Adoption Proceedings Benchbook—Third Edition

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Michigan Supreme Court

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This third edition was initially published in 2018, and the text has been revised, reordered, and updated through September 23, 2020. 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.

Note on Precedential Value

"A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this court rule." MCR 7.215(J)(1).

Several cases in this book have been reversed, vacated, or overruled in part and/or to the extent that they contained a specific holding on one issue or another. Generally, trial courts are bound by decisions of the Court of Appeals "until another panel of the Court of Appeals or [the Supreme] Court rules otherwise[.]" *In re Hague*, 412 Mich 532, 552 (1982). While a case that has been fully reversed, vacated, or overruled is no longer binding precedent, it is less clear when an opinion is not reversed, vacated, or overruled in its entirety. Some cases state that "an overruled proposition in a case is no reason to ignore all other holdings in the case." *People v Carson*, 220 Mich App 662, 672 (1996). See also *Stein v Home-Owners Ins Co*, 303 Mich App 382, 389 (2013) (distinguishing between reversals in their entirety and reversals in part); *Graham v Foster*, 500 Mich 23, 31 n 4 (2017) (because the Supreme Court vacated a portion of the Court of Appeals decision, "that portion of the Court of Appeals' opinion [had] no precedential effect and the trial court [was] not bound by its reasoning"). But see *Dunn v Detroit Inter-Ins Exch*, 254 Mich App 256, 262 (2002), citing MCR 7.215(J)(1) and stating that "a prior Court of Appeals decision that has been reversed on other grounds has no precedential value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision." See also *People v James*, 326 Mich App 98 (2018) (citing *Dunn* and MCR 7.215(J)(1) and stating that the decision, "*People v Crear*, 242 Mich App 158, 165-166 (2000), overruled in part on other grounds by *People v Miller*, 482 Mich 540 (2008), . . . [was] not binding"). Note that *Stein* specifically distinguished its holding from the *Dunn* holding because the precedent discussed in *Dunn* involved a reversal in its entirety while the precedent discussed in *Stein* involved a reversal in part.

The Michigan Judicial Institute endeavors to present accurate, binding precedent when discussing substantive legal issues. Because it is unclear how subsequent case history may affect the precedential value of a particular opinion, trial courts should proceed with caution when relying on cases that have negative subsequent history. The analysis presented in a case that is not binding may still be persuasive. See generally, *Dunn*, 254 Mich App at 264-266.

COVID-19: Special Procedures

In response to the public health emergency, the Michigan Supreme Court and the Governor have issued (and continue to issue) administrative and executive orders affecting trial court procedures. MJI has endeavored to summarize and synthesize these orders to assist courts in adapting to the new requirements and limitations. Please visit our COVID-19: Procedures Affected webpage for more information.

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1.1 Establishment of the Michigan Adoption Code

In Michigan, adoption was created purely by statute and did not exist in the common law. *Slattery v Hartford-Connecticut Trust Co*, 254 Mich 671, 675 (1931); *In re MKK*, 286 Mich App 546, 558 (2009). The Adoption Code was established for the following general purposes:

> "(a) To provide that each adoptee in this state who needs adoption services receives those services.
>
> (b) To provide procedures and services that will safeguard and promote the best interests of each adoptee in need of adoption and that will protect the rights of all parties concerned. If conflicts arise between the rights of the adoptee and the rights of another, the rights of the adoptee shall be paramount.
>
> (c) To provide prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time.
>
> (d) To achieve permanency and stability for adoptees as quickly as possible.
>
> (e) To support the permanency of a finalized adoption by allowing all interested parties to participate in proceedings regarding the adoptee." MCL 710.21a.

"Because the Adoption Code is in derogation of the common law, it must be strictly construed." *In re Dawson* 232 Mich App 690, 696 (1998). If the statutory provisions of the Adoption Code are not substantially complied with, the adoption fails. *Slattery*, 254 Mich at 675.

1.2 Adoption Cases are High Priority[1]

"All proceedings under [the Adoption Code] shall be considered to have the highest priority and shall be advanced on the court docket so as to provide for their earliest practicable disposition. . . . An adjournment or continuation of a proceeding under [the Adoption Code] shall not be granted without a showing of good cause." MCL 710.25(1)-(2). See also MCL 710.21a(c), which sets out the general purposes of the Adoption Code and includes, among other purposes, providing "prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time."

[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

In parallel adoption and paternity proceedings, "[t]he trial court ha[s] the authority to stay the paternity action in favor of the adoption proceedings: absent good cause, adoption proceedings should be given priority," and "a trial court has the inherent authority to control the progress of a case." *In re MGR*, 504 Mich 852, 853 (2019), rev'g *In re MGR*, 323 Mich App 279 (2018). In *MGR*, "[r]espondent-father never requested the court to stay the adoption proceedings under MCL 710.25(2) for good cause relating to his separate paternity proceeding, and the facts did not justify a stay in any event" where he filed a paternity action over one month after a petition for adoption was filed for the minor child, and "[t]he trial court entered an order of filiation . . . *after* it had issued its [MCL 710.39 (interested putative father)] determination and *after* petitioners had appealed that decision to the Court of Appeals." *MGR*, 504 Mich at 853. "Because petitioners[-adoptive parents] had a right to appeal the [MCL 710.39] determination and because good cause to delay those proceedings had not been alleged, the trial court should have stayed the paternity proceedings pursuant to MCR 7.209(E)(2)(b) so that the appellate court could review th[e MCL 710.39] decision." *MGR*, 504 Mich at 853 (vacating the erroneously-entered order of filiation in the related paternity case, *Brown v Ross*, 504 Mich 871 (2019), and concluding that "the order of filiation did not moot appellate review of the trial court's . . . [MCL 710.39] decision").[2] See also *In re LMB*, 504 Mich 869, 869 (2019) (trial court abused its discretion by denying petitioners-adoptive parents' motion to stay respondent-father's related paternity action (filed after the MCL 710.39 hearing in the adoption case was already underway) and by "allowing the case to proceed to entry of an order of filiation while" an appeal on the trial court's MCL 710.39 hearing "was pending before the Court of Appeals" and where "respondent-father never sought a stay of the adoption proceedings to pursue the paternity action, and no facts justified a stay in any event").

"Although proceedings under the Adoption Code should, in general, take precedence over proceedings under the Paternity Act, adoption proceedings may be stayed upon a showing of good cause, as determined by the trial court on a case-by-case basis." *In re MKK*, 286 Mich App 546, 562-563 (2009) (finding that the respondent-putative father "established good cause for delaying the adoption proceedings in favor of his paternity action[, where t]here was never any genuine dispute that respondent was the child's biological father, . . . there was no unreasonable delay in respondent's attempt to establish paternity, . . . [h]e filed his paternity action shortly after the child's birth and before petitioners filed their adoption petition[, and] . . . there [was] little merit to the argument that he filed his paternity action simply to thwart [the mother's] adoption plan.").[3]

[2] For additional discussion on MCL 710.39, see Section 2.10.

1.3 Overview of Adoption Process[4]

This section generally summarizes the steps in the adoption process.

A. Step One - Indian Child Involved

The first step in the adoption process is to determine whether an Indian child is involved. If the proceeding involves an Indian child, regardless whether a parent's parental rights are being voluntarily or involuntarily terminated, the court must follow the mandates of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., the Code of Federal Regulations implementing ICWA, 25 CFR Part 23, and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*.

However, regardless of when the court discovers an Indian child is the subject of the adoption, it must adhere to the ICWA and the MIFPA requirements. See Chapter 11 for a detailed discussion of the ICWA's and the MIFPA's substantive and procedural mandates.

For a flowchart on the applicability of the ICWA and MIFPA, see the Michigan Judicial Institute's *Are ICWA and MIFPA Requirements Applicable to the Case Flowchart*.

B. Step Two - Voluntary or Involuntary

The second step in the adoption process is to determine whether a parent's parental rights are being voluntarily or involuntarily terminated. There are different standards that apply to voluntary and involuntary terminations.

For a flowchart depicting the adoption process in voluntary termination cases, see the Michigan Judicial Institute's *Voluntary Termination of Parental Rights*, and for a flowchart depicting the adoption process in involuntary termination cases, see the Michigan Judicial Institute's *Involuntary Termination of Parental Rights*.

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[3] "[T]he timing of a paternity claim is but one factor to be considered in determining whether there is good cause under MCL 710.25(2) to stay adoption proceedings." *In re MKK*, 286 Mich App at 562. Because "the general presumption followed by the courts of this state is that the best interests of a child are served by awarding custody to the natural parent or parents, . . . giving a paternity action priority over an adoption proceeding does not necessarily conflict with protecting the best interests of the child." *Id.* at 562-563.

[4] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

1. Voluntary Termination

A parent may voluntarily relinquish his or her parental rights over his or her child:

(a) By releasing his or her parental rights under the Adoption Code;

(b) During the course of a child protective proceeding; or

(c) By consenting to his or her child's adoption under the Adoption Code.

a. Release of Parental Rights

A parent may only release a child to the Department of Health and Human Services (DHHS) or a child placing agency. MCL 710.28(5). See Sections 2.2–2.4 for a detailed discussion on releases.

b. Voluntary Termination During Child Protective Proceedings

A parent may voluntarily terminate his or her parental rights during a child protective proceeding by doing one of the following:

- Executing a release and termination of parental rights under the Adoption Code. See Sections 2.2–2.4. Note that a release requires *both* parents' parental rights over a child to be terminated. See MCL 710.22(u); MCL 710.28(1)(a); MCL 710.29(8).

