHS submits results from the criminal record check, the central registry clearance, and the home study.[59] MCR 3.979(B). If the proposed guardian is seeking guardianship assistance payments, the assistance agreement must be approved and signed before the order of guardianship is entered.[60] See the DHHS's Child Guardianship Manual (GDM), *Juvenile Guardianship GDM 600*, p 9, available at http://www.mfia.state.mi.us/olmweb/ex/GD/Public/GDM/600.pdf.

Note: If parental rights have already been terminated, the court must first obtain written consent from the Michigan Children's Institute (MCI) Superintendent before appointing a juvenile guardian.[61] MCL 712A.19c(3); MCR 3.979(A)(3). However, the court may appoint a juvenile guardian without the MCI Superintendent's consent under certain circumstances. MCL 712A.19c(6); MCR 3.979(A)(3)(c). See Section 18.5(A).

Once a juvenile guardian is appointed, the court's jurisdiction over the guardianship continues until released by court order. MCL 712A.19a(11); MCL 712A.19c(10); MCR 3.979(C)(1).[62] However, the court's jurisdiction over the child pursuant to MCL 712A.2(b) terminates once the juvenile guardian is appointed and a review hearing is conducted under MCL 712A.19. MCL 712A.19a(10); MCL 712A.19c(9); MCR 3.979(C)(1). But see MCL 712A.2a(4), which requires the court to retain its jurisdiction over a youth 16 years of age or older who was appointed a juvenile guardian under MCL 712A.19a or MCL 712A.19c until the DHHS determines whether the youth[63] is eligible to receive extended guardianship assistance under the Young Adult Voluntary Foster Care Act (YAVFCA),

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[59] If the child is of Indian heritage, the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA) must be followed. See Chapter 19 for information on the ICWA and the MIFPA.

[60] See Section 14.5 for a detailed discussion of guardianship assistance, and Section 16.8(A) and Section 18.5(A) for a detailed discussion of juvenile guardianship appointments.

[61] The MCI Superintendent must consult with the child's lawyer-guardian ad litem prior to granting written consent. MCL 712A.19c(3).

[62] The procedures of MCL 712A.19a pertain to the pretermination of parental rights, while the procedures of MCL 712A.19c pertain to the post-termination of parental rights.

[63] For purposes of the Juvenile Code, the term *youth* "applies to a person 18 years of age or older concerning whom proceedings are commenced in the court under [MCL 712A.2] and over whom the court has continuing jurisdiction under [MCL 712A.2a(1)-(6)]." MCL 712A.2a(8).

MCL 400.641 *et seq.*[64] If the DHHS determined the youth was eligible for extended guardianship assistance under the YAVFCA, the court must retain jurisdiction until the youth no longer receives the guardianship assistance.[65] If the DHHS provides the court with notice that it is extending guardianship assistance to a youth beyond the age of 18 under the YAVFCA, the court must also "retain [its] jurisdiction over the guardianship until that youth no longer receives extended guardianship assistance."[66] MCR 3.979(C)(1).

MCR 3.979(C)(1) also contains provisions regarding termination of the court's and the MCI's jurisdiction over a child. When parental rights to a child have not been terminated, the court's jurisdiction over the child is terminated after the court appoints a juvenile guardian and conducts a review hearing under MCR 3.975. MCR 3.979(C)(1). When parental rights to a child have been terminated, the court's and the MCI's jurisdiction over the child are terminated after the court appoints a juvenile guardian and conducts a review hearing under MCR 3.978. MCR 3.979(C)(1).

Although a juvenile guardian appointed under the Juvenile Code is distinct from a guardian appointed under the Estates and Protected Individuals Code, a juvenile guardian appointed under MCR 3.979 has all the power and duties described in MCL 700.5215. MCR 3.979(E). See Section 16.8(C) and Section 18.5(A) for a detailed discussion of a juvenile guardian's duties and authority.

A. Lawyer-Guardian Ad Litem

The appointment of a lawyer-guardian ad litem terminates once the court's jurisdiction over the child under MCL 712A.2(b) terminates. MCR 3.979(C)(3). At the court's discretion, the court may reappoint the lawyer-guardian ad litem or appoint a new lawyer-guardian ad litem once a juvenile guardian is appointed. *Id.* See Section 7.9 for a detailed discussion of a lawyer-guardian ad litem's powers and duties.

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[64] The DHHS must determine the youth's eligibility to receive extended guardianship assistance under the YAVFCA "within 120 days of the youth's eighteenth birthday." MCL 712A.2a(4).

[65] See also MCL 400.669(1), which requires the court to retain its jurisdiction "of a youth receiving, or a youth for whom the [DHHS] is determining eligibility for receiving, extended guardianship assistance until that youth no longer receives guardianship assistance."

[66] See Section 4.6 for a discussion of juvenile guardianship appointments, Section 14.5(I) for additional information on the extension of guardianship assistance under MCL 400.665, and Section 16.9 for a discussion of the Young Adult Voluntary Foster Care Act (YAVFC).

B. Review Hearing

The court must annually review a guardianship and may conduct additional reviews as it deems necessary. MCL 712A.19a(11); MCL 712A.19c(10); MCR 3.979(D)(1)(a).[67] The annual review must be commenced within 63 days after the anniversary date of a juvenile guardian's appointment. MCR 3.979(D)(1)(a).

> **Note:** Because the law does not require the annual review to be a court hearing, the court could satisfy the review requirement by requiring the guardian to submit a report to the court from which the court could then determine whether a hearing was necessary. In order for the court to properly review the guardianship based on a report submitted by the guardian, the SCAO recommends that the court require the guardian to report, at a minimum, the following information:[68]
>
> > "[(1)] The guardian and child's current address and phone number.
> >
> > [(2)] The guardian's willingness and ability to continue to provide for the child's welfare.
> >
> > [(3)] Information about the child's education, including the name of the child's school and current progress, including a copy of the child's most recent report card, if the child is of sufficient age to attend school.
> >
> > [(4)] Information about the child's physical and emotional health, specifically if the child is having any medical/dental problems of concern and if the child has experienced any traumatic event during the past year.
> >
> > [(5)] Information about other members of the guardian's household."

"The review hearing following appointment of the juvenile guardian must be conducted within 91 days of the most recent review hearing if it has been one year or less from the date the child was last removed from the home[.]" MCR 3.979(C)(2). If it has been more than one year from the date of the child's last removal from the home, the court

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[67] The procedures of MCL 712A.19a pertain to the pretermination of parental rights, while the procedures of MCL 712A.19c pertain to the post-termination of parental rights.

[68] See SCAO Memorandum, *New Foster Care / Permanency Planning Laws* (2008 Public Acts 199-203), at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Administrative-Memoranda/2008-05.pdf.

must conduct a review hearing following appointment of the juvenile guardian within 182 days of the most recent review hearing. *Id.*

"If extended guardianship assistance has been provided to a youth pursuant to MCL 400.665,"[69] MCR 3.979(D)(1)(b) requires:

- "the court [to] conduct an annual review hearing at least once every 12 months after the youth's eighteenth birthday to determine that the guardianship meets the criteria under MCL 400.667[;]"[70]
- [n]otice of the hearing [to] be sent to the guardian and the youth as provided in MCR 3.920(D)(1)[; and]"
- [t]he court [to] issue an order to support its determination and serve the order on the Department of [Health and] Human Services [(DHHS)], the guardian, and the youth." (Bullets added).

C. Investigation of Juvenile Guardianship

The court must appoint the DHHS or a court employee to conduct an investigation of the juvenile guardianship if the court deems it necessary or upon petition by the DHHS or another interested person.[71] MCR 3.979(D)(2). If the court orders an investigation, the DHHS or the court employee must file a written report within 28 days of the court's appointment and serve it on the other interested parties listed in MCR 3.921(C). *Id.* See Section 5.2 for a list of interested persons in juvenile guardianships.

The report must include a recommendation on whether the juvenile guardianship should continue or be modified, and whether a hearing needs to be scheduled. MCR 3.979(D)(2). If the report indicates the juvenile guardianship should be modified, the DHHS or the court employee must state the nature of the modification.[72] *Id.*

Upon receipt and informal review of the report, the court must enter an order that:

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[69] See Section 14.5(I) for additional information on the extension of guardianship assistance under MCL 400.665.

[70] See also MCL 400.669(2), which requires "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance not less than 1 time every 12 months." "A hearing held under [MCL 400.669(2)] may be combined with a hearing held under [MCL 712A.19(2)] to [MCL 712A.19(4)], . . . [MCL 712A.19a(1)], . . . or [MCL 712A.19c(1)] . . . ." MCL 400.669(2).

[71] See SCAO form JC 95, *Order Appointing Person to Investigate Juvenile Guardianship*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc95.pdf.

[72] See SCAO form JC 96, *Report After Investigation of Juvenile Guardianship*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc96.pdf.

(1) denies the modification recommendation; or

(2) sets it for hearing within 28 days of the court's review of the report.[73] MCR 3.979(D)(3).

D. Order of Discharge

Within 14 days of a child's death, the juvenile guardian must provide the court and interested persons with written notice. MCR 3.979(E)(4). Upon notice of a child's death, the court must enter an order of discharge.[74] MCR 3.979(D)(4). However, the court may schedule a hearing before entry of the discharge order. *Id.*

E. Transfer of Jurisdiction

The court's jurisdiction over a juvenile guardianship continues until released by court order.[75] MCL 712A.19a(11); MCL 712A.19c(10); MCR 3.979(C)(1).[76] If the guardian relocates to another county within Michigan, the SCAO recommends that the court that handled the child protective proceeding and determined that appointment of a juvenile guardian was in the child's best interests retain its jurisdiction over the guardianship.[77] However, the court may transfer the guardianship. See MCR 3.926.[78]

Prior to transferring the juvenile guardianship, the transferring court should contact the receiving court to make sure the receiving court is willing to accept the guardianship. If the receiving court is willing to accept the guardianship, the transferring court should send either the

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[73] See SCAO form JC 97, *Order Following Investigation and Report on Juvenile Guardianship*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc97.pdf.

[74] See SCAO form JC 104, *Order Discharging Juvenile Guardian*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc104.pdf.

[75] But see MCL 712A.2a(4), which requires the court to retain its jurisdiction over a youth 16 years of age or older who was appointed a juvenile guardian under MCL 712A.19a or MCL 712A.19c until the DHHS determines whether the youth is eligible to receive extended guardianship assistance under the Young Adult Voluntary Foster Care Act (YAVFCA), MCL 400.641 *et seq*. If the DHHS determines the youth is eligible for extended guardianship assistance under the YAVFCA, the court must retain jurisdiction until the youth no longer receives the guardianship assistance, and MCR 3.979(C)(1), which requires the court to "retain [its] jurisdiction over the guardianship until that youth no longer receives extended guardianship assistance" where the DHHS provides the court with notice that it is extending guardianship assistance to a youth beyond the age of 18 under the YAVFCA. For additional information on the extension of guardianship assistance under MCL 400.665, see Section 14.5(I).

[76] The procedures of MCL 712A.19a pertain to the pretermination of parental rights, while the procedures of MCL 712A.19c pertain to the post-termination of parental rights.

[77] See SCAO Memorandum, *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/JuvenileGuardianship.pdf. See Case File Management Standards, Component 11, for detailed requirements of a case transfer, at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_stds.pdf.

original case file or a certified copy of the file to the receiving court. See the SCAO Memorandum, *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/JuvenileGuardianship.pdf, and the Case File Management Standards, Component 11, for detailed requirements of a case transfer, at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_stds.pdf.

Upon revocation of a juvenile guardianship (including any action on a petition to revoke or terminate the guardianship), MCR 3.979(F)(5)-(6) requires that jurisdiction over the child in the previous child protective proceeding be reinstated. Because the transferring court only transferred the juvenile guardianship and not the child protective proceeding, the SCAO recommends that the previous child protective proceeding be reopened in the county that originally handled the child protective proceeding and appointed the juvenile guardian. See Section 4.9(F) for a detailed discussion of revocation of a guardianship.

A dispositional review hearing must be held within 42 days of revocation of a juvenile guardianship. MCR 3.979(F)(7). Therefore, when jurisdiction over a juvenile guardianship has been transferred to another court and the original abuse/neglect case is to be reinstated in the original court, the receiving court should immediately notify and forward copies of the juvenile guardianship file to the transferring court so that the transferring (original) court has the complete history of the case when conducting the dispositional review hearing. See MCR 3.979(F)(7). See also the SCAO Memorandum, *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/JuvenileGuardianship.pdf, and the Case File Management Standards, Component 11, for detailed requirements of a case transfer, at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_stds.pdf.

F. Revocation or Termination of Guardianship

The court may hold a hearing to determine whether to revoke the guardianship, on its own motion or upon petition from the DHHS or the child's lawyer-guardian ad litem.[79] MCL 712A.19a(13); MCL 712A.19c(11); MCR 3.979(F)(1)(a).[80] The court may hold a hearing to

[78] MCR 3.926 was adopted before the introduction of juvenile guardianships and does not provide clear guidance for transferring a juvenile guardianship.

[79] See SCAO form JC 99, *Petition to Revoke Juvenile Guardianship, Notice of Hearing, and Order for Investigation*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc99.pdf.

determine whether to terminate the guardianship upon petition from the appointed juvenile guardian or another interested person.[81] MCL 712A.19a(14); MCL 712A.19c(12); MCR 3.979(F)(1)(b).[82]

> **Note:** An appointed guardian seeking permission to terminate a guardianship may include a request for appointment of a successor guardian. MCL 712A.19a(14); MCL 712A.19c(12); MCR 3.979(F)(1)(b).

If the court finds by a preponderance of the evidence that it is not in the child's best interests to continue the guardianship, the court must revoke or terminate the guardianship and either appoint a successor guardian or return the child to the temporary custody of the DHHS. MCL 712A.19a(15); MCL 712A.19c(13); MCR 3.979(F)(5)-(6).

1. Process Required to Revoke or Terminate a Guardianship

a. Hearing

Once a petition for revocation or termination is filed with the court, the court must hold a hearing within 28 days to determine whether to grant the petition to revoke or terminate the juvenile guardianship. MCR 3.979(F)(2).

"The court may order temporary removal of the child under MCR 3.963 to protect the health, safety, or welfare of the child, pending the revocation or termination hearing. If the court orders removal of the child from the juvenile guardian to protect the child's health, safety, or welfare, the court must proceed under [MCR 3.974(C)[83]]." MCR 3.979(F)(2). For information on court-ordered temporary removal of a child under MCR 3.963, see Section 4.1(A), and for information on the court procedures set out in MCR 3.974(C), see Section 15.8.

b. Investigation

To prepare for the revocation or termination hearing, the court must order the DHHS to perform an investigation and file a written report of its findings. MCR 3.979(F)(3).

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[80] The procedures of MCL 712A.19a pertain to the pretermination of parental rights, while the procedures of MCL 712A.19c pertain to the post-termination of parental rights.

[81] See SCAO form JC 98, *Petition to Terminate Appointment of Juvenile Guardian, Notice of Hearing, and Order for Investigation*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc98.pdf.

[82] See Section 5.2 for a list of interested persons in juvenile guardianships.

[83] Formerly MCR 3.974(B).

The DHHS must file the report with the court at least seven days before the hearing. *Id.*

The DHHS must include in its report the reason for revoking or terminating the juvenile guardianship and if applicable, a recommendation on a temporary placement for the child. MCR 3.979(F)(3).

c. Notice

The court must make sure that interested persons receive notice of the hearings as provided in MCR 3.920 and MCR 3.921. MCR 3.979(F)(4). See Section 5.2 for information on notice of hearings and a list of interested persons in juvenile guardianships.

The notice must inform the interested persons that they:

> (1) may participate in the hearing; and
>
> (2) may provide information at the hearing. MCR 3.979(F)(4).
>
> > **Note**: Any information an interested person wishes to provide should be submitted to the court, the agency, the child's lawyer-guardian ad litem, and one of the party's attorneys in advance. MCR 3.979(F)(4).

If proper notice has been given, the court may proceed in the absence of interested persons. MCR 3.979(F)(4).

d. Order Revoking Juvenile Guardianship

After notice and a hearing on a petition to revoke a juvenile guardianship, the court must enter an order to revoke a juvenile guardianship if it finds that:

> (1) by a preponderance of the evidence the continuation of the juvenile guardianship is not in the child's best interests;
>
> (2) it is contrary to the child's welfare to be placed in or remain in the juvenile guardian's home; and
>
> (3) reasonable efforts were made to prevent removal. MCR 3.979(F)(5).

Upon entry of the revocation order, the child must be placed under the care and supervision of the DHHS.[84] MCR 3.979(F)(5). Additionally, the court's jurisdiction over the child pursuant to MCL 712A.2(b) is reinstated under the previous child protective proceeding. *Id.*

e. Order Terminating Juvenile Guardianship

If the court finds that terminating the appointment of the juvenile guardian is in the child's best interests after notice and a hearing on the petition to terminate, the court must terminate the appointment and proceed with an investigation and the appointment of a successor juvenile guardian in accordance with MCR 3.979(B).[85] MCR 3.979(F)(6)(b). The court's jurisdiction over the juvenile guardianship continues with the appointment of a successor juvenile guardian. *Id.*

> **Note:** See Section 16.8(A) and Section 18.5(A) for a detailed discussion of juvenile guardian appointments.

However, if the court finds that there is no successor juvenile guardian after notice and a hearing on the petition to terminate, and upon a finding that terminating the appointment of the juvenile guardian is in the child's best interests, the court must place the child under the care and supervision of the DHHS. MCR 3.979(F)(5); MCR 3.979(F)(6)(a). The court's jurisdiction over the child pursuant to MCL 712A.2(b) is also reinstated under the previous child protective proceeding. MCR 3.979(F)(5); MCR 3.979(F)(6)(a).

f. Dispositional Review Hearing

Within 42 days of revoking a juvenile guardianship, the court must hold a dispositional review hearing pursuant to MCR 3.973 or MCR 3.978. MCR 3.979(F)(7). The DHHS must prepare a case service plan and file it with the court at least seven days before the hearing. *Id.* Any subsequent postdispositional review hearings must be scheduled in conformity with MCR 3.974 and MCR 3.975. MCR 3.979(F)(7).

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[84] See SCAO form JC 101, *Order Regarding Revocation of Juvenile Guardianship*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc101.pdf.

[85] See SCAO form JC 100, *Order Following Hearing on Petition to Terminate Appointment of Juvenile Guardian*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc100.pdf.

Note: See Chapter 16 for a detailed discussion of dispositional review hearings.

2. Maintaining Title IV-E Funding

To maintain a child's Title IV-E funding eligibility following a juvenile guardianship revocation and reinstatement of the child protective proceeding, the court must make "contrary to the welfare of the child findings" and place the child with the DHHS.[86] The *contrary to the welfare of the child* findings are made against the juvenile guardian (not the child's parents). *Contrary to the welfare of the child* findings do not require that a new petition alleging abuse or neglect be filed against the juvenile guardian.

However, if the child has not lived with the juvenile guardian for the last six consecutive months, the SCAO recommends that the court make both *reasonable efforts* and *contrary to the welfare* findings regarding both the juvenile guardian and the child's parents. If the court fails to make a *reasonable efforts* finding in its order revoking the juvenile guardianship, those findings need to be made within 60 days of the revocation order.

4.10 Jurisdiction and Authority Over Adults

The court has jurisdiction over adults and may make orders affecting adults where the court determines it to be necessary for a child's physical, mental, or moral well-being. MCL 712A.6.[87] However, entry of an order affecting an adult must be incidental to the court's jurisdiction over the child. *Id.*

Note: The authority to fashion remedies under MCL 712A.6 extends beyond MCL 712A.18, which provides dispositional alternatives. *In re Macomber*, 436 Mich 386, 389-393, 398-400 (1990).[88]

Additionally, "[i]n a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court may issue orders affecting a party as necessary[until] . . . May 1, 2018." MCL 712A.2(i). For purposes

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[86] See SCAO Memorandum, *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/JuvenileGuardianship.pdf.

[87] "[MCL 712A.6] does not grant the trial court plenary power, but has inherent limits. . . . '[U]nder [MCL 712A.6], the court may only make orders affecting adults if "necessary" for the child's interest. The word "necessary" is sufficient to convey to probate courts that they should be conservative in the exercise of their power over adults.'" *In re Harper*, 302 Mich App 349, 357 (2013), quoting *In re Macomber*, 436 Mich 386, 389-399 (1990).

[88] See Section 13.9(A).

of child protective proceedings, MCL 712A.2(i)(*ii*) defines *party* as "the petitioner, [DHHS], child, respondent, parent, guardian, or legal custodian, and any licensed child caring institution or child placing agency under contract with the [DHHS] to provide for a juvenile's care and supervision."

The court may also order a parent, nonparent adult, or other person out of the child's home before trial where: (1) the petition contains allegations of abuse; (2) after a hearing, the court finds probable cause that an adult in the child's home committed the abuse; and (3) the court finds on the record that there is a substantial risk of harm to the child's life, physical health, or mental well-being if the adult alleged to have committed the abuse is permitted to remain in the child's home. MCL 712A.13a(4). If the court does not order the adult to leave the child's home, the child will be placed with an individual in whose custody the child is adequately safeguarded from the risk of harm to the child's life, health, or mental well-being. MCL 712A.13a(5). MCL 712A.6b gives the court authority to enter very specific orders against nonparent adults. See Section 7.7(E) for orders affecting nonparent adults.

> **Note:** MCL 712A.13a(1)(h) defines a nonparent adult as a person, regardless of where he or she lives, who is 18 years of age or older and has substantial and regular contact with the child, has a close personal relationship with the child's parent or person acting as a parent, and is not related to the child by blood or affinity to the third degree.
>
> Although "courts may assume jurisdiction over a child on the basis of the adjudication of one parent[,]" procedural "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights."[89] *In re Sanders*, 495 Mich 394, 407, 412-413 n 8, 415, 422-423 (2014) (finding unconstitutional the one-parent doctrine, which permitted the court to "enter dispositional orders affecting the parental rights of *both* parents" once "jurisdiction [was] established by adjudication of only *one* parent").[90] "[N]either the admissions made by [the adjudicated parent] nor [the unadjudicated parent's] failure to object to those admissions constituted an

[89] Note, however, where "a minor faces an *imminent* threat of harm, . . . the state may take the child into custody without prior court authorization or parental consent[;] . . . [s]imilarly, upon the authorization of a child protective petition, the trial court may order *temporary* placement of the child into foster care pending adjudication if the court finds that placement in the family home would be contrary to the welfare of the child." *In re Sanders*, 495 Mich at 416-417 n 12 (limiting the requirement for adjudication over each parent to "the court's exercise of its postadjudication dispositional authority").

[90] See Section 4.3(E)(2) for additional information on the procedural due process rights of the unadjudicated parent, and Chapter 13 for a discussion on the dispositional phase of child protective proceedings.

adjudication of [the unadjudicated parent's] fitness[.]" *In re SJ Temples*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2015 (Docket No. 323246)[91] (finding that the trial court violated the unadjudicated parent's "due process rights by subjecting him to dispositional orders without first adjudicating him as unfit[]"). DELETED TEXT WAS MOVED TO FN**Note**: The Supreme Court's conclusion that the one-parent doctrine violates a nonadjudicated parent's due process rights, *In re Sanders*, 495 Mich at 412, 422, applies retroactively "to all cases pending on direct appeal at the time [*Sanders*] was decided." *In re Kanjia*, 308 Mich App 660, 674 (2014).

4.11 Jurisdiction of Contempt Proceedings

This section provides general guidance of contempt proceedings. For a detailed discussion of procedural requirements in contempt cases, see the Michigan Judicial Institute's *Contempt of Court Benchbook*.

A. Authority

The court has the authority to hold a person in contempt under the contempt provisions in MCL 600.1701 *et seq.*, when he or she "willfully violates, neglects, or refuses to obey and perform any order or process the court has made or issued to enforce [the Juvenile Code]." MCL 712A.26. See also MCR 3.928(A).

Courts have an inherent power under common law to punish all contempts of court. *In re Scott*, 342 Mich 614, 618 (1955). Through its contempt powers, the court may also enforce its reimbursement orders (MCL 712A.18(2)-(3)) and orders assessing attorney costs (MCL 712A.17c(8), MCL 712A.18(5), and MCR 3.915(E)). See generally, *In re Reiswitz*, 236 Mich App 158, 172 (1999).

B. Procedure

Although courts have inherent authority to punish for contempt, the Legislature has the authority to prescribe penalties for such contempt. *Cross Co v UAW Local No 155 (AFL-CIO)*, 377 Mich 202, 223 (1966). Additionally, MCR 3.928(B) provides that contempt of court proceedings are governed by MCL 600.1711, MCL 600.1715, and MCR 3.606.

[91] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

Pursuant to MCL 600.1711(1), when a person commits contempt in the "immediate view and presence of the court,"[92] the court has the authority to instantly punish the person by fine, imprisonment, or both. However, if a person commits contempt outside the court's presence,[93] the court's authority to punish the person by fine, imprisonment, or both is limited; the court may punish contempt in these cases only "after proof of the facts charged is made by affidavit or other method and opportunity [is] given to defend." MCL 600.1711(2).

[92] Direct contempt.

[93] Indirect contempt.

Chapter 5: Service of Process in Child Protective Proceedings

5.1 Issuance and Service of Summons in Child Protective Proceedings 5-2
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In this chapter. . .

This chapter discusses the general requirements for issuing and serving summonses and notices of hearings in child protective proceedings. The statutory requirements for service in termination of parental rights proceedings are particularly important because a failure to meet those requirements renders the proceedings void.

This chapter includes a discussion on waiving notice of hearing or service of process and subsequent services.

This chapter also discusses subpoenas, proof of service, judgment orders, and adjournments in child protective proceedings.

5.1 Issuance and Service of Summons in Child Protective Proceedings

After a petition is filed, the court may:

> (1) dismiss the petition; or
>
> (2) issue a summons "reciting briefly the substance of the petition, and requiring the person or persons who have custody or control of the child, or with whom the child may be, to appear personally and bring the child before the court at a time and place stated[.]" MCL 712A.12.

A summons may be issued and served on a party before any juvenile proceeding. MCR 3.920(B)(1). The parties in a child protective proceeding include the "petitioner, child, respondent, and parent, guardian, or legal custodian[.]"[1] MCR 3.903(A)(19)(b).

> **Note:** "'Parent' means the mother, the father as defined in MCR 3.903(A)(7), or both, of the minor. It also includes the term 'parent' as defined in MCR 3.002(20)."[2] MCR 3.903(A)(18). MCR 3.002(20) defines an Indian child's *parent* as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the putative father if paternity has not been acknowledged or established."
>
> "'Guardian' means a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or [MCL] 700.5205, by a court of another state under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202, or a juvenile guardian appointed pursuant to MCL 712A.19a or MCL 712A.19c." MCR 3.903(A)(11).
>
> "'Legal Custodian' means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. It also includes the term 'Indian custodian' as defined in MCR 3.002(15)."[3] MCR 3.903(A)(14). An *Indian custodian* is "any Indian person who has custody of an Indian child under tribal law or custom or

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[1] If the child is of Indian heritage, additional requirements must be followed. See Chapter 19.

[2] Formerly MCR 3.002(10).

[3] Formerly MCR 3.002(7).

> under state law, or to whom temporary physical care, custody, and control have been transferred by the child's parent." MCR 3.002(15).

"An order directed to a parent or a person . . . is not effective and binding on the parent or other person unless opportunity for hearing is given by issuance of summons . . . as provided in [MCL 712A.12 and MCL 712A.13] and until a copy of the order, bearing the seal of the court, is served on the parent or other person as provided in [MCL 712A.13]."[4] MCL 712A.18(4).

A. Contents of Summons

If the court issues a summons, the summons must "direct the person to whom it is addressed to appear at a time and place specified by the court and must:

> (a) identify the nature of the hearing;
>
> (b) explain the right to an attorney and the right to trial by judge or jury, including, where appropriate, that there is no right to a jury at a termination hearing;
>
> (c) if the summons is for a child protective proceeding, include notice that the hearings could result in termination of parental rights; and
>
> (d) have a copy of the petition attached."[5] MCR 3.920(B)(3).

B. Service Requirements

"In a child protective proceeding, a summons must be served on any respondent and any nonrespondent parent." MCR 3.920(B)(2)(b). A person who is not a respondent, but is the child's guardian or legal custodian must also be notified of the petition and served with notice of hearing.[6] *Id.*; MCL 712A.12.

> **Note:** MCR 3.903(C)(12) defines *respondent* as "the parent,[7] guardian,[8] legal custodian,[9] or nonparent adult[10] who is alleged to have committed an offense against a child." Respondent, in termination of parental

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[4] This rule is significant for purposes of collecting reimbursement of the costs of care and service (see Section 14.2), and for other orders affecting adults under MCL 712A.6 and MCL 712A.6b (see Section 4.10).

[5] See SCAO form JC 21, *Summons: Order to Appear (Child Protective Proceedings)*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc21.pdf.

[6] See Section 5.2 for information on notice of hearings.

> rights proceedings, does not include "other persons to whom legal custody has been given by court order, persons who are acting in the place of the mother or father, or other persons responsible for the control, care, and welfare of the child." MCR 3.977(B).[11]
>
> MCR 3.903(C)(8) defines *nonrespondent parent* as "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)."

A noncustodial parent must be personally served with notice of hearing and a copy of the petition.[12] MCL 712A.12; *In re Miller (Julie)*, 182 Mich App 70, 73 (1990).

A summons may also be served on a person having physical custody of the child with the direction to appear with the child for a hearing. MCR 3.920(B)(2)(b). In addition, "[a] [s]ummons may be issued requiring the appearance of any other person whose presence, in the opinion of the judge, is necessary." MCL 712A.12.

The statutory requirements for issuance and service of summonses to custodial parents, or notice of the petition and the time and place of a hearing to a noncustodial parent, are jurisdictional, which means that if they are not fulfilled, an appellate court may declare all proceedings in a case void. *In re Brown (Carrie)*, 149 Mich App 529, 534-542 (1986) (because the jurisdictional requirement in MCL 712A.12, requiring the respondent be personally served, was not complied with, jurisdiction was never established and the Court of Appeals held that orders arising out of the proceedings were void). Cf. *In re Andeson*, 155 Mich App 615, 618-619 (1986) (proceedings were not void when the respondent-parent was properly served with a summons before the adjudicative hearing, the hearing was adjourned, and the respondent-parent was later mailed a notice of hearing but failed to appear).

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[7] "'Parent' means the mother, the father as defined in MCR 3.903(A)(7), or both, of the minor. It also includes the term *parent* as defined in MCR 3.002(20)." MCR 3.903(A)(18). MCR 3.002(20) defines an Indian child's *parent* as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the putative father if paternity has not been acknowledged or established." MCR 3.002(20) was formerly MCR 3.002(10).

[8] MCR 3.903(A)(11) defines a *guardian* as "a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or [MCL] 700.5205, by a court of another state under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202, or a juvenile guardian appointed pursuant to MCL 712A.19a or MCL 712A.19c."

[9] "'Legal Custodian' means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. It also includes the term 'Indian custodian' as defined in MCR 3.002(15)." MCR 3.903(A)(14). An *Indian custodian* is "any Indian person who has custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody, and control have been transferred by the child's parent." MCR 3.002(15) (formerly MCR 3.002(7)).

"Once personal jurisdiction [is] established [by properly serving the respondent with the original summons and petition,] . . . petitioner's preparation and filing of [an] amended petition[] d[oes] not invalidate [] personal jurisdiction that ha[s] already been obtained" even when the respondent is not served with the amended petition. *In re Dearmon/Harverson-Dearmon Minors*, 303 Mich App 684, 693 (2014) ("[b]ecause [the] respondent was properly served with the initial petition and an accompanying summons," personal jurisdiction was established[and] it did not evaporate merely upon the *filing* of the amended petitions").

A party's presence at a hearing does not cure a jurisdictional error. *In re Brown (Carrie)*, 149 Mich App at 541.

Defective service of process on another party to the proceedings does not render those proceedings void with respect to a person to whom service was required. *In re Terry*, 240 Mich App 14, 21 (2000).

1. Manner of Service

The petitioner is "charged with providing [sic] that service of process is accomplished in accordance with the court rules." *In re Adair*, 191 Mich App 710, 715 (1991). See also MCL 712A.13 (judge may designate peace officer or other suitable person to serve summons, notice, or court orders).

Where practicable, service of a summons should be made by personal service. MCL 712A.13. However, if the judge finds that personal service is impracticable, he or she may order service by registered mail or publication, or both.[13] *Id*. See also MCR 3.920(B)(4), which states:

> "(a) Except as provided in [MCR 3.920(B)(4)(b)], a summons required under [MCR 3.920(B)(2) (for child

[10] A *nonparent adult* is a person 18 years old or older who, regardless of the person's domicile, meets all of the following criteria in relation to a child over whom the court takes jurisdiction under MCL 712A.2(b): (1) The person has substantial and regular contact with the child; (2) The person has a close personal relationship with the child's parent or with a "person responsible for the child's health or welfare"; and (3) The person is not the child's parent or a person otherwise related to the child by blood or affinity to the third degree. MCL 712A.13a(1)(h)(*i*)–(*iii*); MCR 3.903(C)(7)(a)-(c).

[11] "[MCR 3.977] applies to all proceedings in which termination of parental rights is sought." MCR 3.977(A)(1).

[12] See Michigan *Absent Parent Protocol: Identifying, Locating, and Notifying Absent Parents in Child Protective Proceedings*, F(3), pp 11-12, at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/APP.pdf.

[13] See SCAO form JC 46, *Motion for Alternative Service*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc46.pdf.

protective proceedings)] must be served by delivering the summons to the party personally.

(b) If the court finds, on the basis of testimony or a motion and affidavit, that personal service of the summons is impracticable or cannot be achieved, the court may by ex parte order direct that it be served in any manner reasonably calculated to give notice of the proceedings and an opportunity to be heard, including publication.

(c) If personal service of a summons is not required, the court may direct that it be served in a manner reasonably calculated to provide notice."

Note: Violations of statutory notice provisions constitute jurisdictional defects, while violations of court rule requirements do not. *In re Mayfield*, 198 Mich App 226, 230-231 (1993). See also *In re SZ*, 262 Mich App 560 (2004), which discussed a conflict between MCR 3.920(B)(4)(b) (requires court to make its decision to order substitute service "on the basis of testimony or a motion and affidavit") and MCL 712A.13 (allows court to order substitute service if it "is satisfied that it is impracticable" to personally serve the summons). In *In re SZ*, *supra* at 564-565, the respondent argued that the trial court improperly allowed service by publication when it failed to comply with the requirement in MCR 3.920(B)(4)(b) that the court's finding that personal service is impracticable or cannot be achieved be based on "testimony" or "a motion and affidavit," and, therefore, lacked jurisdiction over her. The Court of Appeals concluded that MCL 712A.13, not MCR 3.920, controls the determination of whether a court has established jurisdiction over a respondent:

> "We believe that MCL 712A.13 reflects our Legislature's policy considerations concerning the necessary requirements for obtaining jurisdiction over a parent or guardian of a juvenile. Because the issue of service is a jurisdictional one, the statutory provision governs. The plain language of the statute contains no specific requirements concerning what

> types of evidence a court must consider in determining whether substitute service is indicated, or the form in which the evidence must be received. By its silence, MCL 712A.13 permits a court to evaluate evidence other than testimony or a motion and affidavit when determining whether notice can be made by substituted service. We believe that the . . . court rule requirements . . . found in MCR 3.920(B)(4)(b) are restrictions affecting jurisdiction in matters that are usually time-sensitive and for which the Legislature's policy is to seek prompt resolution for the sake of the juvenile involved and, as such, conflict with MCL 712A.13. Therefore, the statute prevails." *In re SZ*, 262 Mich App at 568.

"While MCL 712A.13 allows for alternative methods of service of process, it still requires that the trial court first determine that personal service is impracticable." *In re Adair*, 191 Mich App at 714 (trial court erred by ordering notice by publication before determining whether the Department of Health and Human Services (DHHS) made reasonable efforts to locate the respondent-mother for service by registered mail).

Motions for substituted service must show that personal service of process cannot reasonably be made, and that the substituted method of service is the best method available to provide notice. *Krueger v Williams*, 410 Mich 144, 167-168 (1981). A motion for substituted service should contain sufficient facts to allow the court to determine what specific efforts were made to serve process and why the substituted method should be used. *Krueger*, *supra* at 168-170.

2. Time of Service

MCL 712A.13 provides that "[i]t shall be sufficient to confer jurisdiction if:

> (1) personal service is effected at least 72 hours before the date of hearing;
>
> (2) registered mail is mailed at least five days before the date of hearing if within the state and 14 days if outside the state;

> (3) publication is made once in some newspaper printed and circulated in the county in which [the] court is located at least 1 week before the time fixed in the summons or notice for the hearing."[14] MCL 712A.13.

Failure to meet the requirements of MCL 712A.13 may constitute a jurisdictional defect rendering the proceedings void. *In re Mayfield*, 198 Mich App at 230-232.

MCR 3.920(B)(5) provides additional time requirements for service of a summons:

> "(a) A summons shall be personally served at least:
>
> > (*i*) 14 days before hearing on a petition that sets to terminate parental rights or a permanency planning hearing,
> >
> > (*ii*) 7 days before trial or a child protective dispositional review hearing, or
> >
> > (*iii*) 3 days before any other hearing.
>
> (b) If the summons is served by registered mail, it must be sent at least 7 days earlier than [MCR 3.920(B)(5)(a)] requires for personal service of a summons if the party to be served resides in Michigan, or 14 days earlier than required by [MCR 3.920(B)(5)(a)] if the party to be served resides outside of Michigan.
>
> (c) If service is by publication, the published notice must appear in a newspaper in the county where the party resides, if known, and, if not, in the county where the action is pending. The published notice need not include the petition itself. The notice must be published
>
> > at least once 21 days before a hearing specified in [MCR 3.920(B)(5)(a)(*i*)],
> >
> > 14 days before trial or a hearing specified in [MCR 3.920(B)(5)(a)(*ii*)], or
> >
> > 7 days before any other hearing."

[14] Sufficient "lead time" for the publication of notices in newspapers should be considered. Depending on the county, a newspaper may require as much as two weeks' "lead in" before publication.

C. Subsequent Notices After Failure to Appear

"When persons whose whereabouts are unknown fail to appear in response to notice by publication or otherwise, the court need not give further notice by publication of subsequent hearings, except a hearing on the termination of parental rights." MCR 3.921(E).

> **Note:** If a person fails to appear without reasonable cause after being summoned to do so, he or she may be held in contempt of court and punished accordingly. MCL 712A.13.

5.2 Notice of Hearings in Child Protective Proceedings

Generally, notice of a hearing must be given in writing or on the record at least seven days before the hearing. MCR 3.920(D)(1). However, written notice must be given at least 14 days before a permanency planning hearing or a hearing on a petition requesting termination of parental rights in child protective proceedings.[15] MCL 712A.19a(4); MCL 712A.19b(2); MCR 3.920(D)(3).

> **Note:** Written notice in a permanency planning hearing must also contain "a statement of the purposes of the hearing, including a notice that the hearing may result in further proceedings to terminate parental rights[.]" MCL 712A.19a(4).

"When a child is placed outside the home, notice of the preliminary hearing or an emergency removal hearing under [MCR 3.974(C)(3)[16]] must be given to the parent of the child as soon as the hearing is scheduled."[17] MCR 3.920(D)(2)(b). Notice of the preliminary hearing "may be in person, in writing, on the record, or by telephone." *Id.*

"When a party fails to appear in response to a notice of hearing, the court may order the party's appearance by summons or subpoena."[18] MCR 3.920(D)(4).

"An order directed to a parent or a person . . . is not effective and binding on the parent or other person unless opportunity for hearing is given by . . . notice as provided in [MCL 712A.12 and MCL 712A.13] and until a

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[15] See SCAO form JC 45, *Notice of Hearing*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc45.pdf.

[16] Formerly MCR 3.974(B)(3).

[17] See Section 6.8 for a detailed discussion of preliminary hearings.

[18] See Section 5.1 for information on summonses, and Section 5.5 for information on subpoenas.

copy of the order, bearing the seal of the court, is served on the parent or other person as provided in [MCL 712A.13]."[19] MCL 712A.18(4).

A. Persons Entitled to Notice of Hearings

1. Generally

In child protective proceedings, the court must ensure that the following persons are notified of each hearing:

> "(a) the respondent,[20]
>
> (b) the attorney for the respondent,
>
> (c) the lawyer-guardian ad litem for the child,
>
> (d) subject to [MCR 3.921(D)],[21] the parents, guardian, or legal custodian, if any, other than the respondent,
>
> (e) the petitioner,
>
> (f) a party's guardian ad litem appointed pursuant to these rules,
>
> (g) the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state, and
>
> (h) in accordance with the notice provisions of MCR 3.905, if the court knows or has reason to know the child is an Indian child:
>
> > (*i*) the child's tribe and, if the tribe is unknown, the Secretary of the Interior, and
> >
> > (*ii*) the child's parents or Indian custodian, and if unknown, the Secretary of the Interior, and[22]

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[19] This rule is significant for purposes of collecting reimbursement of the costs of care and service (see Section 14.2), and for other orders affecting adults pursuant to MCL 712A.6 and MCL 712A.6b (see Section 4.10).

[20] "[T]he state deprived respondent of even minimal due process by failing to adequately notify him of proceedings affecting his parental rights and then terminating his rights on the basis of his lack of participation without attempting to remedy the failure of notice." *In re Rood*, 483 Mich 73, 118 (2009).

[21] MCR 3.921(D) governs establishing paternity in child protective proceedings. See Chapter 6. A putative father must establish paternity before he is entitled to notice of proceedings. *In re Gillespie*, 197 Mich App 440, 443-446 (1992).

[22] See Section 19.4 for additional information on notice of proceedings to the Indian child's parent and tribe or Secretary of the Interior.

> (i) any other person the court may direct to be notified." MCR 3.921(B)(1).

2. Dispositional Review Hearings and Permanency Planning Hearings

Before dispositional review hearings and permanency planning hearings, the court must ensure that the following persons receive written notification of each hearing:

> "(a) the agency responsible for the care and supervision of the child,
>
> (b) the person or institution having court-ordered custody of the child,
>
> (c) the parents of the child, subject to [MCR 3.921(D)],[23] and the attorney for the respondent parent, unless parental rights have been terminated,
>
> (d) the guardian or legal custodian of the child, if any,
>
> (e) the guardian ad litem for the child,
>
> (f) the lawyer-guardian ad litem for the child,
>
> (g) the attorneys for each party,
>
> (h) the prosecuting attorney if the prosecuting attorney has appeared in the case,
>
> (i) the child, if 11 years old or older,
>
> (j) if the court knows or has reason to know the child is an Indian child, the child's tribe,[24]
>
> (k) the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state, and
>
> (*l*) if the court knows or has reason to know the child is an Indian child and the parents, guardian,

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[23] MCR 3.921(D) governs establishing paternity in child protective proceedings. See Chapter 6. A putative father must establish paternity before he is entitled to notice of proceedings. *In re Gillespie*, 197 Mich App at 443-446.

[24] See Section 19.4 for additional information on notice of proceedings to the Indian child's parent and tribe or Secretary of the Interior.

> legal custodian, or tribe are unknown, to the Secretary of Interior, and
>
> (m) any other person the court may direct to be notified." MCR 3.921(B)(2). See also MCL 712A.19(5); MCL 712A.19a(4).

MCL 712A.19(5)(f) also requires notification in dispositional review hearings to a nonparent adult who is required to comply with a case service plan.

For children in permanent foster family agreements[25] or relative placements[26] intended to be permanent under MCL 712A.19(4), the notice provisions of MCL 712A.19(5) apply. MCL 712A.19(5).

3. Hearings on Termination of Parental Rights

"Written notice of a hearing to determine if the parental rights to a child shall be terminated must be given to those appropriate persons or entities listed in [MCR 3.921](B)(2), except that if the court knows or has reason to know the child is an Indian child, notice shall be given in accordance with MCR 3.920(C)(1)." MCR 3.921(B)(3). See also MCL 712A.19b(2), which requires the court to ensure that the following persons receive written notification of a hearing on termination of parental rights:

> "(a) The agency. The agency shall advise the child of the hearing if the child is 11 years of age or older.
>
> (b) The child's foster parent or custodian.
>
> (c) The child's parents.
>
> (d) If the child has a guardian, the child's guardian.
>
> (e) If the child has a guardian ad litem, the child's guardian ad litem.
>
> (f) If tribal affiliation has been determined, the Indian tribe's elected leader.[27]
>
> (g) The child's attorney and each party's attorney.

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[25] "'Permanent foster family agreement' means an agreement for a child 14 years old or older to remain with a particular foster family until the child is 18 years old under standards and requirements established by the [DHHS], which agreement is among all of the following: (*i*) The child. (*ii*) If the child is a temporary ward, the child's family. (*iii*) The foster family. (*iv*) The child placing agency responsible for the child's care in foster care." MCL 712A.13a(1)(i).

[26] See Section 8.2(A) for a discussion on relative placements.

[27] See Section 19.4 for additional information on notice of proceedings to the Indian child's parent and tribe or Secretary of the Interior.

(h) If the child is 11 years of age or older, the child.

(i) The prosecutor." MCL 712A.19b(2).

4. Post-termination Review Hearings

"The foster parents (if any) of a child and any preadoptive parents or relative providing care to the child must be provided with notice of and an opportunity to be heard at each hearing." MCR 3.978(B).

5. Juvenile Guardianships

In juvenile guardianship proceedings, the following persons are entitled to notice:

"(1) the child, if 11 years old or older;

(2) the Department of Health and Human Services [DHHS];

(3) the parents of the child, unless parental rights over the child have been terminated;

(4) the juvenile guardian or proposed juvenile guardian;

(5) any court that previously had jurisdiction over the child in a child protective proceeding, if different than the court that entered an order authorizing a juvenile guardianship;

(6) the attorneys for any party;

(7) the prosecuting attorney, if the prosecuting attorney has appeared in the case;

(8) if the court knows or has reason to know the child is an Indian child, the child's tribe, Indian custodian, or if the tribe is unknown, the Secretary of the Interior;[28]

(9) the Michigan Children's Institute [MCI] superintendent;

(10) any other person the court may direct to be notified." MCR 3.921(C).

[28] See Chapter 19 for information on Indian children.

B. Special Notice Provisions for Physicians

If the child is placed outside the home and the DHHS is required to review the case with the child's physician, "then in a judicial proceeding to determine if the child is to be returned to his or her home, the court must allow the child's attending physician of record during a hospitalization or the child's primary care physician to testify regarding the case service plan."[29] MCL 712A.18f(7). The court must notify each physician of the time and place of the hearing. *Id.*

C. Special Notice Provisions for Incarcerated Parties

If a party is incarcerated under the jurisdiction of the Michigan Department of Corrections, specific requirements must be met in order to provide proper notice to the party. MCR 2.004; *In re BAD*, 264 Mich App 66, 75-76 (2004).

Specifically, MCR 2.004(A) applies to:

> "(1) domestic relations actions involving minor children, and
>
> (2) other actions involving the custody, guardianship, neglect, or foster-care placement of minor children, or the termination of parental rights."

1. Petitioner's Responsibility

The party seeking an order regarding a minor child must

> "(1) contact the [D]epartment [of Corrections] to confirm the incarceration and the incarcerated party's prison number and location;
>
> (2) serve the incarcerated person with the petition or motion seeking an order regarding the minor child, and file proof with the court that the papers were served; and
>
> (3) file with the court the petition or motion seeking an order regarding the minor child, stating that a party is incarcerated and providing the party's prison number and location; the caption of the petition or motion shall state that a telephonic or video hearing is required by this rule." MCR 2.004(B).[30]

[29] See Section 13.5 for a detailed discussion of required case review and testimony by child's physician.

2. Court's Responsibility

The court must issue an order requesting the Department of Corrections to permit the incarcerated party to participate in a hearing "by way of a noncollect and unmonitored telephone call or by video conference[.]"[31] MCR 2.004(C). The court's order must include the date and time of the hearing and the incarcerated party's name and prison identification number, and must be served on "the parties and the warden or supervisor of the facility where the incarcerated party resides." *Id.*

The purpose of the telephonic hearing or video conference is to determine:

> "(1) whether the incarcerated party has received adequate notice of the proceedings and has had an opportunity to respond and to participate,
>
> (2) whether counsel is necessary in matters allowing for the appointment of counsel to assure that the incarcerated party's access to the court is protected,
>
> (3) whether the incarcerated party is capable of self-representation, if that is the party's choice,
>
> (4) how the incarcerated party can communicate with the court or the friend of the court during the pendency of the action, and whether the party needs special assistance for such communication, including participation in additional telephone calls or video conferences, and
>
> (5) the scheduling and nature of future proceedings, to the extent practicable, and the manner in which the incarcerated party may participate." MCR 2.004(E).

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[30]Effective January 1, 2015, ADM File No. 2014-06 amended MCR 2.004(B)(3) to require "[a] party seeking an order regarding a minor child" to file a petition or motion that contains a caption "stat[ing] that a telephonic or video hearing is required by [MCR 2.004]." (Emphasis supplied to show newly-added language.).

[31]Effective January 1, 2015, ADM File No. 2014-06 amended 2.004(C) and (E) to allow an incarcerated party to participate in a hearing or conference regarding a minor child by video conference (as opposed to only through a telephonic conference).

3. Documentation and Correspondence to Incarcerated Party

All court documents or correspondence mailed to an incarcerated party must include the incarcerated party's name and prison number on the envelope. MCR 2.004(D).

4. Denial of Relief

If the requirements of MCR 2.004 are not satisfied, the court may not grant the relief requested by the moving party. MCR 2.004(F). However, this provision does not apply "if the incarcerated party actually does participate in a telephone call or video conference or if the court determines that immediate action is necessary on a temporary basis to protect the minor child." *Id.*[32]

"[T]o comply with MCR 2.004, the moving party and the court must offer the [incarcerated party] 'the opportunity to participate in' each proceeding in a child protective action. *In re Mason*, 486 Mich 142, 154 (2010). "[P]articipation through 'a telephone call' [or video conference] during one proceeding will not suffice to allow the court to enter an order at another proceeding for which the [incarcerated party] was not offered the opportunity to participate." *In re Mason*, *supra* at 154-155.

"[E]xcluding a[n incarcerated party from the opportunity to participate] for a prolonged period of the proceedings can[not] be considered harmless error." *In re DMK*, 289 Mich App 246, 255 (2010).

5. Sanctions

The court may impose sanctions if it finds that an attempt was made to prevent an incarcerated party from obtaining information on the case in order to deny the incarcerated party access to the courts. MCR 2.004(G).

6. Parent's Due Process Right to be Present at Hearing

If a respondent-parent is incarcerated, the court must balance the parent's compelling interest in his or her parental rights, the

[32]Effective January 1, 2015, ADM File No. 2014-06 amended MCR 2.004(F) (allowing the court to deny relief to the moving party if the incarcerated party has not been afforded the opportunity to participate as described in MCR 2.004) to provide that it does not apply if the incarcerated party actually participates by telephone call or video conference, or if the court determines immediate temporary action is necessary to protect the minor child. (Emphasis supplied to show newly-added language.

incremental risk of an erroneous deprivation of that interest if the parent is not present at the hearing, and the government's interest in avoiding the burden of securing the parent's presence at the hearing, to determine whether due process requires the parent's presence at a hearing to terminate parental rights. *Mathews v Eldridge*, 424 US 319, 335 (1976); *In re Vasquez*, 199 Mich App 44, 46-50 (1993) (due process did not require presence of parent in prison in Texas, where parent was well represented by counsel at the hearing); *In re Render*, 145 Mich App 344, 348-350 (1985) (due process required presence of parent incarcerated in county jail, where parent's attorney had learned of parent's incarceration the day of the trial).

D. Notice Requirements Under the Safe Delivery of Newborns Law

The Safe Delivery of Newborns Law,[33] MCL 712.1 *et seq.*, permits a parent to leave a newborn with an emergency service provider without expressing an intent of returning for the newborn. See MCL 712.1(2)(n). After a newborn is surrendered, he or she must be placed in the protective custody of a child placing agency. MCL 712.5; MCL 712.7(a). The notice requirements are met if the child placing agency makes reasonable efforts to identify, locate, and provide published notice of the surrender to the nonsurrendering parent within 28 days. MCL 712.7(f). If the identity and address of the nonsurrendering parent are unknown, the child placing agency must provide notice of the newborn's surrender by publication in a newspaper of general circulation in the county in which the newborn was surrendered. *Id.*

5.3 Waiving Notice of Hearing or Service of Process

A. Waiver of Defects by Appearance and Participation in Hearing

If a party appears and participates in a hearing without having been properly served, that party waives any "defects in service with respect to that hearing unless objections regarding the specific facts are placed on the record. If a party appears or participates without an attorney, the court shall advise the party that the appearance and participation waives notice defects and of the party's right to seek an attorney." MCR 3.920(H).

[33] See Section 8.11 for a detailed discussion of child placements under the Safe Delivery of Newborns Law.

B. Waiver of Notice of Hearing or Service of Process in Writing

A party may waive notice of hearing or service of process by submitting a waiver in writing.[34] MCR 3.920(F). When a party waives service of a summons that is required by MCR 3.920(B), the party must be advised of:

> (1) the nature of the hearing;
>
> (2) the right to counsel;
>
> (3) the right to trial by judge or jury (unless it is a termination hearing where there is no right to a jury); and
>
> (4) the fact that the hearing could result in termination of parental rights if the summons is for a child protective proceeding. MCR 3.920(B)(3); MCR 3.920(F).

Where only a petition requesting temporary custody of a child has been filed, a respondent-parent's written waiver of service of process and notice of hearing is not effective to waive the parent's rights to service of a petition to terminate parental rights. *In re Atkins*, 237 Mich App 249, 251-252 (1999).

5.4 Subsequent Services

"After a party's first appearance before the court, subsequent notice of proceedings and pleadings shall be served on that party or, if the party has an attorney, on the attorney for the party as provided in [MCR 3.920(D)], except that a summons must be served for trial or termination hearing as provided in [MCR 3.920(B)]." MCR 3.920(G).

Failure to personally serve a parent with a summons as required by MCL 712A.12 before termination of that parent's parental rights is a jurisdictional defect that renders the proceedings void with regard to that parent. *In re Atkins*, 237 Mich App 249, 250-251 (1999); *In re Gillespie*, 197 Mich App 440, 442 (1992).

Where a dispositional order has been entered placing a child in the temporary custody of the court, the court may not proceed to a hearing on termination of parental rights without issuing and serving a fresh summons. MCL 712A.20; *In re Atkins*, 237 Mich App at 251.

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[34] See SCAO Form JC 23, *Waiver of Summons/Notice of Hearing*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc23.pdf.

5.5 Subpoenas

MCR 3.920(E) states that:

> "(1) The attorney for a party or the court on its own motion may cause a subpoena to be served upon a person whose testimony or appearance is desired.
>
> (2) It is not necessary to tender advance fees to the person served a subpoena in order to compel attendance.
>
> (3) Except as otherwise stated in this subrule, service of a subpoena is governed by MCR 2.506."

5.6 Proof of Service

A proof of service must identify the papers being served. MCR 3.920(I)(4). For papers being served on a foster parent, preadoptive parent, or relative caregiver, a proof of service must "be maintained in the confidential social file as identified in MCR 3.903(A)(3)(b)(*vii*)." MCR 3.920(I)(4).

If a party fails to file a proof of service, it will not affect the validity of the service. MCR 3.920(I)(5).

A. Proof of Service For Summons

Proof of service of a summons must be made in accordance with MCR 2.104(A). MCR 3.920(I)(1).

MCR 2.104(A) specifies that proof of service may be made by any of the following:

> "(1) written acknowledgment of the receipt of a summons and a copy of the complaint, dated and signed by the person to whom the service is directed or by a person authorized under these rules to receive the service of process;
>
> (2) a certificate stating the facts of service, including the manner, time, date, and place of service, if service is made within the State of Michigan by
>
> > (a) a sheriff,
> >
> > (b) a deputy sheriff or bailiff, if that officer holds office in the county in which the court issuing the process is held,

(c) an appointed court officer,

(d) an attorney for a party; or

(3) an affidavit stating the facts of service, including the manner, time, date, and place of service, and indicating the process server's official capacity, if any."

"The place of service must be described by giving the address where the service was made or, if the service was not made at a particular address, by another description of the location." MCR 2.104(A).

B. Proof of Service For Other Papers

Proof of service of other papers permitted or requiring service must be made in accordance with MCR 2.107(D). MCR 3.920(I)(2).

MCR 2.107(D) specifies that unless MCR 2.104, MCR 2.105, or MCR 2.106 provide otherwise, the proof of service of other papers required or permitted to be served may be made by any of the following:

(1) written acknowledgment of service;

(2) affidavit of the person making the service;

(3) a statement regarding the service verified under MCR 2.114(B); or

(4) other proof satisfactory to the court. MCR 2.107(D).

The proof of service may be added to the filed paperwork. MCR 2.107(D). The proof of service must also be filed "promptly and at least at or before a hearing to which the paper relates." *Id.*

C. Proof of Service By Publication

Proof of service by publication must be made in accordance with MCR 2.106(G)(1) and MCR 2.106(G)(3), if the publication is accompanied by a mailing. MCR 3.920(I)(3).

MCR 2.106(G)(1) specifies that proof of service by publication may be proven as follows:

"(1) Publication must be proven by an affidavit of the publisher or the publisher's agent

(a) stating facts establishing the qualification of the newspaper in which the order was published,

(b) setting out a copy of the published order, and

> (c) stating the dates on which it was published." MCR 2.106(G)(1).

MCR 2.106(G)(3) specifies that proof of service by publication accompanied by a mailing may be proven as follows:

> "(3) Mailing must be proven by affidavit. The affiant must attach a copy of the order as mailed, and a return receipt."

5.7 Judgments and Orders

"The form and signing of judgments are governed by MCR 2.602(A)(1) and [MCR 2.602(A)](2)." MCR 3.925(C).

MCR 2.602(A) specifically states:

> "(1) Except as provided in this rule and in MCR 2.603, all judgments and orders must be in writing, signed by the court and dated with the date they are signed.
>
> (2) The date of signing an order or judgment is the date of entry."

"Judgments and orders may be served on a person by first-class mail to the person's last known address." MCR 3.925(C).

5.8 Adjournments and Continuances in Child Protective Proceedings

In child protective proceedings, adjourning a trial or hearing should only be granted for good cause after the court takes the child's best interests into consideration and where the adjournment is for as short of a period as possible.[35] MCR 3.923(G). In order for a court to find good cause, "'a legally sufficient or substantial reason' must first be shown." *In re Utrera*, 281 Mich App 1, 10-12 (2008) (although the court erred by failing to find good cause or consider the child's best interests to support its multiple adjournments, reversal was not required when the respondent-mother contributed to the adjournments on several occasions and failed to show how she was prejudiced by them).

The court should not adjourn a hearing or grant a continuance if it is solely upon stipulation of counsel or for a party's convenience. MCL

[35] See Section 7.7(D) for a detailed discussion of adjourning preliminary hearings, and Section 12.2 for a detailed discussion of time requirements for trials.

712A.17(1). Rather, the adjournment must be for good cause with factual findings on the record and where one of the following applies:

> "(a) The motion for the adjournment or continuance is made in writing not less than 14 days before the hearing.
>
> (b) The court grants the adjournment or continuance upon its own motion after taking into consideration the child's best interests. An adjournment or continuance granted under this subdivision shall not last more than 28 days unless the court states on the record the specific reasons why a longer adjournment or continuance is necessary." MCL 712A.17(1).

Chapter 6: Establishing Paternity For Child Protective Proceedings

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In this chapter. . .

One of the most important steps in child protective proceedings is identifying a child's father or determining that he cannot be found. In identifying the father, it is important to note the type of father involved because the type of father involved dictates which procedure the court must follow to properly proceed with child protective proceedings. This chapter addresses the different types of fathers found in the law.

This chapter also provides a general overview of establishing paternity through the Paternity Act, the Acknowledgment of Parentage Act, the Revocation of Paternity Act, and the Genetic Parentage Act. The chapter discusses the procedures used to identify a putative father under the Adoption Code and through child protective proceedings.

This chapter also briefly introduces the Uniform Interstate Family Support Act (UIFSA). This chapter does not, however, discuss child support, confinement expenses, or attorney fees in relation to establishing a legal father.

6.1 Identifying the Father

It is important that all parents involved in a child's life are included in the child protective proceedings as soon as possible. National Council of Juvenile and Family Court Judges, *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases*, p 33, available at http://www.ncjrs.gov/pdffiles/resguid.pdf. Early identification and involvement of a noncustodial legal father who is actively involved in a child's life may allow him to serve as a safe and permanent placement for a child. On the other hand, an absent and uninvolved legal father should be located, made a respondent to the petition, and, if appropriate, have his parental rights terminated.

Timely resolving any paternity issues as early as possible will prevent later delays in proceedings and disruption of permanency plans. National Council of Juvenile and Family Court Judges, *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, p 10, available at http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/aandpguidelinesbookcompact.pdf.

As a useful tool to guide the court through the procedures of finding and notifying absent fathers during a child protective proceeding, the State Court Administrative Office (SCAO) developed the *Michigan Absent Parent Protocol: Identifying, Locating, and Notifying Absent Parents in Child Protective Proceedings*. This protocol is available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/APP.pdf.

6.2 Types of Fathers for Purposes of Paternity Act[1]

The type of father involved dictates which procedures the court must follow to properly proceed with child protective proceedings. The procedures for termination of a putative father's parental rights differ from the procedures followed for termination of a legal father's parental rights.

This section contains key definitions of the different types of fathers found in the law.

The different types of fathers are:

(1) A legal father.

(2) A putative father.

(3) An equitable father.

[1] See Section 6.3 for information on the types of fathers addressed in the Revocation of Paternity Act.

A. Legal Father

A legal father is a man who the law has presumed to be a child's father or a man who the court has determined to be a child's father. Specifically, MCR 3.903(A)(7) indicates that a legal father is one of the following:

> (1) A man married to the child's mother at any time from the child's conception to the child's birth, unless the court determines that the child is not an issue of the marriage.
>
> > **Note:** If the parties are married at the time of conception or birth, then the child is presumed to be an issue of the marriage, with the husband being the legal father to the child. *Serafin v Serafin*, 401 Mich 629, 636 (1977).
>
> (2) A man who legally adopts a child.
>
> (3) A man determined to be the child's father through an order of filiation or a paternity judgment. See Section 6.4.
>
> (4) A man judicially determined to have parental rights.
>
> (5) A man who established paternity under an acknowledgment of parentage. See Section 6.5.

Once a legal father is determined, he has the rights to care, custody, control, and earnings of the child, and the right to inherit from the child. MCL 722.2; MCL 700.2103(b).

> **Note:** A biological father is not always the legal father. *In re KH*, 469 Mich 621, 635 (2004).

B. Putative Father

A putative father is an alleged biological father of a child who has no legal father. MCR 3.903(A)(24). See also MCL 722.1433(c), which defines an *alleged father* as "a man who by his actions could have fathered the child."

Specifically, a putative father is one of the following:

> (1) A man claiming to be the biological father of a child born out of wedlock.
>
> (2) A man who a child's mother claims is the biological father to a child born out of wedlock.

> (3) A man claiming to be the biological father to a child born to a married man and woman, but not an issue of the marriage.

Once a child has a legal father, there cannot be a putative father. See *In re KH*, 469 Mich at 635-637.

1. Child Born Out of Wedlock

A man may not be identified as a putative father until the child is determined to have been born out of wedlock. *In re KH*, 469 Mich at 630.

MCL 710.22(h) defines a *child born out of wedlock* as "a child conceived and born to a woman who was not married from the conception to the date of birth of the child, or a child whom the court has determined to be a child born during a marriage but not the issue of that marriage."

2. Notice of Intent to Claim Paternity

Before the birth of a child born out of wedlock, a man claiming to be the child's father may file a verified notice of intent to claim paternity with the court in any county within Michigan. MCL 710.33(1). The notice must be made under oath and contain the putative father's address. *Id.*

A man filing a notice of intent to claim paternity is presumed to be the child's father, unless the child's mother denies that the man is the child's father. MCL 710.33(2). The man filing a notice also creates a rebuttable presumption that he is the child's father in child protective proceedings under the Juvenile Code. *Id.*

A man who timely files a notice of intent to claim paternity is entitled to notice of any hearing that involves determining the father's identity or parental rights termination involving that child. MCL 710.33(3). The notice is also admissible in paternity proceedings. MCL 710.33(2). See Section 6.4 for additional information on paternity proceedings.

On the next business day following receipt of the notice, the court must forward the notice of intent to claim paternity to the vital records division of the Michigan Department of Community Healthy (MDCH). MCL 710.33(1). Once the vital records division receives the notice, it must send a copy of the notice by first-class mail to the child's mother (if her address is indicated on the notice). *Id.*

> **Note:** MCL 710.33 is silent on how the vital records division is to handle a notice that does not indicate the mother's address.

3. Rebutting Presumption of Legitimacy

A putative father can only exist where a child has no legal father. *In re KH*, 469 Mich at 635-637. Because a child born to a married man and woman is presumed to be an issue of that marriage, the mother or legal father may only rebut the presumption. *In re KH*, *supra* at 635; *Serafin*, 401 Mich at 636. If the mother or legal father does not take any steps to formally rebut this presumption, then the man married to the mother at the time of conception or birth is the legal father of the child. See *In re KH*, *supra* at 635. In order to rebut the presumption, clear and convincing evidence must be presented. *Serafin*, *supra* at 636.

> **Note:** Rebutting the presumption of legitimacy is limited to a mother or legal father. *In re KH*, 469 Mich at 635.

A biological father does not have a due process right to establish and maintain a relationship with his child when the mother gave birth to the child while married to another man. *Aichele v Hodge*, 259 Mich App 146, 167-168 (2003); *Michael H v Gerald D*, 491 US 110, 111-112 (1989).

C. Equitable Father

An equitable father is a man to whom the court has granted legal father status even though he is not the child's biological or legal father. *Atkinson v Atkinson*, 160 Mich App 601, 610-611 (1987). In order for a man to be an equitable father, he must establish all of the following:

> (1) He is married to the child's mother.
>
> (2) He is not the child's biological father.
>
> (3) Both he and the child mutually acknowledge a relationship as father and child, or the child's mother has cooperated in the development of a father-child relationship over a period of time before filing for divorce.
>
> (4) He desires to have parental rights to the child.
>
> (5) He is willing to pay child support. *Atkinson*, 160 Mich App at 608-609.

If the court recognizes a man as an equitable father, that status is permanent, and he possesses all of the rights and responsibilities of a legal parent. *York v Morofsky*, 225 Mich App 333, 337 (1997). However, only a man married to the child's mother at the time the child was born or conceived may be recognized as an equitable parent. See *Van v Zahorik*, 460 Mich 320, 331-334 (1999) (Court refused to extend the equitable parenthood doctrine to unmarried persons); *Killingbeck v Killingbeck*, 269 Mich App 132, 142 (2005) (Court refused to extend the equitable parenthood doctrine to an alleged father who did not marry the child's mother until three years after the child's birth).

Once established, an equitable father is estopped from denying paternity. *Nygard v Nygard*, 156 Mich App 94, 95-97 (1986) (a man who dissuaded a child's mother from placing the child for adoption and who agreed to raise the child as his own is estopped from denying his obligation to support the child); *Johnson v Johnson*, 93 Mich App 415, 419-420 (1979) (a man who married a pregnant woman knowing he was not the child's biological father, but who held himself out as the child's father for more than nine years, is estopped from denying paternity). But see *Bergan v Bergan*, 226 Mich App 183, 184-185, 187-188 (1997) (estoppel is *not* proper where a child's mother falsely led her plaintiff husband to believe that he was the child's biological father, and where the "plaintiff made no implied representation that he would raise the child as his own").

Identification of a child's equitable father precludes any later determination that the child was born out of wedlock; consequently, the child's mother has no standing to pursue a paternity action against any other man concerning that child. *Coble v Green*, 271 Mich App 382, 388-389 (2006) (a legal malpractice action involving the biological father of the child at issue in *York v Morofsky*, 225 Mich App 333 (1997)).

> **Note:** The *Coble* case arose when the equitable father named in the *York* case (Morofsky) failed to pay child support. *Coble*, 271 Mich App at 384. The child's mother initiated a paternity action against the child's biological father (Coble) and the trial court ordered Coble to pay child support. *Coble, supra* at 384. In disposing of Coble's malpractice action against the attorney who represented him in the paternity action, the Court reiterated the permanent and exclusive status of an individual determined to be the equitable parent of the child:
>
> > "Because a court determination that a man is the equitable father of a child is mutually exclusive of a determination that the child was born out of wedlock, an equitable parentage order precludes the mother from having standing to assert a

paternity action regarding that child." *Coble*, 271 Mich App at 383.

6.3 Types of Fathers for Purposes of Revocation of Paternity Act

A. Presumed Father

MCL 722.1433(e) defines a *presumed father* as "a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth."

"[U]nder the Paternity Act, the custodial rights of a presumed father . . . are significant and warrant due process protection[,]" . . . [and] the RPA's definition of a 'presumed father' clearly implies that the presumed father is afforded the legal right of parenthood, unless that presumption is rebutted in a successful action under the act." *Graham v Foster*, ___ Mich App ___, ___ (2015) (finding that, under MCR 2.205(A), the presumed father was a necessary party to the RPA action that sought court determination that the child was born out of wedlock),[2] citing *Aichele v Hodge*, 259 Mich App 146, 164 (2003).

B. Affiliated Father

MCL 722.1433(b) defines an *affiliated father* as "a man who has been determined in a court to be the child's father."

"[I]t seems plain that the Legislature intended to recognize the existence of an affiliated father when there was an actual determination of paternity; that is, when there was a dispute or question presented regarding the man's paternity and the matter was in fact resolved by a court. A judicial order establishing this determination would constitute an order of filiation for purposes of the Revocation of Paternity Act[, MCL 722.1433(f)[3]]." *Glaubius v Glaubius*, 306 Mich App 157, 168 (2014). Because the Revocation of Paternity Act's definition of *order of filiation*, MCL 722.1433(f), "makes no reference to an order entered pursuant to the Paternity Act[,]" such an order may arise from procedures outside the Paternity Act. *Glaubius*, 306 Mich App at 168-169. Accordingly, "[a]bsent any indication of . . . specificity [as to under which Act an order of filiation may arise], any judicial order establishing a determination in court that a man is a child's father could demonstrate the determination of

[2] For a detailed discussion of actions filed under the RPA that seek the court's determination that a child is born out of wedlock, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 3.

[3] Formerly MCL 722.1433(5).

an affiliated father within the meaning of [MCL 722.1433(b)[4]]." *Glaubius*, 306 Mich App at 169.

In *Glaubius*, the Court of Appeals stated that where "the court makes a determination regarding a man's paternity and correspondingly enters an ordering [sic] establishing this determination" during a divorce or custody proceeding, "nothing in the plain language of [MCL 722.1433(b)[5]] or [MCL 722.1433(f)[6]] . . . suggest[s] that such a determination . . . would not establish a man's status as an affiliated father." *Glaubius*, 306 Mich App at 169. However, the Court cautioned that "not all divorce proceedings squarely address the question of a child's paternity." *Id.* at 170. "Whether a particular divorce proceeding resolved the question of paternity will depend on the facts of the particular case and the determinations expressed in the divorce judgment. Specifically, whether divorce proceedings and a resulting divorce judgment establish the man as an affiliated father within the meaning of [MCL 722.1433(b)] necessarily depends on whether there was a determination in court that the man was the child's father. . . . [T]here must have been a dispute or question aboutthe issue of paternity and an actual resolution of the matter by the trial court, culminating in a judicial order establishing the man as the child's father." *Glaubius*, 306 Mich App at 170.

C. Acknowledged Father

MCL 722.1433(a) defines an *acknowledged father* as "a man who has affirmatively held himself out to be the child's father by executing an acknowledgment of parentage under the [A]cknowledgment of [P]arentage [A]ct, . . . MCL 722.1001 to [MCL] 722.1013."

D. Genetic Father

MCL 722.1433(d) defines a *genetic father* as "a man whose paternity has been determined solely through genetic testing under the paternity act, . . . MCL 722.711 to [MCL] 722.730, the summary support and paternity act, [MCL 722.1491 to MCL 722.1503,] or the genetic parentage act, [MCL 722.1461 to MCL 722.1475]."

6.4 Paternity

A man who fathers a child out of wedlock may be considered a child's legal father under an order of filiation. MCR 3.903(A)(7)(c). Statutes that

[4] Formerly MCL 722.1433(2).

[5] Formerly MCL 722.1433(2).

[6] Formerly MCL 722.1433(5).

"deal[] . . . with the determination of a child's legal father" include the Acknowledgment of Parentage Act, MCL 722.1001 *et seq.*,[7] the Paternity Act, MCL 722.711 *et seq.*, the Revocation of Paternity Act, MCL 722.1431 *et seq.*, and the Genetic Parentage Act, MCL 722.1461 *et seq.*, and courts should "construe these statutes in *pari materia*." *In re E R Moiles (Moiles I)*, 303 Mich App 59, 69 (2013), rev'd in part and vacated in part on other grounds by 494 Mich 944 (2014).

An action under the Paternity Act cannot be raised if a father has already acknowledged paternity through an acknowledgment of parentage or an adjudication of paternity has already occurred in another state. MCL 722.714(2). However, under the Revocation of Paternity Act, "[t]he mother, the acknowledged father, an alleged father, or a prosecuting attorney may file an action for revocation of an acknowledgment of parentage." MCL 722.1437(1). See Section 6.5 for a detailed discussion of acknowledgment of parentage, and Section 6.8 for a detailed discussion of paternity adjudication in another state.

> **Note:** "The prosecuting attorney and the [DHHS] may enter into an agreement to transfer the prosecutor's responsibilities under [the Revocation of Paternity Act] to 1 one of the following:
>
> > (a) The friend of the court, with the approval of the chief judge of the circuit court.
> >
> > (b) An attorney employed or contracted by the county under . . . MCL 49.71.
> >
> > (c) An attorney employed by, or under contract with, the [DHHS]." MCL 722.1437(2).
>
> "A proceeding under [MCL 722.1437] is conducted on behalf of the state and not as the attorney for any other party." MCL 722.1437(3).

For a detailed discussion of the Paternity Act, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 3.

6.5 Acknowledgment of Parentage

A man who fathers a child out of wedlock may be considered a legal father to the child if he joins the child's mother in acknowledging the child as his own. MCL 722.1003(1). An acknowledgment properly signed and filed with the court establishes a child's paternity. MCL 722.1004.

[7] The Acknowledgment of Parentage Act is discussed in Section 6.5.

> **Note:** For purposes of the Acknowledgment of Parentage Act, MCL 722.1002(b) defines a *child* as "a child conceived and born to a woman who was not married at the time of conception or the date of birth of the child, or a child that the circuit court determines was born or conceived during a marriage but is not the issue of that marriage."

"'[T]he Acknowledgment of Parentage Act does not prohibit a child from being acknowledged by a man that is not his or her biological father' . . . [when the] man honestly, but mistakenly, believe[s] that he [is] the biological father of a child and sign[s] an acknowledgment of parentage so believing." *In re E R Moiles (Moiles I)*, 303 Mich App 59, 72-73 (2013), rev'd in part and vacated in part on other grounds by 494 Mich 944 (2014), quoting *In re Daniels Estate*, 301 Mich App 450, 456 (2013).

The child must bear the same relationship to the mother and acknowledging father as a child born or conceived to a married mother and father and must have "identical status, rights, and duties of a child born in lawful wedlock[.]" MCL 722.1004.

Once an acknowledgment of parentage has been filed and the putative father has established a custodial relationship with the child or provided appropriate regular and substantial support or care for the mother during pregnancy or for both mother and child after the child's birth, a legal father's parental rights may only be involuntarily terminated pursuant to a stepparent adoption or pursuant to the Juvenile Code. MCL 710.39(2). See Chapter 17 for a detailed discussion of terminating parental rights.

Because an acknowledgment of parentage "legally establishe[s] paternity and confer[s] the status of natural and legal father on the man executing the acknowledgment," an order of filiation cannot be entered under the Paternity Act as long as the acknowledgment of parentage remains valid and has not been revoked. *Sinicropi v Mazurek*, 273 Mich App 149, 152 (2006). According to the Court of Appeals,

> "If an acknowledgment of parentage has been properly executed, subsequent recognition of a person as the father in an order of filiation by way of a paternity action cannot occur unless the acknowledgment has been revoked." *Sinicropi*, 273 Mich App at 165.

"The [child's] mother, the acknowledged father, an alleged father,[8] or a prosecuting attorney may file an action for revocation of an

[8] "An alleged father may not bring an action under [MCL 722.1437] if the child is conceived as the result of acts for which the alleged father was convicted of criminal sexual conduct under . . . MCL 750.520b to [MCL] 750.520e." MCL 722.1443(14).

acknowledgment of parentage."[9] MCL 722.1437(1). However, an action for revocation may not be filed "if the child is under the court jurisdiction under . . . MCL 712A.1 to [MCL 712A.32], and a petition has been filed to terminate the parental rights to the child, unless the court having jurisdiction under . . . MCL 712A.1 to [MCL] 712A.32, first finds that allowing an action under [MCL 722.1437] would be in the best interests of the child." MCL 722.1443(15).

> **Note:** "The prosecuting attorney and the [DHHS] may enter into an agreement to transfer the prosecutor's responsibilities under [the Revocation of Paternity Act] to 1 one of the following:
>
> > (a) The friend of the court, with the approval of the chief judge of the circuit court.
> >
> > (b) An attorney employed or contracted by the county under . . . MCL 49.71.
> >
> > (c) An attorney employed by, or under contract with, the [DHHS]." MCL 722.1437(2).
>
> "A proceeding under [MCL 722.1437] is conducted on behalf of the state and not as the attorney for any other party." MCL 722.1437(3).

"A judgment entered under [the Revocation of Paternity Act] does not relieve a man from a support obligation for the child or the child's mother that was incurred before the action was filed or prevent a person from seeking relief under applicable court rules to vacate or set aside a judgment." MCL 722.1443(3). MCL 722.1443(3) "allows a person who has obtained a judgment under the RPA to seek relief from prior child support orders under [MCR] 2.612." *Adler v Dormio*, 309 Mich App 702, 709 (2015) (noting that "MCL 722.1443(3) specifically allows a defendant to resort to applicable court rules to seek relief from prior support orders[,]" and that "MCR 2.612(C)(1) expressly provides for such relief and does not limit the type of orders from which relief may be sought[]").

For a detailed discussion of the Acknowledgment of Parentage Act and the Revocation of Paternity Act, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 3.

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[9] MCL 722.1433(a) defines an *acknowledged father* as "a man who has affirmatively held himself out to be the child's father by executing an acknowledgment of parentage under the [A]cknowledgment of [P]arentage [A]ct, . . . MCL 722.1001 to [MCL] 722.1013." MCL 722.1433(c) defines an *alleged father* as "a man who by his actions could have fathered the child."

6.6 Genetic Testing

A. Paternity Act

This subsection contains a very brief overview of genetic testing under the Paternity Act. For additional information on genetic testing under the Paternity Act, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 3.

Under the Paternity Act, before trial, on its own motion or pursuant to a party's request, a court must order a mother, child, and alleged father to submit to genetic testing.[10] MCL 722.714(9); MCL 722.716. When a verified complaint is filed in accordance with the Paternity Act, neither a search warrant nor an evidentiary hearing is required prior to the court ordering blood tests. *Bowerman v MacDonald*, 431 Mich 1, 3 (1988).

MCL 722.716(2) requires the genetic testing to be conducted by a person accredited for paternity determination through a nationally recognized scientific organization. The testing consists of "blood or tissue typing determinations that may include, but are not limited to, determinations of red cell antigens, red cell isoenzymes, human leukocyte antigens, serum proteins, or DNA identification profiling, to determine whether the alleged father is likely to be, or is not, the father of the child." MCL 722.716(1).

> **Note:** A scientific discussion of genetic testing is outside the scope of this benchbook.

B. Revocation of Paternity Act

Under the Revocation of Paternity Act, MCL 722.1443(5) requires the court to "order the parties to an action or motion under [the Revocation of Paternity Act, MCL 722.1431 *et seq.*,] to participate in and pay for blood or tissue typing or DNA identification profiling to assist the court in making a determination under [the Revocation of Paternity Act][, and the] [b]lood or tissue typing or DNA identification profiling shall be conducted in accordance with . . . MCL 722.716." However, "[t]he results of blood or tissue typing or DNA identification profiling are not binding on a court in making a determination under [the Revocation of Paternity Act]." MCL 722.1443(5). See also *Helton v Beaman*, 304 Mich App 97, 110 (2014) (opinion by O'Connell, J.) ("DNA results are not binding on a court making a determination under the [Revocation of Paternity Act][,]

[10] See SCAO form CCFD 04, *Order for Blood or Tissue Typing or DNA Profile*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/safedeliveryofnewborn/ccfd04.pdf.

MCL 722.1443(5)[, and t]hat statutory declaration gives circuit courts discretion to consider other factors when determining whether to revoke an acknowledgment of parentage[]"), aff'd on other grounds; *Helton*, 304 Mich App at 123 (Kelly, J., concurring) (agreeing with Judge O'Connell's discussion related to DNA results), aff'd on other grounds.

C. Genetic Parentage Act

A child born out of wedlock[11] is considered to be a man's biological child "if all of the following are true:

> (a) The alleged father[12] or mother is receiving services from a title IV-D agency.
>
> (b) The mother, child, and alleged father submitted to blood or tissue typing determinations that may include, but are not limited to, determinations of red cell antigens, red cell isoenzymes, human leukocyte antigens, serum proteins, or DNA identification profiling,[13] to determine whether the alleged father is likely to be, or is not, the father of the child.
>
> (c) A blood or tissue typing or DNA identification profiling was conducted by a person accredited for paternity determinations by a nationally recognized scientific organization, including, but not limited to, the American association of blood banks and approved by the department of [health and] human services.
>
> (d) The probability of paternity determined by the qualified person described in subdivision (c) conducting the blood or tissue typing or DNA identification profiling is 99% or higher.
>
> (e) The mother and alleged father sign a form created by the [DHHS] agreeing to submit to the test. The form created under this subdivision shall include, but not be limited to, the following information:
>
> > (*i*) A summary of how the tests will be conducted.

[11] MCL 722.1463(b) defines *child born out of wedlock* as "a child conceived and born to a woman who was not married from the conception to the date of birth of the child or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage."

[12] MCL 722.1463(a) defines *alleged father* as "a man who by his actions could have fathered the child."

[13] MCL 722.1463(c) defines *DNA identification profiling* as that term is defined under the Paternity Act, MCL 722.711.

(*ii*) A summary of how the test results will establish or exclude the alleged father as the child's father.

(*iii*) That if genetic testing establishes paternity, the mother shall be granted initial custody of the child, without prejudice to the determination of either parent's custodial rights, until otherwise determined by the court or otherwise agreed upon by the parties in writing and acknowledged by the court.

(*iv*) That the parties consent to the general personal jurisdiction of the court of record of this state regarding the issues of the support, custody, and parenting time of the child." MCL 722.1467(1).

Note: "If the results of the analysis of genetic testing material from 2 or more persons indicate a probability of paternity greater than 99%, the accredited person described in [MCL 722.1467(1)(c)] shall conduct additional genetic paternity testing until all but 1 of the alleged fathers is eliminated, unless the dispute involves 2 or more alleged fathers who have identical DNA." MCL 722.1467(2).

"Genetic testing that determines a man is the biological father of a child under [the Parentage Act, MCL 722.1461 *et seq.*,] establishes paternity." MCL 722.1469(1).

An action under the Genetic Parentage Act cannot be raised if "[the child's father has previously acknowledged paternity under the acknowledgment of parentage act, . . . MCL 722.1001 to [MCL] 722.1013, or if the child's paternity has been established under the law of this or another state."[14] MCL 722.1465(a).

1. Custody Determination

If the genetic testing establishes a father is a child's biological father, the mother has initial custody over the minor child until the court determines or the parties agree otherwise. MCL 722.1469(1). If the parties agree otherwise, it must be in writing and acknowledged by the court. *Id.*

[14] An action is also precluded if the child is subject to a pending adoption proceeding, but that discussion is outside the scope of this benchbook. MCL 722.1465(b). See Section 6.4 for a brief discussion of the Paternity Act, and Section 6.5 for a discussion of the Acknowledgment of Parentage Act.

Granting a mother initial custody of a child does not, on its own, impact either parent's custodial or parenting time rights. MCL 722.1469(1). In addition, this initial custody determination is "without prejudice to the determination of either parent's custodial rights[.]" *Id.*

"Genetic testing that determines the man is the biological father of a child under this act may be the basis for court-ordered child support, custody, or parenting time without further adjudication under the paternity act." MCL 722.1469(2).

2. Child's Rights, Duties, and Status

"The child who is the subject of the genetic testing has the same relationship to the mother and the man determined to be the biological father under [the Genetic Parentage A]ct as a child born or conceived during a marriage and has identical status, rights, and duties of a child born in lawful wedlock effective from birth." MCL 722.1469(2).

3. Parentage Registry

"The title IV-D agency shall file a genetic paternity determination form and a summary report[15] with the state registrar.[16] The state registrar shall review the genetic paternity determination form and the summary report upon receipt. If the genetic paternity determination form and summary report comply with the provisions of [the Genetic Parentage A]ct, the state registrar shall file the genetic paternity determination form and the summary report in a parentage registry in the office of the state registrar. The genetic paternity determination form and the summary report filed with the state registrar shall be maintained as a permanent record in a manner consistent with . . . MCL 333.2876." MCL 722.1471(1).

MCL 722.1463(d) defines *genetic paternity determination form* as "a form issued by the title IV-D agency to provide genetic testing information to the state registrar. A genetic paternity determination form provides identifying information for individuals on the summary report and includes, but is not limited to, the following information:

> (*i*) As provided under [MCL 722.1467] or [MCL 722.1469], the man is the child's father.

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[15] MCL 722.1463(c) defines *summary report* as that term is defined under the Paternity Act, MCL 722.711.

[16] "'State registrar' means that term as defined in . . . MCL 333.2805." MCL 722.1463(g). "'Title IV-D agency' means that term as defined in . . . MCL 552.602." MCL 722.1463(h).

> (*ii*) The child's name, date of birth, and the name of the city, county, and state where the child was born.
>
> (*iii*) The mother's name, social security number, and date of birth.
>
> (*iv*) The father's name, social security number, and date of birth.
>
> (*v*) Other information required to carry into effect the provisions of this act." MCL 722.1463(d)(*i*)-(*v*).

4. Providing Copy of Genetic Paternity Determination Form

"The title IV-D agency shall provide a copy of the genetic paternity determination form and the summary report to the mother and father." MCL 722.1471(2).

"Upon request, the state registrar shall issue a copy of the genetic paternity determination form and summary report filed in the parentage registry under the procedures and upon payment of the fee prescribed by . . . MCL 333.2891." MCL 722.1471(4).

5. Birth Certificate

"When the genetic paternity determination form and the summary report are filed with the state registrar on a child born in this state, the father of the child may be included on the birth certificate unless another man is recorded as the child's father on the birth certificate. The state registrar shall collect the fee to amend the birth certificate as identified in . . . MCL 333.2891. For a birth certificate amended under this subsection and upon written request of both parents, the child's surname shall be recorded on the birth certificate as designated by the child's parents." MCL 722.1471(3).

6. Court's Jurisdiction

"Except as otherwise provided by law, a mother and father who have genetic tests that are filed as a genetic paternity determination form as prescribed by [MCL 722.1471[17]] are consenting to the general personal jurisdiction of the courts of

[17] See Section 6.6(C)(3) for a discussion of the filing procedures set out under MCL 722.1471.

record of this state regarding the issues of the support, custody, and parenting time of the child." MCL 722.1473.

D. Determine Genetic Father is Not Child's Father

Under the Revocation of Paternity Act, MCL 722.1443(2)(b), the court may "[d]etermine that a genetic father is not a child's father." "[MCL 722.1438] governs an action to determine that a genetic father is not a child's father." MCL 722.1435(2).

> **Note:** For purposes of MCL 722.1443, a *genetic father* is "a man whose paternity has been determined solely through genetic testing under the paternity act, . . . MCL 722.711 to [MCL] 722.730, the summary support and paternity act, [MCL 722.1491 to MCL 722.1503,[18]] or the genetic parentage act, [MCL 722.1461 to MCL 722.1475]." MCL 722.1433(d).

1. Standing

Under MCL 722.1438(1), "[t]he mother, the genetic father, an alleged father,[19] or a prosecuting attorney may file an action for an order determining that a genetic father is not a child's father."[20]

2. Time Requirements

"An action under [MCL 722.1438] shall be filed within 3 years after the child's birth or within 1 year after the date that the genetic father was established as a child's father, whichever is later." MCL 722.1438(1).

3. Affidavit Requirement

"An action under [MCL 722.1438] shall be supported by an affidavit signed by the person filing the action that states facts constituting 1 of the following:

> (a) The genetic tests that established the man as a child's father were inaccurate.

---

[18] Discussion of the Summary Support and Paternity Act is outside the scope of this benchbook.

[19] "An alleged father may not bring an action under [MCL 722.1438] if the child is conceived as the result of acts for which the alleged father was convicted of criminal sexual conduct under . . . MCL 750.520b to [MCL] 750.520e." MCL 722.1443(14).

[20] MCL 722.1433(c) defines *alleged father* as "a man who by his own actions could have fathered a child."

(b) The man's genetic material was not available to the child's mother.

(c) A man who has DNA identical to the genetic father is the child's father." MCL 722.1438(2).

4. Order Blood or Tissue Typing or DNA Identification Profiling

"If the court in an action under [MCL 722.1438] finds that an affidavit under [MCL 722.1438(2)] is sufficient, the court shall order blood or tissue typing or DNA identification profiling as required under [MCL 722.1443(5)]." MCL 722.1438(3). "The court may order the person filing the action to repay the cost of the genetic test to the state." *Id.*

MCL 722.1443(5) requires the court to "order the parties to an action or motion under [the Revocation of Paternity Act] to participate in and pay for blood or tissue typing or DNA identification profiling to assist the court in making a determination under [the Revocation of Paternity Act]. Blood or tissue typing or DNA identification profiling shall be conducted in accordance with . . . MCL 722.716." See the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 3, for additional information on genetic testing.

5. No Right to Representation

"Whether an action filed under [MCL 722.1438] is brought by a complaint in an original action or by a motion in an existing action, the prosecuting attorney, an attorney appointed by the county, or an attorney appointed by the court is not required to represent any party regarding the action." MCL 722.1438(5).

6. Burden of Proof and Standard of Review

"The person filing the action has the burden of proving, by clear and convincing evidence, that the genetic father is not the father of the child." MCL 722.1438(3).

7. Send Order to State Registrar

"If a genetic father has been reported to the state registrar as a child's father, the clerk of the court shall forward a copy of an order determining that the genetic father is not a child's father to the state registrar. The state registrar shall remove the genetic father as the child's father and may amend the birth certificate as prescribed by the order." MCL 722.1438(4).

8. Refusing to Enter an Order Determining a Genetic Father is Not a Child's Father

"A court may refuse to enter an order . . . determining that a genetic father is not a child's father . . . if the court finds evidence that the order would not be in the best interests of the child." MCL 722.1443(4).[21] "The court may consider the following factors:

> (a) Whether the presumed father[22] is estopped from denying parentage because of his conduct.
>
> (b) The length of time the presumed father was on notice that he might not be the child's father.
>
> (c) The facts surrounding the presumed father's discovery that he might not be the child's father.
>
> (d) The nature of the relationship between the child and the presumed or alleged father.
>
> (e) The age of the child.
>
> (f) The harm that may result to the child.
>
> (g) Other factors that may affect the equities arising from the disruption of the father-child relationship.
>
> (h) Any other factor that the court determines appropriate to consider." MCL 722.1443(4).

"Given the discretion afforded to a trial court under MCL 722.1443(4) generally, and under MCL 722.1443(4)(h) specifically, the court is free to consider the best interest factors set forth in the child custody act, MCL 722.23, in its [paternity] assessment under MCL 722.1443(4)." *Demski v Petlick*, 309 Mich App 404, 432 n 10 (2015).

"The court shall state its reasons for refusing to enter an order [determining a genetic father is not a child's father] on the record." MCL 722.1443(4).

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[21] The court may refuse to enter other enumerated orders, as well. See MCL 722.1443(4). Those orders are outside the scope of this discussion and are discussed as appropriate elsewhere in this chapter.

[22] MCL 722.1433(e) defines *presumed father* as "a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the conception or birth."

6.7 Putative Father Hearing — Child Protective Proceedings

A biological father is not permitted to participate in child protective proceedings where a legal father exists. *In re KH*, 469 Mich 621, 624, 635 n 29 (2004), overruling *In re Montgomery*, 185 Mich App 341 (1990). However, the court may determine at any time during child protective proceedings that the child has no legal father. MCR 3.921(D). See Section 6.2(A) for a detailed discussion of legal fathers, and Section 6.2(B) for a detailed discussion of putative fathers.

Termination of a legal father's parental rights under the Juvenile Code is not determinative that a child has no legal father. *In re CAW*, 469 Mich 192, 199 (2003). Specifically, the Michigan Supreme Court held:

> "In this case, [the child] had a married mother and father . . . during the gestation period. Moreover, no finding was ever made by the [trial] court that [the child] was not the issue of the marriage. The termination of [the husband's] parental rights was not a determination that [the child] was not the issue of the marriage and, thus, that [the husband] was no longer [the child's] father; rather, it was only a determination that [the husband's] legal rights were terminated. Thus, the requirements of the court rule to give . . . a putative father[] standing were not met. *In re CAW*, 469 Mich at 199.
>
> > **Note:** A putative father does not have a procedural or substantive due process right to intervene in a child protective proceeding when there is no substantial parent-child relationship between the putative father and the child. *In re CAW (On Remand)*, 259 Mich App 181, 183-185 (2003). If paternity has been established or is uncontested and the father has a substantial parent-child relationship with his child, he has a protected liberty interest in that relationship that entitles him to due process of law. *Lehr v Robertson*, 463 US 248, 261-262 (1983); *Caban v Mohammed*, 441 US 380, 392-393 (1979); *Stanley v Illinois*, 405 US 645, 649 (1972).

At its discretion, the court may take testimony on an alleged putative father's identity and location. MCR 3.921(D)(1).

A man who files a notice of intent to claim paternity creates a rebuttable presumption in child protective proceedings that he is the child's father. MCL 710.33(2).

As a useful tool to guide the court through the procedures of finding and notifying a noncustodial parent during a child protective proceeding, the

State Court Administrative Office (SCAO) developed the *Michigan Absent Parent Protocol: Identifying, Locating, and Notifying Absent Parents in Child Protective Proceedings*. This protocol is available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/APP.pdf.

A. Notice

If the court finds probable cause to believe that an identified man is the child's biological father, it must direct that the identified man receive notice of the hearing to identify the child's father.[23] MCR 3.921(D)(1). Notice may be served on the identified man in any manner reasonably calculated to place him on notice of the hearing. MCR 3.921(D)(1)-(2).

After a diligent inquiry, if the alleged putative father's whereabouts are unknown, the court must direct that notice be given by publication. MCR 3.921(D)(1). Any notice by publication must not include the name of the putative father. *Id*. The court must also direct that notice be given by publication if the court determines that the identity of the putative father is unknown. *Id*.

> **Note:** If a putative father, whose whereabouts are unknown, fails to appear at the hearing, the court need not give further notice by publication of subsequent hearings, unless it is a hearing for termination of parental rights. MCR 3.921(E).

If the alleged putative father is incarcerated, see Section 5.2(C) for the notice requirements for incarcerated parties.

Notice of the hearing must include all of the following information:

> (1) The child's name (if known).
>
> (2) The mother's name (if known).
>
> (3) Child's birthplace and date (if known).
>
> (4) That a petition to identify the child's father has been filed with the court.
>
> (5) The time and location of the hearing where the alleged putative father is to appear to express his interest, if any, in the child.
>
> (6) A statement indicating that the putative father's failure to appear for the hearing will result in:

[23] See SCAO form PCA 316, *Notice to Putative Father and Custody Statement*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/adoptions/pca316.pdf.

(a) The putative father's denial of interest in the child;

(b) The putative father's waiver of his right to receive notice of all subsequent hearings; and

(c) The putative father's waiver of his right to an attorney.

(7) A statement indicating that the putative father's failure to appear for the hearing may result in termination of his parental rights. MCR 3.921(D)(1)(a)-(d).

B. Hearing

The court may conduct a hearing to identify a child's father after the alleged putative father is provided notice of the hearing. MCR 3.921(D)(2).

At the hearing, the court may determine, as appropriate, that:

(1) Under the circumstances, the alleged putative father was properly served notice of the hearing to identify the child's father.

(2) A preponderance of the evidence establishes that the alleged putative father is the child's biological father, and that the biological father is entitled to 14 days to establish paternity.

Note: The 14-day period may be extended upon good cause shown. MCR 3.921(D)(2)(b).

(3) There is probable cause to believe that another identified man is the child's biological father, and the other alleged putative father must receive notice of the hearing to identify the child's father.

(4) The biological father's identity cannot be determined after a diligent search. MCR 3.921(D)(2).

Note: The court may proceed without giving the unidentified person further notice and without appointment of an attorney. MCR 3.921(D)(2)(d).

The court may also find that the biological father waives all rights to further notice, including the right to notice of termination of parental rights and the right to an attorney, if the father fails to appear after proper notice or if he appears but fails to establish paternity within

the time set by the court. MCR 3.921(D)(3). See Chapter 17 for a detailed discussion of termination of parental rights.

> **Note:** Unless good cause for delay is shown, the court does not have to allow a putative father to perfect paternity outside of the time set by the court. *In re LE*, 278 Mich App 1, 21 (2008).

6.8 Adjudication of Paternity in Another State

The establishment of paternity in another state has the same effect in Michigan and may be treated as if an acknowledgment of paternity was filed or an order of filiation was entered. MCL 722.714b.

6.9 The Uniform Interstate Family Support Act (UIFSA)

The primary purpose of the Uniform Interstate Family Support Act (UIFSA), ~~MCL 552.1101~~ MCL 552.2101 *et seq.*,[24] is to provide a means for establishing and collecting child support across state lines and foreign countries subject to the Convention.[25] The UIFSA also provides a means for establishing paternity. MCL 552.2305(2)(a); MCL 552.2402; MCL 552.2704(1)(c). ~~MCL 552.1701(1).~~

UIFSA cases may be initiated in Michigan and transferred to another state or foreign country for the establishment of paternity and support in that state or foreign country, or they may be initiated in another state or foreign country and transferred to Michigan for the establishment of paternity and support. MCL 552.2301(2); MCL 552.2305(2)(a); MCL 552.2402. ~~MCL 552.1301(2)(f); MCL 552.1701(2).~~

~~When a case is transferred to Michigan for the establishment of paternity, the Paternity Act, MCL 722.711 *et seq.*, governs the proceedings. MCL 552.1701(2). See Section 6.4 for a detailed discussion of paternity actions.~~ "A voluntary acknowledgment of paternity, certified as a true copy, is admissible to establish parentage of the child." MCL 552.2316(10).

A person residing in a foreign country subject to the Convention may file a petition "in a tribunal[26] of this state in a proceeding involving an

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[24] Effective January 1, 2016, the Michigan Legislature repealed the Uniform Interstate Family Support Act (UIFSA), MCL 552.1101 *et seq.*, and in its place created the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*, to now include guidelines and procedures for establishing and collecting foreign support orders from foreign countries subject to the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance adopted on November 23, 2007.

[25] For purposes of the UIFSA, *Convention* is "the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, concluded at The Hague on November 23, 2007." MCL 552.2102(c).

obligee, obligor, or child residing outside the United States[]" for determination of parentage of a child. MCL 552.2701(d); MCL 552.2702; MCL 552.2705(1). "In the proceeding, the law of this state applies." MCL 552.2705(1).

A detailed discussion of the procedures and statutes governing UIFSA cases is beyond the scope of this benchbook.

[26] For purposes of the UIFSA, *tribunal* is "a court, administrative agency, or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine parentage of a child." MCL 552.2102(cc).

Chapter 7: Petitions, Preliminary Inquiries, and Preliminary Hearings

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In this chapter. . .

This chapter discusses how to initiate child protective proceedings and the requirements for filing a proper petition. It also discusses the required procedures for conducting a preliminary inquiry, which is an informal proceeding that may be used when a child has not been taken into protective custody and the petitioner does not request that the child be placed.

If a child is in protective custody or the petitioner requests placement of the child, a preliminary hearing must be conducted. The court must make two major decisions at a preliminary hearing: whether to authorize the filing of the petition and, if so, whether to order pretrial placement of the child. This chapter deals only with the procedures leading up to the

decision to authorize the filing of the petition. The procedures governing the determination of whether the child should be placed pending trial are covered in Chapter 8. In addition to, or as an alternative to, placing the child outside his or her home, the court may order an alleged abuser to leave the child's home, and the court may also enter orders affecting nonparent adults.

This chapter also discusses the appointment of attorneys for respondents and the appointment of lawyer-guardians ad litem (L-GAL), attorneys, guardians ad litem (GAL), and court-appointed special advocates (CASAs) for children.

In an effort to provide trial courts with a quick practical guide through the process of preliminary hearings, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys:Preliminary Hearing (MCR 3.965/MCL 712A.11)*. This toolkit is accessible at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/CWSToolkit/Pages/Preliminary-Hearing.aspx.

7.1 Initiating Child Protective Proceedings

Absent exigent circumstances, a request for court action to protect a child must be by petition.[1] MCR 3.961(A). MCR 3.903(A)(20) provides that a *petition* is "a complaint or other written allegation, verified in the manner provided in MCR 2.114(B), that a parent, guardian, nonparent adult, or legal custodian has harmed or failed to properly care for a child[.]"

> **Note:** See Section 3.1 for a detailed discussion of exigent circumstances warranting removal of a child before a petition is filed.

The purposes of a petition are to frame the issues for the court and to provide notice of the allegations to a respondent.

> "[A] petition has two essential functions: 'First, [a petition] is a court document which should set forth the alleged basis of the court's jurisdiction over a particular child. The petition names the child and the respondents and frames the issues to be addressed by the court. The court may not inquire into matters not alleged in the petition. . . . The second principal function of the petition is to communicate to the respondents a notice of the charges against them so that they might evaluate their situation and prepare a response. The description of the parents' acts of commission or omission should be put in terms specific enough to allow a defense to be prepared.'" *In re Hatcher*, 443 Mich 426, 434 n 7 (1993), quoting Duquette, Michigan Child Welfare Law, ch 5, pp 47-48.

7.2 Adding Nonrespondent Parent to Child Protective Proceedings

Although child protective proceedings may be initiated against one parent, the nonrespondent parent must receive an adjudication hearing before the court can interfere with his or her parental rights. See *In re Sanders*, 495 Mich 394, 407, 412-413 n 8, 415, 422 (2014) (finding unconstitutional the one-parent doctrine, which permitted the court to "enter dispositional orders affecting parental rights of *both* parents" once "jurisdiction [was] established by adjudication of only *one* parent" and holding that procedural "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights[]").[2] For purposes of child protective proceedings, a

[1] See SCAO form JC 04b, *Petition (Child Protective Proceedings)*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc04b.pdf.

nonrespondent parent is "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)." MCR 3.903(C)(8).

MCR 3.961(C)(1)-(2) sets out the procedures for initiating child protective proceedings against a nonrespondent parent:

- "If a nonrespondent parent is being added as an additional respondent to a petition that has been authorized by the court under MCR 3.962 or MCR 3.965 against the first respondent parent, and the first respondent parent has not made a plea under MCR 3.971 or a trial has not been conducted under MCR 3.972, the allegations against the second respondent shall be filed in an amended petition."[3] MCR 3.961(C)(1).

  Note: For purposes of child protective proceedings, an *amended petition* is "a petition filed to correct or add information to an original petition, as defined in [MCR 3.903(A)(20)[4]], after it has been authorized, but before it is adjudicated." MCR 3.903(C)(2).

- "If a nonrespondent parent is being added as an additional respondent in a case in which a petition has been authorized under MCR 3.962 or MCR 3.965, and adjudicated by plea under MCR 3.971 or by trial under MCR 3.972, the allegations against the second respondent shall be filed in a supplemental petition." MCR 3.965(C)(2).

  Note: For purposes of child protective proceedings, a *supplemental petition* is:

  > "(a) a written allegation, verified in the manner provided in MCR 2.114(B), that a parent, for whom a petition was authorized, has committed an

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[2] Where "a minor faces an *imminent* threat of harm, . . . the state may take the child into custody without prior court authorization or parental consent[;] . . . [s]imilarly, upon the authorization of a child protective petition, the trial court may order *temporary* placement of the child into foster care pending adjudication if the court finds that placement in the family home would be contrary to the welfare of the child." *In re Sanders*, 495 Mich at 416-17 n 12 (limiting the requirement for adjudication over each parent to "the court's exercise of its postadjudication dispositional authority"). See Chapter 3 for additional information on taking temporary protective custody over a child, and Chapter 8 for additional information on temporary placements pending adjudication.

[3] See Chapter 10 for a discussion of MCR 3.971 (pleas of admission or no contest), and Chapter 12 for a discussion of MCR 3.972 (trials).

[4] MCR 3.903(A)(20) defines *petition* as "a complaint or other written allegation, verified in the manner provided in MCR 2.114(B), that a parent, guardian, nonparent adult, or legal custodian has harmed or failed to properly care for a child, or that a juvenile has committed an offense." Note, that MCR 3.903(C)(2) mistakenly references to MCR 3.903(A)(21) for its definition of the term *petition*, but the term is actually defined in MCR 3.903(A)(20).

additional offense since the adjudication of the petition, or

(b) a written allegation, verified in the manner provided in MCR 2.114(B), that a nonrespondent parent is being added as an additional respondent in a case in which an original petition has been authorized and adjudicated against the other parent under MCR 3.971 or MCR 3.972, or

(c) a written allegation, verified in the manner provided in MCR 2.114(B), that requests the court terminate parental rights of a parent or parents under MCR 3.977(F) or MCR 3.977(H)." MCR 3.903(C)(13).

7.3 Who May Submit a Petition

Any person who suspects child abuse or child neglect may report the matter to the Department of Health and Human Services (DHHS), a law enforcement agency, or the court. MCL 712A.11(1); MCL 722.624. Once reported to the DHHS, the DHHS has 24 hours to either commence its own investigation or refer the case to the prosecuting attorney and the local law enforcement agency.[5] MCL 722.628(1). Following the investigation, either a Children's Protective Services (CPS) worker or a prosecuting attorney acting on behalf of the DHHS drafts and files a petition seeking court jurisdiction over a child suspected of being abused or neglected. See MCL 712A.11(1); MCL 712A.17(5); MCR 3.914(C).

Note: See Section 2.2(A) for a list of mandatory reporters.

In addition, school officials may file a petition alleging educational neglect under MCL 712A.2(b)(1). MCL 712A.11(1). The Children's Ombudsman may also file a petition requesting the court to assume jurisdiction under MCL 712A.2(b) if the ombudsman is satisfied that a complainant has contacted the DHHS, the prosecuting attorney, the child's attorney, and the child's guardian ad litem, if any, and that none of those persons intend to file a petition.[6] MCL 722.927(4).

[5] See Section 2.3 for a detailed discussion of investigation and referral requirements.

[6] See MCL 722.922(i) for a definition of *complainant* for purposes of MCL 722.925, and see MCL 722.925 for a list of persons who may make a complaint to the Children's Ombudsman "alleging that an administrative act is contrary to law, rule, or policy, imposed without an adequate statement of reason, or based on irrelevant, immaterial, or erroneous grounds[,]" and see MCL 722.923 for a description of the Children's Ombudsman.

However, where a person or agency other than a prosecuting attorney or the DHHS files a petition, the court may refer the matter to the DHHS for investigation. MCL 712A.11(1); MCR 3.962(A).

> **Note:** The DHHS will not investigate a report alleging only a child's failure to attend school. See Section 2.2.

A. When DHHS Must Submit a Petition

"[I]f [the statutory requirements of MCL 722.638] [are] satisfied, [the DHHS] must file a petition" and "the child [must] be brought within the jurisdiction of the court, [where] further determinations regarding the child's well-being and placement are made by the court, not [the DHHS][;]"[7] the DHHS "ha[s] no discretion to refrain from filing the petition." *Jasinski v Tyler*, 729 F3d 531, 543-544 (CA 6, 2013) (because this Court "cannot say that a reasonable [DHHS] official would understand that the failure to file a petition under [MCL 722.638] would constitute a denial of procedural due process[,]" DHHS officials "are [now put] on notice that if a petition is mandated [under MCL 722.638], the failure to file a petition when [the statutory requirements of MCL 722.628] [are] met may constitute a denial of procedural due process").

MCL 722.638(1)(a)-(b) require the DHHS to submit a petition seeking the court's jurisdiction if it determines that one or more of the following apply:

- A parent, guardian, custodian, or a person 18 years of age or older residing with the child has abused the child or the child's sibling, and the abuse included one or more of the following:
  - abandonment of a young child;
  - criminal sexual conduct that involved 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; or
  - murder or attempted murder.

[7] For a detailed discussion of the court's placement options, see Chapter 8.

- There is a risk of harm to the child at issue and the parent's parental rights to another child were terminated under MCL 712A.2(b) (or a similar law of another state).

- There is a risk of harm to the child at issue and the parent voluntarily terminated his or her parental rights to another child following initiation of proceedings under MCL 712A.2(b) (or a similar law of another state) and the proceeding involved abuse that included one or more of the following:

  - abandonment of a young child;

  - criminal sexual conduct that involved 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;

  - voluntary manslaughter; or

  - aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter.

If the DHHS suspects a parent as the perpetrator of the abuse or suspects that a parent is placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate the risk, the DHHS must include with the mandatory petition filed under MCL 722.638(1) a request for termination of parental rights at the initial dispositional hearing.[8] MCL 722.638(2). See also DHHS's Children Protective Services Manual (PSM), *Family Court: Petitions, Hearings and Court Orders PSM 715-3*, p 4, available at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/715-3.pdf.

Note: MCL 722.638 does not violate a parent's procedural due process rights in mandating that a petitioner file a request for termination of parental rights after a parent voluntarily terminated their parental rights to another child, because the request for termination of parental rights does not necessarily mean a court will grant the request, and the petitioner is still

[8] See Chapter 17 for a detailed discussion of hearings to terminate parental rights.

> required to show a risk of harm to the child at issue and that the child's parent is a suspected perpetrator or suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene or eliminate the risk.[9] *In re AH*, 245 Mich App 77, 85 (2001).
>
> Further, although MCL 722.638 creates a separate class of parents by requiring a petitioner to file a request for termination of parental rights of parents who have had their parental rights to another child terminated (voluntarily or otherwise), it does not violate a parent's fundamental right to the interest in the custody of their child and in the parent-child relationship, because MCL 722.638 is precisely tailored to serve a compelling state interest in protecting children from an unreasonable risk of harm. *In re AH*, 245 Mich App at 82-84.

If the DHHS determines that a child was severely physically injured, sexually abused, or allowed to be exposed to, or have contact with, methamphetamine production, it must file a petition under MCL 712A.2(b) within 24 hours. MCL 722.637(1). However, the DHHS is not required to file a petition if it determines that the child's parent or legal guardian is not a suspected perpetrator of the abuse and all of the following apply:

> (1) the child's parent or legal guardian did not neglect or fail to protect the child;
>
> (2) the child's parent or legal guardian does not have a history that shows a documented pattern of neglect or failing to protect the child; and
>
> (3) the child is safe under the parent's or legal guardian's care. MCL 722.637(2).

B. Prosecutor's Role

A prosecutor has standing to appear in child protective proceedings when:

> (1) the DHHS requests it to do so;
>
> (2) the court requests it to do so; or

[9] Although the prior version of MCL 722.638 was in effect at the time the petition was filed, the respondent-mother chose to challenge the amended version of the statute. *In re AH*, 245 Mich App 77, 80-81 (2001). The Court of Appeals found that the respondent-mother had standing to challenge the amended statute because she was attacking language present in both the prior and amended versions of the statute. *In re AH*, *supra* at 81.

> (3) it files a petition for termination of parental rights after a child has remained in foster care or the custody of a guardian for a specified duration. *In re Hill*, 206 Mich App 689, 691 (1994).

In the context of child protective proceedings, a *prosecutor* or *prosecuting attorney* is defined as the "prosecuting attorney of the county in which the court has its principal office or an assistant to the prosecuting attorney." MCR 3.903(C)(11).

1. Filing Petition on Behalf of DHHS

Upon request of the DHHS (or an agent of the DHHS under contract with the DHHS), the prosecutor must serve as a legal consultant to the DHHS or its agent at all stages of the child protective proceeding. MCL 712A.17(5); MCR 3.914(C)(1). If the prosecutor does not appear on behalf of the DHHS or its agent, the DHHS may contract with an attorney of its choice for legal representation. MCL 712A.17(5); MCR 3.914(C)(2).

2. Court's Request

Upon the court's request, a prosecutor must review a petition for legal sufficiency and appear at any proceeding. MCL 712A.17(4); MCR 3.914(A).

> **Note:** A court's compliance with a prosecuting attorney's request for notice of hearings does not constitute a court request to make a formal appearance in a proceeding. *In re Hill*, 206 Mich App at 692-693.

3. Filing Petition Independent of DHHS

A prosecutor may file a petition independent of the DHHS. *In re Jagers*, 224 Mich App 359, 362 (1997). In *In re Jagers*, *supra* at 362, although the DHHS had retained independent legal counsel, the prosecutor filed a petition alleging abuse and neglect. The Court of Appeals held that a prosecutor has standing, independent of the DHHS, to file a petition in child protective proceedings. *Id*. Specifically, the Court stated:

> "Under the plain language of MCL 712A.11, a petition may be filed by 'a person' requesting the court to take action on behalf of a child because of parental abuse or neglect. A prosecutor or an assistant prosecutor assuredly qualifies as 'a person.'

* * *

> Moreover, [the Court] believe[s] that public policy favors allowing prosecutors to act independently of the [DHHS]. . . . [T]he prosecutor and the [DHHS] do not always agree on how a particular case should be handled. When . . . the prosecutor believes that a petition should be filed and the [DHHS], for whatever reason, is not persuaded, the prosecutor should not be precluded from taking any action. The state, and every county within it, has an interest in protecting children from abuse and neglect." *In re Jagers*, 224 Mich App at 362, 365.

A prosecutor may also file a petition for termination of parental rights if the child remains in foster care regardless of whether the prosecuting attorney is representing or acting as a legal consultant to the DHHS or any other party. MCL 712A.19b(1); MCR 3.977(A)(2)(f).

A prosecutor may not amend or supplement a petition filed by another party. *In re Hill*, *supra* at 692 (prosecutor was prevented from amending and supplementing petitions that were originally submitted by the DHHS, which had obtained legal representation by the attorney general's office).

C. Petition Requesting Termination of Parental Rights[10]

1. Standing to File Petition Requesting Parental Termination

Only persons granted standing under a statute, court rule, or case law may participate in proceedings to terminate parental rights. *In re Foster (Catherine)*, 226 Mich App 348, 358-359 (1997). As such, a request for termination of parental rights may be made by any one of the following:

> (1) the agency;[11]
>
> (2) the child;
>
> (3) a guardian, legal custodian, or representative of the child;

[10] For more information on termination of parental rights, see Chapter 17.

[11] "'Agency' means a public or private organization, institution, or facility that is performing the functions under part D of title IV of the social security act, 42 USC 651 to [42 USC] 669b, or that is responsible under court order or contractual arrangement for a juvenile's care and supervision." MCL 712A.13a(1)(a).

(4) a concerned person;

Note: A concerned person is a foster parent who:

(a) a child is living with or has lived with;

(b) has specific knowledge of the parent's behavior which constitutes grounds for termination under MCL 712A.19b(3)(b) or MCL 712A.19b(3)(g);[12]

(c) has contacted the DHHS, prosecuting attorney, child's attorney, and child's guardian ad litem (if any); and

(d) is satisfied that the DHHS, prosecuting attorney, child's attorney, and child's guardian ad litem (if any) does not intend to file a petition for termination of parental rights. MCL 712A.19b(6); MCR 3.977(A)(2)(d).

(5) the Children's Ombudsman; or

(6) the prosecuting attorney (without regard to whether the prosecuting attorney is representing or acting as a legal consultant to the agency or any other party). MCL 712A.19b(1); MCR 3.977(A)(2).

Additionally, a custodial parent has standing to file a petition requesting termination of a noncustodial parent's parental rights. *In re Huisman*, 230 Mich App 372, 378-383 (1998), overruled in part by *In re Trejo Minors*, 462 Mich 341 (2000). In *In re Huisman*, *supra* at 374-375, the child's mother attempted to kill the child after the parents divorced to prevent further contact with the child's father. The mother was sentenced to prison, and the father remarried. *Id.* After an unsuccessful attempt to obtain a stepparent adoption under the Adoption Code, the child's father filed a termination petition under the Juvenile Code. *Id.* at 375-376. The Court of Appeals held that as a custodial parent, the child's father had standing to file the petition requesting termination of the mother's parental rights. *Id.* at 374. Specifically, the Court interpreted "custodian" as used in MCL

[12] MCL 712A.19b(3)(b) allows for termination of parental rights due to physical injury or physical or sexual abuse, and MCL 712A.19b(3)(g) allows for termination due to a failure to provide proper care or custody (neglect). See Section 17.6 for a detailed discussion of MCL 712A.19b(3)(b) and MCL 712A.19b(3)(g).

712A.19b(1) to include a custodial parent. *In re Huisman*, *supra* at 380-381.

> **Note:** In *In re Hudson (Amanda)*, 262 Mich App 612, 614 n 1 (2004), the Court of Appeals conceded that its definition of "custodian" was not consistent with that of *In re Huisman*, *supra*, stating in dicta that *In re Huisman* had been overruled by *In re Trejo Minors*, 462 Mich 341 (2000). However, in an unpublished opinion, the Court of Appeals explained, "a close inspection of *Trejo* reveals that the Court did not overrule the portion of *Huisman* that pertained to the Court's definition of 'custodian' under the Juvenile Code. *Trejo*, *supra* at 353. Nonetheless, even if *Huisman* is disregarded and the *Hudson (Amanda)* Court's definition of 'custodian' is applied to the instant case, the facts show that [the child's mother], who was responsible for the child's property and her financial, emotional, and physical care and protection, qualifies as a 'custodian' under *Hudson*. Therefore, as a custodian, [the child's mother] had standing under [MCL 712A.19b(1)] to file a petition to terminate [the child's father's] parental rights." *In re MV,* unpublished opinion per curiam of the Court of Appeals, issued April 4, 2006 (Docket No. 264226).[13]

However, in *In re Swope*, 190 Mich App 478, 480-481 (1991), the Court of Appeals held that adoptive parents did not have standing to petition the court under MCL 712A.19b to terminate their own parental rights to their adopted daughter. The Court concluded that parents cannot petition to terminate their own parental rights "because the statute was clearly enacted for the protection of children, rather than for the convenience of parents." *In re Swope*, *supra* at 481.

2. Requirements for Filing Petition Requesting Parental Termination

A request for termination of parental rights must be made in an original, amended,[14] or supplemental petition.[15, 16] MCR

[13] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

[14] For purposes of child protective proceedings, "'[a]mended petition' means a petition filed to correct or add information to an original petition, as defined in [MCR 3.903(A)(20)], after it has been authorized, but before it is adjudicated." MCR 3.903(C)(2). Note, that MCR 3.903(C)(2) mistakenly references to MCR 3.903(A)(21) for its definition of the term *petition*, but the term is actually defined in MCR 3.903(A)(20).

3.977(A)(2). For termination of parental rights at the initial dispositional hearing, a request for termination of parental rights must be made in an original or amended petition. MCR 3.977(E)(1). For termination of parental rights on the basis of changed circumstances, or after the child has been placed in foster care, the request may be made in a supplemental petition. MCL 712A.19b(4); MCR 3.977(F).

> **Note:** In some cases, MCL 722.638(2) requires the DHHS to file a petition seeking court jurisdiction and termination of parental rights at the initial dispositional hearing. See Section 7.3(A).

If a petition or an amended petition fails to request the termination of parental rights, a subsequent order terminating parental rights must be set aside. *In re SLH*, 277 Mich App 662, 674 (2008).

Res judicata will not bar a second petition requesting termination of parental rights where the petitioner is not seeking termination on the same grounds in both petitions and new evidence and changed circumstances are presented in the second petition. *In re Pardee*, 190 Mich App 243, 249-250 (1991). "[W]hen the facts have changed or new facts develop, the dismissal of a prior termination proceeding will not operate as a bar to a subsequent termination proceeding." *In re Pardee*, *supra* at 248.

7.4 Petition Requirement

A. Required Content Information

"A petition must contain the following information, if known:

(1) The child's name, address, and date of birth.

(2) The names and addresses of:

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[15] For purposes of child protective proceedings, "'[s]upplemental petition' means: (a) a written allegation, verified in the manner provided in MCR 2.114(B), that a parent, for whom a petition was authorized, has committed an additional offense since the adjudication of the petition, or (b) a written allegation, verified in the manner provided in MCR 2.114(B), that a nonrespondent parent is being added as an additional respondent in a case in which an original petition has been authorized and adjudicated against the other parent under MCR 3.971 or MCR 3.972, or (c) a written allegation, verified in the manner provided in MCR 2.114(B), that requests the court terminate parental rights of a parent or parents under MCR 3.977(F) or MCR 3.977(H)." MCR 3.903(C)(13). MCR 3.903(C)(8) defines a *nonrespondent parent* as "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)."

[16] If the child is of Indian heritage, the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA) must be followed. See Chapter 19 for information on the ICWA and the MIFPA.

(a) the child's mother and father,

(b) the parent, guardian, legal custodian, or person who has custody of the child, if other than a mother or father,

(c) the nearest known relative of the child, if no parent, guardian, or legal custodian can be found, and

(d) any court with prior continuing jurisdiction.[17]

(3) The essential facts that constitute an offense against the child under the Juvenile Code.[18]

(4) A citation to the section of the Juvenile Code relied on for jurisdiction.

(5) The child's membership or eligibility for membership in an Indian tribe, if any, and the identity of the tribe.[19]

(6) The type of relief requested. A request for removal of the child or a parent or for termination of parental rights at the initial disposition must be specifically stated. If the petition requests removal of an Indian child or if an Indian child was taken into protective custody pursuant to MCR 3.963 as a result of an emergency, the petition must specifically describe:

(a) the active efforts, as defined in MCR. 3002,[20] that have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; and

(b) documentation, including attempts, to identify the child's tribe.

(7) The information required by MCR 3.206(A)(4), identifying whether a family division matter involving members of the same family is or was pending."[21] MCR 3.961(B).

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[17] See Section 4.4 for a detailed discussion of concurrent jurisdiction.

[18] See Section 17.6 for a detailed discussion of the MCL 712A.19b(3) statutory standards for termination of parental rights.

[19] If the child is of Indian heritage, the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA) must be followed. See Chapter 19 for information on the ICWA and the MIFPA.

[20] For a detailed discussion of active efforts, including the definition, see Section 19.9(E).

[21] See Section 7.5.

A petition need not enumerate every theory or argument in support of Family Division jurisdiction. *In re Arntz*, 125 Mich App 634, 639 (1983), rev'd on other grounds 418 Mich 941 (1984). Nor must the petition disprove every possible innocent explanation for an alleged injury. *In re Martin (Ashley Lynn)*, 167 Mich App 715, 723-724 (1988).

"A petition . . . may be amended at any stage of the proceedings as the ends of justice require." MCL 712A.11(6). See *In re Slis*, 144 Mich App 678, 684 (1985) (requirements of due process were satisfied where petition was amended on the record to include respondent-parent's name).

However, if a petition or an amended petition fails to request the termination of parental rights, a subsequent order terminating parental rights must be set aside. *In re SLH*, 277 Mich App 662, 674 (2008).

B. Verification Requirement

Information provided in the petition must be verified and may be upon information and belief. MCL 712A.11(3). However, if any of the facts required to be contained in the petition are unknown to the petitioner, the petition must state that the facts are unknown. MCL 712A.11(4).

A petition may be verified by oath or affirmation of the person having knowledge of the facts stated, or by a signed and dated declaration. MCR 2.114(B)(2). With the exception of an affidavit, the declaration may be verified by "including the following signed and dated declaration: 'I declare that the statements above are true to the best of my information, knowledge, and belief.'" MCR 2.114(B)(2)(b). See also *In re Jagers*, 224 Mich App 359, 364-365 (1997).

A person who knowingly makes a false declaration under MCR 2.114(B)(2)(b) may be found in contempt of court. MCR 2.114(B)(2).

C. Form and Filing of Petition

MCR 5.113 governs the form and filing of papers with the court, and applies to child protective proceedings. MCR 3.901(A)(1). A petition filed under the Juvenile Code must contain a petition number, including a prefix indicating the year and a suffix containing a case-type code. MCR 5.113(A)(1)(b)(ii). The case-type code for child protective proceedings is "NA." See the SCAO's *Case File Management Standards* (rev. 10/08), 6.1: Case Type Codes (F)(d), p 6, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_stds.pdf.

D. Court Fees

A party is not required to pay a filing fee for filing a child protective petition. See MCL 600.2529(8).

7.5 Other Court Cases Involving Same Family Members

MCR 3.961(B)(7) requires the petition to contain information identifying whether a family division matter that involves the same family members is or was pending. Specifically, the petition must contain one of the following statements:

> "(a) There is no other pending or resolved action within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition.
>
> (b) An action within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition has been previously filed in [this court]/[____ Court], where it was given docket number ____ and was assigned to Judge ____. The action [remains]/[is no longer] pending." MCR 3.206(A)(4).
>
> > **Note:** As a practical matter, petitioners do not provide the information required by MCR 3.206(A)(4), due at least in part to the difficulties in gathering information on families who have cases pending in other Michigan counties. However, if the DHHS is investigating a suspected abused or neglected child and determines that there is an open Friend of the Court (FOC) case regarding the child, the DHHS must "notify the office of the [FOC] in the county in which the [FOC] case is open that there is an investigation conducted under [the Child Protection Law] regarding that child[.]" MCL 722.628(19). See Section 2.4(E) for additional information.

Whenever practicable, two or more matters within the Family Division's jurisdiction, pending in the same judicial circuit and involving members of the same family, must be assigned to the judge who was assigned the first matter. MCL 600.1023.

7.6 Preliminary Inquiries

If a person gives information to the court that a child is within MCL 712A.2(b) or MCL 712A.2(c), a preliminary inquiry may be made to determine whether the interests of the public or the child require that further action be taken. MCL 712A.11(1).

A preliminary inquiry may also be held to determine the appropriate course of action when a petition does not request placement and the child is not in custody. MCR 3.962(A). However, if the child is in protective custody or placement[22] is requested, the court must commence a preliminary hearing[23] within 24 hours after the child is taken into protective custody.[24] MCR 3.965(A)(1). The court must also "conduct a preliminary inquiry to determine the appropriate action to be taken on a petition[]" "[i]f either an amended[25] or supplemental petition[26] [filed under MCR 3.961(C)(1) or MCR 3.961(C)(2)] is not accompanied by a request for placement of the child or the child is not in protective or temporary custody[.]" MCR 3.961(C)(3).

A *preliminary inquiry* is defined as "informal review by the court to determine appropriate action on a petition." MCR 3.903(A)(23). "A preliminary inquiry need not be conducted on the record or in the presence of the parties." MCR 3.962(B).

> "At the preliminary inquiry, the court may:
>
> (1) Deny authorization of the petition.
>
> (2) Refer the matter to alternative services.

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[22] MCR 3.903(C)(10) defines *placement* as "court-approved transfer of physical custody of a child to foster care, a shelter home, a hospital, or a private treatment agency."

[23] See Section 7.7 for a more detailed discussion of preliminary hearings.

[24] The 24-hour time period does not include Sundays or holidays. MCR 3.965(A)(1). See also MCR 8.110(D)(2).

[25] For purposes of child protective proceedings, "'[a]mended petition' means a petition filed to correct or add information to an original petition, as defined in [MCR 3.903(A)(20)], after it has been authorized, but before it is adjudicated." MCR 3.903(C)(2). Note, that MCR 3.903(C)(2) mistakenly references to MCR 3.903(A)(21) for its definition of the term *petition*, but the term is actually defined in MCR 3.903(A)(20).

[26] For purposes of child protective proceedings, "'[s]upplemental petition' means: (a) a written allegation, verified in the manner provided in MCR 2.114(B), that a parent, for whom a petition was authorized, has committed an additional offense since the adjudication of the petition, or (b) a written allegation, verified in the manner provided in MCR 2.114(B), that a nonrespondent parent is being added as an additional respondent in a case in which an original petition has been authorized and adjudicated against the other parent under MCR 3.971 or MCR 3.972, or (c) a written allegation, verified in the manner provided in MCR 2.114(B), that requests the court terminate parental rights of a parent or parents under MCR 3.977(F) or MCR 3.977(H)." MCR 3.903(C)(13). MCR 3.903(C)(8) defines a *nonrespondent parent* as "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)."

> (3) Authorize the filing of the petition if it contains the information required by MCR 3.961(B), and there is probable cause to believe that one or more of the allegations is true. For the purpose of this subrule, probable cause may be established with such information and in such a manner as the court deems sufficient." MCR 3.962(B).

See also *In re Kyle*, 480 Mich 1151 (2008) ("[t]he permissible actions following a preliminary inquiry are limited to granting or denying authorization to file the petition, or referring the matter to 'alternative services[]'").

A. Referring Case to Alternative Services

"Referring the matter to 'alternative services' [MCR 3.962(B)(2)] does not include granting the only relief sought by the petition." *In re Kyle*, 480 Mich at 1151. In *In re Kyle*, *supra* at 1151, the Court of Appeals erred in concluding that the preliminary inquiry procedure provided the circuit court with authority to grant the relief sought under the petition without a trial pursuant to MCR 3.972 and MCL 712A.17, when the sole focus of the demand for relief was for the minor child to receive a medical examination. *Id*. The preliminary inquiry procedure only permits a court to grant or deny authorization to file the petition or to refer the matter to alternative services. *In re Kyle*, *supra* at 1151.

B. Authorizing Petition

A "'[p]etition authorized to be filed' refers to written permission given by the court to file the petition containing the formal allegations against the . . . respondent with the clerk of the court." MCR 3.903(A)(21). "An authorized petition is deemed 'filed' when it is delivered to, and accepted by, the clerk of the court." MCR 3.903(A)(9).

Where a juvenile is alleged to be within the provisions of MCL 712A.2(b), the court may authorize the filing of a petition at the conclusion of a preliminary inquiry. MCL 712A.13a(2). The court may authorize the filing of the petition if it contains the information required by MCR 3.961(B),[27] and there is probable cause to believe that one or more of the allegations is true. MCL 712A.13a(2); MCR 3.962(B)(3).

[27] See Section 7.4(A) for a list of requirements under MCR 3.961(B).

> "[P]robable cause may be established with such information and in such a manner as the court deems sufficient." MCR 3.962(B)(3).

Unless a parent enters a plea of admission or no contest, a trial will be held upon the court's authorization to file the petition to determine whether the court will take personal jurisdiction over the child. See MCR 3.903(A)(27). See also Section 4.3 for a detailed discussion of personal jurisdiction, and Section 17.7 for a detailed discussion of voluntary termination.

If the court authorizes the petition and the child is not in custody, a trial must be held within six months after the filing of the petition, unless adjourned for good cause under MCR 3.923(G). MCR 3.972(A).

7.7 Preliminary Hearings

If a petition is accompanied by a request for placement[28] and the child is in temporary custody, the court must hold a preliminary hearing to decide whether to authorize the filing of the petition and whether to place the child outside his or her home. MCR 3.965(A)(1). However, if the petition does not request placement and the child is not in custody, the court may conduct a preliminary inquiry to determine an appropriate course of action. MCR 3.962(A). See Section 7.6 for a more detailed discussion of preliminary inquiries.

"If either the amended[29] or supplemental petition[30] [filed under MCR 3.961(C)(1) or MCR 3.961(C)] contains a request for removal, the court shall conduct a preliminary hearing to determine the appropriate action to be taken on the petition consistent with MCR 3.965(B)[, and i]f either the amended or supplemental petition is authorized, the court shall proceed against each respondent parent in accordance with MCR 3.971 or MCR 3.972."[31] MCR 3.961(C)(3). However, "[i]f either an amended or

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[28] MCR 3.903(C)(10) defines *placement* as "court-approved transfer of physical custody of a child to foster care, a shelter home, a hospital, or a private treatment agency."

[29] For purposes of child protective proceedings, "'[a]mended petition' means a petition filed to correct or add information to an original petition, as defined in [MCR 3.903(A)(20)], after it has been authorized, but before it is adjudicated." MCR 3.903(C)(2). Note, that MCR 3.903(C)(2) mistakenly references to MCR 3.903(A)(21) for its definition of the term *petition*, but the term is actually defined in MCR 3.903(A)(20).

[30] For purposes of child protective proceedings, "'[s]upplemental petition' means: (a) a written allegation, verified in the manner provided in MCR 2.114(B), that a parent, for whom a petition was authorized, has committed an additional offense since the adjudication of the petition, or (b) a written allegation, verified in the manner provided in MCR 2.114(B), that a nonrespondent parent is being added as an additional respondent in a case in which an original petition has been authorized and adjudicated against the other parent under MCR 3.971 or MCR 3.972, or (c) a written allegation, verified in the manner provided in MCR 2.114(B), that requests the court terminate parental rights of a parent or parents under MCR 3.977(F) or MCR 3.977(H)." MCR 3.903(C)(13). MCR 3.903(C)(8) defines a *nonrespondent parent* as "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)."

supplemental petition [filed under MCR 3.961(C)(1) or MCR 3.961(C)(2)] is not accompanied by a request for placement of the child or the child is not in protective or temporary custody, the court shall conduct a preliminary inquiry to determine the appropriate action to be taken on a petition." MCR 3.961(C)(3). See Section 7.6 for a more detailed discussion of preliminary inquiries.

A preliminary hearing must commence within 24 hours of a child being taken into protective custody unless the preliminary hearing is adjourned for good cause, or the child must be released.[32] MCR 3.965(A)(1); MCL 712A.14(2). A preliminary hearing must also commence within 24 hours of the DHHS submitting a petition or by the next business day following submission of the petition where the child was severely physically injured[33] or sexually abused. MCR 3.965(A)(2).

Two-way interactive video technology may be used to conduct preliminary hearings. MCR 3.904(B)(2). However, the use of two-way interactive video technology must comply with any standards established by the State Court Administrative Office, and any proceedings conducted using the technology must be recorded verbatim. MCR 3.904(C).[34]

A. Required Procedures at Preliminary Hearings

1. Notification

The court must determine whether the child's parent, guardian, or legal custodian received notification of the preliminary hearing and if the child's lawyer-guardian ad litem is present at the hearing. MCR 3.965(B)(1).

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[31] See Chapter 10 for a discussion of MCR 3.971 (pleas of admission or no contest), and Chapter 12 for a discussion of MCR 3.972 (trials).

[32] The 24-hour time period does not include Sundays or holidays. MCR 3.965(A)(1).

[33] *Severe physical injury* is defined as "an injury to the child that requires medical treatment or hospitalization and that seriously impairs the child's health or physical well-being." MCL 722.628(3)(c).

[34] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Administrative Order No. 2012-7 further provides that "[t]he judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

> **Note:** When a child is placed outside the home, notice of the preliminary hearing must be given to the parent of the child soon as it is scheduled. MCR 3.920(D)(2)(b). See Section 5.2 for a detailed discussion of notice of hearings.

The failure of an attorney, parent, guardian, or legal custodian to appear may result in adjournment of the preliminary hearing.[35] MCR 3.965(B)(1). The court may, however, continue with the preliminary hearing in the absence of the child's parent, guardian, or legal custodian if notice was given or if the court finds that a reasonable attempt to give notice was made. *Id.* When a notice is returned unclaimed, "'the adequacy of the [DHHS]'s efforts will be evaluated in light of the actions it takes after it learns that its attempt at notice has failed.'" *In re Rood*, 483 Mich 73, 110 (2009), quoting *Sidun v Wayne Co Treas*, 481 Mich 503, 511 (2008).

2. Inquiring About Indian Children

The court must inquire whether a child or either of the child's parents is a member of an Indian tribe. MCR 3.965(B)(2). "If the court knows or has reason to know the child is an Indian child, the court must determine the identity of the child's tribe[.]" *Id.*

Where an Indian child was taken into protective custody without a court order[36] or the petition requests removal of the Indian child, the court must follow the procedures set out in MCR 3.967. MCR 3.965(B)(2). See Section 19.9(A) for information on MCR 3.967.

> **Note:** The court may hold the preliminary hearing in conjunction with the removal hearing if all necessary parties are notified,[37] there are no objections by the parties to do so, and at least one qualified expert witness is present to provide testimony. MCR 3.965(B)(2). However, the court may adjourn the preliminary hearing pending the conclusion of the removal hearing if necessary.[38] *Id.*

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[35] See Section 7.7(D) for a detailed discussion of preliminary hearing adjournments.

[36] See Section 3.1(A) for a detailed discussion of protective custody of a child without court order.

[37] See Section 19.4 for a detailed discussion of notification requirements under the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA).

[38] See Section 7.7(D) for information on adjournments of preliminary hearings.

3. Temporary Orders

"The court may make temporary orders for the protection of the child pending the appearance of an attorney or pending the completion of the preliminary hearing." MCR 3.965(B)(3).

4. Lawyer-Guardian Ad Litem (L-GAL) for Child

The court must appoint a lawyer-guardian ad litem to represent a child in a child protective proceeding.[39] MCL 712A.17c(7). "The child's lawyer-guardian ad litem must be present to represent the child at the preliminary hearing." MCR 3.965(B)(3).

The court must determine whether the child's lawyer-guardian ad litem is present at the preliminary hearing. MCR 3.965(B)(1). The court must also direct that the child's lawyer-guardian ad litem receive a copy of the petition. MCR 3.965(B)(3).

5. Reading Allegations

Unless waived, the court must read the allegations in the petition in open court. MCR 3.965(B)(4).

6. Required Procedures Toward Respondent

If a respondent is present at the preliminary hearing, the court must assure that he or she has a copy of the petition. MCR 3.965(B)(4).

The court is also required to advise the respondent of his or her right:

> (1) pursuant to MCR 3.915(B)(1)(a), to the assistance of an attorney at the preliminary hearing and any subsequent hearing. MCR 3.965(B)(6). See Section 7.8 for a detailed discussion of a respondent's right to counsel.
>
> (2) to a trial on the allegations in the petition, and that the trial may be held in front of a referee unless a demand for a jury or judge is filed under MCR 3.911 or MCR 3.912. MCR 3.965(B)(7). See Section 9.6 for a detailed discussion on demands for a jury or bench trial.

[39] See Section 7.9 for a detailed discussion of lawyer-guardian ad litem (L-GAL) appointments.

Additionally, the court must provide the respondent with an opportunity to deny or admit the allegations contained in the petition and give an explanatory statement. MCR 3.965(B)(9).

7. Decision to Dismiss, Refer, or Continue

The court must determine whether a petition should be dismissed or referred to alternative services. MCR 3.965(B)(5). If the case is dismissed or referred, the court must release the child. *Id.* However, if the court does not dismiss or refer the case, the court must continue the preliminary hearing. *Id.*

8. Nonrespondent Parent's Right to Seek Placement of Child in Home

"The court must advise a nonrespondent parent of his or her right to seek placement of his or her children in his or her home." MCR 3.965(B)(8).

For purposes of child protective proceedings, a *nonrespondent parent* is "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)." MCR 3.903(C)(8).

9. Child Subject to Another Court's Jurisdiction

The court must inquire whether the child is subject to the continuing jurisdiction of another court and, if so, which court. MCR 3.965(B)(10). See Section 4.4 for a detailed discussion of concurrent jurisdiction.

10. Inquiring About the Child's Family

Where a child's father has not been identified, the court must ask the child's mother about the father's identity and whereabouts. MCR 3.965(B)(14).

The court must also ask a child's parent, guardian, or legal custodian if the child has any relatives who might be available to provide care. MCR 3.965(B)(14).

> **Note:** A *relative* is "an individual who is at least 18 years of age and related to the child by blood, marriage, or adoption, as grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew or niece, first cousin or first cousin once removed, and the spouse of any of the above, even after the

> marriage has ended by death or divorce. A stepparent, ex-stepparent, or the parent who shares custody of a half-sibling[40] shall be considered a relative for the purpose of placement."[41] MCL 712A.13a(1)(j).

B. Petition Authorization

Unless the preliminary hearing is adjourned, the court must decide whether to authorize the filing of a petition. MCR 3.965(B)(12). The court's authorizing of the filing of the petition refers to the court's written permission to "file the petition containing the formal allegations against the . . . respondent with the clerk of the court." MCR 3.903(A)(21).

The judge or referee must authorize the filing of a petition during the preliminary hearing, or the child must be released to his or her parents, guardian, or custodian. MCL 712A.14(2). The court may authorize the filing of the petition upon a showing of probable cause, unless waived, that one or more of the allegations contained in the petition are true and fall within MCL 712A.2(b).[42] MCL 712A.13a(2); MCR 3.965(B)(12).

> **Note:** "The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent that such privileges are abrogated by MCL 722.631."[43] MCR 3.965(B)(12).

A petition may be amended at any stage of the proceedings as the ends of justice require. MCL 712A.11(6).

1. Finding of Probable Cause

At a preliminary hearing, the court must make "a finding of probable cause to substantiate that the facts alleged in the petition are true and that if proven at trial would fall under [MCL 712A.2(b)]." *In re Hatcher*, 443 Mich 426, 434-435 (1993).

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[40] "'Sibling' means a child who is related through birth or adoption by at least 1 common parent. Sibling includes that term as defined by the American Indian or Alaskan native child's tribal code or custom." MCL 712A.13a(1)(*l*).

[41] Notification to the stepparent, ex-stepparent, or the parent who shares custody of a half-sibling is required as described in . . . MCL 722.954a." MCL 712A.13a(1)(j).

[42] See Section 4.3(A) for information on MCL 712A.2(b).

[43] See Chapter 8 for a detailed discussion of child placements and Section 11.3 for information on abrogation of privileges.

The probable-cause phase of a preliminary hearing may proceed in the following ways:

- **Respondent waives probable-cause determination:** if the respondent waives the probable-cause determination, the verified petition allows the court to authorize the filing of the petition. See MCR 3.965(B)(12); MCR 3.965(C)(1). This is similar to the probable-cause showing at a preliminary inquiry. See MCL 712A.13a(2); MCR 3.962(B)(3).

- **Respondent does not waive probable-cause determination and witnesses are present:** if the respondent does not waive the probable-cause determination, the petitioner presents witnesses, and the respondent is given an opportunity to cross-examine witnesses, to subpoena witnesses, and to offer proofs to counter the admitted evidence. MCR 3.965(C)(1). If the court finds probable cause that one or more of the allegations in the petition are true, the court may authorize the filing of the petition. MCR 3.965(B)(12).

- **Respondent does not waive probable-cause determination and no witnesses are present:** if the respondent does not waive the probable-cause determination and no witnesses are present, the court may adjourn the hearing for up to 14 days to secure the attendance of witnesses. MCR 3.965(B)(11). If the court finds probable cause that one or more of the allegations in the petition are true, the court may authorize the filing of the petition. MCR 3.965(B)(12).

2. Authorizing the Filing of Petition

If the court authorizes the filing of the petition, it must decide whether the child should remain in the home, be returned home, or be placed in foster care pending trial. MCR 3.965(B)(12).[44] See also MCL 712A.14(3).

"If the court authorizes the filing of the petition, the court:

> (a) may release the child to a parent, guardian, or legal custodian and may order such reasonable terms and conditions believed necessary to protect the physical health or mental well-being of the child; or

[44] See Chapter 8 for a detailed discussion of child placements.

> (b) may order placement of the child after making the determinations specified in [MCR 3.965](C), if those determinations have not previously been made.[45] If the child is an Indian child, the child must be placed in descending order of preference with:
>
> > (i) a member of the child's extended family,
> >
> > (ii) a foster home licensed, approved, or specified by the child's tribe,
> >
> > (iii) an Indian foster family licensed or approved by the department,
> >
> > (iv) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.
>
> The court may order another placement for good cause shown in accordance with MCL 712B.23(3)-(5). If the Indian child's tribe has established a different order of preference than the order prescribed above, placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in MCL 712B.23(6). The standards to be applied in meeting the preference requirements above shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties."[46] MCR 3.965(B)(13).

If the court authorizes the petition, it may release the child to his or her parents, guardian, or custodian under reasonable terms and conditions necessary for the child's physical health or mental well-being. MCL 712A.13a(3). However,

- if the petition alleges that the child's parent, guardian, custodian, nonparent adult[47], or other person

[45] See Chapter 8.

[46] The Michigan Indian Family Preservation Act (MIFPA) also sets out a standard order of preference for the placement of Indian children in MCL 712B.23(1), which mirrors the order set out in 25 USC 1915(b). For a detailed discussion of 25 USC 1915(b) and MCL 712B.23(1), see Section 19.10.

[47] See Section 7.7(E) for the definition of nonparent adult.

residing in the child's home abused the child, the court must not "leave the child in or return the child to the child's home or place the child [in an unlicensed foster care], unless the court finds that the conditions of custody at the placement and with the individual with whom the child is placed are adequate to safeguard the child from the risk of harm to the child's life, physical health, or mental well-being." MCL 712A.13a(5).

- "[i]f [the] court finds [that] a parent is required by court order to register under the [S]ex [O]ffenders [R]egistration [A]ct,[48] the [DHHS] may, but is not required to, make reasonable efforts to reunify the child with the parent. The court may order reasonable efforts to be made by the [DHHS]." MCL 712A.13a(6).

Under MCL 712A.13a(2), if severe physical injury or sexual abused is alleged,[49] the court must consider:

(1) Ordering the alleged abuser to leave the child's home. MCL 712A.13a(4). See Section 7.7(C).

(2) Not leaving the child in or returning the child home unless the court finds that the child is adequately safeguarded from the risk of harm to his or her life, physical health, or mental well-being. MCL 712A.13a(5).

C. Order Alleged Abuser From Child's Home

If the court authorizes the filing of the petition and releases the child to a parent, guardian, or legal custodian, the court may order such reasonable terms and conditions believed necessary to protect the child's physical health or mental well-being. MCR 3.965(B)(13)(a). One of the terms and conditions available to the court is to order the child's parent, guardian, custodian, nonparent adult,[50] or other person residing in the child's home to leave and not return except as the court orders. See MCL 712A.13a(4).

1. Procedure to Order Alleged Abuser From Child's Home

When a court orders a child's parent, guardian, custodian, nonparent adult, or other person residing in the child's home to

[48] "'Sex [O]ffenders [R]egistration [A]ct' means the [S]ex [O]ffenders [R]egistration [A]ct, . . . MCL 28.721 to [MCL] 28.736." MCL 712A.13a(1)(k).

[49] See Section 7.3(A).

[50] See Section 7.7(E) for the definition of *nonparent adult*.

leave and to not subsequently return to the home, except as the court orders, the court must:

> (1) authorize the filing of the petition that contains allegations of child abuse;
>
> (2) find, during the preliminary hearing, probable cause to believe the child's parent, guardian, custodian, nonparent adult, or other person residing in the child's home committed the abuse; and
>
> (3) find on the record that the presence of the alleged abuser in the child's home presents a substantial risk of harm to the child's life, physical health, or mental well-being.[51] MCL 712A.13a(4).

The court may also consider whether the parent remaining in the home is married to the removed person or has a legal right to retain possession of the home. MCL 712A.13a(7).

Abuse, for purposes of MCL 712A.13a, is any of the following:

> "(a) Harm or threatened harm by a person to a juvenile's health or welfare that occurs through nonaccidental physical or mental injury.
>
> (b) Engaging in sexual contact or sexual penetration as defined in . . . MCL 750.520a, with a juvenile.
>
> (c) Sexual exploitation of a juvenile, which includes, but is not limited to, allowing, permitting, or encouraging a juvenile to engage in prostitution or allowing, permitting, encouraging, or engaging in photographing, filming, or depicting a juvenile engaged in a listed sexual act as defined in . . . MCL 750.145c.
>
> (d) Maltreatment of a juvenile." MCL 712A.13a(17).

2. Additional Conditions Added to Order

The order removing a parent, guardian, custodian, nonparent adult, or other person from the home may contain one or more of the following terms or conditions:

[51] See SCAO form JC 65, *Order Removing Alleged Abuser From Child's Home (Child Protective Proceedings)*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc65.pdf.

"(a) The court may require the alleged abusive parent to pay appropriate support to maintain a suitable home environment for the juvenile during the duration of the order.

(b) The court may order the alleged abusive person, according to terms the court may set, to surrender to a local law enforcement agency any firearms or other potentially dangerous weapons the alleged abusive person owns, possesses, or uses.

(c) The court may include any reasonable term or condition necessary for the juvenile's physical or mental well-being or necessary to protect the juvenile." MCL 712A.13a(8).

3. Violation of Court Order

A law enforcement officer has the authority to arrest a person without a warrant if the officer has reasonable cause to believe that:

(1) the court has issued an order under MCL 712A.13a(4) that removes the person from the child's home and indicates the period of time when the order is valid;

(2) a true copy of the order and proof of service has been filed with the law enforcement agency having jurisdiction of the area in which the person having custody of the child under MCL 712A.13a(4) resides;

Note: Orders and proofs of service must be entered into the Law Enforcement Information Network (LEIN). MCL 764.15f(6). If an order is rescinded, the court must immediately order the removal of the protective order from LEIN. MCL 764.15f(7).

(3) the person removed from the home has received notice of the order;

(4) the removed person is acting in violation of the court's order; and

(5) the order indicates that a violation of its terms subjects the person to criminal contempt of court and may result in imprisonment of not more than

> 90 days and a fine of not more than $500. MCL 764.15f(1)(a)-(e).

"'Reasonable cause' means having enough information to lead an ordinarily careful person to believe that the defendant committed a crime." *People v Freeman*, 240 Mich App 235, 236 (2000) (reliance on LEIN information provided police officer with reasonable cause to believe that defendant named on the personal protection order (PPO) had notice of the PPO and had violated its provision, thereby subjecting him to an immediate arrest).

When a person is arrested for violating a court's order under MCL 712A.13a(4), he or she must go before the Family Division having jurisdiction of the cause within 24 hours of the arrest to answer to a charge of contempt for violation of the order. MCL 764.15f(3). Once the arrested person is brought before the court, the court must:

> (1) schedule a hearing on the alleged violation of the order within 72 hours of the arrest (unless the court grants an extension of time upon the motion of the arrested person);
>
> (2) set a reasonable bond pending the scheduled hearing; and
>
> (3) notify the person having custody of the child under MCL 712A.13a(4) to appear at the scheduled hearing to give evidence on the charge of contempt. MCL 764.15f(3)(a)-(c).
>
> > **Note:** A Family Division judge may arraign, take a plea, or sentence a person for criminal contempt in the same manner as a circuit court judge could in other criminal cases. MCL 764.15f(4).

If a person is arrested for violating the court's order and a Family Division judge is not available within 24 hours of the arrest, he or she must go before a district court judge. MCL 764.15f(5). The district court judge must set a hearing before the Family Division that entered the violated order or that has jurisdiction over the order, and set bond. *Id.*

> **Note:** The requirements for enforcing orders issued under MCL 712A.13a(4) are similar to the requirements for enforcing a PPO. For a detailed discussion of PPOs, see the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 5.

For a detailed discussion of contempt proceedings, see the Michigan Judicial Institute's *Contempt of Court Benchbook*.

D. Adjournments of Preliminary Hearings

Adjourning a preliminary hearing should only be granted for good cause after the court takes the child's best interests into consideration and where the adjournment is for as short of a period of time as possible. MCR 3.923(G). For a more detailed discussion of adjournments, see Section 5.8.

The court may find good cause to adjourn a preliminary hearing for any of the following reasons:

(1) An attorney, parent, guardian, or legal custodian fails to appear at the preliminary hearing. MCR 3.965(B)(1). The court may, however, continue with the preliminary hearing in the absence of the child's parent, guardian, or legal custodian if notice was given or if the court finds that a reasonable attempt to give notice was made.[52] *Id.*

Note: The child's lawyer-guardian ad litem must be present to represent the child at the preliminary hearing. MCR 3.965(B)(3). See Section 7.7(A) for additional information.

(2) A petition requests the removal of an Indian child. MCR 3.965(B)(2). The court may adjourn the preliminary hearing pending the conclusion of the removal hearing or continue with the preliminary hearing in conjunction with the removal hearing if the necessary parties are notified,[53] there are no objections by the parties to do so, and at least qualified one expert witness is present to provide testimony. *Id.*

(3) A witness's attendance needs to be secured. MCR 3.965(B)(11). The court may adjourn the preliminary hearing for up to 14 days to secure a witness's attendance or for good cause shown. *Id.*

(4) "[T]he court knows or has reason to know the child is an Indian[.]" MCR 3.965(B)(11). "[T]he court may adjourn the [preliminary] hearing for up to 21 days to

[52] See Section 7.7(A) for additional information on notification requirements.

[53] See Section 19.4 for a detailed discussion of notification requirements under the ICWA and the MIFPA.

ensure proper notice to the tribe or Secretary of the Interior as required by MCR 3.920(C)(1)."[54] MCR 3.965(B)(11).

Note: If a preliminary hearing is adjourned, the court may enter temporary orders for placement of a child when necessary for the child's immediate safety, pending completion of the preliminary hearing, and subject to MCR 3.965(C), and as applicable, MCR 3.967.[55] MCR 3.965(B)(11).

E. Impact of Preliminary Hearing on Nonparent Adult

At a preliminary hearing, the court may issue an order that does one or more of the following:

"(a) Requires the nonparent adult to participate in the development of a case service plan.[56]

(b) Requires the nonparent adult to comply with a case service plan.

(c) Permanently removes the nonparent adult from the home of the child as provided in [MCL 712A.13a].[57]

(d) Permanently restrains the nonparent adult from coming into contact with or within close proximity of the child." MCL 712A.6b(1)(a)-(d). See Section 4.10 for a discussion on the court's jurisdiction and authority over adults.

A *nonparent adult* is "a person who is 18 years of age or older and who, regardless of the person's domicile, meets all of the following criteria in relation to a child over whom the court takes jurisdiction under [MCL 712A.2(b)]:

(*i*) Has substantial and regular contact with the child.

(*ii*) Has a close personal relationship with the child's parent or with a person responsible for the child's health or welfare.

[54] See Section 19.4 for a detailed discussion of notification requirements under the ICWA and the MIFPA.

[55] See Chapter 8 for a detailed discussion of pretrial placements.

[56] See Section 13.6 for a detailed discussion of case service plans.

[57] See Section 7.7(C).

(*iii*) Is not the child's parent or a person otherwise related to the child by blood or affinity to the third degree." MCL 712A.13a(1)(h).

A nonparent adult who violates a court order issued under MCL 712A.6b is guilty of a misdemeanor.[58] MCL 712A.6b(2). For subsequent violations, a nonparent adult is guilty of a felony.[59] MCL 712A.6b(3). A nonparent adult may also be charged with, convicted of, or punished for any other violations he or she commits while violating a court order issued under MCL 712A.6b. MCL 712A.6b(4).

The court may also exercise its criminal or civil contempt powers for a nonparent's violation of an order issued under MCL 712A.6b. MCL 712A.6b(5).

7.8 Respondent's Right to Counsel

An indigent respondent in a child protective proceeding has the right to appointed counsel at any hearing (including the preliminary hearing). MCL 712A.17c(5); MCR 3.915(B)(1)(b). However, a person does not enjoy the right to court-appointed counsel until he or she is named as a respondent. *In re Williams*, 286 Mich App 253, 276-277 (2009). In *In re Williams*, *supra* at 276, a child's father did not qualify as a respondent, and thus was not entitled to court-appointed counsel, when child protective proceedings were initiated against the child's mother and the petition did not accuse him of any wrongdoing or allege that he was incapable of parenting his child. However, the father's status changed, raising his right to court-appointed counsel, when the DHHS filed a supplemental petition four months later that directly named the father as a respondent. *Id.* at 276-277.

A *respondent* is "the parent, guardian, legal custodian, or nonparent adult who is alleged to have committed an offense against a child[,]" (except as provided in MCR 3.977(B)). MCR 3.903(C)(12). MCR 3.977(B) limits the definition of respondent for termination of parental rights hearings to only include the child's natural or adoptive mother and the child's father as defined by MCR 3.903(A)(7).[60] It does not include "other persons to whom legal custody has been given by court order, persons who are acting in the place of the mother or father, or other persons responsible for the control, care, and welfare of the child." MCR 3.977(B).

[58] Punishable by not more than one year of imprisonment, a maximum fine of $1,000, or both.

[59] Punishable by not more than two years of imprisonment, a maximum fine of $2,000, or both.

[60] See Chapter 6 for the definition of *father* under MCR 3.903(A)(7).

MCR 3.903 defines *parent*, *guardian*, *legal custodian*, and *nonparent adult* as follows:

- "'Parent' means the mother, the father as defined in MCR 3.903(A)(7),[61] or both, of the minor. It also includes the term 'parent' as defined in MCR 3.002(20)."[62] MCR 3.903(A)(18).

- "'Guardian' means a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or [MCL] 700.5205, by a court of another state under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202, or a juvenile guardian appointed pursuant to MCL 712A.19a or MCL 712A.19c." MCR 3.903(A)(11).

- "'Juvenile Guardian' means a person appointed guardian of a child by a Michigan court pursuant to MCL 712A.19a or MCL 712A.19c. A juvenile guardianship is distinct from a guardianship authorized under the Estates and Protected Individuals Code." MCR 3.903(A)(13).

- "'Legal Custodian' means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. It also includes the term 'Indian custodian' as defined in MCR 3.002(15)."[63] MCR 3.903(A)(14).

- "'Nonparent adult' means a person who is 18 years of age or older and who, regardless of the person's domicile, meets all the following criteria in relation to a child over whom the court takes jurisdiction under this chapter:

  (a) has substantial and regular contact with the child,

  (b) has a close personal relationship with the child's parent or with a person responsible for the child's health or welfare, and

[61] See Chapter 6 for the definition of *father* under MCR 3.903(A)(7).

[62] MCR 3.002(20) defines an Indian child's *parent* as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the putative father if paternity has not been acknowledged or established." MCR 3.002(20) was formerly MCR 3.002(10).

[63] An "'Indian custodian' means any Indian person who has custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody, and control have been transferred by the child's parent." MCR 3.002(15) (formerly MCR 3.002(7)).

> (c) is not the child's parent or a person otherwise related to the child by blood or affinity to the third degree." MCR 3.903(C)(7).

The court has discretionary authority to appoint counsel to assist an indigent noncustodial parent in contesting termination of parental rights under the Adoption Code.[64] *In re Sanchez*, 422 Mich 758, 760-761 (1985). In *In re Sanchez*, *supra* at 770-771, the Michigan Supreme Court noted that when exercising its discretion,

> "the trial court will be guided by the principle of assuring the nonconsenting parent the ability to present a case properly, measured in the particular case by factors such as the relative strength of the adversaries and the presence or absence of legal, factual, procedural, or evidentiary complexity."

A parent is not entitled to court-appointed counsel for a voluntary release of parental rights. See *In re Blankenship*, 165 Mich App 706, 713 (1988) ("[i]t is well established that there is no right to appointed counsel in a voluntary adoption matter"); *In re Koroly*, 145 Mich App 79, 88 (1985) ("the right to counsel does not extend to releases for adoption, which are voluntary in nature"); *In re Jackson (Kenneth)*, 115 Mich App 40, 50-52 (1982) ("[t]here is no parallel statutory right to counsel provision under the Michigan Adoption Code, nor have the courts held that due process requires the right to counsel at such proceedings").

A. Appointment of Counsel at Trial Court Level

Once a person is named as a respondent during a child protective proceeding, the court must inform the respondent of his or her right to court-appointed counsel. *In re Williams*, 286 Mich App at 276. Specifically, the Court of Appeals found:

> "Both MCL 712A.17c(4) and MCR 3.915(B)(1)(b) specifically extend the right of appointed counsel only to indigent 'respondent[s]' in child protective proceedings. The initial petition contained no allegations of wrongdoing against respondent father, and expressed no concerns about his ability to parent [his child]. Consequently, at the preliminary hearing, the adjudication, and the dispositional hearing, respondent father did not qualify as a 'respondent.' Although the foster care workers voiced some concerns involving respondent father's medical condition, at no point until petitioner filed the supplemental petition did

[64] For additional information on involuntary termination of parental rights pursuant to the Adoption Code, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 2.

> it directly identify an act or omission that converted respondent father's status from that of a nonoffending parent into that of a respondent. Under the applicable statute and court rule, respondent father thus enjoyed no right to appointed counsel during the first four months of the proceedings. However, when the circuit court authorized the supplemental petition . . . , it was required to advise respondent father of his right to appointed counsel." *In re Williams*, 286 Mich App at 276.

At a respondent's first court appearance, the court must advise the respondent that he or she has:

> (1) the right to an attorney at each stage of the proceeding (including the preliminary hearing);
>
> (2) the right to a court-appointed attorney if he or she financially unable to retain one; and
>
> (3) the right to request and receive a court-appointed attorney at a later proceeding if he or she is not represented by an attorney. MCL 712A.17c(4); MCR 3.915(B)(1)(a).
>
> > **Note:** An attorney's appearance in a child protective proceeding is governed by MCR 2.117(B). MCR 3.915(C).

A respondent must make some type of affirmative action in order for the court to appoint an attorney. *In re Hall (Sharnetta)*, 188 Mich App 217, 222 (1991).[65] After a respondent requests court-appointed counsel, the court must appoint an attorney if "it appears to the court, following an examination of the record, through written financial statements, or otherwise, that the respondent is financially unable to retain an attorney."[66] MCR 3.915(B)(1)(b)(ii). See also MCL 712A.17c(5).

> **Note:** When determining indigency, the trial court erred when it imputed all household income to the respondent, including income earned by those not legally obligated to contribute to the respondent's attorney fees. *In re Williams*, 286 Mich App at 277. Specifically, the Court of Appeals found:

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[65] The *Hall (Sharnetta)* case referred to former MCR 5.915(B), which required a court to appoint counsel "if the respondent desire[d] an attorney . . . ." Current MCR 3.915(B)(1)(i) requires a court to appoint counsel if "the respondent requests appointment of an attorney . . . ."

[66] See SCAO form JC 102, *Request and Order For Court-Appointed Attorney*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc102.pdf.

> "[The Court] reject[s] the idea that a [trial] court may deny a respondent appointed counsel by imputing to the respondent income earned by people who bear no legal responsibility to contribute to the respondent's legal expenses. Mere cohabitants, even if parents of an adult respondent, possess no obligation to pay the respondent's attorney fees, and a [trial] court may not prohibit a respondent from exercising the right to appointed counsel on the basis of a calculation that imputes income from sources unavailable to the respondent. . . . Furthermore, [the DHHS] contended at the termination hearing that respondent father's lack of 'independent housing' and his insufficient income supplied grounds for terminating his rights. We find it fundamentally unfair to deny appointed counsel because a respondent does not qualify as indigent, while at the same time invoking the respondent's indigence as a ground for terminating parental rights." *In re Williams*, 286 Mich App at 277.

If an attorney is appointed, the court may enter an order assessing costs of the representation to the respondent or against the person responsible for support of the respondent. MCR 3.915(E).

A respondent may waive his or her right to an attorney.[67] MCL 712A.17c(6); MCR 3.915(B)(1)(c). See *In re Hall (Sharnetta)*, 188 Mich App at 222, where the respondent waived her right to representation after effectively terminating her attorney-client relationship by failing to contact her court-appointed attorney for sixteen months, failing to appear at any review hearings, and residing at an unknown address where her attorney was unable to locate her.

> **Note:** The court must not accept a minor respondent's waiver of counsel over the objection of his or her parent, guardian, legal custodian, or guardian ad litem. MCL 712A.17c(6); MCR 3.915(B)(1)(c).

A court must permit a respondent who has initially waived counsel to withdraw from self-representation "if the [respondent] shows a legitimate reason for the change and if substitution would 'not result in unwarranted disruption prejudicial to the orderly progress of the case'." *In re Cobb*, 130 Mich App 598, 600-601 (1983), quoting *People v Eddington*, 77 Mich App 177, 188 (1977).

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[67] See SCAO form JC 06, *Waiver of Attorney or Request For Appointment of Attorney*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc06.pdf.

A court-appointed attorney must represent the respondent until discharged by the court. MCL 712A.17c(9); MCR 3.915(D)(2). A retained attorney may only withdraw from representation by court order. MCR 3.915(D)(1).

B. Appointment of Appellate Counsel

Immediately following entry of an order terminating a parent's parental rights, the court must advise the respondent-parent orally or in writing that:

> (1) he or she is entitled to appellate review of the termination order.
>
> (2) the court will appoint an attorney if the respondent-parent is financially unable to retain one, and the court will furnish the appointed attorney with the necessary portions of the transcript and record to appeal.
>
> (3) he or she must request the assistance of an attorney within 14 days after:
>
> > (a) notice of the termination order is given; or
> >
> > (b) entry of an order denying a timely filed postjudgment motion.
>
> (4) if he or she requests the assistance of an attorney, the instructions and time period for requesting the appointment of an attorney, which must be repeated in the form that the court must also provide to the respondent-parent.[68]
>
> (5) he or she has the right to control the release of his or her identifying information. MCR 3.977(J)(1)(a)-(d).

Within 14 days of a respondent-parent's timely request, the court must appoint an attorney if it finds that the respondent-parent is financially unable to retain one.[69] MCR 3.977(J)(2)(a).

> **Note:** See, generally, *In re Conley*, 216 Mich App 41, 45 (1996), where the Court of Appeals refused to require appointment of appellate counsel where tardiness of request was the only reason for denial of the request for

[68] See SCAO form JC 44, *Advice of Rights After Order Terminating Parental Rights (Juvenile Code)*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc44.pdf.

[69] It is the chief judge's responsibility to ensure that the appointment is made within 14 days of the respondent-parent's request. MCR 3.977(J)(2)(a).

counsel; appointment in such circumstances is within the court's discretion.

The court must immediately send to the Court of Appeals:

(1) a copy of the Claim of Appeal and Order Appointing Appellate Counsel;

Note: In cases involving the termination of parental rights, the court must use SCAO form JC 84, *Claim of Appeal and Order Appointing Appellate Counsel*, which can be found at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc84.pdf. MCR 3.977(J)(2)(b).

(2) a copy of the judgment or order being appealed; and

(3) a copy of the complete register of actions in the case. MCR 3.977(J)(2)(b).

Note: The trial court's entry of the order constitutes a timely filed claim of appeal for purposes of MCR 7.204. MCR 3.977(J)(2)(b).

The court must also file in the Court of Appeals proof of service that the Claim of Appeal and Order Appointing Appellate Counsel was received by:

(1) The respondent-parent(s);

(2) The respondent-parent's or parents' appointed counsel;

(3) The court reporter(s)/recorder(s);

(4) The petitioner;

(5) The prosecuting attorney;

(6) The child's lawyer-guardian ad litem under MCL 712A.13a(1)(f);[70] and

(7) The child's guardian ad litem or attorney (if applicable).[71] MCR 3.977(J)(2)(b).

If the trial court finds that the respondent-parent is financially unable to pay for the preparation of transcripts for the appeal, the court must

[70] See Section 7.9 for a detailed discussion of lawyer-guardians ad litem (L-GAL).

[71] See Section 7.10 and Section 7.11.

order preparation of the transcripts at public expense. MCR 3.977(J)(3).

> **Note:** See *MLB v SLJ*, 519 US 102, 107 (1996) (it is inconsistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment for a state to "condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees").

C. Appointment of Counsel in Proceedings Involving an Indian Child

The court must appoint counsel in any removal, placement, or termination proceeding where it determines the parent or custodian is indigent. 25 USC 1912(b); MCL 712B.21. However, the court has discretion whether to appoint counsel for an Indian child and only upon a finding that court-appointed counsel would be in the child's best interests. 25 USC 1912(b); MCL 712B.21.[72]

"If state law does not require the appointment of a lawyer-guardian ad litem for the child, the court may, in its discretion, appoint a lawyer-guardian ad litem for the child upon a finding that the appointment is in the best interest of the child."[73] MCL 712B.21(2). Michigan statutory law requires the court to appoint a lawyer-guardian ad litem to represent a child during child protective proceedings. MCL 712A.17c(7). See Section 7.9.

25 USC 1912(b) mandates that "[w]here State law makes no provision for appointment of counsel in [involuntary Indian child custody] proceedings, the court shall promptly notify the Secretary [of the Interior] upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to [25 USC 1913]." See also MCL 712B.21(1), which contains substantially similar language.

When the court notifies the Secretary of the Interior of the appointment of counsel, the court must also notify the Bureau of Indian Affairs (BIA) Regional Director in the Minneapolis Area

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[72] For additional information on the ICWA and the MIFPA requirements as they pertain to an Indian child, see Chapter 19.

[73] MCL 712B.3(q) defines *lawyer-guardian ad litem* as "an attorney appointed under [MCL 712B.21]. A lawyer-guardian ad litem represents the child, and has the powers and duties, as set forth in [MCL 712A.17d]. The provisions of [MCL 712A.17d] also apply to a lawyer-guardian ad litem appointed for the purposes of [the MIFPA] under each of the following: (*i*) [MCL 700.5213] or [MCL 700.5219][;] (*ii*) [MCL 722.24][;] and (*iii*) [MCL 722.630]." See also MCR 3.002(18), which contains substantially similar language.

Office. 25 CFR 23.13(a); 25 CFR 23.11(c)(2). The contact information for the Minneapolis Area Office may be found at http://www.kstrom.net/isk/maps/mn/mplsbia.html#MINNEAPOLIS%20AREA%20OFFICE.

The notice of appointment of counsel must include the following:

> "(1) Name, address, and telephone number of attorney who has been appointed.
>
> (2) Name and address of client for whom counsel is appointed.
>
> (3) Relationship of client to child.
>
> (4) Name of Indian child's tribe.
>
> (5) Copy of the petition or complaint.
>
> (6) Certification by the court that state law makes no provision for appointment of counsel in such proceedings.
>
> (7) Certification by the court that the Indian client is indigent." 25 CFR 23.13(a).

D. Effective Assistance of Counsel

"It is axiomatic that the right to counsel includes the right to competent counsel." *In re Trowbridge*, 155 Mich App 785, 786 (1986). In other words, "[t]he right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to effective assistance of counsel." *In re EP*, 234 Mich App 582, 597 (1999), overruled on other grounds by *In re Trejo Minors*, 462 Mich 341 (2000).

"[O]nce the right to counsel exists, there is a correlative right to effective representation that is free from actual conflicts of interest." *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 606 (1999) (order terminating parental rights should not be reversed on the basis of a conflict of interest arising from the fact that the prosecutor that represented the Department of Health and Human Services (DHHS) at the termination hearing had represented the respondent parent at an earlier hearing in the same matter absent a showing of actual prejudice).

For a respondent to prevail on a claim of ineffective assistance of counsel, the respondent must show that "[his or] her trial counsel's performance was deficient, i.e., [he or] she must 'show that counsel's performance fell below an objective standard of reasonableness, and

that the representation so prejudiced' [him or] her that it denied [him or] her a fair trial. This necessarily entails proving prejudice to [the respondent], which means that there is 'a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.'" *In re CR*, 250 Mich App 185, 198 (2002), overruled on other grounds by *In re Sanders*, 495 Mich 394 (2014) and quoting *People v Johnson (Johnnie)*, 451 Mich 115, 124 (1996).

A respondent cannot assert a claim of ineffective assistance of counsel on behalf of another person. *In re EP*, 234 Mich App at 598 (holding that the respondent could not assert a claim of ineffective assistance of counsel on behalf of her child because constitutional protections are personal and cannot be asserted vicariously).

7.9 Lawyer-Guardian Ad Litem (L-GAL)

During child protective proceedings, the court must appoint a lawyer-guardian ad litem[74] to represent the child at every hearing (including preliminary hearings), and the child may not waive the lawyer-guardian ad litem's assistance.[75] MCL 712A.17c(7); MCL 722.630; MCR 3.915(B)(2)(a).[76]

A lawyer-guardian ad litem is appointed to represent the interests of a child. MCL 712A.13a(1)(g); MCL 712A.17d(1); MCL 722.630. The lawyer-guardian ad litem's powers and duties include:

(1) The attorney-client privilege.

(2) Serving as the independent representative for the child's best interests.

[74] The Child Protection Law, MCL 722.621 *et seq.*, defines a *lawyer-guardian ad litem* as "an attorney appointed under [MCL 722.630] who has the powers and duties referenced by [MCL 722.630]." MCL 722.622(r). The Juvenile Code, MCL 712A.1 *et seq.*, defines a *lawyer-guardian ad litem* as "an attorney appointed under [MCL 712A.17c]." MCL 712A.13a(1)(g).

[75] See SCAO form JC 03, *Order Appointing Attorney/Guardian Ad Litem/Lawyer-Guardian Ad Litem*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc03.pdf.

[76] Where state law does not require the appointment of a lawyer-guardian ad litem, the ICWA and the MIFPA provide the court with the authority to appoint a lawyer-guardian ad litem for an Indian child on a finding that the appointment is in the child's best interests. 25 USC 1912(b) and MCL 712B.21(2). For a detailed discussion of the ICWA and the MIFPA, see Chapter 19. For purposes of the MIFPA, MCL 712B.3(q) defines *lawyer-guardian ad litem* as "an attorney appointed under [MCL 712B.21]. A lawyer-guardian ad litem represents the child, and has the powers and duties, as set forth in [MCL 712A.17d]. The provisions of [MCL 712A.17d] also apply to a lawyer-guardian ad litem appointed for the purposes of [the MIFPA] under each of the following: (*i*) [MCL 700.5213] or [MCL 700.5219][;] (*ii*) [MCL 722.24][;] and (*iii*) [MCL 722.630]." See also MCR 3.002(18), which contains a substantially similar definition of *lawyer-guardian ad litem*.

(3) Entitlement to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.

(4) Conducting his or her own independent investigation (including interviewing the child, social workers, family members, and others as necessary, and reviewing relevant reports and other information).

(5) Reviewing the agency case file[77] before disposition and before the parental rights termination hearing.

> **Note:** At least five business days before the scheduled hearing, the supervising agency must provide documentation of progress relating to all aspects of the last court-ordered treatment plan (including copies of evaluations and therapy reports, and verification of parenting time) to a child's lawyer-guardian ad litem.

(6) Reviewing all updated material as provided to the court and parties.

(7) Meeting with or observing the child[78] and assessing the child's needs and wishes with regard to the representation and issues in the case at the following times:

(a) Before the pretrial hearing.

(b) Before the initial disposition (if held more than 91 days after the petition has been authorized).

(c) Before a dispositional review hearing.

(d) Before a permanency planning hearing.

(e) Before a posttermination review hearing.

(f) At least once during the pendency of a supplemental petition.

(g) At other times as ordered by the court.

> **Note:** Unless directed by the court, adjourned or continued hearings do not require additional visits.

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[77] An *agency case file* means "the current file from the agency providing direct services to the child, that can include the child protective services file if the child has not been removed from the home or the [DHHS] or contract agency foster care file as defined under . . . MCL 722.111 to [MCL] 722.128." MCL 712A.13a(1)(b).

[78] The court may permit the lawyer-guardian ad litem an alternative means to contact the child if good cause is shown on the record. MCL 712A.17d(1)(e).

(8) Explaining to the child his or her role as the child's lawyer-guardian ad litem.

(9) Filing all necessary pleadings and papers.

(10) Independently calling witnesses on the child's behalf.

(11) Attending all hearings or substituting representation on the child's behalf with court approval.

(12) Making a determination regarding the child's best interests, and advocating for those best interests "regardless of whether the LGAL's determination reflects the child's wishes." The lawyer-guardian ad litem must weigh the child's wishes according to the child's competence and maturity.

(13) "Consistent with the law governing attorney-client privilege, informing the court of the child's wishes and preferences."

(14) Monitoring the implementation of case plans and court orders, and determining whether the court-ordered services are being timely provided and accomplishing their intended purposes.

> **Note:** It is the lawyer-guardian ad litem's duty to inform the court if the services are not being provided in a timely manner, the family is not taking advantage of the services, or the services are not accomplishing their intended purposes.

(15) Identifying common interests among the parties and promoting a cooperative resolution of the matter through consultation with the child's parents, foster care provider, guardian, and caseworker, if possible, and "[c]onsistent with the rules of professional responsibility."

(16) Requesting the court's authorization to pursue any additional issues on the child's behalf that do not arise specifically from the court appointment.

(17) Participating in training in early childhood, child, and adolescent development. MCL 712A.17d(1)(a)-(m); MCR 3.915(B)(2)(a).[79]

> **Note:** An attorney's appearance in a child protective proceeding is governed by MCR 2.117(B). MCR

[79] The provisions of MCL 712A.17d apply to a lawyer-guardian ad litem appointed under MCL 700.5213, MCL 700.5219, MCL 712A.17c, MCL 722.24, and MCL 722.630. MCL 712A.13a(1)(g).

3.915(C). See SCAO form JC 07, *Appearance of Attorney/ Guardian Ad Litem/Lawyer-Guardian Ad Litem*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc07.pdf.

The court must inquire at each hearing whether the lawyer-guardian ad litem has met or had contact with the child. MCR 3.915(B)(2)(a). If the lawyer-guardian has not met or had contact with the child, the lawyer-guardian ad litem must state on the record the reasons for failing to do so. *Id.*

Where a conflict exists between a lawyer-guardian ad litem's determination of a child's best interests and what the child identifies as his or her interests, the lawyer-guardian ad litem court must communicate the child's position to the court. MCL 712A.17d(2). The court may appoint an attorney to represent the child if it deems the attorney appointment appropriate given the child's age and maturity, and nature of the discrepancy between the child's stated interests and the guardian ad litem's determination of the child's best interests. *Id.*; MCR 3.915(B)(2)(b). See Section 7.10 for additional information on a child's attorney appointment.

> **Note:** An attorney appointed to represent the child's identified interests serves in addition to the child's appointed lawyer-guardian ad litem. MCL 712A.17d(2).

A court-appointed lawyer-guardian ad litem must serve until he or she is discharged by the court. MCL 712A.17c(9); MCR 3.915(D)(2). The court may permit another attorney to temporarily substitute for the child's lawyer-guardian ad litem if it prevents adjournment of a hearing or for other good cause. MCR 3.915(D)(2). However, a substitute attorney must be familiar with the case and, for hearings other than a preliminary hearing or emergency removal hearing, must review the agency case file[80] and consult with the foster parents and caseworker before the hearing (unless the child's lawyer-guardian ad litem has already done so and communicated the information to the substitute attorney). *Id.* The court must inquire on the record whether the attorneys have followed these requirements. *Id.*

When a child has been committed to the Michigan Children's Institute (MCI), the child's attorney and/or lawyer-guardian ad litem and the MCI superintendent must consult with one another if the child's attorney and

[80] An *agency case file* means "the current file from the agency providing direct services to the child, that can include the child protective services file if the child has not been removed from the home or the [DHHS] or contract agency foster care file as defined under . . . MCL 722.111 to [MCL] 722.128." MCL 712A.13a(1)(b).

/or lawyer-guardian ad litem has an objection or concern regarding the child's placement or permanency plan. MCL 400.204(2).

> **Note:** If a lawyer-guardian ad litem was appointed in a child protective proceeding, the court may not discharge the lawyer-guardian ad litem while the child is "subject to the jurisdiction, control, or supervision of the court, or of the [MCI] or other agency, unless the court discharges the lawyer-guardian ad litem for good cause shown on the record." MCL 712A.17c(9). Once the court discharges a lawyer-guardian ad litem for good cause, the court must immediately appoint another lawyer-guardian ad litem to represent the child if the child remains under the court's or MCI's or another agency's jurisdiction, control, or supervision. *Id*.

A. Appointment of Lawyer-Guardian Ad Litem Under the Safe Delivery of Newborns Law

The court may appoint a lawyer-guardian ad litem to represent a newborn under the Safe Delivery of Newborns Law, MCL 712.1 *et seq*. A *lawyer-guardian ad litem* appointed under the Safe Delivery of Newborns Law is "an attorney appointed under [MCL 712.2]. . . . [who] represents the newborn, and has the powers and duties, as set forth in [MCL 712A.17d]." MCL 712.1(2)(j). See Section (D) for information on the custody of a child under the Safe Delivery of Newborns Law, Section 4.2(D) for the court's jurisdiction over a newborn child surrendered to an emergency service provider, and Section 8.14 for information on the placement of a child under the Safe Delivery of Newborns Law.

> **Note:** According to MCL 712.1(2)(k), a *newborn* is "a child who a physician reasonably believes to be not more than 72 hours old."

B. Effective Assistance of Counsel

A child is entitled to the effective assistance of counsel. To constitute effective assistance of counsel, a child's attorney's conduct must comply with "applicable statutes, court rules, rules of professional conduct, and any logically relevant case law." *In re AMB*, 248 Mich App 144, 226 (2001).

C. Lawyer-Guardian Ad Litem as Witness

A lawyer-guardian ad litem cannot be called as a witness to testify in matters that relate to a case to which he or she is appointed. MCL

712A.17d(3). In addition, a lawyer-guardian ad litem's case files are not discoverable. *Id.*

D. Assessment of Costs

If a lawyer-guardian ad litem is appointed and after a determination of the ability to pay, the court may enter an order assessing costs of the representation to "the party or the person responsible for that party's support, or against the money allocated from marriage license fees for family counseling services under . . . MCL 551.103." MCL. 712A.17c(8); MCR 3.915(E).

A court's order assessing costs may be enforced through contempt proceedings. MCL 712A.17c(8).

7.10 Appointment of Attorney for the Child

Where a conflict exists between a lawyer-guardian ad litem's determination of a child's best interests and what the child identifies as his or her interests, the lawyer-guardian ad litem must communicate the child's position to the court. MCL 712A.17d(2). The court may appoint an attorney to represent the child if it deems the attorney appointment appropriate given the child's age and maturity, and nature of the discrepancy between the child's stated interests and the guardian ad litem's determination of the child's best interests.[81] *Id.*; MCR 3.915(B)(2)(b). See Section 7.9 for additional information on a child's lawyer-guardian ad litem appointment.

> **Note:** An attorney's appearance in a child protective proceeding is governed by MCR 2.117(B). MCR 3.915(C). See SCAO form JC 07, *Appearance of Attorney/Guardian Ad Litem/ Lawyer-Guardian Ad Litem*, at http://courts.mi.gov/ Administration/SCAO/Forms/courtforms/juvenile/jc07.pdf.

An attorney appointed to represent a child under MCL 712A.2(b) means:

> "an attorney serving as the child's legal advocate in a traditional attorney-client relationship with the child, as governed by the Michigan rules of professional conduct. An attorney defined under this subdivision owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client. For the purpose of a notice required

[81] See SCAO form JC 03, *Order Appointing Attorney/Guardian Ad Litem/Lawyer-Guardian Ad Litem*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc03.pdf.

> under these sections, attorney includes a child's lawyer-guardian ad litem." MCL 712A.13a(1)(c).

An attorney appointed to represent the child's expressed wishes is in addition to the child's appointed lawyer-guardian ad litem. MCL 712A.17d(2). The court-appointed attorney must serve until he or she is discharged by the court. MCL 712A.17c(9); MCR 3.915(D)(2).

If an attorney is appointed and after a determination of the ability to pay, the court may enter an order assessing costs of the representation to "the party or the person responsible for that party's support, or against the money allocated from marriage license fees for family counseling services under . . . MCL 551.103." MCL. 712A.17c(8); MCR 3.915(E). A court's order assessing costs may be enforced through contempt proceedings. MCL 712A.17c(8).

7.11 Appointment of Guardians Ad Litem (GAL)

If the court finds that the welfare of the child requires it, the court may appoint a guardian ad litem to assist the court in determining the child's best interests.[82] MCL 712A.17c(10); MCR 3.916(A). A guardian ad litem does not need to be an attorney. MCL 712A.13a(1)(f).

> **Note:** Similar to a Court-Appointed Special Advocate (CASA), a guardian ad litem may be appointed to investigate a child's circumstances and make recommendations to the court regarding the child's best interests. See Section 7.12 for additional information on CASAs.

Upon appointment, the guardian ad litem must file a written appearance with the court. MCR 3.916(B). The appearance must include "a statement regarding the existence of any interest that the guardian ad litem holds in relation to the [child], the [child's] family, or any other person in the proceeding before the court or in other matters." MCR 3.916(B). See SCAO form JC 07, *Appearance of Attorney/Guardian Ad Litem/Lawyer-Guardian Ad Litem*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc07.pdf.

After an appearance is filed, the guardian ad litem is entitled to "copies of all petitions, motions, and orders filed or entered," and to consult with the child's attorney and/or lawyer-guardian ad litem. MCR 3.916(C).

"The court may assess the cost of providing a guardian ad litem against the party or a person responsible for the support of the party, and may

[82] See SCAO form JC 03, *Order Appointing Attorney/Guardian Ad Litem/Lawyer-Guardian Ad Litem*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc03.pdf.

enforce the order of reimbursement as provided by law." MCR 3.916(D). Where the child is a ward of the state and a guardian ad litem is required in order for the case to proceed, the DHHS "is the responsible party for payment of [the guardian ad litem's] fees and expenses." *Doe v Boyle*, ___ Mich App ___, ___ (2015) (noting that "[a]lthough[, in this case, the guardian ad litem] was appointed in a civil case, rather than a child-protective or delinquency proceeding, . . . since [the child] was a ward of the state and required a guardian ad litem in order for the case to proceed[,] . . . [i]n this case, the person responsible for [the child] was the state[]").

7.12 Appointment of Court-Appointed Special Advocates (CASAs)

The court may appoint a volunteer special advocate to assess and make recommendations to the court regarding a child's best interests. MCR 3.917(A). The court-appointed special advocate must obtain appropriate screening. MCR 3.917(B).

Once a special advocate is appointed and upon a court's order, the special advocate may have access to "all information, confidential or otherwise, contained in the court file[.]" MCR 3.917(E).

A court-appointed special advocate's required duties are to:

(1) maintain regular contact with the child;

(2) investigate the background of the case;

(3) gather information regarding the child's status;

(4) provide written reports to the court and all parties before each hearing; and

(5) appear at all hearings when required by the court. MCR 3.917(C).

The court-appointed special advocate must consult with the child's lawyer-guardian ad litem. MCR 3.917(E). The court-appointed special advocate must serve until he or she is discharged by the court. MCR 3.917(D).

7.13 Court-Appointed Foreign Language Interpreter[83]

A party or witness with limited English proficiency is entitled to a court-appointed foreign language interpreter if the interpreter's "services are necessary for the person to meaningfully participate in the case or court proceeding[.]" MCR 1.111(B)(1).[84] A person financially able to pay for the interpretation costs may be ordered to reimburse the court for those costs. MCR 1.111(F)(5). See also MCR 1.111(A)(4).

- "'Case or Court Proceeding' means any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer." MCR 1.111(A)(1).

- "'Party' means a person named as a party or a person with legal decision-making authority in the case or court proceeding." MCR 1.111(A)(2).

[83] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 1, for more information on foreign language interpreters.

[84] In addition, "[t]he court may appoint a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding." MCR 1.111(B)(2).

Chapter 8: Placement of a Child

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In this chapter. . .

This chapter discusses the court's requirements in determining whether to order a child out of his or her home or to return the child to his or her parent(s), guardian, or legal custodian pending a trial on the allegations in a petition. It also discusses the court's placement options, placement of the child, placement of newborns falling under the Safe Delivery of Newborns Law, and a review or change in a child's placement.

This chapter also includes discussions on the procedures for releasing information concerning the child to the child's care provider, and the requirements for a child's medical treatment. It also discusses initial service plans, parenting time or visitation, and ordering an examination or evaluation for a parent, guardian, legal custodian, or a child.

In an effort to "offer[] a comprehensive approach to child safety decision-making, addressing the fundamentals of safety assessments and safety planning[,]" the National Resource Center for Child Protective Services and the National Child Welfare Resource Center on Legal and Judicial Issues developed the *Child Safety: A Guide for Judges and Attorneys*. This guide is accessible at http://nrccps.org/special-initiatives/safety-law-guide/.

8.1 Requirements to Release or Place a Child Pending Trial

If the court authorizes the filing of a petition,[1] it must then determine "whether the child should remain in the home, be returned home, or be placed in foster care pending trial."[2] MCR 3.965(B)(12). See also MCL 712A.14(3).

If the court authorizes the filing of the petition, the court may

- release the child to a parent, guardian, or legal custodian (with or without conditions); or
- order placement of the child after finding on the record that it would be contrary to the child's welfare to remain at home and that reasonable efforts have been made to prevent the child's removal from the home.[3] MCR 3.965(B)(13).

  Note: See MCR 3.965(B)(13)(b) and Section 19.10 for preferred placements of Indian children.

A. Requirements to Release a Child to a Parent, Guardian, or Legal Custodian

If the court authorizes the filing of a petition, it may release a child to his or her parent(s), guardian, or legal custodian. MCL 712A.13a(3); MCR 3.965(B)(13)(a). The court may also order reasonable terms and conditions necessary for the child's physical health or mental well-being. MCL 712A.13a(3); MCR 3.965(B)(13)(a). However,

- if a petition alleges that a child's parent, guardian, custodian, nonparent adult,[4] or other person residing in a child's home has abused the child, the court must not leave the child in or return the child to the home unless it "finds that the conditions of custody . . . are adequate to safeguard the child from the risk of harm to the child's life, physical health, or mental well-being." MCL 712A.13a(5).

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[1] See Section 7.7(B) for information on petition authorization.

[2] See also MCL 712A.2(i), which permits, "[i]n a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court [to] issue orders affecting a party as necessary[until] . . . May 1, 2018." For purposes of child protective proceedings, MCL 712A.2(i)(*ii*) defines *party* as "the petitioner, [DHHS], child, respondent, parent, guardian, or legal custodian, and any licensed child caring institution or child placing agency under contract with the [DHHS] to provide for a juvenile's care and supervision."

[3] SeeSection (B) and Section 8.4 for more information on making these findings.

[4] See Section 7.7(E) for the definition of nonparent adult.

Note: "As used in [MCL 712A.13a], 'abuse' means 1 or more of the following:

> (a) Harm or threatened harm by a person to a juvenile's health or welfare that occurs through nonaccidental physical or mental injury.
>
> (b) Engaging in sexual contact or sexual penetration as defined in . . . MCL 750.520a, with a juvenile.
>
> (c) Sexual exploitation of a juvenile, which includes, but is not limited to, allowing, permitting, or encouraging a juvenile to engage in prostitution or allowing, permitting, encouraging, or engaging in photographing, filming, or depicting a juvenile engaged in a listed sexual act as defined in . . . MCL 750.145c.
>
> (d) Maltreatment of a juvenile." MCL 712A.13a(17).

- "[i]f [the] court finds [that] a parent is required by court order to register under the [S]ex [O]ffenders [R]egistration [A]ct,[5] the [DHHS] may, but is not required to, make reasonable efforts to reunify the child with the parent. The court may order reasonable efforts to be made by the [DHHS]." MCL 712A.13a(6).

Additionally, "[n]o one has the right to post bail in a protective proceeding for the release of a child in the custody of the court."MCR 3.965(C)(6).

B. Requirements to Place a Child Outside His or Her Home

If the court authorizes the filing of a petition, "[t]he court may order placement of the child in foster care[6] if the court finds all of the following conditions:

> (a) Custody of the child with the parent presents a substantial risk of harm to the child's life, physical health, or mental well-being.
>
> (b) No provision of service or other arrangement except removal of the child is reasonably available to

[5] "'Sex [O]ffenders [R]egistration [A]ct' means the [S]ex [O]ffenders [R]egistration [A]ct, . . . MCL 28.721 to [MCL] 28.736." MCL 712A.13a(1)(k).

[6] For purposes of MCL 712A.13a, *foster care* is "care provided to a juvenile in a foster family home, foster family group home, or child caring institution licensed or approved under . . . MCL 722.111 to [MCL] 722.128, or care provided to a juvenile in a relative's home under a court order." MCL 712A.13a(1)(e).

> adequately safeguard the child from risk as described in subdivision (a).
>
> (c) Continuing the child's residence in the home is contrary to the child's welfare.[7]
>
> (d) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.[8]
>
> (e) Conditions of child custody away from the parent are adequate to safeguard the child's health and welfare."[9] MCL 712A.13a(9). See also MCR 3.965(C)(2), which contains substantially similar language.

"If the child was not released under [MCR 3.965(B)], the court shall receive evidence, unless waived, to establish that the criteria for placement set forth in [MCR 3.965(C)(2)] are present." MCR 3.965(C)(1). In addition, the respondent must be given the opportunity to cross-examine and subpoena witnesses, and to offer proofs to counter the admitted evidence. MCR 3.965(C)(1).

8.2 Placement Options

MCR 3.903(C)(10) defines *placement* as a "court-approved transfer of physical custody of a child to foster care, a shelter home, a hospital, or a private treatment agency."

If the court authorizes the filing of the petition, the child may be placed in any of the following:

> (1) The home of the child's parent(s), guardian, or legal custodian;
>
> (2) In a licensed county child care home or facility; or
>
> (3) With a licensed child care institution or child placing agency. MCL 712A.14(3); MCL 712A.16(2).

"If continuing the child's residence in the home is contrary to the welfare of the child,"[10] the court must not release the child to his or her parent(s), guardian, or legal custodian, but instead order that the child be placed in the most family-like setting consistent with the needs of the child. MCL

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[7] For additional information on contrary to the welfare findings, see Section 8.3.

[8] For additional information on reasonable efforts findings, see Section 8.4.

[9] If the child is of Indian heritage, see Section 19.10 for preferred placements of Indian children.

[10] For additional information on contrary to the welfare findings, see Section 8.3.

712A.13a(12); MCR 3.965(C)(3). Accordingly, a child removed from his or her parent's control must be placed in care "as nearly as possible equivalent to the care that should have been given to the [child] by his or her parents." MCL 712A.1(3). However, if an Indian child is involved in the proceedings, the court must follow the placement preferences as outlined in MCR 3.965(B)(13)(b).[11]

Foster care is "24-hour a day substitute care for children placed away from their parents, guardians, or legal custodians, and for whom the court has given the Department of [Health and] Human Services [(DHHS)] placement and care responsibility, including, but not limited to,

> (a) care provided to a child in a foster family home, foster family group home, or child caring institution licensed or approved under MCL 722.111 *et seq.*,[12] or
>
> (b) care provided to a child in a relative's home pursuant to an order of the court." MCR 3.903(C)(5).[13] See also MCL 712A.13a(1)(e).
>
> > **Note:** Placement often occurs through an agency, either a local DHHS office or a private agency under contract with DHHS. MCL 712A.13a(1)(a) defines agency as "a public or private organization, institution, or facility that is performing the functions under part D of title IV of the social security act, 42 USC 651 to [42 USC] 669b, or that is responsible under court order or contractual arrangement for a juvenile's care and supervision."
> >
> > A *child placing agency* is "a governmental organization or an agency organized . . . for the purpose of receiving children for placement in private family homes for foster care or for adoption. The function of a child

[11] MCR 3.965(B)(13)(b) mirrors the placement preferences for Indian children under the ICWA as outlined in 25 USC 1915(b), and the MIFPA as outlined in MCL 712B.23(1). See Section 19.10.

[12] A foster family home is "a private home in which 1 but not more than 4 minor children, who are not related to an adult member of the household by blood or marriage, or who are not placed in the household under the Michigan adoption code . . . are given care and supervision for 24 hours a day, for 4 or more days a week, for 2 or more consecutive weeks, unattended by a parent, legal guardian, or legal custodian." MCL 722.111(1)(i)(*i*). A foster family group home is where more than 4 but fewer than 7 minor children, who are not related to an adult member of the household by blood or marriage, or who are not placed in the household under the Michigan adoption code . . . are given care and supervision for 24 hours a day, for 4 or more days a week, for 2 or more consecutive weeks, unattended by a parent, legal guardian, or legal custodian. MCL 722.111(1)(i)(*ii*). A child caring institution is "a child care facility that is organized for the purpose of receiving minor children for care, maintenance, and supervision, usually on a 24-hour basis, in buildings maintained by the child caring institution for that purpose, and operates throughout the year. . . . Child caring institution also includes institutions for developmentally disabled or emotionally disturbed minor children." MCL 722.111(1)(b).

[13] Federal Title IV-E funding is unavailable if the child's foster home is unlicensed. See Section 14.1.

> placing agency may include investigating applicants for adoption and investigating and certifying foster family homes and foster family group homes as provided in this act. The function of a child placing agency may also include supervising children who are at least 16 but less than 21 years of age and who are living in unlicensed residences as provided in [MCL 722.115(4)]." MCL 722.111(1)(c).

A. Relative Placements[14]

Before a supervising agency[15] determines where to place a child in its care, it must give special consideration and preference to the child's relatives who are willing and fit to care for the child and can meet the child's developmental, emotional, and physical needs. MCL 722.954a(5). However, "MCL 722.954a limits the applicability of the preference to only the initial stage of the process, i.e., immediately after a child is removed from his or her parents' care and during the statutory review period established in MCL 722.954a(3)." *In re COH*, *ERH*, *JRG*, & *KBH*, 495 Mich 184, 198 (2014). "[C]onsequently, the requirements of MCL 722.954a are intended to guide the [DHHS's] initial placement decision." *In re COH*, *ERH*, *JRG*, & *KBH*, 495 Mich at 195 ("the preference for placement with relatives created in MCL 722.954a does not apply outside the time period for determining a child's initial placement immediately after removal and, therefore, does not apply to a court's decision to appoint a [juvenile] guardian under MCL 712A.19c(2) after parental rights are terminated").[16]

Upon the child's removal from parental custody, as part of the initial service plan,[17] the child's supervising agency must, within 30 days, identify, locate, notify, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs. MCL 722.954a(2).

In notifying the child's relatives, the supervising agency must:

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[14] Relative placements are also known as kinship care, i.e., "the provision of full time nurturing and protection of children by adults other than parents who have a family relationship bond with the children." Child Welfare League of American, 1994. For additional information on Kinship Care, see the Kinship Care Resource Center at http://www.kinship.msu.edu/.

[15] MCL 722.952(*l*) defines a *supervising agency* as "the [DHHS] if a child is placed in the [DHHS's] care for foster care, or a child placing agency in whose care a child is placed for foster care."

[16] For additional information on appointing a juvenile guardian under MCL 712A.19c(2), see Section 18.5(A).

[17] See Section 8.7 for more information on Initial Service Plans.

> "(a) Specify that the child has been removed from the custody of the child's parent.
>
> (b) Explain the options the relative has to participate in the care and placement of the child, including any option that may be lost by failing to respond to the notification.
>
> (c) Describe the requirements and benefits, including the amount of monetary benefits, of becoming a licensed foster family home.
>
> (d) Describe how the relative may subsequently enter into an agreement with the department for guardianship assistance." MCL 722.954a(3).

The supervising agency's decision on where to place the child must be in the child's best interests. MCL 722.954a(5).

1. Relative Defined

A *relative* is "an individual who is at least 18 years of age and related to the child by blood, marriage, or adoption, as grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew or niece, first cousin or first cousin once removed, and the spouse of any of the above, even after the marriage has ended by death or divorce. A stepparent, ex-stepparent, or the parent who shares custody of a half-sibling[18] shall be considered a relative for the purpose of placement. Notification to the stepparent, ex-stepparent, or the parent who shares custody of a half-sibling is required as described in . . . MCL 722.954a. A child may be placed with the parent of a man whom the court has found probable cause to believe is the putative father if there is no man with legally established rights to the child. A placement with the parent of a putative father under this subdivision is not to be construed as a finding of paternity or to confer legal standing on the putative father." MCL 712A.13a(1)(j).

2. Placement in a Relative's Home

Within seven days of a child being placed in a relative's home, the DHHS must perform a central registry clearance and criminal record check on every resident of the home.[19] MCL

[18] "'Sibling' means a child who is related through birth or adoption by at least 1 common parent. Sibling includes that term as defined by the American Indian or Alaskan native child's tribal code or custom." MCL 712A.13a(1)(*l*).

712A.13a(11); MCR 3.965(C)(5)(a). The court may order the DHHS to report the results of the central registry clearance and criminal record check. MCR 3.965(C)(5)(a). The court must order the DHHS to perform a home study and submit a copy to the court within 30 days of the child's placement with his or her relative. MCL 712A.13a(11); MCR 3.965(C)(5)(b).

> **Note:** The DHHS may not place a child in a home where a member of the home is listed as a perpetrator on the central registry or has a felony conviction for:
>
> (1) Child abuse or neglect.
>
> (2) Spousal abuse.
>
> (3) Crime against a child (including pornography).
>
> (4) Crime that involves violence (including rape, sexual assault, or homicide, but not including other physical assault or battery).
>
> (5) Physical assault, battery, or drug related offense within the last five years. DHHS's Children's Foster Care Manual (FOM), *Placement Selection and Standards FOM 722-03*, p 12, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/722-03.pdf.
>
> The DHHS may not also place a child in a home where an adjudicated juvenile sex offender resides. *Placement Selection and Standards FOM 722-03*, *supra* at p 19.

3. Relative Licensing Requirement[20]

"Within five days of a child's placement in [a] relative's home, the assigned foster care (FC) worker must discuss licensure with the relative caregiver. The discussion must include completion of the form, Foster Home Licensing Requirements for Relative Caregivers, DHS-972.[21] The relative is required to sign the DHS-972 and indicate if they are interested in pursuing licensure

[19] See Section 2.4(F) for a discussion on accessing information from the Law Enforcement Information Network (LEIN), and Section 2.5(D) for a discussion on accessing information from the DHHS Registry.

[20] A brief discussion on relative licensing requirements is contained in this sub-subsection. For a detailed discussion see the DHHS's Children's Foster Care Manual (FOM), *Placement Selection and Standards FOM 722-03*, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/722-03.pdf.

or wish to waive licensure." *Placement Selection and Standards FOM 722-03, supra* at p 10.

The DHHS may place a child in an unlicensed home for up to 90 days while a relative is completing the licensing process.[22] *Dwayne B v Granholm*, settlement agreement of the United States District Court for the Eastern District of Michigan, VIII(B)(7)(j)(ii), p 43, filed July 3, 2008 (Docket No. 2:06-cv-13548).[23]

> **Note:** Once licensed, relatives will qualify for foster care maintenance payments. See Chapter 14 for a detailed discussion.

"In exceptional circumstances, a waiver may be requested for a relative caregiver to forego licensure when it is determined to be in the child(ren)'s best interest to be placed or remain with an unlicensed relative caregiver. All attempts must be made to license the relative caregiver prior to requesting a waiver." *Placement Selection and Standards FOM 722-03, supra* at p 15.

Exceptional circumstances to forego licensing include:

> "• Reunification is imminent.
>
> • The child is a permanent ward and the relative caregiver is pursuing adoption.
>
> • The relative caregiver will become the child's juvenile guardian without guardianship assistance payments and it is anticipated that the unsubsidized juvenile guardianship will be granted timely.
>
> • The child is an Indian child as defined by the Indian Child Welfare Act.[24]

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[21] See DHHS form DHS-972, *Foster Home Licensing Requirements for Relative Caregivers*, available at http://www.michigan.gov/documents/dhs/DHS-972_Foster_Home_Licensing_Requirments_for_Relative_Caregivers_320168_7.pdf.

[22] For children placed in unlicensed foster homes before October 1, 2008, the DHHS was required to license those caregivers by September 30, 2010. *Dwayne B v Granholm*, settlement agreement of the United States District Court for the Eastern District of Michigan, VIII(B)(7)(*l*), p 43, VIII(B)(7)(o), p 46, filed July 3, 2008 (Docket No. 2:06-cv-13548).

[23] The settlement agreement, in its entirety, is available at http://www.childrensrights.org/wp-content/uploads//2008/09/22008-07-03_mi_signed_settlement.pdf.

[24] See Chapter 19 for information on the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA).

• The case meets the requirements of ICPC [Interstate Compact on the Placement of Children] Regulation 7-Priority Placement. (CFF 932.2).

• The court orders placement against [DHHS] recommendation.[25]

• The Foster Care Review Board (FCRB) recommends the child(ren) maintain placement with the relative caregiver against [DHHS] recommendation.

• The relative caregiver has been fully informed of licensing benefits and does not agree to pursue licensure or is unable to become licensed for non-safety reasons.

• Additional conditions include:

•• The assigned caseworker has completed a 30 day home assessment utilizing the Home Study Outline (DHS-197).

•• The [DHHS] supervisor approved the 30 day home assessment, the home is considered safe for the child as indicated by the Central Registry clearance, criminal history checks, and approved 30 day home assessment.

•• The placement with the relative is in the child's best interest and will facilitate permanency." *Placement Selection and Standards FOM 722-03, supra* at pp 15-16.

B. Placement With Siblings

Upon the recommendation of a local Foster Care Review Board or a child placing agency, the DHHS may grant a variance to one or more licensing rules or statutes that regulate foster family homes or foster family group homes to permit a child and one or more siblings to be placed together. MCL 722.118b(1); MCL 722.137a.

The DHHS may grant the variance, if it determines that placement of a child with his or her sibling(s):

[25] "A court order that . . . specifies placement eliminates Title IV-E eligibility for that child with the exception of cases where the court has heard from all parties and then makes a placement decision." DHHS's Children's Foster Care Manual (FOM), *Placement Selection and Standards FOM 722-03*, p 35, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/722-03.pdf. See Chapter 14 for information on Title IV-E funding.

> (1) will be in the child's best interests; and
>
> (2) will not jeopardize the child's health or safety.[26] MCL 722.118b(1).

See the DHHS's Children's Protective Services Manual (PSM), *Removal and Placement of Children PSM 715-2*, p 5, available at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/715-2.pdf, which provides:

> "All siblings who enter foster care at or near the same time must be placed together, unless:
>
> • One of the siblings has exceptional needs that can be met only in a specialized program or facility.
>
> • Such placement is harmful to one or more of the siblings.
>
> • The size of the sibling group makes a joint placement impractical, notwithstanding diligent efforts to make a joint placement."

C. Placement in Setting Providing Certain Services for Human Trafficking Victims

"Before determining placement of a child in its care, a supervising agency shall give special consideration to information that a child may be the victim of human trafficking. If a supervising agency finds that a child is or may be a victim of human trafficking, the supervising agency shall place the child in a setting that provides mental health services, counseling, or other specialized services that are necessary or appropriate for a victim of human trafficking." MCL 722.954e.

D. Children Absent Without Leave From Placement (AWOLP)

A Children's Protective Services (CPS) worker is required to notify law enforcement (state or local police or the sheriff's department) within one hour of a child being absent from a court-ordered placement. DHHS's Children's Protective Services Manual (PSM), *Removal and Placement of Children PSM 715-3*, p 9, available at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/715-3.pdf. Within 24 hours of a child being absent from a court-ordered placement, a CPS worker must notify the following:

[26] If the DHHS grants a variance, a private home's licensure status does not change. MCL 722.118b(2).

> (1) The court having jurisdiction over the child;
>
> (2) The child's parent(s), if appropriate; and
>
> (3) The child's lawyer-guardian ad litem, if applicable. *Family Court: Petitions, Hearings, and Court Orders PSM 715-3*, *supra* at p 9.

The court is required to institute expedited procedures to review cases involving children who are absent from court-ordered placements without the court's permission and take appropriate action. See the Michigan Supreme Court Administrative Order 2002-4, entered November 19, 2002 (ADM 2002-48), available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/CWS/AWOLP/2002-4.pdf. See also the Michigan Supreme Court State Court Administrative Office (SCAO) Memorandum re: SCAO Administrative Memorandum 2002-12, Guidelines for Development of Plans Involving Children who are Absent Without Legal Permission, December 13, 2002, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Administrative-Memoranda/2002-12.pdf.

For more information on AWOLP reporting, training, and additional resources, see http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/AWOLP/Pages/default.aspx.

8.3 Contrary to the Welfare Findings

If the court orders foster care placement, it must find, among other factors, that "[c]ontinuing the child's residence in the home is contrary to the child's welfare." MCR 3.965(C)(2)(c). See also MCR 3.965(C)(3). "If [the court finds that] continuing the child's residence in the home is contrary to the welfare of the child, the court shall not return the child to the home, but shall order the child placed in the most family-like setting available consistent with the child's needs." MCR 3.965(C)(3).

> **Note:** MCR 3.903(C)(4) defines *contrary to the welfare of the child* as "includ[ing], but [] not [being] limited to, situations in which the child's life, physical health, or mental well-being is unreasonably placed at risk."

The court may base its findings on "hearsay evidence that possesses adequate indicia of trustworthiness." MCR 3.965(C)(3).

If the court orders placement, it must make a statement of findings in writing or on the record that explicitly includes "the finding that it is contrary to the welfare of the child to remain at home and the reasons supporting that finding." MCR 3.965(C)(3). If the court elects to place its

findings on the record, the finding "must be capable of being transcribed." MCR 3.965(C)(3).

> **Note:** To establish eligibility for federal funding of a child's foster care placement, a court must make a finding in its first order that sanctions a child's removal from his or her home that "continuation of residence in the home would be contrary to the welfare . . . of the child." 45 CFR 1356.21(c). This finding must be detailed "explicitly documented and must be made on a case-by-case basis and so stated in the court order." 45 CFR 1356.21(d). Affidavits, nunc pro tunc orders, or orders simply referencing a Michigan statute or court rule are insufficient. 45 CFR 1356.21(d)(2)-(3).[27]

Additionally, if a petition alleges that a parent, guardian, custodian, nonparent adult, or other person residing in a child's home has abused the child, the court may not place the child in unlicensed foster care, i.e., with a relative, unless it "finds that the conditions of custody . . . are adequate to safeguard the child from the risk of harm to the child's life, physical health, or mental well-being." MCL 712A.13a(5).[28]

8.4 Reasonable Efforts Findings

If the court orders foster care placement, it must find, among other factors, that "[c]onsistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child." MCR 3.965(C)(2)(d). See also MCR 3.965(C)(4). A court is also required to make a finding that reasonable efforts have been made to avoid non-emergency removal of a child from his or her home and placement of the child in foster care to establish a child's eligibility for federal foster care maintenance payments under Title IV-E of the Social Security Act. 42 USC 672(a)(1).

Accordingly, the court must find that reasonable efforts were made "to maintain the family unit and prevent the unnecessary removal of a child from his/her home, as long as the child's safety is assured[.]" 45 CFR 1356.21(b). The court must make a child's health and safety its paramount concern when making reasonable efforts determinations. 45 CFR 1356.21(b); MCR 3.965(C)(4).

"When the court has placed a child with someone other than the custodial parent, guardian, or legal custodian, the court must determine whether reasonable efforts to prevent the removal of the child have been made or that reasonable efforts to prevent removal are not required."

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[27] See Section 3.1(A) and Section 14.1 for further discussion of these requirements.

[28] See Section 7.7(C) for information on ordering an alleged abuser from a child's home.

MCR 3.965(C)(4). The court must make a reasonable efforts determination at the earliest possible time, but no later than 60 days of the child's removal from the home. MCR 3.965(C)(4); 45 CFR 1356.21(b)(1)(*i*). The court "must state the factual basis for the determination in the court order." MCR 3.965(C)(4). "Nunc pro tunc orders or affidavits are not acceptable." *Id.*

> **Note:** The court's failure to make a reasonable efforts determination within 60 days of the child's removal will result in the child's ineligibility for federal foster care maintenance payments under Title IV-E during the child's stay in foster care. 45 CFR 1356.21(b)(1)(*ii*).

The court's 60-day period for making a reasonable efforts determination begins on the date the child was actually removed from his or her home. 45 CFR 1356.21(b)(1)(*i*). If the child was living with a relative before the court proceedings and the court places the child with that relative, the date of the court order for removal from the constructive custody of a parent is the date of actual removal. 45 CFR 1356.21(k)(1)(*ii*).

A. Reasonable Efforts Not Required for Child's Removal

Reasonable efforts to prevent a child's removal from his or her home are not required if the court has determined any of the following:

> "(a) the parent has subjected the child to aggravated circumstances as listed in . . . MCL 722.638(1) and [MCL 722.638](2);[29] or
>
> (b) the parent has been convicted of 1 or more of the following:
>
> > (*i*) murder of another child of the parent,
> >
> > (*ii*) voluntary manslaughter of another child of the parent,
> >
> > (*iii*) aiding or abetting, attempting, conspiring, or soliciting to commit such a murder or such a voluntary manslaughter, or
> >
> > (*iv*) a felony assault that results in serious bodily injury to the child or another child of the parent; or
>
> (c) parental rights of the parent with respect to a sibling have been terminated involuntarily; or

[29] See Section 7.3(A) for the list of aggravated circumstances set out in MCL 722.638(1)-(2).

> (d) the parent is required to register under the Sex Offender[s] Registration Act [(SORA), MCL 28.721 *et seq.*]"[30] MCR 3.965(C)(4). See also 45 CFR 1356.21(b)(3).
>
> > **Note:** If the court determines that reasonable efforts to reunite the family or prevent removal are not required, an initial permanency planning hearing must be held within 28 days of that determination. MCR 3.976(B)(1). See Section 16.3(A).

B. Required Documentation for Reasonable Efforts Finding

The court's determination "regarding . . . reasonable efforts to prevent removal . . . including judicial determinations that reasonable efforts are not required, must be explicitly documented and must be made on a case-by-case basis and so stated in the court order." 45 CFR 1356.21(d). See also MCR 3.965(C)(4).

Additionally, 45 CFR 1356.21(d) states:

> "(1) If the reasonable efforts . . . judicial determination[is] not included as required in the court orders identified in . . . [45 CFR 1356.21(b)], a transcript of the court proceedings is the only other documentation that will be accepted to verify that th[is] required determination[has] been made.
>
> (2) Neither affidavits nor nunc pro tunc orders will be accepted as verification documentation in support of reasonable efforts . . . judicial determinations.
>
> (3) Court orders that reference State law to substantiate judicial determinations are not acceptable, even if State law provides that a removal must be based on a judicial determination . . . that removal can only be ordered after reasonable efforts have been made."

For a description of services that may be offered to families to prevent a child's removal from his or her home, see the Department of Health and Human Services's (DHHS's) Children's Protective Services Manual (PSM), *CPS Supportive Services PSM 714-2*, available at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/714-2.pdf, and the DHHS's Children's Foster Care Manual (FOM), *Case Planning FOM 722-06*, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/722-06.pdf.

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[30] For information on the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, including a list of who must register under SORA, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 10.

8.5 Release of Information Pertaining to Child

If the child is placed in foster care,[31] the court must order that, within 10 days after receiving a written request, the agency must provide the person who is providing the foster care with copies of the following:

> (1) All initial, updated, and revised case service plans and court orders relating to the child; and
>
> (2) All of the child's medical, mental health, and education reports (including reports compiled before the child was placed with that person). MCL 712A.13a(15); MCL 712A.18f(5).

The court must include in its placement order an order that "the child's parent, guardian, or custodian provide the supervising agency[32] with the name and address of each of the child's medical providers." MCL 712A.13a(16)(a); MCR 3.965(C)(8)(a). The court must also include an order that "each of the child's medical providers release the child's medical records."[33] MCL 712A.13a(16)(b); MCR 3.965(C)(8)(b).

8.6 Child's Medical Treatment

A. Medical Examination

The child's supervising agency must ensure that "the child receives a medical examination when the child is first placed in foster care." MCL 722.954c(5). "One objective of this examination is to provide a record of the child's medical and physical status upon entry into foster care." *Id.*

"If a child under the care of a supervising agency has suffered sexual abuse, serious physical abuse, mental illness, or is alleged to be the victim of human trafficking, the supervising agency shall have an experienced and licensed mental health professional as defined under [MCL 330.1100b(16)(a), MCL 330.1100b(16)(b), or MCL 330.1100b(16)(d)], who is trained in children's psychological

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[31] MCR 3.903(C)(5) defines *foster care* as "24-hour a day substitute care for children placed away from their parents, guardians, or legal custodians, and for whom the court has given the Family Independence Agency placement and care responsibility, including, but not limited to, (a) care provided to a child in a foster family home, foster family group home, or child caring institution licensed or approved under MCL 722.111 *et seq.*, or (b) care provided to a child in a relative's home pursuant to an order of the court." MCL 712A.13a(1)(e) contains a substantially similar definition of *foster care*.

[32] MCL 722.952(*l*) defines *supervising agency* as "the [Department of Health and Human Services (DHHS)] if a child is placed in the [DHHS's] care for foster care, or a child placing agency in whose care a child is placed for foster care."

[33] The placement order may specify providers by profession or type of institution. MCL 712A.13a(16)(b).

assessments perform an assessment or psychological evaluation of the child." MCL 722.954c(4).[34] "If an assessment or psychological evaluation required under [MCL 722.954c(4)] indicates that a child may have been a victim of human trafficking, the supervising agency shall provide, in addition to any reunification, adoption, or other services provided to a child under the supervising agency's care, counseling services appropriate for minor victims of human trafficking." MCL 722.954c(6).

The supervising agency must obtain the name and address of the child's medical provider and a signed release of the child's medical records from the parent, guardian, or custodian. MCL 722.954c(1). The child's medical provider must remain constant while the child is in foster care, unless the child's current primary medical provider is a managed care health plan, or unless requiring the medical provider to remain constant would create an unreasonable burden for the child's relative, foster parent, or other custodian. *Id.*

> **Note:** The court must include in its placement order an order that "the child's parent, guardian, or custodian provide the supervising agency with the name and address of each of the child's medical providers." MCL 712A.13a(16)(a); MCR 3.965(C)(8)(a). The placement order must also include an order that "each of the child's medical providers release the child's medical records."[35] MCL 712A.13a(16)(b); MCR 3.965(C)(8)(b).

B. Medical Passports

The supervising agency must develop a medical passport for each child coming within its care. MCL 722.954c(2). The medical passport must contain all of the following:

> "(a) All medical information required by policy or law to be provided to foster parents.
>
> (b) Basic medical history.
>
> (c) A record of all immunizations.
>
> (d) Any other information concerning the child's physical and mental health, including information that the child may be a victim of human trafficking." MCL 722.954c(2).

[34] See MCL 712A.12 and MCR 3.923(B), which also permit the court to order an assessment or psychological evaluation of a child.

[35] The placement order may specify providers by profession or type of institution. MCL 712A.13a(16)(b).

The DHHS requires the supervising agency to provide a copy of all medical passports and updates for maintenance in a central location. MCL 722.954c(3).