- Parties stipulate to specific facts and court finds based on those facts sufficient grounds for termination of parental rights under the Juvenile Code and finds that termination is in the child's best interests. See *In re Toler*, 193 Mich App 474, 477 (1992); MCL 712A.19b(5). See Section 2.5.

c. Consent to Adoption

A parent may voluntarily relinquish his or her parental rights and consent to the child's placement with a specific adoptive parent. See MCL 710.22(*l*); MCL 710.44(1); MCL 710.44(8). See Sections 2.6–2.9 for a detailed discussion of consent adoptions.

Under a consent to adopt, a parent may consent to a direct placement adoption, a stepparent adoption, or a relative adoption. See MCL 710.22(*o*); MCL 710.23a(4); MCL 710.43(7).

Direct Placement Adoption. A direct placement adoption occurs when the biological parent or guardian selects an adoptive parent and transfers his or her physical custody of the child to the prospective adoptive parent. MCL 710.22(*o*). See Section 8.2. Before the adoption can go forward, the other parent's parental rights must be voluntarily terminated under a consent to adopt, voluntarily terminated under the Juvenile Code, or involuntarily terminated. See Sections 2.6–2.9 (consent adoptions), Section 2.5 (voluntary termination during child protective proceedings), and Sections 2.10–2.11 (involuntary termination).

After the adoptive parent is selected, the parent or guardian may directly place the child temporarily or formally with the adoptive parent. MCL 710.23a(1). See Chapter 5 on temporary placement and Chapter 6 on formal placements.

Stepparent Adoption. A stepparent adoption occurs when the custodial parent marries and his or her spouse petitions to adopt the custodial parent's child, and either the other parent consents to the adoption or the court terminates the other parent's parental rights. MCL 710.23a(4); MCL 710.43(7); MCL 710.51(6). See Section 8.3.

Relative Adoption. A relative adoption occurs when a custodial parent formally places the child with a relative. MCL 710.23a(4). See Section 8.4. Before the adoption can go forward, the other parent's parental rights must be voluntarily terminated under a consent to adopt, voluntarily terminated under the Juvenile Code, or involuntarily terminated. See Sections 2.6–2.9 (consent adoptions), Section 2.5 (voluntary termination during child protective proceedings), and Sections 2.10–2.11 (involuntary termination).

2. Involuntary Termination

The court may involuntarily terminate a parent's parental rights under the Adoption Code or the Juvenile Code. See MCL 710.37; MCL 710.39; MCL 710.51(6); MCL 712A.19b. See Sections 2.10–2.11 for a detailed discussion of involuntary termination.

Because the procedures for involuntary termination of a putative father's parental rights differ from the procedures followed for involuntary termination of a legal father's parental rights, it is important to establish the type of father involved. See Section 3.2 for a detailed discussion of the types of fathers.

a. Adoption Code

Under the Adoption Code, a mother or a legal father's parental rights may only be involuntary terminated under a stepparent adoption. See MCL 710.51(6); MCR 3.903(A)(7); MCR 3.903(A)(18). Involuntary termination of a putative father's parental rights under the Adoption Code may be terminated under MCL 710.37 (uninterested putative father), MCL 710.39 (interested putative father), or MCL 710.51(6) (stepparent adoption). See Section 2.10 for a discussion of each of these types of involuntary termination.

b. Juvenile Code

The court may involuntarily terminate a parent's parental rights as a result of child protective proceedings under the Juvenile Code. MCL 712A.19b(3).

A discussion of the involuntary termination of parental rights under the Juvenile Code is outside the scope of this benchbook. See the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*.

1.4 Legal Advice

Parties in an adoption proceeding are not always represented by counsel, and it is important to remember that court clerks cannot provide legal advice. However, clerks have a wealth of knowledge about the court system and can provide information.

A brief discussion on serving the self-represented without providing legal advice is contained in this section. For a detailed discussion on serving the self-represented, see the web-based training, *Serving the Self-represented Without Providing Legal Advice*.

A. Information Clerks May Provide

Court clerks can provide the following information:

(1) Legal definitions. (MCL 710.22 contains the legal definitions for many terms contained in the Adoption Code.)

(2) Procedural definitions. (The clerk can explain what happens at a specific hearing.)

(3) Citations of statutes, court rules, and ordinances. (The statutory provisions of the Michigan Adoption Code are MCL 710.21 through MCL 710.70. However, a clerk may not provide legal research.)

(4) Public case information. (Adoption files are not public; they are confidential[5] and cannot be shared with the public. However, if asked about a confidential file, a clerk may confirm its existence but cannot provide any other information.)

(5) General information on court operations. (A clerk may indicate generally when hearings will be scheduled and at which hearing an adoption may be finalized.)

(6) Options. (Although a clerk cannot provide legal interpretation or conduct legal research, the clerk may refer a person elsewhere for assistance.)

(7) Access. Most people are not familiar with the court system. They often cannot describe their problem in legal terms. Court clerks are the gatekeepers to the system. It is their job to ensure that the court system is accessible. The information that is presented, and the manner in which it is presented, can affect how accessible the system is. (If someone misstates a legal term, the clerk should correct that person, and direct them appropriately. A clerk should not deny someone access because he or she does not know the correct legal terminology.)

(8) General referrals. (If someone is looking for an adoption agency, an appropriate referral would be a general referral to the yellow pages.)

(9) Forms and instructions on how to complete the forms.

[5] See Chapter 9 for information on the confidentiality of adoption files.

B. Information Clerks Must Not Provide

The clerk must *not* do any of the following:

(1) Provide legal interpretations.

(2) Provide procedural advice.

(3) Provide research of statutes, court rules, and ordinances.

(4) Provide confidential case information. See Chapter 9 for information on recordkeeping and release of information.

(5) Provide confidential or restricted information on court operations.

(6) Provide opinions.

(7) Deny access, discourage access, or encourage litigation.

(8) Provide subjective or biased referrals.

Note: The clerk may not refer a party to a specific attorney or adoption agency.

(9) Fill out forms for a party.

Note: The clerk may fill out forms for a party when there are language barriers or physical handicaps. However, this should only be done when no other options are available.

1.5 Child Placing Agency's Religious Exemption From Providing Adoption Services

"In accordance with . . . [the Child Care Licensing Act,] MCL 722.124e and [MCL] 722.124f, a child placing agency shall not be required to provide adoption services if those adoption services conflict with, or provide adoption services under circumstances that conflict with, the child placing agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency. Also, in accordance with . . . MCL 722.124e and [MCL] 722.124f, the state or a local unit of government shall not take an adverse action against a child placing agency on the basis that the child placing agency has declined or will decline to provide adoption services that conflict with, or provide adoption services under circumstances that conflict with, the child placing agency's sincerely held religious beliefs

contained in a written policy, statement of faith, or other document adhered to by the child placing agency."[6] MCL 710.23g. For additional information on the child placing agency's religious exemption from providing services that conflict with the agency's sincerely held religious beliefs, see MCL 722.124e and MCL 722.124f.

[6] Effective September 9, 2015, 2015 PA 55 amended the Social Welfare Act by adding MCL 400.5a to also prohibit the DHHS, "[i]n accordance with . . . MCL 710.23g, and . . . MCL 722.124e and [MCL] 722.124f, . . . [from] tak[ing] an adverse action against a child placing agency on the basis that the child placing agency has declined or will decline to provide services that conflict with, or provide services under circumstances that conflict with, the child placing agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency." MCL 400.5a.

Chapter 2: Freeing a Child for Adoption

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2.1 Overview of Chapter[1]

An important step in the adoption process is ensuring the child is freed for adoption. Because different standards apply when freeing a child for adoption based on whether a child's parent's parental rights are voluntarily or involuntarily terminated, this chapter is broken down into two parts: voluntary termination and involuntary termination.

In freeing a child for adoption, one of the first matters to be determined is the identity of the child's father. Although this chapter discusses terminating a father's parental rights, it does not cover identifying a father. Chapter 3 focuses on identifying fathers. This chapter does not address jurisdictional issues. An in-depth discussion of jurisdiction and venue can be found in Chapter 4. This chapter also does not address cases involving an Indian child. An in-depth discussion of the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA) can be found in Chapter 11.

Part 1: Voluntary Termination

A parent may voluntarily relinquish parental rights over his or her child:

(1) By releasing his or her parental rights through a release or out-of-court release;

(2) During the course of a child protective proceeding; or

(3) By consenting to a child's adoption through a consent or out-of-court consent.

For a flowchart depicting the adoption process in voluntary termination cases, see the Michigan Judicial Institute's *Voluntary Termination of Parental Rights*.

[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

Part 1A—Release

2.2 Release of Parental Rights

A *release* is "a document in which all parental rights over a specific child are voluntarily relinquished to the department or to a child placing agency." MCL 710.22(u). It is important to note that the release may *only* be given to the department or a child placing agency. See MCL 710.28(5). A parent may not release his or her parental rights to the court or to a third party but may consent to adoption by a third party. See Section 2.6 for a detailed discussion on consent adoptions.

If the child is or the court has reason to believe the child is an Indian child, ICWA and MIFPA provide additional requirements for the execution of a release. See MCL 712B.13(1); MCL 712B.27(1). For a detailed discussion on releasing an Indian child, see Section 11.15(B).

For specific provisions related to out-of-court releases, see Section 2.3.

For checklists on adoption releases, see the Michigan Judicial Institute's Adoption Proceedings Quick Reference Materials, *Releases*. For checklists and flowcharts on adoption releases involving an Indian child, see the Michigan Judicial Institute's Proceedings Involving an Indian Child Quick Reference Materials, *Voluntary Proceedings*.