A foster care worker who transfers a child's medical passport to another foster care worker must sign and date it, verifying that the worker has sought and obtained the required information and any additional information required by the DHHS policy. MCL 722.954c(3).

C. Authority to Consent to Medical Treatment

If a child is placed outside the home, the child placing agency, the DHHS, or a court may consent to "routine, nonsurgical medical care, or emergency medical and surgical treatment" of a child. MCL 722.124a(1). See Section 3.3 for a detailed discussion of ordering medical treatment for a child.

> **Note:** If the child is placed in a child care organization,[36] the child placing agency, the DHHS, or the court must execute a written instrument that grants the organization authority to consent to the child's emergency medical and surgical treatment. MCL 722.124a(1). The DHHS may also execute a written instrument granting the child care organization the authority to consent to the child's routine, nonsurgical medical care. *Id.*
>
> If the child is placed in a child care institution,[37] the child placing agency, the DHHS, or the court must, in addition to emergency medical and surgical treatment, execute a written instrument that grants the institution authority to consent to the child's routine, nonsurgical medical care. MCL 722.124a(1).

Only the child's parent or guardian may consent to nonemergency, elective surgery for a child in foster care. MCL 722.124a(3). However, if a court terminated the parent's parental rights, the court or the

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[36] A *child care organization* is "a governmental or nongovernmental organization having as its principal function receiving minor children for care, maintenance, training, and supervision, notwithstanding that educational instruction may be given. Child care organization includes organizations commonly described as child caring institutions, child placing agencies, children's camps, children's campsites, children's therapeutic group homes, child care centers, day care centers, nursery schools, parent cooperative preschools, foster homes, group homes, or child care homes." MCL 722.111(1)(a).

[37] A *child caring institution* is "a child care facility that is organized for the purpose of receiving minor children for care, maintenance, and supervision, usually on a 24-hour basis, in buildings maintained by the child caring institution for that purpose, and operates throughout the year. . . . Child caring institution also includes institutions for developmentally disabled or emotionally disturbed minor children." MCL 722.111(1)(b).

agency with jurisdiction over the child may consent to nonemergency, elective surgery. *Id.*

> **Note:** "[R]outine, nonsurgical medical care" does not include "contraceptive treatment, services, medication or devices." MCL 722.124a(4). The DHHS does not consider the prescription or use of psychotropic medications as routine, nonsurgical medical care. DHHS's Children's Foster Care Manual (FOM), *Delegation of Parental Consent FOM 722-11*, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/722-11.pdf.

8.7 Initial Service Plans

If placement is ordered, the court must inform the parties, either orally or in writing, of all of the following:

> "(1) that the agency designated to care and supervise the child will prepare an initial service plan no later than 30 days after the placement;
>
> (2) that participation in the initial service plan is voluntary unless otherwise ordered by the court;
>
> (3) that the general elements of an initial service plan include:
>
> > (a) the background of the child and the family,
> >
> > (b) an evaluation of the experiences and problems of the child,
> >
> > (c) a projection of the expected length of stay in foster care, and
> >
> > (d) an identification of specific goals and projected time frames for meeting the goals;
>
> (4) that, on motion of a party, the court will review the initial service plan and may modify the plan if it is in the best interests of the child; and
>
> (5) that the case may be reviewed for concurrent planning." MCR 3.965(D). See also MCL 712A.13a(10).

In addition, the court must direct the agency to identify, locate, notify, and consult with a child's relatives to determine if placement with a relative would be in the child's best interests.[38] MCR 3.965(D). As part of the initial service plan, the child's supervising agency must, within 30

[38] See Section 8.2(A) for a detailed discussion of relative placements.

days of removing the child from parental custody, "identify, locate, notify, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs." MCL 722.954a(2).

> **Note:** "MCL 722.954a applies from the moment a child is removed from his or her parents' care, i.e., *before* any placement decision is made, and, consequently, the requirements of MCL 722.954a are intended to guide the DHHS's initial placement decision." *In re COH*, *ERH*, *JRG*, & *KBH*, 495 Mich 184, 195 (2014). However, "there is no indication within the statutory language of MCL 722.954a that the Legislature intended that the preference for placement with relatives exists beyond the time frame identified within MCL 722.954a." *In re COH*, *ERH*, *JRG*, & *KBH*, 495 Mich at 196.

The court must also require the agency to provide the name and address of the child's attending physician of record or primary care physician where a physician has diagnosed the child's abuse or neglect as involving one or more of the following:

(1) failure to thrive;

(2) Munchausen syndrome by proxy;

(3) shaken baby syndrome;

(4) a bone fracture diagnosed as being the result of abuse or neglect; or

(5) drug exposure.[39] MCL 712A.18f(6); MCR 3.965(D).

The development of a case plan for a child is governed by a federal regulation implementing the Adoption and Safe Families Act (ASFA). Specifically, 45 CFR 1356.21(g) states:

> "(g) *Case plan requirements*. In order to satisfy the case plan requirements of [42 USC 671(a)(16), 42 USC 675(1), and 42 USC 675(5)(A) and (D)], the State agency must promulgate policy materials and instructions for use by State and local staff to determine the appropriateness of and necessity for the foster care placement of the child. The case plan for each child must:
>
> (1) Be a written document, which is a discrete part of the case record, in a format determined by the State, which

[39] See Section 13.5.

is developed jointly with the parent(s) or guardian of the child in foster care; and

(2) Be developed within a reasonable period, to be established by the State, but in no event later than 60 days from the child's removal from the home pursuant to [45 CFR 1356.21(k)];[40]

(3) Include a discussion of how the case plan is designed to achieve a safe placement for the child in the least restrictive (most family-like) setting available and in close proximity to the home of the parent(s) when the case plan goal is reunification and a discussion of how the placement is consistent with the best interests and special needs of the child. ([Federal financial participation] is not available when a court orders a placement with a specific foster care provider);

(4) Include a description of the services offered and provided to prevent removal of the child from the home and to reunify the family; and

(5) Document the steps to finalize a placement when the case plan goal is or becomes adoption or placement in another permanent home in accordance with [42 USC 675(1)(E), 42 USC 675(5)(E)]. When the case plan goal is adoption, at a minimum, such documentation shall include child-specific recruitment efforts such as the use of State, regional, and national adoption exchanges including electronic exchange systems."

8.8 Parenting Time or Visitation

A. Preliminary Hearing to Adjudication

"[I]t is clear from the language of [MCR 3.965(C)(7)(a)] and [MCL 712A.13a(13)] that these provisions only govern parenting time from the preliminary hearing to adjudication. . . . There is no indication in the language of [MCR 3.965(C)(7)(a)] or [MCL 712A.13a(13)] that these provisions are applicable once adjudication occurs[.]" *In re Laster*, 303 Mich App 485, 488 (2013).

If a child is removed from his or her home, MCL 712A.13a(13) and MCR 3.965(C)(7)(a) require the court to permit the child's parent to have frequent parenting time with his or her child unless:

[40] The 60-day period is calculated from the child's actual or constructive removal from his or her home. 45 CFR 1356.21(k).

(1) Parenting time (even if supervised) may be harmful to the child; or

Note: If parenting time (even if supervised) may be harmful to a child, the court must order the child to have "a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time." MCL 712A.13a(13). The court may suspend parenting time while the psychological evaluation or counseling is conducted. *Id.*

(2) The court suspends parenting time pursuant to MCL 712A.19b(4); or

Note: If a petition requesting termination of parental rights has been filed, the court may suspend parenting time for a parent who is the subject of the petition.[41] MCL 712A.19b(4); MCR 3.977(D).

(3) The child has a guardian or legal custodian.

If a child was living with a guardian or legal custodian, the court must determine what, if any, visitation it will permit the guardian or legal custodian to have with the child. MCR 3.965(C)(7)(b).

The frequency of parenting time or visitation before trial is not specified in statute or court rule. But see MCL 712A.18f(3)(e), which specifies that parenting time must occur at least every seven days during the dispositional stage of proceedings. See also the DHHS's Children's Foster Care Manual (FOM), *Case Planning FOM 722-06*, p 14, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/722-06.pdf, which provides:

"Foster care staff must utilize the following guidelines in developing a parenting time plan with the parent(s):

• A child and parent must be offered parenting time within the first week of placement and at least weekly thereafter. If the child is very young, parenting time should be more frequent.

• The standard scheduling for parenting time, when the plan is reunification, is to increase the length of parenting time and to allow

[41] See Section 8.8(C) for more information on suspension of parenting time under MCL 712A.19b(4) and MCR 3.977(D).

> unsupervised parenting time in the parental home."

The supervising agency must institute a flexible schedule to allow for the occurrence of supervised in-home visitation outside of the traditional workday to accommodate the schedules of the individuals involved. MCL 722.954b(3).

B. Between Adjudication and Filing of Termination Petition

"[T]here is no court rule or statutory provision that governs the trial court's authority concerning parenting time between adjudication and the filing of a termination petition[.]"[42] *In re Laster*, 303 Mich App 485, 491 (2013).

"In the absence of a court rule or statute, the issue of the amount, if any, and conditions of parenting time following adjudication and before the filing of a petition to terminate parental rights is left to the sound discretion of the trial court and is to be decided in the best interests of the child. No finding of harm is required [by the court][.]" *In re Laster*, 485 Mich App at 490-491 ("trial court did not err when it suspended [the] respondent-mother's parenting time [after adjudication occurred, but before the termination petition was filed] without a finding of harm").

C. After Termination Petition Is Filed

"Once a termination petition is filed, parenting time is [] governed by MCR 3.977(D) and MCL 712A.19b(4)."[43] *In re Laster*, 303 Mich App 485, 488-489 (2013). Accordingly, "'[i]f a petition to terminate parental rights to a child is filed, the court may suspend parenting time for a parent who is a subject of the petition.'" MCL 712A.19b(4); MCR 3.977(D).

"The suspension of parenting time once a petition to terminate parental rights is filed requires no finding of harm [by the court] and is presumptively in the child's best interest[.]" *In re Laster*, 303 Mich App at 489.

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[42] "The only statutory provisions that concern parenting time between adjudication and the filing of a termination petition are MCL 712A.18f(3)(e) and [MCL 712A.18(3)(f)], which only address the required contents of the agency's case service plan that is created following adjudication for use at the initial dispositional hearing. . . . [T]hey do not govern the trial court's authority to enter orders regarding parenting time following adjudication." *In re Laster*, 303 Mich App at 489-490. See Section 13.6(A) for additional information on case service plan requirements.

[43] See Section 17.1 for additional information on requests for termination of parental rights.

8.9 Order for Examination or Evaluation of Child, Parent, Guardian, or Legal Custodian

The court may order an evaluation or examination of a child or a parent, guardian, or legal custodian by a physician, dentist, psychologist, or psychiatrist. MCL 712A.12; MCR 3.923(B).

The privilege against self-incrimination in the Fifth Amendment to the United States Constitution may not be raised by a parent to prevent him or her from undergoing a psychological examination in child protective proceedings to determine if parental rights should be terminated. *In re Johnson*, 142 Mich App 764, 765-766 (1985).

8.10 Placement of Child

Not more than 90 days after the child's removal, the supervising agency must make a placement decision and document the reason for the decision in writing.[44] MCL 722.954a(4)(a). The supervising agency must give written notice of the placement decision and supporting reasons to the following persons:

(1) the child's attorney;

(2) the child's guardian;

(3) the child's guardian ad litem;

(4) the child's mother;

(5) the child's father;

(6) the attorneys for the mother and father;

(7) each relative who expresses an interest in caring for the child;

(8) the child, if he or she is old enough to express an opinion regarding placement; and

(9) the prosecuting attorney. MCL 722.954a(4)(b).

Placement is the "court-approved transfer of physical custody of a child to foster care,[45] a shelter home, a hospital, or a private treatment agency." MCR 3.903(C)(10).

The goal of a foster care placement is "not to create a new 'family' unit or encourage permanent emotional ties between the child and foster

[44] See Section 8.2 for a detailed discussion of placement options.

parents[, but rather] [f]oster care is designed to provide a stable, nurturing, noninstitutionalized environment for the child while the natural parent or caretaker attempts to remedy the problems which precipitated the child's removal or, if parental rights have been terminated, until suitable adoptive parents are found." *Mayberry v Pryor*, 422 Mich 579, 586-587 (1985).

A. Change in Child's Foster Care Placement

Where a child under the court's or the Michigan Children's Institute's (MCI's) jurisdiction, control, or supervision is placed in foster care, the agency must not change the child's placement unless:

> "(a) The person providing the foster care requests or agrees to the change.
>
> (b) Even though the person providing the foster care objects to a proposed change in placement, 1 of the following applies:
>
> > (*i*) The court orders the child returned home.
> >
> > (*ii*) The change in placement is less than 30 days after the child's initial removal from his or her home.
> >
> > (*iii*) The change in placement is less than 90 days after the child's initial removal from his or her home, and the new placement is with a relative.[46]
> >
> > (*iv*) The change in placement is in accordance with other provisions of this section." MCL 712A.13b(1).

Unless there is an emergency change in a child's foster care placement,[47] the agency must comply with all of the following requirements before changing the child's foster care placement:

> (1) Notify the State Court Administrative Office (SCAO) of the proposed change;[48]

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[45] MCR 3.903(C)(5) defines *foster care* as "24-hour a day substitute care for children placed away from their parents, guardians, or legal custodians, and for whom the court has given the Family Independence Agency placement and care responsibility, including, but not limited to, (a) care provided to a child in a foster family home, foster family group home, or child caring institution licensed or approved under MCL 722.111 *et seq.*, or (b) care provided to a child in a relative's home pursuant to an order of the court." MCL 712A.13a(1)(e) contains a substantially similar definition of *foster care*."

[46] See Section 8.2(A) for a detailed discussion of relative placements.

[47] See Section 8.10(B) for a detailed discussion of emergency change in a child's foster care placement.

[48] Notice may be sent by first-class mail or electronically as agreed on by the Department of Health and Human Services (DHHS) and SCAO. MCL 712A.13b(2)(a).

(2) Notify the foster parents of the proposed change and inform them that if they disagree with the proposed change, they may appeal within three days to a Foster Care Review Board;

(3) Maintain the current placement for not less than the three days, and if the foster parents do appeal, then maintain the placement until the Foster Care Review Board makes its determination;

(4) Notify the court with jurisdiction over the child of the proposed change;[49] and

(5) Notify the child's lawyer guardian ad litem of the proposed change. MCL 712A.13b(2).

The agency's notification, which does not affect the DHHS placement discretion, must include all of the following information:

(1) The reason for the change in placement.

(2) The number of times the child's placement has been changed.

(3) Whether the child will be required to change schools as a result of the placement change.

(4) Whether the change will separate or reunite siblings, or affect sibling visitation. MCL 712A.13b(2)(d).

B. Emergency Change in Foster Care Placement

The agency may change a child's foster care placement without adhering to the time requirements in MCL 712A.13b(1), or the notice requirements in MCL 712A.13b(2)(b)-(c), where the agency responsible for the child's care and supervision has reasonable cause to believe that:[50]

(1) the child has suffered sexual abuse or nonaccidental physical injury while in a foster care placement; or

(2) there is substantial risk of harm to the child's emotional well-being in the foster care placement. MCL 712A.13b(7).[51]

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[49] Notice may be sent by first-class mail or electronically as agreed on by the DHHS and the court. MCL 712A.13b(2)(d).

[50] See Section 8.10(A) for a detailed discussion of MCL 712A.13b(1)-(2).

[51] See Section 2.3.

The agency must still notify the State Court Administrative Office. MCL 712A.13b(2)(a). The agency must also include documentation in the child's file that justifies the emergency change in the child's foster care placement. MCL 712A.13b(7).

The agency must inform the foster parent(s) at the time of removal or immediately thereafter of their option to appeal the change in placement within three days of the child's removal. MCL 712A.13b(8).[52] The agency must also provide the foster parent(s) with the address and telephone number of the Foster Care Review Board (FCRB)[53] with jurisdiction over the child. *Id.*

> **Note:** The foster parent may appeal the change in placement, orally or in writing, to the FCRB within three days after the child's removal. MCL 712A.13b(7). Although the foster parent may appeal orally, a written appeal must be filed immediately thereafter. *Id.*

Once removed, a child may not be returned to the foster care placement without a court order or the MCI Superintendent's approval. MCL 712A.13b(5). "After hearing testimony from the agency and any other interested party and considering any other evidence bearing upon the proposed change in placement, the court shall order the continuation or restoration of the placement unless the court finds that the proposed change in placement is in the child's best interests." MCL 712A.13b(6).

8.11 Appeals of Foster Care Placement Changes

A. Appeals to Foster Care Review Board

Before a change in a child's foster care placement takes effect, a child placing agency must notify the foster parent(s) of the proposed change and of their option to appeal the proposed change to a foster care review board (FCRB) within three days.[54] MCL 712A.13b(2)(b). If there is an emergency change in a child's foster care placement, the child placing agency must inform the foster parent(s) at the time of removal or immediately thereafter of their option to appeal the change in placement to the FCRB within three days of the child's removal.[55] MCL 712A.13b(7).

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[52] See Section 8.11 for a detailed discussion of appeals of foster care placement changes.

[53] For an overview of the Foster Care Review Board see http://courts.mi.gov/administration/scao/officesprograms/fcrbp/Pages/default.aspx.

[54] See Section 8.10(A) for more information on changing a child's foster care placement.

[55] See Section 8.10(B) for a detailed discussion of emergency change in a child's foster care placement.

A foster parent may appeal orally but must submit a written appeal immediately thereafter. MCL 712A.13b(2)(b); MCL 712A.13b(7).

1. Investigation by Foster Care Review Board (FCRB)

Once an appeal is received from a foster parent, the FCRB must investigate the change within seven days. MCL 712A.13b(3). Within three days after completion of the investigation, the FCRB must report its findings and recommendations to the court or the Michigan Children's Institute (MCI) Superintendent (if the child is under the jurisdiction, supervision, or control of the MCI), foster care parent(s), parents, and the agency. *Id.*

2. Change in Child's Placement Pending Appeal to Family Division

If, after investigation, the FCRB determines that the change in the child's foster care placement is in the child's best interests, the child placing agency may move the child. MCL 712A.13b(4).

However, if, after investigation, the FCRB determines that the change in the child's foster care placement is not in the child's best interest, the child placing agency must maintain the child's current placement until a finding and order by the court or a decision by the MCI Superintendent (if the child is under the jurisdiction, supervision, or control of the MCI). MCL 712A.13b(5). If the child placing agency removed a child under an emergency change, the child placing agency must not return the child to the foster care placement from which the child was removed unless the court orders a placement restoration or the MCI Superintendent approves a placement restoration. *Id.*

The FCRB must notify the court or the MCI Superintendent (if the child is under the jurisdiction, supervision, or control of the MCI) about the disagreement between the FCRB and the child placing agency. MCL 712A.13b(5).

B. Appeals to Family Division or Michigan Children's Institute (MCI) Superintendent

1. Court's Review

Upon receipt of notice from the FCRB of its disagreement with the child placing agency's proposed change, the court must set a hearing date and provide notice of the scheduled hearing to:

(1) The child's foster parent(s);

(2) Each interested party; and

(3) The prosecuting attorney (if the prosecuting attorney has appeared in the case). MCL 712A.13b(5); MCR 3.966(C)(1)-(2).

> **Note:** "The court must set the hearing no sooner than 7 days and no later than 14 days after receipt of the notice from the [FCRB] that there is a disagreement regarding a placement change." MCR 3.966(C)(2)(a). See also MCL 712A.13b(5).

The Rules of Evidence do not apply, and the court may hear testimony from the child placing agency and any other interested party. MCL 712A.13b(5)-(6); MCR 3.966(C)(2)(c). The court may also consider any other evidence relevant to the proposed change in the child's foster care placement. MCL 712A.13b(6); MCR 3.966(C)(2)(c).

In making its determination, the court must order the child's foster care placement continued or restored unless it finds that the change in placement is in the child's best interests. MCL 712A.13b(6); MCR 3.966(C)(2)(d).

2. MCI Superintendent's Review

If the child is subject to MCI jurisdiction, control, or supervision, the MCI Superintendent must make a decision regarding a child's placement within 14 days of receiving notice from the FCRB of its disagreement with the child placing agency's proposed change. MCL 712A.13b(5). The MCI Superintendent must also inform all interested parties of its decision. *Id.*

8.12 Review of Placement and Initial Service Plan

On any party's motion, the court must review custody orders, placement orders, and Initial Service Plans and may modify these orders and plans if it is in the child's best interests. MCL 712A.13a(14); MCR 3.966(A)(1). If the court receives a request for a child's removal from his or her parent(s), guardian, or legal custodian, "at the hearing on the motion, the court shall follow the placement procedures in MCR 3.965(B) and [MCR 3.965](C)."[56] MCR 3.966(A)(1).

[56] See Section 7.7 for a discussion of MCR 3.965 (preliminary hearings).

> **Note:** In child protective proceedings, MCR 3.903(A)(19)(b) defines *party* to include a "petitioner, child, respondent, and parent, guardian, or legal custodian[.]"

If a child is removed from the home before the dispositional phase is complete, "the court shall conduct a dispositional hearing in accordance with MCR 3.973."[57] MCR 3.966(A)(2).

A. Petition for Review of Placement Decision

Not more than 90 days after the child's removal, the supervising agency must make a placement decision, document the reasons for the decision in writing, and provide notice of the placement decision.[58] MCL 722.954a(4).

A person receiving the supervising agency's notice of the placement decision "may request in writing, within 5 days, documentation of the reasons for the decision[.]" MCL 722.954a(6). If the person disagrees with the supervising agency's placement decision, he or she may request the child's lawyer-guardian ad litem to review the supervising agency's decision to determine whether the placement decision is in the child's best interest. *Id.* If the child's lawyer-guardian ad litem determines that the supervising agency's placement decision is not in the child's best interest, the lawyer-guardian ad litem must petition the court for a review hearing within 14 days of the supervising agency's written placement decision. MCL 722.954a(6); MCR 3.966(B)(1)(e), (2).

Within seven days of the filing of the petition, the court must hold a review hearing on the record. MCR 3.966(B)(3). The court may review the supervising agency's placement decision once all of the following have been met:

> "(a) a child has been removed from the home;
>
> (b) the supervising agency has made a placement decision after identifying, locating, and consulting with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs as an alternative to nonrelative foster care;
>
> (c) the supervising agency has provided written notice of the placement decision;

[57] See Chapter 13 for information on dispositional hearings.

[58] See Section 8.10 for a detailed discussion of placing a child.

(d) a person receiving notice has disagreed with the placement decision and has given the child's lawyer-guardian ad litem written notice of the disagreement within 5 days of the date on which the person receives notice; and

(e) the child's lawyer-guardian ad litem determines the decision is not in the child's best interest." MCR 3.966(B)(1).

B. Usage of Two-Way Interactive Video Technology

Two-way interactive video technology may be used to conduct review hearings in child protective proceedings. MCR 3.904(B)(2). Use of two-way interactive video technology must comply with any standards established by the State Court Administrative Office, and any proceedings conducted using the technology must be recorded verbatim by the court. MCR 3.904(C).[59]

8.13 Interstate Compact on the Placement of Children (ICPC)

The Interstate Compact on the Placement of Children (ICPC), MCL 3.711 *et seq.*, "ensures protection and services to children placed across state lines for foster care (including relative and residential placements) or adoption by establishing procedures that guarantee placements are safe, suitable and able to provide proper care given the needs of the child." DHHS's Children's Foster Care Manual (FOM), *Interstate Services Overview FOM 931*, p 1, is available at http://www.mfia.state.mi.us/olmweb/ex/Mobile/FOM/931.pdf. The ICPC became effective in Michigan on May 29, 1984. MCL 3.711.

Note: MCL 3.711, Article II(a) defines *child* as "a person who, by reason of minority, is legally subject to parental, guardianship, or similar control."

[59] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Administrative Order No. 2012-7 further provides that "[t]he judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

> MCL 3.711, Article II(d) defines *placement* as "the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective, or epileptic or any institution primarily educational in character, and any hospital or other medical facility."

The purpose of the ICPC is to provide a legal framework and protections for children being placed across state lines. See MCL 3.711, Article I(a)-Article I(d). Limitations on the ICPC include:

> "(a) The sending or bringing of a child into a receiving state by the child's parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or the child's guardian and leaving the child with any such relative or nonagency guardian in the receiving state.
>
> (b) Any placement, sending, or bringing of a child into a receiving state pursuant to any other interstate compact to which both the state from which the child is sent or brought and the receiving state are party, or to any other agreement between said states which has the force of law." MCL 3.711, Article VIII.

A. Placement Conditions

A sending agency must not place a child in foster care or preadoptive placement unless the sending agency complies with the ICPC placement conditions and the receiving state's governing laws. MCL 3.711, Article III(1).

> **Note:** MCL 3.711, Article II(b) defines a *sending agency* as "a party state, or officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency, or other entity which sends, brings, or causes to be sent or brought any child to another party state."
>
> MCL 3.711, Article II(c) defines a *receiving state* as "the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local public authorities or for placement with private agencies or persons."

Before a child is placed in a foster care or a preadoptive placement, the sending agency must provide written notice of the intent to place

the child in the receiving state. MCL 3.711, Article III(2). The notice must contain:

> (1) The child's name, date, and place of birth.
>
> (2) The identity and address(es) of the parents or legal guardian.
>
> (3) The individual's, agency's, or institution's name and address where the child is being placed.
>
> (4) A statement indicating the reasons for the placement.
>
> (5) Evidence supporting the authority for placement.
>
> (6) Any additional evidence the receiving state requests. MCL 3.711, Article III(2)-(3).

The sending agency must not place the child in the receiving state until it receives written notice that the proposed placement is not contrary to the child's interests. MCL 3.711, Article III(4). When Michigan is the receiving state, the Department of Health and Human Services (DHHS) must send written approval for placement of a child in a home of an unrelated person. MCL 3.716; MCL 400.115c. If the intent of the placement is for adoption, the court's approval is also required. MCL 400.115c.

B. Penalty for Illegal Placement

Violating any of the ICPC conditions will result in a violation of the ICPC in both the receiving state and the sending agency's state. MCL 3.711, Article IV. Either the receiving state or the sending agency's state may exercise jurisdiction over the violation in accordance with its laws. *Id.*

Any violation of the ICPC constitutes full and sufficient grounds for the suspension or revocation of the sending agency's license, permit, or other legal authority under which the agency places or cares for children. MCL 3.711, Article IV.

C. Retention of Jurisdiction

1. Sending Agency Located in Michigan

A sending agency located in Michigan must retain jurisdiction over a child:

> (1) Sufficient to determine all matters relating to the custody, supervision, care, treatment, and disposition of the child, which it would have had if the child had remained in Michigan, until the child is adopted, reaches majority, becomes self-supporting, or is discharged with the concurrence of the appropriate authority in the receiving state.
>
> (2) Including the power to effect or cause a child's return or transfer to another placement.
>
> (3) Including financial responsibility for support and maintenance of the child during the period of placement. MCL 3.711, Article V(1). See also the DHHS's Children's Foster Care Manual (FOM), *Interstate Services Program Requirements FOM 932*, pp 1-2, available at http://www.mfia.state.mi.us/olmweb/ex/Mobile/FOM/932.pdf.

However, a receiving state exercising jurisdiction over a delinquent child or a criminal matter takes precedence over a sending agency's retained jurisdiction. MCL 3.711, Article V(1).

2. Placement Made in Michigan

The sending agency must send its requests for home study and placement through the Michigan Interstate Compact Office.[60] The contact information for the Michigan Interstate Compact Office may be obtained at http://michigan.gov/documents/FIA-CompactChildren_10014_7.pdf. The home study:

> "• Must be conducted and completed within 60 days of receipt of the request by the interstate compact office
>
> • Must include an assessment of the safety and suitability of the home and address the extent to which placement in the home would meet the needs of the child." DHHS's Children's Foster Care Manual (FOM), *Interstate Services Overview FOM 931*, p 1, available at http://www.mfia.state.mi.us/olmweb/ex/Mobile/FOM/931.pdf.

Actual placement of the child is not made until after the training requirements are met and the ICPC Office gives its approval. DHHS's Children's Foster Care Manual (FOM), *Interstate Services*

[60] See DHHS form DHS-4332, *Interstate Compact Placement Request*, available at http://www.michigan.gov/documents/FIA4332_43100_7.pdf.

Overview FOM 931, pp 1-2, available at http://www.mfia.state.mi.us/olmweb/ex/Mobile/FOM/931.pdf.

8.14 Placement of Child Pursuant to Safe Delivery of Newborns Law

The Safe Delivery of Newborns Law permits a parent to leave a newborn with an emergency provider[61] without expressing an intent to return for the newborn. See MCL 712.1(2)(n). The Safe Delivery of Newborns Law, MCL 712.1 *et seq.*, governs the procedures for surrendering a newborn. According to MCL 712.1(2)(k), a newborn is "a child who a physician reasonably believes to be not more than 72 hours old."

If a parent surrenders a child who may be a newborn to an emergency service provider, the emergency service provider must assume the child is a newborn and immediately take the newborn into temporary protective custody. MCL 712.3(1). An emergency service provider that is not a hospital that takes a newborn into temporary protective custody must transfer the newborn to a hospital. MCL 712.5(1).

> **Note:** Although MCL 722.623 requires that suspected child abuse or child neglect be reported to the Department of Health and Human Services (DHHS), the reporting requirement does not apply to a newborn surrendered to an emergency service provider. MCL 712.2(2).

A hospital must accept an emergency service provider's transfer of a newborn. MCL 712.5(1). A hospital that takes a newborn into temporary protective custody must have the newborn examined by a physician. MCL 712.5(2). If the examining physician determines that there is reason to suspect the newborn experienced neglect or abuse (other than the parent surrendering the child to an emergency service provider), or if the examining physician believes the child is not a newborn, the physician must immediately report the suspected child abuse to the DHHS. MCL 712.5(2). However, if the examining physician does not suspect child abuse, the hospital must notify a child placing agency that it has taken a newborn into temporary protective custody. MCL 712.5(3).

Once the hospital informs a child placing agency that it has taken a newborn into temporary protective custody, MCL 712.7 requires a child placing agency to do all of the following:

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[61] See Section (D) for the definition and responsibilities of an emergency service provider. See also Section 4.2(D) for information on the court's jurisdiction over a newborn child surrendered to an emergency service provider, and Section 7.9(A) for information on the appointment of a Lawyer-Guardian Ad Litem under the Safe Delivery of Newborns Law.

(1) Immediately assume the care, control, and temporary protective custody of the newborn.

(2) Immediately meet with a parent, if the parent's identity is known and he or she is willing.

(3) Temporarily place the newborn with a prospective adoptive parent who has an approved preplacement assessment or a licensed foster parent if a petition for custody has been filed. See Section 8.14(B) for a detailed discussion of a petition for custody.

(4) Unless the emergency service provider witnessed the birth, immediately request law enforcement assistance to investigate and determine whether the newborn is a missing child.

(5) Within 48 hours of transferring physical custody to a prospective adoptive parent, petition the court in the county in which the prospective adoptive parent resides to provide authority to place the newborn and provide care for the newborn.[62] The petition must include all of the following:

(a) The transfer date of physical custody.

(b) The emergency service provider's name and address.

(c) Any written or oral information the surrendering parent provided by and to the emergency service provider.

Note: The emergency service provider that originally accepted the newborn must provide this information to the child placing agency. MCL 712.7(e)(*iii*).

(6) Make reasonable efforts to identify, locate, and provide notice of the newborn's surrender to the nonsurrendering parent within 28 days.

(7) File a written report with the court that issued the order placing the newborn, indicating the efforts made and the result of those efforts to identify and locate the nonsurrendering parent.[63]

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[62] See SCAO form CCFD 01, *Petition for Placement Order of Surrendered Newborn Child*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/safedeliveryofnewborn/ccfd01.pdf.

[63] See SCAO form CCFD 02, *Order Placing Surrendered Newborn With Prospective Adoptive Parents*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/safedeliveryofnewborn/ccfd02.pdf.

Note: If the identity and address of the nonsurrendering parent are unknown, the child placing agency must provide notice of the newborn's surrender by publication in a newspaper of general circulation in the county where the newborn was surrendered. MCL 712.7(f).

A. Immunity From Civil Damages

Except for an act or omission constituting gross negligence[64] or willful or wanton misconduct, a hospital and a child placing agency, and their agents or employees, are immune in a civil action for damages for an act or omission in accepting or transferring a newborn. MCL 712.2(4).

Note: To the extent the Governmental Liability for Negligence Act, MCL 691.1401 *et seq.*, does not protect a fire department's or police station's employee or contractor, MCL 712.2(4) extends the same immunity to them that a hospital's or child placing agency's employee or agent receives.

B. Petition for Custody

1. Petition Requirements

A parent who surrenders custody of a newborn to an emergency service provider may file a petition with the court for custody of the newborn within 28 days after the newborn was surrendered. MCL 712.10(1).

A nonsurrendering parent, claiming to be the newborn's parent, may file a petition with the court for custody of the newborn within 28 days after notice of a newborn has been published. MCL 712.10(1). SeeSection 8.14(C).

A parent's petition for custody[65] must be filed in one of the following counties:

(1) The county where the newborn is located.

(2) If the newborn's location is unknown, the county where the emergency service provider to

[64] *Gross negligence* is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 712.1(2)(h).

[65] See SCAO form CCFD 03, *Petition of Parent for Custody of Surrendered Newborn Child*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/safedeliveryofnewborn/ccfd03.pdf.

> whom the newborn was surrendered is located, if known.
>
> (3) If the newborn or the emergency service provider to whom the newborn was surrendered cannot be located, the county where the parent is located. MCL 712.10(1).

If the petition for custody is filed in a court that did not issue the order placing the newborn, it must transfer the proceedings to that court. MCL 712.10(2).

2. Hearing to Determine Maternity or Paternity

Within seven days of a surrendering or nonsurrendering parent's petition for custody and before holding a custody hearing on the petition, the court must conduct a hearing to determine the newborn's biological parents. MCL 712.10(3).

If a petition for custody is filed, the court must order the newborn and each party claiming paternity or maternity to submit to "blood or tissue typing determinations or DNA identification profiling[.]"[66] MCL 712.11(1)-(2).

> **Note:** A party claiming maternity need not submit to a DNA identification profiling or blood or tissue typing when an emergency service provider witnesses the birth and "sufficient documentation exists to support maternity[.]" MCL 712.11(2).

The court may order the petitioner to pay all or part of the cost of the paternity or maternity testing. MCL 712.11(4).

Maternity or paternity is presumed when the test results show a probability of 99 percent or higher and the DNA identification profile and summary report are admissible. MCL 712.11(3). A petitioner may move for summary disposition on the issue of maternity or paternity.[67] *Id.*

If the DNA identification profile and summary report are admissible and establish that the petitioner is not the newborn's parent, the court must dismiss the petition for custody. MCL 712.11(5).

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[66] See SCAO form CCFD 04, *Order for Blood or Tissue Typing or DNA Profile (Safe Delivery of Newborn Act)*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/safedeliveryofnewborn/ccfd04.pdf.

[67] See SCAO form CCFD 04a, *Order Determining Maternity/Paternity of Surrendered Newborn Child*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/safedeliveryofnewborn/ccfd04a.pdf.

3. Hearing to Determine Custody

After a petition for custody is filed and the court enters an order determining the newborn's biological parents, the court must hold a hearing to determine custody. See MCL 712.10(3).

The court must determine custody based on the newborn's best interests. MCL 712.14(1). With the goal of achieving permanence for the newborn at the earliest possible date, the court must consider, evaluate, and make a finding on each of the following factors:

> "(a) The love, affection, and other emotional ties existing between the newborn and the parent.
>
> (b) The parent's capacity to give the newborn love, affection, and guidance.
>
> (c) The parent's capacity and disposition to provide the newborn with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The permanence, as a family unit, of the existing or proposed custodial home.
>
> (e) The parent's moral fitness.
>
> (f) The parent's mental and physical health.
>
> (g) Whether the parent has a history of domestic violence [as defined in MCL 400.1501(d)(*i*)-(*iv*)].
>
> > [**Note:** MCL 400.1501(d) defines *domestic violence* as "the occurrence of any of the following acts by a person that is not an act of self-defense:
> >
> > > "(*i*) Causing or attempting to cause physical or mental harm to a family or household member.
> > >
> > > (*ii*) Placing a family or household member in fear of physical or mental harm.
> > >
> > > (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested."]

(h) If the parent is not the parent who surrendered the newborn, the opportunity the parent had to provide appropriate care and custody of the newborn before the newborn's birth or surrender.

(i) Any other factor considered by the court to be relevant to the determination of the newborn's best interest." MCL 712.14(2).

After a review of the newborn's best interest factors, the court may issue an order[68] that does one of the following:

(1) Grants the parent legal or physical custody, or both, and:

(a) The court retains jurisdiction; or

(b) The court relinquishes jurisdiction.

(2) Orders the child placing agency to petition the court for jurisdiction under MCL 712A.2(b) if the court determines that granting custody to the petitioning parent is not in the newborn's best interest.

(3) Dismisses the petition. MCL 712.15.

C. No Parental Request for Custody

A parent who surrenders a newborn and does not file a petition for custody within 28 days of the surrender is presumed to have knowingly released his or her parental rights to the newborn. MCL 712.10(1); MCL 712.17(1). Once the 28 days have expired, the child placing agency with authority to place the newborn must immediately file a petition with the court to determine whether the release must be accepted and whether the court must enter an order terminating the surrendering parent's parental rights.[69] MCL 712.17(2).

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[68] See SCAO form CCFD 06, *Order Determining Custody of Surrendered Newborn Child*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/safedeliveryofnewborn/ccfd06.pdf.

[69] See SCAO form CCFD 07, *Petition to Accept Release and Terminate Rights to Surrendered Newborn Child*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/safedeliveryofnewborn/ccfd07.pdf.

If a nonsurrendering parent fails to file a petition for custody of the newborn within 28 days of notice of the surrender was published, the child placing agency with authority to place the newborn must immediately petition the court to determine whether the court must enter an order terminating the nonsurrendering parent's parental rights. MCL 712.17(3).

The court must schedule a hearing on the petition from the child placing agency within 14 days of receiving the child placing agency's petition. MCL 712.17(4). At the hearing, the child placing agency must present evidence that demonstrates that the surrendering parent released the newborn and that demonstrates the efforts made by the child placing agency to identify, locate, and provide notice to the nonsurrendering parent. *Id.* The court must terminate the surrendering and nonsurrendering parents' parental rights[70] if it finds by a preponderance of the evidence that the child placing agency demonstrated all of the following:

> (1) The surrendering parent knowingly released his or her rights to the newborn.
>
> (2) Reasonable efforts were made to locate the nonsurrendering parent.
>
> (3) A custody action had not been filed. MCL 712.17(5).

D. Closed Hearings and Confidentiality of Records

All hearings held under the Safe Delivery of Newborns Law are closed to the public. MCL 712.2a(1).

Records of the proceedings and all of the child placing agency's records created under the Safe Delivery of Newborns Law are confidential. MCL 712.2a(1)-(2).

> **Note:** Records of the proceedings are available to parties to the proceedings. MCL 712.2a(1).

Any individual who discloses information made confidential under MCL 712.2a(1) or MCL 712.2a(2) without a court order or specific authorization under federal or state law is civilly liable for damages proximately caused by the disclosure and is guilty of a misdemeanor. MCL 712.2a(3).

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[70] See SCAO form CCFD 08, *Order After Hearing on Petition to Accept Release and Terminate Rights to Surrendered Newborn Child*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/safedeliveryofnewborn/ccfd08.pdf.

E. Applicability of Other Law

"Unless [the Safe Delivery of Newborns Law] specifically provides otherwise, a provision in another chapter of [the Probate Code] does not apply to a proceeding under [the Safe Delivery of Newborns Law]. Unless [the Safe Delivery of Newborns Law] specifically provides otherwise, [the Child Custody Act] does not apply to a proceeding under [the Safe Delivery of Newborns Law]." MCL 712.2(3).

F. Safe Delivery of Newborns Program

The Michigan Department of Community Health (MDCH) and the DHHS operate a safe delivery of newborns program. See MCL 712.20. For additional information on the safe delivery of newborns program, see http://www.michigan.gov/dhs/0,1607,7-124-5452_7124_7200---,00.html.

Chapter 9: Pretrial Proceedings

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In this chapter. . .

This chapter discusses several issues that arise following a preliminary inquiry or preliminary hearing, including which proceedings a judge must conduct and which proceedings a referee may conduct. The chapter discusses the court's ability to schedule a pretrial conference to isolate contested issues in a case and to set discovery, motion, and plea deadlines. The chapter also discusses issues that arise when a trial is held.

In an effort to provide trial courts with a quick practical guide through the process of pretrial hearings, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys:Pretrial Hearing*. This toolkit is accessible at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/CWSToolkit/Pages/Pretrial-Hearing.aspx.

9.1 Conducting Pretrial Proceedings

A. Judges

A judge must conduct a jury trial. MCR 3.912(A)(1). A judge may also conduct a nonjury trial if a proper demand has been made. MCR 3.912(B).

Whenever practicable, two or more matters within the Family Division's jurisdiction, pending in the same judicial circuit and involving members of the same family, must be assigned to the judge who was assigned the first matter. MCL 600.1023.

A judge may be disqualified as provided in MCR 2.003. MCR 3.912(D). See *In re Schmeltzer*, 175 Mich App 666, 673-674 (1989) (disqualification of trial judge was not warranted, where the judge had presided over termination proceedings involving a younger sibling).

B. Referees

MCR 3.913(A)(1) states that "the court may assign a referee to conduct a preliminary inquiry or to preside at a hearing other than those specified in MCR 3.912(A) and to make recommended findings and conclusions."[1]

In a child protective proceeding, "[o]nly a person licensed to practice law in Michigan may serve as a referee at a child protective proceeding other than a preliminary inquiry, preliminary hearing, a progress review under MCR 3.974(A), or an emergency removal hearing under [MCR 3.974(C)[2]]. In addition, either an attorney or a nonattorney referee may issue an ex parte placement order under MCR 3.963(B)."[3] MCR 3.913(A)(2)(b).

An attorney referee may conduct a contempt hearing but may not issue an order holding a person in contempt of court. *In re Contempt of Steingold (In re Smith)*, 244 Mich App 153, 157 (2000); MCL 712A.10(1).

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[1] For purposes of a child protective proceeding, the only applicable listed exception is a jury trial. MCR 3.912(A)(1).

[2] Formerly MCR 3.974(B).

[3] For information on ex parte placement orders under MCR 3.963(B), see Section 3.2(A).

1. Length of Authority

Unless a party has demanded a trial by judge or jury, a referee may conduct the trial and further proceedings through the dispositional phase. MCR 3.913(B).

2. Scope of Authority

MCL 712A.10(1) sets out the scope of a referee's authority. *In re AMB*, 248 Mich App 144, 216 (2001). Specifically, MCL 712A.10(1) provides:

> "Except as otherwise provided in [MCL 712A.10(2)[4]] and [MCL 712A.14], [MCL 712A.14a], and [MCL 712A.14b],[5] the judge may designate a probation officer or county agent to act as referee in taking the testimony of witnesses and hearing the statements of parties upon the hearing of petitions alleging that a child is within the provisions of [the Juvenile Code], if there is no objection by parties in interest. The probation officer or county agent designed to act as referee shall do all of the following:
>
> > (a) Take and subscribe the oath of office provided by the constitution.
> >
> > (b) Administer oaths and examine witnesses.
> >
> > (c) If a case requires a hearing and the taking of testimony, make a written signed report to the judge containing a summary of the testimony taken and a recommendation for the court's findings and disposition." MCL 712A.10(1).

"[A] hearing referee's recommendations and proposed order *cannot* be accepted without judicial examination[;] '[t]hey are a helpful time-saving crutch and no more[, and] [t]he responsibility for the ultimate decision and the exercise of judicial discretion in reaching it still rests squarely upon the trial judge' and may not be delegated." *In re AMB*, 248 Mich App at 217-218, quoting *Campbell v Evans*, 358 Mich 128, 131 (1959).

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[4] MCL 712A.10(2) pertains to juvenile proceedings, which exceeds the scope of this benchbook. For additional information on MCL 712A.10(2), see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 2.

[5] MCL 712A.14(2), MCL 712A.14a(3), and MCL 712A.14b(1) specifically provide a referee with the authority to issue an order under certain circumstances.

Consequently, when it is apparent that someone other than a judge made the substantive legal decision in a case [where the referee's authority extends only to making a recommendation and proposed order], the only appropriate appellate response is to reverse." *In re AMB*, 248 Mich App at 217-218, quoting *Campbell v Evans*, 358 Mich 128, 131 (1959) (referee acted outside his authority when he entered an order permitting the withdrawal of a critically-ill premature infant's life support).

Referees are bound by the rules governing the Judicial Tenure Commission and the Michigan Code of Judicial Conduct. MCR 9.201(B)(2); MCR 9.205; Michigan Ethics Opinion JI-19 (April 9, 1990).

3. Required Summary of Testimony and Recommended Findings and Conclusions

MCL 712A.10(1)(c) provides that if a case requires a hearing and the taking of testimony, the referee must make a written signed report to the judge containing a summary of the testimony taken and a recommendation for the court's findings and disposition. Similarly, MCR 3.913(A)(1) requires a referee to "make recommended findings and conclusions."

4. Advice of Right to Appeal Referee's Recommended Findings and Conclusions

A referee must advise the parties of their right to request that a judge review the referee's recommended findings and conclusions. MCR 3.913(C). See Section 20.1 for a detailed discussion on reviewing a referee's recommendation.

C. Table Summarizing Who May Conduct What Proceeding

Note: The information contained in this section is in table form. However, some e-reader programs or apps do not properly display tables. If the table below appears to have poor formatting or is illegible, you may access the PDF version of this table by clicking here.

	Judge	Attorney Referee	Non-Attorney Referee
Preliminary inquiries	✔	✔	✔

	Judge	Attorney Referee	Non-Attorney Referee
Preliminary hearings	✔	✔	✔
Hearings to review a child's placement	✔	✔	
Bench trials	✔	✔	
Jury Trials	✔		
Initial disposition hearings	✔	✔	
Progress reviews	✔	✔	✔
Review hearings	✔	✔	
Emergency removal hearings	✔	✔	✔
Ex parte placement orders	✔	✔	✔
Permanency planning hearings	✔	✔	
Termination of parental rights hearings	✔	✔	
Post-termination review hearings	✔	✔	

9.2 Pretrial Conferences

The court may direct the parties to appear at a pretrial conference. MCR 3.922(D). "The scope and effect of a pretrial conference are governed by MCR 2.401, except as otherwise provided in or inconsistent with [subchapter 3.900 of the court rules]." MCR 3.922(D).

A pretrial conference may be held at any time after the commencement of the action. MCR 2.401(A). The court must give reasonable notice of the scheduling of a conference. *Id.*

9.3 Discovery

A. Materials Discoverable As of Right

"The following materials are discoverable as of right in all proceedings provided they are requested no later than 21 days before trial unless the interests of justice otherwise dictate:

> (a) all written or recorded statements and notes of statements made by the juvenile or respondent that are in possession or control of petitioner or a law enforcement agency, including oral statements if they have been reduced to writing;
>
> (b) all written or recorded nonconfidential statements made by any person with knowledge of the events in possession or control of petitioner or a law enforcement agency, including police reports;
>
> (c) the names of prospective witnesses;
>
> (d) a list of all prospective exhibits;
>
> (e) a list of all physical or tangible objects that are prospective evidence that are in the possession or control of petitioner or a law enforcement agency;
>
> (f) the results of all scientific, medical, or other expert tests or experiments, including the reports or findings of all experts, that are relevant to the subject matter of the petition;
>
> (g) the results of any lineups or showups, including written reports or lineup sheets; and
>
> (h) all search warrants issued in connection with the matter, including applications for such warrants, affidavits, and returns or inventories." MCR 3.922(A)(1).

Note: A lawyer-guardian ad litem's case file is not discoverable. MCL 712A.17d(3).

B. Materials Discoverable by Motion

Upon a party's motion, the court may permit discovery of any other materials and evidence (including untimely requested materials and evidence that would have been discoverable as of right[6] if timely requested during the 21-day period). MCR 3.922(A)(2). "Absent manifest injustice, no motion for discovery will be granted unless the moving party has requested and has not been provided the materials or evidence sought through an order of discovery." *Id.*

C. Court's Authority

"Depositions may only be taken as authorized by the court." MCR 3.922(A)(3).

The court may also serve process on additional witnesses and order production of other evidence. MCR 3.923(A)(3).

D. Sanctions

Failure to comply with MCR 3.922(A)(1) and MCR 3.922(A)(2) may result in sanctions as set out in MCR 2.313. MCR 3.922(A)(4).

9.4 Motion Practice

A brief discussion on motion practice requirements is contained in this section. For a more comprehensive discussion, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 8.

Motion practice is governed by MCR 2.119. MCR 3.922(C).

> **Note:** In civil cases, MCR 2.116(C)(10) allows a court to grant a motion for summary disposition when "there is no genuine issue as to any material fact . . . ." This rule does not apply to child protective proceedings. *In re PAP*, 247 Mich App 148, 154-155 (2001). In *In re PAP*, *supra* at 155, the Court of Appeals rejected the Department of Health and Human Services's (DHHS's) argument on appeal that because MCR 2.116(G) provides that MCR 2.119 applies to summary disposition motions, and MCR 2.119 applies to child protective proceedings, MCR 2.116 applies to child protective proceedings. The Court of Appeals termed the DHHS's logic "specious" and concluded that the argument was "simply without merit." *Id.*

[6] See Section 9.3(A) for a list of materials discoverable as of right.

A. Time Requirements

Unless the court rules or the trial court (for good cause) state otherwise, a written motion (excluding ex parte motions), notice of hearing, and any supporting brief or affidavit must be served:

> (1) at least nine days before the time set for hearing if mailed.[7]
>
> (2) at least seven days before the time set for hearing if delivered.[8] MCR 2.119(C)(1).

Unless the court rules or the trial court (for good cause) state otherwise, any response to a motion (including a brief or affidavits) must be served:

> (1) at least five days before the hearing if mailed.
>
> (2) at least three days before the hearing if delivered. MCR 2.119(C)(2).

The court may set a different time for serving a motion or a response. MCR 2.119(C)(3). "[The court's] authorization must be endorsed in writing on the face of the notice of hearing or made by separate order." *Id.*

Unless the court sets a different time, a motion must be filed at least seven days before the hearing, and any response to a motion required or permitted must be filed at least three days before the hearing. MCR 2.119(C)(4).

B. Required Form of Written Motions

Unless a motion is made during a hearing or trial, it must be in writing, state with particularity the grounds and authority on which it is based, state the relief or order sought, and be signed by the party or attorney filing the motion. MCR 2.119(A)(1).

A motion or response to a motion that presents an issue of law must be accompanied by a brief citing authority for its proposition. MCR 2.119(A)(2). A trial court should not deny a motion if it is filed without a brief, and the motion itself contains citations to legal

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[7] MCR 2.107(C)(3) defines mailing a copy as "enclosing it in a sealed envelope with first class postage fully prepaid, addressed to the person to be served, and depositing the envelope and its contents in the United States mail." Service by mail is complete at the time of mailing. *Id.*

[8] Service by delivery is defined in MCR 2.107(C)(1), MCR 2.107(C)(2), and MCR 2.107(C)(4). (Service by e-mail under MCR 2.107(C)(4) is treated as service by delivery. MCR 2.107(C)(4)(f)).

authority supporting its proposition. *Woods v SLB Property Mgmt, LLC*, 277 Mich App 622, 625-626 (2008).

Unless the court permits otherwise, the combined length of a motion and brief may not exceed 20 pages double spaced.[9] MCR 2.119(A)(2). Permission to file a motion and brief in excess of the 20-page limit should be requested sufficiently in advance of the hearing on the motion to allow the opposing party adequate opportunity for analysis and response. See *People v Leonard*, 224 Mich App 569, 578-579 (1997).

The motion and notice of hearing may be combined into one document. MCR 2.119(A)(3).

C. Affidavits

Unless specifically required by rule or statute, a pretrial motion need not be verified or accompanied by an affidavit. See MCR 2.114(B)(1).

Although an affidavit is not required, if one is included with a motion, MCR 2.119(B) sets out its required form. *Porter v Porter*, 285 Mich App 450, 461 (2009). Under MCR 2.119(B)(1), an affidavit filed in support of or in opposition to a motion must:

> "(a) be made on personal knowledge;
>
> (b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and
>
> (c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit."

In addition, an affidavit must:

> (1) be verified by oath or affirmation, MCR 2.113(A);
>
> (2) include sworn or certified copies of any papers it refers to, unless the papers or copies
>
> > (a) have already been filed;
> >
> > (b) are matters of public record in the county in which the action is pending;
> >
> > (c) are in the adverse party's possession, and the affidavit or motion states this fact; or

[9] Many jurisdictions have local court rules governing the form of motions.

(d) are of such nature that it would be unreasonable or impracticable to attach them, and the affidavit or motion states this fact, MCR 2.119(B)(2); and

(3) be served on the opposing party within the same time frame as written motions, MCR 2.119(C)(1).[10]

D. Evidentiary Hearings

An evidentiary hearing must be conducted whenever a defendant challenges the admissibility of evidence on constitutional grounds. *People v Reynolds (Anthony)*, 93 Mich App 516, 519 (1979). Where a defendant fails to substantiate a claim that evidence is inadmissible on constitutional grounds or it is apparent that the defendant's allegations do not rise to the level of a constitutional violation, no evidentiary hearing is required. *People v Johnson (James)*, 202 Mich App 281, 285 (1993).

Note: A judge or referee need not hold an evidentiary hearing if no factual dispute exists. *Bielawski v Bielawski*, 137 Mich App 587, 592 (1984) (trial court should first determine whether contested factual questions exist before conducting an evidentiary hearing in a child custody case).

The parties have the right to a judge at an evidentiary hearing. See MCR 3.912(B) (parties have the right to a judge at a hearing on the formal calendar,[11] which includes evidentiary hearings).

E. Motions for Rehearing or Reconsideration

1. Requirements

A motion for reconsideration or rehearing must be filed and served 21 days after entry of an order deciding the motion, unless another rule provides a different procedure for reconsideration of a decision. MCR 2.119(F)(1).

Responses and oral arguments are not permitted unless ordered by the court. MCR 2.119(F)(2).

[10] See Section 9.4(A) on time requirements for written motions.

[11] MCR 3.903(A)(10) defines *formal calendar* as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

"The moving party must demonstrate a palpable error by which the court and the parties have been misled" and show that correcting the error will result in a different disposition in order for a court to grant a motion for rehearing or reconsideration. MCR 2.119(F)(3).

"'[R]ehearing [or reconsideration] will not be ordered on the ground merely that a change of members of the bench has either taken place, or is about to occur.'" *People v White (Kadeem) (White (Kadeem) II)*, 493 Mich 962, 962 (2013) (quoting *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883), and applying MCR 2.119(F)(3) to a motion for rehearing of the Michigan Supreme Court's decision[12] affirming the judgment of the Court of Appeals).[13]

2. Decision

MCR 2.119(F) does not restrict the court's discretion to hear or consider motions it has already denied. *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 722-723 (1986). The rule merely provides guidance to the court on when it may deny motions for reconsideration or rehearing. *Smith*, *supra* at 723.

Generally, a motion for rehearing or reconsideration that presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. MCR 2.119(F)(3). However, MCR 2.119(F)(3) "does not categorically prevent a trial court from revisiting an issue even when the motion for reconsideration presents the same issue already ruled upon; in fact, it allows considerable discretion to correct mistakes." *Macomb Co Dep't of Human Servs v Anderson*, 304 Mich App 750, 754 (2014), citing *In re Moukalled Estate*, 269 Mich App 708, 714 (2006).

"The purpose of MCR 2.119(F) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal, but at a much greater expense to the parties. The time requirement for filing a motion for reconsideration or rehearing insures that the motion will be brought expeditiously." *Bers v Bers*, 161 Mich App 457, 462 (1987) (citation omitted).

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[12] *People v White (Kadeem) (White (Kadeem) I)*, 493 Mich 187 (2013).

[13] On April 12, 2013, the Michigan Supreme Court issued similar orders applying MCR 2.119(F)(3) to motions for reconsideration in several civil cases. See, e.g., *Boertmann v Cincinnati Ins Co*, 493 Mich 963 (2013).

A court's decision to grant or deny a motion for reconsideration is an exercise of discretion. *Kokx v Bylenga*, 241 Mich App 655, 658-659 (2000). "[MCR 2.119(F)] allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx*, *supra* at 659. The court also has discretion to limit its reconsideration to the issues it believes warrant further consideration. *Id.*

A motion for reconsideration or rehearing may not be entertained by a court after entry of an order changing venue to another court, unless the order specifies an effective date. *Frankfurth v Detroit Med Ctr*, 297 Mich App 654, 656, 658-661 (2012) (holding that "once a transfer of venue is made, the transferee court has full jurisdiction over the action [under MCL 600.1651] and, therefore, the transferor court has none[; a]ny motion for rehearing or reconsideration would have to be heard by whichever court has jurisdiction over the action at the time the motion is brought, which, after entry of an order changing venue, would be the transferee court[]").[14]

9.5 Closing Child Protective Proceedings to the Public

Generally, all juvenile court proceedings on the formal calendar[15] and all preliminary hearings must be open to the public. MCR 3.925(A)(1). However, upon motion of a party or a victim, the court may close proceedings to the general public during the testimony of a child witness or a victim to protect the welfare of either.[16] MCL 712A.17(7); MCR 3.925(A)(2). In making such a decision, the court must consider:

(1) the age and maturity of the witness or victim;

(2) the nature of the proceedings; and

(3) the witness's or victim's preference, and if the witness or victim is a child, the preference of his or her parent, guardian, or legal custodian. MCL 712A.17(7); MCR 3.925(A)(2).

Except where the victim requests a copy of the adjudication order under MCL 780.799, the records from a hearing that is closed under MCL

[14] The *Frankfurth* Court noted that "the better practice might be to make orders changing venue effective as of some reasonable time [after entry of that order]." *Frankfurth*, 297 Mich App at 662.

[15] MCR 3.903(A)(10) defines *formal calendar* as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

[16] A court may also limit access to court proceedings under MCR 8.116(D).

712A.17(7) must only be opened by court order to persons having a legitimate interest. MCL 712A.28(2).[17]

9.6 Demand for Jury Trial or Trial by Judge

A. Right to Jury Trial

MCR 3.911(A) states that "[t]he right to a jury in a juvenile proceeding exists only at the trial."[18] Once a child protective petition[19] is filed against a parent, "[t]he respondent[-]parent can either admit the allegations in the petition or plead no contest to them[,] MCR 3.971[,] . . . [or] the respondent[-parent] may demand a trial (i.e., an adjudication) and contest the merits of the petition[,] MCR 3.972. If a trial is held, the respondent[-parent] is entitled to a jury, MCR 3.911(A)[.]"[20] *In re Sanders*, 495 Mich 394, 405 (2014) (finding unconstitutional the one-parent doctrine, which permitted the court to "enter dispositional orders affecting parental rights of *both* parents" once "jurisdiction [was] established by adjudication of only *one* parent").[21]

Further, "MCL 712A.17(2) affords the [unadjudicated parent] the *statutory* right to demand a jury because a parental-fitness hearing qualifies as a noncriminal hearing under the juvenile code." *In re Sanders*, 495 Mich 394, 418 fn 15, 422 (2014).

"Once a court assumes jurisdiction over a child [after adjudication], the parties enter the dispositional phase[, and u]nlike the adjudicative phase, . . . the respondent[-parent] is not entitled to a jury determination of facts[under] MCR 3.911(A)."[22] *In re Sanders*, 495 Mich at 406.

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[17] See Section 20.3(B)for the criteria to determine who has a "legitimate interest."

[18] However, this is not a constitutional right. *McKeiver v Pennsylvania*, 403 US 528, 545 (1971). But see *In re Sanders*, 495 Mich 394, 418 n 15, where the Michigan Supreme Court "express[ed] no opinion about whether the jury guarantee in MCL 712A.17(2) is constitutionally required."

[19] See Chapter 7 for a detailed discussion of child protective petitions.

[20] See Chapter 10 for additional information on pleading to allegations in the child protective petition, and Chapter 12 for additional information on trials.

[21] For additional information on the procedural due process rights of the unadjudicated parent, see Section 4.3(E)(2). For a discussion on the dispositional phase of child protective proceedings, see Chapter 13.

[22] See Section 4.3 for a discussion on taking jurisdiction of a child, and Chapter 13 for a discussion on the dispositional phase of child protective proceedings.

B. Demand or Waiver of Jury Trial

A party who is entitled to a trial by jury may demand a jury trial by filing a written demand with the court. MCR 3.911(B). The demand must be filed within "(1) 14 days after the court gives notice of the right to jury trial, or (2) 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later, but no later than 21 days before trial. The court may excuse a late filing in the interest of justice." *Id.*

MCL 712A.17(2) allows an interested person to demand a jury trial, or the court, on its own motion, to order a jury trial in noncriminal trials.

C. Demand for Judge to Preside at Hearing

Parties have the right to a judge at a hearing on the formal calendar.[23] MCR 3.912(B). A judge must preside at a jury trial. MCR 3.912(A)(1).

> **Note:** The right to have a judge sit as factfinder is not absolute. A party who fails to make a timely demand for a judge to serve as factfinder at a bench trial may find that a referee will conduct all further proceedings, and that the right to demand a judge has been waived. See Section 9.6(D) for information on referees.

In a bench trial, a party may demand that a judge preside rather than a referee by filing a written demand with the court. MCR 3.912(B). The demand must be filed within "(1) 14 days after the court gives notice of the right to a judge, or (2) 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later, but no later than 21 days before trial. The court may excuse a late filing in the interest of justice." *Id.*

D. Referees

Unless a party has demanded a trial by judge or jury, a referee may conduct the trial and further proceedings through the dispositional phase.[24] MCR 3.913(B).

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[23] MCR 3.903(A)(10) defines *formal calendar* as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

[24] See Section (B) for a more detailed discussion of referees.

Chapter 10: Pleas of Admission or No Contest

10.1 When Respondent May Make a Plea of Admission or No Contest 10-2
10.2 Requirements Before Court Can Accept Plea..... 10-4
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In this chapter. . .

A respondent may enter a plea of admission or no contest to allegations contained in a petition. If the court accepts a respondent's plea, the court takes jurisdiction over the child or children involved in the case. This chapter sets out the rules governing the taking of pleas of admission or no contest. It discusses when a plea may be entered, required advice of rights, and establishing a factual basis for a plea. The effect of a plea by one respondent, but not the other, is also noted.

A parent may consent to the termination of his or her parental rights. See Section 17.7.

10.1 When Respondent May Make a Plea of Admission or No Contest

"A respondent may make a plea of admission or of no contest to the original allegations in the petition." MCR 3.971(A).

With an amended petition,[1] however, the court has the discretion whether to permit a respondent to enter a plea of admission or no contest. MCR 3.971(A). The plea may be taken at any time after the filing of a petition if:

> (1) the petitioner and the child's attorney are notified of the plea offer to the amended petition; and
>
> (2) the petitioner and the child's attorney are given an opportunity to object before the plea is accepted. MCR 3.971(A).

A. Plea Must Be By Respondent

The plea of admission or no contest to the allegations in the petition must be made by the respondent. *In re SLH*, 277 Mich App 662, 670 (2008). A *respondent* is "the parent, guardian, legal custodian, or nonparent adult who is alleged to have committed an offense against a child." MCR 3.903(C)(12). An *offense against a child* is "an act or omission by a parent, guardian, nonparent adult, or legal custodian asserted as grounds for bringing the child within the jurisdiction of the court" under the Juvenile Code. MCR 3.903(C)(9).

In *In re SLH*, 277 Mich App at 670, the trial court erred in finding jurisdiction over the children based on the mother's plea to a petition that alleged only that she found the respondent having sex with their child and that the respondent admitted as much. Reversing the trial court, the Court of Appeals concluded:

> "The petition does not allege that the mother permitted, or failed to prevent, the alleged sexual abuse from occurring. Therefore, although the mother was a 'party' to the proceeding, by definition, she was not a respondent. Because only a respondent may enter a plea and the mother was not a respondent, she could not enter a plea.

[1] "'Amended petition' means a petition filed to correct or add information to an original petition, as defined in [MCR 3.903(A)(20)], after it has been authorized, but before it is adjudicated." MCR 3.903(C)(2). Note, that MCR 3.903(C)(2) mistakenly references to MCR 3.903(A)(21) for its definition of the term *petition*, but the term is actually defined in MCR 3.903(A)(20).

* * *

> At trial, the mother certainly could testify regarding what she witnessed and the alleged admission by respondent, but these could not be the basis for a plea, because they involve no wrongdoing by her. Although the failure of one parent to protect a child from abuse or neglect by the other parent can be grounds for taking jurisdiction over the child, in this case the petition did not allege that the mother failed to protect her daughters, and the court's belief that 'there's a suggestion there was a failure to protect this child from inappropriate behavior from her father' is insufficient to serve as an allegation against the mother if it is not contained in the petition. Only allegations contained in the original, or amended, petition can be the basis for jurisdiction." *In re SLH*, 277 Mich App at 670-671.

B. Plea by One Respondent-Parent Does Not Extend Court's Jurisdiction to Unadjudicated Second Parent

Although "courts may assume jurisdiction over a child on the basis of the adjudication of one parent[,]" procedural "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights." *In re Sanders*, 495 Mich 394, 412 n 8, 415 (2014) In *In re Sanders*, the Court of Appeals found the one-parent doctrine[2] unconstitutional and vacated the trial court's order that limited the unadjudicated parent's contact with his children and required that he comply with a service plan following the trial court's assumption of jurisdiction over the children based on the respondent-mother's no contest plea to allegations of child neglect and abuse and remanded the case to the trial court. *Id.* at 402-403, 422-423. For additional information on the procedural due process rights of the unadjudicated parent, see Section 4.3(E)(2). For a discussion on the dispositional phase of child protective proceedings, see Chapter 13.

> **Note:** The Supreme Court's conclusion that the one-parent doctrine violates a nonadjudicated parent's due process rights, *In re Sanders*, 495 Mich at 412, 422, applies retroactively "to all cases pending on direct appeal at the time [*Sanders*] was decided." *In re Kanjia*, 308 Mich App 660, 674 (2014).

[2] "In cases in which jurisdiction has been established by adjudication of only *one* parent, the one-parent doctrine allow[ed] the court to then enter dispositional orders affecting the parental rights of *both* parents." *In re Sanders*, 495 Mich 394, 407 (2014).

"[N]either the admissions made by [the adjudicated parent] nor [the unadjudicated parent's] failure to object to those admissions constituted an adjudication of [the unadjudicated parent's] fitness[.]" *In re SJ Temples*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2015 (Docket No. 323246)[3] (finding that the trial court violated the unadjudicated parent's "due process rights by subjecting him to dispositional orders without first adjudicating him as unfit[]").

10.2 Requirements Before Court Can Accept Plea

A. Advice of Rights and Possible Disposition

Before the court accepts a plea of admission or no contest, it must advise the respondent on the record or in a writing that is made a part of the file:

> "(1) of the allegations in the petition;
>
> (2) of the right to an attorney, if respondent is without an attorney;
>
> (3) that, if the court accepts the plea, the respondent will give up the rights to
>
> > (a) trial by a judge or trial by a jury,
> >
> > (b) have the petitioner prove the allegations in the petition by a preponderance of the evidence,
> >
> > (c) have witnesses against the respondent appear and testify under oath at the trial,
> >
> > (d) cross-examine witnesses, and
> >
> > (e) have the court subpoena any witnesses the respondent believes could give testimony in the respondent's favor;
>
> (4) of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent." MCR 3.971(B).

A respondent's plea of admission or no contest is defective if the court fails to provide him or her with the advice of rights and possible

[3] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

disposition as provided in MCR 3.971(B) before accepting the respondent's plea. *In re SLH*, 277 Mich App 662, 672-673 (2008).

B. Knowing, Understanding, Voluntary, and Accurate Plea

Before accepting a plea, the court must satisfy itself that the plea is knowingly, understandingly, and voluntarily made. MCR 3.971(C)(1). The court must also establish the accuracy of the plea. MCR 3.971(C)(2).

It is the duty of the judge to be satisfied that a felony plea is made freely, with full knowledge of the nature of the accusation, and without undue influence. MCL 768.35. The court may not accept a guilty or nolo contendere (no contest) plea unless it is convinced that the plea is understanding, voluntary, and accurate. MCR 6.302(A). In other words, a defendant must be afforded due process. See *People v Cole (David)*, 491 Mich 325, 332 (2012). Before accepting a guilty or nolo contendere plea, the court must place the defendant under oath and personally carry out MCR 6.302(B)–MCR 6.302(E). MCR 6.302(A). However, due process "might not be entirely satisfied by compliance with subrules (B) through (D)." *Cole (David)*, *supra* at 330-332, 337-338 (holding that, "regardless of the explicit wording of" former MCR 6.302(B)–MCR 6.302(D), which did not specifically require a trial court to inform a defendant about the possibility of lifetime electronic monitoring, "a court may be required by the Due Process Clause of the Fourteenth Amendment to inform a defendant that mandatory lifetime electronic monitoring is a consequence of his or her guilty or no-contest plea[;]" however, MCR 6.302(B)(2) was subsequently amended to require this advice by the court).

1. Knowing and Understanding Plea

The court need not ask respondent directly if his or her plea is knowingly made. *In re King*, 186 Mich App 458, 466-467 (1990) (trial court's lengthy discussion with respondent regarding a plea agreement clearly showed that the plea was knowingly made).

2. Voluntary Plea

The court may establish that the plea is voluntarily made by confirming any plea agreement on the record and asking the respondent and all attorneys of record if any promises have been made beyond those in the agreement, or if anyone has threatened the respondent. See MCR 3.941(C)(2) (delinquency proceedings); MCR 6.302(C)(4); MCR 6.302(E) (pleas in felony cases). "In assessing voluntariness, . . . a defendant entering a plea must be 'fully aware of the direct consequences' of the plea.

Cole (David), 491 Mich at 333. In determining whether a consequence is direct or collateral, "the prevailing distinction . . . 'turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Cole (David)*, *supra* at 334, quoting *Cuthrell v Patuxent Institution Director*, 475 F2d, 1364, 1366 (CA 4, 1973) (concluding that "[t]he most obvious direct consequence of a conviction is the penalty to be imposed[]" (internal quotation marks omitted)).

3. Accurate Plea

The court must establish support for a finding that one or more of the statutory grounds alleged in the petition are true before accepting a plea of admission or no contest. MCR 3.971(C)(2). Jurisdiction cannot be conferred by consent of the parties. *In re Youmans*, 156 Mich App 679, 684-685 (1986) ("Although the respondents are free to admit the truth of the allegations and relieve the prosecutor of the need to put forth proofs, the admissions do not establish the court's jurisdiction. The court must make an independent determination of whether the allegations are sufficient to permit the court to assume jurisdiction over the matter.")

If the respondent is entering a plea of admission, the accuracy of the plea should be established by questioning the respondent. MCR 3.971(C)(2). See *In re SLH*, 277 Mich App 662, 673 (2008) (inadequate factual basis established where, during the only dialogue exchanged, the mother admitted to an allegation after the court simply read the petition's first paragraph and asked the mother whether she admitted it); *In re Waite*, 188 Mich App 189, 195 (1991) (inadequate factual basis established at plea proceeding where the mother admitted negligence only upon the court's questioning, and the mother's testimony "did not indicate that, at the time [she] entrusted her son to her friend's temporary care, she had any basis to believe that her friend either would not or could not provide proper care").

If the respondent pleads no contest, the court must not question him or her, but, by some other means, must establish support for a finding that one or more of the statutory grounds alleged in the petition are true. MCR 3.971(C)(2). The court must also state why a plea of no contest is appropriate. *Id*. See *In re Guilty Plea Cases*, 395 Mich 96, 134 (1975), for examples of appropriate reasons to accept a plea of no contest.

10.3 Records of Plea Proceedings

"A record of all hearings must be made. All proceedings on the formal calendar[4] must be recorded by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108. A plea of admission or no contest, including any agreement with or objection to the plea, must be recorded." MCR 3.925(B).

10.4 Withdrawal of Pleas

A respondent must raise issues concerning the court's noncompliance with the court rule governing pleas in the trial court in order to preserve the issue for appeal. *In re Campbell*, 170 Mich App 243, 249-250 (1988).

"While juvenile court proceedings need not conform to all of the requirements of a criminal proceeding," rules governing the withdrawal of pleas in criminal proceedings may be applied in child protective proceedings. See *In re Zelzack*, 180 Mich App 117, 125 (1989). Juveniles charged as delinquents and criminal defendants have the right to withdraw a plea before it is accepted, and the court has discretion to allow a juvenile or a criminal defendant to withdraw a plea after it has been accepted. MCR 3.941(D) (delinquency proceedings); MCR 6.310 (criminal proceedings). See *In re Zelzack*, *supra* at 124-126 (trial court did not err in refusing to allow respondent-father to withdraw his plea where he failed to meet a condition of the plea agreement (failing to comply with the service agreement), and the Department of Health and Human Services (DHHS) moved to terminate his parental rights).

10.5 Combined Adjudicative and Dispositional Hearings

MCR 3.973(B), which governs notice of dispositional hearings, contemplates a combined adjudicative and dispositional hearing: "[u]nless the dispositional hearing is held immediately after the trial, notice of hearing may be given by scheduling it on the record in the presence of the parties or in accordance with MCR 3.920." MCR 3.973(C) assigns to the court's discretion the interval between the trial and the dispositional hearing (not to exceed 28 days when a child is in placement). Accordingly, the two hearings may be combined if necessary preparations are made before the hearing, including preparation of a case service plan.[5] MCR 3.973(E)(2).

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[4] MCR 3.903(A)(10) defines *formal calendar* as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

[5] See Section 13.6 for a detailed discussion of case service plans.

Note: Combined hearings are often conducted when the allegations in the petition are uncontested.

Chapter 11: Common Evidentiary Issues in Child Protective Proceedings

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In this chapter. . .

This chapter discusses rules of evidence that apply specifically to child protective proceedings, such as the abrogation of privileges, the admissibility of hearsay statements by children under 10 years old, and the admissibility of evidence of maltreatment of a sibling. It also discusses generally applicable rules of evidence that are frequently at issue in child protective proceedings, such as hearsay exceptions, witness competence, expert witness testimony, and the admissibility of photographic evidence.

11.1 Applicability of Michigan Rules of Evidence in Child Protective Proceedings

"The Michigan Rules of Evidence, except with regard to privileges, do not apply to proceedings under this subchapter, except where a rule in this subchapter specifically so provides." MCR 3.901(A)(3). See also MRE 1101(b)(7) (the Michigan Rules of Evidence, other than those with respect to privileges, do not apply wherever a rule in Subchapter 3.900 states that they do not apply).

See Appendix C for the applicability of the Michigan Rules of Evidence during Child Protective Proceedings.

11.2 Constitutional Issues

A. Clear and Convincing Evidence Standard

Because US Const, Am XIV, provides natural parents with a fundamental liberty interest in the care, custody, and management of their children, the state must provide fundamentally fair procedures when it seeks to permanently terminate parental rights. *Santosky v Kramer*, 455 US 745, 752-754 (1982). Consequently, at a termination proceeding, the state must prove parental unfitness by clear and convincing evidence. *Santosky*, *supra* at 769.[1] See also MCL 712A.19b(3).[2]

Evidence is clear and convincing when it

> "'produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'" *Hunter v Hunter*, 484 Mich 247,

[1] The United States Supreme Court granted the states with discretion to implement a higher standard of proof. *Santosky*, 455 US at 769-770. However, Michigan uses the clear and convincing standard. See *In re Utrera*, 281 Mich App 1, 15 (2008).

[2] The standard of proof at trial is by a preponderance of the evidence, regardless of whether the petition contains a request to terminate parental rights. MCR 3.972(C).

265 (2009), quoting *In re Martin (Michael)*, 450 Mich 204, 227 (1995).

B. Privilege Against Self-Incrimination[3]

Both the state and federal constitutions prohibit compelled self-incrimination in a criminal case. US Const, Am V (no person "shall be compelled in any criminal case to be a witness against himself"); Const 1963, art 1, §17 ("[n]o person shall be compelled in any criminal case to be a witness against himself").

However, "[t]he privilege against self-incrimination [also] applies to a civil proceeding at which evidence is sought which might subject the witness to criminal prosecution." *In re Stricklin*, 148 Mich App 659, 664 (1986).

A witness in a civil suit must take the stand when called as a witness and may not invoke the privilege "'until testimony sought to be elicited will in fact tend to incriminate.'" *People v Ferency*, 133 Mich App 526, 533-534 (1984), quoting *Brown v United States*, 356 US 148, 155 (1958). The trial judge must determine that the witness's answer does not have a tendency to incriminate him or her before ordering the witness to respond. *Ferency*, *supra* at 534. This inquiry should be conducted outside a jury's presence. See *In re Stricklin*, 148 Mich App at 666.

To protect a person's privilege against self-incrimination, courts may stay civil proceedings pending the outcome of criminal proceedings. *Landis v North American Co*, 299 US 248, 254-255 (1936). A court has inherent authority to stay a proceeding pending the outcome of a separate action even though the parties to both proceedings are not the same. *Landis*, *supra* at 254-255.

Where the respondent-parents' testimony was presumed to be nonincriminating, the penalty exacted for respondent-parents' refusal to testify at termination proceedings was insufficient to amount to a breach of the parents' rights of self-incrimination. *In re Stricklin*, 148 Mich App at 664-666. In *Stricklin*, *supra* at 662-664, the Court of Appeals reviewed the trial court's refusal to adjourn a child protective proceeding during the pendency of concurrent criminal proceedings based on the same alleged conduct and found no violation of the parents' privilege against compelled self-incrimination. The parents did not testify during the civil proceeding and were eventually convicted following a criminal proceeding. *Id.* at 662. The issue was

[3] See also Section 8.9 (privilege against self-incrimination does not allow a parent to refuse to undergo a psychological examination) and Section 16.6 (privilege does not allow parent to refuse to produce a child subject to a court order).

> "whether a penalty was exacted" for their refusal to testify "sufficient to amount to the kind of compulsion contemplated by the Fifth Amendment." *Id.* at 664. The Court of Appeals held that the purported penalty—the increased risk of loss of parental rights by refusing to testify during the protective proceeding—did not amount to compulsion prohibited by the state and federal constitutions. The parents' asserted increased risk of loss of their parental rights implied that they would present nonincriminating testimony during the civil proceedings, making their choice not to give nonincriminating testimony a matter of trial strategy, not a matter of protecting their constitutional rights. *Id.* at 665-666.

11.3 Abrogation of Privileges in Child Protective Proceedings

"MCL 722.631 governs privileges in child protective proceedings." MCR 3.901(A)(3). MCL 722.631 states:

> "Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy[4] in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to [the Child Protection Law]. This section does not relieve a member of the clergy from reporting suspected child abuse or child neglect under [MCL 722.623] if that member of the clergy receives information concerning suspected child abuse or child neglect while acting in any other capacity listed under [MCL 722.623]."

"[A] communication [between a member of the clergy and a church member] [was] within the meaning of 'similarly confidential communication' when the church member d[id] not make an admission, but ha[d] a similar expectation that the information [would] be kept private and secret." *People v Prominski*, 302 Mich App 327, 328, 336-337 (2013) (where the parishioner "went to [her pastor] 'for guidance[and] advice'" to discuss "her concerns that her husband was abusing her daughters" and "'expected that the conversation be kept private[,]'" the parishioner's communication with the pastor was a confidential communication as contemplated by MCL 722.631, and the pastor was not

[4] A *member of the clergy* is "a priest, minister, rabbi, Christian science practitioner, or other religious practitioner, or similar functionary of a church, temple, or recognized religious body, denomination, or organization." MCL 722.622(*l*).

required to report the suspected child abuse under the mandatory reporting statute, MCL 722.623(1)(a)).

Abrogation of privileges under MCL 722.631 does not depend on whether the person initiating the child protective proceeding was required to report the suspected abuse, or whether the proffered testimony directly addresses the abuse or neglect that gave rise to the protective proceeding. *In re Brock*, 442 Mich 101, 116-120 (1993) (physician and psychologist were permitted to testify concerning a parent's past history of mental illness despite the fact that a neighbor reported the suspected neglect that gave rise to the proceeding). See also MCR 3.973(E)(1), which states in relevant part that, "as provided by MCL 722.631, no assertion of an evidentiary privilege, other than the privilege between attorney and client, shall prevent the receipt and use, at the dispositional phase, of materials prepared pursuant to a court-ordered examination, interview, or course of treatment."

11.4 Admissibility of Child's Statement

MCR 3.972 governs the admissibility of a child's statement:

> "Any statement made by a child under 10 years of age or an incapacitated individual under 18 years of age with a developmental disability as defined in MCL 330.1100a(21)[5] regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622(f), [MCL 722.622](j), [MCL 722.622](w), or [MCL 722.622](x), performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.
>
> > (a) A statement describing such conduct may be admitted regardless of whether the child is available to testify or not, and is substantive evidence of the act or omission if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. This statement may be received by the court in lieu of or in addition to the child's testimony.
> >
> > (b) If the child has testified, a statement denying such conduct may be used for impeachment purposes as permitted by the rules of evidence.

[5] See Section 11.8(A) for a definition of *developmental disability*, and Section 2.1 for definitions of *child abuse*, *child neglect*, *sexual abuse*, and *sexual exploitation*.

> (c) If the child has not testified, a statement denying such conduct may be admitted to impeach a statement admitted under subrule (2)(a) if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement denying the conduct provide adequate indicia of trustworthiness."

A. Notice of Intent

A proponent of a statement under MCR 3.972(C) must notify all parties of the intent to introduce the statement at trial. MCR 3.922(E).

Within 21 days after the parties received notice of a trial date (but no later than seven days before trial), the proponent must file with the court and serve all parties the written notice of intent. MCR 3.922(E)(1). The written notice of intent must indicate that the proponent intends to "admit out-of-court hearsay statements under MCR 3.972(C)(2), including the identity of the persons to whom a statement was made, the circumstances leading to the statement, and the statement to be admitted." MCR 3.922(E)(1)(d).

Within seven days of being notified of the proponent's intent (but no later than two days before trial) to use a child's statement, the nonproponent parties must provide written notice to the court of the intent to offer rebuttal testimony or evidence opposing the request. The notice must include the identity of any witnesses to be called. MCR 3.922(E)(2).

"The court may shorten the time periods provided in [MCR 3.922](E) if good cause is shown." MCR 3.922(E)(3).

B. Totality of Circumstances Surrounding Child's Statement

The court must examine the totality of the circumstances surrounding the making of a child's statement to determine whether there are adequate indicia of trustworthiness. *In re Archer*, 277 Mich App 71, 82 (2007). Such circumstances include:

- spontaneity of the statement,
- consistent repetition of the statement,
- the child's mental state,
- the child's use of terminology unexpected by a child of similar age, and
- lack of a motive to fabricate. *In re Archer*, 277 Mich App at 82.

In *In re Archer*, 277 Mich App at 82-83, the minor children's out-of-court video statements were properly admitted at trial through the testimony of a forensic interviewer under MCR 3.972(C)(2)(a) because the totality of the circumstances provided adequate indicia of trustworthiness when the forensic interviewer was trained to conduct interviews of abused children, the forensic interviewer followed the state's forensic interviewing protocol when interviewing the children, the children used age-appropriate language in describing the abuse, there was no evidence of the children fabricating the stories or having a motive to lie, and there was photographic evidence to corroborate one of the children's description of the abuse.

11.5 Exclusions From and Exceptions to Hearsay Rule

MRE 801(c) defines *hearsay* as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a).

"Hearsay is not admissible except as provided by [the Michigan Rules of Evidence]." MRE 802 ("the hearsay rule").[6] The following exclusions from and exceptions to the hearsay rule are commonly relied on in child protective proceedings:

(A) Admissions by party opponents;

(B) Present sense impressions;

(C) Excited utterances;

(D) Statements of existing mental, emotional, or physical condition;

(E) Statements made for purposes of medical treatment or diagnosis;

(F) Records of regularly conducted activity;

(G) General records and reports;

(H) Previous judgment or conviction; and

(I) Residual exceptions to the hearsay rule (catch-all hearsay exceptions).

[6] A child's statement may be admissible under MCR 3.972(C). See Section 11.4.

A. Admissions by Party-Opponents Are Excluded From the Hearsay Rule

A brief discussion on the admissibility of party-opponent admissions is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

A respondent's statements may be offered against him or her in child protective proceedings. See MRE 801(d)(2). A party's own statement is not hearsay if it is offered against the party. MRE 801(d)(2). A statement by a party-opponent need not be against that party's interest to be admitted, as is required for admissibility of statements under MRE 804(b)(3).[7] *Shields v Reddo*, 432 Mich 761, 774 n 19 (1989).

B. Present Sense Impressions

A brief discussion on the admissibility of present sense impressions is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

A present sense impression is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." MRE 803(1). A present sense impression is admissible even though the declarant is available as a witness. MRE 803.

The following three conditions must be met for evidence to be admissible under the present sense impression exception to the hearsay rule:

> "(1) [T]he statement must provide an explanation or description of the perceived event[.]
>
> (2) [T]he declarant must personally perceive the event[.][]
>
> (3) [T]he explanation or description must be 'substantially contemporaneous' with the event." *People v Hendrickson*, 459 Mich 229, 236 (1998).

[7] Under MRE 804(b)(3), a statement against a proprietary interest is not excluded by the hearsay rule if the declarant is unavailable as a witness. See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4, for a detailed discussion.

C. Excited Utterances

A brief discussion on the admissibility of excited utterances is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

An *excited utterance* is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2). An excited utterance is admissible even though the declarant is available as a witness. MRE 803.

Before a statement may be admitted as an excited utterance, the following requirements must be met:

> (1) The statement must arise out of a startling event.
>
> (2) The statement must relate to the circumstances of the startling event.
>
> (3) The statement must be made before there has been time for contrivance or misrepresentation by the declarant. *People v Kowalak (On Remand)*, 215 Mich App 554, 557 (1996).

"[I]t is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection." *People v Smith (Larry)*, 456 Mich 543, 551 (1998).

In the following cases, the statements were found admissible as excited utterances:

- *People v Houghteling*, 183 Mich App 805, 806-808 (1990) (statements of five-year-old made 20 hours after sexual assault in response to mother's questions were admissible);
- *People v Garland*, 152 Mich App 301, 307 (1986) (statements by seven-year-old victim of sexual abuse made one day after event were admissible where child had limited mental ability and was threatened);
- *People v Soles*, 143 Mich App 433, 438 (1985) (statements made five days after particularly heinous sexual assault were admissible);
- *People v Slaton*, 135 Mich App 328, 334-335 (1984) (tape recording of 911 call was admissible under MRE 803(2) where statements made by both a caller and 911

operator related to a startling event and made under stress of that event); and

- *People v Lovett*, 85 Mich App 534, 543-545 (1978) (statements by three-year-old witness to rape-murder made one week later were admissible; child stayed with grandparents during the interval between event and statements, and statements were spontaneous).

In the following cases, the statements were found inadmissible as excited utterances:

- *People v Straight*, 430 Mich 418, 425-428 (1988) (statements regarding sexual abuse made one month after event, during examination, and in response to repeated questioning were inadmissible);

- *People v Scobey*, 153 Mich App 82, 85 (1986) (statements by 13-year-old two and five days after event were inadmissible); and

- *People v Sommerville*, 100 Mich App 470, 489-490 (1980) (statements to police made 24 hours after assault were inadmissible).

D. Statements of Existing Mental, Emotional, or Physical Condition

A brief discussion on the admissibility of statements of then existing mental, emotional, or physical condition is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

MRE 803(3) allows admission of statements "of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." Such statements are admissible even though the declarant is available as a witness. MRE 803.

Before a statement may be admitted under MRE 803(3), the court must conclude that the declarant's state of mind is relevant to the case. *Int'l Union UAW v Dorsey* (*On Remand*), 273 Mich App 26, 36 (2006).

Where the declarant states that he or she is afraid, the statement may be admissible to show the declarant's state of mind. *In re Utrera*, 281 Mich App 1, 18-19 (2008). In *In re Utrera, supra* at 18-19, the Michigan Court of Appeals affirmed the trial court's decision to admit

statements the declarant (a child) made to her therapist regarding the fear the child felt towards her mother. The Court of Appeals concluded that these hearsay statements were admissible because they pertained to the declarant's then-existing mental or emotional condition. *Id.* at 18.

E. Statements Made for Purposes of Medical Treatment or Diagnosis

A brief discussion on the admissibility of statements made for purposes of medical treatment or diagnosis in connection with treatment is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

MRE 803(4) provides an exception to the hearsay rule, regardless of the declarant's availability as a witness, for statements that are "made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment."

The rationales for admitting statements under MRE 803(4) are "'(1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient.'" *Merrow v Bofferding*, 458 Mich 617, 629 (1998), quoting *Solomon v Shuell*, 435 Mich 104, 119 (1992).

Before a hearsay statement can be found inherently trustworthy and necessary for obtaining adequate medical diagnosis and treatment under MRE 803(4), the following must be found:

- The statement was made for purposes of medical treatment or diagnosis in connection with treatment.
- The statement describes medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the injury.
- The statement is supported by the "self-interested motivation to speak the truth to treating physicians in order to receive proper medical care[.]"[8]

[8] See Section 11.5(E) for a list of ten factors to assist in determining the trustworthiness of statements of patients age ten and under. See also *Meeboer*, 439 Mich at 324-325.

- The statement is reasonably necessary to the diagnosis and treatment of the patient. *People v Meeboer (After Remand)*, 439 Mich 310, 322 (1992).

This exception is frequently used in child abuse or neglect cases. Typically, a child suspected of being neglected or abused is examined by a physician and makes statements concerning injuries and their cause. Note, however, that the exception is not limited to statements made to physicians. See *People v James*, 182 Mich App 295, 297 (1990) (statements made to child sexual abuse expert were admissible); *People v Skinner*, 153 Mich App 815, 821 (1986) (statements made to child psychologist were admissible); *In re Freiburger*, 153 Mich App 251, 256-258 (1986) (statements made to psychiatric social worker were admissible).

1. Trustworthiness: Age of Declarant

In assessing the trustworthiness of a declarant's statements, Michigan appellate courts have drawn a distinction based upon the declarant's age. For declarants over the age of ten, a rebuttable presumption arises that they understand the need to speak truthfully to medical personnel. *People v Van Tassel (On Remand)*, 197 Mich App 653, 662 (1992).[9] For declarants ten years of age and younger, a trial court must inquire into the declarant's understanding of the need to be truthful with medical personnel. *Meeboer (After Remand)*, 439 Mich at 326. To do this, a trial court must "consider the totality of circumstances surrounding the declaration of the out-of-court statement." *Meeboer*, *supra* at 324. The Michigan Supreme Court established ten factors to address when considering the totality of the circumstances:

- The age and maturity of the declarant.
- The manner in which the statement was elicited.
- The manner in which the statement was phrased.
- The use of terminology unexpected of a child of similar age.
- The circumstances surrounding initiation of the examination.
- The timing of the examination in relation to the assault or trial.

[9] The *Van Tassel* Court discussed the declarant's age with respect to MRE 803A (applicable only to criminal and delinquency proceedings). Presumably, the Court's decision would also apply to a child protective proceeding. See MCR 3.972(C), which contains language similar to MRE 803A.

- The type of examination.
- The relation of the declarant to the person identified as the assailant.
- The existence of or lack of motive to fabricate.
- The corroborative evidence relating to the truth of the child's statement. *Meeboer*, 439 Mich at 324-325.

2. Trustworthiness: Statements to Psychologists

Regardless of the declarant's age, statements made to psychologists may be less reliable and thus less trustworthy than statements made to medical doctors. *Meeboer* (*After Remand*), 439 Mich at 327; *People v LaLone*, 432 Mich 103, 109-110 (1989).

In *LaLone*, *supra* at 116, a first-degree criminal sexual conduct case, the Michigan Supreme Court overturned the trial court's decision to admit the testimony of a psychologist based on statements made by her 14-year-old patient who was the complainant. The decision was based in part on the difficulty in determining the trustworthiness of statements to a psychologist. *Id*. at 109-110. The Michigan Supreme Court revisited this question in *Meeboer* (*After Remand*), 439 Mich at 329, reiterating that statements to psychologists may be less reliable than those to physicians. However, the *Meeboer* Court also noted that "the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment." *Meeboer*, *supra* at 329. Accordingly, the Court stated that its decision in *LaLone* should not preclude from evidence statements made during "psychological treatment resulting from a medical diagnosis." *Meeboer*, *supra* at 329.

3. Statements Identifying Assailant

When a sexual assault victim seeks medical treatment for an injury, it is possible that the victim's statements may identify the assailant as the "cause or external source" of the injury. If this occurs, trial courts may be called upon to determine whether the assailant's identity is "reasonably necessary to . . . diagnosis and treatment." MRE 803(4).

The following cases set forth some general principles for determining whether an assailant's identity is medically relevant.

- ***People v Meeboer (After Remand)*, 439 Mich 310 (1992):**

In three consolidated cases, all involving criminal sexual conduct against children aged seven and under, the Michigan Supreme Court found that statements identifying an assailant may be necessary for the declarant's diagnosis and treatment—and thus admissible under MRE 803(4)—as long as the totality of the circumstances surrounding the statements indicates trustworthiness. The Court listed the following circumstances under which identification of an assailant may be necessary to obtain adequate medical care:

> "Identification of the assailant may be necessary where the child has contracted a sexually transmitted disease. It may also be reasonably necessary to the assessment by the medical health care provider of the potential for pregnancy and the potential for pregnancy problems related to genetic characteristics, as well as to the treatment and spreading of other sexually transmitted diseases . . . .
>
> Disclosure of the assailant's identity also refers to the injury itself; it is part of the pain experienced by the victim. The identity of the assailant should be considered part of the physician's choice for diagnosis and treatment, allowing the physician to structure the examination and questions to the exact type of trauma the child recently experienced.
>
> In addition to the medical aspect . . . , the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment. A physician must know the identity of the assailant in order to prescribe the manner of treatment, especially where the abuser is a member of the child's household. . . . [S]exual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment. . . .
>
> A physician should also be aware of whether a child will be returning to an abusive home. This information is not needed merely for 'social disposition' of the child, but rather to indicate whether the child will have the opportunity to heal once released from the hospital.

> Statements by sexual assault victims to medical health care providers identifying their assailants can, therefore, be admissible under the medical treatment exception to the hearsay rule if the court finds the statement sufficiently reliable to support that exception's rationale." *Meeboer (After Remand),* 439 Mich at 328-330.

- *People v Van Tassel (On Remand)*, **197 Mich App 653 (1992):**

In this first-degree criminal sexual conduct case, the 13-year-old complainant identified her father as her assailant during a health interview that preceded a medical examination ordered by the probate court in a separate abuse and neglect proceeding. *Van Tassel* (*On Remand*), 197 Mich App at 656. The Court of Appeals found that the *Meeboer* factors had no application in a criminal sexual conduct case involving a complainant over age ten. *Van Tassel, supra* at 662. Nonetheless, the Court applied the *Meeboer* factors and concluded that the complainant's hearsay statements were trustworthy and properly admitted by the trial court.[10] *Van Tassel, supra* at 663-664. The Court also held that identification of the assailant was reasonably necessary to the complainant's medical diagnosis and treatment: "[T]reatment and removal from an abusive home environment was medically necessary for the child victim of incest." *Id.* at 661.

- *People v Creith*, **151 Mich App 217 (1986):**

The defendant appealed from his conviction of manslaughter. The victim, who suffered from kidney failure, died after an alleged beating by the defendant. *Creith*, 151 Mich App at 220. At trial, the court permitted the jury to hear the testimony of a nurse from the victim's dialysis center and another nurse from a hospital emergency room. *Creith*, *supra* at 220-222. These nurses testified that the victim had described abdominal pain resulting from being punched in the abdomen by the defendant. *Id.* The Court of Appeals held that the trial court properly admitted the testimony of these witnesses under MRE 803(4). *Creith*, *supra* at 226-227. The Court found that the victim's statements were made for the sole purpose of seeking medical treatment and were reasonably necessary for that purpose. *Id.*

[10] The *Van Tassel* Court evaluated the *Meeboer* factors "[i]n an effort to comply fully with the dictates of the [Michigan Supreme Court's] remand order." *Van Tassel*, 197 Mich App at 663.

F. Records of Regularly Conducted Activity

A brief discussion on the admissibility of records of regularly conducted activity is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

In child protective proceedings, MRE 803(6) allows for the admission of records such as the Department of Health and Human Services (DHHS) records, medical records concerning the child, and police reports.[11] MRE 803(6) specifically indicates that the following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> "A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

See *Merrow v Bofferding*, 458 Mich 617, 626-628 (1998) (part of plaintiff's "History and Physical" hospital record was admissible under MRE 803(6) because it was compiled and kept by the hospital in the regular course of business); *People v Jobson*, 205 Mich App 708, 713 (1994) (police activity log sheet was properly admitted into evidence under MRE 803(6)).

Although it otherwise meets the foundational requirements of MRE 803(6), a business record may be excluded from evidence if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. *People v Huyser*, 221 Mich App 293, 296-299 (1997) (expert's report lacked trustworthiness of a report generated

[11] Police reports may be admissible under this rule, or under MRE 803(8), as public records. See Section 11.5(G).

exclusively for business purposes when the expert prepared the report in contemplation of trial).

A business record may itself contain hearsay statements, each of which is admissible only if it conforms independently with an exception to the hearsay rule. MRE 805.

Under MRE 803(6), properly authenticated records that constitute records of regularly conducted activity may be introduced into evidence without requiring the records' custodian to appear and testify. See MRE 902, governing the authentication of a business record by the written certification of the custodian or other qualified person, which provides in part:

> "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> * * *
>
> (11) *Certified Records of Regularly Conducted Activity*. The original or a duplicate of a record, whether domestic or foreign, of regularly conducted business activity that would be admissible under rule 803(6), if accompanied by a written declaration under oath by its custodian or other qualified person certifying that-
>
> (A) The record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
>
> (B) The record was kept in the course of the regularly conducted business activity; and
>
> (C) It was the regular practice of the business activity to make the record.
>
> A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them."

G. Public Records and Reports

A brief discussion on the admissibility of public records and reports is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

MRE 803(8) contains a hearsay exception for:

> "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624."[12]

MRE 803(8)(B) does not allow the introduction of evaluative or investigative reports. *Bradbury v Ford Motor Co*, 419 Mich 550, 553-554 (1984). The exception extends only to "reports of objective data observed and reported by [public agency] officials." *Bradbury*, *supra* at 554. See *People v Shipp*, 175 Mich App 332, 334-335, 339-340 (1989) (portions of an autopsy report containing the medical examiner's conclusion and opinion that death ensued after attempted strangulation and blunt instrument trauma were improperly admitted into evidence under MRE 803(8); however, the medical examiner's recorded observations about the decedent's body were admissible).

A public record may itself contain hearsay statements, each of which is admissible only if it conforms independently with an exception to the hearsay rule. MRE 805.

H. Previous Judgment or Conviction

Child protective proceedings often arise from the same circumstances as a criminal prosecution. Furthermore, a prior order terminating a parent's parental rights may serve as a basis to assume jurisdiction over a current child or to terminate a parent's parental rights to a current child.[13] Thus, the issue of the admissibility of a prior order or judgment may arise in child protective proceedings.

"A copy of any order, judgment or decree, of any court of record in this state, duly authenticated by the certificate of the judge, clerk or

[12] MCL 257.624 prohibits the use in a court action of a report required by Chapter VI of the Michigan Vehicle Code.

[13] See Section 4.3(D) and Section 17.6.

register of such court, under the seal thereof, *shall be admissible in evidence in any court in this state, and shall be prima facie evidence of the jurisdiction of said court over the parties to such proceedings and of all facts recited therein*, and of the regularity of all proceedings prior to, and including the making of such order, judgment or decree." MCL 600.2106 (emphasis added).

With regard to the orders, judgments, or decrees of a court of another state, MCL 600.2103 provides:

> "The records and judicial proceedings of any court in the several states and territories of the United States and of any foreign country shall be admitted in evidence in the courts of this state upon being authenticated by the attestation of the clerk of such court with the seal of such court annexed, or of the officer in whose custody such records are legally kept with the seal of his office annexed."

A judgment of conviction of a felony or two-year misdemeanor may be admissible as substantive evidence of conduct at issue in a subsequent civil case. See MRE 803(22), which specifically provides:

> "Evidence of a final judgment, entered after a trial or upon a plea of guilty (or upon a plea of nolo contendere if evidence of the plea is not excluded by MRE 410), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, [is admissible] to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility."
>
> > **Note:** By its terms, MRE 803(22) is limited to convictions and does not extend the hearsay exception to judgments of acquittal.

MRE 803(22) must be read in conjunction with MRE 410, which limits the use of pleas and plea-related statements. Under MRE 410, the following evidence is not admissible in a civil or criminal proceeding against a defendant who made a plea or participated in plea discussions:

> "(1) A plea of guilty which was later withdrawn;
>
> (2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal

> charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;
>
> (3) Any statement made in the course of any proceedings under MCR 6.302[14] or comparable state or federal procedure regarding either of the foregoing pleas; or
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn."[15]

However, such statements are admissible in a subsequent civil proceeding if "another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it . . . ." MRE 410.

I. Residual Exceptions to the Hearsay Rule

A brief discussion on the residual exceptions is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

By invoking MRE 803(24) or MRE 804(b)(7), commonly known as "catch-all" hearsay exceptions, a party may seek admission of hearsay statements not covered under one of the firmly established exceptions in MRE 803(1)-(23).

Under MRE 803(24), the following is not excluded by the hearsay rule, even though the declarant is available as a witness:

> "A statement not specifically covered by [MRE 803(1)–MRE 803(23)] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of

[14] MCR 6.302 addresses the requirements for guilty and nolo contendere pleas in felony cases.

[15] "MRE 410(4) does not require that a statement made during plea discussions be made in the presence of an attorney for the prosecuting authority. It only requires that the defendant's statement be made 'in the course of plea discussions' with the prosecuting attorney." *People v Smart*, 497 Mich 950, 950 (2015), overruling *People v Hannold*, 217 Mich App 382 (1996), to the extent that it conflicts with the holding in *Smart*, *supra*.

> the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

If the declarant is unavailable as a witness, a hearsay statement not admissible under the specific exceptions described in MRE 804(b)(1)-(6) may be admissible under MRE 804(b)(7), which is identical to MRE 803(24).

A statement is admissible under MRE 803(24) or MRE 804(b)(7)[16] upon a showing of (1) circumstantial guarantees of trustworthiness equivalent to those of the established hearsay exceptions, (2) materiality, (3) probative value greater than that of other reasonably available evidence, (4) serving the interests of justice, and (5) sufficient notice. *People v Katt*, 468 Mich 272, 279, 290, 297 (2003) (child victim's statements to her social worker that the defendant sexually abused her were not admissible under MRE 803A, but were under MRE 803(24)). See *People v Geno*, 261 Mich App 624, 625, 631-635 (2004) (child's statement to an interviewer conducting an assessment of the child that the defendant hurts her "here" and pointed to her vaginal area was properly admitted under MRE 803(24)).

11.6 Child Witness

A brief discussion on child witnesses is contained in this section. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3.

"Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in [the Michigan Rules of Evidence]." MRE 601.

Competency to testify is a matter within the discretion of a trial court. See *Surman v Surman*, 277 Mich App 287, 303-304 (2007) (12-year-old child diagnosed with bipolar disorder, oppositional defiant disorder, taking medication, and receiving psychological care competent to testify); *People v Breck*, 230 Mich App 450, 457-458 (1998) (developmentally disabled complainant competent to testify); *People v Jehnsen*, 183 Mich App 305,

[16] MRE 804(b)(7) also requires the declarant to be unavailable.

307-308 (1990) (four-year-old victim competent to testify); *People v Norfleet*, 142 Mich App 745, 748-749 (1985) (reversible error in finding seven-year-old witness incompetent to testify).

11.7 In-Camera Conferences

In-camera conferences should not be held in child protective proceedings for any reason whatsoever. *In re HRC*, 286 Mich App 444, 453 (2009). Although child custody cases permit the use of in-camera reviews for the limited purpose of determining a child's best interests, child protective proceedings are governed by the Juvenile Code. *In re HRC*, *supra* at 454. "[N]othing in the [J]uvenile [C]ode, the caselaw, the court rules, or otherwise permits a trial court presiding over a termination of parental rights case to conduct in camera interviews of the children for purposes of determining their best interests." *Id*. Accordingly, "a trial court presiding over a juvenile proceeding has no authority to conduct in camera interviews of the children involved." *Id*.

11.8 Alternative Procedures to Obtain Testimony of Child or Developmentally Disabled Witness

In general, a trial court is given broad authority to employ special procedures to protect any victim or witness while testifying. MRE 611(a). Specifically, MRE 611(a) provides:

> "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) *protect witnesses from harassment or undue embarrassment*." (Emphasis added).

> **Note:** MRE 611(a) contains no age or developmental disability restrictions and thus may be applied to all victims and witnesses. Moreover, MRE 611(a) contains no restrictions as to the specific type of procedures or protections that may be employed to protect victims and witnesses. Some of these procedures may include permitting the use of dolls or mannequins, providing a support person, rearranging the courtroom, shielding or screening the witness from the defendant, and allowing closed-circuit television or videotaped depositions in lieu of live, in-court testimony. See Section 11.8(B).

MRE 611(a) permits the trial court to limit cross-examination to protect witnesses from harassment or undue embarrassment. *People v Daniels*, ___ Mich App ___, ___ (2015). Specifically, "MRE 611(a) allows the trial

court to prohibit a defendant from personally cross-examining vulnerable witnesses—particularly children who have accused the defendant of committing sexual assault[; t]he court must balance the criminal defendant's right to self-representation with 'the State's important interest in protecting child sexual abuse victims from further trauma.'" *Daniels*, ___ Mich App at ___ (holding that the "trial court wisely and properly prevented [the] defendant from personally cross-examining [his children regarding their testimony that he sexually abused them], to stop the children from suffering 'harassment and undue embarrassment[,]'" following "a motion hearing at which [the court] heard considerable evidence that [the] defendant's personal cross-examination would cause [the children] significant trauma and emotional stress[,]" and finding that the defendant's right to self-representation was not violated because "a criminal defendant has 'no constitutional right to personally cross-examine the victim of his crimes[,]" and "[a]t all times in this case, [the] defendant maintained autonomy in presenting his defense, and was able to control the direction of the cross-examination of [the children] by writing the relevant questions for his advisory attorney[,] . . . [and the] advisory counsel conferred with [the] defendant and received assistance from him in coordinating the exhibits during [the children's cross-]examinations[]") (quoting MRE 611(a); additional citations omitted).

During child protective proceedings, the court may appoint an impartial person to address questions to a child witness. MCR 3.923(F).

MCL 712A.17b provides specific protections or procedures to a witness in addition to those afforded to a witness by law or court rule. MCL 712A.17b(18). The special statutory protections in MCL 712A.17b apply to witnesses who are either:

- under 16 years of age, or
- 16 years of age or older and developmentally disabled. MCL 712A.17b(1)(d).

A. Developmental Disability

A developmental disability is defined in MCL 330.1100a(25). MCL 712A.17b(1)(b). However, the Juvenile Code limits this definition to "include[] only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments, and [] not include a condition attributable to a physical impairment unaccompanied by a mental impairment." *Id.* Keeping these limitations in mind, MCL 330.1100a(21) defines *developmental disability* to mean one of the following:

"(a) If applied to an individual older than 5 years of age, a severe, chronic condition that meets all of the following requirements:

(*i*) Is attributable to a mental or physical impairment or a combination of mental and physical impairments.

(*ii*) Is manifested before the individual is 22 years old.

(*iii*) Is likely to continue indefinitely.

(*iv*) Results in substantial functional limitations in 3 or more of the following areas of major life activity:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

(*v*) Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

(b) If applied to a minor from birth to 5 years of age, a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in developmental disability as defined in subdivision (a) if services are not provided."

B. Alternative Procedures

If the age or disability requirements of MCL 712A.17b are met, the court may allow one or more of the following measures to protect a witness or a party:

(1) use of dolls or mannequins.

(2) provide support person.

(3) use of videotaped depositions.

(4) use of videorecorded statements.

(5) use of closed-circuit television. MCR 3.923(E). See also MCL 712A.17b(3)-(5).

1. Dolls or Mannequins

"If pertinent, the [child or developmentally disabled] witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination." MCL 712A.17b(3). See MCR 3.923(E).

2. Support Person

"A [child or developmentally disabled] witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony." MCL 712A.17b(4). See MCR 3.923(E). See also *People v Rockey*, 237 Mich App 74, 78 (1999) (trial court did not err in allowing a seven-year-old sexual assault victim to sit on her father's lap while testifying where there was no evidence of nonverbal communication between the victim and her father); *People v Jehnsen*, 183 Mich App 305, 308-311 (1990) (trial court did not err in allowing four-year-old victim's mother to remain in courtroom following the mother's testimony despite engaging in "nonverbal behavior which could have communicated the mother's judgment of the appropriate answers to questions on cross-examination[,]" where the trial court found no correlation between the mother's conduct and the victim's answers).[17]

A notice of intent to use a support person must be filed with the court and served on all the parties. MCL 712A.17b(4). The notice of intent must:

(1) name the support person;

(2) identify the relationship the support person has with the child or developmentally disabled witness; and

[17] These cases were decided under the authority of a similar statute, MCL 600.2163a, which only applies to criminal cases involving criminal sexual conduct. However, MCL 600.2163a(4) (allowing a support person) is substantially similar to MCL 712A.17b(4), except that it also extends these protections to certain vulnerable adult victim-witnesses.