A. Interested Parties

In a release proceeding, the interested parties are:

(1) The adoptee (if over the age of five);

(2) The department or child placing agency to which the adoptee is being released;

(3) The person executing the release; and

(4) "If the court knows or has reason to know the adoptee is an Indian child," in addition to the parties listed above, the Indian child's tribe and Indian custodian (if applicable), or where the Indian child's parent, Indian custodian, or tribe is unknown, the Secretary of the Interior.[2] MCL 710.24a(3); MCR 3.800(B)(1)-(2).

[2] See Chapter 11 for a detailed discussion of adoption proceedings involving an Indian child.

In the interest of justice, the court may also require other parties to be served. MCL 710.24a(6).

If a party to the release is incarcerated, see Section 2.12 for information regarding notice to an incarcerated party.

B. Persons Authorized to Execute a Release

"Subject to [MCL 710.28] and [MCL 710.29], a release shall be executed" by the persons or entities listed in MCL 710.28(1). MCL 710.28(1).

1. Parent

Each parent or the surviving parent if one is deceased may execute a release of his or her parental rights, unless that parent's parental rights were already terminated or a guardian was appointed for the child or parent.[3] MCL 710.28(1)(a).

Prior to arranging a parent's release, the department must inform the parent what child placing agencies serve the county, and at the parent's request, must refer the parent to one of the agencies. MCL 710.28(6).

a. Minor Parent

If the parent is a minor and has not been emancipated, then the minor parent's release must also be accompanied by a release from his or her parent, guardian, or guardian ad litem. MCL 710.28(2).

Before a release is executed, the adoption attorney or child placing agency providing adoption services must provide an unrepresented minor parent an opportunity to meet with an attorney, unrelated to the adoption proceedings, to discuss the legal ramifications. MCL 710.55a(2).

b. Court-Appointed Counsel

An adult 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); *In re Jackson (Kenneth)*, 115 Mich App 40, 52 (1982). See also *In re Koroly*, 145 Mich App 79, 88 (1985) (putative father was not entitled to counsel where he voluntarily signed a

[3] See the SCAO form *Release of Child by Parent*, or *Release of Indian Child by Parent*.

disclaimer of paternity and a denial of interest in custody).

2. Guardian of Child or Parent

An appointed guardian of the child or parent may execute a release of a child to the department or a child placing agency if the court gives the guardian authorization to execute the release.[4] MCL 710.28(1)(d)-(e), (3)-(5). If a parent's guardian executes a release, the release has the same effect as if the parent executed the release. MCL 710.28(4).

To obtain authorization to execute a release, the guardian must petition the court where he or she received the guardianship appointment.[5] See MCL 710.28(3)-(4). The court may authorize a full guardian or a juvenile guardian to release a child for adoption. See MCL 700.5215(e); MCL 712A.19a(10); MCL 712A.19c(7). However, a limited guardian is prohibited from executing a release for adoption. MCL 700.5206(4).

Committee Tip:

Neither the Adoption Code nor the Michigan Court Rules address procedures for conducting a hearing on a guardian's motion requesting authority to release a child for adoption. The Advisory Committee recommends that the court consider the purposes of the Adoption Code in considering the motion. See Section 1.1.

Prior to arranging a guardian's release, the department must inform the guardian what child placing agencies serve the county, and at the guardian's request, must refer the guardian to one of the agencies. MCL 710.28(6).

3. Child Placing Agency

A child placing agency may release a child to the department for adoption purposes[6] and the department must accept the release. MCL 710.28(1)(b); MCL 710.28(7).

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[4] See the SCAO form *Release of Child by Guardian*.

[5] The court cannot appoint a guardian for an adoptee or a parent if the sole purpose of the appointment is to defeat a parent's status as an interested party. MCL 710.24a(7). I

[6] See the SCAO form *Release of Child by Child Placing Agency*.

A child placing agency's authority to release a child for adoption is derived from either:

(1) A court order committing the child to that agency; or

(2) A release to that agency by the parents or guardian. MCL 710.28(1)(b)-(c).

C. Required Documents for Release

1. Parent's or Guardian's Verified Statement

A verified statement must be submitted with a parent's or guardian's release.[7] MCL 710.29(6). See Section 10.5 for a detailed discussion of a parent's or guardian's verified statement.

2. Itemized Statement of Money Promised or Received

A parent or guardian must indicate in the verified statement that he or she "has not received or been promised any money or anything of value for the release of the child," unless it is considered a lawful payment, in which case the parent must file an itemization of the lawful payment with the release.[8] MCL 710.29(6)(c); see also MCL 710.54(1)(c) (generally prohibiting compensation for obtaining a release).

3. Other Required Documentation

When applicable, the following documentation must accompany a release:

(1) Proof of termination of parental rights;

(2) Release of parental rights;

(3) Appointment;

(4) Authorization; or

(5) Commitment. See MCL 710.28(9). See also MCL 710.28(1)(a)-(c) (requiring child placing agency to file proof that parents' rights were terminated or released).

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[7] See the SCAO form *Statement to Accompany Release*.

[8] See the SCAO form *Parent's or Guardian's Verified Accounting for Adoption Release or Direct Placement Consent*.

A guardian must submit proof of his or her guardianship appointment and authorization to execute a release. See MCL 710.28(3)-(4).

D. Executing a Release[9]

"Except as otherwise provided in [MCL 710.29(5)-(11)],[10] a release shall be by a separate instrument executed before a judge of the court or a juvenile court referee."[11] MCL 710.29(1). Alternatively, "the release may be executed and acknowledged before an individual authorized by law to administer oaths" when the release is required from:

- A person in the armed services;
- A person in prison; or
- An authorized representative of the child placing agency that has jurisdiction of the child to be adopted. MCL 710.29(2)-(3).

If the release is accepted by a judge or referee, "a verbatim record of testimony related to execution of the release shall be made." MCL 710.29(1).

If the child is or the court has reason to believe the child is an Indian child, ICWA and MIFPA provide additional requirements. See MCL 712B.13(1); MCL 712B.27(1). For a detailed discussion on releasing an Indian child, see Section 11.15(B).

1. Steps Required Before Execution of Release

a. Completion of Court-Ordered Investigation

A parent's or guardian's release must be not "executed until after the investigation the court considers proper[.]" MCL 710.29(7). See *In re Blankenship*, 165 Mich App 706, 714 (1988) (trial court's questioning of the parties during

[9]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[10]MCL 710.29(5)-(11) contain information related to out-of-court releases, which is discussed in Section 2.3.

[11] A case code is available "for handling certain adoption-related filings that precede the filing of a petition for adoption and for which a petition for adoption might not be subsequently filed." SCAO Memorandum, *New Case-Type Code for Adoption-Related Matters.* For "instruction on how to process a release for purposes of adoption under MCL 710.29 where there is no open adoption case," see SCAO Memorandum, *AU Case-Type Code and Release to Adopt*.

the release procedure was sufficient to satisfy the investigation requirement of MCL 710.29(7)).

b. Explanation of Relinquishment of Rights

A parent's or guardian's release must not be executed until "after the judge, referee, or other individual authorized in [MCL 710.29(2)] has fully explained to the parent or guardian the legal rights of the parent or guardian and the fact that the parent or guardian by virtue of the release voluntarily relinquishes permanently his or her rights to the child[.]" MCL 710.29(7).

Parental rights to a child include the rights to custody, control, services, earnings, and the right to inherit from the minor. See MCL 722.2 (Status of Minors and Child Support Act); MCL 700.2103(b) (Estates and Protected Individuals Code).

c. Continuation of Support Obligation

"Before executing a release, as part of the explanation of the parent's legal rights, the parent shall be informed that the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law." MCR 3.804(C)(1). "Failure to provide required notice under [MCR 3.804(C)] does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent." MCR 3.804(C)(3).

d. Execution is in Child's Best Interests

If the child is over the age of five, a parent's or guardian's release must be not be executed until after the court determines that execution of the release is in the child's best interests. MCL 710.29(7). See *In re Buckingham*, 141 Mich App 828, 834-835 (1985).

2. Delaying Formal Execution of Mother's Release

"At the request of the mother, her formal execution of a release or consent shall be delayed until after court determination of the status of the putative father's request for custody of the child." MCL 710.31(3). See Section 2.10(B)(2) for a detailed discussion of putative fathers requesting custody.

3. Foreign Release

> "If the release is executed in another state or country, the court having jurisdiction over the adoption proceedings in this state shall determine whether the release was executed in accordance with the laws of that state or country or the laws of this state and shall not proceed unless it finds that the release was so executed." MCL 710.29(4).

E. Terminating Parental Rights After Execution of Release

Except as otherwise provided in MCL 710.29(8),[12] after a parent or guardian executes a release, the court must immediately issue an order terminating that parent's or guardian's rights to that child.[13] MCL 710.29(8).

The court must serve the parent or guardian with a copy of the termination order, an advice of rights,[14] a pamphlet on release of adoption information, and a parent's consent/denial to the release of identifying information. See MCL 710.27a(4). See Chapter 9 for a detailed discussion of releasing information.

> **Note:** The court must inform each parent that unless he or she files a statement with the central adoption registry denying the release, there is a presumption of consent to release information specifying the biological parent's name at the time of parental termination and the biological parent's current name and address. MCL 710.27a(4). The court must also explain "the parent's right to file, update, or revoke the denial at any time[.]" *Id*.

Once one parent's or guardian's rights over the child are released, the other parent's parental rights must be released or involuntarily terminated in order to commit the child to the department or a child placing agency. See MCL 710.29(8); MCL 710.31. For information on involuntary terminations, see Section 2.10 and Section 2.11.

If the child is allegedly born out of wedlock and the mother executed the release but a release "of the natural father cannot be obtained, the judge shall hold a hearing as soon as practical to

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[12] MCL 710.29(8) provides alternative procedures for out-of-court releases, which are discussed in Section 2.3(D).

[13] See the SCAO form *Order Terminating Parental Rights/Rights of Person in Loco Parentis After Release or Consent*.

[14] See the SCAO form, *Advice of Rights After Order Terminating Parental Rights (Adoption Code)*, or *Advice of Rights After Order Terminating Parental Rights to Indian Child (Adoption Code)*.

determine whether the child was born out of wedlock, to determine the identity of the father, and to determine or terminate the rights of the father as provided in [MCL 710.36, MCL 710.37, and MCL 710.39]." MCL 710.36(1). For information on identifying the child's father, including the steps required to determine a putative father, see Chapter 3.

Once the rights of both parents, the surviving parent, or the guardian are terminated, the court must "issue an order committing the child to the child placing agency or department to which the release was given." MCL 710.29(8). If the child is released to the department, the child becomes a state ward. MCL 710.28(8).

"If the termination of parental rights after release extinguishes all remaining parental rights, the child must be committed to the child placing agency or MDHHS pursuant to MCL 710.29(8).[15] . . . When committed pursuant to [MCL 710.29(8)] the child is referred to as an Act 296 ward. Where appropriate, the court may authorize foster care funding following release for a youth committed as a 296 ward."[16] SCAO Memorandum, *AU Case-Type Code and Release to Adopt*, p 2. "If all parental rights are not extinguished following the release, and the remaining parental rights are terminated in [a neglect and abuse] proceeding pursuant to the juvenile code, MCL 712A.19b, the court may commit the child to the Michigan Children's Institute (MCI) pursuant to MCL 400.203(1)(a).[17] . . . A child committed to MCI pursuant to MCL 400.203(1)(a) is referred to as an Act 220 ward." *AU Case-Type Code and Release to Adopt*, *supra* at p 2. For additional information on foster care funding, see Section 10.2, and for additional information on terminating parental rights under MCL 712A.19b, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*.

F. Denying Release

If the court denies the petition for release, the court must state the reasons for the denial on the record or in writing. See MCL 710.63.

G. Termination of Court's Jurisdiction

"Entry of an order terminating the rights of both parents under [MCL 710.28(8)] terminates the jurisdiction of the circuit court over the child in any divorce or separate maintenance action." MCL 710.29(10).

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[15] See SCAO form *Order Committing Child to Agency/Department of Health and Human Services*.

[16] See SCAO form *Order Authorizing Foster Care Funding After Release*.

[17] See SCAO form *Order Following Hearing to Terminate Parental Rights (Child Protective Proceedings)*.

H. Revocation of Release

After voluntarily releasing his or her parental rights,

- a parent or guardian has 21 days to file a motion to set aside the termination order. MCL 710.64(1). If the parent or guardian fails to petition the court within the 21-day period, he or she does not have a due process right to a rehearing. See *In re Myers*, 131 Mich App 160, 165-166 (1983).

  Note: A court may only grant a rehearing for good cause. MCR 3.806(B). See Section 7.2 for a detailed discussion on rehearings.

- a parent or guardian has up until a child's placement to file a petition for revocation of the release *if* the department or child placing agency to which the child was released joins or acquiesces in the petition for revocation.[18] MCL 710.29(11).

A release may not be revoked once a child is placed for adoption, unless the placement is under a legal risk adoption. MCL 710.29(11). See Section 8.5 for a detailed discussion of legal risk adoptions.

1. Court's Jurisdiction

The court has jurisdiction to entertain a request for revocation of the release *unless:*

> (1) more than 21 days has passed since the parent or guardian voluntarily released his or her parental rights and the department or child placing agency *refuses* to join or acquiesce in the petition for revocation; or
>
> (2) more than 21 days has passed since the parent or guardian voluntarily released his or her parental rights and the department or child placing agency agrees to join or acquiesce in the petition for revocation *but* the child has been placed for adoption. See *In re Myers*, 131 Mich App 160, 163-165 (1983) (finding the trial court lacked jurisdiction where the father filed his petition requesting revocation of his release 22 days after its execution and the child placing agency to which the child was released refused to join or acquiesce

[18] For a discussion on revoking an out-of-court release, see Section 2.3(F).

in the petition); *In re Hole*, 102 Mich App 286, 291-292 (1980) (finding the trial court had jurisdiction under MCL 710.64(1) where the mother, without the support of the department to which the child was released, filed her petition requesting revocation of her release 18 days after its execution).

When a release is obtained through fraud, the court has jurisdiction to entertain a request for revocation filed outside the 21-day period. See *In re Kozak*, 92 Mich App 579, 583 (1979) (noting that "an adoption could be overturned if a case of significant fraud could be made out[,]" and clarifying that "[t]he fraud which justifies equitable interference with a [court] order must be fraud in obtaining the order and not merely constructive, but positive, fraud"), citing *In re Leach*, 373 Mich 148 (1964) and *Beatty v Brooking*, 9 Mich App 579, 584 (1968).

2. Court Determination

MCL 710.29(11) and MCL 710.64(1) "grant [the court] discretion on two levels: on whether to hold a hearing and on whether to grant the requested relief." *In re Hole*, 102 Mich App 286, 290 n 1 (1980).

a. Hearing

Under MCL 710.29(11), the court may grant a hearing to determine whether the release should be revoked. If the court grants a hearing, it must make a verbatim record of the testimony. MCL 710.29(11).

Under MCL 710.64(1), the court may only grant a rehearing for good cause. MCR 3.806(B). If the court grants a rehearing, it must state the reason for doing so on the record or in writing. MCR 3.806(B). See Section 7.2 for a detailed discussion on rehearings.

b. Relief

After a parent voluntarily releases his or her child for adoption, the parent does not have "an absolute right to revoke the release for a mere change of heart[.]" *In re Blankenship*, 165 Mich App 706, 713 (1988). Rather, it is within the court's discretion to revoke the release based on the child's best interests. *Id*. See also *In re Burns*, 236 Mich App at 293 ("[t]he family court did not abuse its discretion, upon rehearing, when denying petitioner's

> request to have the release vacated" where petitioner's release was knowingly and voluntarily made, and the petitioner sought to vacate the release based on petitioner's change of heart); *In re Koroly*, 145 Mich App 79, 87 (1985) ("[t]he court *did* grant a rehearing; but it properly determined that a petitioner's [abrupt] change of mind [after signing two denials of paternity] was not a sufficient reason for the court to set aside its previous order[terminating petitioner's right to the child]. Although [MCL 710.64] recognizes the possibility that a release may be revoked, the Legislature did not thereby intend to bestow such a remedy as a matter of right on natural parents who have a 'change of heart'"), citing *DeBoer v Child & Family Services of Michigan, Inc.*, 76 Mich App 641, 645 (1977).

3. Appealing the Court's Denial

If a court denies a parent's or guardian's petition to revoke a release, the parent or guardian may appeal the decision to the Court of Appeals within 21 days of the denial order. MCL 710.65. The standard of review for a court's denial of a petition to revoke a release is an abuse of discretion. *In re Burns*, 236 Mich App 291, 292 (1999); *In re Curran*, 196 Mich App 380, 381 (1992).

For additional information on appealing to the Court of Appeals, see Section 7.4.

2.3 Out-of-Court Release

"A parent or guardian may sign an out-of-court release in front of and witnessed by an adoption attorney representing the parent or guardian and a child placing agency caseworker. An out-of-court release signed under this subsection must comply with all of the [provisions set out in MCL 710.29(5).]" MCL 710.29(5). Those requirements are discussed in the following subsections.

If the parent is a minor and has not been emancipated, then the minor parent's out-of-court release must also be signed by the minor's parent or guardian, who must also sign the release in the presence of the adoption attorney representing the minor parent and a child placing agency caseworker. MCL 710.29(5)(b).

If the child is or the court has reason to believe the child is an Indian child, ICWA and MIFPA provide additional requirements for the

execution of a release. See MCL 712B.13(1); MCL 712B.27(1). For a detailed discussion on releasing an Indian child, see Section 11.15(B).

For a discussion on releases in general, see Section 2.2.

A. Timing

An out-of-court release must not be signed until at least 72 hours after the child is born. MCL 710.29(5)(a).

B. Required Language and Documents

1. Required Language

"In separate paragraphs with sufficient space in the margin for a parent to place his or her initials beside each paragraph, the out-of-court release must state the following:[19]

> (*i*) I have read or had read to me each of my rights as a parent described in [MCL 710.29(5)(c)], and I understand these rights.
>
> (*ii*) I am signing the out-of-court release as a free and voluntary act on my part, and I have been advised that I cannot be forced to sign the out-of-court release for any reason.
>
> (*iii*) I have not been given or promised any money or other thing of value in exchange for signing the out-of-court release.
>
> (*iv*) If I sign the out-of-court release, I understand that I am giving up all of my parental rights and authorizing the court to permanently terminate all of my parental rights, unless the court allows me to revoke my out-of-court release.[20]
>
> (*v*) It has been explained to me and I understand all of the following:
>
> > (A) I am not required to sign an out-of-court release.
> >
> > (B) I may make a temporary placement of my child with the prospective adoptive parent or

[19] See the SCAO form, *Out-of-Court Release of Child by Parent*.

[20] See Section 2.3(F) for more information on revoking an out-of-court release.

parents, if I have not already done so, or I may continue the temporary placement I have already made, until I choose to sign a release in court or sign an out-of-court release.

(C) I may request revocation of the out-of-court release I have signed by submitting a timely written request for revocation.

(D) If I request a revocation of the out-of-court release, I must appear before the court so the court may consider whether to grant the revocation.

(*vi*) I have been advised that I may submit a request for revocation in writing to the adoption attorney or child placing agency that accepted the out-of-court release not more than 5 days, excluding weekends and holidays, after the out-of-court release was signed or I may petition the court on my own for revocation of the out-of-court release not more than 5 days, excluding weekends and holidays, after the out-of-court release was signed.