> (3) give notice that the child or developmentally disabled witness may request that the support person sit with him or her during any stage of the proceeding. MCL 712A.17b(4).

A party may file a motion objecting to the use of a named support person. See MCL 712A.17b(4). If a party objects, the court must rule on the motion "before the date at which the [child or developmentally disabled] witness desires to use the support person." *Id.*

3. Videotaped Depositions

"The court may allow the use of videotaped . . . depositions . . . to protect the child witness as authorized by MCL 712A.17b." MCR 3.923(E). The court may order a videorecorded deposition of a child or developmentally disabled victim witness on motion of a party or in the court's discretion. MCL 712A.17b(13).

"[I]f, upon the motion of a party or in the court's discretion, the court finds on the record that psychological harm to the witness would occur if the witness were to testify at the adjudication stage, the court shall order to be taken a videorecorded deposition of a [child or developmentally disabled] witness that shall be admitted into evidence at the adjudication stage instead of the live testimony of the witness." MCL 712A.17b(13).

If the court permits the use of a videorecorded deposition, "[t]he examination and cross-examination of the witness in the videorecorded deposition shall proceed in the same manner as permitted at the adjudication stage." MCL 712A.17b(13).

Use of a child's videotaped deposition did not deprive the respondent-parents of their due process rights to confrontation where an expert testified to the child's inability to communicate if attorneys questioned her and that she may suffer trauma if forced to participate in cross-examination, and during the deposition, the respondent-parents' counsel observed the child through a one-way window and submitted questions before and during the deposition. *In re Brock*, 442 Mich 101, 105-115 (1993).[18] The Court found that although parents "have an important liberty interest in the management of their children that is protected by due process[,] . . . the child's welfare is primary in child protective proceedings." *In re Brock*, *supra* at 114-115. Thus,

[18] The Michigan Supreme Court also concluded that the Sixth Amendment right to confrontation was inapplicable to child protective proceedings because that right only applies to criminal proceedings. *In re Brock*, 442 Mich at 108. For information on an individual's Sixth Amendment right to confrontation in a criminal case, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 10.

where "the spirit of confrontation and cross-examination [can] only be achieved by alternative, nontraditional procedures, deviation from traditional practices should be allowed." *Id*. at 115.

4. Videorecorded Statements

"The court may allow the use of videotaped statements . . . to protect the child witness as authorized by MCL 712A.17b." MCR 3.923(E). A videorecorded statement is "a witness's statement taken by a custodian of the videorecorded statement[19] as provided in [MCL 712A.17b(5)]." MCL 712A.17b(1)(c). See Section 2.3(B) for additional information on the taking of a child's videorecorded statement.

A videotaped statement must be admitted for all stages of the proceeding except for trial. MCL 712A.17b(5). "MCL 712A.17b(5) requires a trial court to admit videorecordings of a child's forensic interview during a non-adjudicatory stage," rather than a "forensic [interviewer's] interpretation of [the child's] statements." *In re Brown/Kindle/Muhammad*, *Minors*, 305 Mich App 623, 632, 633 (2014).

"Each respondent and, if represented, his or her attorney has the right to view and hear the videorecorded statement at a reasonable time before it is offered into evidence." MCL 712A.17b(7). The court may also order that the defense receive a copy of the videorecorded statement "[i]n preparation for a court proceeding and under protective conditions, including, but not limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement[.]" *Id*.

> **Note:** MCL 712A.17b(7) permits "[a] custodian of the videorecorded statement [to] release or consent to the release or use of a videorecorded statement or copies of a videorecorded statement to a law enforcement agency, an agency authorized to prosecute the criminal case to which the videorecorded statement relates, or an entity that is part of county protocols established under . . . MCL 722.628."

[19] "'Custodian of the videorecorded statement' means the [Department of Health and Human Services (DHHS)], investigating law enforcement agency, prosecuting attorney, or department of attorney general or another person designated under the county protocols established as required by . . . MCL 722.628." MCL 712A.17b(1)(a).

"A videorecorded statement that becomes part of the court record is subject to a protective order of the court for the purpose of protecting the privacy of the witness." MCL 712A.17b(10).

5. Closed-Circuit Television

"The court may allow the use of closed-circuit television, speaker telephone, or other similar electronic equipment to facilitate hearings or to protect the parties." MCR 3.923(E).

In order to preserve a respondent's due process rights, including the right to confront witnesses against him or her face-to-face, the court must hear evidence and make particularized, case-specific findings that the procedure is necessary to protect the welfare of a child witness who seeks to testify. *Maryland v Craig*, 497 US 836, 855-856 (1990). See also *In re Brock*, 442 Mich at 110. In *Craig, supra,* the United States Supreme Court described the necessary findings:

> "The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than 'mere nervousness or excitement or some reluctance to testify'. . . ." (Internal citations omitted).

C. Notice of Intent to Use Special Procedure

A party must give notice of his or her intent to use certain alternative procedures. MCR 3.922(E)(1).

Within 21 days after the parties have been notified of a trial date (but no later than seven days before trial), the proponent must file with the court and serve all parties the written notice of intent. MCR 3.922(E)(1). The written notice of intent must indicate that the proponent intends to:

> "(a) use a support person, including the identity of the support person, the relationship to the witness, and the anticipated location of the support person during the hearing.
>
> (b) request special arrangements for a closed courtroom or for restricting the view of the respondent/defendant from the witness or other special arrangements allowed under law and ordered by the court.
>
> (c) use a videotaped deposition as permitted by law." MCR 3.922(E)(1).

A nonproponent party must provide written notice to the court of the intent to offer rebuttal testimony or evidence opposing the request, including the identity of any witnesses to be called, within seven days of receiving notice of the proponent's intent (but no later than two days before trial). MCR 3.922(E)(2).

"The court may shorten the time periods provided in [MCR 3.922(E)] if good cause is shown." MCR 3.922(E)(3).

11.9 Evidence of Prior Conduct

A. Doctrine of Anticipatory Neglect

A party may seek to admit evidence of a respondent's prior maltreatment of the same child at issue in the current child protective proceeding or a respondent's prior maltreatment of another person not involved in the current proceeding. *In re LaFlure*, 48 Mich App 377, 392 (1973). See also M Civ JI 97.39 and the following cases:

- *In re Foster (Tommy)*, 285 Mich App 630, 631-632 (2009) (where the conditions that led to the temporary wardship of the respondents' other children also led to the adjudication of the child in question when the conditions still existed at the time of and after the

respondents' parental rights to the child in question were terminated);

- *In re Powers (Kayla)*, 208 Mich App 582, 592-593 (1995) (where respondent-custodian was found to have physically abused respondent-mother's first child, evidence of that abuse was relevant to respondent-custodian's ability to provide proper care and custody for a sibling subsequently born to respondent-custodian and respondent-mother);

- *In re Emmons*, 165 Mich App 701, 705 (1988) (evidence of respondent-father's prior guilty plea to charge of sexually assaulting child's siblings was admissible to provide basis for jurisdiction over child);

- *In re Smebak*, 160 Mich App 122, 128-129 (1987) (evidence that respondent-mother's mental illness prevented her from providing proper care of sibling was probative of her ability to care for another child);

- *In re Andeson*, 155 Mich App 615, 622 (1986) (where evidence suggested that respondent's physical abuse of a sibling led to the sibling's death, the probate court properly considered that evidence in terminating respondent's parental rights to another child);

- *In re Futch*, 144 Mich App 163, 166-168 (1984) (evidence that respondents were convicted of manslaughter in the beating death of respondent-mother's first child supported termination of respondents' parental rights to a subsequent child);

- *In re Kantola*, 139 Mich App 23, 28-29 (1984) (where evidence showed that respondents treated their son well but sexually, physically, and verbally abused their daughters, respondents' treatment of their son was not conclusive of their ability to provide a fit home for their daughters); and

- *In re Dittrick*, 80 Mich App 219, 222 (1977) (where respondents' parental rights were terminated to respondent-mother's first child on grounds of continuing physical and sexual abuse, allegations of the neglect of the first child were relevant to a finding of neglect sufficient to allow the court to take jurisdiction over respondents' second child).

B. Evidence of Other Crimes, Wrongs, or Acts

A brief discussion on evidence of other crimes, wrongs, or acts, is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

A party may seek to admit evidence of a respondent's past maltreatment of the same child or a non-sibling. See MRE 404(b)(1), which provides:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."[20]

The admissibility of other acts evidence under MRE 404(b), except for modus operandi evidence used to prove identity,[21] is generally governed by the test established in *People v VanderVliet*, 444 Mich 52 (1993), which is as follows:

- The evidence must be offered for a purpose other than to show the propensity to commit a crime or other bad act.
- The evidence must be relevant under MRE 402 to an issue or fact of consequence at trial.
- The trial court should determine under MRE 403 whether the danger of undue prejudice substantially outweighs the probative value of the evidence, in view of the availability of other means of proof and other appropriate facts.
- Upon request, the trial court may provide a limiting instruction[22] under MRE 105, cautioning the jury to use the evidence for its proper purpose and not to infer a bad or criminal character that caused the respondent to commit the charged offense. V*anderVliet*, 444 Mich at 74-75.

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[20] MRE 404 "applies in civil cases even though it is used mre often in criminal cases." MRE 404, Staff Comments (1991).

[21] Modus operandi evidence is not discussed in this benchbook.

[22] See, e.g., M Crim JI 4.11.

Note: MRE 404(b) codifies the requirements set forth in *People v VanderVliet*, 444 Mich 52 (1993).

The *VanderVliet* case underscores the following principles of MRE 404(b) as a rule of inclusion, not exclusion:

- There is no presumption that other acts evidence should be excluded.
- The rule's list of "other purposes" for which evidence may be admitted is not exclusive. Evidence may be presented to show any fact relevant under MRE 402, except a respondent's propensity to commit criminal or other bad acts.
- A respondent's general denial of the charges does not automatically prevent the prosecutor from introducing other acts evidence at trial.
- MRE 404(b) imposes no heightened standard for determining logical relevance or for weighing the prejudicial effect versus the probative value of the evidence. *VanderVliet*, 444 Mich at 65.

11.10 Admitted Evidence Considered at Subsequent Hearings

Evidence admitted at one hearing in a child protective proceeding may be considered as evidence at all subsequent hearings. *In re LaFlure*, 48 Mich App 377, 391 (1973) (due to the nature of the decision to terminate parental rights, the court must be apprised of all relevant circumstances). Hearings in protective proceedings are to be considered "as a single continuous proceeding." *In re LaFlure*, *supra* at 387.

A trial court may also take judicial notice of its court file. See MRE 201. See also *In re DMK*, 289 Mich App 246, 253 (2010).

11.11 Postpetition Evidence

"Ultimately, the question presented to an adjudication jury is whether a respondent's actions or inactions created an unfit environment for the children. If relevant[23] to a fact of consequence flowing from that question and otherwise admissible, a fact-finder may consider evidence gathered after the events cited in the petition." *In re Dearmon/Harverson-Dearmon Minors*, 303 Mich App 684, 698 (2014). Accordingly, "evidence

[23] For a discussion of relevant evidence, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 2.

relevant to prove or defend a statutory ground for termination is potentially admissible at an adjudication trial despite that the evidence involves postpetition facts. The evidence must conform to the rules of evidence and the parties must have notice of the evidence." *Id.* at 687-88. (postpetition evidence of "[the r]espondent's recorded [jailhouse telephone] conversations with [her boyfriend]" were admissible at trial where the recorded jailhouse telephone conversations "related to [the respondent's] credibility and to whether she had [voluntarily] severed her relationship with [her boyfriend after the first assault and] before the third assault" and where "[the] respondent had notice of the existence of the [recorded] tapes"). "Fundamentally, evidence gathered postpetition should be shared with the opposing party to avoid unfair prejudice[, and a]dherence to the rules governing discovery embodied in MCR 3.922 should avoid prejudice to either party's due process rights." *In re Dearmon/Harverson-Dearmon Minors*, 303 Mich App at 699.

> **Note:** In *In re Dearmon/Harverson-Dearmon Minors*, 303 Mich App at 698-699, the Court highlighted "the important distinction between evidence of an event supporting jurisdiction that was not alleged in a petition, and evidence obtained after the petition was filed" and emphasized that "due process safeguards apply during the adjudicative phase of a child protective proceeding."

11.12 Expert Testimony in Child Protective Proceedings

A brief discussion on expert testimony is contained in this section. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3.

Qualified expert testimony is required when a child is an Indian child who is being placed outside the home or whose parent's parental rights are being terminated.[24] 25 USC 1912(e)-(f); MCL 712B.15(2); MCL 712B.15(4); MCR 3.977(G)(2).

In addition, when preparing a case service plan, the Department of Health and Human Services (DHHS) must consult the child's attending physician during a hospitalization or the child's primary care physician if a child is placed outside the home and a physician has diagnosed the child's abuse or neglect as involving:

(a) a failure to thrive;

(b) Munchausen syndrome by proxy;

[24] See Section 19.11 for a discussion of qualified expert testimony under the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA).

(c) Shaken baby syndrome;

(d) a bone fracture diagnosed as a result of abuse or neglect; or

(e) drug exposure.[25] MCL 712A.18f(6).

If this consultation is made and a subsequent judicial proceeding is held to determine whether to return the child home, "the court must allow the child's attending physician of record during a hospitalization or the child's primary care physician to testify regarding the case service plan." MCL 712A.18f(7).

Doubts regarding an expert's credibility or qualifications, and disagreements with an expert's opinion or interpretation of facts, go to the weight of an expert's testimony, not its admissibility. *Surman v Surman*, 277 Mich App 287, 309 (2007). Such issues should be addressed during cross-examination and left for the jury to decide. *Surman*, *supra* at 309-310.

A. Admissibility

MRE 702 provides the standard for admissibility of expert testimony:

> "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

After a court determines "that expert testimony will assist the trier of fact and that a witness is qualified to give the expert testimony," and if all the parties consent, the court may allow a qualified expert witness "to be sworn and testify at trial by video communication equipment that permits all the individuals appearing or participating to hear and speak to each other in the court, chambers, or other suitable place." MCL 600.2164a(1). The party wishing to present expert testimony by video communication equipment must file a motion at least seven days before the date set for trial, unless good cause is shown to waive that requirement. MCL 600.2164a(2). The party "initiat[ing] the use of video communication equipment shall

[25] See Section 13.5 for a discussion of required physician testimony.

pay the cost for its use unless the court otherwise directs." MCL 600.2164a(3). "A verbatim record of the testimony shall be taken in the same manner as for other testimony." MCL 600.2164a(1).

B. Factual Basis for Opinion

MRE 703 governs the bases of opinion testimony:

> "The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence.[26] This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter."

Opinions and diagnoses may be admissible under MRE 803(6).[27]

A party may examine an expert witness using hypothetical situations based on facts already in evidence. *In re Rinesmith*, 144 Mich App 475, 482-483 (1985) (experts "opinion was based on a general knowledge of the development and sexual awareness of 4-year-olds and was not an evaluation of [the victim's] credibility").

C. Court-Appointed Expert

A court is authorized to appoint expert witnesses in any case. MRE 706. The court may seek nominations by the parties and appoint an agreed upon expert, or appoint an expert of the court's own selection. MRE 706(a).

An expert must consent to the appointment. MRE 706(a). An appointed expert must be informed of his or her duties, either in writing or at a conference where all the parties are able to participate. *Id.*

The appointed expert witness must disclose any findings to all parties, and may be required to participate in a deposition or to testify at trial. MRE 706(a). If testifying, the expert witness must be subject to cross-examination by any party (including the party calling the expert witness). *Id.*

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[26] This is a significant change from the prior rule, which gave the court discretion to allow an expert opinion to be based on facts *not* in evidence.

[27] See Section 11.5(F) for additional information on MRE 803(6).

D. Expert Testimony by Physician or Psychologist

Like other expert testimony, an examining physician's testimony will be admissible if the expert possesses specialized knowledge that will assist the trier of fact in understanding the evidence or determining a fact in issue under MRE 702. *People v Smith (Joseph)*, 425 Mich 98, 112 (1986).

In cases involving child sexual abuse, a psychologist's opinion as to whether abuse actually occurred "is a legal question outside the scope of the psychologist's expertise and therefore not a proper subject of expert testimony." *In re Brimer*, 191 Mich App 401, 407 (1991), citing *People v Beckley*, 434 Mich 691, 726-729 (1990).[28] It is also improper for the psychologist to evaluate the child's credibility. *Brimer*, *supra*, citing *Beckley*, *supra* at 737.

E. Sexually Abused Child Syndrome Evidence—Expert Testimony

A brief discussion on expert testimony of sexually abused child syndrome is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3.

"'[C]ourts should be particularly insistent in protecting innocent defendants in child sexual abuse cases' given 'the concerns of suggestibility and the prejudicial effect an expert's testimony may have on a jury.'" *People v Musser*, 494 Mich 337, 362-363 (2013) (holding that a detective who was not qualified as an expert witness was still subject to the same limitations as an expert because he "'gave . . . the same aura of superior knowledge that accompanies expert witnesses in other trials'" and because, as a police officer, jurors may have been inclined to place undue weight on his testimony), quoting *People v Peterson (Peterson I)*, 450 Mich 349, 371 (1995), modified *People v Peterson (Peterson II)*, 450 Mich 1212. Accordingly, an expert witness's testimony is limited. *Peterson (Peterson I)*, 450 Mich at 352. The expert witness may not (1) testify that the sexual abuse occurred, (2) vouch for the veracity of the victim, or (3) testify to the defendant's guilt. *Id.* at 352.

Despite these limitations, "(1) an expert may testify in the prosecution's case in chief [(rather than only in rebuttal)] regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the

[28] See also *People v Harris* (*Johnny*), 491 Mich 906, 906 (2012) ("trial court impermissibly allowed [the expert witness] to testify that the complainant was the victim of child sexual abuse").

consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Peterson (Peterson I)*, 450 Mich at 352-353. See *id.* at 379-380 (expert's testimony was properly admitted where it helped to dispel common misperceptions held by jurors regarding reporting of child sexual abuse, rebutted an inference that the victim's delay was inconsistent with the behavior of a child sexual abuse victim, and did not improperly bolster the victim's credibility); *People v Draper* (*On Remand*), 188 Mich App 77, 78-79 (1991) (expert testimony by two psychologists who gave opinions that the victim had been sexually abused was improper because their opinions went "beyond merely relating whether the victim's behavior [was] consistent with that found in other child sexual abuse victims [but rather] [were] opinions on an ultimate issue of fact, which is for the jury's determination alone[]").

A defendant must raise certain issues before expert testimony is admissible in the prosecutor's case-in-chief to show that the victim's behavior was generally consistent with sexually abused victims:

> "Unless a defendant raises the issue of the particular child victim's postincident behavior or attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child. Such testimony would be improper because it comes too close to testifying that the particular child is a victim of sexual abuse." *Peterson*, 450 Mich at 373-374.

See *People v Lukity*, 460 Mich 484, 501-502 (1999) (where the defense theory raised the issue of the complainant's postincident behavior [attempting suicide], it was not an abuse of discretion to admit expert testimony comparing the child-victim's postincident behavior with that of sexually abused children).

11.13 Photographic Evidence

A brief discussion on admissibility of photographic evidence is contained in this section. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 5.

The admissibility of photographic evidence, which includes digital and analog images, concerns two issues that commonly arise when such evidence is introduced at trial:

(A) Authentication (MRE 901).

(B) Relevancy questions (MRE 401 and MRE 403).

A. Authentication

Authentication of photographic evidence is governed by MRE 901(a), which states:

> "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

To lay a proper foundation for the admission in evidence of a photograph, a person familiar with the scene or object photographed must testify that the photograph accurately reflects the scene or object photographed. *People v Riley*, 67 Mich App 320, 322 (1976), rev'd on other grounds 406 Mich 1016 (1979). The photographer need not testify. *Riley*, *supra* at 322.

MRE 901(b)(1)–(10) provides a nonexhaustive list of examples of appropriate means of authentication.

B. Relevance

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[29] MRE 401.

In general, "[a]ll relevant evidence is admissible[.]" MRE 402. However, MRE 403 sets out an exception to this general rule:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

As with all evidence, the trial court has discretion to admit or exclude photographs. *People v Mills*, 450 Mich 61, 76 (1995).

> "Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs. Photographs may also be used to corroborate a witness'[s] testimony. Gruesomeness alone need not cause exclusion. The

[29] For additional information on relevant evidence, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 2.

> proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice." *Mills*, 450 Mich at 76 (internal citations omitted).

In *Mills*, the victim was intentionally set on fire by the defendants, and the prosecution sought to introduce color slides depicting the extent of the victim's injuries. *Mills*, 450 Mich at 63-64, 66. The Michigan Supreme Court found that the photographs were relevant under MRE 401 because they "affect[ed] two material facts: (1) elements of the crime, and (2) the credibility of witnesses." *Mills*, *supra* at 69. Additionally, the probative value of the slides was not substantially outweighed by unfair prejudice because, despite their graphic nature, they were an "accurate factual representation[] of the [victim's] injuries" and they "did not present an enhanced or altered representation of the injuries." *Id.* at 77-78.

11.14 Demonstrative Evidence

A brief discussion on admissibility of demonstrative evidence is contained in this section. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 5.

"Demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case." *People v Bulmer*, 256 Mich App 33, 34-35 (2003) (trial court properly admitted a computer-animated slideshow simulation illustrating "what happens to [a] baby's brain during a shaken-baby episode[]").

"The demonstrative evidence must be relevant and probative[, and] . . . when evidence is offered not in an effort to recreate an event, but as an aid to illustrate an expert's testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event." *Bulmer*, 256 Mich App at 35. If the evidence bears a "substantial similarity" to an issue of fact in the case, it may be admissible. *Lopez v Gen Motors Corp*, 224 Mich App 618, 627-634 (1997). "The burden . . . is on the party presenting the evidence to satisfy the court that the necessary similar conditions exist." *Duke v American Olean Tile Co*, 155 Mich App 555, 561 (1986).

11.15 Lawyer-Guardian Ad Litem Serving as Witness

Neither the court nor another party to the case may call a lawyer-guardian ad litem as a witness to testify regarding matters related to the case. MCL 712A.17d(3).

Chapter 12: Trials

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In this chapter. . .

This chapter outlines the procedures for conducting a trial or adjudicative hearing in a child protective proceeding. It contains discussions on the purpose of a trial, time requirements, the standard of proof, and jury procedures.

This chapter also includes a discussion on the standards and procedures for granting or denying directed verdicts and motions for new trial or rehearing.

In an effort to provide trial courts with a quick practical guide through the process of adjudicatory hearings, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys:Adjudicatory Hearing (MCR 3.972)*. This toolkit is accessible at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/CWSToolkit/Pages/Adjudicatory-Hearing.aspx.

12.1 Trials in Child Protective Proceedings

In the context of a child protective proceeding, a *trial* is "the fact-finding adjudication of an authorized petition[1] to determine if the minor comes within the jurisdiction of the court[, and also] . . . a specific adjudication of a parent's unfitness to determine whether the parent is subject to the dispositional authority of the court." MCR 3.903(A)(27). A court may conduct the trial in an informal manner, but it must read the allegations in the petition at the beginning of a trial (unless waived) and make a record of the proceeding. MCL 712A.17(1); MCR 3.972(B)(2).

> **Note:** Child protective proceedings are civil, not criminal, proceedings. MCL 712A.1(2).

If the factfinder concludes that the child is not within the jurisdiction of the court, the court must dismiss the petition. MCL 712A.18(1); *In re Waite*, 188 Mich App 189, 202 (1991).

If the factfinder concludes that the child is within the jurisdiction of the court, the court will generally hold a dispositional hearing. MCR 3.973(A). See Chapter 13 for information on dispositional hearings.

Although "courts may assume jurisdiction over a child on the basis of the adjudication of one parent[,]" procedural "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights." *In re Sanders*, 495 Mich 394, 407, 412-413 n 8, 415, 422-23 (2014) (finding unconstitutional the one-parent doctrine, which permitted the court to "enter dispositional orders affecting parental rights of *both* parents" once "jurisdiction [was] established by adjudication of only *one* parent").[2] "[N]either the admissions made by [the adjudicated parent] nor [the unadjudicated parent's] failure to object to those admissions constituted an adjudication of [the unadjudicated parent's] fitness[.]" *In re SJ Temples*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2015 (Docket No. 323246)[3] (finding that the trial court violated the unadjudicated parent's "due process rights by subjecting him to dispositional orders without first adjudicating him as unfit[]").

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[1] See Section 7.1(B) for a discussion of authorization for filing petitions.

[2] Where "a minor faces an *imminent* threat of harm, . . . the state may take the child into custody without prior court authorization or parental consent[;] . . . [s]imilarly, upon the authorization of a child protective petition, the trial court may order *temporary* placement of the child into foster care pending adjudication if the court finds that placement in the family home would be contrary to the welfare of the child." *In re Sanders*, 495 Mich at 416-417 n 12 (limiting the requirement for adjudication over each parent to "the court's exercise of its postadjudication dispositional authority"). See Chapter 3 for additional information on taking temporary protective custody over a child, and Chapter 8 for additional information on temporary placements pending adjudication.

[3] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

A. Judge or Referee as Factfinder

Unless a party has demanded a trial by judge or jury, a referee may conduct the trial. MCR 3.913(B). However, parties have the right to a judge at a hearing on the formal calendar, which includes a trial.[4] MCR 3.912(B). A judge must conduct a jury trial. MCR 3.912(A).

In a bench trial, a party may demand that a judge preside rather than a referee by filing a written demand with the court. MCR 3.912(B). The demand must be filed within "(1) 14 days after the court gives notice of the right to a judge, or (2) 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later, but no later than 21 days before trial. The court may excuse a late filing in the interest of justice." *Id.*[5]

B. Lawyer-Guardian ad Litem Recommendation

"At the conclusion of the proofs, the lawyer-guardian ad litem for the child may make a recommendation to the finder of fact regarding whether one or more of the statutory grounds alleged in the petition have been proven." MCR 3.972(D).

C. Findings of Fact and Conclusions of Law by Factfinder

Subchapter 3.900 of the Michigan Court Rules does not have a specific court rule addressing required findings of fact and conclusions of law by a judge or referee in a nonjury trial.[6] However, MCR 3.977(I), which sets out the requirements for findings and conclusions following hearings on the termination of parental rights, may be helpful:

> "(1) *General*. The court shall state on the record or in writing its findings of fact and conclusions of law. Brief, definite, and pertinent findings and conclusions on contested matters are sufficient. . . .
>
> (2) *Denial of Termination*. If the court finds that the parental rights of respondent should not be terminated, the court must make findings of fact and conclusions of law.

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[4] MCR 3.903(A)(10) defines *formal calendar* as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

[5] See Section 9.1(B) for a discussion on a referee's scope of authority, and Section 20.1 for a discussion on reviewing a referee's recommendation.

[6] MCR 2.517, the rule governing civil bench trials, is not applicable to proceedings under Subchapter 3.900. See MCR 3.901(A)(2).

> (3) *Order of Termination*. An order terminating parental rights under the Juvenile Code may not be entered unless the court makes findings of fact, states its conclusions of law, and includes the statutory basis for the order." MCR 3.977(I).

After trial, a referee must "make a written signed report to the judge containing a summary of the testimony taken and a recommendation for the court's findings . . . ."[7] MCL 712A.10(1)(c).

12.2 Time Requirements

If a child is not in placement, a court must hold a trial within six months of the petition being filed unless it adjourns the trial for good cause under MCR 3.923(G). MCR 3.972(A).

If a child is in placement, the court must hold a trial "as soon as possible, but not later than 63 days after the child is removed from the home unless the trial is postponed:

> (1) on stipulation of the parties for good cause;
>
> (2) because process cannot be completed; or
>
> (3) because the court finds that the testimony of a presently unavailable witness is needed." MCR 3.972(A).

If a trial is postponed because the process cannot be completed or because the testimony of an unavailable witness is necessary, the court must "release the child to the [child's] parent, guardian, or legal custodian unless the court finds that releasing the child to the custody of the parent, guardian, or legal custodian will likely result in physical harm or serious emotional damage to the child." MCR 3.972(A).

In child protective proceedings, adjourning a trial or hearing should only be granted for good cause after the court takes the child's best interests into consideration. MCR 3.923(G). The adjournment must be "for as short a period of time as possible."[8] *Id.* In order for a court to find good cause, "'a legally sufficient or substantial reason' must first be shown." *In re Utrera*, 281 Mich App 1, 10-12 (2008) (although the court erred by failing to find good cause or consider the child's best interests to support its multiple adjournments, reversal was not required when the respondent-mother contributed to the adjournments on several occasions and failed to show how she was prejudiced by them).

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[7] See Section 9.1(B) for additional information on referees.

[8] See Section 7.1(B) for a detailed discussion of adjourning preliminary hearings.

The court's refusal to adjourn a child protective proceeding pending the outcome of a related criminal proceeding that arose out of the same factual circumstances did not violate the appellant-parents' Fifth Amendment right against compelled self-incrimination. *In re Stricklin*, 148 Mich App 659, 664-665 (1986) (finding that an "accept[ance of the] appellant[-parents'] premise that the increased risk of loss of parental rights was the penalty imposed upon them for their refusal to testify [at the child protective proceeding], it must be concluded that the testimony sought through such compulsion would have been nonincriminating[, and t]he compulsion of nonincriminating testimony is not the sort of compulsion contemplated by the Fifth Amendment.").[9]

"If the child has been removed from the home, a review hearing must be held within 182 days of the date of the child's removal from the home, even if the trial has not been completed before the expiration of that 182-day period." MCR 3.972(A).

MCR 3.973(B), which governs notice of dispositional hearings, contemplates a combined adjudicative and dispositional hearing: "[u]nless the dispositional hearing is held immediately after the trial, notice of hearing may be given by scheduling it on the record in the presence of the parties or in accordance with MCR 3.920." MCR 3.973(C) assigns to the court's discretion the interval between the trial and the dispositional hearing (not to exceed 28 days except for good cause, when a child is in placement). Accordingly, the two hearings may be combined if necessary preparations are made before the hearing, including preparation of a case service plan.[10] MCL 712A.18f(2). See also MCR 3.973(E)(2).

12.3 Who May Be Present at Trial

Before proceeding with the trial, the court must determine that the proper parties are present. MCR 3.972(B)(1). "The respondent has the right to be present, but the court may proceed in the absence of the respondent provided notice has been served on the respondent." *Id.*

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[9] In *In re Stricklin*, 148 Mich App at 664-665, the Court also found that "[b]ecause of the essential similarity of issues in the [child protective proceeding and the related criminal proceeding], any incriminating testimony offered at the criminal proceeding would have also been incriminating at the [child protective] proceeding[,]" and that "[a]ny adverse consequences resulting from [the] appellant[-parents'] failure to testify [during the child protective proceeding] cannot be said to have been created by the state[, but rather a]ny penalty resulting from [the] appellant[-parents'] failure to testify [during the child protective proceeding] was no more than the 'penalty' that any party suffers when he [or she] decides not to testify in his [or her] own defense."

[10] See Section 13.6 for a detailed discussion of case service plans.

In its discretion, a court may excuse a child "as [it] determines the child's interests require[,]" but may not restrict the child from attending trial. MCL 712A.12; MCR 3.972(B)(1).

A member of a local Foster Care Review Board must be admitted to a trial. MCL 712A.17(6).

12.4 Rules of Evidence and Standard of Proof

"Except as otherwise provided in these rules, the rules of evidence for a civil proceeding and the standard of proof by a preponderance of evidence apply at the trial, notwithstanding that the petition contains a request to terminate parental rights."[11] MCR 3.972(C)(1). See also *In re Dearmon/Harverson-Dearmon Minors*, 303 Mich App 684, 696 (2014) (citing MCR 3.972(C)(1) and stating that "the rules of evidence apply in adjudication trials").

The standard of proof required to terminate parental rights is clear and convincing evidence, or, if an Indian child is the subject of the proceedings, beyond a reasonable doubt. MCR 3.977(E)(3); MCR 3.977(G)(2).

12.5 Jury Procedures

A brief discussion of jury procedures is contained in this section. For a detailed discussion, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 10.

In child protective proceedings, parties have the right to demand a jury trial. MCL 712A.17(2); MCR 3.911(A). Juries in child protective proceedings consist of six jurors. MCL 712A.17(2). Alternate jurors may be impaneled and may deliberate under MCR 2.511(B) and MCR 2.514(A)(3).[12]

Prospective jurors must be summoned and impaneled in accordance with MCR 2.510.

Although MCR 2.508–MCR 2.516 govern most jury procedures in child protective proceedings, these types of cases have their own specific set of rules regarding peremptory challenges, multiple parties, and verdicts:

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[11] See Appendix C for a chart summarizing the applicability of the rules of evidence and applicable standards of proof at different stages throughout a child protective proceeding.

[12] MCR 3.911(C) states that "[j]ury procedure . . . is governed by MCR 2.508–[MCR] 2.516, except as provided in this subrule."

"(2) In a child protective proceeding,

(a) each party is entitled to 5 peremptory challenges, with the child considered a separate party, and

(b) a verdict in a case tried by 6 jurors will be received when 5 jurors agree."

(3) Two or more parties on the same side, other than a child in a child protective proceeding, are considered a single party for the purpose of peremptory challenges.

(a) When two or more parties are aligned on the same side and have adverse interests, the court shall allow each such party represented by a different attorney 3 peremptory challenges.

(b) When multiple parties are allowed more than 5 peremptory challenges under this subrule, the court may allow the opposite side a total number of peremptory challenges not to exceed the number allowed to the multiple parties." MCR 3.911(C).

12.6 Jury Instructions

A brief discussion of jury instructions is contained in this section. For a detailed discussion, see the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 6.

At the request of a party or on its own, the court may provide the jury with a full set of written or electronically recorded instructions, or a partial set in response to a jury request or with the agreement of the parties. MCR 2.513(N)(3).

"Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions[13] or its predecessor committee must be given in each action in which jury instructions are given if

(a) they are applicable,

(b) they accurately state the applicable law, and

(c) they are requested by a party." MCR 2.512(D)(2).

A court may also "give additional instructions on applicable law not covered by the model instructions[, but the] [a]dditional instructions . . .

[13] The Model Civil Jury Instructions for child protective proceedings is available at http://courts.mi.gov/courts/michigansupremecourt/resources/mcji/pages/child-protection-proceedings.aspx.

must be patterned as nearly as practicable after the style of the model instructions, and must be concise, understandable, conversational, unslanted, and nonargumentative." MCR 2.512(D)(4).

12.7 Motions for Directed Verdict in Jury Trials

A motion for directed verdict may be made at the close of the evidence offered by the opponent. MCR 2.516. The motion must be supported by specific grounds. *Id.* If the motion is denied, the moving party may offer evidence without having reserved the right to do so. *Id.* A motion for a directed verdict that is not granted does not constitute a waiver of trial by jury, even though all parties have moved for a directed verdict. *Id.*

The judge may grant a motion for directed verdict only "when the evidence does not establish a prima facie case and reasonable persons would agree that there is an essential failure of proof." *Auto Club Ins Assoc v Gen Motors Corp*, 217 Mich App 594, 601 (1996). The evidence and all legitimate inferences that may be drawn from it must be viewed in a light most favorable to the nonmoving party. *Caldwell v Fox*, 394 Mich 401, 407 (1975).

12.8 Verdict in Jury Trial

A verdict in a child protective proceeding is reached when five of the six jurors agree.[14] MCR 3.911(C)(2)(b). A party may require the jury to be polled. MCR 2.514(B)(2). If the number of jurors agreeing is less than required, the jury must be sent out for further deliberation. MCR 2.514(B)(3). If the required number of jurors agrees to a verdict, it is deemed complete, and the court must discharge the jury. *Id.*

The court may also discharge and order a new jury:

> "(1) because of an accident or calamity requiring it;
>
> (2) by consent of all the parties;
>
> (3) whenever an adjournment or mistrial is declared;
>
> (4) whenever the jurors have deliberated and it appears that they cannot agree.
>
> The court may order another jury to be drawn, and the same proceedings may be had before the new jury as might have been had before the jury that was discharged." MCR 2.514(C).

[14] See Section 12.1(C) on findings and conclusions in nonjury trials.

12.9 Court's Authority to Call Additional Witnesses or Order Production of Additional Evidence

"If at any time the court believes that the evidence has not been fully developed, it may:

(1) examine a witness,

(2) call a witness, or

(3) adjourn the matter before the court, and

(a) cause service of process on additional witnesses, or

(b) order production of other evidence." MCR 3.923(A).

See *In re Vandalen*, 293 Mich App 120, 137 (2011) (in a child protective proceeding, the court had authority to obtain, on its own accord, a previously entered custody order "in an attempt to resolve a conflict in the testimony, which bore on respondent-mother's ability to adequately protect the children from harm or abuse, an issue pertinent to the termination decision[]");[15] *In re Alton*, 203 Mich App 405, 407-408 (1994) (in a delinquency proceeding, the court properly allowed additional testimony that directly addressed key conflicts between the testimony of the complainant and the juvenile).

12.10 Record of Proceedings at Trial

"A record of all hearings must be made. All proceedings on the formal calendar[16] must be recorded by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108." MCR 3.925(B). See also MCL 712A.17(1), which requires the court to record the proceedings via stenographic notes or another method of transcription.

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[15] The Court of Appeals further found that the trial court did not deprive the respondent-parents' of their due process rights when it sought the previously entered custody order because "the court fully apprised the parties of its conduct in obtaining the additional evidence, allowed the parties to review the evidence, and gave the parties the opportunity to call additional witnesses and present additional evidence in light of the newly obtained evidence before rendering its decision[, and the] [r]espondent[-parents] did not object to the court's actions or the admission of the newly obtained evidence, despite having the opportunity to do so." *In re Vandalen*, 293 Mich App at 138.

[16] MCR 3.903(A)(10) defines *formal calendar* as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

12.11 Motions for Rehearings or New Trial

A. Generally

In a child protective proceeding, "except for a case in which parental rights are terminated, a party may seek a rehearing or new trial by filing a written motion[17] stating the basis for the relief sought[.]" MCR 3.992(A). "In a case that involves termination of parental rights, [a party may file] a motion for new trial, rehearing, reconsideration, or other postjudgment relief[.]" *Id.*

A petition for rehearing may be filed by "an interested person[,]" which includes a member of a local foster care review board with whom the child's case has been assigned. MCL 712A.21.

"A motion will not be considered unless it presents a matter not previously presented to the court, or presented, but not previously considered by the court, which, if true, would cause the court to reconsider the case." MCR 3.992(A).

B. Procedural Requirements

1. Timing

The written motion stating the basis for the relief sought must be filed "within 21 days after the date of the order resulting from the hearing or trial." MCR 3.992(A). If the case involves "termination of parental rights, a motion for new trial, rehearing, reconsideration, or other postjudgment relief shall be filed within 14 days after the date of the order terminating parental rights." *Id.* But see MCL 712A.21, which requires a petition for rehearing to be filed within 20 days of entry of the order terminating parental rights where parental rights have been terminated and custody of a child has been removed from the parents, guardian, or other person.

However, "[t]he court may entertain an untimely motion for good cause shown." MCR 3.977(A).

Any response by parties to a motion for rehearing or new trial "must be in writing and filed with the court and served on the opposing parties within 7 days after notice of the motion." MCR 3.992(C).

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[17] See SCAO form JC 15, *Motion and Authorization/Denial*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc15.pdf.

2. Notice

"All parties must be given notice of the motion in accordance with [MCR] 3.920."[18] MCR 3.992(B).

3. No Hearing Required

The court does not need to hold a hearing before ruling on a motion for rehearing or new trial. MCR 3.992(E). "Any hearing conducted shall be in accordance with the rules for dispositional hearings and, at the discretion of the court, may be assigned to the person who conducted the hearing."[19] *Id.*

4. Stay of Proceedings and Grant of Bail

The court may stay any order pending a ruling on a motion for rehearing or new trial. MCR 3.992(F).

5. Findings by Court

The court must state the reasons for its decision on the record or in writing. MCR 3.992(E).

C. Standards for Granting Relief

MCR 3.992(A) does not state the standard for granting relief following a court's consideration of a party's motion for rehearing or new trial. See *In re Alton*, 203 Mich App 405, 409 (1994). However, MCR 2.613(A), the "harmless error rule" for civil proceedings, applies to child protective proceedings. MCR 3.902(A). See also *In re Alton*, *supra* at 410. MCR 2.613(A) states:

> "An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice."

In *In re Alton*, 203 Mich App at 409-410, the Court of Appeals remanded the case to the juvenile court for a rehearing on the

[18] See Section 5.2

[19] See Section 13.4 for a discussion of the applicable evidentiary rules.

juvenile's motion for a new trial, adopting the following guidelines for ruling on such motions:

> "In ruling on the motion, the parties and the trial court applied the rules for granting a new trial embodied in MCR 2.611(A)(1). That court rule is not applicable in juvenile delinquency proceedings. See MCR [3].901(B). Therefore, we remand this case for the trial court to reconsider the juvenile's motion under the proper standard of review: whether, in light of the new evidence presented, it appears to the trial court that a failure to grant the juvenile a new trial would be inconsistent with substantial justice. MCR 2.613(A). In this case, that means the trial court must decide whether it appears that if the court refuses to grant the motion, it will be exercising jurisdiction over a juvenile who is not properly within its jurisdiction. The trial court must state the reasons for its decision on the record or in writing. MCR [3].992(E)."

D. Remedies

"The judge may affirm, modify, or vacate the decision previously made in whole or in part, on the basis of the record, the memoranda prepared, or a hearing on the motion, whichever the court in its discretion finds appropriate for the case." MCR 3.992(D). See also MCL 712A.21(1).

The court may also enter an order for supplemental disposition while the child remains under the court's jurisdiction. MCL 712A.21(1).

Chapter 13: Initial Dispositions

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In this chapter. . .

This chapter discusses the requirements for initial dispositions. At an initial disposition hearing, the court may enter orders regarding the child's placement and the treatment and conduct of the respondents and other adults. The court may also consider a request for a termination of parental rights at an initial disposition hearing.[1]

Specifically, this chapter discusses procedural requirements for initial dispositional hearings, dispositional options, and case service plans. The chapter also addresses the procedures required when additional

[1] See Section 17.2 for a detailed discussion of terminating parental rights at an initial disposition hearing.

allegations of child abuse or neglect are made during the dispositional phase of proceedings.

In an effort to provide trial courts with a quick practical guide through the process of initial dispositional hearings, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys: Initial Dispositional Hearing (MCR 3.973/MCL 712A.18)*. This toolkit is accessible at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/CWSToolkit/Pages/Disposition-Hearing.aspx.

13.1 Overview of the Dispositional Phase of Child Protective Proceedings

"Child protective proceedings [are] divided into two phases: the adjudicative phase and the dispositional phase." *In re AMAC*, 269 Mich App 533, 536 (2006). "The adjudicative phase occurs first and involves a determination whether the trial court may exercise jurisdiction over the child, i.e., whether the child comes within the statutory requirements of MCL 712A.2(b)." *In re AMAC*, 269 Mich App at 536.

If a court finds that a child is not within the court's jurisdiction, the court must dismiss the petition. MCL 712A.18(1). See also *In re Waite*, 188 Mich App 189, 202 (1991).

If a court finds that a child is within the jurisdiction of the court, the dispositional phase follows. *In re AMAC*, 269 Mich App at 536. During a dispositional hearing, the court may order one or more of the dispositional alternatives contained in MCL 712A.18(1) "that are appropriate for the welfare of the [child] and society in view of the facts proven and ascertained[.] . . ."[2] MCL 712A.18(1). See also MCR 3.973(F)(1).

> **Note:** "The court shall not enter an order of disposition until it has examined the case service plan as provided in MCL 712A.18f." MCR 3.973(F)(2). See Section 13.6 for a detailed discussion of case service plans.

The purpose of the dispositional phase is "to determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult, once the court has determined following trial, plea of admission, or plea of no contest that one or more of the statutory grounds alleged in the petition are true." MCR 3.973(A). See *In re Sanders*, 495 Mich 394, 414 n 10 (2014), where the Michigan Supreme Court noted that "the phrase 'when applicable' [contained in MCR 3.973(A)] can reasonably—and constitutionally—be interpreted to mean that when the person meeting the definition of 'any adult' is a presumptively fit parent, the court's authority during the dispositional phase is limited by the fact that the state must overcome the presumption of parental fitness by proving the allegations in the [child protective] petition."

In child protective proceedings, the dispositional phase encompasses:

(1) initial dispositional hearings;

(2) dispositional review hearings;

[2] See Section 13.9(A) for a list of dispositional options available to the court.

(3) permanency planning hearings; and

(4) hearings on termination of parental rights.[3] See MCR 3.973–MCR 3.977.

No right to a jury trial exists during the dispositional phase of proceedings, even where a supplemental petition is subsequently filed containing new allegations of abuse or neglect. *In re Miller (Michelle)*, 178 Mich App 684, 686 (1989). See also MCR 3.911(A).

The court must hold a dispositional hearing "either immediately following the adjudicative hearing or after proper notice." *In re AMAC*, 269 Mich App at 538 (Court of Appeals reversed the trial court's order terminating respondent-mother's parental rights, finding the trial court's failure to afford respondent a dispositional hearing constituted error). See also MCR 3.973(B).

13.2 Timing Requirements

"The interval, if any, between the trial and the dispositional hearing is within the discretion of the court. When the child is in placement, the interval may not be more than 28 days, except for good cause." MCR 3.973(C).

MCR 3.973(B), which governs notice of dispositional hearings, contemplates a combined adjudicative and dispositional hearing: "[u]nless the dispositional hearing is held immediately after the trial, notice of hearing may be given by scheduling it on the record in the presence of the parties or in accordance with MCR 3.920." MCR 3.973(C) assigns to the court's discretion the interval between the trial and the dispositional hearing (not to exceed 28 days when a child is in placement). Accordingly, the two hearings may be combined if necessary preparations are made before the trial, including preparation of a case service plan.[4] See MCR 3.973(E)(2).

13.3 Parties Who May Be Present at Initial Dispositional Hearings

In its discretion, a court may excuse a child "as the interests of the child require[,]" from attending the dispositional hearing. MCR 3.973(D)(1). See also MCL 712A.12.

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[3] See Chapter 16 for a discussion of dispositional review hearings and progress reviews, Chapter 17 for a discussion of permanency planning hearings, and Chapter 18 for a discussion of hearings on termination of parental rights.

[4] See Section 13.6 for a detailed discussion of case service plans.

"The respondent has the right to be present [at the dispositional hearing] or may appear through an attorney." MCR 3.973(D)(2).

If proper notice has been given, the court may proceed in the absence of a party. MCR 3.973(D)(3).

13.4 Rules of Evidence and Reports

MCR 3.973(E) sets out the rules of evidence applicable to an initial disposition hearing and requirements for examination of reports:

> "**(E) Evidence; Reports**
>
> (1) The Michigan Rules of Evidence do not apply at the initial dispositional hearing, other than those with respect to privileges. However, as provided by MCL 722.631, no assertion of an evidentiary privilege, other than the privilege between attorney and client,[5] shall prevent the receipt and use, at the dispositional phase, of materials prepared pursuant to a court-ordered examination, interview, or course of treatment.
>
> (2) All relevant and material evidence, including oral and written reports, may be received and may be relied on to the extent of its probative value. The court shall consider the case service plan and any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom the child is placed. If the agency responsible for the care and supervision of the child recommends not placing the child with the parent, guardian, or legal custodian, the agency shall report in writing what efforts were made to prevent removal, or to rectify conditions that caused removal, of the child from the home.[6]
>
> (3) The parties shall be given an opportunity to examine and controvert written reports so received and may be allowed to cross-examine individuals making the reports when those individuals are reasonably available.

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[5] MCL 722.631 also preserves the priest-penitent privilege under certain circumstances. See Section 11.3.

[6] See also MCL 712A.18f(4), which requires the court to consider any relevant information about the child, including "the appropriateness of parenting time" from any of the individuals or entities listed in MCR 3.973(E)(2), or from the child's lawyer-guardian ad litem, attorney, or guardian ad litem. MCL 712A.18f(4).

> (4) Written reports, other than those portions made confidential by law, case service plans, and court orders, including all updates and revisions, shall be available to the foster parent, child caring institution, or relative with whom the child is placed. The foster parents, child caring institution, or relative with whom the child is placed shall not have the right to cross-examine individuals making such reports or the right to controvert such reports beyond the making of a written or oral statement concerning the child as provided in subrule (E)(2).
>
> (5) The court, upon receipt of a local foster care review board's report, shall include the report in the court's confidential social file. The court shall ensure that all parties have had the opportunity to review the report and file objections before a dispositional order, dispositional review order, or permanency planning order is entered. The court may at its discretion include recommendations from the report in its orders."

13.5 Required Case Review and Testimony by Child's Physician

To ensure that a case service plan[7] addresses a child's medical needs in relation to abuse and neglect, the Department of Health and Human Services (DHHS) must review the case with the child's attending or primary care physician if a physician has diagnosed the child's abuse or neglect as involving one or more of the following:

- Failure to thrive;
- Munchausen syndrome by proxy;
- Shaken baby syndrome;
- Bone fracture diagnosed as a result of abuse or neglect; or
- Drug exposure. MCL 712A.18f(6).

If a child is placed outside the home and the DHHS is required to review the child's case with a physician, the court must allow the child's attending or primary care physician to testify regarding the case service plan at a judicial proceeding to determine if the child is to be returned

[7] See Section 13.6 for a detailed discussion of case service plans.

home. MCL 712A.18f(7). The court must notify each physician of the time and place of the hearing. *Id.*

13.6 Case Service Plans

The agency must prepare a case service plan and make it available to the court and all parties involved before the dispositional hearing. MCL 712A.18f(2). Before a court enters an order of disposition, it must consider the case service plan. MCL 712A.18f(4); MCR 3.973(F)(2).

> **Note:** The "agency" may be the Department of Health and Human Services (DHHS) or another agency supervising a child's placement. See MCL 712A.13a(1)(a).

A "'[c]ase service plan' [is] the plan developed by an agency and prepared under [MCL 712A.18f] that includes services to be provided by and responsibilities and obligations of the agency and activities, responsibilities, and obligations of the parent." MCL 712A.13a(1)(d). A case service plan may also be "referred to using different names than case service plan including, but not limited to, a parent/agency agreement or a parent/agency treatment plan and service agreement."[8] *Id.*

If placement was ordered following the preliminary hearing, services may have already been provided to the parent and child.[9] See MCL 712A.13a(10); MCR 3.965(D). On a party's motion, the court must review the initial service plan and may modify the plan if it is in the child's best interests. MCR 3.965(D)(4).

Because a putative father is not considered a parent under MCR 3.903(A), he is not entitled to an agency's services until he perfects paternity. *In re LE*, 278 Mich App 1, 18-19 (2008). However, an agency is not required to provide services to a putative father who perfected paternity 17 months after he was first ordered to do so. *In re LE*, *supra* at 19-21. In *In re LE*, *supra* at 21, the respondent was considered a putative father until he perfected paternity, and thus, the goal of reunification with the child never existed. The Court stated that "[s]ervices need not be provided where reunification is not intended." *Id.* at 21.

A. Case Service Plan Requirements

If a child is removed from his or her home, the child must "be placed in care as nearly as possible equivalent to the care that should have

[8] See the DHHS's Children's Foster Care Manual (FOM), *Foster Care - Parent-Agency Treatment Plan & Service Agreement FOM 722-08C*, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/722-08C.pdf.

[9] See Chapter 7 for information on placements.

been given to the [child] by his or her parents." MCL 712A.1(3). The case service plan must provide placement for the child "in the most family-like setting available and in as close proximity to the child's parents' home as is consistent with the child's best interests and special needs." MCL 712A.18f(3).

The case service plan must include, but not be limited to, the following:

> "(a) The type of home or institution in which the child is to be placed and the reasons for the selected placement.
>
> (b) Efforts to be made by the child's parent to enable the child to return to his or her home.
>
> (c) Efforts to be made by the agency to return the child to his or her home.
>
> (d) Schedule of services to be provided to the parent, child, and if the child is to be placed in foster care, the foster parent, to facilitate the child's return to his or her home or to facilitate the child's permanent placement.
>
> (e) Except as otherwise provided in this subdivision, unless parenting time, even if supervised, would be harmful to the child as determined by the court under [MCL 712A.13a] or otherwise, a schedule for regular and frequent parenting time between the child and his or her parent, which shall not be less than once every 7 days.
>
> (f) Conditions that would limit or preclude placement or parenting time with a parent who is required by court order to register under the [S]ex [O]ffenders [R]egistration [A]ct."[10] MCL 712A.18f(3).[11]

B. Court-Ordered Participation in Case Service Plan

If a child is found to be within the court's jurisdiction, the court may order participation in all or part of the case service plan. MCL 712A.18f(4); MCR 3.973(F)(2). Substantial failure to comply with a case service plan is evidence supporting a termination of parental rights. See MCR 3.976(E)(2).

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[10] "'Sex [O]ffenders [R]egistration [A]ct' means the [S]ex [O]ffenders [R]egistration [A]ct, . . . MCL 28.721 to [MCL] 28.736." MCL 712A.13a(1)(k).

[11] See Section 8.8 for additional information on parenting time.

A nonparent adult may also be required to participate in the development of and comply with a case service plan. MCL 712A.6b(1)(a)-(b).[12]

C. Revising Case Service Plans

If a child's placement continues outside the home, the case service plan must be updated and revised every 90 days. MCL 712A.18f(5). The updated and revised case service plan must be made available to the court and all parties involved. *Id*.

When revising and updating the case service plan, the DHHS must consult with the foster parent(s) and attach a summary of the information received from the foster parent(s) to the revised case service plan. MCL 712A.18f(5).

13.7 Required Reasonable Efforts Determination

If an agency during a child protective proceeding advises a court not to place a child in the custody of the child's parent, guardian, or custodian, the agency must submit a written report to the court stating:

> "what efforts were made to prevent the child's removal from his or her home[;] or
>
> the efforts made to rectify the conditions that caused the child's removal from his or her home." MCL 712A.18f(1). See also MCR 3.973(E)(2).

The written report must include all of the following:

> "(a) If services were provided to the child and his or her parent, guardian, or custodian, the services, including in-home services, that were provided.
>
> (b) If services were not provided to the child and his or her parent, guardian, or custodian, the reasons why services were not provided.
>
> (c) Likely harm to the child if the child were to be separated from his or her parent, guardian, or custodian.
>
> (d) Likely harm to the child if the child were to be returned to his or her parent, guardian, or custodian." MCL 712A.18f(1).

[12] See Section 7.7(E) for more information on nonparent adults as they relate to child protective proceedings.

"The court, on consideration of the written report prepared by the agency responsible for the care and supervision of the child pursuant to MCL 712A.18f(1), shall, when appropriate, include a statement in the order of disposition as to whether reasonable efforts were made:

(a) to prevent the child's removal from home, or

(b) to rectify the conditions that caused the child to be removed from the child's home." MCR 3.973(F)(3). See also MCL 712A.18f(4), which contains substantially similar language.

Note: To establish a child's eligibility for federal foster care maintenance payments under Title IV-E of the Social Security Act, a court is required to make a finding that reasonable efforts have been made to avoid non-emergency removal of a child from his or her home and placement of the child in foster care. 42 USC 672(a)(1). See Section 8.4 for a detailed discussion of the reasonable efforts finding, and Section 14.1 for a detailed discussion of federal funding.

13.8 Reasonable Efforts Under the Americans With Disabilities Act (ADA)

Because termination of parental rights proceedings does not constitute "'services, programs or activities' within the meaning of 42 USC 12132[,[13]] . . . a parent may not raise violations of the [Americans with Disabilities Act] (ADA)[, 42 USC 12101 *et seq.*,] as a defense to termination of parental rights proceedings." *In re Terry*, 240 Mich App 14, 25 (2000). However, the Department of Health and Human~~s~~ Services (DHHS), as a public agency, must make reasonable accommodations for disabled individuals when providing family reunification services and programs. *In re Terry*, *supra* at 25. "[I]f the [DHHS] fails to take into account the parents' limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family." *Id*. at 26.

To be considered by the family court, claims that the DHHS violated the ADA must be raised in a timely manner:

"[I]f a parent believes that the [DHHS] is unreasonably refusing to accommodate a disability, the parent should claim

[13] 42 USC 12132 states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of *services, programs, or activities* of a public entity, or be subjected to discrimination by any such entity." (Emphasis added).

> a violation of [his or] her rights under the ADA, either when a service plan is adopted or soon afterward. The court may then address the parent's claim under the ADA. Where a disabled person fails to make a timely claim that the services provided are inadequate to [his or] her particular needs, [he or] she may not argue that petitioner failed to comply with the ADA at a dispositional hearing regarding whether to terminate [his or] her parental rights. In such a case, [his or] her sole remedy is to commence a separate action for discrimination under the ADA. At the dispositional hearing, the family court's task is to determine, as a question of fact, whether petitioner made reasonable efforts to reunite the family, without reference to the ADA." *In re Terry*, 240 Mich App 26.

13.9 Order of Disposition

A. Dispositional Options Available to Court

A court must "enter an order of disposition as provided in the Juvenile Code and these rules."[14] MCR 3.973(F)(1).

"[I]f the court finds that a [child] is within [the Juvenile Code], the court may enter any of the following orders of disposition that are appropriate for the welfare of the [child] and society in view of the facts proven and ascertained:"

> (1) Warn the child's parents, guardian, or custodian and dismiss the petition, MCL 712A.18(1)(a).
>
> (2) Under supervision, return the child home or place the child with a relative, MCL 712A.18(1)(b).
>
> (3) The court must not place the child in a court-supervised foster care home, MCL 712A.18(1)(c).
>
> (4) Place the child in a private institution or agency, MCL 712A.18(1)(d).
>
> (5) Place the child in a public institution or agency, MCL 712A.18(1)(e).
>
> (6) Provide health care, MCL 712A.18(1)(f).

[14] See SCAO form JC 17, *Order of Disposition (Child Protective Proceedings)*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc17.pdf.

(7) Order the parents, guardian, custodian, or any other person to refrain from conduct harmful to the child, MCL 712A.18(1)(g). See also MCR 3.973(A) and MCL 712A.6.[15]

(8) Appoint a guardian for the child, MCL 712A.18(1)(h).

(9) Include an order for child support with disposition, MCR 3.973(F)(5).

Additionally, "[i]n a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court may issue orders affecting a party as necessary[until] . . . May 1, 2018." MCL 712A.2(i). For purposes of child protective proceedings, MCL 712A.2(i)(*ii*) defines *party* as "the petitioner, [DHHS], child, respondent, parent, guardian, or legal custodian, and any licensed child caring institution or child placing agency under contract with the [DHHS] to provide for a juvenile's care and supervision."

1. Warning and Dismissal of Petition

The court may warn a child's parents, guardian, or custodian and dismiss the petition. MCL 712A.18(1)(a).

2. In-Home Placement With Supervision

a. Placement

The court may order supervision and return the child to his or her home or place the child with a relative.[16] MCL 712A.18(1)(b). See *In re Brown (Abijah)*, 171 Mich App 674 (1988) (Court of Appeals affirmed the trial court's placement of the children with their father, where custody had previously been awarded to the respondent-mother in divorce proceedings, but where the respondent-mother pled no contest to physically abusing one of the children in the child protective proceeding).

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[15] But see *In re Sanders*, 495 Mich 394, 414, 414 n 10 (2014), "rejecting any interpretation of MCL 712A.6 and MCR 3.973(A) that fails to recognize the unique constitutional protections that must be afforded to unadjudicated parents, irrespective of the fact that they meet the definition of 'any adult[,]'" and noting that "the court's authority during the dispositional phase is limited by the fact that the state must overcome the presumption of parental fitness by proving the allegations in the [child protective] petition."

[16] See Section 8.2(A) for a discussion of required procedures before placing a child in a relative's home. For purposes of MCL 712A.18(1)(b), a *relative* is "an individual who is not less than 18 years of age and related to the child by blood, marriage, or adoption, as grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew or niece, first cousin or first cousin once removed, and the spouse of any of the above, even after the marriage has ended by death or divorce." MCL 712A.18(1)(b).

The court may also place a child with the parent of a man whom the court has probable cause to believe is the child's putative father and "there is no [other] man with legally established rights to the child." MCL 712A.18(1)(b).

> **Note:** Placement with the parent of a man believed to be the child's putative father "is for the purposes of placement only and is not to be construed as a finding of paternity or to confer legal standing." MCL 712A.18(1)(b).

b. Terms of Supervision

The court must order terms and conditions of supervision, including rules governing the conduct of the parents, guardian, or custodian "as the court deems necessary for the physical, mental, or moral well-being and behavior of the [child]." MCL 712A.18(1)(b). A trial court's authority to enter a disposition order under MCL 712A.18(1)(b) extends to any conduct the court might find harmful to the child:

> "In analyzing [MCL 712A.18(1)(b) (allowing court to place child under in-home supervision and may also include reasonable rules of conduct for parents, guardian, or custodian) and MCL 712A.18(1)(g) (allowing court to order any person to refrain from conduct considered harmful to child], it is significant to note that these dispositional orders are stated in broad, general terms. The court may provide 'reasonable rules for the conduct of the parents [or other persons or adults] [designed for the well-being of the child].' Also, the court may order parents [or other persons or adults] to discontinue conduct which, 'in the opinion of the court,' causes a child to come within the court's jurisdiction. Thus, we hold that the Legislature has conferred very broad authority to the . . . court. There are no limits to the 'conduct' which the court might find harmful to a child. The Legislature intended that the court be free to define 'conduct' as it chooses. Moreover, in light of the directive that these provisions are to be 'liberally construed' [(under MCL 712A.1(3))] in favor of allowing a child to remain in the home, we

> find these sections supportive of the court's order prohibiting the father from living with his daughter." *In re Macomber*, 436 Mich 386, 393 (1990).

"An order directed to a parent or a person other than the [child] is not effective and binding on the parent or other person unless opportunity for hearing is given by issuance of summons or notice as provided in [MCL 712A.12] and [MCL 712A.13] and until a copy of the order, bearing the seal of the court, is served on the parent or other person as provided in [MCL 712A.13]." MCL 712A.18(4).[17]

3. Placement in Foster Care Home

"If a [child] is within the court's jurisdiction under [MCL 712A.2b], the court shall not place a juvenile in a foster care home subject to the court's supervision." MCL 712A.18(1)(c). See also *Wayne Co v State*, 202 Mich App 530, 535 (1993), which states that although the court is prohibited from supervising such placement under MCL 712A.18(1)(c), it does have the authority to place a child in private foster care under MCL 712A.18(1)(d) (foster care in a private institution or agency that is licensed and supervised by the DHHS). *Wayne Co*, *supra* at 535.

4. Placement in Private Institution or Agency

The court may place the child in a private institution or agency "approved or licensed by the department of consumer and industry service for the care of [children] of similar age, sex, and characteristics." MCL 712A.18(1)(d). However, if the child is not a ward of the court, the child must be placed with the Department of Health and Human~~s~~ Services (DHHS) for commitment to an institution or agency the DHHS determines most appropriate and "subject to any initial level of placement the court designates."[18] *Id.*

If the court places a child in a private institution or agency, it must "transmit with the order of disposition or supplemental order of disposition a summary of its information concerning such child, and such child may be placed in the care of a county agent, probation officer, juvenile matron or some other reliable

[17] See Chapter 5 for a discussion of notice and service requirements.

[18] MCL 400.55(h) requires a county office of the DHHS to provide supervision of or foster care services to children under the Family Division's jurisdiction when ordered by the court.

person designated by the court to be conveyed to the institution[.]" MCL 712A.24.

> **Note:** If a child is placed in a private institution or agency, the court must require a progress report on the child "be made at least once every 6 months from the date of the order." MCL 712A.24.

a. Religious Affiliation

With the exception of a child placed in a state institution, a child's religious affiliations must be protected by ordering placement in a private child-placing or child-caring agency or institution, if available. MCL 712A.18(1)(e).

b. Child Placed Outside of Michigan

"If desirable or necessary, the court may place a ward of the court in or commit a ward of the court to a private institution or agency incorporated under the laws of another state and approved or licensed by that state's department of social welfare, or the equivalent approving or licensing agency, for the care of children of similar age, sex, and characteristics." MCL 712A.18a.

5. Placement in Public Institution or Agency

The court may place a child in a public institution or agency "authorized by law to receive [children] of similar age, sex, and characteristics." MCL 712A.18(1)(e). However, if the child is not a ward of the court, the child must be placed with the DHHS for placement in or commitment to an institution or agency the DHHS determines most appropriate and "subject to any initial level of placement the court designates."[19] *Id.*

Unless placement is with a state institution, a child's religious affiliations must be protected by placement in a private child-placing or child-caring agency or institution, if available. MCL 712A.18(1)(e).

If the court places a child in a public institution or agency, it must "transmit with the order of disposition or supplemental order of disposition a summary of its information concerning such child, and such child may be placed in the care of a county

[19] MCL 400.55(h) requires a county office of the DHHS to provide supervision of or foster care services to children under the Family Division's jurisdiction when ordered by the court.

agent, probation officer, juvenile matron or some other reliable person designated by the court to be conveyed to the institution[.]" MCL 712A.24.

6. Order Health Care

The court may order a child to be provided "with medical, dental, surgical, or other health care, in a local hospital if available, or elsewhere, maintaining as much as possible a local physician-patient relationship, and with clothing and other incidental items the court determines are necessary." MCL 712A.18(1)(f).

> **Note:** Under MCL 722.124a(1), when a child is placed outside the home under the Juvenile Code, a child placing agency, the DHHS, or the court may consent to "routine, nonsurgical medical care, or emergency medical and surgical treatment" of a child. See Section 3.3 for a detailed discussion of ordering medical treatment for a child, and Section 8.6(C) for a detailed discussion of the authority to consent to medical treatment.

7. Order Parents, Guardian, Custodian, or Other Person to Refrain From Conduct Harmful to the Child

The court may "[o]rder the parents, guardian, custodian, or any other person to refrain from continuing conduct that the court determines has caused or tended to cause the [child] to come within or to remain under [the court's jurisdiction,] or that obstructs placement or commitment of the [child under a dispositional order]." MCL 712A.18(1)(g). See also MCR 3.973(A) (purpose of dispositional hearing includes determining "what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult") and MCL 712A.6 (court has jurisdiction over adults and may make orders affecting adults where the court determines it is necessary for a child's physical, mental, or moral well-being).[20] But see *In re Sanders*, 495 Mich 394, 414 (2014), "rejecting any interpretation of MCL 712A.6 and MCR 3.973(A) that fails to recognize the unique constitutional protections that must be afforded to unadjudicated parents, irrespective of the fact that they meet the definition of 'any adult[,]'" and noting that "the court's authority during the dispositional phase is limited by the fact that the state must overcome the presumption of parental

[20] See Section 4.10 for additional information on the court's jurisdiction and authority over adults.

fitness by proving the allegations in the [child protective] petition."

A trial court's authority to enter a disposition order under MCL 712A.18(1)(g) extends to any conduct the court might find harmful to the child:

> "In analyzing [MCL 712A.18(1)(b) (allowing court to place child under in-home supervision and may also include reasonable rules of conduct for parents, guardian, or custodian) and MCL 712A.18(1)(g) (allowing court to order any person to refrain from conduct considered harmful to child], it is significant to note that these dispositional orders are stated in broad, general terms. The court may provide 'reasonable rules for the conduct of the parents [or other persons or adults] [designed for the well-being of the child].' Also, the court may order parents [or other persons or adults] to discontinue conduct which, 'in the opinion of the court,' causes a child to come within the court's jurisdiction. Thus, we hold that the Legislature has conferred very broad authority to the . . . court. There are no limits to the 'conduct' which the court might find harmful to a child. The Legislature intended that the court be free to define 'conduct' as it chooses. Moreover, in light of the directive that these provisions are to be 'liberally construed' [(under MCL 712A.1(3))] in favor of allowing a child to remain in the home, [the Michigan Supreme Court] find[s] these sections supportive of the court's order prohibiting the father from living with his daughter." *In re Macomber*, 436 Mich at 393.

"An order directed to a parent or a person other than the [child] is not effective and binding on the parent or other person unless opportunity for hearing is given by issuance of summons or notice as provided in [MCL 712A.12] and [MCL 712A.13] and until a copy of the order, bearing the seal of the court, is served on the parent or other person as provided in [MCL 712A.13]." MCL 712A.18(4).[21] Moreover, procedural "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights."[22] *In re Sanders*, 495 Mich 394, 412-13 n 8, 407, 422 (2014) (finding unconstitutional the one-parent doctrine, which permitted the court to "enter

[21] See Chapter 5 for a discussion of notice and service requirements.

dispositional orders affecting parental rights of *both* parents" once "jurisdiction [was] established by adjudication of only *one* parent").[23]

8. Appointment of Guardian for Child

A court may appoint a guardian under MCL 700.5204, if it receives a petition requesting appointment of a guardianship over the child from a person interested in the child's welfare. MCL 712A.18(1)(h).[24] If the court grants the request and appoints a guardian, it may enter an order dismissing the petition under the Juvenile Code. *Id.*

9. Order Child Support Payments

The court may order one or both of the child's parents to pay child support. MCR 3.973(F)(5). To order child support under MCR 3.973(F), the court must use the Michigan Child Support Formula, MCL 552.605, and the Uniform Support Order, MCR 3.211(D). MCR 3.973(F)(5).

B. Supplemental Orders of Disposition

If a child remains under the jurisdiction of the court, an order of disposition may be amended or supplemented in accordance with MCL 712A.18 at any time the court considers necessary and proper. MCL 712A.19(1).[25] Such an amended or supplemented order "shall be referred to as a 'supplemental order of disposition'." MCL 712A.19(1).

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[22] "[N]either the admissions made by [the adjudicated parent] nor [the unadjudicated parent's] failure to object to those admissions constituted an adjudication of [the unadjudicated parent's] fitness[.]" *In re SJ Temples*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2015 (Docket No. 323246) (finding that the trial court violated the unadjudicated parent's "due process rights by subjecting him to dispositional orders without first adjudicating him as unfit[]"). Note that unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

[23] Where "a minor faces an *imminent* threat of harm, . . . the state may take the child into custody without prior court authorization or parental consent[;] . . . [s]imilarly, upon the authorization of a child protective petition, the trial court may order *temporary* placement of the child into foster care pending adjudication if the court finds that placement in the family home would be contrary to the welfare of the child." *In re Sanders*, 495 Mich at 416-17 n 12 (limiting the requirement for adjudication over each parent to "the court's exercise of its postadjudication dispositional authority"). See Chapter 3 for additional information on taking temporary protective custody over a child, and Chapter 8 for additional information on temporary placements pending adjudication.

[24] See Section 4.6 for a discussion on appointment of guardians.

[25] See SCAO form JC 19, *Order Following Dispositional Review/Permanency Planning Hearing (Child Protective Proceedings)*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc19.pdf.

13.10 Ordering Release of Child's Medical Records

"Unless the court has previously ordered the release of medical information,[26] the order placing the child in foster care must include the following:

> (a) an order that the child's parent, guardian, or legal custodian provide the supervising agency with the name and address of each of the child's medical providers, and
>
> (b) an order that each of the child's medical providers release the child's medical records." MCR 3.973(F)(4).

If a child remains in foster care after the initial disposition, the agency must, within 10 days after receipt of a written request, provide the foster care provider with "all of the child's medical, mental health, and education reports, including reports compiled before the child was placed with that person." MCL 712A.13a(15); MCL 712A.18f(5).

13.11 Scheduling Review Hearings

"When the court does not terminate jurisdiction upon entering its dispositional order, it must:

> (1) follow the review procedures in MCR 3.975 [dispositional review hearings[27]] for a child in placement, or
>
> (2) review the progress of a child at home pursuant to the procedures of MCR 3.974(A)."[28] MCR 3.973(G).

A. Accelerated Review Hearings

For children placed in foster care, the court must decide whether it will accelerate the date for the next review hearing at the initial dispositional review hearing and every review hearing. MCL 712A.19(9); MCR 3.975(D) (also applicable to children who were not placed in foster care at initial disposition but subsequently removed from home then later returned to home, MCR 3.974(A)(2)). See MCL 712A.19(2)-(4) for review hearing time requirements.[29]

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[26] These requirements should have been met before the initial dispositional hearing under MCL 712A.13a(16), if the child was placed in foster care following the preliminary hearing. See Section 8.5.

[27] See Chapter 15 for a detailed discussion of dispositional review hearings.

[28] See Section 15.3(B) and Section 15.6(A) for a detailed discussion of review hearings for children at home.

[29] See Section 15.3(C) for a detailed discussion of accelerated review hearings.

B. Two-Way Interactive Video Technology

MCR 3.904(B)(2) allows for the use of two-way interactive video technology to conduct review hearings in child protective proceedings. Use of two-way interactive video technology must comply with any standards established by the State Court Administrative Office, and any proceedings conducted using the technology must be recorded verbatim. MCR 3.904(C).[30]

13.12 Additional Allegations of Abuse or Neglect

"If the agency becomes aware of additional abuse or neglect of a child who is under the court's jurisdiction and if that abuse or neglect is substantiated as provided in the child protection law, . . . MCL 722.621 to [MCL] 722.638, the agency shall file a supplemental petition with the court." MCL 712A.19(1).

When allegations of additional abuse or neglect are made, the following procedures must be followed:

> "(1) Proceedings on a supplemental petition seeking termination of parental rights on the basis of allegations of additional child abuse or child neglect, as defined in MCL 722.622(f) and [MCL 722.622](j), of a child who is under the jurisdiction of the court are governed by MCR 3.977.[31]
>
> (2) Where there is no request for termination of parental rights, proceedings regarding allegations of additional child abuse or child neglect, as defined in MCL 722.622(f) and [MCL 722.622](j), of a child who is under the jurisdiction of the court, including those made under MCL 712A.19(1), are governed by MCR 3.974 for a child who is at home or MCR 3.975 for a child who is in foster care."[32] MCR 3.973(H).

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[30] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Administrative Order No. 2012-7 further provides that "[t]he judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

[31] See Section 17.3 for a detailed discussion of termination of parental rights based on new or different circumstances.

[32] See Chapter 15.

Proceedings regarding additional allegations of abuse or neglect are dispositional in nature:

> "Once a case enters the dispositional phase, any subsequently filed petition which alleges new instances of abuse or neglect of the minor children does not create an entirely new case which requires the . . . court to redetermine jurisdiction and thus afford the respondent the right to a jury trial. The new charges fall within the continuation of the original proceeding. The hearing on such a petition is dispositional in nature, and no right to a jury trial exists." *In re Miller (Michelle)*, 178 Mich App 684, 686 (1989).

Chapter 14: Funding

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In this chapter. . .

This chapter contains an overview of sources used to pay the costs associated with child protective proceedings. The chapter discusses government sources used to pay the costs of care and service provided to a child and family, and federal reimbursement of foster care costs under Title IV-E of the Social Security Act. The chapter also discusses parental reimbursement of the costs of care, and attorney and lawyer-guardian ad litem fees.

The chapter contains an overview of guardianship assistance and a juvenile guardian's receipt of child support payments.

14.1 Federal, State, and County Sources of Funding

Unless otherwise provided, expenses incurred in cases under the Juvenile Code must be paid "upon the court's order by the county treasurer from the county's general fund." MCL 712A.25(1). See e.g., MCL 400.117c(1)-(3), which either allows or requires the county to use its Child Care Fund to pay for placement costs (depending on type of placement and other factors), and provides for reimbursement by the Department of Health and Human Services (DHHS) for a portion of such expenses.

MCR 3.926(C)(1) provides that when a disposition is ordered by a court other than the court in the county where the child resides, the court ordering disposition is responsible for any costs incurred in connection with the order unless the court in the county where the child resides agrees to pay such dispositional costs.

A. Generally

1. Funding

"Payments for out-of-home placement (hereafter called foster care payments) are made from legally defined fund[ing] sources for which specific eligibility must be determined. Funding comes from federal, state and county monies." DHHS's Children's Foster Care Manual (FOM), *Fund Sources FOM 901-8*, p 1, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/901-8.pdf.

Specific funding sources available:

- **Title IV-E Funding:** "This fund source is established by [T]itle IV-E of the Social Security Act to provide federal financial participation in the administrative costs and foster care maintenance payments for [children][.]" *Fund Sources FOM 901-8*, *supra* at 1.

- **County Child Care Funding (CCF):** "[This fund] is a state legislative appropriation to partially reimburse counties for the costs of foster care and other services provided for court wards." *Fund Sources FOM 901-8*, *supra* at 2.

- **State Ward Board and Care Funding (SWBC):** "[This fund] is [a] state legislative appropriation to provide payment of foster care costs for state wards who are not eligible for [T]itle IV-E or the placement is not [T]itle IV-E reimbursable[.]" *Fund Sources FOM 901-8*, *supra* at 3.

- **Limited Term and Emergency Foster Care:** "Limited term and emergency foster care is a limited funding source to assist DHHS staff in providing foster care payment and service under . . . specific circumstances[.]"[1] *Fund Sources FOM 901-8, supra* at 3.

"The fund source and payment procedures to be utilized in paying for the out-of-home care of [children] are determined by a combination of factors including legal status, living arrangement and federal regulations." DHHS's Children's Foster Care Manual (FOM), *Payment Source Guide FOM 901-9*, p 1, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/901-9.pdf. For additional information on the payment systems used to execute foster care payments and a chart detailing which fund sources may be available, see the DHHS's Children's Foster Care Manual (FOM), *Payment Source Guide FOM 901-9*.[2]

2. Assignment of Support to DHHS

If the DHHS is making state or federally funded foster care maintenance payments for a child that is either under the supervision of the DHHS or has been committed to the DHHS, all rights to current, past due, and future child support are assigned to the DHHS while the child is receiving or benefiting from those payments. MCL 400.115b(5). "When the [DHHS] ceases making foster care maintenance payments for the child, both of the following apply:

> (a) Past due support that accrued under the assignment remains assigned to the [DHHS].
>
> (b) The assignment of current and future support rights to the [DHHS] ceases." MCL 400.115b(5).

"The maximum amount of support the [DHHS] may retain to reimburse the state, the federal government, or both for the cost of care shall not exceed the amount of foster care maintenance payments made from state or federal money, or both." MCL 400.115b(6).

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[1] See Section (E) for the list of circumstances.

[2] The DHHS's Children's Foster Care Manual (FOM), *Payment Source Guide FOM 901-9*, is accessible at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/901-9.pdf.

B. Federal Foster Care Maintenance Payments Under Title IV-E Funding

Title IV-E funding is a "fund[ing] source [] established by [T]itle IV-E of the Social Security Act[, 42 USC 670 *et seq.*,] to provide federal financial participation in the administrative costs and foster care maintenance payments for [children][.]" DHHS's Children's Foster Care Manual (FOM), *Fund Sources FOM 901-8*, p 1, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/901-8.pdf.

45 CFR 1355.20(a) defines foster care maintenance payments:

> "*Foster care maintenance payments* are payments made on behalf of a child eligible for [T]itle IV-E foster care to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel for a child's visitation with family, or other caretakers. Local travel associated with providing the items listed above is also an allowable expense. In the case of child care institutions, such term must include the reasonable costs of administration and operation of such institutions as are necessarily required to provide the items described in the preceding sentences.'Daily supervision' for which foster care maintenance payments may be made includes:
>
> > (1) *Foster family care* — licensed child care, when work responsibilities preclude foster parents from being at home when the child for whom they have care and responsibility in foster care is not in school, licensed child care when the foster parent is required to participate, without the child, in activities associated with parenting a child in foster care that are beyond the scope of ordinary parental duties, such as attendance at administrative or judicial reviews, case conferences, or foster parent training. Payments to cover these costs may be: included in the basic foster care maintenance payment; a separate payment to the foster parent, or a separate payment to the child care provider; and
> >
> > (2) *Child care institutions* — routine day-to-day direction and arrangements to ensure the well-being and safety of the child."

Regardless of a child's actual placement, the DHHS must determine "the appropriate funding source for out[-]of[-]home placements at the time the [child] is referred for care and supervision by [the] DHHS[.]"[3] DHHS's Children's Foster Care Manual (FOM), *Funding Determinations and Title IV-E Eligibility FOM 902*, p 1, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/902.pdf.

To be eligible for funding under Title IV-E, a child and the child's placement must meet the following conditions:

> (a) the child must be a United States citizen or qualified alien;
>
> (b) the child must have been eligible for former AFDC (Aid to Families with Dependent Children) funds in the home from which the child was removed;[4]
>
> (c) to remain eligible on the basis of need, the child's income must be less than the board rate being paid for care;
>
> (d) the DHHS must be responsible for the child's placement and care by court order;
>
> (e) the court order must contain documentation of the evidence the court used to make required judicial determinations;
>
> (f) the child must be in a licensed foster home, a private child-caring institution, or a DHHS child care treatment facility with 25 beds or less. *Funding Determinations and Title IV-E Eligibility FOM 902*, *supra* at 4-26.[5]

C. County Child Care Fund (CCF)

"The county [C]hild [C]are [F]und [(CCF)] is a county-state fiscal program whereby the State of Michigan reimburses counties which

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[3] "A family court order must exist that makes the [DHHS] responsible for the child's placement and care (unless the child is a voluntary placement). The [DHHS] assumes legal, financial and service responsibility at the point it accepts a child for placement and care." DHHS's Children's Foster Care Manual (FOM), *Foster Care - Entry into Foster Care FOM 722-01*, p 6, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/722-01.pdf.

[4] Eligibility for the Family Independence Program cash assistance grant does not entitle a child to Title IV-E funds. DHHS's Children's Foster Care Manual (FOM), *Funding Determinations and Title IV-E Eligibility FOM 902*, pp 1-2, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/902.pdf.

[5] DHHS's Children's Foster Care Manual (FOM), *Funding Determinations and Title IV-E Eligibility FOM 902*, pp 1-2, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/902.pdf, provides comprehensive information on the DHHS's determination of whether a child meets the eligibility requirements for Title IV-E funding.

provide care and service for children and their families." DHHS's Children's Foster Care Manual (FOM), *Fund Sources FOM 901-8*, p 2, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/901-8.pdf.

A county CCF consists of funds appropriated by a county for foster care. MCL 400.117c(1)-(2). The CCF *must* be used to pay the costs of providing foster care[6] for children "under the jurisdiction of the family division of circuit court or court of general criminal jurisdiction." MCL 400.117c(2). The CCF *may* be used for paying the county's share of the cost of placement in the Michigan Children's Institute (MCI). MCL 400.117c(3).

The DHHS must reimburse 50 percent of a county's eligible annual expenditures from a county's CCF. MCL 400.117a(4)(a). The reimbursement of annual expenses does not include reimbursement for a county's capital expenditures. *Ottawa Co v Family Independence Agency*, 265 Mich App 496, 502-504 (2005). In *Ottawa Co*, eleven Michigan counties filed suit seeking reimbursement from the DHHS for 50 percent of the costs they incurred for capital expenditures that included building, equipping, and improving juvenile detention facilities. *Ottawa Co*, *supra* at 498. The Court of Appeals concluded that reimbursement of a county's expenditure is conditional. *Id.* at 500. The DHHS "is obligated to establish standards for reimbursing the funds and may withhold reimbursement if certain expenditures violate its rules." *Id.* at 501. The Court further noted that MCL 400.117a(8) and relevant administrative rules and policies limit the DHHS's ability to reimburse a county by requiring reimbursements be "'based on care given to a specific, individual child.'" *Ottawa Co*, *supra* at 501-503, quoting MCL 400.117a(8). Thus, the counties were held financially "responsible for absorbing the large capital costs of building and equipping the facilities[.]" *Ottawa Co*, *supra* at 503. The Court of Appeals also concluded that the DHHS's failure to reimburse the counties for their capital expenditures did not violate the Headlee Amendment, Const 1963, art 9, § 29. *Ottawa County*, *supra* at 503.

Until May 1, 2018, "[n]otwithstanding the provisions in [MCL 400.117a(4)(a)] and subject to appropriations, in a county with a population of not less than 575,000 or more than 650,000, for the purpose of this subdivision only for cases transferred by the [DHHS] to a child placing agency, the [DHHS] shall pay 100% of the administrative rate to providers responsible for foster care case

[6] MCR 3.903(C)(5) defines *foster care* as "24-hour a day substitute care for children placed away from their parents, guardians, or legal custodians, and for whom the court has given the Department of [Health and] Human Services placement and care responsibility, including, but not limited to, (a) care provided to a child in a foster family home, foster family group home, or child caring institution licensed or approved under MCL 722.111 *et seq.*, or (b) care provided to a child in a relative's home pursuant to an order of the court." MCL 712A.13a(1)(e) contains a substantially similar definition of *foster care.*

management services to families of children who are court-ordered into foster care due to child abuse or child neglect and placed in the care and supervision of the [DHHS], regardless of placement setting until the prospective payment system described in [MCL 400.117a(4)(g)] is implemented." MCL 400.117a(4)(f). See also MCL 803.305(4), which contains substantially similar provisions under the Youth Rehabilitation Services Act.

If a child is committed to the MCI, the DHHS pays the entire cost of a child's care and supervision, but the county is charged back 50 percent of that cost. See MCL 400.207(1); MCL 803.305(1). To recover an "amount of uncontested liability" up to 50 percent of the costs, the DHHS may offset the amount due by the DHHS to the county's CCF. MCL 400.117a(4)(a).

D. State Ward Board and Care Funds (SWBC)

The State Ward Board and Care Funds (SWBC) are available to support children in out-of-home placements when all of the following criteria are met:

- The child is a state ward committed to the DHHS.
- The child is in a DHHS supervised and approved out-of-home placement.
- The child or the placement is ineligible for Title IV-E funding.
- The child has not reached 19 years of age. DHHS's Children's Foster Care Manual (FOM), *Fund Sources FOM 901-8*, p 3, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/901-8.pdf.

"[SWBC] funds may be used to reimburse the foster family, placement agency foster care (PAFC) provider or residential facility for care provided, for certain intermittent or non-scheduled payments and for independent living payments to the [child.]" *Funding Sources FOM 901-8, supra.*

E. Limited Term and Emergency Foster Care Funding

The Limited Term and Emergency Foster Care Fund is "a limited funding source to assist [the] DHHS [] in providing foster care payment and service under the following specific circumstances:

> [(1)] The child is a court ward . . . and [T]itle IV-E eligible except for the receipt of [Social Security Income (SSI)]. . . .
>
> [(2)] Former MCI wards between age 19 and 20 who are in foster care or independent living.
>
> * * *
>
> [(3)] Emergency foster care for children in families receiving [Family Independence Program (FIP) assistance] and the caretaker is hospitalized or incarcerated for seven days or less and no other plan can be made through the FIP program. . . .
>
> * * *
>
> [(4)] Children may be placed in foster care prior to release to [the] DHHS] under the Michigan Adoption Code." DHHS's Children's Foster Care Manual (FOM), *Fund Sources FOM 901-8*, pp 3-4, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/901-8.pdf.

14.2 Costs Assessed by Court

A. Orders for Reimbursement of the Costs of Care or Services When a Child Is Placed Outside the Home

"An order of disposition placing a [child] in or committing a [child] to care outside of the [child's] own home and under state . . . or court supervision shall contain a provision for reimbursement by the [child], parent, guardian, or custodian to the court for the cost of care or service." MCL 712A.18(2).

> **Note:** For purposes of MCL 712A.18(2), "one does not become a 'custodian' without acquiring, under clearly articulated circumstances, legal possession of a [child's] property, which is then held in trust for the child." *In re Hudson (Amanda)*, 262 Mich App 612, 614 (2004), citing MCL 554.521 *et seq.* (because stepfather was not a financial custodian within the "specialized meaning in the law," he could not be ordered to reimburse the court for the cost of stepdaughter's out-of-home placement).

An order directed to anyone other than the child is not effective and binding on that person unless he or she has been served a copy of the order as provided in MCL 712A.13 and given an opportunity for a

hearing on the matter by summons or notice as provided in MCL 712A.12 and MCL 712A.13. MCL 712A.18(4).

1. Amount of Reimbursement

A reimbursement order "shall be reasonable, taking into account both the income and resources of the [child], parent, guardian, or custodian." MCL 712A.18(2). The amount may be based upon the Michigan Child Support Formula Schedules Supplement from the Michigan Child Support Formula Manual. See MCL 712A.18(2); MCL 712A.18(3); MCL 712A.18(6).[7]

If the juvenile is receiving an adoption support subsidy under MCL 400.115f *et seq.*, the amount of reimbursement ordered must not exceed the amount of the support subsidy. MCL 712A.18(2).

2. Duration of Reimbursement Order

"The reimbursement provision applies during the entire period the [child] remains in care outside of the [child's] own home and under state . . . or court supervision, unless the [child] is in the permanent custody of the court." MCL 712A.18(2).

Because the reimbursement order is included in an order of disposition, the court must necessarily order reimbursement before it is aware of the total amount of expenses that the state will incur in caring for the child. *In re Brzezinski*, 214 Mich App 652, 677, 679 (1995) (Griffin, P.J., dissenting), rev'd for the reasons stated in the dissent 454 Mich 890 (1997). However, the court should defer the determination of the total amount of a parent's reimbursement obligation until total costs can be determined. See *In re Brzezinski*, *supra* at 679.

See also *In re Reiswitz*, 236 Mich App 158, 163-168 (1999), which extended the logic of Judge Griffin's dissent in *In re Brzezinski*, 214 Mich App at 673, to situations in which the child is no longer under the court's jurisdiction because of his or her age. The Court of Appeals held that "a . . . court may order and collect reimbursement, both before and after the [child] reaches the age of majority, for the costs incurred by the state when out-of-home placement is ordered." *In re Reiswitz*, *supra* at 168.

[7] Effective July 1, 2006, the Michigan Child Support Formula Schedules Supplement replaced the guidelines and model schedule to which MCL 712A.18(2) and MCL 712A.18(6) refer. Administrative Order No. 2006-5.

3. Collection and Disbursement of Amounts Collected

All money collected for reimbursement for out-of-home care for a child must be accounted for and reported to the county board of commissioners. MCL 712A.18(2). Money collected for children placed in or committed to the DHHS must be reported on an individual basis. *Id.* Money may be collected for reimbursement or to cover a delinquent account even if the child has been released or discharged from out-of-home care and from under state or court supervision. *Id.* The court may also collect benefits paid by the federal government for the cost of care of a court ward. *Id.*

Of the amounts collected, 25 percent must be credited to the county's fund for offsetting the administrative cost of collections. MCL 712A.18(2). The balance of any money collected must be divided in the same ratio in which the county, state, and federal government participate in the cost of a child's care outside the child's own home and under county, state, or court supervision. *Id.*

4. Delinquent Accounts

MCL 712A.18(2) states in relevant part:

> "In cases of delinquent accounts, the court may also enter an order to intercept state or federal tax refunds of a [child], parent, guardian, or custodian and initiate the necessary offset proceedings in order to recover the cost of care or service. The court shall send to the person who is the subject of the intercept order advance written notice of the proposed offset. The notice shall include notice of the opportunity to contest the offset on the grounds that the intercept is not proper because of a mistake of fact concerning the amount of the delinquency or the identity of the person subject to the order. The court shall provide for the prompt reimbursement of an amount withheld in error or an amount found to exceed the delinquent amount."

5. Copy of Reimbursement Order to Department of Treasury

A court that enters a reimbursement order under MCL 712A.18(2) must mail a copy of the order to the Michigan Department of Treasury. MCL 712A.28(3). Any action taken

against the child's parent or other adult must not be released for publicity unless the parent or other adult is found guilty of contempt of court. *Id.*

B. Orders for Reimbursement of the Costs of Service When a Child Is Placed Under Supervision in the Child's Own Home

An order of disposition under MCL 712A.18(1)(b) placing a child under supervision in the child's own home *may* contain a provision for the reimbursement by the child, parent, guardian, or custodian to the court for the cost of service. MCL 712A.18(3). If reimbursement is ordered under MCL 712A.18(3), the court must determine the amount due and treat the order for reimbursement in the same manner as provided in MCL 712A.18(2) (reimbursement orders for cost of care of out-of-home placement). MCL 712A.18(3).[8]

The Michigan Child Support Formula Schedules Supplement from the Michigan Child Support Formula Manual may be used in determining the amount of reimbursement. See MCL 712A.18(6).[9]

14.3 Methods of Paying For Costs of Care

A. Governmental Benefits

MCL 712A.18(1)(e) states in relevant part:

> "Except for commitment to the Department of [Health and] Human Services [(DHHS)] . . . , an order of commitment under this subdivision to a state institution or agency described in . . . MCL 400.201 to [MCL] 400.214,[10] the court shall name the superintendent of the institution to which the [child] is committed as a special guardian to receive benefits due the [child] from the government of the United States. An order of commitment under this subdivision to the [DHHS] . . . shall name that agency as a special guardian to receive those benefits. The benefits received by the special guardian shall be used to the extent necessary to pay for the portions of the cost of care in the institution or

[8] See Section 14.2(A). Note that an order for reimbursement of costs when the child is placed in the home is discretionary, not mandatory.

[9] Effective July 1, 2006, the Michigan Child Support Formula Schedules Supplement replaced the guidelines and model schedule to which MCL 712A.18(6) refers.

[10] Under these statutes, a child may be committed to the Michigan Children's Institute (MCI) following termination of all parental rights. See Section 17.11.

facility that the parent or parents are found unable to pay."

B. Wage Assignments

If a parent or other adult legally responsible for the care of a child fails or refuses to obey a reimbursement order under MCL 712A.18, and has been found guilty of contempt of court for such failure or refusal, the court ordering reimbursement may order[11] a wage assignment against that individual, which must continue until the support is paid in full. MCL 712A.18b. A wage assignment is effective one week after an employer is served a true copy of the order by personal service or by registered or certified mail. *Id.*

Upon receiving notice of a wage assignment, an employer must withhold the employee's earnings in the amount specified in the order of assignment until notified by the court that the obligation is paid in full.[12] MCL 712A.18b. An employer must not use the wage assignment as a basis for discharging an employee or for any other disciplinary action against an employee. *Id.* "Compliance by an employer with the order of assignment operates as a discharge of the employer's liability to the employee as to that portion of the employee's earnings so affected." *Id.*

14.4 Orders for Reimbursement of Attorney and Lawyer-Guardian ad Litem Fees

If the court appoints an attorney or lawyer-guardian ad litem to represent a party under MCR 3.915, the court may require the party or the person responsible for the party's support to pay for the costs of representation. MCR 3.915(E). See also MCL 712A.17c(8) (requiring the order to be made after the court determine's the party's ability to pay); MCL 712A.18(5).

If the court appoints a guardian ad litem for a party under MCR 3.916, the court may require the party or a person responsible for the party's support to reimburse the court for the costs incurred. MCR 3.916(D).

"An order assessing attorney costs may be enforced through contempt proceedings." MCL 712A.17c(8).

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[11] See SCAO Form JC 39, *Order for Assignment of Wages*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc39.pdf.

[12] See SCAO Form JC 58, *Order Cancelling Wage Assignment*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc58.pdf.

14.5 Guardianship Assistance

If the court appoints a guardian for a child under MCL 712A.19a(7)(c) or MCL 712A.19c(2), the Department of Health and Human Services (DHHS) is permitted to provide assistance payments to guardians of eligible children under the Guardianship Assistance Act, MCL 722.871 *et seq*. The purpose of guardianship assistance is to encourage guardianships of children for whom the more preferred permanency goals of reunification and adoption are inappropriate. See MCL 722.873.

"[T]he [DHHS] may pay guardianship assistance to an eligible guardian on behalf of an eligible child." MCL 722.875(1). The prospective guardian must apply to the DHHS for the guardianship assistance. MCL 722.875(2). After the prospective guardian applies, the DHHS has 30 days to determine whether to grant the request. MCL 722.875(8).

> **Note:** "If guardianship assistance is requested, the determination of eligibility for guardianship assistance and a signed guardianship assistance agreement must be completed before the court enters the order appointing the guardian." DHHS's Child Guardianship Manual (GDM), *Juvenile Guardianship GDM 600*, p 9, available at http://www.mfia.state.mi.us/olmweb/ex/GD/Public/GDM/600.pdf.

A. Eligibility for Guardianship Assistance

In order for a guardian to be eligible for guardianship assistance, he or she must meet the following conditions:

> "(a) The guardian is the eligible child's relative[13] or legal custodian.[14]
>
> (b) The guardian is a licensed foster parent and approved for guardianship assistance by the [DHHS]. The approval process shall include criminal record checks and child abuse and neglect central registry checks on the guardian and all adults living in the guardian's home as well as fingerprint-based criminal

[13] "'Relative' means an individual who is at least 18 years of age and related to the child by blood, marriage, or adoption, as grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew or niece, first cousin or first cousin once removed, or the spouse of any of the above, even after the marriage has ended by death or divorce. The parent of a man who the court has found probable cause to believe is the putative father if there is no man with legally established rights to the child may be considered a relative under this act but this is not to be considered as a finding of paternity and does not confer legal standing on the putative father." MCL 722.872(h).

[14] "'Legal custodian' means an individual who is at least 18 years of age in whose care a child remains or is placed after a court makes a finding under . . . MCL 712A.13a." MCL 722.872(f).

> record checks on the guardian. If the guardian's fingerprints are stored in the automated fingerprint identification system under . . . MCL 722.115k, the [DHHS] shall use those fingerprints for the criminal record check required in this subdivision.
>
> (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 [DHHS]." MCL 722.874(1).

A child is eligible for guardianship assistance if the DHHS determines that all of the following provisions apply:

> "(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~~and placing the child for adoption ~~is~~are not ~~an~~ appropriate permanency options.
>
> (d) The child demonstrates a strong attachment to the prospective guardian and the guardian has a strong commitment to caring permanently for the child until the child reaches 18 years of age.
>
> (e) If the child has reached 14 years of age, he or she has been consulted regarding the guardianship arrangement." MCL 722.873.

For additional information on juvenile guardianship assistance eligibility, see the DHHS's Child Guardianship Manual (GDM), *Juvenile Guardianship Assistance Eligibility GDM 715*, available at http://www.mfia.state.mi.us/olmweb/ex/GD/Public/GDM/715.pdf.

B. Successor Guardian

"Subject to the provisions of [the Guardianship Assistance] Act, the [DHHS] may pay guardianship assistance to an eligible successor guardian[15] on behalf of an eligible child."[16] MCL 722.875c(1). The

[15] "'Successor guardian' means a person appointed by the court to act as a legal guardian when the preceding guardian is no longer able to act as a result of his or her death or incapacitation under . . . MCL 712A.19a [or MCL] 712A.19c. Successor guardian does not include a person appointed as a guardian if that person's parental rights to the child have been terminated or suspended." MCL 722.872(i).

successor guardian must apply to the DHHS for the guardianship assistance. MCL 722.875c(2).

> **Note:** "Payment of guardian assistance shall not be made to a successor guardian until the court appoints a successor guardian. If the successor guardian began caring for the child before the court appoints the successor guardian, guardianship assistance payments can be made retroactively to either the date of death of the relative guardian, the date of incapacity of the relative guardian, or the date the successor guardian assumed care of the child, whichever is later." MCL 722.875c(4).

In order for a successor guardian to be eligible for guardianship assistance, the DHHS must determine that all of the following conditions have been met:

> "(a) A guardianship assistance agreement for the child was in effect before the appointment of the successor guardian.[17]
>
> (b) The successor guardian was appointed by the court as a result of the death or incapacitation of the preceding guardian.
>
> (c) The preceding guardian had an active guardianship assistance agreement for the child before his or her death or incapacitation.
>
> (d) The successor guardian meets all of the conditions set forth in this act."[18] MCL 722.875c(5).

C. Guardianship Assistance Agreement

If the DHHS finds that a guardian is eligible for guardianship assistance, the DHHS and the guardian may enter into a guardianship assistance agreement. MCL 722.875(3). A *guardianship assistance agreement* is "a negotiated binding agreement regarding financial support as described in [MCL 722.875] for children who meet the qualifications for guardianship assistance as specified in this act or in the [DHHS's] administrative rules." MCL 722.872(e).

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[16] MCL 722.874(4) permits a successor guardian to receive guardianship assistance payments if the child meets the eligibility requirements set out under MCL 722.873. For the eligibility requirements under MCL 722.873, see Section 14.5(A).

[17] For additional information on guardianship assistance agreements, see Section 14.5(C).

[18] For eligibility conditions set out under the Guardianship Assistance Act, see Section 14.5(A).

> **Note:** The guardianship assistance agreement "may be transferred to a successor guardian who has been appointed by the court. This occurs when the successor guardian enters into a written, binding guardianship assistance agreement with the [DHHS]." MCL 722.875c(3).

"The guardianship assistance agreement shall specify all of the following:

> (a) The amount of the guardianship assistance to be provided under the agreement for each eligible child, and the manner in which the payment may be adjusted periodically in consultation with the guardian, based on the guardian's circumstances and the child's needs.
>
> (b) The additional services and assistance the child and the guardian will be eligible for under the guardianship assistance agreement.
>
> (c) The procedure by which the guardian may apply for additional services, if needed.
>
> (d) That the [DHHS] will pay the total cost of nonrecurring expenses associated with obtaining legal guardianship of an eligible child, to the extent the total cost does not exceed $2,000.00." MCL 722.875(4).

For additional information on juvenile guardianship assistance agreements, see the DHHS's Child Guardianship Manual (GDM), *Juvenile Guardianship Assistance Agreements/Guardian Responsibilities GDM 740*, available at http://www.mfia.state.mi.us/olmweb/ex/GD/Public/GDM/715.pdf.

D. Annual Review

In order to continue the guardianship assistance, the DHHS must annually review the guardian's and the child's eligibility. MCL 722.875(7). MCL 722.875(7) requires the guardian to provide all eligibility information requested by the DHHS for purposes of the annual review.

> **Note:** It is the DHHS's responsibility to collect, assemble, and report all data and information required for reporting purposes. MCL 722.878(1). The guardian or successor guardian must provide all the information within his or her possession that the DHHS requests for reporting purposes. MCL 722.878(2).

The guardian or successor guardian is also required to apply for and maintain medical insurance for the child for which the child is eligible. MCL 722.877.

E. Case Service Plan

If a child's permanency plan includes placement with a guardian and the receipt of guardianship assistance, the DHHS must include all of the following in the child's case service plan:

> "(a) The steps that the child placing agency or the [DHHS] has taken to determine that reunification ~~or~~and placing the child for adoption ~~is~~are not ~~an~~ appropriate permanency options.
>
> (b) The reason for any separation of siblings during placement.
>
> (c) The reason a permanent placement through guardianship is in the child's best interest.
>
> (d) The way in which the child meets the eligibility criteria for a guardianship assistance payment.
>
> (e) The efforts the child placing agency or the [DHHS] has made to discuss adoption by the prospective guardian as a permanent alternative to legal guardianship and~~, in the case of a relative foster parent who has chosen not to pursue adoption,~~ documentation of the reasons the prospective guardian has chosen not to pursue adoption.
>
> (f) In cases where the parental rights have not been terminated, the efforts the [DHHS] has made to discuss with the child's birth parent or parents the guardianship assistance arrangement, or the reasons why the efforts were not made." MCL 722.875a.

F. Duration of Guardianship Assistance

Except as otherwise provided in MCL 722.876(2), the DHHS must not provide guardianship assistance if any one of the following occurs:

> "(a) The child reaches 18 years of age.
>
> (b) The [DHHS] determines that the guardian is no longer legally responsible for support of the child.
>
> (c) The [DHHS] determines that the child is no longer receiving any support from the relative guardian.

> (d) The death of the child.
>
> (e) The child is adopted by the guardian or another individual under the Michigan [A]doption [C]ode, . . . MCL 710.21 to [MCL] 710.70, or the adoption laws of any other state or country.
>
> (f) The guardianship is terminated by order of the court having jurisdiction in the guardianship proceeding.
>
> (g) The death of the guardian unless a successor guardian has been appointed by the court." MCL 722.876(1).

MCL 722.876(2) permits the DHHS to provide "extended guardianship assistance until the [child] reaches the age of 21 if the [child] meets the requirements set forth in the [Y]oung [A]dult [V]oluntary [F]oster [C]are [A]ct, . . . MCL 400.641 to [MCL] 400.671." See Section 14.5(I).

If the DHHS terminates a guardian's assistance, the DHHS must mail notice of the termination to the guardian's current or last known address and to the court with jurisdiction over the guardianship. MCL 722.876(3). MCL 722.876(3) requires the DHHS, in its notice of termination, to inform the guardian and the court why it is terminating the guardianship assistance.

"The guardianship assistance agreement shall remain in effect without regard to the state residency of the guardian." MCL 722.875(5).

G. Appeal

A prospective guardian may appeal the DHHS's decision denying guardianship assistance. MCL 722.879.

MCL 722.879 also permits a guardian, successor guardian, or child who has received guardianship assistance to appeal the DHHS's decision to modify or terminate the guardianship assistance.

H. Court's Role

The court is authorized to appoint a guardian or juvenile guardian at a permanency planning hearing (rather than terminating parental rights or returning the child home) or after parental rights to the child have been terminated.[19] See MCL 712A.19a; MCL 712A.19c. However, the DHHS, not the court, determines whether a guardian will receive guardianship assistance. See the Guardianship Assistance Act, MCL 722.871 *et seq*.

"If guardianship assistance is requested, the determination of eligibility for guardianship assistance and a signed guardianship assistance agreement must be completed before the court enters the order appointing the guardian." DHHS's Child Guardianship Manual (GDM), *Juvenile Guardianship GDM 600*, p 9, available at http://www.mfia.state.mi.us/olmweb/ex/GD/Public/GDM/600.pdf.

I. Young Adult Guardianship Extension (YAGE)

MCL 722.876(2) permits the DHHS to provide "extended guardianship assistance until the youth reaches the age of 21 if the youth meets the requirements set forth in the [Y]oung [A]dult [V]oluntary [F]oster [C]are [A]ct[(YAVFCA)], . . . MCL 400.641 to [MCL] 400.671."

Under the YAVFCA, the DHHS may provide extended guardianship assistance to a youth between the ages of 18-20 if the youth began receiving guardianship assistance at 16 years of age or older and the youth meets one of the eligibility conditions set out in MCL 400.667.[20] MCL 400.665; MCL 400.667. Under MCL 400.667, the youth must meet one of the following eligibility conditions:

> "(a) The youth is completing secondary education or a program leading to an equivalent credential.
>
> (b) The youth is enrolled in an institution that provides postsecondary or vocational education.
>
> (c) The youth is participating in a program or activity designed to promote employment or remove barriers to employment.
>
> (d) The youth is employed for at least 80 hours per month.
>
> (e) The youth is incapable of doing any part of the activities in subdivisions (a) to (d) due to a medical condition. This assertion of incapacity must be supported by regularly updated information." MCL 400.667.

For additional information on extending guardianship assistance, see the DHHS's Child Guardianship Manual (GDM), *Extensions for Youth*

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[19] See Section 16.8(A) for a detailed discussion of juvenile guardianship appointments during permanency planning hearings, and Section 18.5(A) for a detailed discussion of post-termination guardianship appointments.

[20] "The [DHHS] shall determine a youth's initial and subsequent eligibility for extended guardianship assistance in accordance with the state's approved [T]itle IV-E plan." MCL 400.665(2).

Entering Guardianship at Ages 16-17 GDM 716, available at http://www.mfia.state.mi.us/olmweb/ex/GD/Public/GDM/716.pdf.

1. Notice

The DHHS "will mail an application[21] and notice of eligibility or [the Young Adult Guardianship Extension (YAGE) program] to the guardian no later than 90 days before the youth's 18th birthday." SCAO Administrative Memorandum 2012-04, p 5, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Administrative-Memoranda/2012-04.pdf. The DHHS will also send a notice to the court with jurisdiction over the juvenile guardianship to "inform the court that the youth may be eligible for an extension, and [to] request[] [that] the court [] keep the guardianship case open for 120 calendar days following the youth's 18th birthday to allow time to complete the application and eligibility determination process." SCAO Administrative Memorandum 2012-04, *supra* at p 5.

2. Approval

"[The~~]~~ DHHS] determines the youth's initial and subsequent eligibility for extended guardianship assistance." SCAO Administrative Memorandum 2012-04, *supra* at p 4. If the DHHS approves the extension, it will mail a voluntary agreement[22] to the guardian for the guardian and youth to sign. DHHS's Child Guardianship Manual (GDM), *Extensions for Youth Entering Guardianship at Ages 16-17 GDM 716*, p 5, available at http://www.mfia.state.mi.us/olmweb/ex/GD/Public/GDM/716.pdf.

> **Note:** "Both the youth and the guardian must sign [the] voluntary agreement with [the~~]~~ DHHS] under which the youth and guardian pledge compliance with [MCL 400.667]." SCAO Administrative Memorandum 2012-04, *supra* at p 4.

"If [the~~]~~ DHHS] approves the application [and upon receipt of the signed voluntary agreement], it will send a copy of the signed voluntary agreement to the court, requesting the court to continue the guardianship."[23] SCAO Administrative Memorandum 2012-04, *supra* at p 5. "The court shall determine whether the juvenile guardianship remains in the youth's best interests and issue an order."[24] *Id.*

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[21] See DHHS form DHS-1339-G, *Young Adult Guardianship Assistance Extension*, at http://www.michigan.gov/dhs/0,4562,7-124-5455_7199_53619---,00.html.