(*vii*) If I submit a timely request for revocation, the court may grant the request or deny the request depending on my fitness and immediate ability to properly care for the child and whether the best interests of the child would be served by the revocation." MCL 710.29(5)(d).

"The out-of-court release must contain the contact information for both the adoption attorney representing the parent or guardian and the child placing agency that accepted the out-of-court release specifying where a written request for revocation may be submitted, including a postal mailing address, overnight carrier address, fax number, and electronic mail address. A request for revocation may not be submitted to the adoption attorney representing the parent or guardian or the child placing agency that accepted the out-of-court release by telephone or text message." MCL 710.29(5)(e).

MCL 710.29(5)(f) requires, immediately above the signature of the parent or guardian executing the out-of-court release, the following statement to appear: "'I acknowledge that I am signing this out-of-court release freely and voluntarily, after my parental rights have been explained to me and any questions I may have about it have been fully answered. I understand the rights I am giving up and that an order

terminating my parental rights, when entered by the court, is a permanent termination of all of my parental rights.'"

2. Continuation of Support Obligation

"Before executing a release, as part of the explanation of the parent's legal rights, the parent shall be informed that the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law." MCR 3.804(C)(1). "Failure to provide required notice under [MCR 3.804(C)] does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent." MCR 3.804(C)(3).

3. Verified Statement

A verified statement must be submitted with a parent's or guardian's out-of-court release. MCL 710.29(5)(c); MCL 710.29(6). For a detailed discussion on a parent's or guardian's verified statement, see Section 10.5.

4. Relinquishment of Parental Rights Statement

"[T]he adoption attorney representing the parent or guardian who witnessed the out-of-court release and a caseworker from the child placing agency that accepted the out-of-court release shall fully explain to the parent or guardian his or her legal rights and the fact that the parent or guardian by virtue of the out-of-court release voluntarily relinquishes permanently his or her rights to the child." MCL 710.29(7).

The statement regarding relinquishment of parental rights must include all the following:

> "(*i*) The right to have or to seek care and custody of the child.
>
> (*ii*) The right to have or to seek parenting time with the child.
>
> (*iii*) The right to inherit from the child or have the child inherit from the parent.
>
> (*iv*) The right to services and earnings of the child.
>
> (*v*) The right to determine the child's schooling, religious training, and parenting practices." MCL 710.29(5)(c).

C. Delaying Formal Execution of Mother's Release

"At the request of the mother, her formal execution of a release or consent shall be delayed until after court determination of the status of the putative father's request for custody of the child." MCL 710.31(3). See Section 2.10(B)(2) for a detailed discussion of putative fathers requesting custody.

D. Terminating Parental Rights After Execution of an Out-of-Court Release

Except as otherwise provided in MCL 710.29(8),[21] after a parent or guardian executes an out-of-court release, "not sooner than 5 days, excluding weekends and holidays, after the out-of-court release was signed," the court must issue an order terminating that parent's or guardian's rights to that child.[22, 23] MCL 710.29(8).

The court must serve the parent or guardian with a copy of the termination order, an advice of rights,[24] a pamphlet on release of adoption information, and a parent's consent/denial to the release of identifying information. See MCL 710.27a(4). See Chapter 9 for a detailed discussion of releasing information.

> **Note:** The court must inform each parent that unless he or she files a statement with the central adoption registry denying the release of information, there is a presumption of consent to release information specifying the biological parent's name at the time of parental termination and the biological parent's current name and address. MCL 710.27a(4). The court must also explain "the parent's right to file, update, or revoke the denial at any time[.]" *Id.*

Once one parent's or guardian's rights over the child are released, the other parent's parental rights must be released or involuntarily terminated in order to commit the child to the department or a child

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[21] MCL 710.29(8) provides alternative procedures for releases, which are discussed in Section 2.2(E).

[22] See the SCAO form *Order Terminating Parental Rights/Rights of Person in Loco Parentis After Release or Consent*.

[23] A case code is available "for handling certain adoption-related[, including execution of out-of-court releases,] filings that precede the filing of a petition for adoption and for which a petition for adoption might not be subsequently filed." SCAO Memorandum, *New Case-Type Code for Adoption-Related Matters.* For "instruction on how to process a release for purposes of adoption under MCL 710.29 where there is no open adoption case," see SCAO Memorandum, *AU Case-Type Code and Release to Adopt*.

[24] See the SCAO form, *Advice of Rights After Order Terminating Parental Rights (Adoption Code)*, or *Advice of Rights After Order Terminating Parental Rights to Indian Child (Adoption Code)*.

placing agency. See MCL 710.29(8); MCL 710.31. See Section 2.10 and Section 2.11 for information on involuntary terminations.

If the child is allegedly born out of wedlock and the mother executed the release but a release "of the natural father cannot be obtained, the judge shall hold a hearing as soon as practical to determine whether the child was born out of wedlock, to determine the identity of the father, and to determine or terminate the rights of the father as provided in [MCL 710.36, MCL 710.37, and MCL 710.39]." MCL 710.36(1). For information on identifying the child's father, including the steps required to determine a putative father, see Chapter 3.

Once the rights of both parents, the surviving parent, or the guardian are terminated, the court must "issue an order committing the child to the child placing agency or department to which the release was given." MCL 710.29(8). If the child is released to the department, the child becomes a state ward. MCL 710.28(8).

"If the termination of parental rights after release extinguishes all remaining parental rights, the child must be committed to the child placing agency or MDHHS pursuant to MCL 710.29(8).[25] . . . When committed pursuant to [MCL 710.29(8)] the child is referred to as an Act 296 ward. Where appropriate, the court may authorize foster care funding following release for a youth committed as a 296 ward."[26] SCAO Memorandum, *AU Case-Type Code and Release to Adopt*, p 2. "If all parental rights are not extinguished following the release, and the remaining parental rights are terminated in [a neglect and abuse] proceeding pursuant to the juvenile code, MCL 712A.19b, the court may commit the child to the Michigan Children's Institute (MCI) pursuant to MCL 400.203(1)(a).[27] . . . A child committed to MCI pursuant to MCL 400.203(1)(a) is referred to as an Act 220 ward." *AU Case-Type Code and Release to Adopt*, *supra* at p 2. For additional information on foster care funding, see Section 10.2, and for additional information on terminating parental rights under MCL 712A.19b, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*.

E. Termination of Court's Jurisdiction

"Entry of an order terminating the rights of both parents under [MCL 710.28(8)] terminates the jurisdiction of the circuit court over

[25] See SCAO form *Order Committing Child to Agency/Department of Health and Human Services*.

[26] See SCAO form *Order Authorizing Foster Care Funding After Release*.

[27] See SCAO form *Order Following Hearing to Terminate Parental Rights (Child Protective Proceedings)*.

the child in any divorce or separate maintenance action." MCL 710.29(10).

F. Revocation of Out-of-Court Release

A petition to revoke an out-of-court release may be filed by the parent or guardian who signed the release. MCL 710.29(12). For additional discussion on revocation of releases in general, see Section 2.2(H).

1. Filing Petition

The parent or guardian may seek assistance in filing the petition by submitting a request for revocation to either his or her adoption attorney or the child placing agency that accepted the release. MCL 710.29(12). Alternatively, the "parent or guardian may file [the] petition with the court on his or her own." *Id*.

a. Assistance From Adoption Attorney or Child Placing Agency

"[A] parent or guardian who signed an out-of-court release but wishes to request revocation of the out-of court release shall submit a request for revocation to the adoption attorney representing the parent or guardian or the child placing agency that accepted the out-of-court release not more than 5 days, excluding weekends and holidays, after the out-of-court release was signed. The request for revocation from the parent or guardian must be submitted in writing by the parent or guardian who signed the out-of-court release to the adoption attorney representing the parent or guardian or a caseworker from the child placing agency that accepted the out-of-court release. The request for revocation is timely if delivered to the adoption attorney or the child placing agency not more than 5 days, excluding weekends and holidays, after the out-of-court release was signed. Upon receipt of a timely request for revocation, the adoption attorney or the child placing agency receiving the request for revocation shall assist the parent or guardian in filing the petition to revoke the out-of-court release with the court as soon as practicable." MCL 710.29(12).

b. Filing Without Assistance

"A parent or guardian may file [a] petition [to revoke an out-of-court release] on his or her own. If the parent or

guardian files the petition on his or her own, the petition must be filed with the court not more than 5 days, excluding weekends and holidays, after the out-of-court release was signed." MCL 710.29(12).

2. Hearing on Petition

"If a petition to revoke an out-of-court release is filed with the court, timely notice of revocation does not immediately result in the return of the child to the parent or guardian." MCL 710.29(14). "The court in which the out-of-court release was filed may deny the request for revocation under [MCL 710.29(14)]." MCL 710.29(13).

"A hearing before a judge is required to determine all of the following unless a child placing agency accepting the out-of-court release or the adoptive parent or parents agree to the revocation:

> (a) Whether the request for revocation was given in a timely and proper manner.
>
> (b) Whether good cause exists to determine that the out-of-court release was not signed voluntarily. If the court finds that the out-of-court release was not signed voluntarily, the out-of-court release is invalid and custody of the child shall be returned to the parent or guardian. If the court finds that the out-of-court release was signed voluntarily, the court shall proceed under subdivision (c).
>
> (c) Whether the best interest of the child will be served by any of the following:
>
> > (*i*) Returning custody of the child to the parent or guardian.
> >
> > (*ii*) Continuing the adoption proceeding commenced or intended to be commenced by the adoptive parent or parents.
> >
> > (*iii*) Disposition appropriate to the child's welfare as authorized by [MCL 712A.18] under an ex parte order entered by the court." MCL 710.29(14).