[22] See DHHS form DHS-3313-YA, *Young Adult Guardianship Assistance Extension Agreement*.

Note: "[The] SCAO recommends that, upon receiving a voluntary agreement and request to keep the case open, the court schedule the required annual review hearing to ensure that a best interests determination is made within 365 days after the youth's 18th birthday and annually thereafter."

3. Court's Role

"If the court has appointed a [juvenile] guardian under [MCL 712A.19a] or [MCL 712A.19c] for a youth age 16 or older, the court shall retain jurisdiction of the youth until the [DHHS] determines the youth's[25] eligibility to receive extended guardianship assistance under the [YAVFCA], . . . MCL 400.641 to [MCL] 400.671, that shall be completed within 120 days of the youth's eighteenth birthday. If the [DHHS] determines the youth will receive extended guardianship assistance, the court shall retain jurisdiction of the youth until that youth no longer receives guardianship assistance."[26] MCL 712A.2a(4). See also MCL 400.669(1), which requires the court to retain its jurisdiction "of a youth receiving, or a youth for whom the department is determining eligibility for receiving, extended guardianship assistance until that youth no longer receives guardianship assistance."

If the DHHS provides the court with notice that it is extending guardianship assistance to a youth beyond the age of 18 under the YAVFCA, the court must also "retain [its] jurisdiction over the guardianship until that youth no longer receives extended guardianship assistance." MCR 3.979(C)(1).

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[23] "Within 30 calendar days of the date the DHS-3313-YA, *Young Adult Guardianship Assistance Extension Agreement*, was signed by the [DHHS] Subsidy Office manager, the [DHHS] Subsidy Office will provide a copy of the agreement to the guardian and the court with jurisdiction over the guardianship." DHHS's Child Guardianship Manual (GDM), *Extensions for Youth Entering Guardianship at Ages 16-17 GDM 716*, p 5, available at http://www.mfia.state.mi.us/olmweb/ex/GD/Public/GDM/716.pdf (emphasis added).

[24] "Amendments to MCR 3.979(A)(1) are pending." SCAO Administrative Memorandum 2012-04, p 5 n 12, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Administrative-Memoranda/2012-04.pdf. "The proposed court rules will require the court to serve the orders on the youth, the guardian[,] and [the] DHHS]." SCAO Administrative Memorandum 2012-04, *supra* at p 5. The court order should be sent to the DHHS at the following address: DHHS Adoption Subsidy Office, P.O. Box 30037, Lansing, MI 48909. SCAO Administrative Memorandum 2012-04, *supra.*

[25] For purposes of the Juvenile Code, the term *youth* "applies to a person 18 years of age or older concerning whom proceedings are commenced in the court under [MCL 712A.2] and over whom the court has continuing jurisdiction under [MCL 712A.2a(1)-(6)]." MCL 712A.2a(8).

[26] See Section 4.6 for a discussion of juvenile guardianship appointments, and Section 16.9 for a discussion of the Young Adult Voluntary Foster Care Act (YAVFC).

"If extended guardianship assistance has been provided to a youth pursuant to MCL 400.665," MCR 3.979(D)(1)(b) requires:

- "the court [to] conduct an annual review hearing at least once every 12 months after the youth's eighteenth birthday to determine that the guardianship meets the criteria under MCL 400.667[;][27]
- [n]otice of the hearing [to] be sent to the guardian and the youth as provided in MCR 3.920(D)(1)[; and]
- [t]he court [to] issue an order to support its determination and serve the order on the [DHHS], the guardian, and the youth." (Bullets added).

For additional information on the court's jurisdiction following the appointment of a juvenile guardian, see Section 4.9.

J. Title IV-E Eligibility

MCL 722.874(2) and MCL 722.874(3) address Title IV-E[28] funding and its relationship to guardianship assistance:

> "(2) Only a relative who is a licensed foster parent caring for a child who is eligible to receive [T]itle IV-E-funded foster care payments for 6 consecutive months is eligible for federal funding under [T]itle IV-E for guardianship assistance. A child who is not eligible for [T]itle IV-E funding who is placed with a licensed foster parent, related or unrelated, and who meets the requirements of [MCL 722.873(a)-(e)] may be eligible for state-funded guardianship assistance.
>
> (3) If a child is eligible for [T]itle IV-E-funded guardianship assistance under [MCL 722.873] but has a sibling who is not eligible under [MCL 722.873], both of the following apply:
>
> > (a) The child and any of the child's siblings may be placed in the same relative guardianship arrangement in accordance with . . . the probate

[27] See also MCL 400.669(2), which requires "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance not less than 1 time every 12 months." "A hearing held under [MCL 400.669(2)] may be combined with a hearing held under [MCL 712A.19(2)] to [MCL 712A.19(4)], . . . [MCL 712A.19a(1)], . . . or [MCL 712A.19c(1)] . . . ." MCL 400.669(2).

[28] "'Title IV-E' refers to the federal assistance provided through the United States Department of Health and Human Services [(DHHS)] to reimburse states for foster care, adoption assistance payments, and guardianship assistance payments." MCL 722.872(j).

> code, [MCL 712A.1 *et seq.*,]~~to [MCL] 712A.32,~~ if the [DHHS] and the relative agree on the appropriateness of the arrangement for the sibling.
>
> (b) Title IV-E-funded relative guardianship assistance payments may be paid on behalf of each sibling placed in accordance with this subsection."

To maintain a child's Title IV-E funding eligibility when his or her juvenile guardianship is revoked and the child protective proceeding is reinstated, the court must make "contrary to the welfare of the child findings" and place the child with the DHHS. SCAO Memorandum, *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, p 5, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/JuvenileGuardianship.pdf. The *contrary to the welfare of the child* findings are made against the juvenile guardian (not the child's parents). *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 5 n 10. However, if the child has not lived with the juvenile guardian for the last six consecutive months, the SCAO recommends that the court make *reasonable efforts* and *contrary to the welfare* findings regarding both the juvenile guardian and the child's parents. *Id.* If the court fails to make a *reasonable efforts* finding in its order revoking the juvenile guardianship, the finding needs to be made within 60 days of the revocation order. *Id.* at 6. See Section 16.8(E) for a detailed discussion of revoking a juvenile guardianship.

> **Note:** A new petition alleging abuse and neglect does not need to be filed against the guardian. *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 5.

14.6 Redirecting or Issuing Child Support Payment to Juvenile Guardian

To help support a child, a juvenile guardian may be eligible for child support payments. SCAO Memorandum, *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, p 3, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/JuvenileGuardianship.pdf. Before issuing a child support order, the court must determine whether another state has issued a child support order or another court in Michigan has continuing jurisdiction over child support, custody, or parenting time. *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 5.

A. Child Support Order Already Exists

Where the court finds that a child support order already exists, the court should not issue a new child support order against the same parent. SCAO Memorandum, *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues,* p 3, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/JuvenileGuardianship.pdf. Rather, the juvenile guardian should make a written request for an administrative change of recipient to the Friend of the Court (FOC). *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 3. See also MCL 552.517(1)(f); MCL 552.605d.[29]

> **Note:** Because there has been a change in physical custody of the child, the FOC should initiate a review and modification of the child support order. See MCL 552.517; *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 3. If the FOC finds that both parents were not previously obligated to pay child support and the issuing court has continuing jurisdiction over the nonpaying parent, the FOC should recommend inclusion of the nonpaying parent when it is not inconsistent with the permanency plan. *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 3.

The Uniform Interstate Family Support Act (UIFSA), ~~MCL 552.1101~~MCL 552.2101 *et seq.*,[30] and the Full Faith and Credit of Child Support Orders Act (FFCCSOA), 28 USC 1738B, require recognition of interstate child support orders and a prohibition against modifying another state's child support order without certain criteria being met. *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 4. Where an FOC office already has an interstate case concerning the child, the juvenile guardian should request IV-D services through the Michigan Office of Child Support (OCS).[31] *Id.* However, if another state issued a child support order, but an FOC office does not have an interstate case concerning the child, the juvenile guardian should request IV-D services through an FOC office. *Id.*

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[29] See SCAO recommended guidelines for redirection of child support at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Administrative-Memoranda/2005-04.pdf.

[30] Effective January 1, 2016, the Michigan Legislature repealed the Uniform Interstate Family Support Act (UIFSA), MCL 552.1101 *et seq.*, and in its place created the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*

[31] See DHHS form DHS 1201, *IV-D Child Support Services Application/Referral*, at http://www.michigan.gov/documents/DHS-1201_136519_7.pdf.

B. No Child Support Order Exists

A juvenile guardian may request entry of a child support order, or the court may enter one on its own motion. SCAO Memorandum, *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, p 5, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/JuvenileGuardianship.pdf.

1. Pending Action

MCR 3.204 controls an action to establish a child support obligation where the circuit court has a pending action involving child support, custody, or parenting time, or the court has continuing jurisdiction over such matters due to a prior action involving the child's parents. *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 4. See MCR 3.973(F)(5).

To establish a child support obligation, the juvenile guardian should request IV-D services through the Michigan Office of Child Support (OCS).[32] *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 4. Once the OCS refers the IV-D case, the prosecutor's office will assist in establishing an order of support. *Id.* at 4 n 8.

2. No Pending Action

Where there is no other pending or prior action involving child support, custody, or parenting time, and the court has not terminated the parents' parental rights, the court may enter a support order requiring one or both parents to pay child support.[33] *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 4. See MCR 3.973(F)(5).[34] To order child support, the court must find that the proofs in the case satisfy the requirements for ordering child support under one of the following laws:

(1) Emancipation of Minors Act;

(2) Paternity Act;

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[32] See DHHS form DHS 1201, *IV-D Child Support Services Application/Referral*, at http://www.michigan.gov/documents/DHS-1201_136519_7.pdf.

[33] See SCAO form FOC 10, *Uniform Child Support Order*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/domesticrelations/support/foc10.pdf.

[34] See SCAO recommended guidelines for ordering child support in child protective proceedings under MCR 3.973(F)(5) at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Administrative-Memoranda/2008-01.pdf.

(3) Family Support Act;

(4) Uniform Interstate Family Support Act; or

(5) Divorce Code. *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 4-5.

In entering a support order under MCR 3.973(F)(5), the court must use the Michigan Child Support Formula to determine the amount of support. MCL 552.605; MCR 3.973(F)(5); *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 5. See Section 4.01 and Section 4.02 of the Michigan Child Support Formula for guidance on determining child support for third party custodians and other special custody arrangements for children.

The court should establish child support once the juvenile guardian is appointed and before the child protective proceeding is terminated. *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 4. If the child protective proceeding is terminated before a child support order is entered, the juvenile guardian may file a separate support action to obtain the child support. *Id.* at 5. To establish the child support obligation, the juvenile guardian should request IV-D services through the OCS. *Id.* at 4. Once the OCS refers the IV-D case, the prosecutor's office will assist in establishing an order of support. *Id.* at 5.

Chapter 15: Dispositional Review Hearings

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In this chapter. . .

This chapter discusses the requirements for reviewing a court's initial dispositional order and a party's compliance with the case service plan. When a child has not been removed from his or her home, or when a child has been returned to his or her home following an initial removal, the court must conduct periodic review hearings to determine the family's progress toward rectifying conditions that brought the child within the court's jurisdiction.

This chapter also outlines procedures for removing a child from his or her home in an emergency that arises during the dispositional phase of proceedings.

In an effort to provide trial courts with a quick practical guide through the process of dispositional review hearings, the State Court

Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys: Dispositional Review Hearings*.

15.1 Overview

If the court does not terminate jurisdiction over a child after entering a dispositional order, and the child is placed outside the child's home, the court must "follow the review procedures in MCR 3.975 [(dispositional review hearings).]" MCR 3.973(G). "A dispositional review hearing is conducted to permit court review of the progress made to comply with any order of disposition and with the case service plan prepared pursuant to MCL 712A.18f and court evaluation of the continued need and appropriateness for the child to be in foster care."MCR 3.975(A).

If the court does not terminate jurisdiction over a child after entering a dispositional order and the child remains in the home, the court must review the child's progress under MCR 3.974(A). MCR 3.973(G). The court must "periodically review the progress of a child not in foster care over whom it has taken jurisdiction." MCR 3.974(A)(1).

15.2 Notice

The notice requirements in all dispositional review hearings (i.e. under MCR 3.974 or MCR 3.975) are governed by MCR 3.920 and MCR 3.921(B)(2). See also MCR 3.975(B) (requiring the court to ensure compliance with MCR 3.920 and MCR 3.921(B)(2)).[1] For purposes of MCR 3.975, "[t]he notice must inform the parties of their opportunity to participate in the hearing and that any information they wish to provide should be submitted in advance to the court, the agency, the lawyer-guardian ad litem for the child, or an attorney for one of the parties." MCR 3.975(B).

15.3 Time Requirements

A. Review Hearings for Children Currently or Previously in Foster Care

For children placed in foster care (even if subsequently returned home), the court must conduct a dispositional review hearing "not more than 182 days after the child's removal from his or her home and no later than every 91 days after that for the first year that the child is subject to the court's jurisdiction." MCL 712A.19(3);[2] MCR 3.974(A)(2)

[1] See Section 5.2(A) for a list of persons entitled to written notice of dispositional review hearings.

[2] A hearing held under MCL 400.669(2) (requiring "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance [under the Young Adult Voluntary Foster Care Act (YAVFCA)] not less than 1 time every 12 months[]") may be combined with a hearing held under MCL 712A.19(3). Section 14.5(I) for additional information on the extension of guardianship assistance under MCL 400.665.

(requiring the court to follow procedures in MCR 3.975 in cases where the child was placed outside the home then subsequently returned home); MCR 3.975(C)(1). "After the first year that the child has been removed from his or her home and is subject to the court's jurisdiction, a review hearing shall be held not more than 182 days from the immediately preceding review hearing before the end of that first year and no later than every 182 days from each preceding review hearing thereafter until the case is dismissed." MCL 712A.19(3). See also MCR 3.975(C)(1) (containing substantially similar language). For cases involving children who were in foster care and subsequently returned home, "[t]he review shall occur no later than 182 days after the child returns home[.]" MCR 3.974(A)(2).

> **Note:** Federal regulations implementing the Adoption & Safe Families Act require that reviews of a child's status by a court or administrative agency occur at least every six months. 45 CFR 1355.34(c)(2)(*ii*). The six-month period begins when the child enters foster care. See 45 CFR 1355.34(c)(1)-(2). A child enters foster care the earlier of the date that the court found the child to be abused or neglected or 60 days after the child's removal from his or her home, or an earlier date if the state chooses. 45 CFR 1355.20(a).

"If a child is under the care and supervision of the agency and is either placed with a relative and the placement is intended to be permanent or is in a permanent foster family agreement, the court shall hold a review hearing not more than 182 days after the child has been removed from his or her home and no later than 182 days after that so long as the child is subject to the jurisdiction of the court, the Michigan [C]hildren's [I]nstitute [(MCI)], or other agency [as provided in MCR 3.976(E)(3)]." MCL 712A.19(4).[3] See also MCR 3.975(C)(2) (containing substantially similar language).

The court must not cancel or delay a review hearing beyond the number of days required, "regardless of whether a petition to terminate parental rights or another matter is pending." MCL 712A.19(3); MCL 712A.19(4); MCR 3.975(C).

[3] A hearing held under MCL 400.669(2) (requiring "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance [under the Young Adult Voluntary Foster Care Act (YAVFCA)] not less than 1 time every 12 months[]") may be combined with a hearing held under MCL 712A.19(4). Section 14.5(I) for additional information on the extension of guardianship assistance under MCL 400.665.

B. Review Hearings for Children Never Removed From Home

"[I]f a child subject to the court's jurisdiction remains in his or her home, a review hearing shall be held not more than 182 days from the date a petition is filed to give the court jurisdiction over the child and no later than every 91 days after that for the first year that the child is subject to the court's jurisdiction." MCL 712A.19(2).[4] See also MCR 3.974(A)(2) (containing substantially similar language except that it contemplates the child having "never [been] removed from the home" and requires the review hearing to be held within 182 days from the date a petition was *authorized*). "After the first year that the child is subject to the court's jurisdiction, a review hearing shall be held no later than 182 days from the immediately preceding review hearing before the end of that first year and no later than every 182 days from each preceding review hearing thereafter until the case is dismissed." MCL 712A.19(2); MCR 3.974(A)(2).

> **Note:** "If the child was removed from the home and subsequently returned home, review hearings shall be held in accordance with MCR 3.975." MCR 3.974(A)(2).

The court must not cancel or delay a review hearing beyond the number of days required, "regardless of whether a petition to terminate parental rights or another matter is pending." MCL 712A.19(2).

C. Accelerated Review Hearings

On a party's motion or in the court's discretion, a court may accelerate a review hearing to "review any element of the case service plan[.]" MCL 712A.19(2)-(4). See also MCR 3.975(D).

Where a child is placed in foster care, "the court shall determine at the dispositional hearing and each review hearing whether the cause should be reviewed before the next review hearing[.]" MCL 712A.19(9). See also MCR 3.975(D) (containing substantially similar language). "In making this determination, the court shall consider at least all of the following:

> (a) The parent's, [guardian's, or legal custodian's] ability and motivation to make necessary changes to provide a suitable environment for the child.

[4] A hearing held under MCL 400.669(2) (requiring "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance [under the Young Adult Voluntary Foster Care Act (YAVFCA)] not less than 1 time every 12 months[]") may be combined with a hearing held under MCL 712A.19(2). Section 14.5(I) for additional information on the extension of guardianship assistance under MCL 400.665.

> (b) Whether there is a reasonable likelihood that the child may be returned to his or her home prior to the next review hearing[.]" MCL 712A.19(9). See also MCR 3.975(D), which contains substantially similar language.

D. Return of Child Without Dispositional Review Hearing

If all the parties involved receive notice at least seven days before a child is returned home, or if proper notice of hearing is waived,[5] and if no party requests a hearing within the seven days, the court may issue an order permitting the agency to return the child home without holding a review hearing. MCL 712A.19(10); MCR 3.975(H).

E. Two-Way Interactive Video Technology

Two-way interactive video technology may be used to conduct review hearings in child protective proceedings. MCR 3.904(B)(2). Use of two-way interactive video technology must comply with any standards established by the State Court Administrative Office, and any proceedings conducted using the technology must be recorded verbatim. MCR 3.904(C).[6]

15.4 Procedures and Rules of Evidence

MCR 3.975(E) (applicable to children who have been placed in foster care) sets out the required procedures and rules of evidence for dispositional review hearings:

> "Dispositional review hearings must be conducted in accordance with the procedures and rules of evidence applicable to the initial dispositional hearing.[7] The report of the agency that is filed with the court must be accessible to the parties and offered into evidence. The court shall consider any written or oral information concerning the child

[5] See Section 5.3 for requirements for waiver of notice of hearing.

[6] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." Administrative Order No. 2012-7 further provides that "[t]he judicial officer who presides remotely must be physically present in a courthouse located within his or her judicial circuit, district, or multiple district area." Additionally, "[f]or circuits or districts that are comprised of more than one county, each court that seeks permission to allow its judicial officers to preside by video communication equipment must submit a proposed local administrative order for approval by the State Court Administrator pursuant to MCR 8.112(B)." Administrative Order No. 2012-7.

[7] See Section 13.4 for a discussion of the rules of evidence applicable to an initial disposition hearing.

> from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom a child is placed, in addition to any other relevant and material evidence at the hearing.[8] The court, on request of a party or on its own motion, may accelerate the hearing to consider any element of a case service plan. The court, upon receipt of a local foster care review board's report, shall include the report in the court's confidential social file. The court shall ensure that all parties have had the opportunity to review the report and file objections before a dispositional order, dispositional review order, or permanency planning order is entered. The court may at its discretion include recommendations from the report in its orders."

For proceedings under MCR 3.974(A) (dispositional review hearings applicable to children placed at home), the rules of evidence do not apply except those with respect to privileges as governed by MCL 722.631. See MCR 3.901(A)(3), which states that the rules of evidence do not apply to child protective proceedings unless a court rule specifically provides otherwise.

For dispositional review hearings being conducted pursuant to MCR 3.974(D)(2) for a child in placement under MCR 3.974(B)(2) (postadjudication hearing on petition for out-of-home placement) or MCR 3.974(C)(3)(b) (postadjudication hearing following emergency removal of child from home), the rules of evidence applicable to a dispositional hearing apply. MCR 3.974(D)(2).

If an agency responsible for the care and supervision of the child advises the court not to place a child in the custody of the child's parent, guardian, or custodian, the agency must submit a written report to the court stating:

> "what efforts were made to prevent the child's removal from his or her home[;] or
>
> the efforts made to rectify the conditions that caused the child's removal from his or her home."[9] MCL 712A.18f(1). See also MCR 3.973(E)(2).

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[8] See also MCL 712A.19(11), which requires the court to consider any relevant information about the child, including "the appropriateness of parenting time" from any of the individuals or entities listed in MCR 3.973(E)(2), or from the child's lawyer-guardian ad litem, attorney, or guardian ad litem.

[9] See Section 13.7 for a detailed discussion of required reasonable efforts determination.

15.5 Review of Progress Toward Compliance With Case Service Plan

"The court, in reviewing the progress toward compliance with the case service plan,[10] must consider:

> (a) the services provided or offered to the child and parent, guardian, or legal custodian of the child;
>
> (b) whether the parent, guardian, or legal custodian has benefited from the services provided or offered;
>
> (c) the extent of parenting time or visitation, including a determination regarding the reasons either was not frequent or never occurred;
>
> (d) the extent to which the parent, guardian, or legal custodian complied with each provision of the case service plan, prior court orders, and any agreement between the parent, guardian, or legal custodian and the agency;
>
> (e) any likely harm to the child if the child continues to be separated from his or her parent, guardian, or custodian;
>
> (f) any likely harm to the child if the child is returned to the parent, guardian, or legal custodian; and
>
> (g) if the child is an Indian child, whether the child's placement remains appropriate and complies with MCR 3.967(F) [(providing for preference in order of placement)]." MCR 3.975(F)(1). See also MCL 712A.19(6), which contains substantially similar language.

After review of the case service plan, "[t]he court must decide the extent of the progress made toward alleviating or mitigating conditions that caused the child to be, and to remain, in foster care." MCR 3.975(F)(2). See also MCL 712A.19(7), which contains substantially similar language.

15.6 Dispositional Review Orders

"At a review hearing . . ., the court shall determine the continuing necessity and appropriateness of the child's placement[.]" MCL 712A.19(8).

The court has several options following a dispositional review hearing involving a child who has been placed in foster care:

---

[10] See Section 13.6 for a detailed discussion of case service plans.

> "(1) order the return of the child home,
>
> (2) change the placement of the child,
>
> (3) modify the dispositional order,
>
> (4) modify any part of the case service plan,
>
> (5) enter a new dispositional order, or
>
> (6) continue the prior dispositional order." MCR 3.975(G). See also MCL 712A.19(8), which contains substantially similar language.

Additionally, "[i]n a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court may issue orders affecting a party as necessary[until] . . . May 1, 2018." MCL 712A.2(i). For purposes of child protective proceedings, MCL 712A.2(i)(*ii*) defines *party* as "the petitioner, [DHHS], child, respondent, parent, guardian, or legal custodian, and any licensed child caring institution or child placing agency under contract with the [DHHS] to provide for a juvenile's care and supervision."

A. Order Change in Placement When Child Is at Home

Generally, a court may not order a change in a child's placement without a hearing:

> "Except as provided in [MCR 3.974(C) (emergency removals)[11]], the court may not order a change in the placement of a child without a hearing. If the child for whom the court has authorized a petition remains at home or has otherwise returned home from foster care, and it comes to the court's attention at a review hearing held pursuant to [MCR 3.974(A)(2)], or as otherwise provided in this rule, that the child should be removed from the home, the court may order the placement of the child. If the court orders the child to be placed out of the home following a review hearing held pursuant to [MCR 3.974(A)(2)], the parent must be present and the court shall comply with the placement provisions in MCR 3.965(C). If the parent is not present, the court shall proceed under [MCR 3.974(C)] before it may order removal. If the child is an Indian child, in addition to a hearing held in accordance with this rule, the court must also conduct a removal hearing in accordance with MCR 3.967 [(providing for preference in order of

[11] See Section 15.8 for a discussion of emergency removals under MCR 3.974(C).

placement)[12]] before it may order the placement of the Indian child." MCR 3.974(A)(3).

> **Note:** A person with custody of a child pursuant to court order may not invoke the constitutional privilege against self-incrimination to conceal the child's whereabouts or refuse to surrender the child. *Baltimore City DSS v Bouknight*, 493 US 549, 561 (1990).

The trial court did not err when it amended its dispositional order and terminated a respondent-mother's extended visitation of her child at an accelerated dispositional review hearing, basing its conclusion on the respondent-mother's noncompliance with the case service plan. *In re EP*, 234 Mich App 582 (1999), overruled on other grounds by *In re Trejo Minors*, 462 Mich 341 (2000). Specifically, the Court of Appeals held:

> "Although [the Court of Appeals] agree[s] with respondent[-mother] that the court rules require a hearing before the [trial] court may issue an order terminating the extended visit, [the Court of Appeals] conclude[s] that the court conducted such a hearing before it issued the order removing the child from respondent[-mother's] home.
>
> * * *
>
> In this case, the child was returned to respondent[-mother's] home for an extended visit after the initial disposition. It is reasonable that such an arrangement fits within the phrase 'or has otherwise returned home from foster care.' MCR [3.974(A)(3)].[13] Thus contrary to the [trial] court's opinion regarding this issue, a hearing was required before the child could be removed from respondent[-mother's] home. However, respondent[-mother's] argument that she was denied due process simply because the court reached this conclusion is without merit because a hearing resulting in the relevant supplemental dispositional order was held . . . . Although the hearing was initiated by respondent[-mother], who was seeking a [temporary restraining order] to prevent petitioner from removing the child from her home, it resulted in a dispositional review hearing in which both sides presented evidence,

[12] See Section 19.9 for a detailed discussion of removal hearings for Indian children under MCR 3.967.

[13] The *In re EP* Court refers to the former MCR 5.973(E)(1), which was replaced with MCR 3.974(A)(3).

> and the court did not order termination of the extended visitation until after the hearing was conducted. This hearing fully complied with the requirements of MCR [3.974(A)(3)].
>
> * * *
>
> Further, the [trial] court appropriately focused on respondent[-mother's] compliance, or lack thereof, with the case service plan when making its decision to terminate the child's extended home visit with respondent[-mother]. . . .
>
> Following the . . . dispositional review hearing, the court informed respondent[-mother] that the child would remain in her home only if she complied with the case service plan. The evidence reveals that respondent[-mother] failed to do so. . . . [U]pon respondent[-mother's] demonstrated failure to comply with the case service plan, which was the only means the court had to make sure the child was safe within respondent[-mother's] home, the [trial] court was permitted to amend the dispositional order to terminate the child's extended visit in respondent[-mother's] home." *In re EP*, 234 Mich App at 591-593, 595-596.

B. Modify Dispositional Order

Subject to MCL 712A.20,[14] if a child is under the court's jurisdiction, the court may terminate the cause or amend or supplement a dispositional order under MCL 712A.18 at any time the court finds it necessary. MCL 712A.19(1).

C. Modify Case Service Plan

After review of the case service plan, "[t]he court may modify any part of the part of the case service plan including, but not limited to, the following:

> (a) Prescribing additional services that are necessary to rectify the conditions that caused the child to be placed in foster care or to remain in foster care.

[14] MCL 712A.20 provides that "[i]f the child is placed in the temporary custody of the court, no supplemental order of disposition providing permanent custody, or containing any other order of disposition shall be made except at a hearing pursuant to issuance of summons or notice as provided in [MCL 712A.12] and [MCL 712A.13] or at a rehearing provided by [MCL 712A.19]."

> (b) Prescribing additional actions to be taken by the parent, guardian, nonparent adult,[15] or custodian to rectify the conditions that caused the child to be placed in foster care or to remain in foster care." MCL 712A.19(7).

15.7 Hearing on Petition for Out-of-Home Placement

A. Preadjudication

"If a child for whom a petition has been authorized under MCR 3.962 or MCR 3.965[16] is not yet under the jurisdiction of the court and an amended petition has been filed to remove the child from the home, the court shall conduct a hearing on the petition in accordance with MCR 3.965." MCR 3.974(B)(1).

B. Postadjudication

"If a child is under the jurisdiction of the court and a supplemental petition has been filed to remove the child from the home, the court shall conduct a hearing on the petition. The court shall ensure that the parties are given notice of the hearing as provided in MCR 3.920 and MCR 3.921.[17] Unless the child remains in the home, the court shall comply with the placement provisions in MCR 3.965(C) and must make a written determination that the criteria for placement listed in MCR 3.965(C)(2)[18] are satisfied. If the court orders that the child be placed out of the home, the court shall proceed under [MCR 3.974(D)]." MCR 3.974(B)(2).

"If the child is in placement under [MCR 3.974(B)(2) (postadjudication hearing on petition for out-of-home placement)] . . ., the court shall proceed as follows:

> "(1) If the court has not held a dispositional hearing under MCR 3.973,[19] the court shall conduct the dispositional hearing within 28 days after the child is placed by the court, except for good cause shown.

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[15] See Section 7.7(E) for more information on nonparent adults as they relate to child protective proceedings.

[16] See Section 7.6(B) for petition authorization under MCR 3.962 and Section 7.7(B) for petition authorization under MCR 3.965.

[17] See Chapter 5 for notice requirements under MCR 3.920 and MCR 3.921.

[18] See Section 8.1(B) for a detailed discussion of requirements on placing a child outside the home under MCR 3.965(C)(2).

[19] For a discussion on the dispositional phase of child protective proceedings, see Chapter 13.

> (2) If the court has already held a dispositional hearing under MCR 3.973, a dispositional review hearing must commence no later than 14 days after the child is placed by the court, except for good cause shown. The dispositional review hearing may be combined with the removal hearing for an Indian child prescribed by MCR 3.967.[20] The dispositional review hearing must be conducted in accordance with the procedures and rules of evidence applicable to a dispositional hearing."[21] MCR 3.974(D).

15.8 Emergency Removal of a Child Placed at Home

"If a child for whom the court has authorized an original petition remains at home or is returned home following a hearing pursuant to the rules in this subchapter, the court may order the child to be taken into protective custody pending an emergency removal hearing pursuant to the conditions listed in MCR 3.963(B)(1)[22] and upon receipt, electronically or otherwise, of a petition or affidavit of fact. If the child is an Indian child and the child resides or is domiciled within a reservation, but is temporarily located off the reservation, the court may order the child to be taken into protective custody only when necessary to prevent imminent physical damage or harm to the child." MCR 3.974(C)(1). See also 25 USC 1922 and MCL 712B.7(2), which provide the court with limited emergency jurisdiction under the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA), where a reservation-resident Indian child is temporarily off the reservation and the state has removed the child in an emergency situation to prevent imminent physical damage or harm to the child.

"If the court orders the child to be taken into protective custody under MCR 3.963,[23] the court must conduct an emergency removal hearing no later than 24 hours after the child has been taken into custody, excluding Sundays and holidays as defined in MCR 8.110(D)(2)." MCR 3.974(C)(3). "If the child is an Indian child, the court must also conduct a removal hearing in accordance with MCR 3.967[24] in order for the child to remain removed from a parent or Indian custodian."MCR 3.974(C)(3).

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[20] See Section 19.9 for a detailed discussion of removal hearings for Indian children under MCR 3.967.

[21] See Section 13.4 for a discussion on rules of evidence applicable in dispositional hearings.

[22] For the list of conditions set out in MCR 3.963(B)(1), see Section (A)(1).

[23] For additional information on taking custody of a child with a court order under MCR 3.963, see Section (A).

[24] See Section 19.9 for a detailed discussion of removal hearings for Indian children under MCR 3.967.

"If a child for whom a petition has been authorized under MCR 3.962 or MCR 3.965[25] is not yet under the jurisdiction of the court, the emergency removal hearing shall be conducted in the manner provided by MCR 3.965." MCR 3.974(C)(3)(a).

"If a child is under the jurisdiction of the court, unless the child is returned to the parent pending disposition or dispositional review, the court shall comply with the placement provisions in MCR 3.965(C) and must make a written determination that the criteria for placement listed in MCR 3.965(C)(2) are satisfied.[26] The parent, guardian, or legal custodian from whom the child was removed must be given an opportunity to state why the child should not be removed from, or should be returned to, the custody of the parent, guardian, or legal custodian." MCR 3.974(C)(3)(b).

In an effort to provide trial courts with a quick practical guide through the process of emergency removal hearings, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys:Emergency Removal Hearing (MCR 3.974(C)*[27]*/MCL 712A.13a)*. This toolkit is accessible at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/CWSToolkit/Pages/Emergency-Removal-Hearing.aspx.

A. Notice of Emergency Removal Hearing

"The court shall ensure that the parties are given notice of the emergency removal hearing as provided in MCR 3.920 and MCR 3.921."[28]MCR 3.974(C)(2).

B. Postadjudication Hearing Following Emergency Removal of Child From Home

"If the child is in placement under . . . [MCR 3.974(C)(3)(b) (postadjudication hearing following emergency removal of child from home)], the court shall proceed as follows:

> "(1) If the court has not held a dispositional hearing under MCR 3.973,[29] the court shall conduct the

[25] See Section 7.6(B) for petition authorization under MCR 3.962 and Section 7.7(B) for petition authorization under MCR 3.965.

[26] See Section 8.1(B) for a detailed discussion of requirements on placing a child outside the home under MCR 3.965(C)(2).

[27] Formerly MCR 3.974(B).

[28] See Chapter 5 for notice requirements under MCR 3.920 and MCR 3.921.

[29] For a discussion on the dispositional phase of child protective proceedings, see Chapter 13.

> dispositional hearing within 28 days after the child is placed by the court, except for good cause shown.
>
> (2) If the court has already held a dispositional hearing under MCR 3.973, a dispositional review hearing must commence no later than 14 days after the child is placed by the court, except for good cause shown. The dispositional review hearing may be combined with the removal hearing for an Indian child prescribed by MCR 3.967.[30] The dispositional review hearing must be conducted in accordance with the procedures and rules of evidence applicable to a dispositional hearing."[31] MCR 3.974(D).

At the postadjudication hearing held under MCR 3.974(D), "[t]he respondent parent, guardian, or legal custodian from whom the child is removed must receive a written statement of the reasons for removal and be advised of the following rights . . . :

> (*i*) to be represented by an attorney at the hearing;
>
> (*ii*) to contest the continuing placement at the hearing within 14 days; and
>
> (*iii*) to use compulsory process to obtain witnesses for the hearing." MCR 3.974(C)(3)(b).

15.9 Combined Permanency Planning Hearing and Dispositional Review Hearing

If proper notice for a permanency planning hearing is provided, the permanency planning hearing may be combined with a dispositional review hearing if the combined hearings are held no later than the 12 months or 28 days from the child's removal from the home or 12 months from the preceding permanency planning hearing.[32] MCL 712A.19a(1); MCL 712A.19c(1); MCR 3.976(B)(3).

15.10 Records of Dispositional Review Hearings

MCR 3.925(B) provides in relevant part:

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[30] See Section 19.9 for a detailed discussion of removal hearings for Indian children under MCR 3.967.

[31] See Section 13.4 for a discussion on rules of evidence applicable in dispositional hearings.

[32] See Chapter 16 for a detailed discussion of permanency planning hearings.

> "A record of all hearings must be made. All proceedings on the formal calendar[33] must be recorded by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108."

[33] MCR 3.903(A)(10) defines *formal calendar* as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

Chapter 16: Permanency Planning Hearings

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In this chapter. . .

This chapter discusses permanency planning hearings. The purpose of a permanency planning hearing is to review and finalize a permanency plan for a child in foster care.

Specifically, this chapter discusses the time requirements associated with permanency planning hearings, notice requirements, procedures required for permanency planning hearings, and the applicable rules of evidence. The chapter also discusses the court's placement options at a permanency planning hearing.

In an effort to provide trial courts with a quick practical guide through the process of permanency planning hearings, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys:Permanency Planning Hearings (MCR 3.976)*. This toolkit is accessible at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/CWSToolkit/Pages/Permanency-Planning-Hearing.aspx.

The National Resource Center for Child Protective Services and the National Child Welfare Resource Center on Legal and Judicial Issues also developed the *Child Safety: A Guide for Judges and Attorneys* to "offer[] a comprehensive approach to child safety decision-making, addressing the fundamentals of safety assessments and safety planning." This guide is accessible at http://nrccps.org/special-initiatives/safety-law-guide/.

16.1 Overview

"[I]f a child remains in foster care and parental rights to the child have not been terminated, the court shall conduct a permanency planning hearing within 12 months after the child was removed from his or her home."[1] MCL 712A.19a(1). A permanency planning hearing is conducted to review the progress being made toward returning home a child in foster care, or to show why the child should not be made a permanent court ward. MCL 712A.19a(3).

During the permanency planning hearing, the court must:

- "review the permanency plan for a child in foster care [and] . . . determine whether and, if applicable, when:

  (1) the child may be returned to the parent, guardian, or legal custodian;

  (2) a petition to terminate parental rights should be filed;

  (3) the child may be placed in a legal guardianship;

  (4) the child may be permanently placed with a fit and willing relative; or

  (5) the child may be placed in another planned permanent living arrangement, but only in those cases where the agency has documented to the court a compelling reason for determining that it would not be in the best interests of the child to follow one of the options listed in subrules (1)-(4)."[2] MCR 3.976(A). See Section 16.7.

- obtain the child's views regarding his or her permanency plan in an age appropriate manner.[3] MCL 712A.19a(3); MCR 3.976(D)(2).

- consider both in-state and out-of-state placement options when a child will not be returned home. MCL 712A.19a(3); MCR 3.976(E)(1).

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[1] If the court determines that reasonable efforts to reunite the family or prevent removal are not required, an initial permanency planning hearing must be held within 28 days of that determination. MCR 3.976(B)(1). See Section 16.3(A).

[2] See also 45 CFR 1355.20(a), which contains substantially similar language.

[3] SCAO published recommended guidelines to help courts implement this requirement. See SCAO memorandum, *Obtaining the Child's Opinion at Permanency Planning Hearings*, at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Administrative-Memoranda/2009-02.pdf.

- determine whether the out-of-state placement continues to be appropriate and in the child's best interests if the child is already in an out-of-state placement. MCL 712A.19a(3); MCR 3.976(E)(1).

- make sure the agency[4] provides appropriate services to assist a child transitioning from foster care to independent living. MCL 712A.19a(3); MCR 3.976(E)(1).

"At or before each permanency planning hearing, the court must determine whether the agency has made reasonable efforts to finalize the permanency plan." MCR 3.976(A). MCL 712A.19(12) permits reasonable efforts to finalize an alternate permanency plan and reasonable efforts at reunification to be made concurrently. See also 45 CFR 1356.21(b)(4), which contains substantially similar language.

16.2 Reasonable Efforts Findings

To maintain a child's eligibility for continued federal foster care maintenance payments under Title IV-E of the Social Security Act, "[t]he [T]itle IV-E agency must make reasonable efforts . . . to effect the safe reunification of the child and family (if temporary out-of-home placement is necessary to ensure the immediate safety of the child); and to make and finalize alternate permanency plans in a timely manner when reunification is not appropriate or possible."[5] 45 CFR 1356.21(b). See also 42 USC 672(a)(1).

"At or before each permanency planning hearing, the court must determine whether the agency has made reasonable efforts to finalize the permanency plan." MCR 3.976(A).

> **Note:** To maintain Title IV-E eligibility, "[t]he [T]itle IV-E agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect (whether the plan is reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement) within twelve months of the date the child is considered to have entered foster care[6] . . . , and at least once every twelve months thereafter while the child is in foster care." 45 CFR 1356.21(b)(2)(i). "If such a judicial determination regarding reasonable efforts to finalize a

[4] MCR 3.903(C)(1) defines *agency* as "a public or private organization, institution, or facility responsible pursuant to court order or contractual arrangement for the care and supervision of a child."

[5] Reasonable efforts are not the sole means of establishing eligibility under Title IV-E; an agency must also comply with other federal requirements. See Chapter 14 for a detailed discussion of federal funding.

> permanency plan is not made in accordance with the schedule prescribed in [45 CFR 1356.21(b)(2)(i)], the child becomes ineligible under [T]itle IV-E at the end of the month in which the judicial determination was required to have been made, and remains ineligible until such a determination is made." 45 CFR 1356.21(b)(2)(ii).
>
> However, reasonable efforts to reunify the child with his or her family is not required under certain circumstances. See Section 16.3(A).

16.3 Time Requirements

A. Initial Permanency Planning Hearing

If a child is in foster care and the child's parents' parental rights have not been terminated, the court must hold an initial permanency planning hearing within 12 months of the child's removal from the home. MCL 712A.19a(1); MCR 3.976(B)(2). See also 45 CFR 1355.20(a) and 45 CFR 1355.34(c)(2)(iii), which contain substantially similar language.

However, an initial permanency planning hearing must be held within 30 days[7] of a child's removal if the court determines[8] that reasonable efforts to reunite the family or to prevent the child's removal are not required because one of the following apply:

> "(a) There is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in [MCL 722.638](1) and [MCL 722.638](2).
>
> (b) The parent has been convicted of 1 or more of the following:
>
> (*i*) Murder of another child of the parent.
>
> (*ii*) Voluntary manslaughter of another child of the parent.

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[6] A child enters foster care on the date that the court found a child to be abused or neglected or the date that is 60 calendar days after the child's actual removal from his or her home, whichever is earlier. 45 CFR 1355.20(a). "A [T]itle IV-E agency may use a date earlier than required in this definition, such as the date the child is physically removed from the home." *Id*.

[7] MCR 3.976(B)(1) states that the hearing must be held within 28 days. But see, 45 CFR 1355.20(a) and 45 CFR 1356.21(h)(2), which state that the hearing must be held within 30 days.

[8] "The judicial determinations regarding . . . reasonable efforts to finalize the permanency plan in effect, including judicial determinations that reasonable efforts are not required, must be explicitly documented and must be made on a case-by-case basis and so stated in the court order." 45 CFR 1356.21(d).

(*iii*) Aiding or abetting in the murder of another child of the parent or voluntary manslaughter of another child of the parent, the attempted murder of the child or another child of the parent, or the conspiracy or solicitation to commit the murder of the child or another child of the parent.

(*iv*) A felony assault that results in serious bodily injury to the child or another child of the parent.

(c) The parent has had rights to the child's siblings involuntarily terminated.

(d) The parent is required by court order to register under the [S]ex [O]ffenders [R]egistration [A]ct."[9] MCL 712A.19a(2). See also 45 CFR 1355.20(a), 45 CFR 1356.21(b)(3), 45 CFR 1356.21(h)(2), MCR 3.976(B)(1), which contain substantially similar language.

42 USC 675(5)(E) requires the State agency to file or join in filing a petition requesting termination of parental rights when the court determines that a child has been abandoned or the parent has "committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent[.]" If the State agency files or joins a petition to terminate parental rights, "it must concurrently begin to identify, recruit, process, and approve a qualified adoptive family for the child." 45 CFR 1356.21(i)(3). See also 42 USC 675(5)(E).

Note: "The petition to terminate parental rights must be filed within 60 days of the judicial determination that the child is an abandoned infant[.]" 45 CFR 1356.21(i)(1)(ii). For a parent "[w]ho has been convicted of one of the felonies listed [in 45 CFR 1356.21(b)(3)(ii),] . . . the petition to terminate parental rights must be filed within 60 days of a judicial determination that reasonable efforts to reunify the child and parent are not required." 45 CFR 1356.21(i)(1)(iii).

"Incarceration alone is not a sufficient reason for termination of parental rights." *In re Mason*, 486 Mich 142, 146 (2010). Where a respondent-parent is incarcerated for a crime not listed in MCL 712A.19a(2), "[t]he state is not relieved of its duties to engage an

[9] "'Sex [O]ffenders [R]egistration [A]ct' means the [S]ex [O]ffenders [R]egistration [A]ct, . . . MCL 28.721 to [MCL] 28.736." MCL 712A.13a(1)(k).

absent parent merely because that parent is incarcerated." *In re Mason*, *supra* at 152. Thus, a trial court prematurely terminates an incarcerated parent's parental rights when it fails to provide a "meaningful and adequate opportunity to participate." *Id.* Cf. *In re Smith*, 291 Mich App 621, 623 (2011) (failure of the DHHS to facilitate reunification between an incarcerated parent and his child did not require reversal of the trial court's termination of his parental rights because his parental rights to the child's sibling were previously involuntarily terminated and "the prior involuntary termination of parental rights to a child's sibling [under MCL 712A.19a(2)(c)] is a circumstance under which reasonable efforts to reunite the child and family need not be made").

The court must not cancel or delay an initial permanency planning hearing beyond the 12-month or 28-day period, regardless of whether there is a petition for termination of parental rights or any other matters pending. MCL 712A.19a(1). See also MCR 3.976(B)(2), which states that if the 28-day rule does not apply (i.e. reasonable efforts are required), "the court must conduct an initial permanency planning hearing no later than 12 months after the child's removal from the home, regardless of whether any supplemental petitions are pending in the case."

B. Annual Permanency Planning Hearing

As long as a child is in foster care, subsequent permanency planning hearings must be held no later than 12 months after each preceding permanency planning hearing. MCL 712A.19a(1); MCR 3.976(B)(3).[10] See also 45 CFR 1355.20(a) and 45 CFR 1355.34(c)(2)(iii), which contain substantially similar language.

"The interval between permanency planning hearings is within the discretion of the court as appropriate to the circumstances of the case[.]" MCR 3.976(B)(3). However, the court must not cancel or delay a subsequent permanency planning hearing beyond the 12 month period, regardless of whether there is a petition for termination of parental rights or any other matters pending. MCL 712A.19a(1); MCR 3.976(B)(3).

[10] A hearing held under MCL 400.669(2) (requiring "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance [under the Young Adult Voluntary Foster Care Act (YAVFCA) not less than 1 time every 12 months[]") may be combined with a hearing held under MCL 712A.19a(1). Section 14.5(l) for additional information on the extension of guardianship assistance under MCL 400.665.

C. Combined Permanency Planning Hearing and Dispositional Review Hearing

If proper notice for a permanency planning hearing is provided, a permanency planning hearing may be combined with a dispositional review hearing if the combined hearings are held no later than the 12 months (where reasonable efforts are required) or 28 days (where reasonable efforts are not required) from the child's removal from the home or 12 months from the preceding permanency planning hearing.[11] MCL 712A.19a(1); MCL 712A.19c(1); MCR 3.976(B)(3).

The court must not cancel or delay a permanency planning hearing beyond the 12-month or 28-day period, regardless of whether there are any other pending matters. MCL 712A.19a(1); MCL 712A.19c(1).

D. Finalizing Court-Approved Permanency Plan

"The judicial determination to finalize the court-approved permanency plan must be made within the time limits prescribed in [MCR 3.976(B)(1)-(3)]." MCR 3.976(B)(4).

16.4 Notice

A. Generally

"Written notice of a permanency planning hearing must be given as provided in MCR 3.920 and MCR 3.921(B)(2)."[12] MCR 3.976(C).

The notice must state the purpose of the hearing and must indicate that further proceedings to terminate parental rights may result from the hearing. MCL 712A.19a(4); MCR 3.976(C). "The notice must inform the parties of their opportunity to participate in the hearing and that any information they wish to provide should be submitted in advance to the court, the agency, the lawyer-guardian ad litem for the child, or an attorney for one of the parties." MCR 3.976(C).

Written notice must be served on all individuals and entities entitled to notice at least 14 days before a permanency planning hearing. MCL 712A.19a(4); MCR 3.920(B)(5)(a)(i).

B. Parties Entitled to Notice

Written notice of the hearing must be served on all of the following:

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[11] See Chapter 15 for a detailed discussion of dispositional review hearings.

[12] See Section 5.2 for additional information on notices of hearings in child protective proceedings.

(1) the agency,[13]

(2) the child's parents (if parental rights have not been terminated),

(3) the child (if the child is 11 years of age or older),

(4) the child's guardian,[14]

(5) the child's foster parents or legal custodian,

(6) the child's preadoptive parents,

(7) the child's guardian ad litem,

(8) relative caregivers,

(9) "if the court knows or has reason to know the child is an Indian child, the child's tribe,"[15]

(10) "if the court knows or has reason to know the child is an Indian child and the parents, guardian, legal custodian, or tribe are unknown, to the Secretary of Interior,"[16]

(11) the attorney for the child, for each party (including a respondent-parent if parental rights have not been terminated, MCR 3.921(B)(2)(c)), and the prosecuting attorney (if the prosecuting attorney has appeared in the case),

(12) the noncustodial parent if he or she has requested notice at a hearing or in writing, and

(13) any other person the court may direct. MCL 712A.19a(4); MCR 3.921(B)(2); MCR 3.976(C).[17]

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[13]The agency must advise the child of the permanency planning hearing if the child is 11 years old or older. MCL 712A.19a(4).

[14] MCR 3.903(A)(11) defines a *guardian* to mean "a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or [MCL] 700.5205, by a court of another state under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202, or a juvenile guardian appointed pursuant to MCL 712A.19a or MCL 712A.19c."

[15] See Section 19.4 for additional information on notice requirements for cases involving an Indian child.

[16] See Section 19.4 for additional information on notice requirements for cases involving an Indian child.

[17] MCR 3.976(C) lists only the individuals who are permitted to participate in the hearing. Express reference to "notice" in MCR 3.976(C) refers to MCR 3.920 and MCR 3.921(B)(2).

C. Parties Entitled to Participate in Permanency Planning Hearing

The following parties are entitled to participate in a permanency planning hearing:

> (1) the child's parents, if parental rights have not been terminated,
>
> (2) the child who is of an appropriate age,
>
> (3) the child's guardian,[18]
>
> (4) the child's legal custodian,
>
> (5) the child's foster parents,
>
> (6), the child's preadoptive parents,
>
> (7) the child's relative caregivers, and
>
> (8) if the child is an Indian child, the Indian child's tribe. MCR 3.976(C).

16.5 Permanency Planning Hearing Procedures

MCR 3.976(D)(1) sets out the required procedures for permanency planning hearings:

> "Each permanency planning hearing must be conducted by a judge or a referee. Paper reviews, ex parte hearings, stipulated orders, or other actions that are not open to the participation of (a) the parents of the child, unless parental rights have been terminated; (b) the child, if of appropriate age; and (c) foster parents or preadoptive parents, if any, are not permanency planning hearings." See also 45 CFR 1355.20(a), which contains substantially similar language.

If the court receives a local foster care review board's report, it must include the report in the court's confidential social file. MCR 3.976(D)(3). The court must also make sure that all of the parties involved in the proceedings have an opportunity to review the report and file any objections before the court enters a dispositional order, dispositional review order, or permanency planning order. *Id.* "The court may at its discretion include recommendations from the report in its orders." *Id.*

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[18] MCR 3.903(A)(11) defines a *guardian* to mean "a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or [MCL] 700.5205, by a court of another state under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202, or a juvenile guardian appointed pursuant to MCL 712A.19a or MCL 712A.19c."

16.6 Rules of Evidence Applicable to Permanency Planning Hearings

MCR 3.976(D)(2) sets out the rules of evidence applicable to permanency planning hearings:

> "The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631.[19] At the permanency planning hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value. The court must consider any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent, child caring institution, or relative with whom the child is placed, in addition to any other evidence offered at the hearing.[20] The court shall obtain the child's views regarding the permanency plan in a manner appropriate to the child's age. The parties must be afforded an opportunity to examine and controvert written reports received and may be allowed to cross-examine individuals who made the reports when those individuals are reasonably available."

16.7 Court's Options at Permanency Planning Hearings

"At or before each permanency planning hearing, the court must determine whether the agency has made reasonable efforts to finalize the permanency plan." MCR 3.976(A). MCL 712A.19(12) permits reasonable efforts to finalize an alternate permanency plan and reasonable efforts at reunification to be made concurrently. See also 45 CFR 1356.21(b)(4).

"At the [permanency planning] hearing, the court must review the permanency plan for a child in foster care [and] . . . determine whether and, if applicable, when:

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[19] MCL 722.631 states "Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to this act. This section does not relieve a member of the clergy from reporting suspected child abuse or child neglect under [MCL 722.633] if that member of the clergy receives information concerning suspected child abuse or child neglect while acting in any other capacity listed under [MCL 722.633]." For a discussion of the abrogation of evidentiary privileges in child protective proceedings, see Section 11.3.

[20] See also MCL 712A.19a(12), which requires the court to consider any relevant information about the child, including "the appropriateness of parenting time."

> (1) the child may be returned to the parent, guardian, or legal custodian;
>
> (2) a petition to terminate parental rights should be filed;
>
> (3) the child may be placed in a legal guardianship;[21]
>
> (4) the child may be permanently placed with a fit and willing relative;[22] or
>
> (5) the child may be placed in another planned permanent living arrangement, but only in those cases where the agency has documented to the court a compelling reason for determining that it would not be in the best interests of the child to follow one of the options listed in subrules (1)-(4)." MCR 3.976(A). See also 45 CFR 1355.20(a), which contains substantially similar language.

Additionally, "[i]n a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court may issue orders affecting a party as necessary[until] . . . May 1, 2018." MCL 712A.2(i). For purposes of child protective proceedings, MCL 712A.2(i)(*ii*) defines *party* as "the petitioner, [DHHS], child, respondent, parent, guardian, or legal custodian, and any licensed child caring institution or child placing agency under contract with the [DHHS] to provide for a juvenile's care and supervision."

A. Order Child's Return to Parent, Guardian, or Legal Custodian

At a permanency planning hearing, the court must review the permanency plan for a child in foster care and decide whether the child should be returned to the parent, guardian, or legal custodian.[23] MCR 3.976(A)(1).

> "At the conclusion of a permanency planning hearing, the court must order the child returned home unless it determines that the return would cause a substantial risk of harm to the life, the physical health, or the mental well-being of the child." MCR 3.976(E)(2). See also MCL 712A.19a(5), which contains substantially similar language. In determining whether returning the child to the parent,

[21] See Section 4.6 for additional information on the court's jurisdiction following guardianship appointments.

[22] See Section 8.2(A) for a discussion of required procedures before placing a child in a relative's home.

[23] If the court determines that the child should be returned to the parent, guardian, or legal custodian, it must also determine when this will occur. MCR 3.976(A).

guardian, or legal custodian would cause substantial risk of harm to the child, the court must:

- "view the failure of the parent to substantially comply with the terms and conditions of the case service plan prepared under [MCL 712A.18f] as evidence that return of the child to his or her parent would cause a substantial risk of harm to the child's life, physical health, or mental well-being." MCL 712A.19a(5). See also MCR 3.976(E)(2), which contains substantially similar language.

- "any condition or circumstance of the child that may be evidence that a return to the parent would cause a substantial risk of harm to the child's life, physical health, or mental well-being." MCL 712A.19a(5); MCR 3.976(E)(2).

A parent's physical compliance with a permanency plan is not equivalent to a parent benefitting from the services to improve his or her parenting ability. *In re Gazella*, 264 Mich App 668, 676 (2005), superseded by statute on other grounds.[24] The Court of Appeals discussed "compliance" as it related to an *Adrianson* order[25] issued by the trial court "to give [the respondent-mother] one last chance to avoid termination[.]" Although not directly related to the compliance required by MCL 712A.19a, the Court's discussion provides some insight into what may be required under the statute:

> "'Compliance' could be interpreted as merely going through the motions physically; showing up for and sitting through counseling sessions, for example. However, it is not enough to merely go through the motions; a parent must benefit from the services offered so that he or she can improve parenting skills to the point where the children would no longer be at risk in the parent's custody. In other words, it is necessary, but not sufficient, to physically comply with the terms of a parent[-]agency agreement or case service plan. For example, attending parenting classes, but learning nothing from them and, therefore, not changing one's harmful parenting behaviors is of no benefit to the parent or child.

[24] See MCL 712A.19b(5) (courts must make an affirmative finding that terminating a parent's parental rights is in the best interests of a child).

[25] *In re Adrianson*, 105 Mich App 300 (1981). The Court found that *Adrianson* orders are no longer statutorily permissible because both MCL 712A.19b and MCR 3.977 require termination of parental rights once a court determines there are statutory grounds for termination. *In re Gazella*, 264 Mich at 673-674. For additional information, see Section 17.5.

> It could be argued that a parent complied with a case service plan that merely required attending parenting classes but was silent concerning the need for the parent to benefit from them. It is our opinion that such an interpretation would violate common sense and the spirit of the juvenile code, which is to protect children and rehabilitate parents whenever possible so that the parents will be able to provide a home for their children that is free of neglect or abuse." *In re Gazella*, 264 Mich App at 676.

B. Order Agency to Initiate Termination Proceedings

At a permanency planning hearing, the court must review the permanency plan for a child in foster care and may determine whether a petition to initiate termination of a parent's parental rights should be filed. MCR 3.976(A)(2).

"If the court determines at a permanency planning hearing that a child should not be returned to his or her parent, the court may order the agency to initiate proceedings to terminate parental rights." MCL 712A.19a(6). See also MCR 3.976(E)(3), which contains substantially similar language. Except as otherwise provided by statute or court rule, the court must order the agency to initiate termination of parental rights proceedings if a child has been in foster care for 15 of the last 22 months.[26] MCL 712A.19a(6); MCR 3.976(E)(3).

"If the court does not require the agency to initiate proceedings to terminate parental rights under [MCR 3.976(E)(3)], the court shall state on the record the reason or reasons for its decision." MCR 3.976(E)(3). "The court is not required to order the agency to initiate proceedings to terminate parental rights if 1 or more of the following apply:

> (a) The child is being cared for by relatives.
>
> (b) The case service plan documents a compelling reason for determining that filing a petition to terminate parental rights would not be in the best interest of the child. Compelling reasons for not filing a petition to terminate parental rights include, but are not limited to, all of the following:

[26] SCAO recommends the court set time guidelines for the DHHS to file the termination petition. See SCAO memorandum, *New Foster Care / Permanency Planning Laws* (2008 Public Acts 199-203), pp 3-4, at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Administrative-Memoranda/2008-05.pdf. See also 45 CFR 1356.21(i)(1)(i), which provides methods for calculating when to file the petition.

(*i*) Adoption is not the appropriate permanency goal for the child.

(*ii*) No grounds to file a petition to terminate parental rights exist.

(*iii*) The child is an unaccompanied refugee minor as defined in 45 CFR 400.11[1].[27]

(*iv*) There are international legal obligations or compelling foreign policy reasons that preclude terminating parental rights.

(c) The state has not provided the child's family, consistent with the time period in the case service plan, with the services the state considers necessary for the child's safe return to his or her home, if reasonable efforts are required." MCL 712A.19a(6). See also MCR 3.976(E)(3), 42 USC 675(5)(E) and 45 CFR 1356.21(i)(2), which contain substantially similar language.

See *In re Mason*, 486 Mich 142, 159-160 (2010), where the trial court committed clear error when it failed to consider the fact that a respondent-father had never been evaluated as a future placement or provided with services as required by MCL 712A.19a(6)(c):

> "Although the initial conditions of MCL 712A.19a(6) were met—the children could not yet be returned to respondent and they had been placed out of their home for more than 15 months—the court and the [DHHS] failed to consider that respondent had *never* been evaluated as a future placement or provided with services. . . . [The DHHS] disregarded respondent's statutory right to be provided services and, as a result, extended the time it would take him to comply with the service plan upon his release from prison—which was potentially imminent at the time of the termination hearing. The state failed to involve or evaluate respondent, but then terminated his rights, in part because of his failure to comply with the service plan, while giving him no opportunity to comply in the future. This constituted clear error. As [this Court] observed in *In re Rood*, [483 Mich 73, 119 (2009),] a court may not terminate parental rights on the basis of 'circumstances and missing information directly

[27] MCL 712A.19a(6)(b)(*iii*) incorrectly references 45 CFR 400.11. 45 CFR 400.111 is the correct citation, as reflected in MCR 3.976(E)(3).

> attributable to respondent's lack of meaningful prior participation.'" *In re Mason*, 486 Mich at 159-160.

If the Title IV-E agency files or joins a petition to terminate parental rights, "it must concurrently begin to identify, recruit, process, and approve a qualified adoptive family for the child." 45 CFR 1356.21(i)(3).

If the court orders the agency to initiate termination of parental rights proceedings, "the order must specify the date, or the time within which the petition must be filed." MCR 3.976(E)(3). "In either case, the petition must be filed no later than 28 days after the date the permanency planning hearing is concluded." *Id.*

C. Order Another Planned Permanent Living Arrangement (APPLA)

As an alternative to returning a child home, terminating parental rights, establishing a legal guardianship, or permanently placing a child with a fit and willing relative, the court may order "another planned permanent living arrangement[.]" MCR 3.976(A)(5). The agency must "document[] to the court a compelling reason for determining that it would not be in the best interests of the child to follow one of the options listed in [MCR 3.976(A)(1)-(4)]." MCR 3.976(A)(5). See also 45 CFR 1356.21(h)(3), which contains substantially similar language and also states:

> "Examples of a compelling reason for establishing such a permanency plan may include:
>
> > (i) The case of an older teen who specifically requests that emancipation be established as his/her permanency plan;
> >
> > (ii) The case of a parent and child who have a significant bond but the parent is unable to care for the child because of an emotional or physical disability and the child's foster parents have committed to raising him/her to the age of majority and to facilitate visitation with the disabled parent; or,
> >
> > (iii) the Tribe has identified another planned permanent living arrangement for the child."

"If the court does not return the child to the parent, guardian, or legal custodian and if the agency demonstrates that termination of parental rights is not in the best interests of the child, the court may[:]

> (a) continue the placement of the child in foster care for a limited period to be set by the court while the agency continues to make reasonable efforts to finalize the court-approved permanency plan for the child,
>
> (b) place the child with a fit and willing relative,[28]
>
> (c) upon a showing of compelling reasons, place the child in [another] planned permanent living arrangement, or
>
> (d) appoint a juvenile guardian for the child pursuant to MCL 712A.19a and MCR 3.979.[29]
>
> The court must articulate the factual basis for its determination in the court order adopting the permanency plan." MCR 3.976(E)(4).

See also MCL 712A.19a(7), which requires the court to order one of the following alternative placements if the agency demonstrates that termination is not in the child's best interests, or the court does not order the agency to initiate termination proceedings under MCL 712A.19a(6):

> "(a) If the court determines that other permanent placement is not possible, the child's placement in foster care shall continue for a limited period to be stated by the court.
>
> (b) If the court determines that it is in the child's best interests based upon compelling reasons, the child's placement in foster care may continue on a long-term basis.
>
> (c) Subject to [MCL 712A.19a(9)], if the court determines that it is in the child's best interests, appoint a guardian for the child, which guardianship may continue until the child is emancipated."

16.8 Juvenile Guardianship Placement

If the court does not return the child to the parent, guardian, or legal custodian, and the agency demonstrates that termination of parental rights is not in the child's best interests or the court does not order the agency to initiate termination of parental rights to the child under MCL

[28] See Section 8.2(A) for a discussion of required procedures before placing a child in a relative's home.

[29] See Section 16.8 for a detailed discussion of juvenile guardianship placements.

712A.19a(6), the court may appoint a juvenile guardian for the child if it determines the appointment is in the child's best interests.[30, 31] MCL 712A.19a(7)(c); MCR 3.979(A).

> **Note:** SCAO recommends that the court exercise the appointment of a juvenile guardian placement option *only* when adoption is not an appropriate goal.[32] Reasonable efforts to reunify a child and family may be made concurrently with reasonable efforts to place a child for adoption or with a legal guardian. MCL 712A.19(13).

During the process of appointing a juvenile guardian, the court must order the DHHS to:

> (1) Perform an investigation and file a written report for a review hearing under MCL 712A.19a(10);
>
> (2) Submit to the court within seven days a criminal record check and a central registry clearance of the residents in the home; and
>
> (3) Perform a home study and submit it to the court within 30 days[33] or submit a copy of a home study conducted within the last 365 days.[34] MCL 712A.19a(9); MCR 3.979(A)(1).
>
> > **Note:** If the child is in foster care, the court must continue the foster care placement and order the information required by MCR 3.979(A)(1) about the proposed juvenile guardian. MCR 3.979(A)(2).

In an effort to provide trial courts with a quick practical guide through the process of ordering juvenile guardianships, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys:Ordering a Juvenile Guardianship (MCR 3.979; MCL 712A.19a(7)(c); and MCL 712A.19c(2)*. This toolkit is accessible at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/CWSToolkit/Pages/Juvenile-Guardianship.aspx.

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[30] If the child is of Indian heritage, the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA) must be followed. See Chapter 19 for information on the ICWA.

[31] MCL 712A.19c governs the procedures for appointments of juvenile guardians *after* termination of parental rights. See Section 18.5(A) for additional information.

[32] See SCAO memorandum, *New Foster Care / Permanency Planning Laws* (2008 Public Acts 199-203), p 6, at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Administrative-Memoranda/2008-05.pdf.

[33] MCR 3.979(A)(1) states that the home study must be submitted to the court within 28 days.

[34] "If a home study has been performed within the immediately preceding 365 days, a copy of that home study shall be submitted to the court." MCL 712A.19a(9)(c).

A. Appointing Juvenile Guardian

MCR 3.979(B) describes the process by which a juvenile guardian is appointed:

> "After receiving the information ordered by the court under [MCR 3.979(A)(1)], and after finding that appointment of a juvenile guardian is in the child's best interests, the court may enter an order appointing a juvenile guardian. The order appointing a juvenile guardian shall be on a form approved by the state court administrator.[35] Within 7 days of receiving the information, the court shall enter an order appointing a juvenile guardian or schedule the matter for a hearing. A separate order shall be entered for each child.
>
> (1) *Acceptance of Appointment*. A juvenile guardian appointed by the court shall file an acceptance of appointment with the court on a form approved by the state court administrator.[36] The acceptance shall state, at a minimum, that the juvenile guardian accepts the appointment, submits to personal jurisdiction of the court, will not delegate the juvenile guardian's authority, and will perform required duties.
>
> (2) *Letters of Authority*. On the filing of the acceptance of appointment, the court shall issue letters of authority on a form approved by the state court administrator.[37] Any restriction or limitation of the powers of the juvenile guardian must be set forth in the letters of authority, including but not limited to, not moving the domicile of the child from the state of Michigan without court approval.
>
> (3) *Certification*. Certification of the letters of authority and a statement that on a given date the letters are in full force and effect may appear on the face of copies furnished to the juvenile guardian or interested persons.

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[35] See SCAO form JC 91, *Order Appointing Juvenile Guardian*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenileguardianship/jc91.pdf.

[36] See SCAO form JC 92, *Acceptance of Appointment (Juvenile Guardian)*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenileguardianship/jc92.pdf.

[37] See SCAO form JC 93, *Letters of Juvenile Guardianship*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenileguardianship/jc93.pdf.

> (4) *Notice*. Notice of a proceeding relating to the juvenile guardianship shall be delivered or mailed to the juvenile guardian by first-class mail at the juvenile guardian's address as listed in the court records and to his or her address as then known to the petitioner. Any notice mailed first class by the court to the juvenile guardian's last address on file shall be considered notice to the juvenile guardian."

B. Due Process

"It is axiomatic that a parent has a fundamental liberty interest in the care, custody, and management of his or her child[.]" *In re TK*, 306 Mich App 698, 706 (2014), citing *In re Rood*, 483 Mich 73, 91 (2009). As such, the court must comply with procedural and substantive due process when appointing a juvenile guardian. See *In re TK*, 306 Mich App at 706. However, because "the appointment of a guardian for a juvenile [under MCL 712A.19a(7)(c)] is not tantamount to a de facto termination of parental rights[,]" due process does not require DHHS "to prove statutory grounds for termination of parental rights [under MCL 712A.19b(3)] by clear and convincing evidence." *In re TK* 306 Mich App at 705-706.

"There are two types of due process: procedural and substantive." *Id.* at 706. "Procedural due process requires notice and a meaningful opportunity to be heard before an impartial decision-maker[,]" while "[t]he essence of a substantive due process claim is the arbitrary deprivation of liberty or property interests." *Id.* at 706, citing *AFT Mich v State*, 297 Mich App 597, 622 (2012). "Ultimately, due process requires fundamental fairness." *In re TK*, 306 Mich App at 706.

1. Procedural Due Process

"[T]he statutory provisions governing juvenile guardianship [do not] violate procedural due process principles." *In re TK*, 306 Mich App at 708. A court should consider three factors to determine what is required by procedural due process:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

> *In re TK*, 306 Mich App at 706-707, quoting *In re Brock*, 442 Mich 101, 111 (1993), in turn quoting *Mathews v Eldridge*, 424 US 319, 332, 334 (1976) (quotation marks omitted).

For purposes of juvenile guardianships, "the private interest involved is a parent's fundamental liberty interest in the care, custody, and management of [his or] her child[;]" . . . the applicable statutes and corresponding court rules indicate[] that the procedures employed in the appointment of a juvenile guardianship ensure that there will not be an erroneous deprivation of those interests[;]" and though each case may present other governmental interests, "the primary governmental interest is the welfare of the minor child." *In re TK*, 306 Mich App at 707-708 (finding no procedural due process violation because "[a] parent is given notice and an opportunity to be heard before the appointment of a [juvenile] guardian[,]" and "[t]he statutory scheme employs multiple safeguards to ensure that there is not an erroneous deprivation of a parent's liberty interest in caring for his or her child").

2. Substantive Due Process

Substantive due process in a juvenile guardianship proceeding requires that the appointment not arbitrarily deprive the respondent of liberty or property interests. *In re TK*, 306 Mich App at 708-709, (holding that the appointment did not arbitrarily deprive the respondent-mother of her interest in the minor child where the minor child suffered from post-traumatic stress syndrome related to sexual abuse by her father, was in therapy to address anger issues related to the respondent-mother's failure to protect her from the sexual abuse, flourished in her foster home, and the respondent- mother did not respond well to the minor child's needs).

C. Juvenile Guardian's Duties and Authority

MCR 3.979(E) describes a juvenile guardian's duties and authority:

> "A juvenile guardianship approved under these rules is authorized by the Juvenile Code and is distinct from a guardianship authorized under the Estates and Protected Individuals Code.[38] A juvenile guardian has all the powers and duties of a guardian set forth under [MCL 700.5215].[39]
>
> > (1) *Report of Juvenile Guardian*. A juvenile guardian shall file a written report annually within 56 days

after the anniversary of appointment and at other times as the court may order. Reports must be on a form approved by the state court administrator.[40] The juvenile guardian must serve the report on the persons listed in MCR 3.921.

(2) *Petition for Conservator*. At the time of appointing a juvenile guardian or during the period of the juvenile guardianship, the court shall determine whether there would be sufficient assets under the control of the juvenile guardian to require a conservatorship. If so, the court shall order the juvenile guardian to petition the probate court for a conservator pursuant to MCL 700.5401 *et seq*.

(3) *Address of Juvenile Guardian*. The juvenile guardian must keep the court informed in writing within 7 days of any change in the juvenile guardian's address.

(4) The juvenile guardian shall provide the court and interested persons with written notice within 14 days of the child's death."

D. Jurisdiction and Court's Responsibilities

Once a juvenile guardian is appointed, the court's jurisdiction over the guardianship continues until released by court order.[41] MCL 712A.19a(11); MCR 3.979(C)(1). The court must annually review a guardianship and may conduct additional reviews as it deems necessary or order the DHHS or a court employee to conduct an

[38] Although a juvenile guardian has all the same powers and duties of a guardian appointed under MCL 700.5215, the two guardianships differ in that a juvenile guardian is "intended to be the permanent placement for a child who cannot be returned home[,]" and a guardian appointed under MCL 700.5215 is typically intended to be "short term, due to a temporary inability of a parent to care for a child." SCAO memorandum, *New Foster Care / Permanency Planning Laws* (2008 Public Acts 199-203), p 4, at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Administrative-Memoranda/2008-05.pdf. See Section 4.6 for additional information on guardianship appointments under MCL 700.5215.

[39] See also MCL 712A.19a(8), which contains substantially similar language.

[40] See SCAO form JC 94, *Annual Report of Juvenile Guardian on Condition of Child*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenileguardianship/jc94.pdf.

[41] If the Department of Health and Human Services (DHHS) provides the court with notice that it is extending guardianship assistance to a youth beyond the age of 18 under the Young Adult Voluntary Foster Care Act (YAVFCA), MCL 400.665 *et seq*, the court must "retain [its] jurisdiction over the guardianship until that youth no longer receives extended guardianship assistance." MCR 3.979(C)(1). See Section 4.9 for a detailed discussion of a court's jurisdiction following juvenile guardianship appointments, and Section 14.5(I) for additional information on extension of guardianship assistance under MCL 400.665.

investigation and file a written report.[42] MCL 712A.19a(11); MCR 3.979(D)(1)-(2).

> **Note:** "If extended guardianship assistance has been provided to a youth pursuant to MCL 400.665,"[43] MCR 3.979(D)(1)(b) requires:
>
> - "the court [to] conduct an annual review hearing at least once every 12 months after the youth's eighteenth birthday to determine that the guardianship meets the criteria under MCL 400.667[;][44]
> - [n]otice of the hearing [to] be sent to the guardian and the youth as provided in MCR 3.920(D)(1)[; and]
> - [t]he court [to] issue an order to support its determination and serve the order on the [DHHS], the guardian, and the youth." (Bullets added).

The court's jurisdiction over the child pursuant to MCL 712A.2(b) terminates once the juvenile guardian is appointed and a review hearing is conducted under MCR 3.975 (when parental rights to the child have not been terminated) or MCR 3.978 (when parental rights to the child have been terminated). MCL 712A.19a(10); MCR 3.979(C)(1). But see MCL 712A.2a(4), which requires the court to retain its jurisdiction over a youth 16 years of age or older who was appointed a juvenile guardian under MCL 712A.19a until the DHHS determines whether the youth[45] is eligible to receive extended guardianship assistance under the Young Adult Voluntary Foster Care Act (YAVFCA), MCL 400.641 *et seq*.[46] If the DHHS determined the youth was eligible for extended guardianship assistance under the YAVFCA, the court must retain jurisdiction until the youth no longer receives the guardianship assistance.[47] See also MCL 400.669(1), which requires the court to retain its jurisdiction "of a youth

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[42] See Section 4.9(B) for a detailed discussion of review hearings following juvenile guardianship appointments, and Section 4.9(C) for a detailed discussion of ordering an investigation of juvenile guardianships.

[43] See Section 14.5(I) for additional information on the extension of guardianship assistance under MCL 400.665.

[44] See also MCL 400.669(2), which requires "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance not less than 1 time every 12 months." "A hearing held under [MCL 400.669(2)] may be combined with a hearing held under [MCL 712A.19(2)] to [MCL 712A.19(4)], . . . [MCL 712A.19a(1)], . . . or [MCL 712A.19c(1)] . . . ." MCL 400.669(2).

[45] For purposes of the Juvenile Code, the term *youth* "applies to a person 18 years of age or older concerning whom proceedings are commenced in the court under [MCL 712A.2] and over whom the court has continuing jurisdiction under [MCL 712A.2a(1)-(6)]." MCL 712A.2a(8).

[46] The DHHS must determine the youth's eligibility to receive extended guardianship assistance under the YAVFCA "within 120 days of the youth's eighteenth birthday." MCL 712A.2a(4).

receiving, or a youth for whom the [DHHS] is determining eligibility for receiving, extended guardianship assistance until that youth no longer receives guardianship assistance."

Unless the court releases the child sooner, the appointment of a lawyer-guardian ad litem terminates once the court's jurisdiction over the child under MCL 712A.2(b) terminates. MCR 3.979(C)(3). However, if warranted, the court may reappoint the lawyer-guardian ad litem or appoint a new lawyer-guardian ad litem once a juvenile guardian is appointed.[48] *Id.*

E. Revocation of Juvenile Guardianship

On its own motion or upon petition from the DHHS or the child's lawyer guardian ad litem, the court may[49] hold a hearing to determine whether to revoke a juvenile guardianship.[50] MCL 712A.19a(13); MCR 3.979(F)(1)(a).

After notice and a hearing on a petition to revoke a juvenile guardianship, the court must enter an order to revoke or terminate a juvenile guardianship if it finds:

> (1) by a preponderance of the evidence the continuation of the juvenile guardianship is not in the child's best interests;
>
> (2) it is contrary to the child's welfare to be placed in or remain in the juvenile guardian's home; and
>
> (3) reasonable efforts were made to prevent removal. MCR 3.979(F)(5). See also MCL 712A.19a(15).

Upon entry of the revocation or termination order, the child must be placed under the care and supervision of the DHHS.[51] MCR 3.979(F)(5). See also MCL 712A.19a(15), which requires the court to either "appoint a successor [juvenile] guardian or restore temporary legal custody to the [DHHS]." Additionally, the court's jurisdiction over the child under MCL 712A.2(b) is reinstated under the previous child protective proceeding. MCR 3.979(F)(5).

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[47] See Section 4.6 for a discussion of juvenile guardianship appointments, and Section 16.9 for a discussion of the Young Adult Voluntary Foster Care Act (YAVFCA).

[48] See Section 7.9 for a detailed discussion of a lawyer-guardian ad litem's powers and duties.

[49] MCR 3.979(F)(1)(a) *requires* the court to hold this hearing; MCL 712A.19a(13) states that the court *may* hold this hearing.

[50] See Section 4.9(F) for a detailed discussion of revoking a juvenile guardianship.

[51] See SCAO form JC 101, *Order Regarding Revocation of Juvenile Guardianship*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenileguardianship/jc101.pdf.

F. Termination of Juvenile Guardianship

On petition from the juvenile guardian or other interested person, the court may hold a hearing to determine whether to terminate the juvenile guardianship.[52] MCL 712A.19a(14); MCR 3.979(F)(1)(b).

> **Note:** A request to terminate a guardianship may include a request for appointment of a successor guardian. MCL 712A.19a(14); MCR 3.979(F)(1)(b).

If, after notice and a hearing on the petition to terminate a juvenile guardianship, the court finds by a preponderance of the evidence that termination is in the child's best interests, the court must either:

> (1) proceed under MCR 3.979(F)(5) if there is no successor,[53] or
>
> (2) terminate the appointment if there is a successor and proceed with an investigation and the appointment of a successor juvenile guardian in accordance with MCR 3.979(B).[54] MCR 3.979(F)(6). See also MCL 712A.19a(15).

The court's jurisdiction over a juvenile guardianship continues with the appointment of a successor juvenile guardian. MCR 3.979(F)(6)(b).

16.9 Young Adult Voluntary Foster Care Act (YAVFCA)

The Young Adult Voluntary Foster Care Act (YAVFCA) "authorize[s] the Department of [Health and] Human Services [(DHHS)] to provide foster care services, adoption subsidy support,[55] and guardianship assistance[56] for eligible youth until they reach age 21[.]" SCAO Administrative Memorandum 2012-04, p 1, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Administrative-Memoranda/2012-04.pdf.

"[T]he [YAVFCA] . . . offers 18-, 19-[,] and 20-year-olds who were in state-supervised foster care at the age of 18 or older the option of living in a licensed foster family home, a child care institution[,] or an approved

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[52] See Section 4.9(F) for a detailed discussion of terminating a juvenile guardianship.

[53] The court's jurisdiction over the child under MCL 712A.2(b) is reinstated under the previous child protective proceeding. MCR 3.979(F)(5); MCR 3.979(F)(6)(a).

[54] See SCAO form JC 100, *Order Following Hearing on Petition to Terminate Appointment of Juvenile Guardian*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenileguardianship/jc100.pdf.

[55] See the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 10, for a detailed discussion of extending adoption subsidy agreements and medical subsidy agreements under the YAVFCA.

[56] See Section 14.5(I) for a detailed discussion of extending guardianship assistance under the YAVFCA.

setting in which the individual is living independently, until age 21." DHHS's Children's Foster Care Manual (FOM), *Foster Care - Young Adult Voluntary Foster Care FOM 722-16*, p 1, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/722-16.pdf. See also MCL 722.111(1)(o) (child care organizations), which defines a *minor child* under MCL 722.111(1)(o)(*ii*) to mean "[a] person who is a resident in a child caring institution, foster family home, or foster family group home, who is at least 18 but less than 21 years of age, and who meets the requirements of the [YAVFCA][,]" and under MCL 722.111(1)(o)(*iv*) to mean "[a] person 18 years of age of older who is placed in an unlicensed residence under [MCL 722.115(4)[57]][.]"

"[The] SCAO encourages courts to discuss the youth's options for voluntary foster care at review hearings beginning when the youth is 17 years old." SCAO Administrative Memorandum 2012-04, *supra* at p 2. "[The] DHHS] policy recommends that the YAVFC[A] program be discussed with the youth and considered by the court as a potential component of the youth's transition plan **prior** to the court closing the [child abuse/neglect (NA)] case." *Id.* at p 3.

A. Extension of Foster Care Services

The YAVFCA was enacted to extend foster care services to children who are no longer under the court's jurisdiction. See SCAO Administrative Memorandum 2012-04, *supra* at p 2. It "does not replace other existing law and policy allowing foster care to continue for foster youth until age 20." *Id.* Rather, "[a] youth may **not** participate in [the] YAVFC[A] until [the] family/juvenile court jurisdiction is dismissed." *Foster Care - Young Adult Voluntary Foster Care FOM 722-16*, *supra* at p 6.

> **Note:** MCL 712A.2a(1) permits a court that has exercised personal jurisdiction over a youth under MCL 712A.2(b) before the youth's 18th birthday, to continue its jurisdiction over the youth until the youth reaches 20 years of age unless the court terminates jurisdiction sooner. If the court terminates its jurisdiction over the youth[58] and "the [DHHS] files a report with the court under . . . MCL 400.655, the court shall determine whether it is in the youth's best interests to continue in

[57] MCL 722.115(4) permits the DHHS to "authorize a licensed child placing agency or an approved governmental unit to place a child who is at least [18] but less than 21 years of age [and who meets the requirements of the YAVFCA] in his or her own unlicensed residence, or in the unlicensed residence of an adult who has no supervisory responsibility for the child, if a child placing agency or governmental unit retains supervisory responsibility for the child."

[58] The YAVFCA defines a *youth* as "an individual who is at least 18 years of age but less than 21 years of age." MCL 400.643(c).

> voluntary foster care within 21 days of the filing of the report."[59] MCL 712A.2a(2).
>
> MCL 400.203(1) allows a child who has been committed to the Michigan Children's Institute (MCI) to remain a state ward until his or her 19th birthday, "unless the superintendent or the [DHHS] discharges the child sooner as provided in [MCL 400.208] or [MCL 400.209] or if the child is at least 18 years of age but less than 21 years of age and is participating in extended foster care services as described in [MCL 400.651]. MCL 400.203(1).
>
> MCL 722.111(1)(o)(*iii*) (governing child care organizations) permits a child who was placed in a foster home or foster care facility before his or her 18th birthday to continue placement in the foster home or foster care facility after the child's 18th birthday.

If the court terminates its jurisdiction over the youth, the YAVFCA "allow[s] eligible youth between [the] ages [of] 18 and 21 (whose child abuse/neglect (NA) court file closed) to sign a voluntary agreement that will enable them to receive services until [the] age [of] 21." SCAO Administrative Memorandum 2012-04, *supra* at p 2.

B. Eligibility for YAVFCA

Under the YAVFCA, the DHHS may provide extended foster care services to a youth who meets the eligibility conditions set out under MCL 400.649 after the youth signs a voluntary foster care agreement.[60] MCL 400.653.

"The voluntary agreement may not be signed until the youth reaches 18 years old **and** the court has terminated jurisdiction of the [child abuse/neglect (NA)] court case." SCAO Administrative Memorandum 2012-04, *supra* at p 2.

1. Eligibility Conditions

Under MCL 400.649, the youth must meet one of the following eligibility conditions to be eligible for services under the YAVFCA:

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[59] "A hearing is not required under this subsection, but may be held on the court's own motion or at the request of the youth or the [DHHS]." MCL 712A.2a(2). See Section 16.9(E) for a detailed discussion of the court procedure.

[60] "The [DHHS] shall implement the [YAVFCA] in accordance with the state's approved [T]itle IV-E state plan." MCL 400.645.

> "(a) The youth is completing secondary education or a program leading to an equivalent credential.
>
> (b) The youth is enrolled in an institution that provides postsecondary or vocational education.
>
> (c) The youth is participating in a program or activity designed to promote employment or remove barriers to employment.
>
> (d) The youth is employed for at least 80 hours per month.
>
> (e) The youth is incapable of doing any part of the activities in subdivisions (a) to (d) due to a medical condition. This assertion of incapacity must be supported by regularly updated information in the youth's case plan."

2. Voluntary Foster Care Agreement

The DHHS and an eligible youth choosing to participate in the extended foster care services must sign a voluntary foster care agreement that includes, at a minimum, all of the following information:

> "(a) The obligation for the youth to continue to meet the conditions for eligibility described in [MCL 400.649] for the duration of the voluntary foster care agreement.
>
> (b) Any obligation considered necessary by the [DHHS] for the youth to continue to receive extended foster care services.
>
> (c) Any obligation considered necessary by the [DHHS] to facilitate the youth's continued success in the program.
>
> (d) Termination of a voluntary foster care agreement and program participation as described in [MCL 400.663].
>
> (e) The voluntary nature of the youth's participation in receiving extended foster care services."[61] MCL 400.651.

[61] See DHHS form DHS 1297, *Young Adult Voluntary Foster Care Agreement*, at http://www.michigan.gov/documents/dhs/DHS-1297_381251_7.pdf.

C. YAVFCA Availability

"If the youth meets the eligibility requirements [set out in MCL 400.649] and maintains compliance, the youth may enter or reenter the YAVFCA program at any time between the dismissal of the original [child abuse/neglect (NA)] court case and the age of 21." SCAO Administrative Memorandum 2012-04, *supra* at p 2. See also MCL 400.647, which permits "[a] youth who exited foster care after reaching 18 years of age but before reaching 21 years of age [to] reenter foster care and receive extended foster care services."

D. Ex Parte Petition

"Within 150 days after the signing of a voluntary foster care agreement, the [DHHS] shall file with the family division of the circuit court, in the county where the youth resides, an ex parte petition requesting the court's determination that continuing in voluntary foster care is in the youth's best interests." MCR 3.616(E). See also MCL 400.655, which contains substantially similar language; MCL 712A.2a, the Juvenile Code provision requiring a court to make the best interests determination.

1. Petition Contents

"The petition shall contain

> (a) the youth's name, date of birth, race, gender, and current address;
>
> (b) the name, date of birth, and residence address of the youth's parents or legal custodian (if parental rights have not been terminated);
>
> (c) the name and address of the youth's foster parent or parents;
>
> (d) a statement that the youth has been notified of the right to request a hearing regarding continuing in foster care;
>
> (e) a showing that jurisdiction of a court over the youth's child protective proceeding has been terminated, including the name of the court and the date jurisdiction was terminated; and
>
> (f) any other information the [DHHS], parent or legal custodian, youth, or foster parent wants the court to consider." MCR 3.616(E)(1).

The DHHS must prepare the ex parte petition on a form approved by the state court administrator. MCR 3.616(D). See SCAO form ccfd 20, *Ex Parte Petition Regarding Voluntary Foster Care Agreement*, available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/youngadultfostercare/ccfd20.pdf.

2. Supporting Documentation

"The petition shall be accompanied by a written report prepared pursuant to MCL 400.655 and a copy of the signed voluntary foster care agreement." MCR 3.616(E)(2).

The written report prepared under MCL 400.655 must contain all of the following information:

> "(a) The youth's name, date of birth, race, gender, and current address.
>
> (b) A statement of facts that supports the voluntary foster care agreement and includes both of the following:
>
> > (*i*) The reasonable efforts made to achieve permanency for the youth.
> >
> > (*ii*) The reasons why it remains in the youth's best interests to continue in voluntary foster care.
>
> (c) A copy of the signed voluntary foster care agreement.
>
> (d) Any other information the [DHHS] or the youth wants the court to consider."

3. Service

"The [DHHS] shall serve the petition on

> (a) the youth; and
>
> (b) the foster parent or parents, if any." MCR 3.616(E)(3).

4. Court Fees

A party is not required to pay a fee for filing an ex parte petition requesting an extension of foster care services under the YAVFCA. See MCL 600.2529(8).

E. Court Procedure

"Upon the filing of a petition under [MCR 3.616], the family division of the circuit court has jurisdiction to review an agreement for the voluntary extension of foster care services after age 18." MCR 3.616(B). See also MCL 400.657, which also extends jurisdiction to the court "to review the voluntary foster care agreement signed by the [DHHS] and the youth in [MCL 400.651]."

Once the DHHS files a report under MCL 400.655, "the court shall open a young adult voluntary foster care case for the purpose of determining whether continuing in voluntary foster care is in the youth's best interests."[62] MCL 400.657. See also MCR 3.616(C), which also requires the court to open a voluntary foster care case following the DHHS's filing of an ex parte petition under MCR 3.616(E).

1. Judicial Determination

"The court shall review the petition, report, and voluntary foster care agreement filed pursuant to [MCR 3.616](E), and then make a determination whether continuing in voluntary foster care is in the best interests of the youth."[63] MCR 3.616(F). See also MCL 712A.2a(2), which also requires the court, after receiving a written report from the DHHS, to determine whether "it is in the youth's best interests to continue in voluntary foster care[.]"

"Following the court's determination in [MCL 400.657], the court shall close the young adult voluntary foster care case and the [DHHS] shall provide extended foster care services to the youth[.]"[64] MCL 400.659. See also MCR 3.616(C), which also requires the court to close the young adult voluntary foster care case "following the issuance of the court's determination under [MCR 3.616](F)."

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[62] "Upon receipt of a[n ex parte] petition, the court will open a case using [the] case code 'VF.'" SCAO Administrative Memorandum 2012-04, *supra* at p 3.

[63] "Federal guidelines require that there be a judicial determination that remaining in foster care is in the youth's best interests if [T]itle IV-E foster care maintenance payments are to continue beyond the first 180 days of the voluntary placement." DHHS's Children's Foster Care Manual (FOM), *Young Adult Voluntary Foster Care (YAVFC) Funding and Payments FOM 902-21*, p 2, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/902-21.pdf. "If the order is not signed by the judge or referee within 180 calendar days of the date the youth signed the DHS-1297, YAVFC Agreement, the youth is no longer eligible for the YAVFC program[.]" *Young Adult Voluntary Foster Care (YAVFC) Funding and Payments FOM 902-21*, *supra* at p 2.

[64] "[The] DHHS] retains full responsibility for the YAVFC case[.]" SCAO Administrative Memorandum 2012-04, *supra* at p 3.

a. Findings

"If the court finds that the voluntary foster care agreement is in the youth's best interests, the court shall issue an order containing individualized findings to support its determinations made under [MCL 712A.2a(2)] and close the case in accordance with . . . MCL 400.659." MCL 712A.2a(3).

The court's findings must be "based on the [DHHS's] written report and other information filed with the court." MCR 3.616(F)(1). See also MCL 712A.2a(3). The court must also submit its judicial determination on a form approved by the state court administrator. MCR 3.616(D). See SCAO form ccfd 21, *Order Regarding Voluntary Foster Care Agreement*, available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/youngadultfostercare/ccfd21.pdf.

b. Timing

Within 21 days of the DHHS filing the ex parte petition, the court must sign and date an order "that includes its determination and individualized findings that support its determination."[65] MCR 3.616(F)(1). See also MCL 400.657 and MCL 712A.2a(2), which contain the same 21-day requirement.

c. Service of Court Order

"The court shall serve the order on

(a) the [DHHS];

(b) the youth; and

(c) the foster parent or parents, if any." MCR 3.616(F)(2).

2. Formal Hearing Not Required

"The court's review of the petition and the entry of the order **do not** need to be conducted at a formal hearing on the record. It is sufficient that a judicial officer completes the review and authorization administratively ('paper review')." SCAO

[65] "If the best interests determination is not made within 21 days, the youth will not be eligible for Title IV-E funding[,] and [the~~]~~ DHHS] will cancel the agreement." SCAO Administrative Memorandum 2012-04, *supra* at p 3.

Administrative Memorandum 2012-04, *supra* at p 3. See also MCL 712A.2a(2), which states, "A hearing is not required under [MCL 712A.2a(2)], but may be held on the court's own motion or at the request of the youth or the [DHHS]."

F. Confidentiality of Records

"The [DHHS] and the youth are entitled to access to the records contained in the [youth's young adult voluntary foster care] file, but otherwise, the file is confidential." MCR 3.616(G).

G. Termination of Extended Foster Care Services

"A youth may choose to terminate the voluntary foster care agreement and stop receiving extended foster care services at any time." MCL 400.663(1). "If, at any time, the [DHHS] determines that the youth is not in compliance with the voluntary foster care agreement or any program requirements,[66] the [DHHS] may terminate the voluntary foster care agreement with the youth and stop providing extended foster care services to the youth."[67] MCL 400.663(2).

[66] "The [DHHS] shall conduct periodic case reviews not less than once every 180 days to address the status of the youth's safety, continuing necessity and appropriateness of placement, extent of compliance with the case plan, and projected date by which the youth may no longer require extended foster care service." MCL 400.661.

[67] "The [DHHS] shall provide written or electronic notice to the youth regarding termination of the voluntary foster care agreement and the youth's participation in the program." MCL 400.663(2).

Chapter 17: Hearings on Termination of Parental Rights

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In this chapter. . .

This chapter sets out the applicable procedures, evidentiary standards, and statutory bases for terminating a parent's parental rights to a child. Termination of a parent's parental rights may be considered at an initial dispositional hearing or a hearing on a supplemental petition. In either situation, the petitioner must establish a statutory basis for terminating a parent's parental rights, and the court must determine whether terminating the parent's parental rights is in the child's best interests.

In an effort to provide trial courts with a quick practical guide through the process of terminating parental rights, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys: Termination of Parental Rights*.

17.1 Request for Termination of Parental Rights

A request for termination of parental rights must be made in an original, amended,[1] or supplemental petition.[2] MCR 3.977(A)(2).[3] If a petition or an amended petition fails to request the termination of parental rights, a subsequent order terminating parental rights must be set aside. *In re SLH*, 277 Mich App 662, 674 (2008). See Section 7.3(C) for a detailed discussion of petitions requesting termination of parental rights.

Only individuals or entities granted standing under a statute, court rule, or case law may participate in proceedings to terminate parental rights. *In re Foster (Catherine)*, 226 Mich App 348, 357-359 (1997). MCL 712A.19b(1) and MCR 3.977(A)(2) allow the following individuals or entities to petition the court to terminate parental rights:

- the agency, which means the "public or private organization, institution, or facility responsible pursuant to court order or contractual arrangement for the care and supervision of [the] child, MCR 3.903(C)(1);
- the child;
- the child's guardian, legal custodian, or representative;
- a concerned person;[4]
- the state children's ombudsman; or

[1] For purposes of child protective proceedings, "'[a]mended petition' means a petition filed to correct or add information to an original petition, as defined in [MCR 3.903(A)(20)], after it has been authorized, but before it is adjudicated." MCR 3.903(C)(2). Note, that MCR 3.903(C)(2) mistakenly references to MCR 3.903(A)(21) for its definition of the term *petition*, but the term is actually defined in MCR 3.903(A)(20).

[2] For purposes of child protective proceedings, "'[s]upplemental petition' means: (a) a written allegation, verified in the manner provided in MCR 2.114(B), that a parent, for whom a petition was authorized, has committed an additional offense since the adjudication of the petition, or (b) a written allegation, verified in the manner provided in MCR 2.114(B), that a nonrespondent parent is being added as an additional respondent in a case in which an original petition has been authorized and adjudicated against the other parent under MCR 3.971 or MCR 3.972, or (c) a written allegation, verified in the manner provided in MCR 2.114(B), that requests the court terminate parental rights of a parent or parents under MCR 3.977(F) or MCR 3.977(H)." MCR 3.903(C)(13). MCR 3.903(C)(8) defines a *nonrespondent parent* as "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)."

[3] "[MCR 3.977] applies to all proceedings in which termination of parental rights is sought. Proceedings for termination of parental rights involving an Indian child are governed by 25 USC 1912 in addition to this rule." MCR 3.977(A)(1). MCL 712B.9 also provides proceedings for termination of parental rights involving an Indian child. See Chapter 19 for special procedures applicable to cases involving Indian children.

[4] MCL 712A.19b(6) defines a *concerned person* as "a foster parent with whom the child is living or has lived who has specific knowledge of behavior by the parent constituting grounds for termination under [MCL 712A.19b](3)(b) or [MCL 712A.19b(3)](g) and who has contacted the [DHHS], the prosecuting attorney, the child's attorney, and the child's guardian ad litem, if any, and is satisfied that none of these persons intend to file a petition [to terminate parental rights]."

- the prosecuting attorney regardless of whether he or she is representing or acting as a legal consultant to the agency or any other party.

The parties in a child protective proceeding include the "petitioner, child, respondent,[5] and parent, guardian, or legal custodian[.]" MCR 3.903(A)(19)(b).

> **Note:** "'Parent' means the mother, the father as defined in MCR 3.903(A)(7), or both, of the minor. It also includes the term 'parent' as defined in MCR 3.002(20)."[6] MCR 3.903(A)(18). MCR 3.002(20) defines an Indian child's *parent* as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the putative father if paternity has not been acknowledged or established."
>
> "'Guardian' means a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or [MCL] 700.5205, by a court of another state under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202, or a juvenile guardian appointed pursuant to MCL 712A.19a or MCL 712A.19c." MCR 3.903(A)(11).
>
> "'Legal Custodian' means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. It also includes the term 'Indian custodian' as defined in MCR 3.002(15)."[7] MCR 3.903(A)(14). An *Indian custodian* is "any Indian person who has custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody, and control have been transferred by the child's parent." MCR 3.002(15).

The court must give "[h]earings on petitions seeking termination of parental rights . . . the highest possible priority consistent with the orderly conduct of the court's caseload." MCR 3.977(C)(2).

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[5] MCR 3.977(B) limits the definition of *respondent* for termination of parental rights hearings to only include the child's natural or adoptive mother and the child's father as defined by MCR 3.903(A)(7). It does not include "other persons to whom legal custody has been given by court order, persons who are acting in the place of the mother or father, or other persons responsible for the control, care, and welfare of the child." MCR 3.977(B). See Section 6.2 for a detailed discussion of legal fathers under MCR 3.903(A)(7).

[6] Formerly MCR 3.002(10).

[7] Formerly MCR 3.002(7).

The court cannot consider terminating a respondent-parent's parental rights and placing the child in the permanent custody of the court unless it has first established jurisdiction over the child under MCL 712A.2(b).[8] *In re Taurus F*, 415 Mich 512, 526 (1982). See also MCR 3.977(E)(2) (requiring the court to assume jurisdiction over a child under MCL 712A.2(b) before ordering termination at an initial dispositional hearing); MCR 3.977(F) (allowing the court to take action on a supplemental petition seeking termination if the child is "already within the jurisdiction of the court" for another reason); MCR 3.977(H) (allowing the court to take action on a supplemental petition seeking termination if "the child is within the jurisdiction of the court[]").

In addition, "due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship." *In re Sanders*, 495 Mich 394, 422 (2014).[9] Accordingly, "all parents 'are constitutionally entitled to a hearing on their fitness before their children are removed from their custody.'" *Id.* at 412, quoting *Stanley v Illinois*, 405 US 645, 658 (1972) (concluding that the one-parent doctrine[10] violated the nonadjudicated parent's constitutional due process rights "[b]ecause [it] allow[ed] the court to deprive a parent of th[e] fundamental right [to the care, custody and control of his or her children] without any finding that he or she [was] unfit"). "[N]either the admissions made by [the adjudicated parent] nor [the unadjudicated parent's] failure to object to those admissions constituted an adjudication of [the unadjudicated parent's] fitness[.]" *In re SJ Temples*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2015 (Docket No. 323246)[11] (finding that the trial court violated the unadjudicated parent's "due process rights by subjecting him to dispositional orders without first adjudicating him as unfit[]").

A. No Right to Jury at Disposition

"The right to a jury in a [child protective] proceeding exists only at the trial." MCR 3.911(A). However, there is no right to have a jury determine whether to terminate parental rights. MCR 3.977(A)(3). See also *In re AMAC*, 269 Mich App 533, 537 (2006), where the Court of Appeals stated, "Unlike the adjudicative hearing, at the initial dispositional hearing the respondent is not entitled to a jury determination of the facts[.]"[12]

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[8] See Section 4.3 for a summary of the statutory bases for personal jurisdiction.

[9] For additional information on the procedural due process rights of the nonrespondent parent, see Section 4.3(E)(2).

[10] The one-parent doctrine permitted the court to "enter dispositional orders affecting parental rights of *both* parents" once "jurisdiction [was] established by adjudication of only *one* parent." *In re Sanders*, 495 Mich at 407.

[11] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

B. Suspension of Parenting Time

"If a petition to terminate parental rights to a child is filed, the court may suspend parenting time for a parent who is a subject of the petition." MCL 712A.19b(4); MCR 3.977(D).

17.2 Termination of Parental Rights at Initial Dispositional Hearing

The court may enter an order terminating parental rights at the initial dispositional hearing pursuant to a request in an original or amended petition.[13] MCR 3.977(E)(1). See also MCL 712A.19b(4). If an original or amended petition does not request termination, an order terminating parental rights must not be entered. See *In re SLH*, 277 Mich App 662 (2008) ("[a]bsent . . . a written request [for termination in the petition or amended petition], the . . . order terminating respondent's parental rights . . . must be set aside[]").[14]

> **Note:** Certain serious circumstances require the DHHS to file a petition requesting termination of parental rights at the initial disposition hearing. See MCL 722.638(1)-(2).[15]

MCR 3.977(E) sets out the procedural requirements for termination of parental rights at an initial dispositional hearing:

> "The court shall order termination of the parental rights of a respondent at the initial dispositional hearing held pursuant to MCR 3.973, and shall order that additional efforts for reunification of the child with the respondent shall not be made, if
>
> > (1) the original, or amended, petition contains a request for termination;

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[12] See Section 17.2 for a detailed discussion of termination of parental rights at an initial disposition hearing.

[13] For purposes of child protective proceedings, "'[a]mended petition' means a petition filed to correct or add information to an original petition, as defined in [MCR 3.903(A)(20)], after it has been authorized, but before it is adjudicated." MCR 3.903(C)(2). Note, that MCR 3.903(C)(2) mistakenly references to MCR 3.903(A)(21) for its definition of the term *petition*, but the term is actually defined in MCR 3.903(A)(20). See SCAO form JC 63, *Order Following Hearing to Terminate Parental Rights*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc63.pdf.

[14] In *In re SLH*, 277 Mich App 662, the Court of Appeals also found other reasons that supported setting aside the order terminating the respondent-father's parental rights. Those other reasons are independent of and unrelated to the requirement that the petition contain a request for termination.

[15] See Section 7.3(A) for a detailed discussion of the circumstances that require the DHHS to file a petition for termination of parental rights at an initial dispositional hearing.

(2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;

(3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:

(a) are true, and

(b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a)[-](b), [or MCL 712A.19b(3)](d)[-](n);

(4) termination of parental rights is in the child's best interests."

17.3 Termination of Parental Rights on Basis of New or Different Circumstances

"The court may take action on a supplemental petition[16] that seeks to terminate the parental rights of a respondent[17] over a child already within the jurisdiction of the court on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction." MCR 3.977(F).

"The court must order termination of the parental rights of a respondent, and must order that additional efforts for reunification of the child with the respondent must not be made,[18] if

[16] For purposes of child protective proceedings, "'[s]upplemental petition' means: (a) a written allegation, verified in the manner provided in MCR 2.114(B), that a parent, for whom a petition was authorized, has committed an additional offense since the adjudication of the petition, or (b) a written allegation, verified in the manner provided in MCR 2.114(B), that a nonrespondent parent is being added as an additional respondent in a case in which an original petition has been authorized and adjudicated against the other parent under MCR 3.971 or MCR 3.972, or (c) a written allegation, verified in the manner provided in MCR 2.114(B), that requests the court terminate parental rights of a parent or parents under MCR 3.977(F) or MCR 3.977(H)." MCR 3.903(C)(13). MCR 3.903(C)(8) defines a *nonrespondent parent* as "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)."

[17] MCR 3.977(B) limits the definition of respondent for termination of parental rights hearings to only include the child's natural or adoptive mother and the child's father as defined by MCR 3.903(A)(7). It does not include "other persons to whom legal custody has been given by court order, persons who are acting in the place of the mother or father, or other persons responsible for the control, care, and welfare of the child." MCR 3.977(B). See Section 6.2 for a detailed discussion of legal fathers under MCR 3.903(A)(7).

[18] See SCAO form JC 63, *Order Following Hearing to Terminate Parental Rights*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc63.pdf.

> (a) the supplemental petition for termination of parental rights contains a request for termination;
>
> (b) at the hearing on the supplemental petition, the court finds on the basis of clear and convincing legally admissible evidence[19] that one or more of the facts alleged in the supplemental petition:
>
> > (*i*) are true; and
> >
> > (*ii*) come within MCL 712A.19b(3)(a)[-](b), [MCL 712A.19b(3)(c)(ii), [or MCL 712A.19b(3)(d)[-](n); and
>
> (c) termination of parental rights is in the child's best interests." MCR 3.977(F)(1).

The court must hold a hearing on a supplemental petition for termination of parental rights within 42 days after the supplemental petition is filed. MCR 3.977(F)(2). The court may extend the hearing for an additional 21 days on a showing of good cause. *Id.* Upon a showing of good cause, a court may extend the hearing beyond the additional 21 days allowed under the court rule. *In re King*, 186 Mich App 458, 462 (1990) (an additional continuance that was requested and agreed upon by the parties constituted good cause). See also *In re Jackson (Shereathea Rebecca)*, 199 Mich App 22, 28-29 (1993) (citing to *King*, *supra*, but finding that good cause was not shown where the respondent-mother failed to show she was prejudiced by the delay).

17.4 Termination of Parental Rights in Other Cases

Following a dispositional review hearing under MCR 3.975, a progress review hearing under MCR 3.974, or a permanency planning hearing under MCR 3.976, the court:

> (1) *must* hold a hearing to decide whether to terminate parental rights after a supplemental petition[20] is filed based on one of more grounds listed in MCL 712A.19b(3) if:
>
> > (a) the child is within the court's jurisdiction,
> >
> > (b) parental rights over the child were not terminated at an initial dispositional hearing under MCR 3.977(E) or

[19] Where "the basis for the court taking jurisdiction of a child is unrelated to the basis for seeking termination of parental rights, . . . the basis for terminating parental rights lacks th[e] background of legally admissible evidence from the adjudicative phase and, thus, such a foundation must be laid before probative evidence not admissible under the Michigan Rules of Evidence may be considered." *In re Snyder*, 223 Mich App 85, 89-90 (1997).

at a hearing on a supplemental petition on the basis of different circumstances under MCR 3.977(F), and

(c) the child is in foster care or in the custody of a guardian or limited guardian.[21]

(2) *may* hold a hearing to decide whether to terminate parental rights after a supplemental petition is filed based on one or more grounds listed in MCL 712A.19b(3) if:

(a) the child is within the court's jurisdiction,

(b) parental rights over the child were not terminated at an initial dispositional hearing under MCR 3.977(E) or at a hearing on a supplemental petition on the basis of different circumstances under MCR 3.977(F), and

(c) the child is not in foster care.[22] MCL 712A.19b(1); MCR 3.977(H).

A. Time Requirements

"The supplemental petition for termination of parental rights may be filed at any time after the initial dispositional review hearing, progress review, or permanency planning hearing, whichever occurs first." MCR 3.977(H)(1)(a).

The court must hold a hearing on a supplemental petition for termination of parental rights within 42 days after the supplemental petition is filed. MCR 3.977(H)(1)(b). The court may extend the hearing for an additional 21 days on a showing of good cause. *Id.* Upon a showing of good cause, a court may extend the hearing beyond the additional 21 days allowed under the court rule. *In re King*, 186 Mich App 458, 462 (1990) (an additional continuance that

[20] For purposes of child protective proceedings, "'[s]upplemental petition' means: (a) a written allegation, verified in the manner provided in MCR 2.114(B), that a parent, for whom a petition was authorized, has committed an additional offense since the adjudication of the petition, or (b) a written allegation, verified in the manner provided in MCR 2.114(B), that a nonrespondent parent is being added as an additional respondent in a case in which an original petition has been authorized and adjudicated against the other parent under MCR 3.971 or MCR 3.972, or (c) a written allegation, verified in the manner provided in MCR 2.114(B), that requests the court terminate parental rights of a parent or parents under MCR 3.977(F) or MCR 3.977(H)." MCR 3.903(C)(13). MCR 3.903(C)(8) defines a *nonrespondent parent* as "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)."

[21] MCR 3.977(H) only requires a hearing "if the child is in foster care"; MCL 712A.19b(1) requires a hearing if the child is in foster care or under the custody of a guardian or limited guardian.

[22] A child need not be placed in foster care before a court may entertain a petition requesting the termination of a respondent-parent's parental rights. *In re Marin*, 198 Mich App 560, 568 (1993) (although the trial court is obligated under MCL 712A.19b(1) to conduct a hearing on termination when the child remains in foster care, that section does not otherwise limit the conditions under which a petition for termination may be entertained).

was requested and agreed upon by the parties constituted good cause). See also *In re Jackson (Shereathea Rebecca)*, 199 Mich App 22, 28-29 (1993) (citing to *King*, *supra*, but finding that good cause was not shown where the respondent-mother failed to show she was prejudiced by the delay).