2.4 Notice of Intent to Release Expected Child

"In order to provide due notice at the earliest possible time to a putative father who may have an interest in the custody of an expected child or in the mother's intended release of an expected child for adoption . . ., and in order to facilitate early placement of a child for adoption, a woman pregnant out of wedlock may file with the court an ex parte petition which evidences her intent to release her expected child for adoption . . . ."[28] MCL 710.34(1). See Section 3.19 for a detailed discussion of identifying putative fathers.

For a checklist on a notice of intent to release expected child for adoption, see the Michigan Judicial Institute's *Adoption Release Checklist (Notice of Intent to Release Expected Child for Adoption)*.

A. Petition Requirements

The ex parte petition must be verified and include all of the following information:

> (1) The approximate date and location of the child's conception.
>
> (2) The expected date of the mother's confinement.
>
> (3) The name(s) of the alleged putative father(s).[29]
>
> (4) A request that the court inform the putative father of his right to file a notice of intent to claim paternity under MCL 710.33.[30] MCL 710.34(1).

B. Issuance of Notice

"Upon the filing of the petition, the court shall issue a notice of intent to release . . ., which notice shall be served upon the putative father by any officer or person authorized to serve process of the court. Proof of service shall be filed with the court."[31] MCL 710.34(1). See MCR 3.802(A)(1), which also requires the notice of intent to release under MCL 710.34(1) to "only be served by

[28] See the SCAO form *Petition to Issue Notice of Intent to Release or Consent*.

[29] "The petition may allege more than 1 putative father where circumstances warrant." MCL 710.34(1).

[30] For a detailed discussion on filing a notice of intent to claim paternity under MCL 710.33, see Section 3.18.

[31] A case code is available "for handling certain adoption-related filings[, including ex parte petitions to issue notice of intent to release for adoption,] that precede the filing of a petition for adoption and for which a petition for adoption might not be subsequently filed." SCAO Memorandum, *New Case-Type Code for Adoption-Related Matters*.

personal service by a peace officer or a person authorized by the court."

The notice of intent to release form must be approved by the State Court Administrator and contain all of the following information:[32]

> "(a) Indicate the approximate date and location of conception of the child and the expected date of confinement of the mother.
>
> (b) Inform the putative father of his right under [MCL 710.33(1)) to file a notice of intent to claim paternity before the birth of the child.
>
> (c) Inform the putative father of the rights to which his filing of a notice of intent to claim paternity will entitle him under [MCL 710.33(3)].
>
> (d) Inform the putative father that his failure to file a notice of intent to claim paternity before the expected date of confinement or before the birth of the child, whichever is later, shall constitute a waiver of his right to receive the notice to which he would otherwise be entitled under [MCL 710.33(3)] and shall constitute a denial of his interest in custody of the child, which denial shall result in the court's termination of his rights to the child." MCL 710.34(2)-(3). See Section 3.18 for a detailed discussion on filing a notice of intent to claim paternity under MCL 710.33.

Part 1B—Child Protective Proceedings

2.5 Voluntary Termination During a Child Protective Proceeding[33]

This section discusses termination of parental rights during a child protective proceeding as it relates to adoption proceedings. For a detailed discussion on child protective proceedings in general, including voluntary termination of parental rights under the Juvenile Code, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*.

[32] See the SCAO form *Notice of Intent to Release or Consent*.

[33] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

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.[34] See MCL 712A.19b; MCR 3.973(A); MCR 3.977(E)(2); *In re Taurus F*, 415 Mich 512, 526 (1982) ("The [trial] court cannot consider termination of parental rights without first establishing jurisdiction."). However, the parent may elect to voluntarily terminate his or her parental rights.

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. See Sections 2.2–2.4. Note that a release requires *both* of the parents' parental rights over the child be terminated.[35, 36] See MCL 710.22(u); MCL 710.28(1)(a); MCL 710.29(8).

Note: If the court has an active abuse and neglect case and the parent elects to release his/her parental rights, the court *must* execute the release and termination order under the Adoption Code. See *In re Hernandez*, unpublished opinion per curiam of the Court of Appeals, issued April 16, 2013 (Docket No. 312136),[37] 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]

[34] "[C]ourts may assume jurisdiction over a child on the basis of the adjudication of one parent[;]" however, "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, 412-413, n 8, 415 (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").

[35] A case code is available "for handling certain adoption-related filings that precede the filing of a petition for adoption and for which a petition for adoption might not be subsequently filed." SCAO Memorandum, *New Case-Type Code for Adoption-Related Matters*. For "instruction on how to process a release for purposes of adoption under MCL 710.29 where there is no open adoption case," see SCAO Memorandum, *AU Case-Type Code and Release to Adopt*.

[36] "If the release is related to a pending [neglect and abuse (NA)] case, a copy of the Order Terminating Parental Rights After Release should be marked confidential, placed in the legal file of the NA case, and recorded on the [register of actions] of the NA case." SCAO Memorandum, *AU Case-Type Code and Release to Adopt*.

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

> respondent indicate[s] that [he or] she wishe[s] 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 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 respondent. Upon the expiration of the time period for 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 respondent. By proceeding in such a manner, the trial court could insure that needless confusion does not result."

(2) Parties stipulate to specific facts and court finds based on those facts sufficient grounds for termination of parental rights under the Juvenile Code. See *In re Toler*, 193 Mich App 474, 477-478 (1992) (finding that "the judge need not announce a statutory basis for [termination of the respondent-father's parental rights under the Juvenile Code]" where the respondent-father "conceded in effect that the court would be able to find statutory authorization for the termination [of his parental rights] and that [the] termination would be in the best interests of the children").

> **Note:** The court must still find that the termination of parental rights is in the child's best interests. See MCL 712A.19b(5).

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, 837 (1985). In *Buckingham*, the Court of Appeals reversed the trial court's termination of parental rights order on a finding that the respondent-mother's voluntary release of parental rights did not comply with the requirements of the Adoption Code and was therefore void where the trial court received the respondent-mother's *oral* release following the initiation of child protective proceedings, did not find that the release was in the children's best interests, and issued the respondent-mother's termination of parental rights order under the Juvenile Code. *Id.* at 836-837.

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 *Jones*, the 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. Following the termination, the court attempted to terminate the parental rights under the Juvenile Code. 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*. at 127-128. Specifically,

> "That attempted termination under the juvenile code was without effect and was clearly improper, because the 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 juvenile code. 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 juvenile code." *In re Jones*, 286 Mich App at 128.

Part 1C—Consent Adoptions

2.6 Consent to Adoption

A *consent* is "a document in which all parental rights over a specific child are voluntarily relinquished to the court for placement with a specific adoptive parent." MCL 710.22(*l*). See also MCL 710.23a; 710.44(1); MCL 710.44(8). If the adoptee is over the age of 14, the adoptee must also consent to the adoption. MCL 710.43(2). If the adoptee is an adult, the adoptee must consent, "but consent by any other individual is not required." MCL 710.43(3).

If a consent to adoptive placement is executed under the Adoption Code and the child is or the court has reason to believe the child is an Indian child, ICWA and MIFPA provide additional requirements. See MCL

712B.13(1); MCL 712B.27(1). For a detailed discussion on consenting to the adoptive placement of an Indian child, see Section 11.15(B).

Under a consent to adopt, a parent may consent to a direct placement adoption, a stepparent adoption, or a relative adoption. See Chapter 8 for a detailed discussion on direct placement adoptions, stepparent adoptions, and relative adoptions.

For specific provisions related to out-of-court consents, see Section 2.7.

For checklists on consent adoptions, see the Michigan Judicial Institute's Adoption Proceedings Quick Reference Materials, *Consents*. For checklists and flowcharts on consent adoptions involving an Indian child, see the Michigan Judicial Institute's Proceedings Involving an Indian Child Quick Reference Materials, *Voluntary Proceedings*.

A. Overview of Procedure in Consent Cases

An adoption petition must be filed before a consent can be heard. See MCL 710.46(1); MCR 3.804(B)(1). Once an adoption petition is filed, the court must direct an employee or agent of a child placing agency, the department, or the court to conduct a full investigation. MCL 710.46(1). Within three months of the court-ordered investigation, a written report must be filed, unless the court waived the full investigation and a foster family study was completed or updated. MCL 710.46(2)-(3). See Section 5.6 for a detailed discussion of investigative reports and Section 6.6 for a detailed discussion of adoption petitions.

For a discussion on consents involving an Indian child, see Section 11.15.

1. Consent Hearing[38]

The court must promptly schedule a consent hearing after it examines and approves the investigative report or foster family study. MCR 3.804(B)(1). If an interested party requested a consent hearing, the hearing must be held within seven days of an investigative report or foster family study being filed. *Id.*; MCL 710.44(1). "Except for a consent hearing involving an Indian child pursuant to MCL 712B.13,[39] the court may allow the use of videoconferencing technology under . . . subchapter

[38]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[39] For a discussion on MCL 712B.13, see Section 11.15.

[3.800 of the Michigan Court Rules] in accordance with MCR 2.407." MCR 3.804(B)(3).

2. Court Determination

Within 14 days of receiving the investigative report, the court must *accept* the consent if it finds that:

- The consent is genuine;
- The person consenting has the authority to do so; and
- It is in the adoptee's best interests. MCL 710.51(1)(a)-(b).

The 14-day period may be extended for an additional 14 days, "[i]f it is necessary to hold a hearing before entering an order terminating the rights of a parent, parents, or a person in loco parentis, or if other good cause is shown[.]" MCL 710.51(2).

If the court *denies* the consent, the court must state the reasons for the denial on the record or in writing. MCL 710.63.

3. Foreign Consents

"If the consent is executed in another state or country, the court having jurisdiction over the adoption proceeding in this state shall determine whether the consent was executed in accordance with the laws of that state or country or the laws of this state and shall not proceed unless it finds that the consent was so executed." MCL 710.44(4).

B. Interested Parties

In a consent to a child's adoption, the interested parties consist of:

(1) The petitioner(s).

(2) The adoptee (if over the age of 14).

(3) The adoptee's minor parent, adult parent, or surviving parent, unless:

(a) The parental rights are terminated or released.

(b) A guardian has been appointed with specific authority to consent to an adoption.

(c) The parent already consented to the adoption.

(4) The department or a child placing agency to whom the adoptee is or will be released or committed to.

(5) An unemancipated minor parent's parent, guardian, or guardian ad litem.[40]

(6) A court with permanent custody of the adoptee.

(7) A court with continuing jurisdiction over the adoptee.

(8) Another state's or country's child placing agency with authority to consent to the adoption.

(9) Any interested party's guardian or guardian ad litem.

(10) "If the court knows or has reason to know the adoptee is an Indian child," in addition to the parties listed above, the Indian child's tribe and Indian custodian (if applicable), or where the Indian child's parent, Indian custodian, or tribe is unknown, the Secretary of the Interior.[41] MCL 710.24a(1)(a)-(i); MCR 3.800(B)(1)-(2).

"In the interest of justice, the court may require additional parties to be served." MCL 710.24a(6).

If a party to the consent is incarcerated, see Section 2.12 for information on providing notice to an incarcerated party.

C. Persons Authorized to Execute a Consent

"Subject to [MCL 710.43, MCL 710.44, and MCL 710.51], consent to adoption of a child shall be executed" by the persons or entities listed in MCL 710.43(1). MCL 710.43(1)

1. Parent

Each parent or the surviving parent if one is deceased may consent to his or her child's placement for adoption,[42] unless:

[40] Even if a guardian ad litem is appointed for a minor child, the guardian must have specific authority to consent to an adoption to be an interested party under MCL 710.24a(1). *In re Toth*, 227 Mich App 548, 555-556 (1998).

[41] See Chapter 11 for a detailed discussion on adoption proceedings involving an Indian child.

[42] See the SCAO form *Consent to Adoption by Parent*.

- That parent's parental rights were already terminated;
- The child was released to a child placing agency or the department;[43]
- A guardian was appointed for the child or parent; or
- The custodial parent is married to the petitioner.[44]MCL 710.43(1)(a).

Minor Parent. If the parent is a minor and has not been emancipated, then the minor parent's consent is not valid unless the minor parent's parent, guardian, or guardian ad litem also consents to the child's adoption. MCL 710.43(4). Before the consent is executed, the adoption attorney or child placing agency providing adoption services must provide an unrepresented minor parent an opportunity to meet with an attorney, unrelated to the adoption proceedings, to discuss the legal ramifications. MCL 710.55a(2).

2. Guardian of Child or Parent

An appointed guardian of the child or parent may execute a consent to a child's adoption if the court gives the guardian authorization to execute the consent.[45] MCL 710.43(1)(e)-(f), (5)-(6). If a parent's guardian executes a consent, the consent has the same effect as if the parent executed the consent. MCL 710.43(6). However, the court cannot appoint a guardian if the sole purpose of the appointment is to defeat the parent's status as an interested party. MCL 710.24a(7).

To obtain authorization to execute a consent, the guardian must petition the court where he or she received the guardianship appointment. See MCL 710.43(5)-(6). The court may authorize a full guardian or a juvenile guardian to consent to a child's adoption. See MCL 700.5215(e); MCL 712A.19a(10); MCL 712A.19c(7). However, a limited guardian is prohibited from executing a consent for adoption. MCL 700.5206(4).

[43] See Section 2.2 for a detailed discussion of releases.

[44] See Section 8.3 for a detailed discussion of stepparent adoptions.

[45] See the SCAO form *Consent to Adoption by Guardian*.

Committee Tip:

Neither the Adoption Code nor the Michigan Court Rules address procedures for conducting a hearing on a guardian's motion requesting authority to consent to a child's adoption. The Advisory Committee recommends that the court consider the purposes of the Adoption Code in considering the motion. See Section 1.1.

A properly-authorized guardian with whom a child has been placed does not have the power to consent to the child's adoption without first obtaining consent from the parents or taking steps to terminate the parents' parental rights. *In re Handorf* (*Handorf I*), 285 Mich App 384, 387-388 (2009). In *Handorf I*, the petitioners, as guardians of a child they wanted to adopt, petitioned the court for authorization to consent to the child's adoption. *Id*. at 385. The child's father consented to the adoption, but the child's mother refused to consent. *Id*. The trial court concluded it was not able to grant the petition without terminating the parents' parental rights. *Id*. at 385-386. In affirming the trial court, the Court of Appeals specifically found:

> Petitioners argue that guardians may consent to adoptions of their wards. This assertion is generally correct, subject to authorization by the court and the requirements of MCL 710.44 and MCL 710.51. See MCL 710.43(1)(e) and (5). However, the 'first step in the adoption process is ensuring the child is freed for adoption.' Michigan Judicial Institute Adoption Proceedings Benchbook 2003-2008, p 2-2. Subject to exceptions not at issue here, 'a child shall not be placed in a home for the purpose of adoption until an order terminating parental rights has been entered pursuant to [the Michigan Adoption Code, MCL 710.21 *et seq.*] or [the Michigan [J]uvenile [C]ode, MCL 712A.1 *et seq.*] and the court has formally approved placement under [MCL 710.51].' [MCL 710.41(1).]
>
> Unless there is parental consent to the adoption, an adoption petition must be accompanied by, among other things, 'a copy of each release or order terminating parental rights over the child having a

> bearing upon the authority of a person to execute the consent to adoption.' MCL 710.26(1)(a)." *Handorf I*, 285 Mich App at 386-387.

Additionally, the Michigan Supreme Court clarified in *In re Handorf* (*Handorf II*), 485 Mich 1052 (2010), that the Court of Appeals' decision in *Handorf I*, 285 Mich App 384 (2009), "[does not stand] for the proposition that guardians cannot consent to adoption[;]" rather, the appointment of a guardian does not provide the guardian with authorization to unilaterally consent to a child's adoption in the absence of a termination of parental rights. However, a guardian may consent to a child's adoption once the guardian obtains authority from the court to execute the consent (MCL 710.43(5)) if:

> (1) the parents' rights have already been terminated (MCL 710.41(1));
>
> (2) the parents consent to an adoption (MCL 710.26(1)(a)); or
>
> (3) the parents have released their rights to the child and do not intend to exercise any parental rights over that child (MCL 710.44(6)). *Handorf II*, 485 Mich at 1053.

"The Court of Appeals' decision [in *Handorf I*] does nothing to alter the authority of a guardian, acting in loco parentis, to consent to a child's adoption in these situations." *Handorf II*, 485 Mich at 1053.

3. Child Over 14 Years Old

"If the child to be adopted is over 14 years of age, that child's consent is necessary before the court may enter an order of adoption."[46] MCL 710.43(2). See Section 6.7 for a detailed discussion of adoption orders.

4. Adult Adoptee

"If the individual to be adopted is an adult, the individual's consent is necessary before the court may enter an order of adoption, but consent by any other individual is not

[46] See the SCAO form *Consent to Adoption by Adoptee*.

required."[47] MCL 710.43(3). See MCL 710.22(j), which defines a child as "an individual less than 18 years of age."

5. Court

The court or a Tribal court with permanent custody over a child may consent to the child's adoption.[48] MCL 710.43(1)(c).

6. Department or Child Placing Agency

Once a child has been released[49] or permanently committed to the department or a child placing agency, the authorized representative of the department or his or her designee, or a child placing agency may consent to the child's adoption.[50] MCL 710.43(1)(b); MCL 710.43(1)(d).

The superintendent of the Michigan Children's Institute (MCI) or his or her designee is authorized to consent to the adoption of any child who has been committed to the MCI. MCL 400.209(1).

7. Foreign Child Placing Agency or Court

A child placing agency or court in another state or country that has authority to consent to a child's adoption may do so. MCL 710.43(1)(g).

D. Required Documents for Consent

1. Verified Statement

In a direct placement, a verified statement must be submitted with a parent's or guardian's consent.[51] MCL 710.44(5); MCL 710.44(8)(c). See Section 10.5 for a detailed discussion of a parent's or guardian's verified statement.

2. Itemized Statement of Money Promised or Received

A parent or guardian must indicate in the verified statement that he or she "has not received or been promised any money

[47] See the SCAO form *Consent to Adoption by Adoptee*.

[48] See the SCAO form *Consent to Adoption by Agency/Court*.

[49] See Section 2.2 for information on releases.

[50] See the SCAO form *Consent to Adoption by Agency/Court*.

[51] See the SCAO form *Statement to Accompany Consent in Direct Placement*.

or anything of value for the release of the child," unless it is considered a lawful payment, in which case the parent must file an itemization of the lawful payment with the consent.[52] MCL 710.44(5)(c); see also MCL 710.54(1)(c) (generally prohibiting compensation for obtaining a release).

E. Executing a Consent

"Except as otherwise provided in [MCL 710.44], the consent required by [MCL 710.43] shall be by a separate instrument executed before the judge having jurisdiction or, at the court's direction, before another judge of the family division of circuit court in this state. A consent may be executed before a juvenile court referee." MCL 710.44(1). Alternatively, "the consent may be executed and acknowledged before an individual authorized by law to administer oaths" when the consent is required from:

- A person in the armed services;
- A person in prison;
- An authorized representative of the department or child placing agency (if the child is legally a ward of the department or child placing agency). MCL 710.44(2)-(3).