B. Evidence

"The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631. At the hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value. The parties must be afforded an opportunity to examine and controvert written reports received by the court and shall be allowed to cross-examine individuals who made the reports when those individuals are reasonably available." MCR 3.977(H)(2).

C. Order

"The court must order termination of the parental rights of a respondent and must order that additional efforts for reunification of the child with the respondent must not be made,[23] if the court finds

> (a) on the basis of clear and convincing evidence admitted pursuant to subrule (H)(2) that one or more facts alleged in the petition:
>
> > (i) are true; and
> >
> > (ii) come within MCL 712A.19b(3)[; and]
>
> (b) that termination of parental rights is in the child's best interests." MCR 3.977(H)(3).

17.5 Standard and Burden of Proof Required to Establish Statutory Basis for Termination

There must be clear and convincing evidence that one or more of the statutory bases allowing for termination of parental rights have been met. MCL 712A.19b(3); MCR 3.977(E)(3) (termination at initial disposition); MCR 3.977(F)(1)(b) (termination on the basis of different circumstances); MCR 3.977(H)(3)(a) (termination for "other" reason). The clear and convincing evidence standard is the minimum standard necessary to

[23] See SCAO form JC 63, *Order Following Hearing to Terminate Parental Rights*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc63.pdf.

satisfy the requirements of due process under the Fourteenth Amendment to the United States Constitution. *Santosky v Kramer*, 455 US 745, 768-770 (1982).

The petitioner has the burden of proving the statutory basis for terminating a respondent's parental rights under MCL 712A.19b.[24] MCR 3.977(A)(3); *In re AMAC*, 269 Mich App 533, 537 (2006). See also *Fritts v Krugh*, 354 Mich 97, 115 (1958), overruled on other grounds by *In re Hatcher*, 443 Mich 426 (1993) (termination of parental rights is improper where it has only been shown that the child would be better off in foster care).

A court cannot agree to set aside an order that terminates a respondent-parent's parental rights if the respondent-parent complies with certain conditions set by the court.[25] *In re Gazella*, 264 Mich App 668, 673-674 (2005). Specifically, the Court of Appeals concluded:

> "[MCL 712A.19b(5) and MCR 3.977] are clear: once the court finds there are statutory grounds for termination of parental rights, the court must order termination of parental rights and must further order that 'additional efforts for reunification of the child with the parent not be made,' unless the court finds that termination of parental rights to the child is clearly not in the child's best interest. . . . Once the statutory grounds for termination have been proven (unless the court finds that termination of parental rights to the child is clearly not in the child's best interests), the court must terminate parental rights immediately. An *Adrianson* order cannot be entered." *Gazella*, *supra* at 673-674.

17.6 Statutory Standards for Termination of Parental Rights Under Juvenile Code–§19b(3) Factors

A court may terminate a parent's parental rights to his or her child if the court finds by clear and convincing evidence that one or more of the factors listed under MCL 712A.19b(3) exist. MCL 712A.19b(3); MCR 3.977(E)(3); MCR 3.977(F)(1)(b); MCR 3.977(H)(3)(a).

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[24] See Section 17.6 for a detailed discussion of the statutory standards under MCL 712A.19b(3).

[25] These types of agreements are commonly referred to as Adrianson Agreements. See *In re Gazella*, 264 Mich App 673 (2005). Specifically, "[i]n an *Adrianson* proceeding, the trial court would enter an order terminating the [respondent-]parents' rights following the necessary statutory findings. The court would then enter a further order suspending the order terminating the [respondent-]parents' rights on condition that the [respondent-]parents comply with certain requirements designed to assist their rehabilitation. If the [respondent-]parents were successful, the order terminating their rights would be set aside and never take effect. However, should the [respondent-]parents not be successful, the order terminating rights would be permitted to go into effect." *Gazella*, *supra* at 673.

> **Note:** The court must also find that the termination of parental rights is in the child's best interests. See Section 17.7 for a detailed discussion of the requirements for the best interest step.

A court may terminate one parent's parental rights without terminating the other parent's parental rights. *In re Marin*, 198 Mich App 560, 566 (1993) (use of singular "parent" throughout MCL 712A.19b(3) indicates legislative intent to allow termination of one parent's parental rights).

A court may not terminate parental rights to a child unless at least one statutory ground is proven with regard to *that child*. *In re SLH*, 277 Mich App 662, 674 (2008) (where the trial court only made findings with respect to one child, the order terminating a respondent-father's parental rights to two other children "must be set aside[]").

It is a violation of a parent's due process rights for a state or state agency to "deliberately take[] action with the purpose of 'virtually assur[ing] the creation of a ground for termination of parental rights,' and then proceed[] to seek termination on that very ground. *In re B & J*, 279 Mich App 12, 19-20 (2008) (the DHHS violated respondent-parents' due process rights when it reported them as illegal immigrants to federal officials then sought termination on the ground that they were unable to care for their children because they had been deported).

A. Termination on Grounds of Desertion–§19b(3)(a)

Under MCL 712A.19b(3)(a), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he child has been deserted under either of the following circumstances:

> (*i*) The child's parent is unidentifiable, has deserted the child for 28 or more days, and has not sought custody of the child during that period. For the purposes of this section, a parent is unidentifiable if the parent's identity cannot be ascertained after reasonable efforts have been made to locate and identify the parent.
>
> (*ii*) The child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period."

1. Evidence Supported Termination Under §19b(3)(a)

Termination under §19b(3)(a)(*ii*) was supported by clear and convincing evidence where the respondent-father had moved out-of-state, did not provide support for his children, failed to visit the children since they were removed from the mother's

home (although he did have some phone-contact with them), and failed on two occasions to "make himself available for [a court-ordered] assessment of the suitability of his home," despite receiving ample notification of the visits. *In re Laster*, 303 Mich App 485, 492 (2013).

Termination under §19b(3)(a)(*ii*) was supported by clear and convincing evidence where the respondent-mother "failed to make any substantial effort to communicate with [the child] or obtain assistance in regaining custody of [the child] for a period well beyond the [91-day] statutory period." *In re TM (After Remand)*, 245 Mich App 181, 193-194 (2001) (respondent-mother's efforts to obtain custody of her child years earlier was irrelevant), overruled on other grounds *In re Morris (Morris III)*, 491 Mich 81 (2012).

Termination under §19b(3)(a)(*ii*) was supported by clear and convincing evidence where the respondent-noncustodial parent failed to appear at hearings, failed to provide support, and had not seen his son for over two years. *In re Mayfield*, 198 Mich App 226, 230, 235 (1993).

2. Evidence Did Not Support Termination Under §19b(3)(a)

Termination under §19b(3)(a)(*ii*) was not supported by clear and convincing evidence where "[a]lthough [the] respondent-mother had previously left [her] children with their maternal grandmother for an extended period of time, that occurred approximately one and a half years before the filing of the termination petition. And after that time, [the] respondent-mother did have contact with the children and did participate in some, although very few, of the court hearings and required services." *In re Laster*, 303 Mich App 485, 492 (2013).

B. Termination on Grounds of Physical Injury or Sexual Abuse–§19b(3)(b)

Under MCL 712A.19b(3)(b), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he child or a sibling[26] of the child has suffered physical injury or

[26] "'Sibling' is not specifically defined in the Juvenile Code. . . . [However, t]he *American Heritage Dictionary of the English Language* (3rd ed), p 1675, defines 'sibling' as '[o]ne of two or more individuals having one or both parents in common; a brother or sister.'" *In re Hudson (Sword-Pope)*, 294 Mich App 261, 265-266 (2011) (although the respondent-mother had given up her 14-year-old victim-child for adoption at birth, he still constituted a "sibling" to her other children for purposes of terminating her parental rights to them under §19b(3)(b)(*i*); "there is no rational basis for forging a distinction between a legal sibling and [a] biological sibling under the present factual situation[]").

physical or sexual abuse under 1 or more of the following circumstances:

> (*i*) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.
>
> (*ii*) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.
>
> (*iii*) A nonparent adult's[27] act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home."

Sections 19(3)(b)(*i*)-(*iii*) are interpreted in the context of each other; thus, the application of §19b(3)(b)(*ii*), is no broader than (b)(*i*) or (b)(*iii*). *In re LaFrance*, 306 Mich App 713, 725 (2014). "[U]nder these provisions[,] . . . for physical injury to fall within the MCL 712A.19b(3), it must be caused by a 'parent's act' or a 'nonparent adult's act' and not merely contributed to by a unintentional omission." *Id.* at 725.

Termination of a parent's parental rights under §19b(3)(b) is permissible "even in the absence of definitive evidence regarding the identity of the perpetrator when the evidence does show that the respondent or respondents must have either caused or failed to prevent the child's injuries." *In re Ellis*, 294 Mich App 30, 35-36 (2011) (trial court properly terminated both parents' parental rights under §19b(3)(b) and §19b(3)(k) where the trial court concluded that one parent must have abused the child while the other parent failed to prevent the child abuse when the child suffered "numerous non-accidental injuries that likely occurred on more than one occasion[,]" and the child's parents lived together and shared in the child care responsibilities as the child's sole caregivers).

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[27] A *nonparent adult* is a person 18 years old or older who, regardless of the person's domicile, meets all of the following criteria in relation to a child over whom the court takes jurisdiction under MCL 712A.2(b): (1) The person has substantial and regular contact with the child; (2) The person has a close personal relationship with the child's parent or with a "person responsible for the child's health or welfare"; and (3) The person is not the child's parent or a person otherwise related to the child by blood or affinity to the third degree. MCL 712A.13a(1)(h)(*i*)–(*iii*); MCR 3.903(C)(7)(a)-(c).

1. Termination Under §19b(3)(b)(*i*)

For purposes of terminating parental rights under §19b(3)(b)(*i*), "[i]t is [] appropriate for a trial court to evaluate a respondent's potential risk to the other siblings by analyzing how the respondent treated another one of his or her children, albeit a child the respondent gave up for adoption. Though no legal relationship exists in such a situation, the reality is that respondent is still the biological [parent] of the child who was given up for adoption and that child is the biological half-sibling of the respondent's other children." *In re Hudson (Sword-Pope)*, 294 Mich App 261, 266 (2011) (respondent-mother was convicted of first-degree criminal sexual conduct relating to sexual activity she had with her 14-year-old biological son whom she had given up for adoption at birth, but reconnected with through MySpace).

a. Evidence Supported Termination Under §19b(3)(b)

Termination under §19b(3)(b)(*i*) was supported by clear and convincing evidence where, in a separate proceeding, the respondent-father pled guilty to first-degree criminal sexual misconduct for sexually abusing his stepdaughter, who was the minor children's half-sister. *In re Jenks*, 281 Mich App 514, 517-518 (2008) (stating that the respondent-father's plea constituted sufficient evidence that "a reasonable likelihood [existed] that the minor children would suffer injury or abuse in the foreseeable future if placed in respondent's home[]").

Termination under §19b(3)(b)(*i*) was supported by clear and convincing evidence where the testimony at trial indicated that the respondent-father had sexually abused his oldest daughter from the age of three, fractured her arm, fractured his son's skull with a blunt object, and that he had locked his twin daughters in a closet for approximately 12 hours without food or water to conceal them from investigators. *In re Vasquez*, 199 Mich App 44, 51-52 (1993).

b. Evidence Did Not Support Termination Under §19b(3)(b)

Termination under §19b(3)(b)(*i*) was not supported by clear and convincing evidence where although "[t]here was testimony that before the removal of the children, one of the children was sexually abused by the daughter of

> [the] respondent-mother's girlfriend[,] . . . [the] respondent-mother ended that relationship and moved out of the house before adjudication occurred, which was approximately 18 months before the termination hearing, and there was no evidence that [the] respondent-mother associated with other known abusers." *In re Laster*, 303 Mich App 485, 492 (2013).

Termination under §19b(3)(b)(*i*) was not supported by clear and convincing evidence where "there was no evidence that the children incurred abuse while in the care of [the] respondent-father." *In re Laster*, 303 Mich App at 492.

2. Termination Under §19b(3)(b)(*ii*)

"[§19b(3)(b)(*ii*)] is intended to address the parent who, while not the abuser, failed to protect the child from the other parent or nonparent adult who is an abuser." *In re LaFrance*, 306 Mich App 713, 725 (2014). Thus, §19b(3)(b)(*ii*) is not grounds for termination where the child was injured by the respondent-parent's "negligent failure to respond to an accidental injury or naturally occurring medical condition" when the accidental injury or naturally occurring medical condition was "not caused by an 'act' of a parent or other adult." *In re LaFrance*, 306 Mich App at 724-725 (holding that §19b(3)(b)(*ii*) did not apply where the child's dehydration, resulting kidney failure, and other complications were the result of the respondent-father's "failure to respond" to the child's virus-related symptoms, which were not caused by an act of a parent or other adult).[28]

Where a case involves termination of a parent's parental rights under §19b(3)(b)(*ii*) to multiple children, the statute "d[oes] not require that there be clear and convincing evidence that the children [are] at risk from the same abuser[; r]ather, [§19b(3)(b)(*ii*)] addresses the harm occasioned by a parent who is unwilling or unable to protect his or her children from abuse." *In re Gonzales/Martinez*, 310 Mich App 426, 432 (2015).

a. Evidence Supported Termination Under §19b(3)(b)(*ii*)

Termination under §19b(3)(b)(*ii*) was supported by clear and convincing evidence where "[the] respondent[-mother] did not believe her children's revelations about

[28] The Court also noted that "medical neglect may constitute statutory grounds for termination" under other provisions of MCL 712A.19b(3). *In re LaFrance*, 306 Mich App at 726.

[her boyfriend abusing them despite there being evidence supporting] the abuse, . . . [the] respondent[-mother] 'did nothing to stop' the abuse after [one of her] child[ren] told [her] about it[, and] . . . [the] respondent[-mother] had the opportunity to prevent the abuse, but failed to do so." *In re Gonzales/Martinez*, 310 Mich App 426, 431-432 (2015). "Th[is] evidence established that [the] respondent[-mother] placed her desire to be with her boyfriend–despite his abuse–over the needs of her children, and there was evidence that she would likely continue placing her personal desires over her children's welfare." *Id*. at 432.

Termination under §19b(3)(b)(*ii*) was supported by clear and convincing evidence where the respondent-mother failed to stop the respondent-father from physically harming their child, Andrew, when he hit Andrew's finger with a hammer and tied him to a chair in her presence; although the respondent-mother filed for a personal protection order and divorced the respondent-father, she continued to place her children in danger by associating with known sex offenders, leaving her children with them, and allowing one of the sex offenders to live with her. *In re Archer*, 277 Mich App 71, 74-75 (2007).

Termination under §19b(3)(b)(*ii*) was supported by clear and convincing evidence where the respondent-mother continued to allow her children to stay at the home of an adult acquaintance known as "Uncle Lenny" after her children reported that he was sexually abusing them. *In re Brown/Kindle/Muhammad Minors*, 305 Mich App 623, 636-637 (2014). The respondent-mother confronted "Uncle Lenny," who was a friend of a friend and whose full name and address she did not know, about the alleged abuse; however, "Uncle Lenny" denied abusing the children, and the respondent-mother continued to allow the children to stay with him despite disclosures about the abuse from all three of her children. *Id*. at 636. The Court noted that it was clear that the respondent-mother "was in a position to prevent the abuse and failed to do so and that the children would have been at risk of harm in her care, justifying termination under [§19b(3)(b)(*ii*)]."

b. Evidence Did Not Support Termination Under §19b(3)(b)(*ii*)

Termination of the respondent-mother's parental rights under §19b(3)(b)(*ii*) was not supported by clear and convincing evidence where she ended her relationship with the abusive respondent-father approximately 18 months before the termination hearing, and although her new boyfriend was abusive, her children were not present when the boyfriend assaulted her, the boyfriend did not have a history of abusive behavior, and he was attending violence counseling.[29] *In re Sours Minors*, 459 Mich 624, 634-636 (1999) (stating that these facts did not support a finding that it was reasonably likely the children would be harmed in the foreseeable future if placed in the respondent-mother's home, as required by §19b(3)(b)(*ii*)]).

3. Termination Under §19b(3)(b)(*iii*)

Termination under §19b(3)(b)(*iii*) was supported by clear and convincing evidence where the respondent-mother continued to allow her children to stay at the home of an adult acquaintance known as "Uncle Lenny" after her children reported that he was sexually abusing them. *In re Brown/Kindle/Muhammad Minor*s, 305 Mich App 623, 636-637 (2014). The respondent-mother confronted "Uncle Lenny," who was a friend of a friend and whose full name and address she did not know, about the abuse. *Id*. at 636. However, "Uncle Lenny" denied abusing the children, and the respondent-mother continued to allow the children to stay with him despite disclosures about the abuse from all three of her children. *Id*. The Court noted that it was clear that the respondent-mother "was in a position to prevent the abuse and failed to do so[.]" *Id*.

C. Termination on Grounds of Failure to Rectify Conditions Following Court's Assumption of Jurisdiction–§19b(3)(c)

Under MCL 712A.19b(3)(c), the court may terminate a parent's parental rights if it finds that "[t]he parent was a respondent in a proceeding brought under [the Juvenile Code], 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

[29] The respondent-mother's parental rights were terminated, however, under §19b(3)(c)(*ii*) (failure to rectify conditions following court's assumption of jurisdiction). *In re Sours Minors*, 459 Mich 624, 637-641 (1999).

(*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

(*ii*) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age."

1. Termination Under §19b(3)(c)(*i*)

a. Evidence Supported Termination Under §19b(3)(c)(*i*)

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where although the respondent-mother "made significant progress with the parenting aspect of her service plan[,]" her psychological evaluation indicated that she was "emotionally immature and likely to engage in relationships with exploitive men who would put her children at a risk of harm[,]" to which her oldest daughter "was particularly vulnerable to abuse and harm because of her autism[,]" and "[d]uring the two-year pendency of this case, [she] continued to invite men into her home[, one of which] had a criminal background[, and] the other only left [her home] after the police were called." *In re White Minors*, 303 Mich App 701, 712 (2014).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where "[i]n the approximately two years that the children were in the court's temporary custody, [the] respondent-mother failed to obtain suitable housing[,] . . . she provided multiple false addresses to the agency[,] . . . there was evidence [during the termination hearing] that [she] was living in a shelter[, and a]lthough she testified that she would be obtaining a three-bedroom home once she received an income tax refund, given her inability to obtain suitable housing during the duration of the reunification plan, there [was] no indication that this would occur within a reasonable time." *In re Laster*, 303 Mich App 485, 493 (2013).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where "[the] respondent-father had not provided for the children and there was no evidence that he had obtained suitable housing, considering he twice failed to participate in [a court-ordered] assessment of the suitability of his home," despite receiving ample notification of the visits. *In re Laster*, 303 Mich App at 493.

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where "[the] respondent[-parents] failed to comply or benefit sufficiently from their participation in services in accordance with the court-ordered treatment plans" when the respondent-mother, "[a]fter completing a 30-day inpatient substance abuse program, . . . experienced a relapse in her drug use[,]" she was "arrested three times on charges of retail fraud and home invasion[,]" and she "admitted that her participation in the home invasion was based on her intention to steal prescription drugs[;]" "[the] respondent[-]father was incarcerated for one-half of the time th[e] case remained open[;]" both respondent-parents "missed numerous drug screens," and "[a]t the time of the final hearing, neither [respondent-]parent was physically available to care for the child[;]" and "the trial court was legitimately concerned with the ability of [the] respondent[-parents] to remain clean, sober, and out of prison for sufficient blocks of time in order to be available to provide adequate care for their minor child." *In re Frey*, 297 Mich App 242, 244-245 (2012) ("[t]he primary condition leading to the adjudication in this matter was [the] respondent[-parents'] failure to resolve issues pertaining to [the] respondent[-father's] alcohol abuse and [the] respondent[-mother's] substance abuse[, and] . . . during the pendency of the proceedings, issues came to light pertaining to [the] respondent[-parents'] inability to provide adequate housing and financial support for the minor child, and that [the] respondent[-parents] were involved in criminal activity").

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where despite the respondent-mother's efforts to treat her longstanding drug addictions, she continued to battle them, she was not able to complete a drug treatment program, she was unemployed and lacked housing, "she would require a lengthy period of assessment, counseling, and supervision before reunification with her child could be

considered[, and] . . . the two years [the child] already had spent in foster care, her entire life, constituted too long a period to await the mere possibility of a radical change in respondent[-]mother's life."]" *In re Williams*, 286 Mich App 253, 272-273 (2009) (conditions leading to adjudication were respondent-mother's longstanding drug addiction, repeated failure to complete drug treatment program, and failure to provide adequate housing or find employment).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the respondent-father failed to follow the parent-agency agreement of submitting to regular alcohol screens and continued to drink, the children's school attendance was still an issue, neither respondent-parent was able to adequately manage resources, and the respondent-parents only showed a slight benefit from ten years of services, including intensive services provided before this case began. *In re Foster (Tommy)*, 285 Mich App 630, 631-633 (2009) (conditions leading to adjudication were the underlying conditions "surrounding the temporary wardship over [the child's] older siblings[;]" "[t]he underlying conditions included respondent[-]father's drinking, the children's poor school attendance, and respondent[-parents'] inability to manage their household and finances despite receiving extensive services, which resulted in two evictions and a recurring lack of food).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the respondent-mother had not made progress toward finding adequate housing for the children and she was not likely to do so in the foreseeable future; she continued to miss drug screens despite the court's warnings, which had resulted in the suspension of her visitation with the children; and even if she had been afforded an extended period of time to rectify the conditions, as might be necessary with the older children, there was not a reasonable likelihood that she would have been able to do so within a reasonable time. *In re LE*, 278 Mich App 1, 27-28 (2008) (as related to §19b(3)(c)(*i*), conditions leading to adjudication were respondent-mother's failure to provide adequate housing or employment, and her longstanding substance abuse problem).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the respondent-mother

did not demonstrate that she could provide adequate housing, missed roughly half of the scheduled visitations, continued an abusive relationship, and did not undergo counseling. *In re AH*, 245 Mich App 77, 87-88 (2001) (conditions leading to adjudication were previous child protection petitions filed with respect to respondent-mother's other children, respondent-mother's arrests for domestic violence, respondent-mother's relationship with a man who had substance abuse issues and was listed as a perpetrator of child abuse or neglect, and respondent-mother's history of mental illness combined with her failure to take appropriate medication).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the respondent-mother failed to find and maintain suitable housing for her three children and failed to establish a custodial plan for the children before the "best interests phase" of the termination hearing. *In re Trejo Minors*, 462 Mich 341, 357-360 (2000) (conditions leading to adjudication were respondent-mother's failure to provide adequate housing and care for her children).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the respondent-mother failed to find *adequate* housing for her children, failed to provide numerous drug screens, had a continuing pattern of missing drug treatment therapy sessions, and relapsed while her children were under the court's jurisdiction, and where two years elapsed between the filing of the supplemental petition and the termination hearing. *In re Powers Minors*, 244 Mich App 111, 118-119 (2000) (conditions leading to adjudication were respondent-mother's failure to provide adequate housing for her children and her alcohol and drug abuse).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the respondent-mother's alcoholism left her unable to care for her two sons, one of whom suffered from fetal alcohol syndrome, and although she attended (but did not complete) inpatient treatment programs and participated in counseling, the respondent-mother continued to drink while her children were under the court's jurisdiction. *In re Conley*, 216 Mich App 41, 43-44 (1996) (condition leading to adjudication was respondent-mother's alcohol addiction).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the respondent-mother's

"incarceration[] continued to exist and there was no reasonable likelihood that the condition could be rectified within a reasonable time." *In re McIntyre*, 192 Mich App 47, 51 (1991) (condition leading to adjudication was respondent-mother's extended incarceration). The Court also found that the respondent-mother's planned placement of the child with a relative was inappropriate, and termination was proper "because permanent custody was in the best interest of the children[.]" *In re McIntyre*, *supra* at 52.

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the two-to-three-year time period necessary for the respondent-mother's rehabilitation was unreasonable given the ages and "pervasive behavior disorders" of the children: "two of the children would frequently act like wild dogs, barking incessantly and eating off their plates without using utensils[,] [t]he youngest child demonstrated signs of impaired socialization, indicating an impoverished home environment, and the oldest demonstrated behavior indicative of sexual abuse." *In re Dahms*, 187 Mich App 644, 646-648 (1991) (respondent-mother claimed she was denied "reasonable time" within which to rectify the conditions leading to adjudication, as required by §19b(3)(c)(*i*)).

Termination under §19b(3)(c)(*i*) of the respondent-father's parental rights to his youngest child was supported by clear and convincing evidence where the respondent-father admittedly failed to "notice something amiss with, or otherwise attend to, his youngest child as she went several hours without taking nourishment or fluid[,]" which resulted in a life-threatening condition due to dehydration, the respondent-father had persistent substance-abuse problems, and the respondent-father failed to "participate in, or benefit from, services relat[ed] to caring for a child with cerebral palsy, or to attend most of that child's medical appointments[,]" all of which heightened concerns that the medical neglect could recur. *In re LaFrance*, 306 Mich App 713, 728-729 (2014)

Termination under §19b(3)(c)(*i*) of the respondent-mother's parental rights to her youngest child was supported by clear and convincing evidence where she tested positive for methadone and THC during her pregnancy with that child, admitted using opiates for years, demonstrated behavior while in the hospital for the delivery that caused medical staff to question her ability

to care for a newborn, and "even after the infant's cerebral palsy diagnosis, [the] respondent-mother failed to attend virtually all of the dozens of medical appointments for the baby, failed to attend programs intended to educate her about that condition, and refused to sign paperwork to facilitate the child[] receiving physical therapy." *In re LaFrance*, 306 Mich App at 729. "[T]he failure to participate in services directly linked to the ability to care for a special needs, or medically fragile, child bears directly on issues of neglect." *Id.* at 729-730.

b. Evidence Did Not Support Termination Under §19b(3)(c)(*i*)

Termination of the respondent-mother's parental rights under §19b(3)(c)(*i*) was not supported by clear and convincing evidence where the condition that led to adjudication—the father's abuse and the respondent-mother's failure to protect the children from it—did not exist 182 days or more after the initial dispositional hearing. *In re Sours Minors*, 459 Mich 624, 636-637 (1999) (the respondent-mother took steps to protect her children from the abuse by ending her relationship with the abusive father approximately 18 months before the termination hearing).[30]

Termination under §19b(3)(c)(*i*) was not supported by clear and convincing evidence where the DHHS never gave the respondent-parents adequate instruction on how to maintain a clean home. *In re Newman*, 189 Mich App 61, 65-71 (1991) (as related to §19b[3][c][*i*], conditions leading to adjudication were heating the home with an inappropriate device, the home was unsanitary, and the children were dirty, hungry, and had lice).

Termination under §19b(3)(c)(*i*) of the respondent-parents' parental rights to their three older children was not supported by clear and convincing evidence where, although the respondent-parents failed to "gain control over their substance-abuse habits[,]" there was no evidence "that either respondent[-parent] had ever abused or neglected any of their three older children." *In re LaFrance*, 306 Mich App 713, 730 (2014). Although the court did not clearly err by terminating the respondent

[30] The respondent-mother's parental rights were terminated, however, under §19b(3)(c)(*ii*) (failure to rectify conditions following court's assumption of jurisdiction). *In re Sours Minors*, 459 Mich 624, 637-641 (1999).

parents' respective parental rights to the older children's younger sibling, the doctrine of anticipatory neglect did not apply in relation to whether their parental rights to the older children should also be terminated because the older children did not require special medical care like their younger sibling, the respondent-parents cared for the older children from birth without incident, the only allegation of neglect and abuse related to the youngest child, and "drug use alone, in the absence of any connection to abuse or neglect, cannot justify termination solely through operation of the doctrine of anticipatory neglect." *Id*. at 730-731.

2. Termination Under §19b(3)(c)(*ii*)

a. Evidence Supported Termination Under §19b(3)(c)(*ii*)

Termination under §19b(3)(c)(*ii*) was supported by clear and convincing evidence where the respondent-mother "had been given notice, repeatedly, of the programs she would have to participate in and the changes that she would have to make in order to have her children returned[,]" but the respondent-mother instead after her first five children were removed and a sixth child was born, neglected the sixth child by "fail[ing] to keep a medical appointment, utiliz[ing] the services of a home-care nurse, and properly medicat[ing] the [sixth] child or us[ing] the required apnea monitor[when] [s]he hid the sickly child under a blanket for fifteen minutes without the apnea monitor attached[, and] [m]ost significantly, after the removal of her [sixth child], she admitted not making any contact with her children, the [DHHS], or the court [for approximately four months], and stated that she 'turned to alcohol' during this period."[31] *In re Sours Minors*, 459 Mich 624, 637-640 (1999).

[31] The original and an amended petition alleged the respondent-father's physical abuse and the respondent-mother's failure to protect the children from the father's abuse, after which the mother and father separated. *In re Sours Minors*, 459 Mich 624, 625-626 (1999) (the amended petition also sought removal of the children). After the respondent-mother's first five children were removed from her home, a second amended petition alleged that two children had severe diaper rash, one child was malnourished, and the mother had packed insufficient clothing and provided inappropriate snacks for the children upon their removal by the DHHS. *Id.* at 626-627. Upon the birth of a sixth child, the DHHS filed a petition alleging that the respondent-mother "failed to keep the [sixth] child on [an] apnea monitor [as instructed], that she missed a scheduled doctor's appointment for him, and that she failed to give the child proper medication or allow home visits from the nurse assigned to care for the child." *Id.* at 628-629.

b. Evidence Did Not Support Termination Under §19b(3)(c)(*ii*)

Termination was not supported by clear and convincing evidence where there was insufficient evidence to establish as the "other condition" under §19b(3)(c)(*ii*) a lack of bonding or attachment between the respondent-mother and the child following the child's placement in foster care. *In re JK*, 468 Mich 202, 211-212 (2003). The trial court erroneously relied on a single therapist's minimal observation of the respondent-mother's and the child's interaction over a "fully knowledgeable staff of persons[32] who had worked directly with the respondent[-mother] over an extended period[.]" *In re JK*, *supra* at 211-212. In addition, the respondent-mother was not given "'a reasonable opportunity' to rectify the alleged bonding and attachment issue" where "the trial court ignored the fact that, immediately after the [DHHS] filed the petition for termination of parental rights, visitation was automatically suspended for several months pursuant to MCL 712A.19b(4)[, and t]he [respondent-mother's] counselor was then notified only two months before trial to address the bonding and attachment issue with the respondent[-mother]." *In re JK*, *supra* at 212-213.

D. Termination on Grounds of Substantial Failure to Comply With Limited Guardianship Placement Plan–§19b(3)(d)

Under MCL 712A.19b(3)(d), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he child's parent has placed the child in a limited guardianship under . . . MCL 700.5205, and has substantially failed, without good cause, to comply with a limited guardianship placement plan described in . . . MCL 700.5205, regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship."[33]

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[32] "The respondent[-mother's] therapist met with her weekly[, and] [a]fter ample opportunity to observe the respondent[-mother] and the child interact, she opined that they were adequately bonded[;] . . . [t]he respondent[-mother's] supervisor in the independent-living program also found the respondent[-mother's] interaction with the child to be appropriate[;] [t]he psychologist who conducted the respondent[-mother's] court-ordered evaluation found nothing in her psychological makeup that prevented her from appropriately parenting her child." *In re JK*, 468 Mich 202, 212 (2003).

[33] See Section 4.6 for a detailed discussion of the court's ability to take jurisdiction when a parent fails to comply with a limited guardianship placement plan under MCL 712A.2(b)(4).

A respondent meets the "good cause" requirement when he or she can show "'a legally sufficient or substantial reason'" for his or her noncompliance with the limited guardianship placement plan. *In re Utrera*, 281 Mich App 1, 10-11, 22 (2008). "Termination is therefore appropriate pursuant to MCL 712A.19b(3)(d) if a respondent fails to substantially comply with a limited guardianship plan without a 'legally sufficient or substantial reason,' and this noncompliance results in a disruption of the parent-child relationship." *In re Utrera*, *supra* at 22. In *In re Utrera*, *supra* at 22-24, the respondent-mother asserted that her mental illness constituted good cause for her failure to comply with the limited guardianship placement plan. The Court of Appeals held that "[b]ecause respondent[-mother's] asserted cause for noncompliance with the transition plan, i.e., her mental illness, is the very condition that impairs her ability to care for the child, it cannot constitute a legally sufficient or substantial reason[,]" and without a showing of good cause, clear and convincing evidence supported termination of the respondent-mother's parental rights under §19b(3)(d) where the respondent-mother's failure to comply with the limited guardianship plan resulted in an eight-month gap in visitation. *In re Utrera*, 281 Mich App at 22-24.

E. Termination on Grounds of Substantial Failure to Comply With Court-Structured Guardianship Placement Plan–§19b(3)(e)

Under MCL 712A.19b(3)(e), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he child has a guardian under . . . MCL 700.1101 to [MCL] 700.8206, and the parent has substantially failed, without good cause, to comply with a court-structured plan described in . . . MCL 700.5207 and [MCL] 700.5209, regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship."[34]

F. Termination on Grounds of Parent's Failure to Support, Visit, Contact, and Communicate With Child Who Has Guardian–§19b(3)(f)

Under MCL 712A.19b(3)(f), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he child has a guardian under . . . MCL 700.1101 to [MCL] 700.8206, and both of the following have occurred:

[34] See Section 4.6 for a detailed discussion of the court's ability to take jurisdiction when a parent fails to comply with a court-structured guardianship plan under MCL 712A.2(b)(5).

> (*i*) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.
>
> (*ii*) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition."[35]

G. Termination on Grounds of Failure to Provide Proper Care or Custody–§19b(3)(g)

Under MCL 712A.19b(3)(g), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age."

Termination of both parents' parental rights under MCL 712A.19b(3)(g) "is permissible even in the absence of determinative evidence regarding the identity of the perpetrator when the evidence shows that respondents must have either caused the intentional injuries or failed to safeguard the children from injury." *In re Vandalen*, 293 Mich App 120, 141 (2011) (trial court properly terminated both respondent-parents' parental rights under §19b(3)(g) and §19b(3)(j) where the trial court concluded that one parent must have abused the children while the other parent failed to protect the children from the abuse when the respondent-parents' two infant children "suffered unexplained, serious, non-accidental injuries consistent with intentional abuse while in respondent[-parents'] sole care and custody[]" and "the extent and seriousness of the injuries to both children were consistent with prolonged abuse and clearly demonstrated a pattern of abuse in respondent[-parents'] home indicating a substantial risk of future harm[]").

It is harmless error for a trial court to terminate a respondent's parental rights under §19b(3)(h)[36] where those parental rights clearly

[35] See Section 4.6 for a detailed discussion of the court's ability to take jurisdiction when a parent fails to support and contact a child who has a guardian under MCL 712A.2(b)(6).

[36] Formerly §19b(3)(e).

could have been terminated under §19b(3)(g).[37] *In re Perry*, 193 Mich App 648, 650-651 (1992) (despite the court's potential misinterpretation of the first element of §19b(3)(h), the two remaining elements of §19b(3)(h) were sufficient to warrant termination under §19b(3)(g)[38] and "[a]lthough the termination petition was brought solely under [§19b(3)(h)], respondent[-father] was given adequate notice of the proofs that he would have to present to overcome termination under [§19b(3)(g)][]").

1. Evidence Supported Termination Under §19b(3)(g)

Termination under §19b(3)(g) was supported by clear and convincing evidence where "[the] respondent[-mother] failed to comply with the terms of her agency agreement[,] . . . tested positive for cocaine, had called [her child] a liar with respect to the allegations of sexual abuse, . . . had been charged with retail fraud[,] . . . was found passed out in the home of the 83-year-old man she was living with after consuming alcohol and pills[,] . . . [and] there was evidence that [the] respondent[-mother] was not consistent in attending counseling and treatment sessions, was unemployed and only received a small amount of monthly income in the form of social security disability, and failed to adequately address her mental health issues." *In re Gonzales/Martinez*, 310 Mich App 426, 332-333 (2015). Although "the time between the imposition of the parent-agency agreement and termination was only 13 weeks, [the] respondent[-mother's] actions demonstrated that she was unable to alter her behavior and provide a stable home." *Id.* at 433.

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother was living in a shelter at the time of the termination hearing and had a history of transient housing and rarely had hot water or heat. *In re Brown/Kindle/Muhammad Minors*, 305 Mich App 623, 637 (2014). The respondent-mother also had an "extensive CPS history[,]" and three of six complaints were substantiated, including complaints for physical neglect and poor living conditions, a complaint due to one of her children testing positive for marijuana at birth, and one for unspecified physical neglect. *Id.* Further, the respondent-mother admitted that she smoked marijuana daily. *Id.* Accordingly, the Court concluded that "[c]onsidering [the] respondent's history of inadequate housing and reliance on other people to raise the minor children, the trial

[37] Formerly §19b(3)(d).

[38] "Both elements of [§19b(3)(g)] [are] contained in [§19b(3)(h)]." *In re Perry*, 193 Mich App 648, 651 (1992).

court did not clearly err when it found that respondent was not in a position to provide the children with proper care or custody[.]" *Id*.

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother "had a history of inviting men with criminal backgrounds into her home[,] [she] continued to invite men into her home throughout the pendency of the case, demonstrating that she did not benefit from her service plan[,]" and her psychological evaluation indicated that she was "emotionally immature and likely to engage in relationships with exploitive men who would put her children at a risk of harm[,]" to which her oldest daughter "was particularly vulnerable to abuse and harm because of her autism[.]" *In re White Minors*, 303 Mich App 701, 712 (2014).

Termination under §19b(3)(g) was supported by clear and convincing evidence where "[the] respondent[-mother] [] unsuccessfully participated in several domestic violence classes[,] [] refused to extricate herself from [the mutually abusive] relationship with [her current boyfriend,]" and had a "long history of engaging in domestic violence and [] repetitive selection of violent, abusive partners[.]" *In re Dearmon/Harverson-Dearmon Minors*, 303 Mich App 684, 700 (2014).

Termination under §19b(3)(g) was supported by clear and convincing evidence where "[t]he court took jurisdiction of the children because [the] respondent-mother failed to provide a safe and suitable home for her children[; s]he left [her children for an extended period of time] with their maternal grandmother, whose parental rights had been previously terminated and whose home had no running water[;] . . . [she] had still failed to obtain suitable housing [by the termination hearing][;] . . . she was unable to provide legal documentation of her income, despite two requests made by the agency[; s]he [] failed to attend the majority of her court hearings, parenting classes, weekly therapy sessions, and parenting time visits[; s]he lived across the state from her children[;] . . . she had not had phone contact with her daughter [for over a year, though she had phone contact with her son every weekend; and] . . . [she] did not participate in weekly drug screens, and of the two drug screens she did participate in . . ., one tested positive for alcohol." *In re Laster*, 303 Mich App 485, 493-494 (2013).

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-father "did not provide support for [his] children, he failed to make himself available for a [court-ordered] home assessment [of the suitability of his home on two occasions despite ample

notification of the visits], he did not participate in other voluntary services, such as therapy and parenting classes, and he had not visited [his] children while this case was pending." *In re Laster*, 303 Mich App at 494.

Termination under §19b(3)(g) was supported by clear and convincing evidence. *In re Moss*, 301 Mich App 76, 82 (2013). The respondent-mother's "substance abuse affect[ed] her ability to provide proper care and custody for [her] children" when "she used drugs in the presence of [her] children[,] . . . took them with her to purchase drugs on at least one occasion[, and]" was "living at a homeless shelter with [her] children, and there was no evidence that she would be able to provide suitable housing for the children in the reasonably foreseeable future." *Id.* at 81. Moreover, "there [was not] a reasonable expectation that [the] respondent[-mother] would be able to provide proper care and custody within a reasonable amount of time considering the children's ages[,] [the respondent-mother] ha[d] a long history of mental illness that [she struggled] to manage[,][39] [such as] . . .repeated[] [] psychotic episodes, including auditory hallucinations in which she was told to harm her children." *Id.*

Termination under §19b(3)(g) was supported by clear and convincing evidence where despite the respondent-mother's efforts to treat her longstanding drug addictions, she continued to battle them, she was not able to complete a drug treatment program, she was unemployed and lacked housing, "she would require a lengthy period of assessment, counseling, and supervision before reunification with her child could be considered[, and] . . . the two years [the child] already had spent in foster care, her entire life, constituted too long a period to await the mere possibility of a radical change in respondent[-]mother's life."]" *In re Williams*, 286 Mich App 253, 272-273 (2009).

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother had not made progress toward finding adequate housing for the children and that she was not likely to do so in the foreseeable future; she continued to miss drug screens despite the court's warnings, which had resulted in the suspension of her visitation with the children; and even if she had been afforded an extended period of time to rectify the conditions, as might be necessary with the older children, there was not a reasonable likelihood that she

[39] "[The respondent-mother] had been admitted at least three times for psychiatric care at hospitals in Michigan, Illinois, and Florida, and [the] respondent[-mother admitted to having] difficulties [] when her medications ran out[, and] . . . to [having] numerous problems in adjusting her medications to successfully control her symptoms." *In re Moss*, 76 Mich App at 81.

would have been able to do so within a reasonable time. *In re LE*, 278 Mich App 1, 27-28 (2008).

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-putative father "did not attempt to formally establish legal paternity for the first year and a half of [the child's] life, did not have housing when she was born, did not plan for her birth, and had a longstanding substance abuse problem." *In re LE*, 278 Mich App at 23-24. (stating that "[e]ven though [the respondent], as a mere putative father, did not yet have a legal duty to care for [his child], he did have, as her biological father, a clear moral duty to do so, and he could have and should have offered support or at least a plan to care for her[]"). In addition, there was no bond between the respondent-father and the child, he had an extensive criminal history involving violence, was incarcerated and in drug treatment during the pendency of the case, and was totally dependent on his mother for all necessities. *Id.* at 24.

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother failed to find and maintain adequate housing for her three children and failed to progress in therapy. *In re Trejo Minors*, 462 Mich 341, 360-363 (2000).

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother allowed known sex offenders to interact with her children, failed to take steps to ensure that sexual assaults would not occur, and had a history of failing to protect her children from physical abuse. *In re Archer*, 277 Mich App 71, 75-76 (2007).

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother "maintained suitable employment and separated from her abusive boyfriend" but only "minimally complied" with the provisions of a court-ordered "family plan" (guardianship plan), especially with respect to parenting time. *In re BZ*, 264 Mich App 286, 297-301 (2004).

Termination under §19b(3)(g) was supported by clear and convincing evidence where testimony established that the respondent-mother's emotional and cognitive problems would make her an ineffective parent no matter how well she was assisted by a third party. *In re IEM*, 233 Mich App 438, 451-453 (1999), overruled on other grounds *In re Morris (Morris III)*, 491 Mich 81 (2012).

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother attempted to murder her child to prevent visitation with the noncustodial parent, the respondent-mother was serving an 8-25 year sentence for this, and the evidence showed that the respondent-mother's serious emotional problems would continue to exist in the future. *In re Huisman*, 230 Mich App 372, 384-385 (1998), overruled in part on other grounds by *In re Trejo Minors*, 462 Mich at 353 n 10.

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-father was incarcerated for most of his children's lives, resumed criminal behavior and drug use while not incarcerated, and expert witnesses testified to his poor parenting skills, his lack of cooperation in court-ordered counseling to improve those skills, and his inability to improve those skills within a reasonable time. *In re Hamlet (After Remand)*, 225 Mich App 505, 516-517 (1997), overruled in part on other grounds by *In re Trejo Minors*, 462 Mich at 353 n 10.

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother was diagnosed as a paranoid schizophrenic, repeatedly left the children alone in the home, "would probably have more difficulty as the children grew older[,] and . . . could not cope with five young children, three of whom had health or behavioral problems requiring special attention." *In re Jackson (Shereathea Rebecca)*, 199 Mich App 22, 26-28 (1993).

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-father had not maintained contact with his child since he and the child's mother divorced, he had a drinking problem and an extensive criminal record, and where he was released from prison but reoffended within two weeks and would be incarcerated for at least another year. *In re Systma*, 197 Mich App 453, 457 (1992).

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother's apartment was littered with trash and feces, she was repeatedly evicted from other apartments, and she left the children unattended for extended periods and neglected their physical needs, and she failed to successfully complete parenting classes. *In re King*, 186 Mich App 458, 463-464 (1990).

Termination under §19b(3)(g) of the respondent-father's parental rights to his youngest child was supported by clear and convincing evidence where the respondent-father admittedly

failed to "notice something amiss with, or otherwise attend to, his youngest child as she went several hours without taking nourishment or fluid[,]" which resulted in a life-threatening condition due to dehydration, the respondent-father had persistent substance-abuse problems, and the respondent-father failed to "participate in, or benefit from, services relat[ed] to caring for a child with cerebral palsy, or to attend most of that child's medical appointments[,]" all of which heightened concerns that the medical neglect could recur. *In re LaFrance*, 306 Mich App 713, 728-729 (2014).

Termination under §19b(3)(g) of the respondent-mother's parental rights to her youngest child was supported by clear and convincing evidence where she tested positive for methadone and THC during her pregnancy with that child, admitted using opiates for years, demonstrated questionable behavior while in the hospital for the delivery that caused medical staff to question her ability to care for a newborn, and "even after the infant's cerebral palsy diagnosis, [the] respondent-mother failed to attend virtually all of the dozens of medical appointments for the baby, failed to attend programs intended to educate her about that condition, and refused to sign paperwork to facilitate the child[] receiving physical therapy." *In re LaFrance*, 306 Mich App at 729. "[T]he failure to participate in services directly linked to the ability to care for a special needs, or medically fragile, child bears directly on issues of neglect." *Id*. at 729-730.

2. Evidence Did Not Support Termination Under §19b(3)(g)

Termination under §19b(3)(g) was not supported by clear and convincing evidence where "clear factual errors and errors of law . . . essentially resulted in the termination of respondent[-father's] parental rights solely because of his incarceration." *In re Mason*, 486 Mich 142, 160, 164-165 (2010) (as related to §19b[3][g], the trial court failed to evaluate "whether [the] respondent[-father] could care for his children in the future, either personally or with the help of relatives").

Termination under §19b(3)(g) was not supported by clear and convincing evidence where the DHHS failed to inform the respondent-father of the proceedings and its impact on his parental rights, and he was not evaluated to determine whether he was capable of providing proper care and custody of the child. *In re Rood*, 483 Mich 73, 111-114 (2009). Although the DHHS was able to show that the respondent-father was neglectful in failing to visit or provide support to his child during the proceedings, "a showing of neglect, alone, merely

triggers a parent's right to participate in services. It does not automatically justify termination." *Id*. at 114. Specifically, the Michigan Supreme Court found:

> "As expressed in MCL 712A.19b(3)(g), when a parent fails 'to provide proper care or custody for the child,' termination is not appropriate unless 'there is [also] no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.' Because [the] respondent[-father] was neither informed about nor properly offered the evaluation and services available to aid the court in making the latter determination, his rights could not be terminated merely because of his failure to provide care and custody." *In re Rood*, 483 Mich at 114.

Termination under §19b(3)(g) was not supported by clear and convincing evidence where "the [DHHS], itself, intentionally set out to create [the] very ground for termination[]" by reporting the respondents' illegal presence in the country, after which the respondents were involuntarily deported and forced to leave their children behind. *In re B & J*, 279 Mich App 12, 19-20 (2008).

Termination under §19b(3)(g) was not supported by clear and convincing evidence where the respondent-mother fulfilled every requirement of the parent-agency agreement.[40] *In re JK*, 468 Mich 202, 213-214 (2003).

Termination under §19b(3)(g) was not supported by clear and convincing evidence where the respondent-mother, who had a diagnosed personality disorder, demonstrated "proper motivation" by making significant strides toward meeting the goals the court established, the respondent-mother's psychologist testified that the respondent-mother, with proper motivation, could make progress in dealing with her personality disorder and begin addressing her parenting problems within four to six months, and "[t]he trial court's conclusion that there [was] a 'reasonable likelihood' that the child would be harmed if reunited with respondent[-mother] . . . [was] 'essentially conjecture. . . .'"[41] *In re Boursaw*, 239 Mich App 161, 169-172, 177 (1999), overruled in part on other grounds by *In re Trejo Minors*, 462 Mich at 353-354.

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[40] "Th[e] [Michigan Supreme] Court has held that a parent's failure to comply with the parent-agency agreement is evidence of a parent's failure to provide proper care and custody for the child. [*In re*] *Trejo*[*Minors*], [462 Mich] at 360-363. By the same token, the parent's *compliance* with the parent-agency agreement is evidence of [his or] her ability to provide proper care and custody." *In re JK*, 468 Mich at 214.

> Termination under §19b(3)(g) of the respondent-parents' parental rights to their three older children was not supported by clear and convincing evidence where, although the respondent-parents failed to "gain control over their substance-abuse habits[,]" there was no evidence "that either respondent[-parent] had ever abused or neglected any of their three older children." *In re LaFrance*, 306 Mich App 713, 730 (2014). Although the court did not clearly err by terminating the respondent-parents' respective parental rights to the older children's younger sibling, the doctrine of anticipatory neglect did not apply in relation to whether their parental rights to the older children should also be terminated because the older children did not require special medical care like the younger sibling, the respondent-parents cared for the older children from birth without incident, the only allegation of neglect and abuse related to the youngest child, and "drug use alone, in the absence of any connection to abuse or neglect, cannot justify termination solely through operation of the doctrine of anticipatory neglect." *Id*. at 730-731.

H. Termination on Grounds of Imprisonment of Parent–§19b(3)(h)

Under MCL 712A.19b(3)(h), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age."

"The mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination." *In re Mason*, 486 Mich 142, 160 (2010). MCL 712A.19b(3)(h) requires that all three conditions be met:

> "[t]he combination of the first two criteria—that a parent's imprisonment deprives a child of a normal home for more than two years *and* the parent has not provided for proper care and custody—permits a

[41] The Court of Appeals distinguished this case from *In re Dahms*, 187 Mich App 644 (1991), because the child involved in the *In re Boursaw* matter did not suffer from similar problems as the children in the *In re Dahms* matter. *In re Boursaw*, 239 Mich App 161, 175-176 (1999), overruled in part on other grounds by *In re Trejo Minors*, 462 Mich at 353-354. In *In re Dahms*, *187* Mich App at 647, the Court of Appeals found termination of the respondent-mother's parental rights proper under §19b(3)(c)(*i*) where there was clear and convincing evidence that the two-to-three-year period was unreasonable given the ages and "pervasive behavior disorders" of the children.

> parent to provide for a child's care and custody *although the parent is in prison*; he [or she] need not *personally* care for the child. The third necessary condition is forward-looking; it asks whether a parent 'will be able to' provide proper care and custody within a reasonable time. Thus, a parent's past failure to provide care because of his [or her] incarceration also is not decisive." *In re Mason*, 486 Mich at161.

It is harmless error for a trial court to terminate a respondent's parental rights under §19b(3)(h)[42] where those parental rights clearly could have been terminated under §19b(3)(g).[43] *In re Perry*, 193 Mich App 648, 650-651 (1992) (despite the court's potential misinterpretation of the first element of §19b[3][h], the two remaining elements of §19b(3)(h) were sufficient to warrant termination under §19b(3)(g)[44] and "[a]lthough the termination petition was brought solely under [§19b(3)(h)], respondent[-father] was given adequate notice of the proofs that he would have to present to overcome termination under [§19b(3)(g)][]").

1. Evidence Supported Termination Under §19b(3)(h)

Termination under §19b(3)(h) was supported by clear and convincing evidence where the respondent-mother was going to be imprisoned for nine years, and she would be unable to provide her children with proper care and custody when she "subject[ed] the children to emotional damage, breach[ed] their trust and confidence in her, plac[ed] them in a situation where they no longer reside together as a family unit and depriv[ed] them of her daily presence[.]" *In re Hudson*, 294 Mich App 261, 267 (2011).

2. Evidence Did Not Support Termination Under §19b(3)(h)

Termination under §19b(3)(h) was not supported by clear and convincing evidence where the trial court failed to consider (1) that termination was sought at a time when the respondent-father anticipated being paroled in less than two years, (2) that the DHHS never evaluated the respondent-father's parenting skills or facilitated access to services, and (3) "whether [the] respondent[-father] could provide proper care and custody in

[42] Formerly §19b(3)(e).

[43] Formerly §19b(3)(d).

[44] "Both elements of [§19b(3)(g)] [are] contained in [§19b(3)(h)]." *In re Perry*, 193 Mich App 648, 651 (1992).

the future by voluntarily granting legal custody to his relatives during his remaining term of incarceration." *In re Mason*, 486 Mich at 160-163.

I. Termination on Grounds of Prior Termination of Parental Rights to Siblings–§19b(3)(i)

Under MCL 712A.19b(3)(i), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[p]arental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful."

J. Termination on Grounds of Reasonable Likelihood of Harm to Child–§19b(3)(j)

Under MCL 712A.19b(3)(j), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent."

For purposes of terminating parental rights under §19b(3)(j), it is proper for a court to evaluate the potential for *emotional* harm to the child(ren). *In re Hudson (Sword-Pope)*, 294 Mich App 261, 268 (2011) (trial court properly terminated respondent-mother's parental rights under §19b(3)(j) where her "behavior [would] have life-long and profound effects on her children as they come to grips with the fact that she was guilty of first-degree criminal sexual conduct with her own 14-year-old biological child[]").

Termination of both parents' parental rights under §19b(3)(j) "is permissible even in the absence of determinative evidence regarding the identity of the perpetrator when the evidence shows that respondent-parents must have either caused the intentional injuries or failed to safeguard the children from injury." *In re Vandalen*, 293 Mich App 120, 139, 141 (2011) (trial court properly terminated both respondent-parents' parental rights under §19b(3)(g) and §19b(3)(j) where the trial court concluded that one parent must have abused the children while the other parent failed to protect the children from the abuse when the respondent-parents' two infant children "suffered unexplained, serious, nonaccidental injuries consistent with intentional abuse while in respondent[-parents'] sole care and custody[]" and "the extent and seriousness of the injuries to both children were consistent with prolonged abuse and clearly demonstrated a pattern of abuse in respondent[-parents'] home indicating a substantial risk of future harm[]").

"[A] criminal history alone does not justify termination [under §19b(3)(j)." *In re Mason*, 486 Mich 142, 165 (2010) (concluding that termination of a respondent-father's parental rights was not supported by clear and convincing evidence because there was "no evidence show[ing] that the children would be harmed if they lived with [the] respondent[-father] upon his release[]"). The Michigan Supreme Court noted:

> "[J]ust as incarceration alone does not constitute grounds for termination, a criminal history alone does not justify termination. Rather, termination solely because of a parent's past violence or crime is justified only under certain enumerated circumstances, including when the parent created an unreasonable risk of serious abuse or death of a child, if the parent was convicted of felony assault resulting in the injury of one of his own children, or if the parent committed murder, attempted murder, or voluntary manslaughter of one of his own children." *In re Mason*, 486 Mich at 165.

1. Evidence Supported Termination Under §19b(3)(j)

Termination under §19b(3)(j) was supported by clear and convincing evidence where "[the] respondent[-mother] had difficulty controlling her emotional stability and aggression, . . . evidence from two [police] officers suggested that [the] respondent[-mother] had committed a violent assault on an older woman[,] . . . [the] respondent[-mother] slapped [her child] when the child told [her about being] sexua[ly]l abuse[d,] . . . the children's current caretakers, their aunt and uncle, [did] not feel that [the] respondent[-mother] [was] safe[, and t]here was also testimony that [the respondent-mother's son] specifically thinks that [the] respondent[-mother would] kill him if he [was] returned to her." *In re Gonzales/Martinez*, 310 Mich App 426, 433-434 (2015).

Termination under §19b(3)(j) was supported by clear and convincing evidence where the respondent-mother continued to allow her children to stay at the home of an adult acquaintance known as "Uncle Lenny" after her children reported that he was sexually abusing them. *In re Brown/Kindle/Muhammad Minors*, 305 Mich App 623, 636-637 (2014). The respondent-mother confronted "Uncle Lenny," who was a friend of a friend and whose full name and address she did not know, about the abuse. *Id.* at 636. However, "Uncle Lenny" denied abusing the children, and the respondent-mother continued to allow the children to stay with him despite disclosures about the abuse from all three of her children. *Id*. The Court noted that on the basis of this

conduct, it was clear "that the children would have been at risk of harm in [the respondent-mother's] care[.]" *Id*.

Termination under §19b(3)(j) was supported by clear and convincing evidence where the respondent-mother "had a history of inviting men with criminal backgrounds into her home[, she] continued to invite men into her home throughout the pendency of the case, demonstrating that she did not benefit from her service plan[,]" and her psychological evaluation indicated that she was "emotionally immature and likely to engage in relationships with exploitive men who would put her children at a risk of harm[,]" to which her oldest daughter "was particularly vulnerable to abuse and harm because of her autism[.]" *In re White Minors*, 303 Mich App 701, 712 (2014).

Termination under §19b(3)(j) was supported by clear and convincing evidence where "[the] respondent[-mother] [] unsuccessfully participated in several domestic violence classes[,] [] refused to extricate herself from [the mutually abusive] relationship with [her current boyfriend,]" and had a "long history of engaging in domestic violence and [] repetitive selection of violent, abusive partners[.]" *In re Dearmon/Harverson-Dearmon Minors*, 303 Mich App 684, 700 (2014).

Termination under §19b(3)(j) was supported by clear and convincing evidence where "[the r]espondent-mother left [her] children [for an extended period of time] in the care of their maternal grandmother who previously had her parental rights terminated and whose home did not have running water[; d]uring the approximately two years that [her] children were in the court's temporary custody, she failed to maintain employment and obtain suitable housing, often living with others, and most recently, in a shelter[; and s]he [] neglected to contact the police after her daughter informed her that she had suffered sexual abuse." *In re Laster*, 303 Mich App 485, 494 (2013).

Termination under §19b(3)(j) was supported by clear and convincing evidence where the respondent-mother had "a long history of substance abuse and mental illness, and her [previous attempts at] treatment ha[d] been unsuccessful for both[;]" "it was undisputed that [the] respondent[-mother] had thoughts of harming her youngest daughter and that she acted on those thoughts by attempting to suffocate her[;]" "[the] respondent[-mother's] oldest daughter had previously been removed and placed in foster care [following] [the] respondent[-mother's] [] thoughts of harming her[,]" and after falsifying drug tests to regain custody of the oldest daughter, "[the] respondent[-

mother] continued to have thoughts of harming her daughter." *In re Moss*, 301 Mich App 76, 82 (2013).

Termination under §19b(3)(j) was supported by clear and convincing evidence where the respondent-mother "had been struggling with her anger-management problems for years[,]" "she was unable to control her anger" despite receiving treatment on and off over a span of four years, there were "several incidents of angry outbursts and at least one incident in which [the] DHHS] personnel had to call the police to remove [the] respondent[-mother] from her anger-management class[, which resulted in her] . . . incarcerat[ion] for disturbing the peace[, and] . . . the children had begun to internalize and model [the respondent-mother's] aggressive behavior." *In re Olive/Metts*, 297 Mich App 35, 40-41 (2012).

Termination under §19b(3)(j) was supported by clear and convincing evidence where the respondent-mother's lengthy period of mental instability was relevant to her present ability to properly care for the child, she made poor decisions during the time the child lived with the guardian (e.g. living with two different abusive men after knowing each man for a very short period of time), and her own testimony evidenced her "lack of judgment, insight, and empathy for the child[.]" *In re Utrera*, 281 Mich App 1, 24-26 (2008).

Termination under §19b(3)(j) was supported by clear and convincing evidence where the respondent-mother allowed known sex offenders to interact with her children, failed to take steps to ensure that sexual assaults would not occur, and had a history of failing to protect her children from physical harm and abuse. *In re Archer*, 277 Mich App 71, 75-76 (2007).

Termination under §19b(3)(j) of the respondent-father's parental rights to his youngest child was supported by clear and convincing evidence where the respondent-father admittedly failed to "notice something amiss with, or otherwise attend to, his youngest child as she went several hours without taking nourishment or fluid[,]" which resulted in a life-threatening condition due to dehydration, the respondent-father had persistent substance-abuse problems, and the respondent-father failed to "participate in, or benefit from, services relating to caring for a child with cerebral palsy, or to attend most of that child's medical appointments[,]" which created a reasonable likelihood of harm if returned to the respondent-father's care. *In re LaFrance*, 306 Mich App 713, 728-729 (2014).

Termination under §19b(3)(j) of the respondent-mother's parental rights to her youngest child was supported by clear and

convincing evidence where she tested positive for methadone and THC during her pregnancy with that child, admitted using opiates for years, demonstrated questionable behavior while in the hospital for the delivery that caused medical staff to question her ability to care for a newborn, and "even after the infant's cerebral palsy diagnosis, [she] failed to attend virtually all of the dozens of medical appointments for the baby, failed to attend programs intended to educate her about that condition, and refused to sign paperwork to facilitate the child[] receiving physical therapy." *In re LaFrance*, 306 Mich App at 729. "[T]he failure to participate in services directly linked to the ability to care for a special needs, or medically fragile, child bears directly on issues of neglect." *Id.* at 729-730.

2. Evidence Did Not Support Termination Under §19b(3)(j)

Termination under §19b(3)(j) was not supported by clear and convincing evidence where "[a]lthough [the] respondent-father was not involved in [his] children's lives and did not provide support for them, that [was] not, by itself, sufficient evidence that the children would be harmed if placed in his home." *In re Laster*, 303 Mich App 485, 495 (2013).

Termination under §19b(3)(j) was not supported by clear and convincing evidence where the respondent-father's criminal record consisted of "short jail stints for comparatively minor offenses[, t]he record show[ed] that he supported his family before his imprisonment[,] no evaluation was ever conducted to gauge whether he was likely to offend again." *In re Mason*, 486 Mich at 165. Thus, the DHHS failed to show any evidence that the children would be harmed if returned to the respondent-father upon his release from jail. *In re Mason*, 486 Mich at 165.

Termination under §19b(3)(j) was not supported by clear and convincing evidence where the respondent-mother, who had a diagnosed personality disorder, demonstrated "proper motivation" by making significant strides toward meeting the goals the court established, the respondent-mother's psychologist testified that the respondent-mother, with proper motivation, could make progress in dealing with her personality disorder and begin addressing her parenting problems within four to six months, and "[t]he trial court's conclusion that there [was] a 'reasonable likelihood' that the child would be harmed if reunited with respondent[-mother] . . . [was] 'essentially conjecture. . . .'"[45] *In re Boursaw*, 239 Mich App 161, 169-172, 177 (1999), overruled in part on other grounds by *In re Trejo Minors*, 462 Mich 341, 353-354 (2000).

Termination under §19b(3)(j) of the respondent-parents' parental rights to their three older children was not supported by clear and convincing evidence where, although the respondent-parents failed to "gain control over their respective substance-abuse habits[,]" there was no evidence "that either respondent[-parent] had ever abused or neglected any of their three older children." *In re LaFrance*, 306 Mich App 713, 730 (2014). Although the court did not clearly err by terminating the respondent parents' respective parental rights to the older children's younger sibling, the doctrine of anticipatory neglect did not apply because the older children did not require special medical care like the younger sibling, the respondent-parents cared for the older children from birth without incident, the only allegation of neglect and abuse related to the youngest child, and "drug use alone, in the absence of any connection to abuse or neglect, cannot justify termination solely through operation of the doctrine of anticipatory neglect." *Id*. at 731-732.

K. Termination on Grounds of Serious Abuse of Child or Sibling–§19b(3)(k)

Under MCL 712A.19b(3)(k), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he parent abused the child or a sibling[46] of the child and the abuse included 1 or more of the following:

(*i*) Abandonment of a young child.

(*ii*) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

(*iii*) Battering, torture, or other severe physical abuse.

(*iv*) Loss or serious impairment of an organ or limb.

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[45] The Court of Appeals distinguished this case from *In re Dahms*, 187 Mich App 644 (1991), because the child involved in the *In re Boursaw* matter did not suffer from similar problems as the children in the *In re Dahms* matter had. *In re Boursaw*, 239 Mich App at 175-176, overruled in part on other grounds by *In re Trejo Minors*, 462 Mich at 353-354. In *In re Dahms*, *supra* at 647, the Court of Appeals found termination of the respondent-mother's parental rights proper under §19b(3)(c)(*i*) where there was clear and convincing evidence that the two-to-three-year period was unreasonable given the ages and "pervasive behavior disorders" of the children.

[46] "'Sibling' is not specifically defined in the Juvenile Code. . . . [However, t]he *American Heritage Dictionary of the English Language* (3rd ed), p 1675, defines 'sibling' as '[o]ne of two or more individuals having one or both parents in common; a brother or sister.'" *In re Hudson (Sword-Pope)*, 294 Mich App 261, 265-266 (2011) (although the respondent-mother had given up her 14-year-old victim-child for adoption at birth, he still constituted a "sibling" to her other children for purposes of terminating her parental rights to them under §19b(3)(b)(*i*); "there is no rational basis for forging a distinction between a legal sibling and [a] biological sibling under the present factual scenario[]").

> (*v*) Life threatening injury.
>
> (*vi*) Murder or attempted murder.
>
> (*vii*) Voluntary manslaughter.
>
> (*viii*) Aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter.
>
> (*ix*) Sexual abuse as that term is defined in . . . MCL 722.622."[47]

Termination of a parent's parental rights under §19b(3)(k) is permissible "even in the absence of definitive evidence regarding the identity of the perpetrator when the evidence does show that the respondent or respondents must have either caused or failed to prevent the child's injuries." *In re Ellis*, 294 Mich App 30, 35-36 (2011) (termination of both parents' parental rights under §19b(3)(k) was supported by clear and convincing evidence where the trial court concluded that one parent must have abused the child while the other parent failed to prevent the child abuse when the child suffered "numerous non-accidental injuries that likely occurred on more than one occasion," and the child's parents lived together and shared in the child care responsibilities as the child's sole caregivers).

For purposes of terminating parental rights under §19(3)(k)(*ii*), "[i]t is [] appropriate for a trial court to evaluate a respondent's potential risk to other siblings by analyzing how the respondent treated another one of his or her children, albeit a child the respondent gave up for adoption. Though no legal relationship exists in such a situation, the reality is that respondent is still the biological [parent] of the child who was given up for adoption and that child is the biological half-sibling of the respondent's other children." *In re Hudson (Sword-Pope)*, 294 Mich App 261, 266 (2011) (termination was supported under §19b(3)(k)*(ii)* by clear and convincing evidence where the respondent-mother was convicted of first-degree criminal sexual conduct relating to sexual activity she had with her 14-year-old biological son whom she had given up for adoption at birth, but reconnected with through MySpace).

Termination under §19(3)(k)(*ii*) was supported by clear and convincing evidence where the respondent-father admitted that he sexually penetrated his stepdaughter, the minor children's half-sister. *In re Jenks*, 281 Mich App 514, 518 (2008).

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[47] MCL 722.622(w) defines *sexual abuse* as "engaging in sexual contact or sexual penetration as those terms are defined in . . . MCL 750.520a, with a child."

L. Termination on Grounds of Prior Involuntary Termination of Parental Rights to Another Child–§19b(3)(*l*)

Under MCL 712A.19b(3)(*l*), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he parent's rights to another child were terminated as a result of proceedings under [MCL 712A.2(b)] or a similar law of another state."

Because §19b(3)(*l*) applies to involuntary terminations under the Juvenile Code, the trial court erred when it terminated the respondent-mother's parental rights to her son (her second child) under §19b(3)(*l*) where the respondent-mother voluntarily released her parental rights to her daughter (her first child) under the Adoption Code; the trial court should have terminated the respondent-mother's parental rights to her son under §19b(3)(m), the statutory provision that applies to voluntary terminations under the Adoption Code.[48] *In re Jones*, 286 Mich App 126, 128-129 (2009).

M. Termination on Grounds of Prior Voluntary Termination of Parental Rights to Another Child–§19b(3)(m)

Under MCL 712A.19b(3)(m), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he parent's rights to another child were voluntarily terminated following the initiation of proceedings under [MCL 712A.2(b)] or a similar law of another state and the proceeding involved abuse that included 1 or more of the following:

> (*i*) Abandonment of a young child.
>
> (*ii*) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.
>
> (*iii*) Battering, torture, or other severe physical abuse.
>
> (*iv*) Loss or serious impairment of an organ or limb.
>
> (*v*) Life-threatening injury.
>
> (*vi*) Murder or attempted murder.
>
> (*vii*) Voluntary manslaughter.

[48] After this decision was published, MCL 712A.19b(3)(m) was amended to include an additional requirement for termination under that provision: the child protective proceeding preceding the voluntary termination must have involved certain forms of abuse. 2010 PA 7. It is unclear from the facts as stated in *In re Jones*, 286 Mich App at 126, whether termination would have been appropriate under the current version of §19b(3)(m).

> (*viii*) Aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter.
>
> (*ix*) Sexual abuse as that term is defined in . . . MCL 722.622."[49]

N. Termination on Grounds of Conviction of a Serious Offense–§19b(3)(n)

Under MCL 712A.19b(3)(n), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he parent is convicted of 1 or more of the following, and the court determines that termination is in the child's best interests because continuing the parent-child relationship with the parent would be harmful to the child:

> (*i*) A violation of . . . [first-degree murder under] MCL 750.316, [second-degree murder under MCL] 750.317, [first-degree criminal sexual conduct under MCL] 750.520b, [second-degree crimina l sexual conduct under MCL] 750.520c, [third-degree criminal sexual conduct under MCL] 750.520d, [fourth-degree criminal sexual conduct under MCL] 750.520e, [or assault with intent to commit criminal sexual conduct under MCL] 750.520g.
>
> (*ii*) A violation of a criminal statute that includes as an element the use of force or the threat of force and that subjects the parent to sentencing [as a repeat offender] under . . . MCL 769.10, [MCL] 769.11, and [MCL] 769.12.
>
> (*iii*) A federal law or law of another state with provisions substantially similar to a crime or procedure listed or described in subparagraph (*i*) or (*ii*)."

17.7 Voluntary Termination of Parental Rights

A parent may voluntarily consent to termination of his or her parental rights without the court announcing a statutory basis for termination.[50] *In re Toler*, 193 Mich App 474, 477 (1992). Note, however, that in child protective proceedings, *jurisdiction* cannot be conferred on the Family

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[49] MCL 722.622(w) defines *sexual abuse* as "engaging in sexual contact or sexual penetration as those terms are defined in . . . MCL 750.520a, with a child."

[50] See Chapter 19 for special procedures applicable to cases involving Indian children.

Division by consent of the parties. *In re Youmans*, 156 Mich App 679, 684 (1986).

In voluntarily terminating his or her parental rights during a child protective proceeding, the parent may do one of the following:

(1) Execute a release and termination of parental rights under the Adoption Code.[51]

Note: If a parent elects to release his or her parental rights under the Adoption Code, a new case is opened under the Adoption Code and the neglect and abuse case continues in a separate proceeding.[52] See *In re Hernandez/Vera*, unpublished opinion per curiam of the Court of Appeals, issued April 16, 2013 (Docket No. 312136),[53] where the Court of Appeals set out the procedures the trial court should have followed when a respondent-parent executes a release and termination of parental rights under the Adoption Code after the initiation of a child protective proceeding under the Juvenile Code:

> "We urge the trial court not to mix Juvenile Code and Adoption Code proceedings in the future, in order to avoid confusion. We suggest that when [a] respondent indicate[s] that [he or] she wishes to release [his or] her [parental] rights [during a child protective proceeding under the Juvenile Code], the trial judge should [] order[] a recess in the Juvenile Code proceeding and beg[i]n an Adoption Code proceeding. After taking [the] respondent's release and entering the appropriate orders [under the Adoption Code], the trial court could then [] reconvene[] the Juvenile Code proceeding, terminate[] the [other parent's] [parental] rights under the Juvenile Code, and entertain[] and take[] under advisement a motion to dismiss the Juvenile Code termination petition as to [the] respondent. Upon the expiration of the time period for [the] respondent to request a rehearing, MCL 710.64(1), or file an appeal, MCL 710.65(1), the trial court could then [] grant[] the motion to dismiss the Juvenile Code termination petition as to [the] respondent. By

[51] See the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 2.

[52] Post-termination review hearings would continue in the neglect and abuse case. See Chapter 18 for a detailed discussion of post-termination review hearings.

[53] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

> proceeding in such a manner, the trial court could insure that needless confusion does not result."

(2) Admit to a ground for termination or enter a no contest plea under the Juvenile Code. See *In re Toler*, 193 Mich App 474, 477 (1992).

> **Note:** The court must still find that the termination of parental rights is in the child's best interests. See Section 17.8.

A voluntary release of parental rights for purposes of adoption must comply with the Adoption Code, and the court's failure to properly execute a release and termination of parental rights under the Adoption Code will invalidate a termination order. *In re Buckingham*, 141 Mich App 828, 836-837 (1985) ("[t]he absence of a duly executed release by respondent[-]mother, the failure of the [trial] court to find that the release would be in the best interests of the children, and the [trial] court's failure to distinguish the Adoption Code from the [J]uvenile [C]ode mandate[d] a finding that the release of respondent[-]mother was legally inadequate and therefore void[;] [t]hus, the order terminating respondent[-]mother's parental rights pursuant to the invalid release [was] reversed[]").

Once the court properly executes a release and termination of parental rights under the Adoption Code, it cannot terminate those same parental rights under the Juvenile Code. *In re Jones*, 286 Mich App 126, 128 (2009). In *In re Jones*, *supra* at 127-128, the Department of Health and Human Services (DHHS) sought involuntary termination of the parents' parental rights to their daughter under the Juvenile Code after both parents, in lieu of child protective proceedings, had already voluntarily released their parental rights under the Adoption Code. The court terminated the parents' parental rights pursuant to the Adoption Code and released the daughter to the DHHS. *Id.* Following the termination, the court attempted to terminate the respondents' parental rights under the Juvenile Code. *Id.* at 128. On appeal, the Court of Appeals held that the court clearly erred when it attempted to terminate parental rights to the daughter under the Juvenile Code after it properly executed a release and termination of parental rights under the Adoption Code. *Id.* Specifically, the Court of Appeals found:

> "That attempted termination under the [J]uvenile [C]ode was without effect and was clearly improper, because the [respondent-]parents no longer possessed any parental rights that could be terminated. Their parental rights had previously been terminated under the Adoption Code, a completely separate statutory proceeding from a termination under the [J]uvenile [C]ode. Once a parent voluntarily releases his or her child to the [DHHS] or to a child placement agency under the Adoption Code, and the release

> is accepted by the court, and the court enters an order terminating that parent's rights to the child, that parent no longer has any parental rights subject to termination under the [J]uvenile [C]ode." *In re Jones*, 286 Mich App at 128.

17.8 Requirements for "Best Interest" Step

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). See also MCR 3.977(E)(4), MCR 3.977(F)(1)(c), and MCR 3.977(H)(3)(b), which also require the court to expressly find that termination of parental rights *is* in the child's best interests.

"The trial court must order the parent's parental rights terminated if the Department [of Human Services] has established a statutory ground for termination by clear and convincing evidence and it finds from a preponderance of evidence on the whole record that termination is in the children's best interests." *In re White Minors*, 303 Mich App 701, 713 (2014). See also *In re Moss*, 301 Mich App 76, 90 (2013) ("whether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence").

> **Note:** Because "there is not an established standard of proof for the best-interest determination in Michigan,[54] and *Santosky* [*v Kramer*, 455 US 745 (1982),] did not address what standard of proof is constitutionally required at the best-interest stage of termination proceedings[,]"[55] the *In re Moss* Court applied the test developed in *Mathews v Eldridge*, 424 US 319 (1976), "to determine the requisite standard of proof for the best-interest determination that due process would require[.]"[56] *In re Moss*, 301 Mich App at 86.

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[54] In *In re Moss*, 301 Mich App at 90 n 2, the Court noted that "the Legislature did not include a standard for the best-interest determination when it amended [MCL 712A.19b(5)], as it did for the establishment of a statutory ground for termination [under MCL 712A.19b(3)[;] [h]ad the Legislature intended for the standards to be the same, it could have included such language." "Further, the Michigan Court Rules, which are adopted by our Supreme Court, are silent on the standard of proof required for the best-interest determination, as is Michigan caselaw." *In re Moss*, 301 Mich App at 84.

[55] "[T]he [United States Supreme] Court held [in *Santosky v Kramer*, 455 US 745 (1982),] that the clear and convincing evidence standard is the minimal constitutionally mandated standard that must be applied at the fact-finding stage of termination proceedings." *In re Moss*, 301 Mich App at 86, citing *Santosky*, 455 US at 769. Note that the fact-finding stage of termination proceedings the *Santosky* Court refers to is similar to Michigan's "clear and convincing evidence standard to determine whether there are statutory grounds for termination." *In re Moss*, 301 Mich App at 86.

[56] For a detailed analysis of the *In re Moss* Court's application of the *Mathews's* three-prong test, see *In re Moss,* 301 Mich App at 86-90.

The Michigan Court of Appeals reviews "for clear error the trial court's determination regarding the children's best interests." *In re White Minors*, 303 Mich App at 713. In addition, the Michigan Court of Appeals reviews "for clear error whether the trial court failed to address a significant difference between each child's best interests." *Id.* at 716.

A. Legal Standards for Best-Interest Determination

"To determine whether termination of a parent's parental rights is in a child's best interests, the court should consider a wide variety of factors that may include 'the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home.' The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *In re White Minors*, 303 Mich App 701, 713-714 (2014), quoting *In re Olive/Metts Minors*, 297 Mich App 35, 41-42 (2012). However, a parent's parental rights may not be terminated "solely because he or she was a victim of domestic violence." *In re Plump*, 294 Mich App 270, 273 (2011).[57]

The court may consider a child's placement when making a best-interests determination. *In re Foster (Tommy)*, 285 Mich App 630, 635 (2009). Specifically, the Court of Appeals found:

> "[O]nce a statutory ground [for termination] is established, a parent's interest in the care and custody of his or her child yields to the state's interest in the protection of the child. Thus, while it is inappropriate for a court to consider the advantages of a foster home in deciding whether a statutory ground for termination has been established, such considerations are appropriate in a best-interests determination." *In re Foster*, 285 Mich App at 635 (internal citations omitted).

See *In re Mays*, 490 Mich 997, 997 (2012) (Michigan Supreme Court reversed "that part of the Court of Appeals judgment holding that the trial court did not clearly err in finding that termination was in the children's best interests [under] MCL 712A.19b(5)[] [because] [t]he factual record in th[e] case [was] inadequate to make a best interests determination[] . . . [when] there [was] no evidence in the record that

[57] The trial court did not err in terminating the respondent-mother's parental rights, however, after finding reasonable efforts to reunify were made where the respondent-mother's own behaviors–among other things, maintaining a relationship with the abuser of her and her children, and failing to benefit from services provided to her as a victim of domestic violence–were directly harming her children or exposing them to harm. *In re Plump*, 294 Mich App 270 (2011).

the trial court considered whether termination of the respondent's parental rights was appropriate given the children's placement with their maternal grandmother[]").

"Although the trial court may terminate parental rights in lieu of placement with relatives if it finds that termination is in the child's best interests, the fact that the children are in the care of a relative at the time of the termination hearing is an 'explicit factor to consider in determining whether termination was in the children's best interests.'" *In re Olive/Metts*, 297 Mich App 35, 43 (2012), quoting *In re Mason*, 486 Mich 142, 164 (2010) ("trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal"). See also SCAO Memorandum, *Child's Best Interests in Termination of Parental Rights Proceedings*,[58] p 3, which addresses "[t]he child's placement with a relative [a]s one factor the court must consider," but also sets out the following additional factors the court should consider when determining whether termination of parental rights is in a child's best interests:

> "•The opinion of experts including psychologists and therapists, the caseworker, and the lawyer guardian ad litem.
>
> • The likelihood of the child being adopted.
>
> • The child's age.
>
> • The child's wishes, if of a sufficient age to express an opinion.
>
> • The child's relationships with extended relatives.
>
> • Whether the child has special needs.
>
> • Ethnic or cultural considerations.
>
> • The length of time the child has been in foster care.
>
> • The bond that exists between siblings."
>
> **Note:** It is important to note that the list set out in the *Child's Best Interests in Termination of Parental Rights Proceedings*, *supra* at p 3, "is not an exhaustive list of considerations, as each child protective proceeding includes facts and

[58] Available at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/Documents/TPR-BestInterests.pdf.

circumstances that may trigger other considerations in the best interests analysis." "[T]he [court] record regarding the best interests analysis should be supported by case-specific facts to illustrate that termination of parental rights is in the child's best interests, even if that child is placed with a relative." *Id.*

B. Best Interests of Each Child Individually

"[T]he trial court has a duty to decide the best interests of each child individually[, and] [a]lthough 'in most cases it will be in the best interests of each child to keep brothers and sisters together . . ., if keeping the children together is contrary to the best interests of an individual child, the best interests of that child will control.'" *In re Olive/Metts*, 297 Mich App 35, 42 (2012), quoting *Wiechmann v Wiechmann*, 212 Mich App 436, 439 (1995) (even though *Wiechmann*, *supra*, "[was a] child custody dispute[] in which the children's best interests were analyzed under the framework of the Child Custody Act, MCL 722.21 *et seq.*, the same principle—that each child be treated as an individual—applies with equal force in termination-of-parental-rights cases under the [J]uvenile [C]ode, [MCL 712A.19b][, and] [i]t is, therefore, incumbent on the trial court to view each child individually when determining whether termination of parental rights is in that child's best interests").

The holding in "*In re Olive/Metts Minors* stands for the proposition that, if the best interests of the individual children *significantly* differ, the trial court should address those differences when making its determination of the children's best interests[]" and "does not stand for the proposition that the trial court errs if it fails to explicitly make individual and—in many cases—redundant factual findings concerning each child's best interests." *In re White Minors*, 303 Mich App 701, 715-16 (2014) ("trial court did not clearly err by failing to distinguish the individual best interests of the children" where "the trial court *did* distinguish between the children when [the children's individual and different special needs] differed in significant ways," and "[t]here [was] no indication that the trial court clearly erred by failing to find that the oldest daughter shared a particular, stronger bond with [the respondent-mother] than the younger children").

C. Termination in Child's Best Interests

Termination of the respondent-mother's parental rights was supported by a preponderance of the evidence that the termination was in the children's best interests where "[t]here was evidence that [the] respondent[-mother] had violently attacked an elderly women, had not successfully addressed her substance abuse and mental

health issues, . . . was not motivated to make the necessary changes to address those issues. Respondent also continued to have contact with the children's abuser, even going so far as to indicate her desire to start a family with him[, and t]he children's relatives were willing to adopt them, and both children were excelling in their new environment." *In re Gonzales/Martinez*, 310 Mich App 426, 435 (2015).

Termination of the respondent-mother's parental rights was supported by a preponderance of the evidence that the termination was in the children's best interests where the respondent "lacked the ability to keep her children safe or effectively parent them[,]" despite the fact that the children were placed with relatives, the respondent did not miss any supervised visits, and the respondent and children were bonded. *In re Brown/Kindle/Muhammad Minors*, 305 Mich App 623, 638 (2014). Specifically, the respondent repeatedly sent the minor children to a location where they were sexually abused because the children "begged" her to send them there. *Id*. Moreover, "the children's need for permanency, stability, and finality, militated against placing the minor children in [the] respondent's care" because she "frequently changed housing, lived illegally in a series of abandoned houses without utilities or appliances, and left the minor children in the care of others[.]" *Id*.

Termination of the respondent-mother's parental rights was supported by a preponderance of the evidence based on "the child's need for permanency and stability" where "[a]lthough there was evidence that [the] respondent[-]mother had appropriate parenting skills, . . . [before the termination hearing, the] respondent[-]mother was sentenced to . . . imprisonment for her participation in a bank robbery[,] . . . [and] the child was thriving in foster care and had developed a very strong attachment to the foster mother."[59] *In re Johnson*, 305 Mich App 328, 335-336 (2014).

Termination of the respondent-mother's parental rights was supported by a preponderance of the evidence that the termination was in the children's best interests where although "the trial court found that the children [and the respondent-mother] shared a bond[,]" the court "strongly weighed the children's need for safety and stability" and found that the respondent-mother "had a history of failing to comply with her case service plan by inviting strange men into her home[,] . . . that the children were doing very well in foster care[,] . . . that there was a possibility that the children would be

[59] Note, however, that the trial court's order terminating the respondent-mother's parental rights was conditionally reversed and remanded for purposes of ICWA compliance finding that the ICWA notice requirements were triggered and not followed during the preliminary hearing. *In re Johnson*, 305 Mich App at 332. For additional information on the ICWA's notice requirements under 25 USC 1912(a), see Section 19.4.

adopted[, a]nd . . . that the children strongly needed permanence and stability." *In re White Minors*, 303 Mich App 701, 714 (2014).

Termination of the respondent-father's parental rights was supported by a preponderance of the evidence that the termination was in the children's best interests where "[the] respondent-father had very minimal involvement in [his] children's lives[, h]e did not provide support for [his] children, [] he had little or no contact with [his children] for several years[, and t]here was [] no evidence that he was able to provide suitable housing for [his] children [when he failed to] comply with the required [court-ordered] home assessment [of the suitability of his home on two occasions, despite ample notification of the visits]." *In re Laster*, 303 Mich App 485, 496 (2013).

Termination of the respondent-mother's parental rights was supported by a preponderance of the evidence that the termination was in the children's best interests where "the [court] record show[ed] that [the] respondent[-mother] acted on her thoughts of harming her youngest daughter by attempting to suffocate her numerous times[,] . . . that she brought her children with her while purchasing drugs, that her son had seen her using crack cocaine before, [] that she did not have stable housing[, and] . . . given her history, [the respondent-mother's] ultimate success regarding her substance abuse and mental health treatments [were] uncertain at best." *In re Moss*, 301 Mich App 76, 90 (2013).

Termination of the respondent-parents' parental rights were in the children's best interests where "[even though the] respondent[-parents] did make some progress in addressing their [alcohol and substance abuse], the evidence showed that it was unlikely that the child could be returned to [the child's] parents' home within the foreseeable future, if at all[, and] [t]he child required a permanent, safe, and stable home, which neither respondent[-parent] was capable of providing." *In re Frey*, 297 Mich App 242, 248-249 (2012).

Termination of the respondent-parent's parental rights to three of her five children[60] was in the children's best interests where the evidence showed that "[the] respondent[-mother] struggled to cope with five children, was unable to control her temper to the detriment of the children, lacked a source of income, had lost her home, and was in jail[;] [the] [r]espondent[-mother] failed to derive any lasting benefit from services previously provided and there were no additional

[60] The Michigan Court of Appeals "vacate[d] the trial court's best-interest analysis with respect to the [two youngest children], and remand[ed] th[e] case to the trial court for further proceedings" because "the trial court was required to consider the best interests of each child individually and was required to explicitly address each child's placement with relatives at the time of the termination hearing if applicable," but the trial court failed to "expressly address the fact that the two youngest children were residing with a paternal relative." *In re Olive/Metts*, 297 Mich App at 43-44.

services that could be provided." *In re Olive/Metts*, 297 Mich App 35, 43 (2012).

Termination of the respondent-parents' parental rights were in the children's best interests where there was "[c]ompelling evidence indicat[ing] that the children would not be safe in respondent[-parents'] custody considering that both children suffered unexplained injuries consistent with serious abuse while in respondent[-parents'] primary care[,]" the children were young, "the ongoing uncertainty about the circumstances surrounding the serious abuse of the children while in respondent[-parents'] care weighed heavily against additional reunification efforts[, and] [t]he children had been placed in a stable home where they were thriving and progressing and that could provide them continued stability and permanency given the foster parents' desire to adopt them." *In re Vandalen*, 293 Mich App 120, 141 (2011).

Despite evidence showing that the mother took positive steps to address her anger and emotional control issues, the trial court did not clearly err when it concluded that termination of her parental rights was in the child's best interests where a psychological evaluation revealed that the issues were unresolved, the mother did not show appropriate parenting techniques during parenting time, she continued to place herself in abusive situations, and she had yet to establish a parent-child relationship with her child. *In re Jones*, 286 Mich App 126, 129-130 (2009).

D. In-Camera Interviews

The court does not have the authority to hold in camera interviews with a child when making best interests findings in child protective proceedings. *In re HRC*, 286 Mich App 444, 452-453 (2009). Specifically, the Court of Appeals found:

> "[N]othing in the [J]uvenile [C]ode, the case[]law, the court rules, or otherwise permits a trial court presiding over a termination of parental rights case to conduct in camera interviews of the children for purposes of determining their best interests. Accordingly, [the Court of Appeals] hold[s] that a trial court presiding over a juvenile proceeding has no authority to conduct in camera interviews of the children involved." *In re HRC*, 286 Mich App at 454.

17.9 Court's Required Findings

MCR 3.977(I) sets out the requirements for a court's findings following a hearing on termination of parental rights:

> "(1) *General*. The court shall state on the record or in writing its findings of fact and conclusions of law. Brief, definite, and pertinent findings and conclusions on contested matters are sufficient. If the court does not issue a decision on the record following hearing, it shall file its decision within 28 days after the taking of final proofs, but no later than 70 days after the commencement of the hearing to terminate parental rights.[61]
>
> (2) *Denial of Termination*. If the court finds that the parental rights of respondent should not be terminated, the court must make findings of fact and conclusions of law.
>
> (3) *Order of Termination*. An order terminating parental rights under the Juvenile Code may not be entered unless the court makes findings of fact, states its conclusions of law, and includes the statutory basis for the order."

"The court's failure to issue an opinion within 70 days does not dismiss the petition." MCL 712A.19b(1). See also *In re TC*, 251 Mich App 368, 370-371 (2002) (trial court's failure to issue an opinion within the 70-day requirement under MCR 3.977(I)(1) did not require the trial court to reverse its order terminating the respondent-mother's parental rights where "[t]he Court [of Appeals] has consistently interpreted MCR [3.977(I)(1)[62]] as not requiring dismissal where the time limits set forth in that section have been violated[,] [t]here is no reason to suppose that the [Michigan] Supreme Court intended that the penalty for delay would be more delay[, and] . . . the [Michigan] Supreme Court [] stated in the court rules [under MCR 2.613(A)[63]] that a trial court's error in issuing a ruling or order or an error in the proceedings is not grounds for th[e] Court [of Appeals] to reverse or otherwise disturb an order unless th[e] Court [of Appeals] believes that failure to do so would be inconsistent with substantial justice[]").

Under MCR 3.977(G) additional findings must be made when terminating the parental rights of an Indian child's parent:[64]

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[61] See also MCL 712A.19b(1), which states substantially similar language.

[62] Formerly MCR 5.974(G)(1).

[63] MCR 2.613(A) governs limitations on corrections of error. MCR 3.902(A).

[64] See Chapter 19 for special procedures applicable to cases involving Indian children.

"In addition to the required findings in this rule, the parental rights of a parent of an Indian child must not be terminated unless:

(1) the court is satisfied that active efforts as defined in MCR 3.002[65] have been made to provide remedial service and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful, and

(2) the court finds evidence beyond a reasonable doubt, including testimony of at least one qualified expert witness, as described in MCL 712B.17, that parental rights should be terminated because continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child."

17.10 Required Advice of Rights

Immediately following entry of an order terminating a parent's parental rights, the court must advise the respondent-parent orally or in writing that:

(1) he or she is entitled to appellate review of the termination order.

(2) the court will appoint an attorney if the respondent-parent is financially unable to retain one, and the court will furnish the appointed attorney with the necessary portions of the transcript and record to appeal.[66]

(3) he or she must request the assistance of an attorney within 14 days after:

(a) notice of the termination order is given; or

(b) entry of an order denying a timely filed postjudgment motion.

(4) if he or she requests the assistance of an attorney, the instructions and time period for requesting the appointment of an attorney, which must be repeated in the form that the court must also provide to the respondent-parent.[67]

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[65] For a detailed discussion of active efforts, including the definition, see Section 19.9(E).

[66] For a detailed discussion of the respondent's right to appointment of appellate counsel, see Section 7.8(B).

(5) he or she has the right to control the release of his or her identifying information. MCR 3.977(J)(1).

17.11 Effects of Termination of Parental Rights

Parental rights to a child include the rights to custody, control, services, and earnings. See MCL 722.2. See also *In re Beck*, 488 Mich 6, 14-16 (2010). "[I]f all parental rights to [a] child are terminated, the child [will be] placed in [the] permanent custody of the court." MCL 712A.19b(1).

If the court terminates parental rights, the court must order that additional efforts for the reunification of the child with the respondent-parent must not be made. MCL 712A.19b(5). The court may then commit the child to the Michigan Children's Institute (MCI)[68] for adoptive planning, supervision, care, and placement.[69] See MCL 400.203(1)(a).

Note: See SCAO form JC 63, *Order Following Hearing to Terminate Parental Rights*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc63.pdf.

A. Reinstatement of Parental Rights Following Rehearing

Parental rights may be reinstated by a supplemental order of disposition entered after a rehearing under MCL 712A.21(1). MCL 712A.21(1) requires the petition for rehearing to be filed within "20 days of the entry of the order terminating parental rights."[70]

B. Child Support Obligations

"[E]ven after a parent's rights have been terminated, the obligation to support continues 'unless a court of competent jurisdiction modifies or terminates the obligation . . . .'" *In re Beck*, 488 Mich at 15. In *In re Beck*, *supra* at 12-16, the Michigan Supreme Court distinguished between two statutory provisions relating to a parent's parental rights and a parent's parental obligations. Under MCL 722.2, parental rights include the rights to custody, control, services, and earnings of a child.

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[67] See SCAO form JC 44, *Advice of Rights After Order Terminating Parental Rights (Juvenile Code)*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc44.pdf.

[68] "Wherever commitment to the Michigan [C]hildren's [I]nstitute [(MCI)] is mentioned in any law of this state, it shall be construed to mean commitment to the [DHHS]." MCL 400.204(1).

[69] "Within 30 days after an order is made committing a child to the superintendent of the Michigan [C]hildren's [I]nstitute [(MCI)], the court shall send to the superintendent a certified copy of the petition, the order of disposition in the case, and the report of the physician who examined the child. Upon receipt of the order the superintendent of the [MCI] shall notify the court of the child's placement[.]" MCL 400.204(1).

[70] See Section 12.11 for a detailed discussion of motions for rehearing.

However, "[u]nder the plain language of [MCL 722.2], parental rights do not include or contemplate parental obligations. Rather, it is the very next statutory provision [(MCL 722.3)] that identifies the parental obligations imposed by the Legislature." *In re Beck, supra* at 12. In *In re Beck, supra* at 14-16, the Michigan Supreme Court stated:

> "Because the parental rights identified in MCL 722.2 are distinct and detached from the parental duty identified in MCL 722.3, it is clear that the Legislature has determined that parental rights are independent from parental duties. Nothing in either MCL 722.2 or MCL 722.3 evinces any legislative intent that either statutory provision is connected to or conditioned on the other. There is no indication that the duty of support is conditioned on the retention of parental rights, just as there is no indication that the exercise of parental rights is conditioned on fulfilling the parental obligation to support.
>
> The plain language of the termination statute, MCL 712A.19b, only implicates 'parental rights.' Thus, when parental rights are terminated, what is lost are those interests identified by the Legislature *as parental rights*. In other words, the terminated parent loses any entitlement to the 'custody, control, services and earnings of the minor . . . .' Because nothing in the language of MCL 712A.19b affects the duty of support articulated in MCL 722.3, the obligation remains intact.
>
> * * *
>
> This provision of MCL 722.3 indicates that a court has the *discretion* to terminate or modify a parent's obligation to provide support, but is not *compelled* to do so."

In *In re Beck*, 488 Mich at 16, the respondent-father failed to show that the trial court abused its discretion when it "expressly declined to modify or terminate [the] respondent[-father's] child support obligation. . . . Accordingly, [the] respondent[-father] remain[ed] responsible for supporting his minor children."

See also *Evink v Evink*, 214 Mich App 172, 174-176 (1995) (a father's obligation to pay child support was not extinguished where he voluntarily released his parental rights to his child after a petition alleging child abuse was filed).

Chapter 18: Post-Termination Review Hearings

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In this chapter. . .

If a child remains in placement following termination of parental rights, a court must conduct post-termination review hearings to determine the appropriateness of the child's placement, appropriateness of the permanency plan, and determine whether reasonable efforts are being made to permanently place the child. This chapter describes the procedures for those review hearings.

The chapter also discusses the court's options following a post-termination review hearing, and termination of a court's jurisdiction of a child protective proceeding.

In an effort to provide trial courts with a quick practical guide through the process of post-termination review hearings, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys: Post-Termination Review Hearings*.

The SCAO also developed the *Conducting Effective Post-Termination Review Hearings* to guide trial courts through the procedures of conducting post-termination review hearings.

18.1 Overview

"[I]f a child remains in placement following the termination of parental rights to the child, the court shall conduct a [post-termination] review hearing not more than 91 days after the termination of parental rights and no later than 91 days after that hearing for the first year following termination of parental rights to the child."[1] MCL 712A.19c(1). See also MCR 3.978(A), which contains substantially similar language.

During any post-termination review hearing under MCL 712A.19c, the court must review:

> "(a) The appropriateness of the permanency planning goal for the child.[2]
>
> (b) The appropriateness of the child's placement.[3]
>
> (c) The reasonable efforts being made to place the child for adoption or in other permanent placement in a timely manner." MCL 712A.19c(1).

As long as a child is under the court's, Michigan Children's Institute's (MCI's), or an agency's jurisdiction, control, or supervision, the court must conduct a post-termination review hearing to review a child's placement in foster care and review the progress being made toward a child's adoption or other permanent placement. MCR 3.978(A). See also MCL 712A.19c(14).

However, post-termination review hearings under MCL 712A.19c apply "only to a child's case in which parental rights to the child were either terminated as the result of a proceeding under [MCL 712A.2(b)] or a similar law of another state or terminated voluntarily following the

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[1] If a child is placed in a permanent planned living arrangement or placed with a fit and willing relative with the intent the placement be permanent, the post-termination review hearing must be held within 182 days. MCR 3.978(A). See Section 18.3(A).

[2] "State and federal policies approve four types of permanency goals for children." SCAO Guideline, *Conducting Effective Post-Termination Review Hearings*, p 8, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/PTRH.pdf. The four types in order of priority are: adoption, guardianship, placement with a fit and willing relative, and another planned living arrangement (APPLA). *Conducting Effective Post-Termination Review Hearings*, *supra* at pp 8-9.

[3] "If the child is a **permanent** court ward under MCL 712A.20, the court may order a change in placement if the court determines that a different placement is more appropriate and in the child's best interests." SCAO Guideline, *Conducting Effective Post-Termination Review Hearings*, p 10, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/PTRH.pdf. However, "[i]t is important to note that courts may not order a change of placement for a state ward[;] [t]he MCI superintendent is responsible for decisions regarding state wards' placement and care." *Conducting Effective Post-Termination Review Hearings*, *supra*. "SCAO recommends that if the court believes that the child's placement is not appropriate, the court make that belief known and recommend that the child's [Lawyer Guardian Ad Litem] (LGAL) and the [Michigan Children's Institute] (MCI) superintendent consult regarding the court's concern." *Id.*

initiation of a proceeding under [MCL 712A.2(b)] or a similar law of another state." MCL 712A.19c(14).

18.2 Reasonable Efforts Findings

To establish a child's eligibility for federal foster care maintenance payments under Title IV-E of the Social Security Act, "[t]he State must make reasonable efforts . . . to make and finalize alternate permanency plans in a timely manner when reunification [of the child and family] is not appropriate or possible."[4] 45 CFR 1356.21(b). See also 42 USC 672(a)(1).

"The court must make findings on whether reasonable efforts have been made to establish permanent placement for the child[.]" MCR 3.978(C).

> **Note:** To maintain Title IV-E eligibility, "[t]he . . . agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect (whether the plan is reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement) within twelve months of the date the child is considered to have entered foster care[5] . . . , and at least once every twelve months thereafter while the child is in foster care." 45 CFR 1356.21(b)(2)(i). "If such a judicial determination regarding reasonable efforts to finalize a permanency plan is not made in accordance with the schedule prescribed in [45 CFR 1356.21(b)(2)(i)], the child becomes ineligible under [T]itle IV-E at the end of the month in which the judicial determination was required to have been made, and remains ineligible until such a determination is made." 45 CFR 1356.21(b)(2)(ii).

18.3 Time Requirements

A. Initial Post-Termination Review Hearings

If a child remains in foster care following termination of his or her parent's parental rights, the court must hold an initial post-termination review hearing within 91 days of the termination of parental rights. MCL 712A.19c(1); MCR 3.978(A).

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[4] Reasonable efforts are not the sole means of establishing eligibility under Title IV-E; the state must also comply with other federal requirements. See Chapter 14 for a detailed discussion of federal funding.

[5] A child enters foster care on the earlier of the date that the court found a child to be abused or neglected or the date of the child's actual removal from his or her home. 45 CFR 1355.20(a).

However, "[i]f a child is under the care and supervision of the agency and is either placed with a relative and the placement is intended to be permanent or is in a permanent foster family agreement, the court shall hold a review hearing not more than 182 days after the child has been removed from his or her home[.]" MCL 712A.19(4); MCL 712A.19c(1).

The court must not cancel or delay an initial post-termination review hearing beyond the required number of days, regardless of any other pending matters. MCL 712A.19c(1).

B. Subsequent Post-Termination Review Hearings

The court must not cancel or delay a subsequent post-termination review hearing beyond the required number of days, regardless of any other pending matters. MCL 712A.19c(1).

1. Child is in Foster Care

For the first year following a termination of a child's parent's parental rights, the court must hold subsequent post-termination review hearings at least every 91 days. MCL 712A.19c(1); MCR 3.978(A).

"If a child remains in a placement for more than 1 year following termination of parental rights to the child, a review hearing shall be held no later than 182 days from the immediately preceding review hearing before the end of the first year and no later than every 182 days from each preceding review hearing thereafter until the case is dismissed." MCL 712A.19c(1).[6]

2. Child is Placed in Permanent Planned Living Arrangement or with Relative

If a child resides in a permanent planned living arrangement or with a fit and willing relative and the relative placement is intended to be permanent, the court must hold subsequent post-termination review hearings at least every 182 days. MCL 712A.19(4); MCL 712A.19c(1); MCR 3.978(A).[7]

[6] A hearing held under MCL 400.669(2) (requiring "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance [under the Young Adult Voluntary Foster Care Act (YAVFCA)] not less than 1 time every 12 months[]") may be combined with a hearing held under MCL 712A.19c(1). Section 14.5(I) for additional information on the extension of guardianship assistance under MCL 400.665.

C. Accelerated Review Hearings

On a party's motion or in the court's discretion, a court may accelerate a post-termination review hearing to "review any element of the case." MCL 712A.19c(1).

18.4 Notice

"The foster parents (if any) of a child and any preadoptive parents[8] or relative providing care to the child must be provided with notice of and an opportunity to be heard at each [post-termination review] hearing." MCR 3.978(B).

18.5 Court's Options Following Post-Termination Review Hearings

"The court must make findings on whether reasonable efforts have been made to establish permanent placement for the child, and may enter such orders as it considers necessary in the best interests of the child, including appointment of a juvenile guardian pursuant to MCL 712A.19c and MCR 3.979." MCR 3.978(C).

> **Note:** "After termination [of parental rights], the superintendent of the Michigan Children's Institute (MCI) becomes the child's legal guardian as soon as the court commits the child to the Department of [Health and] Human Services (DHHS)." SCAO Guideline, *Conducting Effective Post-Termination Review Hearings*, p 4, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/PTRH.pdf. "The MCI then oversees the care, custody, and placement of the child[, and] . . . approves the permanency plan developed by the caseworker, resolves placement-change issues, consents to appropriate medical care, and consents to guardianships and adoptions." *Conducting Effective Post-Termination Review Hearings, supra*. "The court's continuing role is to ensure that the agency moves forward on the child's permanency plan." *Id.*

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[7] A hearing held under MCL 400.669(2) (requiring "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance [under the Young Adult Voluntary Foster Care Act (YAVFCA)] not less than 1 time every 12 months[]") may be combined with a hearing held under MCL 712A.19(4) and MCL 712A.19c(1). Section 14.5(I) for additional information on the extension of guardianship assistance under MCL 400.665.

[8] "The term 'preadoptive parent' is not defined in Michigan law or court rule. The term appears in MCL 722.956, where it is used in conjunction with placement." SCAO Guideline, *Conducting Effective Post-Termination Review Hearings*, p 6 n 5, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/PTRH.pdf.

A. Appointment of Juvenile Guardian

After parental rights have been terminated, MCL 712A.19c(2)[9] and MCR 3.979(A) permit the court to appoint a juvenile guardian for the child if the court finds it to be in the child's best interests.[10] See also MCR 3.978(C).

> **Note:** If the proposed guardian is seeking guardianship assistance payments, the assistance agreement must be approved and signed before the order of guardianship is entered. See Section 14.5 for a detailed discussion of guardianship assistance.

"[T]here is no preference for placement with relatives as part of a [juvenile] guardianship determination under MCL 712A.19c(2)." *In re COH, ERH, JRG, & KBH*, 495 Mich 184, 187 (2014). "[T]he preference for placement with relatives created by MCL 722.954a is [not] relevant to a court's consideration of a petition to appoint a [juvenile] guardian under MCL 712A.19c(2)."[11] *In re COH, ERH, JRG, & KBH*, 495 Mich at 187 (because MCL 712A.19c(2) and MCL 722.954a "apply at different and distinct stages of child protective proceedings, . . . there is no preference for placement with relatives as part of a [juvenile] guardianship determination under MCL 712A.19c(2)[;]" "the preference for placement with relatives created in MCL 722.954a does not apply outside the time period for determining a child's initial placement immediately after removal and, therefore, does not apply to a court's decision to appoint a [juvenile] guardian under MCL 712A.19c(2) after parental rights are terminated").

In order for the court to appoint a juvenile guardian, the court must first obtain written consent from the Michigan Children's Institute (MCI) Superintendent or his or her designee.[12] MCL 712A.19c(3); MCR 3.979(A)(3). "The consent must be filed with the court no later than 28 days after the . . . post[-]termination review hearing, or such longer time as the court may allow for good cause shown." MCR 3.979(A)(3). However, the court may appoint a juvenile guardian without the MCI Superintendent's consent, if after a hearing, "the court finds by clear and convincing evidence that the decision to

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[9] "[T]he process for appointing a [juvenile] guardian under MCL 712A.19c(2) is only applicable at the posttermination stage of a child protective proceeding." *In re COH, ERH, JRG, & KBH*, 495 Mich 184, 197 (2014). MCL 712A.19a governs the procedures for appointments of juvenile guardians *before* termination of parental rights. See Section 16.8 for additional information.

[10] See Section 18.5(A)(1) for information on the best interests determination.

[11] For additional information on relative placements under MCL 722.954a, see Section 8.2(A).

[12] The MCI Superintendent or his or her designee must consult with the child's lawyer guardian ad litem before granting written consent. MCL 712A.19c(3).

withhold consent was arbitrary and capricious[.]"[13] MCL 712A.19c(6); MCR 3.979(A)(3)(c).

> **Note:** The court may order the Department of Health and Human Services (DHHS) to seek the MCI Superintendent's consent. MCR 3.979(A)(3).

If a child is placed in a juvenile guardian's or a proposed juvenile guardian's home, the court must order the DHHS to:

> (1) Perform an investigation and file a written report for a review hearing under MCL 712A.19c(10);
>
> (2) Submit to the court within seven days a criminal record check and a central registry clearance of the residents in the home; and
>
> (3) Perform a home study and submit it to the court within 28 days[14] or submit a copy of a home study conducted within the last 365 days.[15] MCL 712A.19c(8); MCR 3.979(A)(1).
>
> > **Note:** If the child is in foster care, the court must continue the foster care placement and order the information required by MCR 3.979(A)(1) about the proposed juvenile guardian. MCR 3.979(A)(2).

1. Best-Interests Determination

Under MCL 712A.19c(2), the trial court must determine whether a juvenile guardianship "is in the child's best interest[.]" "A trial court may use its discretion under MCL 712A.19c(2) to determine the best method for analyzing the child's best interests by considering the circumstances relevant to the particular case." *In re COH, ERH, JRG, & KBH*, 495 Mich 184, 202 (2014). "[D]epending on the circumstances, a case may more reasonably lend itself to application of the Child Custody Act factors [(comparing two placement options)], some combination of the Adoption Code [(when only one party petitions for guardianship)] and Child Custody Act factors, or a unique set of factors developed by the trial court for purposes of a particular case." *Id.* at 203. "A trial court's decision regarding what factors to consider in making the best-interest determination is

[13] See Section 18.5(A) for more information on ordering a juvenile guardianship without the MCI Superintendent's consent.

[14] MCL 712A.19c(8) states that the home study must be submitted to the court within 30 days.

[15] "If a home study has been performed within the immediately preceding 365 days, a copy of that home study shall be submitted to the court." MCL 712A.19c(8).

reviewed for an abuse of discretion." *Id.* at 202 ("the trial court's decision to apply [the Child Custody Act factors] rather than the Adoption Code factors was not an abuse of discretion" because comparing "the two placement options [(between the biological grandmother and the foster parents)] in this case was a logical method for determining which option was in the children's best interests," and "the Child Custody Act factors incorporate a comparative analysis").

"[T]he trial court's findings of fact regarding the best-interest determination . . . are subject to the clear-error standard on appeal." *In re COH*, *ERH*, *JRG*, & *KBH*, 495 Mich 184, 203-204 (2014) ("trial court did not clearly err in concluding that a [juvenile] guardianship with [the children's biological grandmother] was not in the children's best interests under [MCL 712A.19c(2)]" where "the trial court provided an individualized analysis based on the relevant evidence for each of the applicable [Child Custody Act factors][,] . . . the trial court did not take a one-sided view of the evidence[, but] rather . . . weighed evidence that favored each placement option[, and] . . . the trial court correctly explained that[although its decision might be unfair to the biological grandmother,] its focus remained on the *children's* best interests, as required by law"), quoting *In re Mason*, 486 Mich 142, 152 (2010).

2. Juvenile Guardianship Appointment Without MCI Superintendent's Consent

"If a person denied consent believes that the decision to withhold consent by the MCI [S]uperintendent is arbitrary or capricious, the person may file a motion with the court within 56 days of receipt of the decision to deny consent."[16] MCR 3.979(A)(3)(a). The motion must contain all of the following information:

> "(i) the specific steps taken by the person or agency to obtain the consent required and the results, if any, and
>
> (ii) the specific reasons why the person or agency believes that the decision to withhold consent was arbitrary or capricious." MCR 3.979(A)(3)(a). See also MCL 712A.19c(4), which contains substantially similar language.

[16] See also MCL 712A.19c(4), which contains substantially similar language.

Upon receipt of a motion alleging the MCI Superintendent's decision to withhold consent was arbitrary or capricious, the court must set a hearing date and ensure notice is provided to "the MCI [S]uperintendent and all parties entitled to notice under MCR 3.921."[17] MCR 3.979(A)(3)(b).[18]

The court may approve a juvenile guardianship appointment without the MCI Superintendent's consent if it finds by clear and convincing evidence that the MCI Superintendent's decision to withhold consent was arbitrary or capricious. MCL 712A.19c(6); MCR 3.979(A)(3)(c).

3. Procedure for Appointing Juvenile Guardian

MCR 3.979(B) describes the process by which a juvenile guardian is appointed:

> "After receiving the information ordered by the court under [MCR 3.979(A)(1)], and after finding that appointment of a juvenile guardian is in the child's best interests, the court may enter an order appointing a juvenile guardian. The order appointing a juvenile guardian shall be on a form approved by the state court administrator.[19] Within 7 days of receiving the information, the court shall enter an order appointing a juvenile guardian or schedule the matter for a hearing. A separate order shall be entered for each child.
>
> > (1) *Acceptance of Appointment*. A juvenile guardian appointed by the court shall file an acceptance of appointment with the court on a form approved by the state court administrator.[20] The acceptance shall state, at a minimum, that the juvenile guardian accepts the appointment, submits to personal jurisdiction of the court, will not delegate the juvenile guardian's authority, and will perform required duties.

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[17] See Section 5.2 for additional information on notices of hearings in child protective proceedings.

[18] See also MCL 712A.19c(5), which contains substantially similar language to MCR 3.979(A)(3)(b), but also specifies that the "MCI [S]uperintendent, the foster parents, the prospective guardian, the child, and the child's lawyer guardian ad litem" must receive notice of the hearing.

[19] See SCAO form JC 91, *Order Appointing Juvenile Guardian*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenileguardianship/jc91.pdf.

[20] See SCAO form JC 92, *Acceptance of Appointment (Juvenile Guardian)*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenileguardianship/jc92.pdf.

> (2) *Letters of Authority*. On the filing of the acceptance of appointment, the court shall issue letters of authority on a form approved by the state court administrator.[21] Any restriction or limitation of the powers of the juvenile guardian must be set forth in the letters of authority, including but not limited to, not moving the domicile of the child from the state of Michigan without court approval.
>
> (3) *Certification*. Certification of the letters of authority and a statement that on a given date the letters are in full force and effect may appear on the face of copies furnished to the juvenile guardian or interested persons.
>
> (4) *Notice*. Notice of a proceeding relating to the juvenile guardianship shall be delivered or mailed to the juvenile guardian by first-class mail at the juvenile guardian's address as listed in the court records and to his or her address as then known to the petitioner. Any notice mailed first class by the court to the juvenile guardian's last address on file shall be considered notice to the juvenile guardian."

4. Juvenile Guardian's Duties and Authority

MCR 3.979(E) describes a juvenile guardian's duties and authority:

> "A juvenile guardianship approved under these rules is authorized by the Juvenile Code and is distinct from a guardianship authorized under the Estates and Protected Individuals Code.[22] A juvenile guardian has all the powers and duties of a guardian set forth under [MCL 700.5215].[23]

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[21] See SCAO form JC 93, *Letters of Juvenile Guardianship*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenileguardianship/jc93.pdf.

[22] Although a juvenile guardian has all the same powers and duties of a guardian appointed under MCL 700.5215, the two guardianships differ in that a juvenile guardian is "intended to be the permanent placement for a child who cannot be returned home[,]" and a guardian appointed under MCL 700.5215 is typically intended to be "short term, due to a temporary inability of a parent to care for a child." SCAO memorandum, p 4, at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Administrative-Memoranda/2008-05.pdf. See Section 4.6 for additional information on guardianship appointments under MCL 700.5215.

[23] See also MCL 712A.19c(7), which contains substantially similar language.

(1) *Report of Juvenile Guardian*. A juvenile guardian shall file a written report annually within 56 days after the anniversary of appointment and at other times as the court may order. Reports must be on a form approved by the state court administrator.[24] The juvenile guardian must serve the report on the persons listed in MCR 3.921.

(2) *Petition for Conservator*. At the time of appointing a juvenile guardian or during the period of the juvenile guardianship, the court shall determine whether there would be sufficient assets under the control of the juvenile guardian to require a conservatorship. If so, the court shall order the juvenile guardian to petition the probate court for a conservator pursuant to MCL 700.5401 *et seq*.

(3) *Address of Juvenile Guardian*. The juvenile guardian must keep the court informed in writing within 7 days of any change in the juvenile guardian's address.

(4) The juvenile guardian shall provide the court and interested persons with written notice within 14 days of the child's death."

5. Jurisdiction and Court's Responsibilities

Once a juvenile guardian is appointed, the court's jurisdiction over the juvenile guardianship continues until released by court order.[25] MCL 712A.19c(10); MCR 3.979(C)(1). The court must annually review a guardianship and may conduct additional reviews as it deems necessary or order the DHHS or a court

[24] See SCAO form JC 94, *Annual Report of Juvenile Guardian on Condition of Child*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenileguardianship/jc94.pdf.

[25] If the Department of Health and Human Services (DHHS) provides the court with notice that it is extending guardianship assistance to a youth beyond the age of 18 under the Young Adult Voluntary Foster Care Act (YAVFCA), MCL 400.665 *et seq*, the court must "retain [its] jurisdiction over the guardianship until that youth no longer receives extended guardianship assistance." MCR 3.979(C)(1). See Section 4.9 for a detailed discussion of a court's jurisdiction following juvenile guardianship appointments, and Section 14.5(I) for additional information on extension of guardianship assistance under MCL 400.665.

employee to conduct an investigation and file a written report.[26] MCL 712A.19c(10); MCR 3.979(D)(1)-(2).

> **Note:** "If extended guardianship assistance has been provided to a youth pursuant to MCL 400.665,"[27] MCR 3.979(D)(1)(b) requires:
>
> - "the court [to] conduct an annual review hearing at least once every 12 months after the youth's eighteenth birthday to determine that the guardianship meets the criteria under MCL 400.667[;][28]
> - [n]otice of the hearing [to] be sent to the guardian and the youth as provided in MCR 3.920(D)(1)[; and]
> - [t]he court [to] issue an order to support its determination and serve the order on the Department of [Health and] Human Services [(DHHS)], the guardian, and the youth." (Bullets added).

The court's jurisdiction over the child under MCL 712A.2(b) terminates once the juvenile guardian is appointed and a post-termination review hearing is held. MCL 712A.19c(9); MCR 3.979(C)(1). But see MCL 712A.2a(4), which requires the court to retain its jurisdiction over a youth 16 years of age or older who was appointed a juvenile guardian under MCL 712A.19c until the DHHS determines whether the youth[29] is eligible to receive extended guardianship assistance under the Young Adult Voluntary Foster Care Act (YAVFCA), MCL 400.641 *et seq.*[30] If the DHHS determines the youth is eligible for extended guardianship assistance under the YAVFCA, the court must retain jurisdiction until the youth no longer receives the

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[26] See Section 4.9(B) for a detailed discussion of review hearings following juvenile guardianship appointments, and Section 4.9(C) for a detailed discussion of ordering an investigation of juvenile guardianships.

[27] See Section 14.5(I) for additional information on the extension of guardianship assistance under MCL 400.665.

[28] See also MCL 400.669(2), which requires "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance not less than 1 time every 12 months." "A hearing held under [MCL 400.669(2)] may be combined with a hearing held under [MCL 712A.19(2)] to [MCL 712A.19(4)], . . . [MCL 712A.19a(1)], . . . or [MCL 712A.19c(1)] . . . ." MCL 400.669(2).

[29] For purposes of the Juvenile Code, the term *youth* "applies to a person 18 years of age or older concerning whom proceedings are commenced in the court under [MCL 712A.2] and over whom the court has continuing jurisdiction under [MCL 712A.2a(1)-(6)]." MCL 712A.2a(8).

[30] The DHHS must determine the youth's eligibility to receive extended guardianship assistance under the YAVFCA "within 120 days of the youth's eighteenth birthday." MCL 712A.2a(4).

guardianship assistance.[31] See also MCL 400.669(1), which requires the court to retain its jurisdiction "of a youth receiving, or a youth for whom the [DHHS] is determining eligibility for receiving, extended guardianship assistance until that youth no longer receives guardianship assistance."

The appointment of a lawyer-guardian ad litem terminates once the court's jurisdiction over the child under MCL 712A.2(b) terminates. MCR 3.979(C)(3). However, the court may reappoint the lawyer-guardian ad litem or appoint a new lawyer-guardian ad litem once a juvenile guardian is appointed.[32] *Id.*

6. Revocation of Juvenile Guardianship

The court must[33] hold a hearing to determine whether to revoke a juvenile guardianship, on its own motion or upon petition from the DHHS, the child's lawyer guardian ad litem, or the appointed guardian.[34] MCL 712A.19c(11); MCR 3.979(F)(1)(a).

After notice and a hearing on a petition to revoke a juvenile guardianship, the court must enter an order to revoke a juvenile guardianship if it finds that:

> (1) by a preponderance of the evidence the continuation of the juvenile guardianship is not in the child's best interests;
>
> (2) it is contrary to the child's welfare to be placed in or remain in the juvenile guardian's home; and
>
> (3) reasonable efforts were made to prevent removal. MCR 3.979(F)(5). See also MCL 712A.19c(13).

Upon entry of the revocation order, MCR 3.979(F)(5) requires the child to be placed under the care and supervision of the DHHS.[35] However, MCL 712A.19c(13) requires the court to appoint a successor juvenile guardian or commit the child to the MCI under MCL 400.203.

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[31] See Section 4.6 for a discussion of juvenile guardianship appointments, and Section 16.9 for a discussion of the Young Adult Voluntary Foster Care Act (YAVFC).

[32] See Section 7.9 for a detailed discussion of a lawyer-guardian ad litem's powers and duties.

[33] MCR 3.979(F)(1)(a) *requires* the court to hold this hearing; MCL 712A.19c(11) states that the court *may* hold this hearing.

[34] See Section 4.9(F) for a detailed discussion of revoking a juvenile guardianship.

[35] See SCAO form JC 101, *Order Regarding Revocation of Juvenile Guardianship*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenileguardianship/jc101.pdf.

Additionally, upon revocation, the court's jurisdiction over the child under MCL 712A.2(b) is reinstated under the previous child protective proceeding. MCR 3.979(F)(5).

If a court revokes a juvenile guardianship, it must hold a dispositional review hearing under MCR 3.978

7. Termination of Juvenile Guardianship

On petition from the juvenile guardian or other interested person, the court may hold a hearing to determine whether to terminate the juvenile guardianship.[36] MCL 712A.19c(12); MCR 3.979(F)(1)(b).

> **Note:** A request to terminate a guardianship may include a request for appointment of a successor guardian. MCL 712A.19c(12); MCR 3.979(F)(1)(b).

Under MCR 3.979(F)(6), if, after notice and a hearing on the petition to terminate a juvenile guardianship, the court finds by a preponderance of the evidence that termination is in the child's best interests, the court must either:

> (1) proceed under MCR 3.979(F)(5) if there is no successor,[37] or
>
> (2) terminate the appointment if there is a successor and proceed with an investigation and the appointment of a successor juvenile guardian in accordance with MCR 3.979(B).[38]

But see MCL 712A.19c(13), which requires the court to terminate the guardianship and either appoint a successor guardian or commit the child to the MCI under MCL 400.203.

The court's jurisdiction over a juvenile guardianship continues with the appointment of a successor juvenile guardian. MCR 3.979(F)(6)(b).

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[36] See Section 4.9(F) for a detailed discussion of terminating a juvenile guardianship.

[37] The court's jurisdiction over the child under MCL 712A.2(b) is reinstated under the previous child protective proceeding. MCR 3.979(F)(5); MCR 3.979(F)(6)(a).

[38] See SCAO form JC 100, *Order Following Hearing on Petition to Terminate Appointment of Juvenile Guardian*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenileguardianship/jc100.pdf.

B. Placing Child on Adoption Registry

If an adoptive family has not been identified within 90 days of entry of an order terminating parental rights, the supervising agency[39] must submit the child's information for inclusion in the registry of children available for adoption.[40] MCL 722.954b(2).

C. Legal Risk Placement

Once a court enters an order terminating parental rights, it may place a child in an adoptive home before the time for a rehearing or appeal of the termination order has expired. MCL 710.41(2). The placement is often referred to as a legal risk placement or more commonly a legal risk adoption.[41]

> **Note:** The court must not grant an adoption petition while an appeal is pending with the Court of Appeals or the Supreme Court. *In re JK*, 468 Mich 202, 219 (2003). See also MCL 710.56(2). The Court noted that at each post-termination review hearing, "the court can monitor the progress of the parent's appeal and ensure that an adoption does not take place until the parent's right to appellate review has been exhausted." *In re JK*, *supra* at 210 n 28.
>
> Before finalizing the adoption, the court must "provide the following findings on the record:
>
> > I have determined that any appeal of the decision to terminate parental rights has reached disposition, that no appeal, application for leave to appeal, or motion for rehearing or reconsideration is pending, and that the time for all appellate proceedings in this matter has expired." *In re Jackson*, ___ Mich ___, ___ (2015).

18.6 Termination of Jurisdiction

"[I]f the court has exercised jurisdiction over a [child] under [MCL 712A.2(b)], jurisdiction shall continue for a period of 2 years beyond the

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[39] A supervising agency means either the DHHS or a child placing agency as defined in MCL 722.111. MCL 722.952(g); MCL 722.952(h); MCL 722.952(*l*).

[40] See MCL 722.958(2), which requires the DHHS to ~~produce~~maintain a directory of children who are under the DHHS's jurisdiction and who are available for adoption.

[41] For a detailed discussion of legal risk adoptions, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 8.

maximum age of jurisdiction conferred under [MCL 712A.2], unless the [child] is released sooner by court order." MCL 712A.2a(1). The maximum age of jurisdiction conferred under MCL 712A.2(b) is 18 years. See MCL 712A.2(b).

A. Court Order Terminating Jurisdiction

> "The jurisdiction of the court in the child protective proceeding may terminate when a court of competent jurisdiction enters an order:
>
> > "(1) terminating the rights of the entity with legal custody and enters an order placing the child for adoption,[42] or
> >
> > (2) appointing a juvenile guardian under MCR 3.979 after conducting a review hearing under [MCR 3.979(A)]."[43] MCR 3.978(D).

"While courts are authorized to terminate jurisdiction as soon as the child is placed for adoption, SCAO recommends that courts retain jurisdiction until the *final adoption order is entered*[;] [t]his will allow the court [to] continue its oversight of the case in the event that an adoption is disrupted within the [three or] six month waiting period."[44] SCAO Guideline, *Conducting Effective Post-Termination Review Hearings*, pp 13-14, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/PTRH.pdf.

B. Continuation of Child's Placement

If parental rights have been terminated, the court must continue to review the case while a child is in placement or under the jurisdiction, supervision, or control of the Michigan Children's Institute.[45] MCL 712A.19c(1); MCL 712A.19c(14). If a child has been committed to the

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[42] See also MCL 710.51, which permits the court to enter, under the Adoption Code, an order terminating the rights of a person or entity consenting to a child's adoption and to formally place a child for adoption. See the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 6, for a detailed discussion of formal placements.

[43] See Section 18.5(A) for a detailed discussion of juvenile guardianship appointments.

[44] "MCL 710.56 requires a six month waiting period [for an adoptee who is one year of age or older] from the time the child is placed in the adoptive home until the final adoption is entered, unless the waiting period is waived for good cause." SCAO Guideline, *Conducting Effective Post-Termination Review Hearings*, p 14 n 18, available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/PTRH.pdf. However, if the adoptee is less than one-year old at the time the adoption petition is filed, MCL 710.56(1) requires a three-month waiting period from the time the child is placed in the adoptive home until the final adoption order is entered.

[45] "Wherever commitment to the Michigan Children's Institute is mentioned in any law of this state, it shall be construed to mean commitment to the [DHHS]." MCL 400.203(1).

Michigan Children's Institute (MCI), the child may remain a state ward until his or her 19th birthday.[46] MCL 400.203(1).

If a child is placed in a child caring institution, children's camp, or foster family or group home before his or her 18th birthday, that placement may continue after the child's 18th birthday.[47] MCL 722.111(1)(*o*)(*iii*).

[46] A child may be discharged as a state ward by the DHHS earlier than his or her 19th birthday under MCL 400.208 (unable to place or retain the child in a family home) or MCL 400.209 (child is adopted, married, emancipated, or appointed a juvenile guardian). MCL 400.203(1).

[47] Whether a child can continue placement depends on the number of total residents in relation to the number of residents already over the age of 18. See MCL 722.111(1)(*o*)(*iii*)(A)-(D).

Chapter 19: Child Custody Proceedings Involving Indian Children

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In this chapter . . .

This chapter discusses the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq.*, as they apply to child protective proceedings. Through ICWA and the MIFPA, Congress and the Michigan Legislature have expressed a strong preference for keeping Indian children with their families and deferring to tribes on matters of child custody and placement. This preference is expressed in the ICWA's and the MIFPA's notice, transfer, intervention, and heightened evidentiary requirements.

The ICWA and the MIFPA also apply to delinquency, guardianship, and adoption proceedings. For discussion of these types of proceedings, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, the Institute of Continuing Legal Education's *Michigan Probate Benchbook*, and the Michigan Judicial Institute's *Adoption Proceedings Benchbook*.

In an effort to "help Michigan judges learn about the federal Indian Child Welfare Act of 1978, the need for states to comply with the Act, and discuss its implementation in Michigan[,]" the State Court Administrative Office (SCAO) developed the *Indian Child Welfare Act of 1978: A Court Resource Guide*. This resource guide is accessible at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/CWS/ICWACtResourceGuide.pdf.

The SCAO also created the *Indian Child Welfare Act - Michigan Indian Family Preservation Act Reference Comparison Chart* to "provide[] a [reference chart for] comparison between key provisions of ICWA and MIFPA." This chart is accessible at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/CWS/ICWA-MIFPA-Compare.pdf.

The SCAO also developed the *Toolkit for Judges and Attorneys:ICWA/MIFPA (Proceedings Involving Indian Children)* to provide trial courts with a quick practical guide through the process of applying the MIFPA and the ICWA standards and procedures for cases involving Indian children. This toolkit is accessible at http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/CWSToolkit/Documents/BC_ICWA_MIFPA.pdf.

The Permanency Planning for Children Department of the National Council of Juvenile and Family Court Judges also created a series of checklists "to assist juvenile and family court judges in assuring that the necessary inquiries are being made to determine as early as possible in every case whether the [ICWA] applies." The checklists are accessible at http://www.ncjfcj.org/sites/default/files/ICWAChecklistFullDoc.pdf.

19.1 General Requirements and Purpose of the Indian Child Welfare Act (ICWA)

A. General Requirements of the ICWA

The Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, mandates that state courts adhere to certain minimum procedural requirements before removing Indian children[1] from their homes and placing them in foster or adoptive homes. 25 USC 1902. Because the ICWA is federal law, it preempts conflicting state law. It is important to remember that the ICWA provides additional requirements for the termination of parental rights, placements, and adoptions. The court must meet the requirements of the state law and, when the ICWA applies, it must also meet the additional requirements of the ICWA.

However, several of the procedural requirements of the ICWA are less stringent than statutory and court rule requirements in Michigan. When applicable state law contains higher standards than the ICWA, a court must apply those higher standards.[2] See 25 USC 1921.

B. Purpose of the ICWA

The purpose of the ICWA is to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. The ICWA promotes this purpose by establishing minimum federal standards for the removal of Indian children from their families and for their placement in foster or adoptive homes that reflect the unique values of Indian culture. The ICWA's purpose also includes providing assistance to Indian tribes in the operation of child and family service programs. 25 USC 1902.

The ICWA does not violate the Equal Protection rights of non-Indians. *In re Miller (Julie)*, 182 Mich App 70, 74-76 (1990).

19.2 General Requirements and Purpose of the Michigan Indian Family Preservation Act (MIFPA)

"In Indian child custody proceedings, [the MIFPA requires] the best interests of the Indian child[3] [to] be determined, in consultation with the Indian child's tribe,[4] in accordance with the [ICWA], and the policy specified in this section. Court shall do both of the following:

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[1] See Section 19.3(A) for a discussion of Indian children, which includes a definition of an Indian child.

[2] These higher standards are noted in this chapter when relevant.

[3] See Section 19.3(A) for a discussion of Indian children, which includes a definition of an Indian child.

(a) Protect the best interests of Indian children and promote the stability and security of Indian tribes and families.

(b) Ensure that the department[5] uses practices, in accordance with the [ICWA], this chapter, and other applicable law, that are designed to prevent the voluntary or involuntary out-of-home care placement of Indian children and, when an out-of-home care placement, adoptive placement, or preadoptive placement is necessary, place an Indian child in a placement that reflects the unique values of the Indian child's tribal culture and that is best able to assist the Indian child in establishing, developing, and maintaining a political, cultural, and social relationship with the Indian child's tribe and tribal community." MCL 712B.5.

19.3 When the ICWA and the MIFPA Apply

The ICWA and the MIFPA apply when:

(1) There is an Indian child, and

(2) The child is involved in a child custody proceeding. See 25 USC 1903(1), (4); MCL 712B.3(b); MCL 712B.3(k).

Note: The ICWA and the MIFPA uniquely define the term *child custody proceedings* as it specifically relates to an Indian child. See Section 19.3(B) for the ICWA's and the MIFPA's definition of child custody proceedings.

"[A] parent cannot waive a child's status as an Indian child or any right of the tribe that is guaranteed by [the] ICWA." *In re Morris (Morris III)*, 491 Mich 81, 111 (2012).

The court must inquire whether the child or either of the child's parents is a member of an Indian tribe at the preliminary hearing.[6] MCR 3.965(B)(2).

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[4] *Indian child's tribe* is defined as "the Indian tribe in which an Indian child is a member or eligible for membership. In the case of an Indian child who is a member of or eligible for membership in more than 1 tribe, the Indian child's tribe is the tribe with which the Indian child has the most significant contacts." MCL 712B.3(*l*). See also MCR 3.002(13), which contains substantially similar language; 25 USC 1903(5), which contains substantially similar language except that where an Indian child is a member of or eligible for membership in more than one tribe, it defines the *Indian child's tribe* to be the "Indian tribe with which the Indian child has the *more* significant contacts[.]" (Emphasis added).

[5] For purposes of the MIFPA, "'[d]epartment' means the department of [health and] human services [(DHHS)] or any successor department or agency." MCL 712B.3(e). See also MCR 3.002(5), which contains a substantially similar definition of *department.*

[6] See Section 7.7 for a detailed discussion of preliminary hearings.

- "If the court knows or has reason to know the child is an Indian child, the court must determine the identity of the child's tribe[.]" MCR 3.965(B)(2).

- "If the court knows or has reason to know the child is an Indian child, the court may adjourn the [preliminary] hearing for up to 21 days to ensure proper notice to the tribe or Secretary of the Interior as required by MCR 3.920(C)(1)."[7] MCR 3.965(B)(11). See also MCR 3.965(B)(2).

Note: A petitioner must include in a petition for termination of parental rights a child's membership or eligibility for membership in an Indian tribe, if known.[8] MCR 3.961(B)(5).

For a checklist on when the ICWA applies, see http://www.ncjfcj.org/sites/default/files/ICWAChecklistFullDoc.pdf, p 15.

A. An Indian Child Under the ICWA and the MIFPA

An "'Indian child' means an unmarried person who is under the age of 18 and is either of the following:

> (*i*) A member of an Indian tribe.
>
> (*ii*) Eligible for membership in an Indian tribe as determined by that Indian tribe." MCL 712B.3(k). See also MCR 3.002(12), which contains substantially similar language; 25 USC 1903(4), which contains substantially similar language except that it also requires that the Indian child "[be] eligible for membership in an Indian tribe *and* [be] the biological child of a member of an Indian tribe."[9] (Emphasis added).

MCL 712B.9(3) requires the DHHS to "actively seek to determine whether a child at initial contact is an Indian child[, and] [i]f the [DHHS] is able to make an initial determination as to which Indian tribe or tribes a child brought to its attention may be a member, the [DHHS] shall exercise due diligence to contact the Indian tribe or tribes in writing so that the tribe may verify membership or eligibility for membership. If the [DHHS] is unable to make an initial determination as to which tribe or tribes a child may be a member, the

[7] See Section 19.4 for a detailed discussion of notification requirements under the ICWA and the MIFPA.

[8] See Section 17.3(A) for a complete list of a petition's required content.

[9] See also *In re KMN*, 309 Mich App 274, 287 (2015) (noting that "[t]he definition of 'Indian child' in MIFPA is similar to ICWA, but does not require the child, who is eligible for membership, to also be the biological child of a member of an Indian tribe[]").

[DHHS] shall, at a minimum, contact in writing the tribe or tribes located in the county where the child is located and the [S]ecretary [of the Interior]."[10]

> **Note:** In a child custody proceeding, MCL 712B.9(7) requires the "petitioner [to] document all efforts made to determine a child's membership or eligibility for membership in an Indian tribe and [to] provide them, upon request, to the court, Indian tribe, Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian."
>
> "If there is reason to believe the child is an Indian child, the court must confirm that the agency used active efforts to work with all tribes of which the child may be a member to verify whether the child is in fact a member or eligible for membership in any tribe[.]"[11] Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, B.2(b)(2) (2015).

"A written determination or oral testimony by a person authorized by the Indian tribe to speak on its behalf, regarding a child's membership or eligibility for membership in a tribe, is conclusive as to that tribe." MCL 712B.9(6). See also *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at B.3(a), and *Santa Clara Pueblo v Martinez*, 436 US 49, 72 n 32 (1978), which also provide that a tribe's determination of its membership is conclusive.

"Circumstances under which a court, the [DHHS],[12] or other party to a child custody proceeding has reason to believe a child involved in a child custody proceeding is an Indian include, but are not limited to, any of the following:

> (a) Any party to the case, Indian tribe, Indian organization, or public or private agency informs the court that the child is an Indian child.
>
> (b) Any public or state-licensed agency involved in child protection services or family support has discovered information that suggests that the child is an Indian child.

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[10] Note that MCL 712B.9(3) pertains to the DHHS "or any successor department or agency." See MCL 712B.3(e). See also MCL 712B.3(u), which defines *secretary* as the "[S]ecretary of the [I]nterior."

[11] For a discussion on active efforts, see Section 19.9(E).

[12] MCL 712B.9(4) pertains to the DHHS "or any successor department or agency." See MCL 712B.3(e).

> (c) The child who is the subject of the proceeding gives the court[13] reason to believe he or she is an Indian child.
>
> (d) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.[14]
>
> (e) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child." MCL 712B.9(4).[15] See also *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at B.2(c), which contains substantially similar language.

"Only the Indian tribe(s) of which it is believed a biological parent or the child is a member or eligible for membership may make the determination whether the child is a member of the tribe(s), is eligible for membership in the tribe(s), or whether a biological parent of the child is a member of the tribe(s)." *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at B.3(a). "The determination by a tribe of whether a child is a member, is eligible for membership, or whether a biological parent is or is not a member of that tribe, is solely within the jurisdiction and authority of the tribe[, and n]o other entity or person may authoritatively make the determination of whether a child is a member of the tribe or is eligible for membership in the tribe." *Id.* at B.3(b)-(c).

> **Note:** Neither the court nor DHHS "may . . . substitute its own determination regarding a child's membership or eligibility for membership in a tribe or tribes." *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at B.3(d).

1. Indian Tribe

An "'Indian tribe' or 'tribe' means any Indian tribe, band, nation, or other organized group or community of Indians recognized

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[13] Under the *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at B.2(c)(3), reason to believe a child is an Indian child may also be found where the child gives the DHHS (i.e., not just the court) reason to believe he or she is an Indian child.

[14] Under the *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at B.2(c)(4), reason to believe a child is an Indian child may also be found where the residence or domicile is known by the DHHS (i.e. not just the court), or if it is show to be on an Indian reservation (i.e., not just a predominantly Indian community).

[15] Under the *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at B.2(c)(5), reason to believe a child is an Indian child may also be found where an employee of DHHS (i.e., not just an officer of the court) has such knowledge.

as eligible for the services provided to Indians by the [S]ecretary [of the Interior][16] because of their status as Indians, including any Alaska native village as defined in . . . [43 USC 1602(c)]." MCL 712B.3(o). See also 25 USC 1903(8) and MCR 3.002(17), which both contain a substantially similar definition of *Indian tribe*.

The court determines whether a tribe is an Indian tribe. *In re NEGP*, 245 Mich App 126, 133-134 (2001), overruled on other grounds *In re Morris (Morris III)*, 491 Mich 81, 121 (2012).

> **Note:** The Bureau of Indian Affairs, *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 72 Federal Register 13648 (2007), at http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/index.htm, contains a list of federally recognized Indian tribes. However, the list is not necessarily all-inclusive because the Secretary may federally recognize an Indian tribe after the list of federally recognized tribes was last posted.

The ICWA does not apply to an Indian tribe that is not federally recognized. *In re Fried*, 266 Mich App 535, 540 (2005). In *In re Fried*, *supra* at 538, the respondent-father claimed that the trial court erred in failing to apply the ICWA to the proceedings because the child was eligible for membership in the Lost Cherokee Nation. The Court of Appeals held that "because the tribe to which [the] respondent[-father] belongs is not a tribe recognized as eligible for services provided to Indians by the Secretary of the Interior, it is not an 'Indian tribe' within the meaning of the ICWA. 25 USC 1903(8) and [25 USC 1903](11)." *Fried*, *supra* at 540.

Tribes set their own eligibility requirements, and there is no specific degree of Indian ancestry that qualifies a child for tribal membership. *In re Elliott*, 218 Mich App 196, 201-206 (1996). In *In re Elliott*, *supra* at 200-203, the respondent-mother claimed that the trial court violated the ICWA when it held that the issue of the child's membership or eligibility for membership in an Indian tribe need not be addressed in the termination hearing because the Native American culture was not a consistent component of the child's or the mother's life. In reversing the trial court, the Court of Appeals held that the trial court erroneously made an independent determination as to whether

[16] See MCL 712B.3(u), which defines *secretary* as the "[S]ecretary of the [I]nterior."

the child was being removed from an existing Indian family in deciding whether the ICWA applied. *Id.* at 203. Specifically, the Court of Appeals concluded:

> "[T]he [trial] court created an exception to strict application of the ICWA by finding that 'testimony of qualified expert witnesses' was unnecessary given the lack of involvement by the mother or minor child in Indian culture. We agree with respondents that the court committed clear legal error in its interpretation of the ICWA and that the court's termination order is invalid. Although some jurisdictions have adopted the 'existing Indian family' exception to the ICWA, we do not find the analysis of those cases to be persuasive.
>
> Instead, we prefer the view adopted by those courts that have rejected the judicially created 'existing Indian family' exception to application of the ICWA. We agree with these courts that application of the exception undercuts the plain import of the ICWA and fails to consider adequately the interests of the Indian tribes themselves, especially in the involuntary proceedings, such as in this case. . . .
>
> We also believe that the 'existing Indian family' exception was implicitly rejected by the United States Supreme Court in [*Mississippi Band of Choctaw Indians v*] *Holyfield*, [490 US 30 (1989)], where the Court thoroughly examined the legislative history and underlying policies of the ICWA. . . .
>
> [Thus] we hold that an 'existing Indian family' exception would be in direct conflict with the concept of tribal sovereignty and the important public policy of improving tribal ties reflected in the ICWA." *In re Elliott*, 218 Mich App at 203-206 (internal citations omitted).

A parent's enrollment in an Indian tribe is not a prerequisite to application of the ICWA. *In re IEM*, 233 Mich App 438, 445-446 (1999), overruled on other grounds *In re Morris (Morris III)*, 491 Mich 81, 121 (2012). See also *In re NEGP*, 245 Mich App at 133, overruled on other grounds *In re Morris (Morris III)*, 491 Mich 81, 121 (2012) ("The lack of enrollment in a Native American tribe is not . . . conclusive of the issue whether a child qualifies as an 'Indian child.'").

2. Confidentiality

"If court records contain a statement of identifying information of the biological parent or parents that their identity remains confidential, the court shall include the statement of identifying information with the other information sent to the [S]ecretary [of the Interior][17] and the tribal enrollment officer of the appropriate Indian tribe described in [MCL 712B.35(1)]." MCL 712B.35(2).

Moreover, where a parent indicates a desire for anonymity during a voluntary placement proceeding,[18] the agency[19] or the court must seek the child's verification in a manner that "keep[s] relevant documents confidential and under seal." Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, B.2(d) (2015). Note, however, that a parent's request for anonymity "does not relieve the [agency's or the court's] obligation to obtain verification from the tribe(s) or to provide notice." *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at B.2(d).

25 USC 1915(c) requires the court to respect a consenting parent's desire for anonymity.

B. Child Custody Proceedings

The ICWA and the MIFPA apply only to *child custody proceedings* involving an Indian child. 25 USC 1903(1); MCL 712B.3(b). The child custody proceedings include actions involving foster care, guardianship, juvenile guardianship,[20] preadoptive placements, termination of parental rights, and adoptive placements. 25 USC 1903(1)(*i*)-(*iv*); MCL 712B.3(b)(*i*)-(*iv*); MCR 3.002(2)(a)-(d).

Specifically, if the proceedings involve an Indian child, the ICWA and the MIFPA uniquely define the term *child custody proceedings* as it specifically relates to the Indian child. MCL 712B.3(b) provides:

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[17] See 25 USC 1903(11) and MCL 712B.3(u), which define *secretary* as the "[S]ecretary of the [I]nterior."

[18] See Section 19.8 on voluntary proceedings involving an Indian child.

[19] For purposes of the Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, "[*a*]*gency* means a private State-licensed agency or public agency and their employees, agents or officials involved in and/or seeking to place a child in a child custody proceeding." *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at A.2.

[20] See the SCAO memorandum, pp 6-7 at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/JuvenileGuardianship.pdf.

"'Child custody proceeding' includes, but is not limited to, 1 or more of the following:

(*i*) Foster care placement. Any action removing an Indian child from his or her parent[21] or Indian custodian,[22] and where the parent or Indian custodian cannot have the child returned upon demand but parental rights have not been terminated, for temporary placement in, and not limited to, 1 or more of the following:

(A) Foster home or institution.[23]

(B) The home of a guardian or limited guardian under . . . the [E]states and [P]rotected [I]ndividuals [C]ode, . . . MCL 700.5201 to [MCL] 700.5219.

(C) A [J]uvenile [G]uardianship under [MCL 712A.19a or MCL 712A.19c].

(*ii*) Termination of parental rights. Any action resulting in the termination of the parent-child relationship.

(*iii*) Preadoptive placement. Temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but before or in lieu of adoptive placement.

(*iv*) Adoptive placement. Permanent placement of an Indian child for adoption, including an action resulting in a final decree of adoption.

(*v*) An Indian child is charged with a status offense in violation of [MCL 712A.2(a)(2)-(4)] or [MCL 712A.2(d)].

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[21] For purposes of an Indian child, a "'parent' means any biological parent or parents of an Indian child or any person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. *Parent does not include the putative father if paternity has not been acknowledged or established*. MCL 712B.3(s) (with emphasis). See also 25 USC 1903(9) and MCR 3.002(20), which both contain a substantially similar definition of *parent*. See Chapter 6 for information on establishing paternity.

[22] An "'Indian custodian' means any Indian person who has custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control have been transferred by the child's parent." MCL 712B.3(n). See also 25 USC 1903(6) and MCR 3.002(15), which both contain a substantially similar definition of *Indian custodian*.

[23] For purposes of the MIFPA, "'[f]oster home or institution' means a child caring institution as that term is defined in . . . MCL 722.111." MCL 712B.3(g). See also MCR 3.002(8), which contains a substantially similar definition of *foster home or institution.*

(*vi*) Child custody proceeding does not include a placement based on an act that, if committed by an adult, would be a crime or based on an award, in a divorce proceeding, of custody to 1 of the parents." See also 25 USC 1903(1) and MCR 3.002(2), which both contain a substantially similar definition of *child custody proceedings*.

Note: See Section 19.8 for voluntary proceedings, and Section 19.9 for involuntary proceedings.

19.4 Notice of Proceedings

Once the court knows or has reason to know that an Indian child is involved in a child custody proceeding, the child's parent or Indian custodian and the Indian child's tribe must be notified.[24] 25 USC 1912(a); MCL 712B.9(1).[25]

Note: "'Indian child's tribe' means the Indian tribe in which an Indian child is a member or eligible for membership. In the case of an Indian child who is a member of or eligible for membership in more than 1 tribe, the Indian child's tribe is the tribe with which the Indian child has the most significant contacts." MCL 712B.3(*l*). See also MCR 3.002(13), which contains substantially similar language; 25 USC 1903(5), which contains substantially similar language except that where the Indian child is a member of or eligible for membership in more than one tribe, it defines the *Indian child's tribe* to be the "Indian tribe with which the Indian child has the *more* significant contacts[.]" (Emphasis added). See Section 19.3(A) for a detailed discussion of an Indian child, and Section 19.3(B) for what constitutes a child custody proceeding, an Indian child's parent, and an Indian custodian.

"[S]ufficiently reliable information of virtually any criteria on which membership might be based is adequate to trigger the notice requirement of 25 USC 1912(a)." *In re Morris (Morris III)*, 491 Mich 81, 108-109 (2012) (trial courts[26] properly determined "that there existed sufficient indicia of Indian heritage to require tribal notice[]" where the trial court found in

[24] See the ICWA form, *Indian Child Welfare Act Notice*, *25 U.S.C. § 1912(a)*, at http://narf.org/icwa/forms/1.pdf.

[25] Note that 25 USC 1912(a) limits the notification requirement to involuntary proceedings, whereas MCL 712B.9(1) extends the notification requirement to both involuntary and voluntary proceedings.

[26] In *In re Morris (Morris III)*, *supra*, the Michigan Supreme Court combined the *In re Morris* case and the *In re Gordon* case together in its ruling because both cases raised several issues regarding the ICWA.

In re Morris that the tribal-notice requirement under 25 USC 1912(a) was triggered when the child's parents informed the court during a preliminary hearing that they had Cherokee Indian heritage, and the trial court found in *In re Gordon* that the tribal-notice requirement under 25 USC 1912(a) was triggered when the child's parent indicated "her family was part of the Saginaw Chippewa Indian Tribe, and the referee indicated that the DHHS would be required to notify the Saginaw Chippewa [T]ribe to conclusively resolve the issue").

"A nonexhaustive list of indicia sufficient to trigger tribal notice includes situations in which (1) the trial court has information suggesting that the child, a parent of the child, or members of a parent's family are tribal members, (2) the trial court has information indicating that the child has Indian heritage, even though no particular Indian tribe can be identified, (3) the child's birth certificate or other official record indicates that the child or a parent of the child is of Indian descent, (4) the child, the child's parents, or the child's Indian custodian resides or is domiciled in a predominantly Indian community[,] and (5) the child or the child's family has received services or benefits from a tribe or the federal government that are available to Indians." *Morris III*, 491 Mich at 108 n 18. See also *In re Johnson*, 305 Mich App 328, 330, 332 (2014), where the Court of Appeals conditionally reversed and remanded the trial court's order terminating the respondent-mother's parental rights for purposes of ICWA compliance where the ICWA notice requirements were triggered following "the minor child's father['s] state[ment] [during the preliminary hearing] that his deceased grandmothers were both 'full-blooded' Native Americans, although he did not know to which tribe they belonged[,]" and "the [court] record contain[ed] no indication that notice was served under 25 USC 1912(a), nor [was] there any claim that such notice was ever served, apparently because there was a determination, or at least it was stated in court documents, that the minor child [was] not an Indian child."

Once it becomes known that a child is possibly of Indian ancestry, notice becomes mandatory regardless of where the court is in its proceedings. *In re TM (After Remand)*, 245 Mich App 181, 188 (2001), overruled on other grounds *In re Morris (Morris III)*, 491 Mich 81, 121 (2012).

A parent cannot waive a child's status as an Indian child or a tribe's right to notice under 25 USC 1912(a). *In re Morris (Morris III)*, 491 Mich at 95-97, 110-111 (Court of Appeals erroneously held that a parent's "clarification [of the child's grandmother receiving direct notification from the tribe that indicated she and her son "'don't have enough heritage to get—to be part of the tribe"'] had relieved the trial court from making further tribal-notification efforts"). Specifically,

> "We do not think that the purported communication from the tribe to [the child's grandmother] about her eligibility for

> tribal benefits suffices for any purpose relevant to [the] ICWA. First, the purported letter to [the grandmother] had nothing to do with [the] ICWA or the child custody proceedings. Second, it is not clear that ineligibility for tribal benefits equates with ineligibility for tribal membership. Lastly, the trial court was correct to conclude that the tribe's response to the notice of the child custody proceedings needed to be sent from the tribe or the Secretary of the Interior directly to the DHHS or the trial court. A communication from a tribe to a relative of a respondent about eligibility for tribal benefits is insufficient to support any conclusion that [the] ICWA does not apply to the child custody proceedings." *In re Morris (Morris III)*, 491 Mich at 111 n 20.

A. Identity and Location of Parents, Custodians, or Tribe

1. Identity and Location of Parents, Custodians, or Tribe Can be Determined

In a child custody proceeding where the court knows or has reason to know that an Indian child is involved and where the identity and location of a child's Indian parent(s), Indian custodian(s), or tribe(s) can be determined, "the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending child custody proceeding and of the right to intervene."[27] MCL 712B.9(1). See also 25 USC 1912(a) and MCR 3.920(C)(1), which contain substantially similar language.

Copies of these notices must be sent to the Secretary of the Interior's Regional Director, which for Michigan is the Minneapolis Regional Director. 25 CFR 23.11(a), (c)(2). The contact information for the Minneapolis Area Office may be obtained at http://www.kstrom.net/isk/maps/mn/mplsbia.html#MINNEAPOLIS%20AREAOFFICE.

> **Note:** Where there is more than one tribe involved, a court may not choose which tribe to notice. See the Indian Child Welfare Act of 1978: A Court Resource Guide, *Identifying an Indian Child or Indian Tribe; Notification Requirements*, p 23, at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/CWS/

[27] See Section 19.3 for the ICWA's and the MIFPA's definition of child custody proceeding, parent, custodian, and tribe. See also Section 19.7 for information on the tribe's or Indian custodian's right of intervention.

ICWACtResourceGuide.pdf. Rather, notice must be provided to each federally recognized tribe of which an Indian child is a member or for which the child is eligible for membership.[28] *Id.*; Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, B.4(a) (2015).

2. Identity or Location of Parents, Custodians, or Tribe Cannot be Determined

When the identity or location of the Indian parent(s), Indian custodian(s), or Indian tribe cannot be determined, notice of the pending proceeding must be by registered mail with return receipt requested to the Secretary of the Interior's Regional Director,[29] which for Michigan is the Minneapolis Regional Director.[30] 25 USC 1912(a); MCL 712B.9(1); MCR 3.920(C)(1); 25 CFR 23.11(b), (c)(2); Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, B.6(e) (2015).

The contact information for the Minneapolis Area Office may be obtained at http://www.kstrom.net/isk/maps/mn/mplsbia.html#MINNEAPOLISAREAOFFICE.

Note: If notice to the Secretary of the Interior is required, the Secretary must make "reasonable documented efforts to locate and notify the child's tribe and the child's Indian parents or Indian custodians." 25 CFR 23.11(f). The Secretary has 15 days after receiving the notice to notify the child's tribe and parents or Indian custodians. 25 USC 1912(a); MCL 712B.9(1); 25 CFR 23.11(f). If, within the 15-day period, the Secretary is unable to locate the parents or Indian custodians, the Secretary must notify the court, prior to the initiation of the proceedings, regarding the amount of additional time, if any, needed to complete the search. 25 CFR 23.11(f).

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[28] "The notice should specify the other tribe or tribes of which the child may be a member or eligible for membership." *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at B.4(a).

[29] See 25 USC 1903(11), MCL 712B.3(u), and MCR 3.002(22), which define *secretary* as the "[S]ecretary of the [I]nterior."

[30] The Secretary of the Interior's Regional Director "will not make a determination of tribal membership, but may, in some instances, be able to identify tribes to contact." *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at B.6(e).

B. Notice Requirements

The notice must include the following information:

> (1) The name of the Indian child and the child's date and place of birth.
>
> (2) The name of the Indian tribe or tribes in which the child is enrolled or may be eligible for enrollment.
>
> (3) All names (known and current) and former addresses of the Indian child's biological mother, biological father, maternal and paternal grandparents, and great grandparents or Indian custodians (including maiden, married, and former names or aliases), birthdates, places of birth and death, tribal enrollment numbers, and/or other identifying information.
>
> (4) A copy of the petition, complaint, or other document by which the proceeding was initiated.
>
> (5) The name of the petitioner and the name and address of the petitioner's attorney.
>
> (6) A statement of the right of the biological parents or Indian custodians and the Indian child's tribe to intervene in the proceeding.
>
> (7) A statement that if the parents or Indian custodians are unable to afford counsel, and where a state court determines indigency, counsel will be appointed to represent them.
>
> (8) A statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, 20 days (or such additional time as may be permitted under state law) to prepare for the proceeding.
>
> (9) The location, mailing address, and telephone number of the court and all parties notified of the pending action.
>
> (10) A statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court, absent an objection by either parent and provided that the tribal court does not decline jurisdiction.

> (11) A statement of the potential legal consequences of an adjudication on future custodial and parental rights of the parents or Indian custodians.
>
> (12) A statement in the notice to the tribe indicating that because child custody proceedings are usually conducted on a confidential basis, all parties notified must keep confidential the information contained in the notice concerning the particular proceeding. The notices must not be revealed to anyone who does not need the information in order to exercise the tribe's rights under the ICWA.[31] 25 CFR 23.11(d)(1)-(4), 25 CFR 23.11(e)(1)-(7); Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, B.6(c) (2015). See also MCL 712B.13(1)(b); MCL 712B.15(1)(a); MCL 712B.25(2); MCL 712B.27(2) (all requiring "[n]otice of the pending proceeding [to] be given as prescribed by [the Michigan Court Rules], the [ICWA], and [MCL 712B.9]").

"There is no requirement under [the] ICWA, the BIA's regulations, or Michigan caselaw that [requires the] petitioner [to] conduct independent research to obtain a parent's detailed genealogical information[;]" rather, "[t]he BIA adopted regulations [under 25 CFR 23.11(a) and 25 CFR 23.11(d)] requiring notice to include ancestry information *if known*." *In re Morris (Morris IV) (After Remand)*, 300 Mich App 95, 105 (2013)[32] (where the petitioner receives a request for additional information from a tribe, whom the petitioner had notified of the proceedings, "it would be unreasonable to expect [the] petitioner to [locate the requested additional information regarding the respondent's family]" when "[the] respondent could not obtain any additional information regarding his [or her] relatives[;]" "[i]mposing this burden on [the] petitioner would also encourage parents, who can best research their own ancestry, to delay the proceedings by providing limited information[, and] [b]ecause it would often take a long time to uncover ancestry details, a

[31] "In order to assist the Indian tribe(s) in making a determination regarding whether the child is a member or eligible for membership, the [DHHS] or court should include additional information in the notice, such as: (1) Genograms or ancestry charts for both parents, including all names known (maiden, married and former names or aliases); current and former addresses of the child's parents, maternal and paternal grandparents and great grandparents or Indian custodians; birthdates; places of birth and death; tribal affiliation including all known Indian ancestry for individuals listed on the charts, and/or other identifying information; and/or (2) The addresses for the domicile and residence of the child, his or her parents, or the Indian custodian and whether either parent or Indian custodian is domiciled on or a resident of an Indian reservation or in a predominantly Indian community[;] (3) In the event that a parent had requested anonymity, the [DHHS] and court must take steps to keep information related to the parent confidential and sealed from disclosure." *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at B.6(d).

[32] The *In re Morris (Morris IV)* case was filed before the MIFPA was enacted.

requirement that [the] ICWA tribal notices include every detail of a child's ancestry would undermine [the] ICWA's 10-day provision [under 25 USC 1912(a)], which prevents unreasonable delays[, and] [i]t would also jeopardize concepts of permanency and finality.").

C. Procedures After Providing Notice

The court must wait a minimum of ten days after the parents or Indian custodians and the Indian tribe or the Secretary of the Interior have received notice before going forward with a foster care placement or termination of parental rights proceeding. 25 USC 1912(a); MCL 712B.9(2). On request, the court must grant parents, Indian custodians, or an Indian tribe an additional 20 days to prepare for the proceeding.[33] 25 USC 1912(a); MCL 712B.9(2).

> **Note:** "If the petitioner or court later discovers that the child may be an Indian child, all further proceedings shall be suspended until notice is received by the tribe or the [Secretary of the Interior[34]] as set forth in [MCL 712B.9(2)]. If the court determines after a hearing that the parent or tribe was prejudiced by lack of notice, the prior decisions made by the court shall be vacated and the case shall proceed from the first hearing. The petitioner has the burden of proving lack of prejudice." MCL 712B.9(2).

"Notice under [the] ICWA does not require the court or [the] petitioner to demand a response from the tribes notified." *In re Morris (Morris IV)* (*After Remand*), 300 Mich App 95, 108 (2013).

"If proper notice is provided and a tribe fails to either respond or intervene in the matter, the burden shifts to the parties (i.e., the parents) to show that the ICWA still applies. *In re TM* (*After Remand*), 245 Mich App 181, 187 (2001), overruled on other grounds *In re Morris (Morris III)*, 491 Mich 81, 121 (2012). See also *In re IEM*, 233 Mich App 438, 449 (1999), overruled on other grounds *In re Morris (Morris III)*, 491 Mich 81, 121 (2012) ("'[o]nly after notice has been provided and a tribe has failed to respond or has intervened but is unable to determine the child's eligibility for membership does the burden shift to the parties to show that the ICWA still applies.'"); *In re Morris (Morris IV) (After Remand)*, 300 Mich App at 106 (respondent-father failed to meet his burden of proving the ICWA still applied where "[t]here [was] nothing in the [trial court] record to indicate that the minor child [was] eligible for membership in an Indian tribe, [] both

[33] See the ICWA form, *Motion for Extension of Time*, at http://narf.org/icwa/forms/6.pdf.

[34] See MCL 712B.3(u), which defines *secretary* as the "[S]ecretary of the [I]nterior."

[the] petitioner and the trial court satisfied their obligations under [the notice requirements of 25 USC 1912(a)][,]" and the respondent-father did not "show[] that any new information [beyond what the petitioner provided to the tribes] [was] available or would result in a different tribal determination").

There was no due process violation where "[n]otice to the tribes was properly provided under [the] ICWA, no tribe sought a request for more time to prepare for the proceedings, and [the] respondent[-father] was given ample time to investigate, uncover, and provide any family information that he could. *In re Morris (Morris IV) (After Remand)*, 300 Mich App at 108.

D. Recordkeeping Requirements to Show Compliance

"While [the] ICWA is silent regarding the recordkeeping requirements of 25 USC 1912(a) notice compliance, . . . it [is] essential that certain documents be included in the record."[35] *In re Morris (Morris III)*, 491 Mich at 113. Specifically, the Michigan Supreme Court held that the "trial courts have a duty to ensure that the record includes, at minimum[:]

- (1) the original or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a), and
- (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice[, and]
- [i]n addition, it would be helpful—especially for appellate purposes—for the record to include any additional correspondence between the petitioner, the court, and the Indian tribe or other person or entity entitled to notice under 25 USC 1912(a)." *In re Morris (Morris III)*, 491 Mich at 114 (bullets added).

19.5 Jurisdiction

State jurisdiction. A state court has jurisdiction over a child custody proceeding involving an Indian child in three situations:

[35] The Michigan Supreme Court found in *In re Morris (Morris III)*, *supra* at 112, that "[i]t [was] . . . impossible to discern from the [trial court's] record . . . whether notice was actually sent, to whom it was sent, and whether the notices were received by the appropriate recipients."

(1) Concurrent jurisdiction where the child is domiciled or resides off an Indian reservation[36] and is not a ward of the tribal court,[37] see 25 USC 1911(b), MCL 712B.7(3);

(2) A tribal-state agreement where the tribe allocates jurisdiction to the state, 25 USC 1919(a), MCL 712B.31(1); and

Note: A tribe or a state may revoke a tribal-state agreement by providing a 180-day written notice to the other party. 25 USC 1919(b); MCL 712B.31(2)(a). Unless otherwise provided in the agreement, a revocation will not impact an action or proceeding over which the state court has already assumed jurisdiction. 25 USC 1919(b); MCL 712B.31(2)(b).

(3) Limited emergency jurisdiction where a reservation-resident Indian child is temporarily off the reservation and the state has removed the child in an emergency situation to prevent imminent physical damage or harm to the child.[38] 25 USC 1922; MCL 712B.7(2);MCR 3.974(C)(1).

Note: The emergency jurisdiction terminates when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. 25 USC 1922; MCL 712B.7(2); MCR 3.905(B).

Tribal court[39] jurisdiction. A tribe has jurisdiction over a child custody proceeding in three situations:

(1) The child is domiciled or resides on an Indian reservation (unless federal law provides otherwise), 25 USC 1911(a); MCL 712B.7(1); MCR 3.002(6);

(2) The child is a ward of the tribal court[40] (regardless of the child's domicile or residence, or subsequent change in the

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[36] "'Reservation' means Indian country as defined in 18 USC 1151 and any lands, not covered under that section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation." MCL 712B.3(t). See also 25 USC 1903(10) and MCR 3.002(21), which both contain a substantially similar definition of *reservation.*

[37] For purposes of the MIFPA, MCL 712B.3(w) defines *ward of tribal court* as "a child over whom an Indian tribe exercises authority by official action in tribal court of by the governing body of the tribe." See also MCR 3.002(24), which contains a substantially similar definition of *ward of tribal court*.

[38] See Section 15.8 for a detailed discussion of emergency removals.

[39] A "'[t]ribal court' means a court with jurisdiction over child custody proceedings that is either a court of Indian offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe that is vested with authority over child custody proceedings." MCL 712B.3(v). See also 25 USC 1903(12) and MCR 3.002(23), which both contain a substantially similar definition of *tribal court.*

child's residence or domicile), 25 USC 1911(a); MCL 712B.7(1); MCR 3.002(6); and

(3) Concurrent jurisdiction where the child is domiciled or resides off an Indian reservation and is not a ward of the tribe's court. 25 USC 1911(b); MCL 712B.7(3).

A. Mandatory Transfer of Case to Tribal Court

When a case is transferred to a tribal court, the state court should minimize delay by promptly providing the tribal court with all records on the case. Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, C.2(b), C.4(c) (2015).

> **Note:** See the ICWA form, *Motion to Transfer Jurisdiction and Dismiss Case*, at http://narf.org/icwa/forms/12.pdf.

If an Indian tribe has exclusive jurisdiction over an Indian child involved in a child protective proceeding and the state's involvement is not due to an emergency removal, the state court must dismiss the matter. MCR 3.905(A).

1. Child's Domicile or Residence is on an Indian Reservation

Indian tribes have exclusive jurisdiction over child custody proceedings involving an Indian child who resides or is domiciled on the tribe's reservation unless federal law provides otherwise. 25 USC 1911(a); MCL 712B.7(1); MCR 3.002(6).

The child's domicile is typically determined by the child's parent; therefore, a child born in wedlock takes the parents' domicile, but a child born out of wedlock takes the child's mother's domicile. *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 43-48 (1989). In *Mississippi Band of Choctaw Indians*, *supra*, the mother traveled 200 miles from the Indian reservation, where she was domiciled, to give birth to twin babies, and then signed a consent to adoption. An adoption decree was subsequently granted to the adopting parents. Two months after the final adoption order, the Mississippi Band of Choctaw Indians filed a motion to vacate the adoption decree on the ground that, pursuant to the ICWA, exclusive jurisdiction was vested in the tribal court. The trial court denied the motion and indicated that

[40] For purposes of the MIFPA, MCL 712B.3(w) defines *ward of tribal court* as "a child over whom an Indian tribe exercises authority by official action in tribal court of by the governing body of the tribe." See also MCR 3.002(24), which contains a substantially similar definition of *ward of tribal court.*

the children had never been on, resided in, or been domiciled on the Indian reservation, and, therefore, exclusive jurisdiction did not rest with the tribe. The Mississippi Supreme Court affirmed the trial court's ruling. The United States Supreme Court disagreed, overturned the Mississippi Supreme Court, and held that the twin babies were domiciled on the Indian reservation even though the twin babies were never physically present on the Indian reservation. Specifically, the United States Supreme Court held:

> "For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there. One acquires a 'domicile of origin' at birth, and that domicile continues until a new one (a 'domicile of choice') is acquired. Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents. In the case of an illegitimate child, that has traditionally meant the domicile of its mother. . . . It is undisputed in this case that the domicile of the mother (as well as the father) has been, at all relevant times, on the Choctaw Reservation. Thus, it is clear that at their birth the twin babies were also domiciled on the reservation, even though they themselves had never been there." *Mississippi Band of Choctaw Indians*, 490 US at 48-49 (internal citations omitted).

2. Indian Child is a Ward of the Tribal Court

Regardless of the child's domicile or residence (or subsequent change in the child's residence or domicile), an Indian tribe retains exclusive jurisdiction where an Indian child is a ward of the tribal court.[41] 25 USC 1911(a); MCL 712B.7(1); MCR 3.002(6).

B. Non-Mandatory Transfer of Case to Tribal Court (Concurrent Jurisdiction)

When the child is domiciled or resides off the Indian reservation and is not a ward of the tribal court, both the tribal court and the state court have concurrent jurisdiction. 25 USC 1911(b); MCL 712B.7(3).

[41] For purposes of the MIFPA, MCL 712B.3(w) defines *ward of tribal court* as "a child over whom an Indian tribe exercises authority by official action in tribal court or by the governing body of the tribe." See also MCR 3.002(24), which contains a substantially similar definition of *ward of tribal court*.

> **Note:** If the tribe does not have exclusive jurisdiction over the child custody proceeding, the court must ensure that the petitioner gave notice of the proceedings in accordance with MCR 3.920(C) to the interested parties listed in MCR 3.921.[42] MCR 3.905(C).

However, if either parent, the Indian custodian, or the Indian child's tribe requests that the proceeding be transferred to the tribal court, the court must transfer the case to the tribal court unless either parent objects, the court finds good cause not to transfer the case to tribal court jurisdiction, or the tribal court declines jurisdiction. 25 USC 1911(b); MCL 712B.7(3); MCR 3.905(C)(1). Note that "whenever a parent or tribe seeks to transfer the case it is presumptively in the best interest of the Indian child, consistent with the [ICWA] to transfer the case to the jurisdiction of the Indian tribe." Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, C.3(c) (2015).

> **Note:** If the case is transferred to the tribal court, the state court should minimize delay by promptly providing the tribal court with all court records. *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at C.2(b), C.4(c).

A request to transfer the child protective proceeding to a tribal court may be made at any time in accordance with MCL 712B.7(3). MCR 3.905(C)(4). The request may be made "orally on the record or in writing[.]" *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at C.1(a).

1. Parental Objection to a Transfer

Either parent[43] may prevent the state from transferring a case to the tribal court by objecting to the request that the proceeding be transferred. 25 USC 1911(b); MCL 712B.7(3); MCR 3.905(C)(1).

2. Good Cause Not to Transfer

The trial court must not transfer the proceeding to the tribal court if the trial court finds good cause not to transfer it. 25 USC 1911(b); MCL 712B.7(3); MCR 3.905(C)(1).

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[42] See Section 19.4 for information on notice requirements, and Section 5.2 for lists of interested parties under MCR 3.921.

[43] For purposes of an Indian child, a "'parent' *means* any biological parent or parents of an Indian child or any person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. *Parent does not include the putative father if paternity has not been acknowledged or established*. MCL 712B.3(s) (with emphasis). See also 25 USC 1903(9) and MCR 3.002(20), which both contain a substantially similar definition of *parent*. See Chapter 6 for information on establishing paternity.

If the court believes or any party asserts that good cause not to transfer exists, the reasons for such belief or assertion must be stated on the record or in writing and made available to the parties who are petitioning for transfer. *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, supra* at C.3(a). "Any party to the proceedings must have the opportunity to provide the court with views on whether good cause to deny transfer exists." *Id.* at C.3(b).

Under the MIFPA, good cause may exist "only if the person opposing the transfer shows by clear and convincing evidence that either of the following applies:

- The Indian child's tribe does not have a tribal court.[44]

- The requirement of the parties or witnesses to present evidence in tribal court would cause undue hardship to those parties or witnesses that the Indian tribe is unable to mitigate."[45] MCL 712B.7(5) (bullets added). See also MCR 3.905(C)(1), which contains substantially similar requirements.

  Note: In determining whether good cause exists, the court may *not* consider:

  - "[W]hether the case is at an advanced stage[.]" *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, supra* at C.3(c).

  - "[W]hether [the] transfer would result in a change in the placement of the child[.]" *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, supra* at C.3(c).

  - "The Indian child's contacts with the tribe or reservation[.]" *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, supra* at C.3(d)(1).

  - "Socio-economic conditions or any perceived inadequacy of tribal or Bureau of Indian Affairs

[44] MCL 712B.7(5)(a) specifically requires that the person opposing the transfer of a case to the tribal court show "by clear and convincing evidence that . . . [t]he Indian tribe does not have a tribal court." See also MCR 3.905(C)(1)(a), which contains substantially similar language.

[45] "[T]he plain language of MCL 712B.7(5)(b) does not permit [a trial court] to consider the timeliness of the request or its possible effect on the child's best interest in determining whether there exists 'good cause not to transfer a case to tribal court.'" *In re Spears*, 309 Mich App 658, 670 (2015) (trial court erred by giving MCL 712B.7(5)(b) a "'wider' interpretation" that allowed for consideration of the timeliness of the transfer request and the minors' bests interests where "the Michigan Legislature chose not to include timeliness of the request for transfer as a basis for finding good cause under MCL 712B.7(5)[]").

social services or judicial systems[.]" *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at C.3(d)(2). See also MCL 712B.7(4) and MCR 3.807(B)(2)(a), which also prohibit the court from considering the "adequacy of the tribe, tribal court, or tribal social services" when determining good cause.

- "The tribal court's prospective placement for the Indian child." *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at C.3(d)(3).

"By its plain language, good cause to not transfer an Indian child custody proceeding to a tribal court under MCL 712B.7(5)(b) has three components[: f]irst, there must be an undue hardship on the parties or witnesses that will be required to present evidence in the tribal court[;] . . . [s]econd, the undue hardship must stem from the requirement to present evidence in the tribal court[;] . . . [and t]hird, the Indian tribe must be unable to mitigate the undue hardships caused by the requirement of the parties or witnesses [to] present evidence in the tribal court." *In re Spears*, 309 Mich App 658, 671-672 (2015) (trial court erred in finding good cause to not transfer the proceedings to the tribal court by "bas[ing] its decision on an undue hardship to the [Indian children] without determining whether the [Indian children] had any requirement to present evidence in the tribal court[,] . . . not identify[ing] any other parties or witnesses that would be required to present evidence in the tribal court[, a]nd . . . failing to explain why the tribal court would be unable to mitigate the anticipated undue hardships[]").

The burden of establishing good cause is on the party opposing the transfer. *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at C.3(e). See also MCL 712B.7(5).

3. Acceptance or Declination of Transfer

The court must not transfer the proceeding to the tribal court if the tribal court declines the transfer of jurisdiction. 25 USC 1911(b); MCL 712B.7(3). On a declination of transfer, the court must continue to apply the MIFPA and applicable court rule provisions as they pertain to the Indian child. MCR 3.905(C)(3).

The Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, C.4 (2015), provides the following guidelines for acceptance or declination of a transfer:

> "(a) Upon receipt of a transfer petition the State court must promptly notify the tribal court in writing of the transfer petition and request a response regarding whether the tribal court wishes to decline the transfer. The notice should specify how much time the tribal court has to make its decision; provided that the tribal court has at least 20 days from the receipt of notice of a transfer petition to decide whether to accept or decline the transfer.
>
> (b) The tribal court should inform the State court of its decision to accept or decline jurisdiction within the time required or may request additional time; provided that the reasons for additional time are explained.
>
> (c) If the tribal court accepts the transfer, the State court should promptly provide the tribal court with all court records."

The state court must not dismiss the case until the transfer has been accepted by the tribal court. MCR 3.905(C)(2).

19.6 Appointment of Counsel or Lawyer-Guardian Ad Litem

The court must appoint counsel in any removal, placement, or termination proceeding where it determines the parent or custodian is indigent. 25 USC 1912(b); MCL 712B.21. However, the court has discretion whether to appoint counsel for an Indian child and only upon a finding that court-appointed counsel would be in the child's best interests. 25 USC 1912(b); MCL 712B.21. See Section 7.8(C) for a detailed discussion of appointing counsel in proceedings involving an Indian child.

> "If state law does not require the appointment of a lawyer-guardian ad litem for the child, the court may, in its discretion, appoint a lawyer-guardian ad litem for the child upon a finding that the appointment is in the best interest of the child." MCL 712B.21(2). Michigan statutory law requires the court to appoint a lawyer-guardian ad litem to represent a child during child protective proceedings. MCL 712A.17c(7). See Section 7.9.
>
> **Note:** MCL 712B.3(q) defines *lawyer-guardian ad litem* as "an attorney appointed under [MCL 712B.21]. A lawyer-guardian ad litem represents the child, and has the

> powers and duties, as set forth in [MCL 712A.17d]. The provisions of [MCL 712A.17d] also apply to a lawyer-guardian ad litem appointed for the purposes of [the MIFPA] under each of the following:
>
> (*i*) [MCL 700.5213] or [MCL 700.5219].
>
> (*ii*) [MCL 722.24].
>
> (*iii*) [MCL 722.630]."[46]

19.7 Right to Intervene/Participate in Proceedings

"In any state court child custody proceeding, an Indian child, the Indian custodian of the child, and the Indian child's tribe have a right to intervene at any point in the child custody proceeding." MCL 712B.7(6). See also MCR 3.905(D), which contains substantially similar language; 25 USC 1911(c),which provides for a right of intervention, but limits it to a child's Indian tribe or Indian custodian and to a proceeding for foster care placement or termination of parental rights.[47]

> **Note:** "'Indian child's tribe' means the Indian tribe in which an Indian child is a member or eligible for membership. In the case of an Indian child who is a member of or eligible for membership in more than 1 tribe, the Indian child's tribe is the tribe with which the Indian child has the most significant contacts." MCL 712B.3(*l*). See also MCR 3.002(13), which contains substantially similar language; 25 USC 1903(5), which contains substantially similar language except that where the Indian child is a member of or eligible for membership in more than one tribe, it defines the *Indian child's tribe* to be the "Indian tribe with which the Indian child has the *more* significant contacts[.]" (Emphasis added). See Section 19.3(A) for a detailed discussion of an Indian child, and Section 19.3(B) for a detailed discussion of child custody proceedings and Indian custodians.

"[An] [o]fficial tribal representative[] ha[s] the right to participate in any proceeding that is subject to the [ICWA] and [the MIFPA]." MCL 712B.7(7). MCL 712B.3(r) defines an *official tribal representative* as "an individual who is designated by the Indian child's tribe to represent the tribe in a court overseeing a child custody proceeding."[48]

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[46] See also MCR 3.002(18), which contains a substantially similar definition of *lawyer-guardian ad litem.*

[47] See the ICWA form, *Motion to Intervene*, at http://narf.org/icwa/forms/4.pdf.

[48] "An official tribal representative does not need to be an attorney." MCL 712B.3(r). See also MCR 3.002(19), which contains a substantially similar definition of *official tribal representative.*

19.8 Voluntary Proceedings

A brief discussion of the ICWA and the MIFPA in the context of child protective proceedings is included in this section. However, a detailed discussion of the ICWA and the MIFPA as it applies to the Indian child's parent or Indian custodian voluntarily consenting to a release of parental rights or consent to adopt under the Adoption Code, or consenting to a petition for guardianship is beyond the scope of this benchbook. See the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 11, for additional information on this topic.

Under the MIFPA, a proceeding is voluntary if *both* parents or Indian custodian voluntarily consent to:

- a petition for guardianship under MCL 700.5204 or MCL 700.5205.
- an adoptive placement.
- "the termination of his or her parental rights for the express purpose of adoption by executing a release under [MCL 710.28], or consent under [MCL 710.43][.]" MCL 712B.13.[49] See also MCR 5.404(B) (voluntary consent to guardianship).

Once a parent or custodian has voluntarily consented, the court must follow the ICWA's and the MIFPA's placement preferences (unless the child's tribe has established a different order of preference or good cause is shown to the contrary). 25 USC 1915; MCL 712B.23. See Section 19.10 for a detailed discussion of preferred placements of Indian children.

A. Procedures

A voluntary custody proceeding must meet three requirements:

- Valid consent.
- Proper notice.
- Conform to certain statutory requirements. MCL 712B.13(1).

[49] For purposes of voluntary proceedings, the MIFPA provides for higher standards of protection under MCL 712B.13 by specifying certain circumstances that give rise to a voluntary proceeding than the ICWA provides under 25 USC 1913. See 25 USC 1921, which provides that applicable state law prevails if it contains higher standards than the ICWA.

1. Valid Consent

To obtain a valid consent from the child's parent or custodian, the following procedures must be followed:

> (1) The consent must be executed on a form approved by the State Court Administrative Office, in writing during a recorded proceeding before a judge of a court of competent jurisdiction;[50, 51]
>
> (2) The presiding judge must certify that the terms and consequences of the consent were fully explained in detail and were fully understood by the child's parent or custodian;
>
> (3) The court must certify either that the parent or custodian fully understood the explanation in English or that it was translated into a language that the parent or custodian understood; and
>
> (4) A consent is not valid if given prior to the birth of the Indian child, or within ten days after the birth of the Indian child. 25 USC 1913(a); MCL 712B.13(1)(a). See also MCR 5.404(B).

When confidentiality is requested or indicated, a consent does not need to be given in open court. *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, supra* at E.2(d). See Section 19.3(A) for a detailed discussion of confidentiality.

a. Required Content of Consent Document

The consent document[52] must contain the following information:

> (1) The name and birthdate of the Indian child;
>
> (2) The name of the Indian child's tribe;
>
> (3) Any identifying number or other indication of the child's membership in the tribe;

[50] See Section 19.5 for a detailed discussion of jurisdiction.

[51] See also Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, E.2 (2015).

[52] See the ICWA form, *Consent to Temporary Custody and Certification*, at http://narf.org/icwa/forms/2.pdf, and the ICWA form, *Consent to Termination of Parental Rights (or Adoption) and Certification*, at http://narf.org/icwa/forms/3.pdf.

(4) The name and address of the consenting parent or Indian custodian; and

(5) A sworn statement from the translator, if one was used, that attests to the accuracy of the translation.

(6) The parent(s)' or Indian custodian's signature "recorded before the judge, verifying an oath of understanding of the significance of the voluntary placement and the parent's right to petition to terminate the voluntary placement or consent at anytime."

(7) "For consent for voluntary placement of the Indian child in foster care, the name and address of the person or entity who will arrange the foster care placement as well as the name and address of the prospective foster care parents if known at the time."

(8) "For consent to termination of parental rights or adoption of an Indian child, in addition to the information [above], the name and address of the person or entity that will arrange the preadoptive or adoptive placement." MCL 712B.13(2). See also Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, E.3(a) (2015), which contains similar language as MCL 712B.13(2)(a)-(c).

"If there are any conditions to the consent, the consent document must clearly set out the conditions." *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at E.3(a).

2. Notice

"Notice of the pending [voluntary] proceeding must be given as prescribed by [the Michigan Court Rules], the [ICWA], and [MCL 712B.9(1)]. MCL 712B.13(1)(b); MCL 712B.27(3). See Section 19.4 for a detailed discussion of notice proceedings.

3. Conforming to Statutory Requirements

"The voluntary custody proceeding shall be conducted in accordance with [the Michigan Court Rules] and the following statutes:

> (*i*) In a guardianship proceeding under [MCL 700.5204] or [MCL 700.5205] also applies.
>
> (*ii*) In an adoption proceeding, [MCL 712B.27] also applies." MCL 712B.13(1)(c).

B. Consent to Voluntarily Terminate Parental Rights[53] During Child Protective Proceedings

When the court has taken jurisdiction over a child in a child protective proceeding, the court has the authority to conduct a hearing under MCL 712A.19b of the Juvenile Code to determine if parental rights should be involuntarily terminated. However, the parent may elect to voluntarily terminate his or her parental rights by either executing a release and termination of parental rights under the Adoption Code under MCL 710.28,[54] or admitting to a ground for termination or enter a no contest plea under the Juvenile Code. *In re Toler*, 193 Mich App 474, 477 (1992). See also *In re Hernandez/Vera*, unpublished opinion per curiam of the Court of Appeals, issued April 16, 2013 (Docket No. 312136).[55]

If the parent executes a release under MCL 710.28 during the child protective proceeding, the release is subject to MCL 712B.15. See Section 19.9 for a discussion of MCL 712B.15. The court must also "make a finding that culturally appropriate services were offered." MCL 712B.13(5).

> **Note:** MCL 712B.3(d) defines *culturally appropriates services* as:
>
> > "[S]ervices that enhance an Indian child's and family's relationship to, identification, and connection with the Indian child's tribe. Culturally appropriate services should provide the opportunity to practice the teachings, beliefs, customs, and

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[53] *Termination of parental rights* means "[a]ny action resulting in the termination of the parent-child relationship." MCL 712B.3(b)(*ii*). See also 25 USC 1903(1)(ii) and MCR 3.002(2)(b), which both contain a substantially similar definition of *termination of parental rights*.

[54] "If a release . . . to adoption under [the Adoption Code, MCL 710.21 *et seq.*,] is executed, consent to voluntary placement of an Indian child must also be executed by both parents of the Indian child in accordance with [MCL 712B.13]." MCL 712B.27(1).

[55] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

> ceremonies of the Indian child's tribe so those may be incorporated into the Indian child's daily life, as well as services that address the issues that have brought the child and family to the attention of the [DHHS] that are consistent with the tribe's beliefs about child rearing, child development, and family wellness. Culturally appropriate services may involve tribal representatives, extended family members, tribal elders, spiritual and cultural advisors, tribal social services, individual Indian caregivers, medicine men or women, and natural healers. If the Indian child's tribe establishes a different definition of culturally appropriate services, the court shall follow the tribe's definition."[56] See also MCR 3.002(4), which contains a substantially similar definition of *culturally appropriate services*.

25 USC 1913(c) permits a parent or Indian custodian to withdraw his or her consent "[i]n any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, . . . for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent [or custodian]."

> **Note:** The parent or Indian custodian must file the withdrawal of consent in the court where the consent was executed. Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, E.4(a) (2015). The withdrawal of consent must be executed under oath and signed by the parent stipulating to his or her intention to withdraw consent. *Id.* at E.5(a). "The clerk of the court in which the withdrawal of consent is filed must promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged

[56] "'Indian child's tribe' means the Indian tribe in which an Indian child is a member or eligible for membership. In the case of an Indian child who is a member of or eligible for membership in more than 1 tribe, the Indian child's tribe is the tribe with which the Indian child has the most significant contacts." MCL 712B.3(*l*). See also MCR 3.002(13), which contains substantially similar language; 25 USC 1903(5), which contains substantially similar language except that where the Indian child is a member of or eligible for membership in more than one tribe, it defines the *Indian child's tribe* to be the "Indian tribe with which the Indian child has the *more* significant contacts[.]" (Emphasis added). For purposes of the MIFPA, "[e]xtended family members' means that term as defined by the law or custom of the Indian child's tribe or, in the absence of that law or custom, means a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent and includes the term 'relative' as that term is defined in [MCL 712A.13a(1)(j)]." MCL 712B.3(f). See also 25 USC 1903(2) and MCR 3.002(7), which both contain a substantially similar definition of *extended family*. See Section 19.3(B) for a detailed discussion, including definitions, of an Indian child and Indian tribe.

of such filing and the child must be returned to the parent or Indian custodian as soon as practicable." *Id*. at E.5(b).

19.9 Involuntary Proceedings

A court cannot hold a foster care placement or termination of parental rights proceeding until ten days after the child's parent or Indian custodian and the child's tribe receive notice. 25 USC 1912(a); MCL 712B.9(2). See Section 19.4 for a detailed discussion of the ICWA's notice requirements.

On request, the parent or Indian custodian or tribe must be given up to 20 additional days to prepare for the proceedings.[57] 25 USC 1912(a); MCL 712B.9(2).

> **Note:** "If the petitioner or court later discovers that the child may be an Indian child, all further proceedings shall be suspended until notice is received by the tribe or the [Secretary of the Interior[58]] as set forth in [MCL 712B.9(2)]. If the court determines after a hearing that the parent or tribe was prejudiced by lack of notice, the prior decisions made by the court shall be vacated and the case shall proceed from the first hearing. The petitioner has the burden of proving lack of prejudice." MCL 712B.9(2).

"If an Indian child is the subject of a child protective proceeding under [MCL 712A.2(b)], including instances in which the parent or Indian custodian executed a release under [MCL 710.28] during the pendency of that proceeding, or a guardianship proceeding under [MCL 700.5204] or [MCL 700.5205], [and] a parent does not provide consent as described [MCL 712B.13], or a guardianship proceeding under [MCL 712A.19a] or MCL 712A.19c], the following requirements must be met:

> (a) Notice of the pending proceeding must be given as prescribed by [the Michigan Court Rules], the [ICWA], and [MCL 712B.9].[59]
>
> (b) The proceeding shall be conducted in accordance with [the Michigan Court Rules] and [MCL 712B.15(2)-(4)].
>
> (c) [MCL 712B.25] applies in a guardianship proceeding under [MCL 700.5204] or [MCL 700.5205]." MCL 712B.15(1).

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[57] See the ICWA form, *Motion for Extension of Time*, at http://narf.org/icwa/forms/6.pdf.

[58] See MCL 712B.3(u), which defines *secretary* as the "[S]ecretary of the [I]nterior."

[59] See Section 19.4 for a detailed discussion of notice requirements.

A. Removal Hearings

If an Indian child is taken into protective custody with or without a court order under MCR 3.963(A), MCR 3.963(B), or MCR 3.974,[60] or a petition requests the removal of an Indian child,[61] the court must follow the procedures set out in MCR 3.967 [(governing removal hearings)]. MCR 3.967(A)-(B). See also MCR 3.965(B)(2) (governing preliminary hearings).

> **Note:** The court may hold a preliminary hearing in conjunction with a removal hearing if all necessary parties are notified,[62] there are no objections by the parties to do so, and at least one qualified expert witness is present to provide testimony. MCR 3.965(B)(2). However, the court may adjourn the preliminary hearing pending the conclusion of the removal hearing if necessary.[63] *Id.*

MCR 3.967 provides the required procedures and rules of evidence for removal hearings involving an Indian child:

> "**(A) Child in Protective Custody.** If an Indian child is taken into protective custody pursuant to MCR 3.963(A) or [MCR 3.963](B) or MCR 3.974, a removal hearing must be completed within 14 days after removal from a parent or Indian custodian unless that parent or Indian custodian has requested an additional 20 days for the hearing pursuant to MCL 712B.9(2) or the court adjourns the hearing pursuant to MCR 3.923(G). Absent extraordinary circumstances that make additional delay unavoidable, temporary emergency custody shall not be continued for more than 45 days.
>
> **(B) Child Not in Protective Custody.** If an Indian child has not been taken into protective custody and the petition requests removal of that child, a removal hearing must be conducted before the court may enter an order removing the Indian child from the parent or Indian custodian.

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[60] See Section 3.1(B) for a detailed discussion of protective custody of a child without court order.

[61] A petitioner must include in a petition for termination of parental rights a child's membership or eligibility for membership in an Indian tribe, if known. MCR 3.961(B)(5).

[62] See Section 19.4 for a detailed discussion of notification requirements under the ICWA.

[63] See Section 7.7(D) for information on adjournments of preliminary hearings.

> **(C)** Notice of the removal hearing must be sent to the parties prescribed in MCR 3.921 in compliance with MCR 3.920(C)(1).
>
> **(D) Evidence.** An Indian child may be removed from a parent or Indian custodian, or, for an Indian child already taken into protective custody pursuant to MCR 3.963 or[MCR 3.974(C)[64]], remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence, including the testimony of at least one qualified expert witness, as described in MCL 712B.17, who has knowledge about the child-rearing practices of the Indian child's tribe, that active efforts as defined in MCR 3.002 have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe.
>
> **(E)** A removal hearing may be combined with any other hearing."

Federal and state law require a qualified expert witness to provide damage testimony before an Indian child may be removed from his or her home. Specifically, the ICWA requires the court to "consider the testimony of a qualified expert witness to determine whether the Indian child is likely to be seriously damaged if he or she remains in the parent's care[.]" *In re McCarrick/LaMoreaux*, 307 Mich App 436, 463 (2014); MCL 25 USC 1912(e). Similarly, the MIFPA requires the court to consider whether the child will suffer "serious emotional or physical damage" if he or she remains in the custody of the parent or Indian custodian. *In re McCarrick/LaMoreaux*, 307 Mich App at 463-464; MCL 712B.15(2). A court's decision to remove a child from the parent or Indian custodian's care will be conditionally reversed where the determination is made without any testimony from a qualified expert whether the continued custody of the child by the parent or the Indian custodian is likely to result in serious emotional or physical damage to the child. *In re McCarrick/LaMoreaux*, 307 Mich App at 468-470 (conditionally reversing the court's dispositional order that removed the respondent-mother's children from her care on the basis that the court violated the ICWA and the MIFPA when the court made

[64] Formerly, MCR 3.974(B).

its determination without any damage testimony from the qualified expert whether a return of the children to the respondent-mother's care would result in serious emotional or physical damage to the children).

If the Indian child is removed from the home, MCR 3.967(F) sets out a standard order of preference for the placement of the Indian child, which mirrors the order set out in the ICWA and the MIFPA. For a detailed discussion of the preferred placements of Indian children, see Section 19.10.

B. Foster Care Placement

"An Indian child may be removed from a parent or Indian custodian, placed into a foster care placement, or, for an Indian child already taken into protective custody, remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence, that includes testimony of at least 1 expert witness who has knowledge of child rearing practices of the Indian child's tribe[:][65]

- that active efforts[66] have been made to provide remedial services and rehabilitative programs designed to prevent the breakup[67] of the Indian family,
- that the active efforts were unsuccessful, and
- that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." MCL 712B.15(2) (bullets added). See also 25 USC 1912(d)-(e), MCR 3.977(A), and MCR 3.977(G)(1), which contain similar language.

Note: "Foster care placement [means] [a]ny action removing an Indian child from his or her parent or Indian custodian, and where the parent or Indian

[65] See Section 19.11 for a detailed discussion of expert witnesses.

[66] "The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe." MCL 712B.15(2). See Section 19.9(E) for a detailed discussion of active efforts.

[67] "[25 USC 1912(d)] applies only in cases where an Indian family's 'breakup' would be precipitated by the termination of the parent's rights. The term 'breakup' refers in this context to '[t]he discontinuance of a relationship,' or 'an ending as an effective entity[.]'" *Adoptive Couple v Baby Girl*, __ US ___, __ (2013) (where a biological Indian-parent abandons his or her child before the child's birth and never exercises legal or physical custody over the child, 25 USC 1912(d) is inapplicable because "there is no 'relationship' that would be 'discontinu[ed]'–and no 'effective entity' that would be 'end[ed]'–by the termination of the Indian parent's rights[, and i]n such a situation, the 'breakup of the Indian family' has long since occurred") (citations omitted). See Section 19.9(C) for a detailed discussion of involuntary termination of a parent's parental rights.

> custodian cannot have the child returned upon demand but parental rights have not been terminated, for temporary placement in, and not limited to, 1 or more of the following:
>
> > (A) Foster home or institution.
> >
> > (B) The home of a guardian or limited guardian under [MCL 700.5201 to MCL 700.5219].
> >
> > (C) A juvenile guardianship under [the Juvenile Code]." MCL 712B.3(b)(*i*).
>
> See also 25 USC 1903(1)(i) and MCR 3.002(2)(a), which define *foster care placement* as "any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated[.]"
>
> Evidence merely showing that "community or family poverty or isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior" exists does not satisfy the clear and convincing standard. Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, D.3(c) (2015). In order to satisfy the clear and convincing standard, the evidence must focus on whether the particular condition(s) will likely result in the Indian child suffering serious emotional or physical damage. *Id*.

"Each party to a foster care . . . proceeding has a right to examine all reports or other documents filed with the court upon which any decision with respect to that proceeding may be based."[68] MCL 712B.11. See also 25 USC 1912(c), which contains substantially similar language.

Once the court has ordered a foster care placement, it must follow the ICWA's and the MIFPA's placement preferences (unless the child's tribe has established a different order of preference or good cause is shown to the contrary). 25 USC 1915; MCL 712B.23. See Section 19.10 for a detailed discussion of preferred placements of Indian children.

[68] See the ICWA form, *Request to Produce and Examine*, at http://narf.org/icwa/forms/8.pdf.

A court order removing a child from his or her home without testimony from a qualified expert witness regarding whether the continued custody of the child by the parent or the Indian custodian is likely to result in serious emotional or physical damage to the child, violates the ICWA, 25 USC 1912(e), and the MIFPA, MCL 712B.15(2), and is grounds for the conditional reversal of the removal order. *In re McCarrick/LaMoreaux*, 307 Mich App 436, 466-467, 468-470 (2014).

C. Termination of Parental Rights

"A party seeking a termination of parental rights to an Indian child under state law must demonstrate to the court's satisfaction that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the active efforts were unsuccessful."[69] MCL 712B.15(3). See also 25 USC 1912(d) and MCR 3.977(G)(1), which contain substantially similar language.

> **Note:** "[25 USC 1912(d)] applies only in cases where an Indian family's 'breakup' would be precipitated by the termination of the parent's rights. The term 'breakup' refers in this context to '[t]he discontinuance of a relationship,' or 'an ending as an effective entity[,]' . . . [b]ut when an Indian parent abandons an Indian child prior to [the child's] birth and that child has never been in the Indian parent's legal or physical custody, there is no 'relationship' that would be 'discontinu[ed]'–and no 'effective entity' that would be 'end[ed]'–by the termination of the Indian parent's rights. *Adoptive Couple v Baby Girl*, ___ US ___, ___ (2013) (citations omitted). "In such a situation, the 'breakup of the Indian family' has long since occurred, and [25 USC 1912(d)] is inapplicable." *Adoptive Couple*, ___ US at ___ (the South Carolina Supreme Court erred in finding that "[the] [b]iological [Indian-f]ather's parental rights could not be terminated because [the] [couple wishing to adopt the child] had not demonstrated that [the] [b]iological [Indian-f]ather had been provided remedial services in accordance with [25 USC 1912(d)]" where "the [biological Indian-father] abandoned the Indian child before [the child's] birth and never had custody of the child").

"[R]emedial services under [25 USC 1912(d)] are intended 'to alleviate the need to *remove* the Indian child from his or her parents or Indian

[69] "The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe." MCL 712B.15(2). See Section 19.9(E) for a detailed discussion of active efforts.

custodians,' not to facilitate a *transfer* of the child *to* an Indian parent." *Adoptive Couple*, ___ US at ___ (citation omitted).

Under the ICWA and the MIFPA, the court may not terminate the parental rights of an Indian child's parent or Indian custodian unless there is evidence beyond a reasonable doubt, which includes testimony from at least one qualified expert witness,[70] that continued custody of the child by the parent or custodian will likely result in serious emotional or physical injury to the child.[71] 25 USC 1912(f); MCL 712B.15(4); MCR 3.977(A), MCR 3.977(G)(2). See also Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, D.3(b) (2015), requiring that "the continued custody of the child . . . is likely to result in serious harm to the child." See *In re Payne/Pumphrey/Fortson*, ___ Mich App ___, ___ (2015) (trial court, in terminating the mother's parental rights over her Indian children,[72] failed to adhere to the requirements of 25 USC 1912(f), MCL 712B.15(4), and MCR 3.977(G)(2) when "the trial court explicitly recognized that [the assigned qualified expert witness], the only expert witness at the termination [of parental rights] hearing, did not support termination and specifically testified that returning [the Indian children] to [the mother's] care would *not* likely result in serious emotional or physical damage to either [Indian] child[, but the court n]onetheless, considering the other evidence presented, . . . determined that returning [the Indian children] to [the mother's] care *would* result in such damage beyond a reasonable doubt[]").

> **Note:** 25 USC 1912(f) "was primarily intended to stem the unwarranted removal of Indian children from intact Indian families[,]" and thus, "does not apply in cases where the Indian parent *never* had [legal or physical] custody of the Indian child" because "[t]he phrase 'continued custody' [] refers to custody that a parent already has (or at least had at some point in the past)." *Adoptive Couple*, ___ US at ___, ___.[73]

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[70] Although "25 USC 1912(f) requires the 'testimony of qualified expert witnesses[,]' . . . [the] Court [of Appeals] has repeatedly interpreted the term 'witnesses' as used in 25 USC 1912 'to mean that only one "qualified expert witness" need testify.'" *In re Payne/Pumphrey/Fortson*, ___ Mich App ___, ___ (2015) (finding that "25 USC 1912(f) d[id] not conflict with MCL 712B.15(4) and MCR 3.977(G)(2)" because MCL 712B.15(4) and MCR 3.977(G)(2) "merely require the testimony of 'at least one qualified expert witness[,]'" . . . and only one expert witness was required to testify in this [termination of parental rights] case[]"), quoting *In re Elliott*, 218 Mich App 196, 207 (1996).

[71] See Section 19.3(B) for the ICWA's definition of parent and custodian, and Section 19.11 for a detailed discussion of expert witnesses.

[72] In *In re Payne/Pumphrey/Fortson*, ___ Mich App at ___, the Court "affirm[ed] the trial court's termination order with respect to [the mother's two non-Indian children]" where "the trial court did not clearly err in finding that termination of [the mother's] parental rights [over her two non-Indian children] was in [the children's] best interests."

In addition to meeting the requirements of the ICWA and the MIFPA, the petitioner must also establish statutory grounds for termination under state law. *In re Payne/Pumphrey/Fortson*, ___ Mich App at ___, citing *In re Elliot*, 218 Mich App at 209-210. Therefore, in order to involuntarily terminate the parental rights of an Indian child's parent or Indian custodian, the court must find the following:

> (1) Evidence beyond a reasonable doubt that the child would suffer serious emotional or physical damage if returned to the custody of the parent,
>
> (2) A statutory basis for the termination of parental rights under MCL 712A.19b(3), and
>
> (3) Termination of parental rights is in the child's best interests. See MCR 3.977(A), MCR 3.977(E)-(H).
>
> > **Note:** See Section 17.6 for statutory grounds for termination of parental rights as well as the standard of proof required to establish each statutory ground. See Section 17.8 on determining a child's best interests.

"Each party to a . . . termination of parental rights proceeding a right to examine all reports or other documents filed with the court upon which any decision with respect to that proceeding may be based."[74] MCL 712B.11. See also 25 USC 1912(c), which contains substantially similar language.

Once the court has terminated the parental rights of an Indian child's parent or custodian, it must follow the ICWA's and the MIFPA's placement preferences (unless the child's tribe has established a different order of preference or good cause is shown to the contrary). 25 USC 1915; MCL 712B.23. See Section 19.10 for a detailed discussion of preferred placements of Indian children.

"Any Indian child who is the subject of any action for termination of parental rights under state law, any parent or Indian custodian from whose custody the child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate the action upon a showing that the action violated any provision of [MCL 712B.15]." MCL 712B.15(5). See Section 19.13 for additional

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[73] In *Adoptive Couple*, ___ US at ___, the biological Indian-father relinquished his parental rights while the biological mother was still pregnant with his child, and the biological Indian-father did not provide support to the biological mother during the pregnancy after their relationship ended, nor did he provide support to the child for the first four months after her birth. It was not until the biological Indian-father received notice of the pending direct placement adoption with a non-Indian couple that he "sought custody [of his child] and stated that he did not consent to [the child's] adoption." *Id.* at ___.

[74] See the ICWA form, *Request to Produce and Examine*, at http://narf.org/icwa/forms/8.pdf.

information on invalidation of state court action for violation of the ICWA or the MIFPA.

D. Involuntary Guardianship[75] Proceedings Involving an Indian Child

MCL 712B.25 provides for the following procedures related to involuntary guardianships (see also MCR 5.404(A) and MCR 5.404(C)):

> (1) If a petition for a guardianship is filed and is determined to be involuntary under [MCL 712B.15] and the court knows or has reason to know that the child is an Indian child, the court may order the [DHHS][76] or a court employee to conduct an investigation of the proposed guardianship and file a written report[77] of the investigation.[78] In addition to the information required in [MCL 700.5204], the report must include, but is not limited to, the following information:
>
> > (a) Whether the child is or is not an Indian child.
> >
> > (b) The identity and location of the child's parents, if known.
> >
> > (c) If the child is an Indian child, the report must also address all of the following:
> >
> > > (*i*) The tribe or tribes of which the child is a member or eligible for membership.
> > >
> > > (*ii*) If the child and family need culturally appropriate and other services to preserve the Indian family.
> > >
> > > (*iii*) The identity and location of extended family members[79] and if no extended family members can be found, what efforts were made to locate them.

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[75] MCL 712B.3(h) defines *guardian* as "a person who has qualified as a guardian of a minor under a parental or spousal nomination or a court order issued under [MCL 712A.19a] or [MCL 712A.19c], [MCL 700.5204] or [MCL 700.5205], or [MCL 330.1600] to [MCL 330.1644]. Guardian may also include a person appointed by a tribal court under tribal code or custom. Guardian does not include a guardian ad litem." See also MCR 3.002(9), which contains a substantially similar definition of *guardian.*

[76] Note that MCL 712B.9(5) pertains to the DHHS "or any successor department or agency." See MCL 712B.3(e).

[77] "The report shall be filed with the court and served no later than 7 days before the hearing on the petition." MCR 5.404(A)(2).

[78] The court may also appoint a guardian ad litem to represent the child's interests. MCR 5.404(A)(2).

(2) Notice of the pending proceeding must be given as prescribed by [the Michigan Court Rule], the [ICWA], and [MCL 712B.9].[80] If the court knows or has reason to know that the proceeding involves an Indian child,[81] the court shall conduct a hearing to determine all of the following:

(a) If the tribe has exclusive jurisdiction. If so, the court shall issue an order terminating the guardianship or dismissing the petition.

(b) If the current placement with the guardian meets the placement requirements in [MCL 712B.23].[82]

(c) If it is in the Indian child's best interest to order the guardianship.

(d) If a lawyer-guardian ad litem should be appointed to represent the Indian child.[83]

(3) If a petition for guardianship is filed and is to be accompanied by a consent to a voluntary placement of an Indian child, the consent must be executed in accordance with [MCL 712B.13]. If the Indian child's parents do not execute a consent under [MCL 712B.13], the petition is considered to be for an involuntary guardianship and the requirements of [MCL 712B.15[84]] must be met.

* * *

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[79] For purposes of an Indian child, "[e]xtended family members' means that term as defined by the law or custom of the Indian child's tribe or, in the absence of that law or custom, means a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent and includes the term 'relative' as that term is defined in [MCL 712A.13a(1)(j)]." MCL 712B.3(f). See also 25 USC 1903(2) and MCR 3.002(7), which both contain a substantially similar definition of *extended family.*

[80] See Section 19.4 for a detailed discussion of notice proceedings.

[81] "If the petition for guardianship states that it is unknown whether the minor is an Indian child, the investigation shall include an inquiry into Indian tribal membership." MCR 5.404(A)(2).

[82] See Section 19.10 for a detailed discussion of preferred placement preferences under MCL 712B.23.

[83] MCL 712B.3(q) defines *lawyer-guardian ad litem* as "an attorney appointed under [MCL 712B.21]. A lawyer-guardian ad litem represents the child, and has the powers and duties, as set forth in [MCL 712A.17d]. The provisions of [MCL 712A.17d] also apply to a lawyer-guardian ad litem appointed for the purposes of [the MIFPA] under each of the following: (*i*) [MCL 700.5213] or [MCL 700.5219][;] (*ii*) [MCL 722.24][;] and (*iii*) [MCL 722.630]." See also MCR 3.002(18), which contains substantially similar language.

[84] MCL 712B.15 requires notice, compliance with the MIchigan Court Rules and MCL 700.5204 and MCL 700.5205, in addition to demonstration of active efforts. See also MCR 5.404(C). See Section 19.9(E) for information on the active efforts requirement.

> (6) If the court discovers a child may be an Indian child after a guardianship is ordered, the court shall provide notice of the guardianship and the potential applicability of the [ICWA], in compliance with [the Michigan Court Rules] and the [ICWA], to the tribe, the parents or Indian custodian, and the current guardian on a form approved by the state court administrative office."

1. Hearing

Before a court may appoint a guardian in a case involving an involuntary guardianship, it "must conduct a hearing on [the] petition . . . in accordance with [MCR 5.404.]" MCR 5.404(C)(1). Notice of the hearing must be sent to persons prescribed in MCR 5.125(A)(8)[85] and [MCR 5.125(C)(19)[86]] in compliance with MCR 5.109(1).

At the hearing, the court must determine:

> "(a) if the tribe has exclusive jurisdiction as defined in MCR 3.002(6). The court shall comply with MCR 5.402(E)(2).
>
> (b) if the placement with the guardian meets the placement requirements in [MCR 5.404(C)(2) and MCR 5.404(C)(3)].
>
> (c) if it is in the Indian child's best interest to appoint a guardian.
>
> (d) if a lawyer-guardian ad litem should be appointed to represent the Indian child.
>
> (e) whether or not each parent wants to consent to the guardianship if consents were not filed with the petition. If each parent wants to consent to the guardianship, the court shall proceed in accordance with [MCR 5.404(B) (providing procedures for voluntary guardianships)]." MCR 5.404(C)(1).

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[85] If the child is an Indian child, MCR 5.125(A)(8) requires notice to the child's tribe and Indian custodian, if any, in addition to the Secretary of the Interior if the child's parent, Indian custodian, or tribe are unknown.

[86] MCR 5.125(C)(19) requires notice to: the child, if he or she is 14 years of age or older; "if known by the petitioner or applicant, each person who had the principal care and custody of the [child] during the 63 days preceding the filing of the petition or application;" the child's parents, or, if both are deceased, any grandparents and adult presumptive heirs of the child; the nominated guardian; and "if known by the petitioner or applicant, a guardian or conservator appointed by a court in another state to make decisions regarding the person of [the child]."

2. Placement

"An Indian child shall be placed in the least restrictive setting that most approximates a family and in which his or her special needs, if any, may be met[and] shall be placed within reasonable proximity to his or her home, taking into account any special needs of the child." MCR 5.404(C)(2). "Absent good cause to the contrary, the placement of an Indian child must be in descending order of preference with:

> (a) a member of the child's extended family,
>
> (b) a foster home licensed, approved, or specified by the child's tribe,
>
> (c) an Indian foster family licensed or approved by the Department of [Health and] Human Services,
>
> (d) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.
>
> The standards to be applied in meeting the preference requirements above shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties." MCR 5.404(C)(2).

The court may deviate from the placement requirements in MCR 5.404(C)(2) "for good cause shown in accordance with MCL 712B.23(3)-(5) and 25 USC 1915(c)." MCR 5.404(C)(3). In addition, if the child's tribe has a different order of preference than the order listed in MCR 5.404(C)(3), "placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate for the particular needs of the child, as provided in MCL 712B.23(6)." MCR 5.404(C)(3).

"Where appropriate, the preference of the Indian child or parent shall be considered." MCR 5.404(C)(3). But see *In re KMN*, 309 Mich App 274, 290 (2015) (holding that "good cause [under the MIFPA] is limited to the conditions articulated in MCL 712B.23(5)").

3. Evidence Sufficient to Remove Indian Child from Parent or Indian Custodian

MCR 5.404(F)(1) provides:

> "If a petition for guardianship involves an Indian child and the petition was not accompanied by a consent executed pursuant to MCL 712B.13 and these rules, the court may remove the Indian child from a parent or Indian custodian and place that child with a guardian only upon clear and convincing evidence that:
>
> > (a) active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family,
> >
> > (b) these efforts have proved unsuccessful, and
> >
> > (c) continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
>
> The evidence shall include the testimony of at least one qualified expert witness, as described in MCL 712B.17, who has knowledge about the child-rearing practices on the Indian child's tribe. The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. If the petitioner cannot show active efforts have been made, the court shall dismiss the petition and may refer the petitioner to the [DHHS] for child protective services or to the tribe for services." MCR 5.404(F)(1).

E. Active Efforts Requirement

More effort is required under the ICWA's *active efforts* standard than is required under Michigan's *reasonable efforts* standard.[87] *In re JL*, 483 Mich at 321; *In re Roe*, 281 Mich App at 108. The ICWA requires that active efforts be a more direct involvement when the Indian parent or custodian is being provided remedial services and rehabilitative programs. *In re Roe*, *supra* at 106-107. See, e.g., *In re Kreft*, 148 Mich App 682, 693-695 (1986), where the DHHS met the ICWA's active efforts requirements when it provided the respondent-mother with parenting assistance, infant nutrition information, and housing assistance.

[87] The Michigan Supreme Court decision in *In re JL* and the Michigan Court of Appeals decision in *In re Roe* occurred before the MIFPA was enacted.

For purposes of the MIFPA, see MCL 712B.3(a), which defines *active efforts* as "actions to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to reunify the child with the Indian family. Active efforts require more than a referral to a service without actively engaging the Indian child and family. Active efforts include reasonable efforts as required by [T]itle IV-E of the [S]ocial [S]ecurity [A]ct, 42 USC 670 to [42 USC] 679c, and also include doing or addressing all of the following:

> (*i*) Engaging the Indian child, child's parents, tribe, extended family members, and individual Indian caregivers through the utilization of culturally appropriate services and in collaboration with the parent or child's Indian tribes and Indian social services agencies.
>
> (*ii*) Identifying appropriate services and helping the parents to overcome barriers to compliance with those services.
>
> (*iii*) Conducting or causing to be conducted a diligent search for extended family members for placement.[88]
>
> (*iv*) Requesting representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards and child rearing practice within the tribal community to evaluate the circumstances of the Indian child's family and to assist in developing a case plan that uses the resources of the Indian tribe and Indian community, including traditional and customary support, actions, and services, to address those circumstances.
>
> (*v*) Completing a comprehensive assessment of the situation of the Indian child's family, including a determination of the likelihood of protecting the Indian child's health, safety, and welfare effectively in the Indian child's home.
>
> (*vi*) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding and actively soliciting the tribe's advice throughout the proceeding.

[88] See Section 19.10 for additional information on preferred placements for Indian children, including the definition of the term *extended family members.*

(*vii*) Notifying and consulting with extended family members of the Indian child, including extended family members who were identified by the Indian child's tribe or parents, to identify and to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child.

(*viii*) Making arrangements to provide natural and family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the Indian child's permanency plan, including, when requested by the tribe, arrangements for transportation and other assistance to enable family members to participate in that interaction.

(*ix*) Offering and employing all available family preservation strategies and requesting the involvement of the Indian child's tribe to identify those strategies and to ensure that those strategies are culturally appropriate to the Indian child's tribe.

(*x*) Identifying community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child's family with special needs, and providing information about those resources to the Indian child's family, and actively assisting the Indian child's family or offering active assistance in accessing those resources.

(*xi*) Monitoring client progress and client participation in services.

(*xii*) Providing a consideration of alternative ways of addressing the needs of the Indian child's family, if services do not exist or if existing services are not available to the family." See also MCR 3.002(1), which contains a substantially similar definition of *active efforts*, and Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, A.2 (2015), which contains a similar definition of *active efforts* but also provides additional provisions to consider.

The proper standard of proof for determining whether the ICWA's active efforts standard was met is the clear and convincing evidence standard. *In re Roe*, 281 Mich App 88, 101 (2008) (the beyond a reasonable doubt standard of proof to satisfy the active efforts

requirement was incorrectly adopted in *In re Morgan*, 140 Mich App 594, 604 [1985], and *In re Kreft*, 148 Mich App 682, 693 [1986]), overruled in part on other grounds *In re JL*, 483 Mich 300, 326-327 (2009). See also MCL 712B.15(2), which requires the clear and convincing evidence standard for determining whether the MIFPA's active efforts standard was met for an "Indian child [to] be removed from a parent or Indian custodian [and] placed into foster care placement, or[] for an Indian child already taken into protective custody, remain removed from a parent or Indian custodian pending further proceedings[.]"

Active efforts are not required where termination of a parent's parental rights does not result in breaking up an Indian family. *In re SD*, 236 Mich App 240, 244-245 (1999) (active efforts were not required where "the family had already broken up by the time the termination proceedings were initiated[,][89] . . . the children's mother still live[d] with and t[ook] care of the children[,] [t]he children's mother [was] the parent that [was] of Indian heritage and it [was] through her that the children ha[d] ties to their tribe[,] . . . the children's 'Indian family' and connection to their Indian heritage remained intact when petitioner agreed not to seek termination of [the children's mother's parental] rights[, and] [t]he tribe . . . recommend[ed] that respondent[-father's] rights be terminated[]").

The ICWA does not require the DHHS or the tribe to provide services each time a new termination proceeding is commenced against a parent when past efforts failed and it does not appear that providing the additional services will result in a different outcome. *In re JL*, 483 Mich at 305. See also *In re Roe*, 281 Mich App at 102, 105, where the Court held that there was nothing within 25 USC 1912(d) that prevented the DHHS from seeking termination of parental rights when past efforts to reunite the family were unsuccessful. However, the DHHS must "undertake a thorough, contemporaneous assessment of the services provided to the parent in the past and the parent's response to those services before seeking to terminate parental rights without having offered additional services." *In re JL*, 483 Mich at 305.

> **Note:** The *In re JL* Court indicated that despite its refusal to establish an arbitrary threshold at which past services could be used to satisfy current active efforts, it did direct trial courts to "carefully assess the timing of the services provided to the parent [and that] . . . [t]he

[89] At the time of the respondent-father's termination hearing, the respondent-father and the children's mother had separated and filed for divorce, the respondent-father moved away from his children and failed to care for or financially support his children for two years before the termination proceedings, and the respondent-father was sentenced to prison for four to ten years for sexually assaulting two of his children. *In re SD*, 236 Mich App 240, 244-245 (1999).

> timing of the services must be judged by reference to the grounds for seeking termination and their relevance to the parent's current situation." *In re JL*, 483 Mich at 324-325. The *In re JL* Court also declined to hold that "active efforts must always have been provided in relation to the child who is the subject of the current termination proceeding." *Id.* at 325.

19.10 Preferred Placements of Indian Children

One of the primary purposes of the ICWA and the MIFPA is to ensure that the placement of Indian children reflects the unique values of the Indian child's tribal culture. 25 USC 1902; MCL 712B.5.

In 25 USC 1915 and MCL 712B.23(1),[90] the ICWA and the MIFPA establish a standard order of preference for foster care and preadoptive placements of Indian children.[91] However, a child's tribe may establish a different order of preference, and the DHHS or court making the placement must follow the tribe's order of preference if it is the least restrictive setting that most approximates a family, meets the child's special needs, and is in reasonable proximity to the child's home. 25 USC 1915(c); MCL 712B.23(6).[92] Tribal input on placements may also fall under a state-tribal child welfare agreement. See 25 USC 1919(a).

> **Note:** "Nothing in [the MIFPA] or [MCL 712B.23] prevents the emergency removal, protective custody, or subsequent placement of an Indian child who is a resident of or is domiciled on a reservation but is temporarily located off the reservation." MCL 712B.23(9).

The DHHS or court must consider the preference of the parent or custodian when appropriate, and the DHHS or court must give weight to the parent's or custodian's desire for anonymity when applying either the statutory or tribal preferences. 25 USC 1915(c). See Section 19.3(A) for a detailed discussion of confidentiality.

"[T]he prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties[,]" must be considered when meeting the preference requirements. 25 USC 1915(d); MCL 712B.23(8); MCR 3.965(B)(13)(b); MCR 3.967(F).

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[90] Note that MCL 712B.23(1) does not apply to "a placement for guardianship under [MCL 700.5204] or [MCL 700.5205], where both parents submit a consent for the guardianship[.]"

[91] MCR 3.965(B)(13)(b) and MCR 3.967(F) establish the same orders of preference.

[92] See also MCR 3.965(B)(13)(b) and MCR 3.967(F), which contain substantially similar language.

A. Foster Care or Preadoptive Placements

An Indian child accepted for foster care or preadoptive placement must be placed in the least restrictive setting that most approximates a family, meets the child's special needs, and is in reasonable proximity to the child's home. 25 USC 1915(b); MCL 712B.23(1).

Unless the child's tribe has established a different order of preference, MCL 712B.23(6), or good cause is shown to the contrary, MCL 712B.23(1), preference for an Indian child accepted for foster care or preadoptive placement must be in the following order:

> "(a) A member of the Indian child's extended family.
>
> (b) A foster home licensed, approved, or specified by the Indian child's tribe.
>
> (c) An Indian foster home licensed or approved by the department.
>
> (d) An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs." MCL 712B.23(1). See also 25 USC 1915(b)(*i*)-(*iv*), MCR 3.965(B)(13)(b), and MCR 3.967(F), which contain substantially similar language.

For purposes of an Indian child, "'[e]xtended family members' means that term as defined by the law or custom of the Indian child's tribe or, in the absence of that law or custom, means a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent and includes the term 'relative' as that term is defined in [MCL 712A.13a(1)(j)]." MCL 712B.3(f). See also 25 USC 1903(2) and MCR 3.002(7), which both contain a substantially similar definition of *extended family*.

> **Note:** MCL 712B.9(5) requires "[t]he [DHHS] [to] exercise due diligence to determine, document, and contact the Indian child's extended family members in accordance with the [F]ostering [C]onnections to [S]uccess and [I]ncreasing [A]doptions [A]ct of 2008, Public Law 110-351. If applicable, determinations and documentation should be conducted in consultation with the child or parent's tribe."[93]

[93] Note that MCL 712B.9(5) pertains to the DHHS "or any successor department or agency." See MCL 712B.3(e).

"'Indian organization' means any group, association, partnership, corporation, or other legal entity owned of controlled by Indians, or a majority of whose members are Indians." MCL 712B.3(p). See also 25 USC 1903(7) and MCR 3.002(16), which both contain a substantially similar definition of *Indian organization*.

B. Deviating From the Order of Preference

A court need not follow the order of preference for a foster care or preadoptive placement if it finds that good cause exists to not follow the order of preference. 25 USC 1915(b). See also MCL 712B.23(1).

"The court's determination of good cause to not follow the order of preference shall be based on 1 or more of the following conditions:

> (a) A request was made by a child of sufficient age.
>
> (b) A child has an extraordinary physical or emotional need as established by testimony of an expert witness."[94] MCL 712B.23(5).

"[G]ood cause [under the MIFPA] is limited to the conditions articulated in MCL 712B.23(5) . . .[; t]herefore, a biological parent's choice of an adoptive placement does not constitute good cause[.]" *In re KMN*, 309 Mich App 274, 290 (2015).

Although the issue was not before, and thus, not decided by the Court, "it may be the case that an Indian child's tribe could alter [the] preferences [in 25 USC 1915] in a way that includes a biological [parent] whose rights were terminated, but who has now reformed. See [25 USC 1915(c)]. If a tribe were to take such an approach, however, the court would still have the power to determine whether 'good cause' exists to disregard the tribe's order of preference. See [25 USC 1915(a); 25 USC 1915(c); *In re Adoption of TRM*, 525 NE2d 298, 313 (Ind 1988)." *Adoptive Couple v Baby Girl*, ___ US ___, ___ n 11 (2013). See also MCL 712B.23(1) and MCL 712B.23(6) for the MIFPA provisions that correlate to the cited ICWA provisions.

The party requesting the deviation has the burden of establishing good cause to not follow the order of preference. MCL 712B.23(3); *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, supra* at F.4(b).

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[94] Note that the Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, F.4(c) (2015), provides for additional circumstances constituting good cause to modify the statutory order of preference above what is provided for under the MIFPA. However, good cause should be interpreted in accordance with the MIFPA. See *In re KMN*, 309 Mich App at 290 (holding that "good cause [under the MIFPA] is limited to the conditions articulated in MCL 712B.23(5)").

Before the court deviates from the placement preferences under MCL 712B.23, MCL 712B.23(4) requires:

> "The court shall not find good cause to deviate from the placement preferences stated in [MCL 712B.23] without first ensuring that all possible placements required under [MCL 712B.23] have been thoroughly investigated and eliminated. All efforts made under [MCL 712B.23] must be provided to the court in writing or stated on the record. The court shall address efforts to place an Indian child in accordance with [MCL 712B.23] at each hearing until the placement meets the requirements of this section."

See *In re KMN*, 309 Mich App at 292 (finding that "the trial court erred with regard to the application of MCL 712B.23(4)" where "the trial court did nothing to ensure . . . possible placement [with the Indian child's relatives] had been realized, investigated, and eliminated[(even though the Indian child's relatives had not yet filed an adoption petition),] . . . [and] the trial court did nothing to ensure that any other possible listed placements were realized, investigated, and eliminated[]").

C. Maintenance of Placement Records

Michigan must maintain, in a single location, a record of every Indian child's foster care and preadoptive placement, and a record must be made available to the Indian child's tribe or the Secretary of the Interior upon request within seven days. 25 USC 1915(e); Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, G.6(a) (2015). Each record must at least contain "the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination." *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at G.6(b).

The MIFPA also requires:

- "A record of each placement of an Indian child [to] be maintained by the [DHHS][95] or court evidencing the efforts to comply with the order of preference specified in [MCL 712B.23]. The record shall be made available at any time upon the request of the [S]ecretary [of the Interior][96] or Indian child's tribe." MCL 712B.23(7).

[95] For purposes of the MIFPA, "'[d]epartment' means the department of [health and] human services [DHHS] or any successor department or agency."

[96] See MCL 712B.3(u), which defines *secretary* as the "[S]ecretary of the [I]nterior."

- "All efforts made to identify, locate, and place a child according to [MCL 712B.23] [to] be documented and, upon request, made available to the court, tribe, Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian." MCL 712B.23(10).

D. Change of Placement

When an Indian child is being removed from a foster care placement for the purpose of further foster care, preadoptive, or adoptive placement,[97] the court or the DHHS must inform the biological parents and prior Indian custodians of the status change and the right to petition for the return of custody of the child. Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, G.4(a)(3), G.4(b) (2015). The new placement must be in accordance with the placement preferences and the provisions of the ICWA, unless the Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed. 25 USC 1916(b).

A parent or Indian custodian may waive the right to notice of the change in the child's status by filing a written waiver with the court. *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at G.4(c). The parent or Indian custodian may revoke the waiver at any time by filing a written notice of revocation. *Id.*

> **Note:** The filed notice of revocation does not impact any proceeding that occurred prior to the filing of notice. *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at G.4(c).

19.11 Qualified Expert Witnesses

"If the testimony of a qualified expert witness is required, the court shall accept either of the following in the following order of preference:

> (a) A member of the Indian child's tribe, or witness approved by the Indian child's tribe, who is recognized by the tribal community as knowledgeable in tribal customs and how the tribal customs pertain to family organization and child rearing practices.

[97] See the Michigan Judicial Institute's *Adoption Proceedings Benchbook* for additional information on adoptive placements.

> (b) A person with knowledge, skill, experience, training, or education and who can speak to the Indian child's tribe and its customs and how the tribal customs pertain to family organization and child rearing practices." MCL 712B.17(1).

"A party to a child custody proceeding may present his or her own qualified expert witness to rebut the testimony of the petitioner's qualified expert witness." MCL 712B.17(2).

The Indian child's tribe or the BIA may be of assistance in helping to locate "persons qualified to serve as expert witnesses." Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, D.4(c) (2015).

19.12 Improper Removal

If a party asserts or the court has reason to believe, during an Indian child custody proceeding, that an Indian child has been improperly removed or retained, the court must immediately place a stay on the proceedings "until a determination can be made on the question of improper removal or retention, and such determination must be conducted expeditiously." Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, B.9(a) (2015).

"If a court determines at a hearing that a petitioner in an Indian child custody proceeding has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over the petition and immediately return the child to his or her parent or Indian custodian unless returning the child to his or her parent or Indian custodian would subject the child to a substantial and immediate danger or threat of danger." MCL 712B.19. See also 25 USC 1920 and *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at B.9(b),[98] which contain substantially similar language.

19.13 Invalidation of State Court Action for Violation of the ICWA

A petition asking the court to invalidate a placement or a termination proceeding because the court's actions violated 25 USC 1911, 25 USC 1912, or 25 USC 1913, may be filed by any of the following:

[98] Requiring an "imminent threat of physical damage or harm[]" as opposed to "substantial and immediate danger or threat of danger."

> (1) an Indian child subject to foster care placement or termination proceedings under state law,[99]
>
> (2) a parent or Indian custodian from whom the child was removed, and
>
> (3) the Indian child's tribe. 25 USC 1914; Bureau of Indian Affairs, *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, 80 Federal Register 37, G.2(a) (2015).
>
> > **Note:** "There is no requirement that the particular party's rights under the [ICWA] be violated to petition for invalidation; rather, any party may challenge the action based on violations in implementing the [ICWA] during the course of the child custody proceeding." *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at G.2(c).

A parent has standing to challenge an order independent of the participation of the tribe, even though the statute provides for a challenge by the child, parent or Indian custodian, *and* the tribe. *In re Kreft*, 148 Mich App 682, 687-689 (1986).

"Upon a showing that an action for foster care placement or termination of parental rights violated any provision of 25 USC 1911, [25 USC] 1912, or [25 USC] 1913, the court must determine whether it is appropriate to invalidate the action." *Guidelines for State Courts and Agencies in Indian Child Custody Proceedings*, *supra* at G.2(b).

Case law. The following cases discuss the invalidation of a state court action when it violated 25 USC 1911, 25 USC 1912, or 25 USC 1913.

- *In re Johnson*, **305 Mich App 328 (2014)**

The trial court's order terminating the respondent-mother's parental rights was conditionally reversed and remanded for purposes of ICWA compliance where the ICWA notice requirements were triggered following "the minor child's father['s] state[ment] [during the preliminary hearing] that his deceased grandmothers were both 'full-blooded' Native Americans, although he did not know to which tribe they belonged[,]" and "the [court] record contain[ed] no indication that notice was served under 25 USC 1912(a), nor [was] there any claim that such notice was ever served, apparently because there was a determination, or at least it was stated in court documents, that the minor child [was] not an Indian child."[100] *In re Johnson*, 305 Mich App 328, 330, 332 (2014).

[99] See Chapter 17 for information regarding the termination of parental rights pursuant to Michigan law.

- ***In re Morris (Morris IV) (After Remand)*, 300 Mich App 95 (2013)**

"A remand to ensure proper notice under [the] ICWA that does not lead to any evidence that [the] ICWA applies does not unravel a best-interest determination." *In re Morris (Morris IV) (After Remand)*, 300 Mich App 95, 107-108 (2013). Specifically,

> "[The] [r]respondent[-father] asserts that [the] ICWA's remedy provisions [under 25 USC 1914] permit him to petition for invalidation of court orders entered in violation of [the] ICWA's notice requirement; thus, [the respondent-father] requests that the case be remanded to determine whether the minor child is an Indian child. However, [the] respondent[-father] has not established that [the] ICWA's notice requirement was violated on remand or that [the] ICWA actually applies to the minor child. Moreover, the issue of the minor child's best interests is not properly before this Court because it is outside the scope of the [Michigan] Supreme Court's limited remand.[101] This Court already determined that the trial court did not err by finding that termination of [the] respondent's parental rights was in the child's best interests, and the Michigan Supreme Court agreed. Thus, there was no error in the trial court's best-interest determination. A remand to ensure proper notice under [the] ICWA that does not lead to any evidence that [the] ICWA applies does not unravel a best-interest determination."*In re Morris (Morris IV) (After Remand)*, 300 Mich App at 107-108.

- ***In re Morris (Morris III)*, 491 Mich 81 (2012), overruling *In re IEM*, 233 Mich App 438 (1999)**[102]

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[100] Although the Court of Appeals conditionally reversed and remanded the trial court's order terminating the respondent-mother's parental rights for purposes of ICWA compliance, the Court of Appeals went on to find that "the trial court did not clearly err when it found that termination [of the respondent-mother's parental rights] was in the minor child's best interests because of the child's need for permanence and stability[,]" which the respondent-mother could not provide. *In re Johnson*, 305 Mich App at 335-336. See Section 17.8(C) for more information on the best-interests analysis.

[101] In *In re Morris (Morris I)*, 489 Mich 877, 877 (2011), the Michigan Supreme Court "remanded th[is] case to [the Court of Appeals] for reconsideration of [the] respondent[-father's] appeal in light of [the] petitioner's confession of error regarding the failure of [the] petitioner and the trial court to comply with the notice requirements of [the] ICWA." On remand, the Court of Appeals in an unpublished opinion, "readopted, but conditionally affirmed, the order terminating [the] respondent[-father's] parental rights and remanded the case to the trial court for proper notice consistent with [the] ICWA and for further proceedings as necessary and consistent with the opinion." *In re Morris (Morris IV) (After Remand)*, 300 Mich App at 99-100, citing *In re Morris (Morris II) (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket Nos. 299470, 299471).

[102] The Michigan Supreme Court in *In re Morris (Morris III), supra* at 121, overruled *In re IEM*, *supra*, "and its progeny[.]"

In overruling *In re IEM*, 233 Mich App 438 (1999),[103] the Michigan Supreme Court held "that the proper remedy for [the] ICWA-notice violations [under 25 USC 1912(a)] is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue." *In re Morris (Morris III)*, 491 Mich at 121-122. Specifically,

> "Because [the] ICWA and our court rules are silent regarding the proper remedy for 25 USC 1912(a) notice violations, we must choose the best of three remedies suggested by the parties and the amici curiae. The first suggestion is to automatically reverse any proceedings occurring after the tribal-notice condition of 25 USC 1912(a) was triggered. The second proffered remedy is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue. The third possibility, which is substantively very similar to the second, is to conditionally affirm the trial court and remand for resolution of the ICWA-notice issue. In *In re IEM*, 233 Mich App 438, 449-450 (1999), our Court of Appeals adopted the conditional-affirmance remedy, and it has since been applied in more than 20 cases.

* * *

> [W]ithout a showing that [the] ICWA even applies to the foster care or termination of parental rights proceedings, i.e., that the child is an Indian child, we decline to adopt a rule of automatic reversal.[104]

* * *

> From a practical perspective, we realize there is little difference between the conditional remedies: both require a remand to remedy the notice violation. A conditional affirmance merely states that the lower court ruling is affirmed unless [the] ICWA applies, whereas a conditional reversal states that the ruling is reversed unless [the] ICWA

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[103] In *In re IEM, supra* at 449-450, the Court of Appeals found termination was proper under state law but that the DHHS failed to satisfy the ICWA's notice requirements, and the proper remedy was to "conditionally affirm the [trial] court's termination order, but remand so that the court and the [DHHS] may provide proper notice to any interested tribe."

[104] In analyzing the automatic-reversal remedy, the Michigan Supreme Court in *In re Morris (Morris III)*, 491 Mich at 119-120, concluded that "the mere triggering of the notice requirement does not strip the trial court of jurisdiction over the children and does not mandate automatic reversal of all proceedings occurring after the notice requirement was triggered[,]" "[a]n automatic-reversal rule would require new termination proceedings in even the cases not involving Indian children, [which] would disrupt or delay the permanent placement of the child[,]" and the "automatic-reversal remedy would be inconsistent with our longstanding disfavor of automatic reversals." The Court noted, "[h]owever, [that] when an appellate court can conclude from the record properly before it that a child is an Indian child entitled to the benefits and protections of [the] ICWA, an outright reversal may be an appropriate remedy if the trial court failed to apply [the] ICWA's standards." *In re Morris (Morris III), supra* at 120 n 28.

does not apply. Under either remedy, if the child is determined to be an Indian child, then the foster care or termination proceedings are invalidated and the proceedings begin anew under [the] ICWA's standards. If no Indian child is involved, however, or the tribe given proper notice does not respond within the times allotted by 25 USC 1912(a), any notice violation is harmless.

As far as the best interests of the children, there is again little difference between the conditional-affirmance and conditional-reversal remedies. Under either remedy, the children will likely stay in their current placements until the notice violation is resolved, and thus their permanency is not unduly affected in the interim. Additionally, there is no difference between these remedies as far as conserving judicial resources. Both require a remand to remedy the notice violation.

Nevertheless, in other ways, substantial differences exist between the two remedies. First, we think the use of a conditional reversal is more consistent with the text of 25 USC 1912(a), which mandates that '[n]o foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary . . . .' Second, between the two remedies, conditional reversal is more deferential to tribal interests, as expressed by [the] ICWA, and is more likely to ensure these interests are protected by the trial courts. The term 'conditional reversal' sends a clearer signal to the lower courts and the DHHS that they must pay closer attention when [the] ICWA is implicated. In sum, we think that the conditional-reversal remedy is more emphatic, more consistent with the text and purposes animating [the] ICWA, and more likely to encourage compliance with [the] ICWA.

Therefore, we overrule *IEM* and its progeny and hold that conditional reversal is the proper remedy for violations of 25 USC 1912(a)." *In re Morris (Morris III)*, 491 Mich at 115, 120-121.

> **Note:** In *In re Morris (Morris III)*, 491 Mich at 121-122 n 29, the Michigan Supreme Court clarified that language pulled from a Vermont case and quoted with approval in *In re IEM*, *supra* at 450, "erroneously implies that even if the child is determined to be an Indian child, it would be proper to affirm an involuntary foster care placement or termination of parental rights determination made under state law—in the absence of [the] ICWA's

> protections—if the Indian tribe chose not to intervene[;] [rather,] [i]f the child meets the definition of Indian child, [the] ICWA applies, regardless of whether the Indian tribe chooses to intervene in the state-court proceedings."

- ***In re Budd*, 491 Mich 934, 934-935(2012)**

In light of the Michigan Supreme Court's ruling in *In re Morris (Morris III)*, 491 Mich 81 (2012), the Michigan Supreme Court reversed "that part of the judgment of the Court of Appeals applying the conditional-affirmance remedy," and instead "conditionally reverse[d]" the circuit court's "termination of the respondent's parental rights, and remand[ed] th[e] case to the circuit court for resolution of the notice requirements of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*." *In re Budd*, 491 Mich at 934. On remand, the Michigan Supreme Court directed:

> "[T]he circuit court shall first ensure that notice is properly made to the appropriate entities. If the circuit court conclusively determines that [the] ICWA does not apply to the child protective proceeding—because the children are not Indian children or because the properly noticed tribe does not timely respond—the circuit court's order terminating the respondent's parental rights shall be reinstated. If, however, the circuit court concludes that [the] ICWA does apply to the child protective proceeding, the circuit court's order terminating the respondent's parental rights must be vacated and all proceedings must begin anew in accord with the procedural and substantive requirements of [the] ICWA." *In re Budd*, 491 Mich at 934-935.

- ***Empson-Laviolette v Crago*, 280 Mich App 620, 632-633 (2008)**

The Court of Appeals found that the ICWA preempted the stay imposed under MCL 722.26b(4) in a guardianship proceeding because the stay "infringed on the minimum protections [the child's mother] was afforded under § 1913(b)[;]" that is, the stay prevented the child's mother from withdrawing her consent to the guardianship at any time. See Section 19.9(D) for a detailed discussion of a parent's or custodian's right to withdraw consent.

- ***In re Morgan*, 140 Mich App 594, 602-604 (1985)[105]**

[105] A different panel of the Court of Appeals later concluded that the *In re Morgan* Court erred in applying a reasonable doubt standard to the active efforts determination. *In re Roe*, 281 Mich App 88, 99-100 (2008) (stating that the standard required by the ICWA is clear and convincing). However, this decision would not likely disturb the outcome discussed in this section.

The Court of Appeals invalidated the trial court's order terminating parental rights where the trial court used the clear and convincing evidence standard rather than the beyond a reasonable doubt standard during disposition, failed to hear expert witness testimony, and failed to establish that remedial or rehabilitative efforts had failed. See Section 19.9(C) for a detailed discussion of involuntary termination of parental rights.

19.14 Invalidation of State Court Action for Violation of the MIFPA

A petition asking the court to invalidate a placement or a termination proceeding because the court's actions violated MCL 712B.7, MCL 712B.9, MCL 712B.11, MCL 712B.13, MCL 712B.15,[106] MCL 712B.21, MCL 712B.23, MCL 712B.25, MCL 712B.27, and MCL 712B.29, may be filed by any of the following:

> (1) an Indian child subject to foster care placement or termination proceedings under state law,[107]
>
> (2) a parent or Indian custodian from whom the child was removed, and
>
> (3) the Indian child's tribe. MCL 712B.39.

19.15 Annual Census

MCL 712B.37 requires "[t]he [DHHS][108] to publish annually a census with no individually identifiable information of all Indian children in the [DHHS's] care and custody. The census shall include, by county and statewide, information regarding the Indian children on all of the following:

> (a) Legal status.
>
> (b) Placement information and whether it complies with [the MIFPA].

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[106] MCL 712B.15(5) also provides for "[a]ny Indian child who is the subject of any action for termination of parental rights under state law, any parent or Indian custodian from whose custody the child was removed, and the Indian child's tribe [to] petition any court of competent jurisdiction to invalidate the action upon a showing that the action violated any provision of [MCL 712B.15]." MCL 712B.15(5). See Section 19.9 for a discussion of MCL 712B.15.

[107] See Chapter 17 for information regarding the termination of parental rights pursuant to Michigan law.

[108] For purposes of the MIFPA, "'[d]epartment' means the department of [health and] human services [DHHS] or any successor department or agency."

(c) Age.

(d) Sex.

(e) Tribe in which the child is a member or eligible for membership.

(f) Accumulated length of time in foster care.

(g) Other demographic information considered appropriate concerning all Indian children who are the subject of child custody proceedings."

Chapter 20: Review of Referee Recommendations, Rehearings, and Appeals

20.1 Judicial Review of Referee's Recommended Findings and Conclusions 20-2
20.2 Rehearings 20-3
20.3 Appeals to the Michigan Court of Appeals 20-4
20.4 Appeals to the Michigan Supreme Court 20-11

In this chapter. . .

This chapter discusses the procedural requirements for requesting review of a referee's recommended findings and conclusions following a hearing.

This chapter also briefly touches on rehearings and provides a brief overview of (1) how a party may appeal to the Michigan Court of Appeals or the Michigan Supreme Court, (2) the requirements of filing an appeal, and (3) the reviewing court's decisionmaking process.

20.1 Judicial Review of Referee's Recommended Findings and Conclusions

"Before signing an order based on a referee's recommended findings and conclusions, a judge of the court shall review the recommendations if requested by a party in the manner provided by [MCR 3.991(B)]." MCR 3.991(A)(1).

A. Advice of Right to Seek Review

A referee must advise the parties of the right to request that a judge review a referee's recommended findings and conclusions as provided in MCR 3.991(B). MCR 3.913(C).

B. Procedural Requirements

"A party's request for review of a referee's recommendation must:

(1) be in writing,

(2) state the grounds for review,

(3) be filed with the court within 7 days after the conclusion of the inquiry or hearing or within 7 days after the issuance of the referee's written recommendations, whichever is later, and

(4) be served on the interested parties by the person requesting review at the time of filing the request for review with the court. A proof of service must be filed." MCR 3.991(B).

"A party may file a written response within 7 days after the filing of the request for review." MCR 3.991(C).

However, if a request for review of a referee's recommendation is not filed with seven days of the conclusion of the inquiry or issuance of the referee's written recommendation as required under MCR 3.991(B)(3), "the court may enter an order in accordance with the referee's recommendations." MCR 3.991(A)(2).

C. Timing Requirement for Judge's Consideration of Request

Nothing in MCR 3.991 precludes a judge from reviewing a referee's recommendation and entering an appropriate order before the time for requesting a review has expired. MCR 3.991(A)(3).

However, once the judge enters an order, a request for review cannot be filed. MCR 3.991(A)(4). Rather, reconsideration of the order may be granted under MCR 3.992 (rehearings).[1] MCR 3.991(A)(4).

Unless good cause exists, the court must consider the request for review within 21 days after the request is filed if the child is in placement. MCR 3.991(D). A hearing is not required in order to rule on the request. *Id*. However, the judge has discretion to hold a hearing before ruling. MCR 3.991(F).

D. Stay of Proceedings

"The court may stay any order . . . pending its decision on review of the referee's recommendations." MCR 3.991(G).

E. Ruling on Review Request

MCR 3.991(E) sets out the standard of review of a request to review a referee's recommended findings and conclusions:

> "The judge must enter an order adopting the referee's recommendation unless:
>
> > (1) the judge would have reached a different result had he or she heard the case; or
> >
> > (2) the referee committed a clear error of law which
> >
> > > (a) likely would have affected the outcome, or
> > >
> > > (b) cannot otherwise be considered harmless."

"The judge may adopt, modify, or deny the recommendation of the referee, in whole or in part, on the basis of the record and the memorandums prepared, or may conduct a hearing, whichever the court in its discretion finds appropriate for the case." MCR 3.991(F).

20.2 Rehearings

During a child protective proceeding, an interested person may file a petition for rehearing at any time while a child is under the court's jurisdiction.[2] MCL 712A.21. However, "[a] motion will not be considered unless it presents a matter not previously presented to the court, or

[1] See Section 12.11 for a detailed discussion of rehearings.

[2] For a detailed discussion of rehearings, see Section 12.11.

presented, but not previously considered by the court, which, if true, would cause the court to reconsider the case." MCR 3.992(A).

Unless the case involves termination of parental rights, a motion for rehearing must be filed "within 21 days after the date of the order resulting from the hearing or trial." MCR 3.992(A). If the case involves termination of parental rights, a motion for rehearing must be filed "within 14 days after the date of the order terminating parental rights." *Id*. But see, MCL 712A.21, which requires a petition for rehearing to be filed within 20 days of entry of the order terminating parental rights where parental rights have been terminated and custody of a child has been removed from the parents, guardian, or other person.[3]

20.3 Appeals to the Michigan Court of Appeals

A brief discussion on filing an appeal with the Michigan Court of Appeals is contained in this section. For additional information or requirements, see MCR 7.200 *et seq*.[4]

Under MCR 3.993(A),[5] a party to a child protective proceeding aggrieved by a court order may appeal as of right any of the following orders:

(1) a dispositional order that places a child under the court's supervision or removes the child from the home;

> **Note:** The trial court's order removing a child from the respondent-mother's custody is appealable by right where the DHHS retained supervision over a child, but the child was physically residing in the respondent-mother's home at the time the trial court entered the supplemental dispositional order removing the child from the extended home visit. *In re EP*, 234 Mich App 582, 590-591 (1999), overruled on other grounds by *In re Trejo Minors*, 462 Mich 341, 353 n 10 (2000).

(2) an order terminating parental rights;[6]

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[3] A respondent whose parental rights have been terminated also has the right to appeal the court's decision to the Court of Appeals. MCR 3.977(J)(1)(a); MCR 3.993(A)(2). See Section 20.3 for information on appealing to the Court of Appeals.

[4] "Except as modified by [MCR 3.993], chapter 7 of the Michigan Court Rules governs appeals from the family division of the circuit court." MCR 3.993(C)(1).

[5] See also MCL 600.308 and MCL 600.309, which also lists orders and judgments that are appealable as a matter of right.

[6] The Court of Appeals Clerk must give priority to appeals of orders terminating parental rights when scheduling them for submission to the courts. See Administrative Order No. 1981-6.

(3) an order the law requires be appealed to the Court of Appeals; and

(4) a final order.

"MCR 3.993(A)(1) requires the order appealed to be an order of disposition." *In re McCarrick/LaMoreaux*, 307 Mich App 436, 461 (2014). Thus, "a respondent parent may appeal [as of right] (1) an order of disposition that places a minor under the supervision of the court, or (2) an order of disposition that removes the minor from the home." *Id*. Accordingly, the court's order removing the children from the respondent-mother's home was not appealable by right where the order was entered following the preliminary hearing and was not a dispositional order. *Id*. at 461-462.

"All orders not listed in [MCR 3.993(A)] are appealable to the Court of Appeals by leave." MCR 3.993(B).

Filing an appeal does not stay enforcement of a court order, "unless the court to which the appeal is taken specifically orders the suspension." MCL 600.1041. See also MCR 7.209(A)(1).

A party who wishes to attack the court's exercise of jurisdiction must do so on direct appeal following the court's disposition, or during a rehearing or review hearing; a party may not collaterally attack the court's exercise of jurisdiction. *In re Hatcher*, 443 Mich 426, 438-444 (1993). "'If termination occurs at the initial disposition as a result of a request for termination contained in the original, or amended, petition for jurisdiction, then an attack on the adjudication is direct and not collateral, as long as the appeal is from an initial order of disposition containing both a finding that an adjudication was held and a finding that the children came within the jurisdiction of the court.'" *In re Wangler*, 305 Mich App 438, 445-446 (2014), rev'd on other grounds 498 Mich 911 (2015), quoting *In re SLH*, 277 Mich App 662, 668 (2008). ~~In *Wangler*, the respondent-mother's appeal challenging the court's exercise of jurisdiction was an impermissible collateral attack where the trial court's order "formally exercis[ing] its jurisdiction over the minor children [pursuant to a mediation agreement[7]] and [entry of a dispositional order] plac[ing] the minor children under the supervision of [the DHS] . . . constituted an order that was appealable [to the Court of Appeals] as of~~

[7] ~~"During [a court-ordered child protective] mediation, the [DHS and the respondent-mother] negotiated an agreement that was signed by all participants, including [the] respondent[-mother]. . . . The agreement [] state[d] that [the] respondent[-mother] admits [to] several paragraphs of the [child protective] petition[, but] . . . [the] respondent[-mother's] plea of admission and the court's exercise of jurisdiction would 'be held in abeyance,' while [the] respondent[-mother] participated in services. Accordingly, the agreement authorized dispositional proceedings to begin before formal adjudication. . . . As the case progressed, it became clear that [the] respondent[-mother] was not making significant progress, and eventually, the trial court accepted [the] respondent[-mother's] plea of admission and took formal jurisdiction over the minor children following a dispositional review hearing[.]" *In re Wangler*, 305 Mich App at 446-447.~~

~~right under MCR 3.993(A)(1)."[8] *Id.* at 447. Accordingly, the respondent-mother "was required to raise her jurisdictional challenges in an appeal of [that] order[, but] [] [the] respondent instead waited until after the filing of a supplemental petition seeking termination, a termination hearing, and an order terminating her parental rights before challenging the trial court's exercise of jurisdiction[.]" *Id.*~~

A. Jurisdiction

The Court of Appeals has jurisdiction over an aggrieved party's appeal of right against a final judgment or order entered under the Juvenile Code. See MCR 3.993; MCR 7.203(A)(2).

The Court of Appeals may also grant leave to appeal. MCR 3.993(B); MCR 7.203(B).

B. Appeal of Right

Generally, an aggrieved party must file an appeal of right with the Court of Appeals within 21 days[9] after entry of a judgment or order. MCR 7.204(A)(1)(a)-(b).

If an aggrieved party is appealing a parental termination order, the appeal of right must be filed within 14 days[10] after entry of the termination order. MCR 7.204(A)(1)(c).

If an aggrieved party is appealing an order denying a new trial, rehearing, reconsideration, or other postjudgment relief from a parental termination order, the aggrieved party must file the appeal of right within 14 days[11] after entry of the order denying the request, "if the motion was filed within the initial 14-day appeal period or within further time the trial court may have allowed during that period[.]" MCR 7.204(A)(1)(c).

When an aggrieved party is entitled to court-appointed appellate counsel, and he or she requests the appointment within 14 days after entry of a final judgment or order, the 14-day period for taking an appeal or for filing a postjudgment motion starts after entry of an order appointing or denying to appoint counsel.[12] MCR 7.204(A)(1).

~~[8] MCR 3.991(A)(1) provides that "an order of disposition placing a minor under the supervision of the court or removing the minor from the home" is an order "appealable to the Court of Appeals by right[.]"~~

[9] Or another time provided by law. MCR 7.204(A)(1)(d).

[10] Or another time provided by law. MCR 7.204(A)(1)(d).

[11] Or another time provided by law. MCR 7.204(A)(1)(d).

To appeal, an aggrieved party must satisfy the requirements of MCR 7.204(B)-(F). If the appealed case involves custody of a minor child, it must be indicated as such in capital letters in the claim of appeal. MCR 7.204(D)(3).

C. Appeal by Leave

Appeal by leave is available to a party who wishes to appeal a judgment or order that is not considered a final judgment, or to a party whose time for filing an appeal of right has expired (also known as a late appeal). MCR 3.993(B); MCR 7.203(B)(1); MCR 7.203(B)(5).

> **Note:** MCR 7.205(G)(1) describes a late appeal as an appeal of right that was not timely filed, an appeal of right that was dismissed for lack of jurisdiction, or an application for leave that was not timely filed.

A respondent-parent must file an application for leave to appeal a parental termination order within 63 days after entry of the termination order or the order denying rehearing or reconsideration.[13] MCR 3.993(C)(2); MCR 7.205(G)(6).

Generally, leave to appeal may not be granted if the application for leave to appeal is filed more than 6 months after entry of the judgment or order. MCR 7.205(G)(3). However, that time period may be extended or reduced under certain circumstances. See MCL 600.1041 ("An application for a delayed appeal from an order of the family division of circuit court in a matter involving the disposition of a [child] shall be filed within 6 months after entry of the order."); MCR 3.993(C)(1) ("The time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 3.993(C)(2)."[14]); MCR 7.205(G)(5), which states:

> "Notwithstanding the 6-month limitation period otherwise provided in [MCR 7.205](G)(3), leave to appeal may be granted if a party's claim of appeal is dismissed for lack of jurisdiction within 21 days before

[12] Upon entry of an order terminating a respondent's parental rights, the court must advise the respondent-parent that "[i]f the respondent[-parent] is financially unable to provide an attorney to perfect an appeal, the court will appoint an attorney[.]" MCR 3.977(J)(1)(b). See Section 17.10 for additional information on a respondent's rights following termination.

[13] A respondent-parent has an appeal of right with respect to an order terminating parental rights. MCR 3.993(A)(2). See Section 20.3(B) for information on appeal of right procedures. MCR 3.993(C)(2) and MCR 7.205(G)(6) only apply when the respondent-parent is filing a late appeal.

[14] MCR 3.993(C)(2) states that the Court of Appeals may not accept an application for leave to appeal from a respondent-parent appealing an order terminating parental rights if the appeal is not filed within 63 days after entry of an order of judgment on the merits or within 63 days after entry of an order denying rehearing or reconsideration.

> the expiration of the 6-month limitation period, or at any time after the 6-month limitation period has expired, and the party files a late application for leave to appeal from the same lower court judgment or order within 21 days of the dismissal of the claim of appeal or within 21 days of denial of a timely filed motion for reconsideration. A party filing a late application in reliance on this provision must note the dismissal of the prior claim of appeal in the statement of facts explaining the delay."

When filing an application for leave to appeal, an aggrieved party must satisfy the requirements of MCR 7.205(B) (manner of filing). If the appeal is a late appeal, the aggrieved party must also satisfy MCR 7.205(G)(1) (file five copies of the statement of facts, explain the reason for delay, and serve one copy on all parties).

D. Court Determination

1. Decision on Application for Leave to Appeal

Oral argument is not heard on an application for leave to appeal. MCR 7.205(E)(1). Rather, the application is decided solely on the documentation filed, and, in an administrative tribunal or agency appeal, the certified record. *Id.*

On an application for leave to appeal, the Court of Appeals may do any of the following:

> (1) Grant the application.
>
> (2) Deny the application.
>
> (3) Enter a final decision.
>
> (4) Grant other relief.
>
> (5) Request additional information from the record.
>
> (6) Require a certified statement of proceedings and facts from the trial court or administrative tribunal or agency. MCR 7.205(E)(2).

If an application is granted, the application for leave to appeal proceeds as an appeal of right except that a party need not file a claim of appeal and some time limits run from the date the order granting leave is certified. See MCR 7.205(E)(3).

2. Standards of Review

a. Clear Legal Error Standard

- "[A] trial court's factual findings as well as its ultimate determination that a statutory ground for termination of parental rights has been proved by clear and convincing evidence" is reviewed for clear error. *In re Mason*, 486 Mich 142, 152 (2010), citing MCR 3.977(K) ("[t]he clearly erroneous standard shall be used in reviewing the court's findings on appeal from an order terminating parental rights.").

- A trial court's decision regarding a child's best interests is reviewed for clear error. *In re Trejo Minors*, 462 Mich at 356-357.

The clear legal error standard was defined in *In re Cornet*, 422 Mich 274, 278 (1985), quoting *Tuttle v Dep't of State Hwy*, 397 Mich 44, 46 (1976):

> "'[A]n appellate court will set aside the findings of fact of a trial court sitting without a jury when such findings are clearly erroneous. In construing comparable "clearly erroneous" language in Rule 52(a) of the Federal Rules of Civil Procedure, the United States Supreme Court has stated that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."'" See also *In re Mason*, 486 Mich at 152.

However, the Court of Appeals cannot substitute its judgment for that of the trial court. *In re Hall (Dylan)*, 483 Mich 1031 (2009) (Michigan Supreme Court reversed the Court of Appeals and reinstated the trial court's ruling where "[t]he Court of Appeals misapplied the clear error standard by substituting its judgment for that of the trial court . . . and rendered a decision that was contrary to the clear and convincing evidence supporting termination of the respondent-mother's parental rights . . . ."); *In re Krupa*, 490 Mich 1004, 1004 (2012) (Michigan Supreme Court reversed the Court of Appeals and remanded the case to the Court of Appeals to address the respondent's remaining issues where "[t]he Court of Appeals misapplied the clear error standard by engaging in

improper fact-finding and substituting its judgment for that of the trial court[,] . . . [and] [a]s a result, the Court of Appeals rendered a decision that was contrary to the clear and convincing evidence supporting the statutory grounds for termination under MCL 712A.19b(3)(g) and MCL 712A.19b(3)(j)[]"); *In re Engle*, 480 Mich 931 (2007) (Michigan Supreme Court reversed the Court of Appeals and reinstated the trial court's ruling where "[t]he Court of Appeals misapplied the clear error standard by substituting its judgment for that of the trial court. . . , failed to acknowledge that the applicable statutes and court rules do not require efforts for reunification or provision of services under the circumstances of this case. . . , and rendered a decision that was contrary to the clear and convincing evidence supporting the statutory grounds for termination and the best interests of the minor children . . . .").

b. Abuse of Discretion Standard

- A refusal to grant a request for rehearing is reviewed for an abuse of discretion. *In re Toler*, 193 Mich App 474, 478 (1992).

  "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269 (2003). See also *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006), which adopted the *Babcock* Court's articulation of the abuse of discretion standard as the default standard.[15] "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside this principled range of outcomes." *Babcock*, *supra* at 269.

c. De Novo

- Questions of law such as the interpretation and application of statutes and court rules, *In re Mason*, 486 Mich at 152, and constitutional challenges, *In re Rood*, 483 Mich 73, 91 (2009), are reviewed de novo.

[15] But see *Shulick v Richards*, 273 MIch App 320, 324 (2006), where the Michigan Court of Appeals construed the *Maldonado* holding to mean that "a default abuse of discretion standard of review is an assumed or assigned standard of review unless the law instructs otherwise." For example, cases involving MCL 722.28 (child custody under the Child Custody Act) require a different standard for abuse of discretion reviews under *Fletcher v Fletcher*, 447 Mich 871 (1994). *Shulick*, *supra* at 324.

- Claims of instructional error are reviewed de novo. *In re Vandalen*, 293 Mich App 120, 133 (2011).

  Where a claim of instructional error is made, reversal is not warranted if the error did not effect the outcome of the trial. *In re Vandalen*, 293 Mich App at 133. "'If, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury, no error requiring reversal occurs.'" *In re Vandalen*, *supra*, quoting *Lewis v LeGrow*, 258 Mich App 175, 211 (2003).

20.4 Appeals to the Michigan Supreme Court

A brief discussion on filing an appeal with the Michigan Supreme Court is contained in this section. For additional information or requirements, see MCR 7.300 *et seq*. With the exception of certain Judicial Tenure Commission orders, the Michigan Supreme Court retains discretion whether to grant leave to appeal.

A party may apply for leave to appeal to the Michigan Supreme Court while a case is pending review by the Court of Appeals or after a decision has been made by the Court of Appeals. MCR 7.303(B)(1). A party filing for leave to appeal to the Supreme Court must comply with the applicable procedural requirements in MCR 7.305(A), MCR 7.305(C), and MCR 7.305(D).

Unless the Court of Appeals remanded the case to the trial court for further proceedings, a party appealing a parental termination order must file an application for leave to appeal within 28 days "after the date of:[16]

> (a) the Court of Appeals order or opinion disposing of the appeal,
>
> (b) the Court of Appeals order denying a timely filed motion for reconsideration, or
>
> (c) the Court of Appeals order granting a motion to publish an opinion that was originally released as unpublished." MCR 7.305(C)(2).

If the Court of Appeals remanded the case to the trial court for further proceedings, a party appealing a parental termination order may file an application for leave to appeal within 28 days "after the date of:

[16] The Supreme Court Clerk must give priority to appeals of orders terminating parental rights when scheduling them for submission to the courts. See Administrative Order No. 1981-6.

> (a) the Court of Appeals order or opinion remanding the case,
>
> (b) the Court of Appeals order denying a timely filed motion for reconsideration of a decision remanding the case, or
>
> (c) the Court of Appeals order or opinion disposing of the case following the remand procedure, in which case an application may be made on all issues raised initially in the Court of Appeals, as well as those related to the remand proceedings." MCR 7.305(C)(5).

The Supreme Court will not accept late applications for child protective proceeding cases. See MCR 7.305(C)(4).

On receipt of an application for leave to appeal, the Supreme Court may:

(1) Grant the application.

(2) Deny the application.

(3) Enter a final decision.

(4) Direct argument on the application.

(5) Issue a peremptory order. MCR 7.305(H)(1).

If the Supreme Court *grants* a party's application for leave to appeal and the Court of Appeals *has not yet made a decision* on the case, the appeal is deemed pending in the Supreme Court only. MCR 7.305(H)(2). If the Court of Appeals *has made a decision* and leave to appeal is *granted* by the Supreme Court, the Supreme Court has jurisdiction of the case. MCR 7.305(H)(3).

If the Supreme Court *denies* a party's application *after* the Court of Appeals makes a decision, the Court of Appeals decision is the final adjudication and may be enforced MCR 7.305(H)(3).

Chapter 21: Family Division Records

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In this chapter. . .

This chapter discusses the recordkeeping requirements for the Family Division in child protective proceedings. Specifically, this chapter discusses the court's recordkeeping obligations, confidentiality of and access to records, and retention and destruction of records and files.[1] For information concerning records used in suspected abuse or neglect investigations, see Chapter 2.

[1] The destruction of records and files does not "negate, rescind, or set aside an adjudication." MCR 3.925(E)(1).

21.1 Family Division Records and Recordkeeping Obligations

A. Records and Register of Actions

The clerk of the court[2] is required to maintain records, indexes, a register of action, and a case file for each case as set out in MCR 8.119.

"'Records' are as defined in MCR 1.109 and include pleadings, motions, authorized petitions, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, registers of action, and court orders."[3] MCR 3.903(A)(25).

A *file* is "a repository for collection of the pleadings and other documents and materials related to a case." MCR 3.903(A)(8).

MCR 1.109(A) defines *court records* as:

> "(1) Court records are defined by MCR 8.119 and [MCR 1.109(A)]. Court records are recorded information of any kind that has been created by the court or fled with the court in accordance with Michigan Court Rules. Court records may be created using any means and may be maintained in any medium authorized by these court rules provided those records comply with other provisions of law and these court rules.
>
> (a) Court records include, but are not limited to:
>
> (*i*) documents, attachments to documents, discovery materials, and other materials filed with the clerk of the court,
>
> (*ii*) documents, recordings, data, and other recorded information created or handled by the court, including all data produced in conjunction with the use of any system for the purpose of transmitting, accessing, reproducing, or maintaining court records.
>
> (b) For purposes of this subrule:

[2] The county clerk is the clerk of the court for the circuit court, including the Family Division. MCL 600.1007.

[3] Records may be filed using facsimile communication equipment. MCR 2.406(B); MCR 3.929. "Filing of records by the use of facsimile communication equipment in juvenile proceedings is governed by MCR 2.406." MCR 3.929.

> (*i*) Documents include, but are not limited to, pleadings, orders, and judgments.
>
> (*ii*) Recordings refer to audio and video recordings (whether analog or digital), stenotapes, log notes, and other related records.
>
> (*iii*) Data refers to any information entered in the case management system that is not ordinarily reduced to a document, but that is still recorded information.
>
> (iv) Other recorded information includes, but is not limited to, notices bench warrants, arrest warrants, and other process issued by the court that do not have to be maintained on paper or digital image.
>
> (2) Discovery materials that are not filed with the clerk of the court are not court records. Exhibits that are maintained by the court reporter or other authorized staff pursuant to MCR 2.518 or MCR 3.930 during the pendency of a proceeding are not court records."

A *document* is "a record produced on paper or a digital image of a record originally produced on paper or originally created by an approved electronic means, the output of which is readable by sight and can be printed on paper." MCR 1.109(B).

A *register of actions* is "the permanent case history maintained in accord with the Michigan Supreme Court Case File Management Standards."[4] MCR 3.903(A)(26). The clerk of the court must permanently maintain a register of actions for each case, except for civil infraction cases. MCR 8.119(D)(1).

The Michigan Supreme Court Case File Management Standards and MCR 8.119(D)(1)(c) require a register of actions to contain specific information. MCR 8.119(D)(1)(c) provides:

> "Register of Actions. The clerk shall keep a case history of each case, known as a register of actions. The register of actions shall contain both pre- and post-judgment information. When a case is commenced, a register of actions form shall be created. The case identification

[4] The Michigan Supreme Court Case File Management Standards is available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_stds.pdf.

information in the alphabetical index[5] shall be entered on the register of actions. In addition, the following shall be noted chronologically on the register of actions as it pertains to the case:

(*i*) the offense (if one);

(*ii*) the judge assigned to the case;

(*iii*) the fees paid;

(*iv*) the date and title of each filed item;

(*v*) the date process was issued and returned, as well as the date of service;

(*vi*) the date of each event and type and result of action;

(*vii*) the date of scheduled trials, hearings, and all other appearances or reviews, including a notation indicating whether the proceedings were heard on the record and the name and certification number of the court reporter or recorder present;

(*viii*) the orders, judgments, and verdicts;

(*ix*) the judge at adjudication and disposition;

(*x*) the date of adjudication and disposition; and

(*xi*) the manner of adjudication and disposition.

Each notation shall be brief, but shall show the nature of each item filed, each order or judgment of the court, and the returns showing execution. Each notation shall be dated with not only the date of filing, but with the date of entry and shall indicate the person recording the action."

MCR 3.925(E) governs the retention and destruction of court case files and records in child protective proceedings and juvenile guardianship proceedings:[6]

- MCR 3.925(E)(1) provides that "[t]he court may destroy its case files and other court records only as prescribed

[5] MCR 8.119(D)(1)(b) requires the clerk of the court to "maintain a central alphabetical index or separate alphabetical indexes for particular types of cases or particular divisions of the court on which the date of filing, names of all parties, and the case number are recorded."

[6] For a detailed discussion of the retention and destruction of court case files and records in child protective proceedings and juvenile guardianship proceedings, see Section 21.5.

by [MCR 3.925] and the approved General Records Retention and Disposal Schedule #16 - Michigan Trial Courts. Destruction of a file does not negate, rescind, or set aside an adjudication."[7]

- MCR 3.925(E)(2) provides, in relevant part, that "[t]he register of actions and numerical and alphabetical indexes must be maintained permanently. In addition, the court must permanently maintain the order of adjudication, the order terminating parental rights, and the order terminating jurisdiction for each child protective case; . . . and the order appointing a guardian for each juvenile guardianship case."

B. County Clerk's Obligations

1. Custodial Function

"[T]he clerk has a constitutional obligation to have the care and custody of the circuit court's records and . . . the circuit court may not abrogate this authority." *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 158 (2003), citing *In the Matter of Head Notes to the Opinions of the Supreme Court*, 43 Mich 640, 643 (1880). In *Lapeer Co Clerk*, *supra* at 160, the Michigan Supreme Court further explained the clerk's custodial function:

> "The circuit court clerk's role of having the care and custody of the records must not be confused with *ownership* of the records. As custodian, the circuit court clerk takes care of the records for the circuit court, which owns the records. Nothing in the constitutional custodial function gives the circuit court clerk independent ownership authority over court records. Accordingly, the clerk must make those records available to their owner, the circuit court. The clerk is also obligated to make the records available to members of the public, when appropriate."

2. Ministerial Function

"The clerk's noncustodial ministerial duties are directed by the [Michigan Supreme] Court, as the determination of the precise noncustodial ministerial duties to be performed is a matter of court administration entrusted exclusively to the judiciary under

[7] General Records Retention and Disposal Schedule #16 - Michigan Trial Courts is available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_schd.pdf.

Const 1963, art 3, § 2, Const 1963, art 6, § 1, and Const 1963, art 6, § 5." *Lapeer Co Clerk*, 469 Mich at 170-171. "This authority includes the discretion to create duties, abolish duties, or divide duties between the clerk and other court personnel, as well as the right to dictate the scope and form of the performance of such noncustodial ministerial duties." *Lapeer Co Clerk*, *supra* at 164.

21.2 Recording Proceedings in the Family Division

"A record of all hearings must be made. All proceedings on the formal calendar[8] must be recorded by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108. A plea of admission or no contest, including any agreement with or objection to the plea, must be recorded." MCR 3.925(B).

If a record of a hearing is made by a recording device, transcription of the hearing is unnecessary unless there is a request by an interested party. MCL 712A.17a. Such a recording "shall be maintained as prescribed by rules of the supreme court." *Id*.[9]

21.3 Sealing Records

"Unless access to a case record or information contained in a record as defined in [MCR 8.119(D)][10] is restricted by statute, court rule, or an order entered pursuant to [MCR 8.119(I)], any person may inspect that record and may obtain copies as provided in [MCR 8.119(J)]."[11] MCR 8.119(H)(1). Note that "[a]ll court records not included in [MCR 8.119(D)], [MCR 8.119(E)], and [MCR 8.119(F)] are considered administrative and fiscal records or nonrecord materials and are not subject to public access under [MCR 8.119(H)]."[12] MCR 8.119(G).

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[8] MCR 3.903(A)(10) defines *formal calendar* as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

[9] See also MCL 600.1428(1), requiring the State Court Administrative Office (SCAO) to "establish and maintain records management policies and procedures for the courts, including a records retention and disposal schedule, in accordance with [S]upreme [C]ourt rules." For more information on SCAO records management policies, see http://courts.mi.gov/Administration/admin/op/Pages/Records-Management.aspx.

[10] See Section 2.1(A) for a discussion of MCR 8.119(D).

[11] "Except as otherwise provided in [MCR 8.119(F)], only case records as defined in [MCR 8.119(D)] are public records, subject to access in accordance with these rules." MCR 8.119(H). See MCR 8.119(H) for information on accessing public records, and MCR 8.119(J) for information on access and reproduction fees. Note that MCR 8.119(F) refers to court recordings, log notes, jury seating charts, and media, which "are court records and are subject to access in accordance with [MCR 8.119(H)(2)(b)]."

> **Note:** "Documents and other materials made confidential by court rule, statute, or order of the court pursuant to [MCR 8.119(I)] must be designated as confidential and maintained to allow only authorized access."[13] MCR 8.119(D).

Upon motion of a party, the court may seal court records, other than a court order or opinion, as provided in MCR 8.119(I). MCR 8.119(I)(1) provides that, "[e]xcept as otherwise provided by statute or court rule, a court may not enter an order that seals court records, in whole or in part, in any action or proceeding, unless:

> (a) a party has filed a written motion that identifies the specific interest to be protected,
>
> (b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and
>
> (c) there is no less restrictive means to adequately and effectively protect the specific interest asserted."

MCR 8.119(I)(2) provides that, "[i]n determining whether good cause has been shown, the court must consider[:]

> (a) the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence, and
>
> (b) the interest of the public."

Additionally, "[t]he court must provide any interested person the opportunity to be heard concerning the sealing of the records." MCR 8.119(I)(3).

MCR 8.119(I)(6) provides that "[a]ny person may file a motion to set aside an order that disposes of a motion to seal the record, or an objection to entry of a proposed order." If the motion is denied, "the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action." *Id.*[14]

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[12] "[Administrative and fiscal records or nonrecord materials not subject to public access under MCR 8.119(H)] are defined in the approved records retention and disposal schedule for trial courts." MCR 8.199(G). See Section 21.5 for additional information on the records retention and disposal schedule.

[13] "In the event of transfer or appeal of a case, every rule, statute, or order of the court pursuant to [MCR 8.119(I)] that makes a document or other materials in that case confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed." MCR 8.119(D).

[14] MCR 8.116(D)(2) similarly allows "[a]ny person" to "file a motion to set aside an order that limits access to a court proceeding . . . or an objection to entry of such an order[,]" and to file an application for leave to appeal in the same manner as a party if the court denies the motion or objection.

21.4 Access to Family Division Records and Confidential Files

A. Access to Court Records

MCL 712A.28(2) provides, in part:

> "Beginning June 1, 1988, the [Family Division] shall maintain records of all cases brought before it . . . . Except as otherwise provided in [MCL 712A.28(2)], records of a case brought before the [Family Division] shall be open to the general public."[15]

Similarly, MCR 3.925(D)(1) provides that "[r]ecords[16] of the juvenile cases, other than confidential files, must be open to the general public."

> Records created before June 1, 1988, are open only by court order to persons with a legitimate interest, "except that diversion records shall be open only as provided in the juvenile diversion act[, MCL 722.821 *et seq*]." MCL 712A.28(1).

"Requests for access to public court records[17] shall be granted in accordance with MCR 8.119(H)." MCR 1.109(E). Under MCR 8.119(H)(1), access to case records are open to the public, unless made confidential by statute, court rule, or court order.[18] Note that "[e]xcept as otherwise provided in [MCR 8.119(F)[19]], only case records as defined in [MCR 8.119(D)] are public records, subject to access with [MCR 8.119(H)]."[20] MCR 8.119(H).

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[15] For discussion of exceptions to the general rule that records are open to the general public, see Section 21.3 (discussing access to records of proceedings that are closed under MCL 712A.17).

[16] "'Records' are as defined in MCR 1.109 and include pleadings, motions, authorized petitions, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, registers of action, and court orders." MCR 3.903(A)(25).

[17] See Section 21.1(A) for the definition of *court records*.

[18] See Section 21.3 for additional information on sealing records, and Section 21.4(B) for information on confidential files.

[19] MCR 8.119(F) refers to court recordings, log notes, jury seating charts, and media, which "are court records and are subject to access in accordance with [MCR 8.119(H)(2)(b)]."

[20] See Section 21.1(A) for a discussion of MCR 8.119(D). See also MCR 8.119(H) for additional information on accessing public records.

B. Confidential Files

1. Definition of "Confidential Files"

MCR 3.903(A)(3) defines *confidential files* in relevant part as:

> "(a) that part of a file made confidential by statute or court rule, including, but not limited to,
>
> * * *
>
> (*iii*) the testimony taken during a closed proceeding pursuant to MCR 3.925(A)(2) and MCL 712A.17(7);[21]
>
> (*iv*) the dispositional reports pursuant to . . . MCR 3.973(E)(4);[22]
>
> * * *
>
> (b) the contents of a social file maintained by the court, including materials such as
>
> (*i*) youth and family record sheet;
>
> (*ii*) social study;
>
> (*iii*) reports (such as dispositional, investigative, laboratory, medical, observation, psychological, psychiatric, progress, treatment, school, and police reports);
>
> (*iv*) Department of [Health and] Human Services records;
>
> (*v*) correspondence;
>
> (*vi*) victim statements;
>
> (*vii*) information regarding the identity or location of a foster parent, preadoptive parent, relative caregiver, or juvenile guardian."

[21] See Section 9.5 for a detailed discussion of closing child protective proceedings to the public.

[22] See Section 13.4 for additional information on MCR 3.973(E).

2. Access to Confidential Files

Confidential files are accessible only by persons found by the court to have a legitimate interest.[23] MCR 3.925(D)(2). To determine whether a person has a legitimate interest, the court must consider:

- the nature of the proceedings;
- the welfare and safety of the public;
- the interests of the child; and
- any restriction imposed by state or federal law. MCR 3.925(D)(2).

Types of records subject to restrictions under state and federal law include:

- educational records and communications, 20 USC 1232g(b)(1); MCL 600.2165;
- records of recipients of mental health services, MCL 330.1748;
- records of patients participating in substance abuse programs, 42 USC 290dd-2; and
- prescription records, MCL 333.17752.[24]

3. Disclosure Under the Freedom of Information Act (FOIA)

"The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body[]" under the FOIA and is therefore not subject to its disclosure requirements. MCL 15.232(d)(*v*). Accordingly, court records and confidential files are not subject to requests under the FOIA.

4. Immunity for Persons or Agencies Furnishing Information to the Court

MCR 3.924 provides:

[23] "'Persons having a legitimate interest' includes a member of a local foster care review board[.]" MCL 712A.28(4)(b).

[24] For additional information on state and federal restrictions, see Section 2.4.

> "Persons or agencies providing testimony, reports, or other information at the request of the court, including otherwise confidential information, records, or reports that are relevant and material to the proceedings following authorization of a petition, are immune from any subsequent legal action with respect to furnishing the information to the court."[25]

C. Access to Closed Protective Proceedings

MCL 712A.17 permits a court to close proceedings to the general public during the testimony of a child witness or a victim to protect the welfare of either individual. MCL 712A.17(7); MCR 3.925(A)(2).[26]

D. Access to Records and Reports under the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA)

The Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA)[27] provide each party in a foster care placement or a proceeding involving the termination of parental rights with "the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based."[28] 25 USC 1912(c); MCL 712B.11.

21.5 Retention and Destruction of Family Division Records and Files

A. Records Retention and Disposal Schedule #16

"For purposes of retention, the records of the trial courts include: (1) administrative and fiscal records, (2) case records, (3) and nonrecord material.[29] The records of the trial courts shall be retained in the

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[25] See Section 2.7 for a discussion of civil and criminal immunity with respect to reporting suspected child abuse or neglect.

[26] See Section 9.5 for a detailed discussion of closing child protective proceedings to the public.

[27] See Chapter 19 for a detailed discussion of the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA).

[28] See the ICWA form, *Request to Produce and Examine*, at http://narf.org/icwa/forms/8.pdf.

[29] MCR 8.119(D)-(G) address these various types of records. MCR 8.119(G) provides that "[a]ll court records not included in [MCR 8.119(D)-(F)] are considered administrative and fiscal records or nonrecord materials and are not subject to public access under [MCR 8.119](H). These records are defined in the approved records retention and disposal schedule for trial courts." See Section 21.1(A) for additional discussion of records.

medium prescribed by MCR 1.109." MCR 8.119(K). MCR 1.109(A)(1) provides that "[c]ourt records may be created using any means and may be maintained in any medium authorized by these court rules provided those records comply with other provisions of law and these court rules."[30]

"Michigan law (MCL 399.5 and [MCL] 750.491) requires that all public records be listed on an approved Retention and Disposal Schedule that identifies the minimum amount of time that records must be kept to satisfy administrative, legal, fiscal, and historical needs." General Records Retention and Disposal Schedule #16 - Michigan Trial Courts, p ii (2006).[31] Accordingly, trial courts are required to comply with General Records Retention and Disposal Schedule #16 - Michigan Trial Courts ("Schedule #16"), which "lists the records that are created and maintained by Michigan trial courts, for what period they are to be retained, and when those records can be disposed of." General Records Retention and Disposal Schedule #16 - Michigan Trial Courts, *supra* at p ii. Schedule #16 "**must be used in conjunction with the Michigan Trial Court Case File Management Standards**."[32] *Id.* at p ii (emphasis in original).

> "Courts may destroy [public] records or transfer them to the Archives of Michigan for permanent preservation at the end of the assigned retention period.[33] Unless a statute or court rule prescribes otherwise, a court may retain records longer than the specified period of time. Any record not [listed in Schedule #16] or not having a statutory retention period may not be disposed of without first submitting a list or schedule required by MCL 399.5 or securing an amendment to this schedule." General Records Retention and Disposal Schedule #16 - Michigan Trial Courts, *supra* at p ii.

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[30] "Court records are defined by MCR 8.119 and [MCR 1.109(A)][, which MCR 1.109(A) defines] [c]ourt records [as] recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules." MCR 1.109(A)(1). "Court records include, but are not limited to: (i) documents, attachments, data, and other materials filed with the clerk of the court, (ii) documents, recordings, data, and other recorded information created or handled by the court, including all data produced in conjunction with the use of any system for the purpose of transmitting, accessing, reproducing, or maintaining court records." MCR 1.109(A)(1)(a). For additional information on court records, see Section 21.1(A).

[31] General Records Retention and Disposal Schedule #16 - Michigan Trial Courts is available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_schd.pdf.

[32] The Michigan Supreme Court Case File Management Standards may be accessed at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_stds.pdf.

[33] See Section 21.5(B) for discussion of destruction of child protective proceeding case files and juvenile guardianship case files. "Destruction of a file does not negate, rescind, or set aside an adjudication." MCR 3.925(E)(1).

MCR 3.925(E)(2) requires permanent retention of certain files and court records in child protective proceedings and juvenile guardianship proceedings:

> "The register of actions and numerical and alphabetical indexes must be maintained permanently. In addition, the court must permanently maintain the order of adjudication, the order terminating parental rights, and the order terminating jurisdiction for each child protective case; . . . and the order appointing a guardian for each juvenile guardianship case."

B. Destruction of Files and Records

MCR 8.119(K) requires that "[t]he records of a trial court may not be destroyed except upon order by the chief judge of that court." Additionally, "[b]efore destroying records subject to the order, the court shall first transfer to the Archives of Michigan any records specified as such by State Archives in the Michigan trial courts approved records retention and disposal schedule."[34] *Id.*

> **Note:** "An order of destruction shall comply with the retention periods established by the State Court Administrative Office and approved by the state court administrator, Attorney General, State Administrative Board, and Archives and Records Management Services of the Department of Management and Budget, in accordance with MCL 399.5."[35] MCR 8.119(K).

"The court may destroy its case files and other court records only as prescribed by [MCR 3.925] and the approved General Records Retention and Disposal Schedule #16 – Michigan Trial Courts.[36] Destruction of a file does not negate, rescind, or set aside an adjudication." MCR 3.925(E)(1).

1. Child Protective Case Files

In child protective case files and "[e]xcept as provided in [MCR 3.925(E)](2),[37] the court may destroy the legal records in the child protective proceeding case files pertaining to a child, 25 years after the jurisdiction over the child ends, except that where records on more than one child in a family are retained in the

[34] See the General Records Retention and Disposal Schedule #16 - Michigan Trial Courts, which is available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_schd.pdf.

[35] See Section 21.5(A) for discussion of records retention.

[36] See the General Records Retention and Disposal Schedule #16 - Michigan Trial Courts, which is available at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/cf_schd.pdf.

same file, destruction is not allowed until 25 years after jurisdiction over the last child ends. The social records in the child protective proceeding case files pertaining to a child may be destroyed three years after entry of the order terminating jurisdiction of that child or when the child become[s] 18 years of age, whichever is later. The social records are the confidential files defined in MCR 3.903(A)(3)."[38] MCR 3.925(E)(4).[39] Note, the General Records Retention and Disposal Schedule #16 - Michigan Trial Courts, *Child Protective Files - Petition Referred/Not Authorized*, Item 16.058A, p 13 (2006), specifically provides that the court may destroy referred and unauthorized petitions on a child's 18th birthday (or sooner for good cause).[40]

2. Juvenile Guardianship Case Files

"Except as provided in [MCR 3.925(E)(2)], the court may destroy the records in juvenile guardianship case files 25 years after the order appointing a juvenile guardian." MCR 3.925(E)(6).

For each juvenile guardianship case, the register of actions,[41] indexes, and orders appointing a juvenile guardian for each child must be kept as a permanent record of the court. MCR 3.925(E)(2).

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[37] MCR 3.925(E)(2) requires the permanent retention of the register of actions, indexes, orders of adjudication, orders terminating parental rights, and orders terminating jurisdiction for each child protective case. See also MCR 8.119(D)(1); General Records Retention and Disposal Schedule #16 - Michigan Trial Courts, *Judgments and Orders*, Item 16.042, p 10 (2006). See Section 21.1(A) for discussion of the register of actions.

[38] See Section 21.4(B) for discussion of confidential files.

[39] See also General Records Retention and Disposal Schedule #16 - Michigan Trial Courts, *Child Protective Files - Petition Authorized (Legal and Social Files*), Item 16.058B, p 14 (2006),which contains substantially similar language.

[40] See MCR 3.925(E)(1), which provides that "[t]he court may destroy its case files and other court records only as prescribed by [MCR 3.925] and the approved General Records Retention and Disposal Schedule #16 - Michigan Trial Courts."

[41] A *register of actions* is "the permanent case history maintained in accord with the Michigan Supreme Court Case File Management Standards." MCR 3.903(A)(26). The clerk of the court must permanently maintain a register of actions for each case, except for civil infraction cases. MCR 8.119(D)(1). See Section 21.1(A) for discussion of the contents of the register of actions.

Appendix A: Table Summarizing Michigan Statutes and Court Rules Related to Child Protective Proceedings

The following table provides general guidance in locating statutes and court rules governing various proceedings involving child protective proceedings. Other statutes and court rules may be incorporated by reference in these provisions. Court rules take precedence over statutes only in matters involving judicial rules of practice and procedure, not substantive law. See *McDougall v Schanz*, 461 Mich 15 (1999).

Type of Proceeding	Statutes and Court Rules
Reporting and Investigating of Suspected Child Abuse or Neglect	**Statutes:** —MCL 330.1748a (release of mental health records) —MCL 333.2640 (release of medical records) —MCL 333.16281 (release of medical records) —MCL 333.16648 (release of dental records) —MCL 333.18117 (release of counseling records) —MCL 333.18237 (release of psychological records) —MCL 600.2165 (release of school records) —MCL 722.621 *et seq*. (Child Protection Law) **Court Rule:** MCR 3.218(C)(2) (DHHS access to Friend of the Court records)
Child Protective Proceedings in Family Division	**Statutes:** —MCL 712A.1 *et seq*. (Juvenile Code) —MCL 722.1101 *et seq*. (Uniform Child-Custody Jurisdiction and Enforcement Act) **Court Rules:** —MCR 3.901–MCR 3.929 (general rules for child protective cases) —MCR 3.961–MCR 3.980 (rules for child protective cases) —MCR 3.991–MCR 3.993 (reviews, rehearings, and appeals)

Type of Proceeding	Statutes and Court Rules
Safe Delivery of Newborns	**Statute:** MCL 712.1 *et seq*. (Safe Delivery of Newborns Law)
Establishing Parentage	**Statutes:** —MCL 722.711 *et seq*. (Paternity Act) —MCL 722.1001 *et seq*. (Acknowledgment of Parentage Act)
Care and Custody of a Child Subject to Child Protective Proceedings	**Statutes:** —MCL 400.1 *et seq*. (Social Welfare Act) —MCL 400.201 *et seq*. (Michigan Children's Institute) —MCL 400.641 *et seq.* (Young Adult Voluntary Foster Care Act) —MCL 700.5201 *et seq*. (guardian appointments under Estates and Protected Individuals Code) —MCL 722.111 *et seq*. (Child Care Organizations) —MCL 722.124a(1) (authority to consent to medical treatment) —MCL 722.131 *et seq*. (Foster Care Review Boards) —MCL 722.951 *et seq*. (Foster Care and Adoption Services Act)

Appendix B: Table of Time and Notice Requirements in Child Protective Proceedings

The following table contains time and notice requirements only. For contents of notices, see the appropriate sections. For waiver of notice requirements, see Section 5.3. To compute time periods, see MCR 1.108. For court holidays, see MCR 8.110(D)(2).

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Reporting Suspected Child Abuse or Child Neglect	Oral report must be made immediately. Written report must be filed with the DHHS within 72 hours of the oral report.	MCL 722.623(1)(a). See Section 2.2(A).
Investigating Suspected Abuse, Neglect, or Exposure to or Contact with Methamphetamine Production	Report must be referred to the appropriate agency and/or an investigation must be commenced within 24 hours.	MCL 722.628(1); MCL 722.628(6); MCL 722.628(7). See Section 2.3.
Mandatory Petitions in Cases of Severe Physical Abuse, Sexual Abuse, or Exposure to or Contact with Methamphetamine Production	The DHHS must file petition within 24 hours after determining that child was severely physically injured, sexually abused, or allowed to be exposed to or have contact with methamphetamine production. The DHHS is not required to file a petition if it determines that the parent or legal guardian is not a suspected perpetrator of the abuse and all of the following: (1) the parent or legal guardian did not neglect or fail to protect the child; (2) the parent or legal guardian does not have a historical record that shows a documented pattern of neglect or failing to protect the child; and (3) the child is safe in the parent's or legal guardian's care.	MCL 722.637. See Section 7.3(A).

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Contrary to Child's Welfare Determination	**Title IV-E Requirement.** Court must make a contrary to the child's welfare determination in the first court ruling that sanctions (even temporarily) a child's removal from his or her home. *If the determination is not made in the first court ruling, the child is not eligible for Title IV-E foster care maintenance payments for the duration of that stay in foster care.*	42 USC 672(a); 45 CFR 1356.21(c); MCR 3.963(B)(1)(e). See Section 3.1(A).
Preliminary Inquiries	May be conducted at any time. There is no notice requirement.	MCR 3.962. See Section 7.6.
Preliminary Hearings/ Preadjudication Hearing on Petition for Out-of-Home Placement (child *not* under court jurisdiction and amended petition to remove child from home is filed, see MCR 3.974(B)(1))	Hearing must commence within 24 hours after child is taken into protective custody, excluding Sundays and holidays, unless adjourned for good cause shown, or child must be released.	MCR 3.965(A)(1). See Section 7.7.
	If a mandatory petition was filed alleging severe physical injury or sexual abuse, a hearing must be held within 24 hours of the filing, or on the next business day after the filing.	MCL 712A.13a(2); MCR 3.965(A)(2). See Section 7.7.
	Notice of hearing must be given to the parent in person, in writing, on the record, or by telephone as soon as the hearing is scheduled, if the child is placed outside the home.	MCR 3.920(D)(2)(b). See Section 5.2.
	Two-way interactive video technology may be used to conduct the hearing.	MCR 3.904(B)(2). See Administrative Order No. 2012-7.

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Removal Hearing for Indian Child	Following emergency removal, court must complete a removal hearing within 14 days of removal unless that parent or Indian custodian has requested an additional 20 days for the hearing or the court adjourns the hearing. Absent extraordinary circumstances, a temporary emergency custody must not exceed 45 days.	MCR 3.967(A). See Section 19.9(A).
	In other cases, a removal hearing must be conducted before removal.	MCR 3.967(B). See Section 19.9(A).
	A removal hearing may be combined with any other hearing.	MCR 3.967(E). See Section 19.9(A).
Identification of Appropriate Relative Placement	The supervising agency must identify, locate, notify, and consult with the child's relatives within 30 days of the child's removal to determine appropriate placement.	MCL 722.954a(2). See Section 8.2(A).
	Within 90 days of removal, the supervising agency must make and document in writing its placement decision and provide written notice of the decision and the reasons for the placement decision to the child's attorney, guardian, guardian ad litem, mother, father, the attorneys for the mother and father, each relative who expresses an interest in caring for the child, the child if he or she is old enough to be able to express an opinion regarding placement, and the prosecuting attorney.	MCL 722.954a(4). See Section 8.10.
Reasonable Efforts to Prevent Child's Removal Determination	**Title IV-E Requirement.** Court must determine whether reasonable efforts to prevent removal were made or that reasonable efforts are not required. A court must make determination at the earliest possible time, but no later than 60 days after the date of removal. Court must state factual basis for its determination.	45 CFR 1356.21(b); MCR 3.965(C)(4). See Section 8.4.

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Initial Service Plan, Criminal Record Check, Central Registry Clearance, and Home Study	The DHHS must complete an initial service plan within 30 days of placement.	MCL 712A.13a(10)(a); MCR 3.965(D)(1). See Section 8.7.
	If the child is placed in a relative's home, the DHHS must conduct a criminal record check and central registry clearance before or within seven days of placement, and must submit a home study to the court within 30 days of placement.	MCL 712A.13a(11). See Section 8.2(A).
	The court may order the DHHS to report the results of a criminal record check and central registry clearance to the court before or within seven days after placement.	MCR 3.965(C)(5)(a). See Section 8.2(A).
	The court must order the DHHS to perform a home study and submit a copy of it to the court within 30 days after placement.	MCR 3.965(C)(5)(b). See Section 8.2(A).

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Review of Placement Order and Initial Service Plan	Court must review placement order or initial service plan when a motion is made by a party.	MCL 712A.13a(14); MCR 3.966(A)(1). See Section 8.12.
	"If [a] child is removed from the home and disposition is not completed, the court shall conduct a dispositional hearing in accordance with MCR 3.973."	MCR 3.966(A)(2). See Section 8.12.
	Personal service of a written motion must be made at least seven days before hearing, and the response at least three days before hearing. If service is by mail, service must be made at least nine days before hearing, and the response at least five days before hearing. For good cause, court may set different periods for filing and serving motions.	MCR 2.119(C); MCR 3.922(C). See Section 9.4.
	Two-way interactive video technology may be used to conduct the hearing.	MCR 3.904(B)(2). See Administrative Order No. 2012-7.
	If a hearing is held, at least seven days' notice in writing or on record must be given to the respondent; respondent's attorney; child's lawyer-guardian ad litem; child's parents, guardian, or legal custodian, if any, other than respondent; the petitioner; a party's appointed guardian ad litem; the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Indian child's tribe (if unknown to the Secretary of the Interior); Indian child's parents or Indian custodian (if unknown to the Secretary of the Interior); and any other person the court may direct to be notified.	MCR 3.920(D)(1); MCR 3.921(B)(1). See Section 5.2.

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Review of Supervising Agency's Initial Placement Determination	Persons notified of the initial placement decision may request written documentation of the reasons for the decision within five days of the notice.	MCL 722.954a(6); MCR 3.966(B)(1)(d). See Section 8.12(A).
	A child's lawyer-guardian ad litem must petition the court for review within 14 days after the date of the written placement decision, and a review hearing on the record must commence within seven days after the petition is filed.	MCL 722.954a(6); MCR 3.966(B)(2); MCR 3.966(B)(3). See Section 8.12(A).
	Two-way interactive video technology may be used to conduct the hearing.	MCR 3.904(B)(2). See Administrative Order No. 2012-7.
	At least seven days' notice in writing or on record must be given to the respondent; respondent's attorney; child's lawyer-guardian ad litem; child's parents, guardian, or legal custodian, if any, other than respondent; the petitioner; a party's appointed guardian ad litem; the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Indian child's tribe (if unknown to the Secretary of the Interior); Indian child's parents or Indian custodian (if unknown to the Secretary of the Interior); and any other person the court may direct to be notified.	MCR 3.920(D)(1); MCR 3.921(B)(1). See Section 5.2.

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Review of Change of Child's Foster Care Placement	Unless the foster parent requests or agrees to the change in placement or the court orders the child returned home, removal must occur less than 30 days after the child's initial removal from home, or less than 90 days if the new placement is with a relative. Supervising agency must maintain placement for at least three days or until the FCRB makes its determination if foster parent appeals. Removal may occur at any time the supervising agency has reasonable cause to suspect sexual abuse, nonaccidental physical injury, or substantial risk of harm to the child's emotional well-being.	MCL 712A.13b(1)(b); MCL 712A.13b(2); MCL 712A.13b(7). See Section 8.10.
	Supervising agency must notify the SCAO, foster parents, court with jurisdiction over the child, and the child's lawyer guardian ad litem before removal. Notice may be given by ordinary mail or by electronic means subject to agreement of the DHHS and the SCAO. Supervising agency must only notify the SCAO of emergency removal. Notice must indicate the reason for the placement change, how many times the placement has been changed, whether a change in the child's school will be required, and whether the change will separate or reunite siblings or impact sibling visitation. Notice to the court may be given by ordinary mail or by electronic means subject to agreement of the DHHS and court with jurisdiction.	MCL 712A.13b(2); MCL 712A.13b(7). See Section 8.10.
	Foster parents may appeal to the FCRB within three days of notice of the intended move. Within seven days of receiving an appeal, the FCRB must investigate and, within three days after completing its investigation, report to the court or MCI superintendent, foster parents, parents, and supervising agency.	MCL 712A.13b(2)(b); MCL 712A.13b(3). See Section 8.11.

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Review of Change of Child's Foster Care Placement, continued	If necessary, the court must set a hearing no sooner than seven or later than 14 days after notice from the FCRB. Notice of hearing must be given to the foster parents, interested parties, and prosecuting attorney (if he or she has appeared).	MCL 712A.13b(5); MCR 3.966(C)(2)(a); MCR 3.966(C)(2)(b). See Section 8.11.
	MCI superintendent must make a decision regarding the child's placement and inform each interested party of the decision within 14 days after notice from the FCRB.	MCL 712A.13b(5). See Section 8.11.
	Two-way interactive video technology may be used to conduct the hearing.	MCR 3.904(B)(2). See Administrative Order No. 2012-7.
Demand for Jury Trial	Written demand for jury trial must be filed within 14 days after court gives notice of the right to jury trial or 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later, but no later than 21 days before trial. The court may excuse a late filing in the interest of justice.	MCR 3.911(B). See Section 9.6(B).
Demand for Trial by Judge (Rather Than Referee)	Written demand for trial by judge rather than referee must be filed within 14 days after court gives notice of the right to trial by judge or 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later, but no later than 21 days before trial. The court may excuse a late filing in the interest of justice.	MCR 3.912(B). See Section 9.6(C).

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Motions to Suppress Evidence	Personal service of motion must be made at least seven days before hearing, and the response at least three days before hearing. If service is by mail, service must be made at least nine days before hearing, and the response at least five days before hearing. For good cause, court may set different periods for filing and serving motions.	MCR 2.119(C); MCR 3.922(C). See Section 9.4.
	If a hearing is held, at least seven days' notice in writing or on record must be given to the respondent; respondent's attorney; child's lawyer-guardian ad litem; child's parents, guardian, or legal custodian, if any, other than respondent; the petitioner; a party's appointed guardian ad litem; the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Indian child's tribe (if unknown to the Secretary of the Interior); Indian child's parents or Indian custodian (if unknown to the Secretary of the Interior); and any other person the court may direct to be notified.	MCR 3.920(D)(1); MCR 3.921(B)(1). See Section 5.2
Notice of Intent to Use Alternative Procedures to Obtain Testimony or to Admit Hearsay Statements under MCR 3.972(C)(2)	Within 21 days after notice of trial date, but no later than seven days before trial, proponent must file with the court and serve all parties written notice of intent to use alternative procedures or admit hearsay statements.	MCR 3.922(E)(1). See Section 11.4.
	Within seven days after receipt of notice, but no later than two days before trial, nonproponent parties must provide written notice to court of intent to offer rebuttal testimony or evidence in opposition to the proponent's request and identify any witnesses to be called.	MCR 3.922(E)(2). See Section 11.4.
	The court may shorten these time periods for good cause shown.	MCR 3.922(E)(3). See Section 11.4.

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Trials	If the child is not in placement, trial must be held within six months after the filing of the petition unless adjourned for good cause. If the child is in placement, trial must commence as soon as possible but no later than 63 days after the child is removed from the home unless the trial is postponed on stipulation of the parties for good cause, because process cannot be completed, or because the court finds that the testimony of a witness presently unavailable is needed.	MCR 3.972(A). See Section 12.2.
	At least seven days' notice in writing or on record must be given to the respondent; respondent's attorney; child's lawyer-guardian ad litem; child's parents, guardian, or legal custodian, if any, other than respondent; the petitioner; a party's appointed guardian ad litem; the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Indian child's tribe (if unknown to the Secretary of the Interior); Indian child's parents or Indian custodian (if unknown to the Secretary of the Interior); and any other person the court may direct to be notified.	MCR 3.920(D)(1); MCR 3.921(B)(1). See Section 5.2.
	A summons must be served on any respondent and any nonrespondent parent. A summons may be served on a person with physical custody of the child directing such person to appear with the child. A guardian or legal custodian who is not a respondent must be served with notice of hearing as provided in the paragraph above.	MCR 3.920(B)(2)(b). See Section 5.1.
	Personal service is required at least seven days before trial. If personal service is impracticable or cannot be achieved, the court may direct service in any manner reasonably calculated to give notice and an opportunity to be heard, including publication. If summons is served by registered mail, it must be sent at least 14 days before trial, or 21 days if the person is not a Michigan resident.	MCR 3.920(B)(4); MCR 3.920(B)(5)(a); MCR 3.920(B)(5)(b). See Section 5.1.

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Trials, continued	If service is by publication, notice must appear in a newspaper in the county where the party resides, if known, or in the county where the action is pending, at least once 14 days before trial. If the child has been removed from the home, a review hearing must be held within 182 days of the date of removal, even if the trial has not been completed before the expiration of that 182-day period.	MCR 3.920(B)(4)(b); MCR 3.920(B)(5)(c). See Section 5.1. MCR 3.972(A)(3). See Section 12.2.
Rehearings or Motions for New Trial	If case does not involve termination of parental rights, written motion must be filed within 21 days after the date of the order resulting from the hearing or trial. If case involves "termination of parental rights, a motion for new trial, rehearing, reconsideration, or other postjudgment relief [must] be filed within 14 days after the date of the order terminating parental rights." Court may entertain untimely motion for good cause shown. Written response must be filed with the court and served on opposing parties within seven days of motion. At least seven days' notice of the motion or hearing, if held, in writing or on record must be given to the respondent; respondent's attorney; child's lawyer-guardian ad litem; child's parents, guardian, or legal custodian, if any, other than respondent; the petitioner; a party's appointed guardian ad litem; the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Indian child's tribe (if unknown to the Secretary of the Interior); Indian child's parents or Indian custodian (if unknown to the Secretary of the Interior); and any other person the court may direct to be notified.	MCR 3.992(A); MCR 3.992(C). See Section 12.11. MCR 3.920(D)(1); MCR 3.921(B)(1). See Section 5.2.

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Case Service Plans	The DHHS must prepare a Case Service Plan before the court enters an order of disposition. The plan must be made available to the parties and court.	MCL 712A.18f(2). See Section 13.6.
	Foster parent must be given copies of all Initial Service Plans, updated service plans, revised service plans, court orders, and medical, mental health, and education reports, including reports made before child's placement, within 10 days of a written request from the provider.	MCL 712A.13a(15). See Section 8.5; Section 13.10.
	The Case Service Plan must be updated every 90 days as long as the child remains in placement.	MCL 712A.18f(5). See Section 13.6(C).
Initial Dispositional Hearings*	The interval between trial and disposition is discretionary with the court, but if the child is in placement, the interval may not be more than 28 days, except for good cause.	MCR 3.973(C). See Section 13.2.
***If termination is requested at the initial dispositional hearing, see notice requirements in "Hearings to Terminate Parental Rights," below.**	Unless the dispositional hearing is held immediately after trial, notice of hearing may be given by scheduling it on the record in the presence of the parties or in accordance with MCR 3.920.	MCR 3.973(B). See Section 13.2.
	If the child was diagnosed with failure to thrive, Munchausen syndrome by proxy, Shaken baby syndrome, a bone fracture diagnosed as the result of abuse or neglect, or drug exposure, each of the child's physicians must be notified of the time and place of the hearing.	MCL 712A.18f(7). See Section 5.2(B).
Review of Referee's Recommended Findings and Conclusions	Request for review must be filed within seven days after the inquiry or hearing or seven days after issuance of referees' recommendations, whichever is later, and served on interested parties, and a response may be filed within seven days at the time of filing the request for review.	MCR 3.991(B)(3); MCR 3.991(B)(4); MCR 3.991(C). See Section (B).
	Absent good cause for delay, the judge must consider the request within 21 days after it is filed if child is in placement.	MCR 3.991(D). See Section (D).

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Dispositional Review Hearings* ***See also provisions for reviews of children in permanent foster family or relative placements, below.**	The court must conduct review hearings no later than 182 days after the child's removal from the home and no later than every 91 days after that for the first year the child is subject to the court's jurisdiction. After the first year the child has been removed from the home and is subject to the court's jurisdiction, the court must conduct review hearings no later than 182 days from the immediately preceding review hearing conducted during that first year and every 182 days thereafter until the case is dismissed. A review hearing must not be canceled or delayed beyond the number of days set out above, regardless of whether a petition to terminate parental rights or another matter is pending.	MCL 712A.19(3); MCR 3.975(C). See Section 15.3(A).
	Two-way interactive video technology may be used to conduct the hearing.	MCR 3.904(B)(2). See Administrative Order No. 2012-7.
	Title IV-E Requirement. Reviews of child's status must occur at least every six months.	45 CFR 1355.34(c)(2)(*ii*). See Section 15.3(A).
	At the initial disposition hearing and every review hearing, the court must decide whether it will accelerate the date for the next scheduled review hearing.	MCL 712A.19(3); MCR 3.975(D). See Section 15.3(C).

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Dispositional Review Hearings, continued	Seven days' written notice to the agency responsible for child's care and supervision; person or institution having court-ordered custody of child; parents and attorney for respondent-parent (if parental rights have not been terminated); child's guardian or legal custodian; child's guardian ad litem; child's lawyer-guardian ad litem; a nonparent adult (if ordered to comply with Case Service Plan); elected leader of the Indian tribe (if tribal affiliation has been determined); attorneys for each party; prosecuting attorney (if he or she has appeared); the child (if 11 years of age or older); Indian child's tribe (if the court knows or has reason to know the child is an Indian child); the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Secretary of the Interior (if the Indian child's parents, guardian, legal custodian, or tribe are unknown); and any other person the court may direct to be notified.	MCL 712A.19(5); MCR 3.921(B)(2); MCR 3.975(B). See Section 5.2(A).
	If the child was diagnosed with failure to thrive, Munchausen syndrome by proxy, Shaken baby syndrome, a bone fracture diagnosed as the result of abuse or neglect, or drug exposure, each of the child's physicians must be notified of the time and place of the hearing.	MCL 712A.18f(7). See Section 5.2(B) .
	If at least seven days' written notice is given to all parties (unless waived), and if no party requests a hearing within the seven days, the child may be returned home without a hearing.	MCL 712A.19(10); MCR 3.975(H). See Section 15.3(D).

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Review Hearings for Children Remaining in Home	The court must conduct a review hearing no later than 182 days from the date a petition is filed to give the court jurisdiction and no later than every 91 days thereafter for the first year the child is subject to the court's jurisdiction. After the first year the child is subject to the court's jurisdiction, the court must conduct a review hearing no later than 182 days from the immediately preceding review hearing conducted during that first year and every 182 days thereafter until the case is dismissed. A review hearing must not be canceled or delayed beyond the number of days set out above, regardless of whether a petition to terminate parental rights or another matter is pending.	MCL 712A.19(2). See Section 15.3(B).
	Two-way interactive video technology may be used to conduct the hearing.	MCR 3.904(B)(2). See Administrative Order No. 2012-7.
Postadjudication Hearing on Petition for Out-of-Home Placement (child under court jurisdiction and supplemental petition to remove child from home is filed)	Court must ensure proper notice has been provided.	MCR 3.920; MCR 3.921; MCR 3.974(B)(2). See Section 5.2.
	"If the court has not held a dispositional hearing under MCR 3.973, the court shall conduct the dispositional hearing within 28 days after the child is placed by the court, except for good cause shown."	MCR 3.974(D)(1). See Section 15.7(B).
	"If the court has already held a dispositional hearing under MCR 3.973, a dispositional review hearing must commence no later than 14 days after the child is placed by the court, except for good cause shown. The dispositional review hearing may be combined with the removal hearing for an Indian child prescribed by MCR 3.967. . . ."	MCR 3.974(D)(2). See Section 15.7(B).

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Emergency Removal Hearings	Court must conduct hearing no later than 24 hours after child is taken into custody, excluding Sundays and holidays. If the child is an Indian child, the court must also conduct removal hearing under MCR 3.967 for the child to remain removed.	MCR 3.974(C)(3). See Section 15.8.
	Notice of the emergency removal hearing must be given to the parent in person, in writing, on the record, or by telephone as soon as the hearing is scheduled.	MCR 3.920(D)(2)(b); MCR 3.974(C)(2). See Section 5.2.
	"If the court has not held a dispositional hearing under MCR 3.973, the court shall conduct the dispositional hearing within 28 days after the child is placed by the court, except for good cause shown."	MCR 3.974(D)(1). See Section 15.8(B).
	"If the court has already held a dispositional hearing under MCR 3.973, a dispositional review hearing must commence no later than 14 days after the child is placed by the court, except for good cause shown. The dispositional review hearing may be combined with the removal hearing for an Indian child prescribed by MCR 3.967."	MCR 3.974(D)(2). See Section 15.8(B).
	Seven days' written notice to the agency responsible for child's care and supervision; person or institution having court-ordered custody of child; parents and attorney for respondent-parent (if parental rights have not been terminated); child's guardian or legal custodian; child's guardian ad litem; child's lawyer-guardian ad litem; a nonparent adult (if ordered to comply with Case Service Plan); elected leader of the Indian tribe (if tribal affiliation has been determined); attorneys for each party; prosecuting attorney (if he or she has appeared); the child (if 11 years of age or older); Indian child's tribe (if the court knows or has reason to know the child is an Indian child); the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Secretary of the Interior (if the Indian child's parents, guardian, legal custodian, or tribe are unknown); and any other person the court may direct to be notified.	MCL 712A.19(5); MCR 3.921(B)(2). See Section 5.2; Section 15.2.

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Permanency Planning Hearings	If a court determines that reasonable efforts to reunify the family are not required, the court must conduct a permanency planning hearing within 30 days after that determination. **Note:** MCR 3.976(B)(1) requires that this hearing be held within 28 days after a determination that reasonable efforts to reunite the family or to prevent removal are not required.	MCL 712A.19a(2); MCR 3.976(B)(1). See Section 16.3(A).
	In other cases, court must conduct permanency planning hearings within 12 months after the child was removed from home and every 12 months thereafter during the continuation of foster care.	MCL 712A.19a(1); MCL 712A.19c(1); MCR 3.976(B)(3). See Section 16.3.
	A permanency planning hearing must not be canceled or delayed beyond the time limits set out above, regardless of whether a petition for termination of parental rights or another matter is pending.	MCL 712A.19a(1); MCL 712A.19c(1). See Section 16.3.
	Title IV-E Requirement. A permanency hearing must be conducted within 12 months after the child enters foster care and every 12 months thereafter during the continuation of foster care. In cases involving "aggravated circumstances," a permanency hearing must be conducted within 30 days of a determination that reasonable efforts to reunify a family are not required. Agency must obtain a judicial determination that it has made reasonable efforts to finalize permanency plan within 12 months of a child's entry into foster care and every 12 months thereafter during the continuation of foster care.	MCR 3.976(A); 45 CFR 1355.34 (c)(2)(*iii*); 45 CFR 1356.21(b); 45 CFR 1356.21(h)(2). See Section 16.2; Section 16.3.

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Permanency Planning Hearings, continued	14 days' written notice to the agency responsible for child's care and supervision; person or institution having court-ordered custody of child; parents and attorney for respondent-parent (if parental rights have not been terminated); a guardian or legal custodian of child; guardian ad litem; child's lawyer-guardian ad litem; a "nonparent adult" (if ordered to comply with Case Service Plan); elected leader of the Indian tribe (if tribal affiliation has been determined); attorneys for each party; prosecuting attorney (if he or she has appeared); the child (if 11 years of age or older); Indian child's tribe (if the court knows or has reason to know the child is an Indian child); the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Secretary of the Interior (if the Indian child's parents, guardian, legal custodian, or tribe are unknown); and any other person the court may direct to be notified.	MCL 712A.19a(4); MCR 3.920(D)(3)(a); MCR 3.921(B)(2); MCR 3.976(C). See Section 5.2(A).
	If the child was diagnosed with failure to thrive, Munchausen syndrome by proxy, Shaken baby syndrome, a bone fracture diagnosed as the result of abuse or neglect, or drug exposure, each of the child's physicians must be notified of the time and place of the hearing.	MCL 712A.18f(7). See Section 5.2(B).
	If a child is not returned home following hearing, the agency must initiate termination proceedings if the child has been in foster care for 15 of the last 22 months. However, the agency does not have to initiate termination proceedings if relatives are taking care of the child, if there is a compelling reason that filing a petition is not in the child's best interests, or if reasonable efforts for reunification, when required, have not been made. "If the court does not require the agency to initiate proceedings to terminate parental rights under [MCR 3.976(E)(3)], the court shall state on the record the reason or reasons for its decision."	MCL 712A.19a(6); MCR 3.976(E)(3). See Section 16.7(B).

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Dispositional Review Hearings When Child Is in Permanent Foster Family Agreement or Placement With Relative Is Intended to Be Permanent	The court must hold review hearings not more than 182 days after the child is removed from home and every 182 days thereafter as long as the child is subject to the jurisdiction of the court, MCI, or other agency. A review hearing must not be canceled or delayed beyond the number of days set out above, regardless of whether a petition to terminate parental rights or another matter is pending.	MCL 712A.19(4); MCR 3.975(C)(2). See Section 15.3(A).
	Upon motion of a party or the court, the court may accelerate the date for the next scheduled review hearing.	MCL 712A.19(4); MCR 3.975(D). See Section 15.3(C).
	Two-way interactive video technology may be used to conduct the hearing.	MCR 3.904(B)(2). See Administrative Order No. 2012-7.

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Hearings to Terminate Parental Rights	Petition must be filed by the end of a child's fifteenth month in foster care if he or she has been in foster care 15 of the last 22 months, or within 60 days of a determination that a child is an abandoned infant or that reasonable efforts to reunify a child with a parent convicted of a specified felony are not required, unless the child is being cared for by a relative, a compelling reason exists that petitioning is not in the child's best interest, or the state has not provided the family services necessary for the child's safe return home.	MCL 712A.19a(6); MCR 3.976(E)(3); 42 USC 675(5)(E); 45 CFR 1356.21(i). See Section 16.7(B).
	Court must conduct termination hearing within 42 days of filing of supplemental petition, but court may extend time for 21 days for good cause shown.	MCR 3.977(F)(2); MCR 3.977(H)(1)(b). See Section 17.3; Section 17.4(A).
	14 days' written notice to the agency responsible for child's care and supervision; person or institution having court-ordered custody of child; parents and attorney for respondent-parent (if parental rights have not been terminated); child's guardian or legal custodian; child's guardian ad litem; child's lawyer-guardian ad litem; elected leader of the Indian tribe (if tribal affiliation has been determined); attorneys for each party; prosecuting attorney (if he or she has appeared); the child (if 11 years of age or older); Indian child's parent or Indian custodian and Indian child's tribe (these parties must also be given notice of their right of intervention); the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Secretary of the Interior (if the identity or location of an Indian child's parents, Indian custodian, or tribe are unknown); and any other person the court may direct to be notified.	MCL 712A.19b(2); MCR 3.920(C)(1); MCR 3.920(D)(3); MCR 3.921(B)(2); MCR 3.921(B)(3); MCR 3.977(C). See Section 5.2(A); Section 19.4.

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Hearings to Terminate Parental Rights (continued)	Any respondent and nonrespondent parent must be served with a summons. A summons may be served on a person with physical custody of the child directing such person to appear with the child. A guardian or legal custodian who is not a respondent must be served with notice of hearing as provided in the paragraph above.	MCL 712A.12; MCR 3.920(B)(2)(b). See Section 5.1.
	Personal service is required at least 14 days before hearing. If personal service is impracticable or cannot be achieved, the court may direct service in any manner reasonably calculated to give notice and an opportunity to be heard, including publication. If summons is served by registered mail, it must be sent at least 14 days before trial, or 21 days if the person is not a Michigan resident.	MCR 3.920(B)(4); MCR 3.920(B)(5). See Section 5.1.
	If service is by publication, notice must appear in a newspaper in the county where the party resides, if known, or in the county where the action is pending, at least once 14 days before trial.	MCR 3.920(B)(5)(c). See Section 5.1.
	If it does not issue a decision on the record, the court must issue opinion and order within 70 days of the commencement of the initial hearing on termination of parental rights petition. Failure to issue opinion within 70 days does not dismiss petition, however.	MCL 712A.19b(1); MCR 3.977(I)(1). See Section 17.9.

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Post-Termination of Parental Rights Review Hearing	Unless the child is placed in a permanent foster family or a placement with a relative intended to be permanent, the court must conduct review hearings at least every 91 days following termination of parental rights for the first year following termination of parental rights. If a child remains in placement for more than one year following termination of parental rights, the court must conduct a review hearing not later than 182 days from the immediately preceding review hearing during the first year and every 182 days thereafter until the case is dismissed. A review hearing must not be canceled or delayed, regardless of whether a petition to terminate parental rights or another matter is pending.	MCL 712A.19c(1). See Section 18.1.
	Foster parents and preadoptive parents or relatives providing care must be given notice of and an opportunity to be heard at each hearing.	MCR 3.978(B). See Section 5.2(A).
	Supervising agency must submit information to place the child in the adoption directory if an adoptive family is not identified within 90 days of the entry of the order terminating parental rights.	MCL 722.954b(2). See Section 18.5(B).

Type of Proceeding	Time and Notice Requirements	Authorities and Cross-References
Appeals Following Termination of Parental Rights	Request for appellate counsel must be made within 14 days after notice of the order terminating parental rights is given or after a timely postjudgment motion is denied.	MCR 3.977(J)(1)(c). See Section 17.10.
	In Court of Appeals, appeal of right must be filed within 14 days of entry of an order terminating parental rights under the Juvenile Code, 14 days after entry of an order denying a timely postjudgment motion, or 14 days after entry of an order appointing or denying appointment of appellate counsel.	MCR 3.993(A)(2); MCR 7.204(A)(1). See Section 20.3(B).
	Application for leave to appeal may not be granted if filed more than 63 days after entry of the order terminating parental rights or 63 days after entry of an order denying motion for reconsideration or rehearing.	MCR 3.993(C)(2); MCR 7.205(G)(6). See Section 20.3(C).
	In the Michigan Supreme Court, after a decision by the Court of Appeals, application for leave to appeal must be filed within 28 days after the clerk mails notice of an order entered by the Court of Appeals, the filing of the Court of Appeals opinion appealed from, or the mailing of an order denying a timely filed motion for rehearing.	MCR 7.302(C)(2). See Section 20.4.

Appendix C: Table Summarizing Application of the Rules of Evidence and Standards of Proof in Child Protective Proceedings

"The Michigan Rules of Evidence, except with regard to privileges, do not apply to proceedings under this subchapter, except where a rule in this subchapter specifically so provides." MCR 3.901(A)(3). See also MRE 1101(b)(7) (the Michigan Rules of Evidence, other than those with respect to privileges, do not apply wherever a rule in Subchapter 3.900 states that they do not apply).

For most hearings, the applicability of the Michigan Rules of Evidence and the required standard of proof is explained in the following table.[1]

[1] Privileges are discussed in Section 11.2.

Stage of Proceeding	Application of Rules of Evidence	Standard of Proof	Authorities and Cross-References
Order to Take Child Into Protective Custody	The rules of evidence do not apply.	Following "presentment of a petition or affidavit of facts to the court, the court has reasonable cause to believe that all of the following conditions exist, together with specific findings of fact: (a) The child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child's immediate removal from those surroundings is necessary to protect the child's health and safety. If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the child is subject to the exclusive jurisdiction of the tribal court. However, the state court may enter an order for protective custody of that child when it is necessary to prevent imminent physical damage or harm to the child. (b) The circumstances warrant issuing an order pending a hearing in accordance with: (*i*) MCR 3.965 [(preliminary hearing)] for a child who is not yet under the jurisdiction of the court, or (*ii*) MCR 3.974(C) [(emergency removal hearing)] for a child who is already under the jurisdiction of the court under MCR 3.971 or [MCR] 3.972. (c) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child. (d) No remedy other than protective custody is reasonably available to protect the child. (e) Continuing to reside in the home is contrary to the child's welfare."	MCR 3.963(B)(1). See also MCL 712A.14b(1)(a)-(e). See Section 3.1(A).

Stage of Proceeding	Application of Rules of Evidence	Standard of Proof	Authorities and Cross-References
Emergency Removal	The rules of evidence do not apply.	Officer has "reasonable grounds to believe that a child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child's immediate removal from those surroundings is necessary to protect the child's health and safety."	MCL 712A.14a(1); MCR 3.963(A)(1). See Section (B).
Emergency Removal of Indian Child	The rules of evidence do not apply.	If the Indian child resides or is domiciled on a reservation but is temporarily off the reservation, reasonable grounds to believe that the child must be removed to prevent imminent physical damage or harm to the child.	25 USC 1922; MCL 712B.7(2); MCR 3.963(A)(1); MCR 3.974(C)(1). See Section 15.8.
Preliminary Inquiries	The rules of evidence do not apply.	Probable cause that one or more allegations in the petition are true. Probable cause may be established with such information and in such manner as the court deems sufficient.	MCL 712A.13a(2); MCR 3.962(B)(3). See Section 7.6(B).
Hearings to Determine Whether to Order Alleged Abuser Out of Child's Home	The rules of evidence do not apply.	Probable cause to believe that the person ordered to leave the home committed the alleged abuse, and that person's presence in the home presents a substantial risk of harm to the child's life, physical health, or mental well-being.	MCL 712A.13a(4). See Section 7.7(C).

Stage of Proceeding	Application of Rules of Evidence	Standard of Proof	Authorities and Cross-References
Preliminary Hearings	The rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. Findings regarding placement of a child may be on the basis of hearsay evidence that possesses adequate indicia of trustworthiness.	Probable cause that one or more allegations in the petition are true and fall within MCL 712A.2(b).	MCL 712A.13a(2); MCR 3.965(B)(12). See Section 7.7(B).
		"The court may order placement of the child into foster care if the court finds all of the following: (a) Custody of the child with the parent presents a substantial risk of harm to the child's life, physical health, or mental well-being. (b) No provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from risk as described in subrule (A). (c) Continuing the child's residence in the home is contrary to the child's welfare. (d) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child. (e) Conditions of child custody away from the parent are adequate to safeguard the child's health and welfare."	MCL 712A.13a(9); MCR 3.965(C)(2). See Section (B).
		Probable cause that leaving the child in his or her home is contrary to the child's welfare.	MCR 3.965(C)(3). See Section 8.3.
		Reasonable efforts to prevent the removal of the child have been made or are not required.	MCR 3.965(C)(4). See Section 8.4.
Review of Child's Placement	The rules of evidence do not apply.	Best interests of the child.	MCR 3.966. See Section 8.12.

Stage of Proceeding	Application of Rules of Evidence	Standard of Proof	Authorities and Cross-References
Removal Hearing—Indian Child	The rules of evidence do not apply.	Clear and convincing evidence, including testimony by at least one qualified expert witness, that active efforts designed to prevent breakup[1] of Indian family have been made and were unsuccessful, and continued custody by Indian parent or custodian is likely to result in serious emotional or physical damage to child.	25 USC 1912(d)-(e); MCL 712B.15(2); MCR 3.967(D). See Section 19.9(A).
Hearing to Identify Father	The rules of evidence do not apply.	Probable cause that an identified person is the child's legal father. Paternity must be established by a preponderance of the evidence.	MCR 3.921(D). See Section 6.7.
Trials	Except as specifically provided in the court rules, the rules of evidence for civil proceedings apply.	Preponderance of the evidence, even where the initial petition contains a request for termination of parental rights.	MCR 3.972(C)(1). See Section 12.4.
Initial Disposition Hearings (not terminating parental rights)	The rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value.	Appropriate for welfare of child and society.	MCL 712A.18(1); MCR 3.973(E). See Section 13.4.

Stage of Proceeding	Application of Rules of Evidence	Standard of Proof	Authorities and Cross-References
Review of Out-of-Home Placement Following Initial Disposition	The rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value.	Appropriate for welfare of child and society.	MCL 712A.18(1); MCR 3.973(E); MCR 3.974(D)(2). See Section 15.7.
Review of Emergency Removal of Child Following Initial Disposition	The rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value.	Appropriate for welfare of child and society.	MCL 712A.18(1); MCR 3.973(E); MCR 3.974(D)(2). See Section 15.8.
Dispositional Review Hearings for Child in Foster Care	The rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value.	Appropriate for welfare of child and society.	MCL 712A.18(1); MCL 712A.19(11); MCR 3.973(E); MCR 3.975(E). See Section 15.4.

Stage of Proceeding	Application of Rules of Evidence	Standard of Proof	Authorities and Cross-References
Hearings on Supplemental Petitions Alleging Additional Abuse or Neglect	If termination of parental rights is requested, see Hearings to Terminate Parental Rights below. If termination of parental rights is not requested, the rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value.	See Hearings to Terminate Parental Rights below. Appropriate for welfare of child and society.	MCR 3.973(H)(1); MCR 3.977. See Section 13.12. MCL 712A.18(1); MCR 3.973(E); MCR 3.973(H)(2); MCR 3.974; MCR 3.975. See Section 13.12.
Permanency Planning Hearings	The rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value.	Returning child to home would cause substantial risk of harm to life, physical health, or mental well-being of child. Keeping child in out-of-state care must be appropriate and in child's best interests. Initiating proceedings to terminate parental rights is not in best interest of child.	MCL 712A.19a(12); MCR 3.976(D)(2); MCR 3.976(E)(1); MCR 3.976(E)(2); MCR 3.976(E)(3). See Section 16.1; Section 16.6.

Stage of Proceeding	Application of Rules of Evidence	Standard of Proof	Authorities and Cross-References
Hearings to Terminate Parental Rights at Initial Disposition	1. *Trial:* except as specifically provided in the court rules, the rules of evidence for civil proceedings apply.	1. Preponderance of the evidence.	MCL 712A.19b(4)-(5); MCR 3.977(E). See Section 17.2.
	2. *Factfinding phase of termination hearing:* the rules of evidence apply, other than those with respect to privileges, unless abrogated by MCL 722.631.	2. Clear and convincing evidence from trial or plea proceedings or that is introduced at initial disposition that one or more allegations in the petition are true and establish grounds for termination under MCL 712A.19b(3)(a)-(b), MCL 712A.19b(3)(d)-(n).	
	3. *Best interests phase of termination hearing:* the rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value.	3. Termination of parental rights is in the child's best interests.	

Stage of Proceeding	Application of Rules of Evidence	Standard of Proof	Authorities and Cross-References
Hearings to Terminate Parental Rights Based on Different Circumstances	1. *Factfinding phase of termination hearing:* the rules of evidence apply, other than those with respect to privileges, unless abrogated by MCL 722.631.	1. Clear and convincing evidence that one or more allegations in the supplemental petition are true and establish grounds for termination under MCL 712A.19b(3)(a)-(b), MCL 712A.19b(3)(c)(*ii*), MCL 712A.19b(3)(d)-(g), or MCL 712A.19b(3)(i)-(n).	
	2. *Best interests phase of termination hearing:* the rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value.	2. Termination of parental rights is in the child's best interests.	MCR 3.977(F)(1). See Section 17.3.
Hearings to Terminate Parental Rights: Other Cases	The rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value.	Clear and convincing evidence admitted under MCR 3.977(G)(2) that one or more allegations in the petition are true and come within MCL 712A.19b(3), and that termination of parental rights is in the child's best interests.	MCL 712A.19b(1); MCR 3.977(H). See Section 17.4.

Stage of Proceeding	Application of Rules of Evidence	Standard of Proof	Authorities and Cross-References
Hearings to Terminate Parental Rights to Indian Child* *To terminate parental rights of an Indian child, the ICWA and the MIFPA requirements, and the statutory grounds for termination under state law must be met.	*State law requirements:* See Hearings to Terminate Parental Rights above. *ICWA and MIFPA requirements:* See above.	See Hearings to Terminate Parental Rights above. Beyond a reasonable doubt, including testimony of at least one qualified expert witness, that continued custody with the parent or Indian custodian will likely result in serious emotional or physical damage to the child.	MCR 3.977(G); *In re Elliott,* 218 Mich App 196, 209-210 (1996). See Section 17.9; Section 19.9(C). 25 USC 1912(f); MCL 712B.15(4); MCR 3.977(G). See Section 17.9; Section 19.9(C).
Post-termination Review Hearings	The rules of evidence do not apply.	Reasonable efforts to establish permanent placement. Court may enter orders it considers necessary in the child's best interests, including appointment of a juvenile guardian pursuant to MCL 712A.19c and MCR 3.979.	MCR 3.978(C). See Section 18.2.

1. "[25 USC 1912(d)] applies only in cases where an Indian family's 'breakup' would be precipitated by the termination of the parent's rights. The term 'breakup' refers in this context to '[t]he discontinuance of a relationship,' or 'an ending as an effective entity[.]'" *Adoptive Couple v Baby Girl*, __ US ___, __ (2013) (where a biological Indian-parent abandons his or her child before the child's birth and never exercises legal or physical custody over the child, 25 USC 1912(d) is inapplicable because "there is no 'relationship' that would be 'discontinu[ed]'–and no 'effective entity' that would be 'end[ed]'–by the termination of the Indian parent's rights[, and i]n such a situation, the 'breakup of the Indian family' has long since occurred") (citations omitted). See Section 19.9(C) for a detailed discussion of involuntary termination of a parent's parental rights.

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