If the consent is accepted by a judge or referee, "a verbatim record of testimony related to execution of the consent shall be made." MCL 710.44(1).

If the child is or the court has reason to believe the child is an Indian child, ICWA and MIFPA provide additional requirements. See MCL 712B.13(1); MCL 712B.27(1). For a detailed discussion on releasing an Indian child, see Section 11.15(B).

1. Requirements When Parent's or Guardian's Consent is Necessary

"If a parent's consent to adoption is required under [MCL 710.43] or if a guardian's consent is required under [MCL 710.43(1)(e)], the consent shall not be executed until" all of the following occur:

- The completion of any court-ordered investigation.
- "[T]he judge, referee or other individual authorized in [MCL 710.44(2)] has fully explained to the parent

[52] See the SCAO form *Parent's or Guardian's Verified Accounting for Adoption Release or Direct Placement Consent*.

or guardian the legal rights of the parent or guardian and the fact that the parent or guardian by virtue of the consent voluntarily relinquishes permanently his or her rights to the child.

Note: Parental rights to a child include the rights to custody, control, services, earnings, and the right to inherit from the minor. MCL 722.2 (Status of Minors and Child Support Act); MCL 700.2103(b) (Estates and Protected Individuals Code).

- The parent is informed that "the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law."[53] MCL 710.44(6); MCR 3.804(C)(2).

2. Requirements When Adoptee's Consent is Necessary

"If the adoptee's consent to adoption is required under [MCL 710.43], the consent shall not be executed until" all of the following occur:

- The completion of any court-ordered investigation; and

- "[T]he judge or referee has fully explained to the adoptee the fact that he or she is consenting to acquire permanently the adopting parent or parents as his or her legal parent or parents as though the adoptee had been born to the adopting parent or parents." MCL 710.44(7).

F. Terminating Parental Rights After Execution of a Consent

After a consent is executed, the court must enter an order terminating the parent's, guardian's, or agency's rights over the child and approve formal placement of the child.[54] MCL 710.51(1). See Section 2.7(C) for more information on terminating parental rights after execution of an out-of-court consent.

Note: The court must not enter a termination order against a custodial parent married to the petitioner in a

[53] "Failure to provide required notice under [MCR 3.804(C)] does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent." MCR 3.804(C)(3).

[54] See the SCAO form *Order Terminating Parental Rights/Rights of Person in Loco Parentis After Release or Consent*.

stepparent adoption. MCL 710.51(5). See Section 8.3 for a detailed discussion of stepparent adoptions.

However, to formally place the child in a direct placement or relative adoption after one parent or guardian has consented to the adoption, the other parent's or guardian's rights over the child must be:

(1) Voluntarily terminated under a consent to adopt;

(2) Voluntarily terminated under the Juvenile Code, see Section 2.5; or

(3) Involuntarily terminated, see Sections 2.10–2.11. See MCL 710.31(1); MCL 710.41(1).

The child will become a court ward once parental rights are terminated, unless it is a stepparent adoption or the child is being placed for adoption in Michigan by an agency of another state or country and the state's or country's law prohibits giving consent to adopt at the time of placement. MCL 710.51(3)-(4).

G. Termination of Court's Jurisdiction

Entry of an order terminating parental rights (or rights of persons in loco parentis) also terminates any court's jurisdiction over the child in any divorce or separate maintenance action. MCL 710.51(3).

H. Revocation of a Consent

After consenting to his or her child's adoption and voluntarily relinquishing his or her parental rights,

- a parent or guardian has 21 days to file a motion to set aside the termination order. MCL 710.64(1). If the parent or guardian fails to petition the court within the 21-day period, he or she does not have a due process right to a rehearing. See *In re Myers*, 131 Mich App 160, 165-166 (1983).

  Note: A court may only grant a rehearing for good cause. MCR 3.806(B). See Section 7.2 for a detailed discussion on rehearings.

- a parent or guardian has up until entry of the termination order to file a petition for withdrawal of consent.[55] MCL 710.51(3). Once the court enters the order terminating the

[55] For a discussion on revoking an out-of-court consent, see Section 2.7(E).

> parent's parental rights, the parent's or guardian's consent must not be withdrawn. *Id.*

See *In re Neagos*, 176 Mich App 406, 408, 410 (1989) (trial court lacked jurisdiction to consider the biological mother's petition to "set aside the [consent] adoption, or in the alternative, to enforce visitation" where "four years passed between the time [the] respondent[-adoptive parents] adopted the children and the time the petition to set aside was filed[, and t]he [respondent-]adoptive parents vigorously opposed the petition").

1. Consent Induced by Fraud

A consent induced by fraud may constitute sufficient cause to revoke a consent after an adoption was finalized. *In re Nord*, 149 Mich App 817, 820 (1986). In order to establish fraud, the parent must prove all of the following:

> (1) The adoptive parent made a material representation;
>
> (2) The representation was false;
>
> (3) The adoptive parent knew the representation was false, or made the representation recklessly and as a positive assertion, without any knowledge of its truth;
>
> (4) The adoptive parent made the representation with the intention that the parent act on it;
>
> (5) The parent acted in reliance on it; and
>
> (6) The parent suffered an injury. *In re Nord*, 149 Mich App at 821.

2. Appealing the Court's Denial

If a court denies a parent's or guardian's petition to revoke a consent to adopt, the parent or guardian may appeal the decision to the Court of Appeals within 21 days of the denial order. MCL 710.65. The standard of review for a court's denial of a petition to revoke a consent to adopt is an abuse of discretion. *In re Nord*, 149 Mich App 817, 821 (1986).

For additional information on appealing to the Court of Appeals, see Section 7.4.

2.7 Out-of-Court Consent in a Direct Placement

"In a direct placement, a parent or guardian may sign an out-of-court consent after the child's birth. An out-of-court consent signed under [MCL 710.44(8)] must comply with all of the [provisions set out in MCL 710.44(8).]" MCL 710.44(8). Those requirements are discussed in the following subsections.

If the parent is a minor and has not been emancipated, then the minor-parent's out-of-court consent must also be signed by the minor's parent or guardian, who must also sign the consent "in the presence of the witnesses described in this subsection."[56] MCL 710.44(8).

If a consent to adoptive placement is executed under the Adoption Code and the child is or the court has reason to believe the child is an Indian child, ICWA and MIFPA provide additional requirements. See MCL 712B.13(1); MCL 712B.27(1). For a detailed discussion on consenting to adoptive placement of an Indian child, see Section 11.15(B).

For a discussion on consent to adopt in general, see Section 2.6.

A. Timing

An out-of-court consent must not be signed until at least 72 hours after the child is born. MCL 710.44(8)(a).

An out-of-court consent may be signed before filing a petition for adoption. MCL 710.44(8)(g)

B. Required Language and Supporting Documentation

1. Required Language

"In separate paragraphs with sufficient space in the margin for a parent to place his or her initials beside each paragraph, the out-of-court consent must state all of the following:

> (*i*) I have read or had read to me each of my rights as a parent described in [MCL 710.44(8)(c)], and I understand these rights.
>
> (*ii*) I am signing the out-of-court consent as a free and voluntary act on my part, and I have been

[56] MCL 710.44(8) does not specify who must witness the signing of the consent, though several of its provisions assume that the signing was witnessed by the parent's or guardian's adoption attorney and the child placing agency. See MCL 710.44(6).

advised that I cannot be forced to sign the out-of-court consent for any reason.

(*iii*) I have not been given or promised any money or other thing of value in exchange for signing the out-of-court consent.

(*iv*) If I sign the out-of-court consent, I understand that I am giving up all of my parental rights and authorizing the court to permanently terminate all of my parental rights, unless the court allows me to revoke my out-of-court consent.[57]

(*v*) It has been explained to me and I understand the following:

(A) I am not required to sign an out-of-court consent.

(B) I may make a temporary placement of my child with the prospective adoptive parent or parents, if I have not already done so, or I may continue the temporary placement I have already made, until I choose to sign a consent in court or sign an out-of-court consent.

(C) I may request revocation of the out-of-court consent I have signed by submitting a timely written request for revocation.

(D) If I request a revocation of the out-of-court consent, I must appear before the court so the court may consider whether to grant the revocation.

(*vi*) I have been advised that I may submit a request for revocation in writing to the adoption attorney or child placing agency that witnessed the out-of-court consent not more than 5 days, excluding weekends and holidays, after the out-of-court consent was signed or I may petition the court on my own for revocation of the out-of-court consent not more than 5 days, excluding weekends and holidays, after the out-of-court consent was signed.

(*vii*) If I submit a timely request for revocation, the court may grant the request or deny the request for

[57] See Section 2.7(E) for more information on revoking an out-of-court consent.

> revocation depending on my fitness and immediate ability to properly care for the child and whether the best interests of the child would be served by the revocation." MCL 710.44(8)(d).

"The out-of-court consent must contain the contact information for both the adoption attorney representing the parent or guardian and the child placing agency that witnessed the out-of-court consent specifying where a written request for revocation may be submitted, including a postal mailing address, overnight carrier address, fax number, and electronic mail address. A request for revocation may not be submitted to the adoption attorney representing the parent or guardian or the child placing agency that witnessed the out-of-court consent by telephone or text message." MCL 710.44(8)(e).

MCL 710.44(8)(f) requires, immediately above the signature of the parent or guardian executing the out-of-court consent, the following statement to appear: "'I acknowledge that I am signing this out-of-court consent freely and voluntarily, after my parental rights have been explained to me and any questions I may have about it have been fully answered. I understand the rights I am giving up and that an order terminating my parental rights, when entered by the court, is a permanent termination of all of my parental rights.'"

2. Continuation of Support Obligation

"Before executing the consent, as part of the explanation of the parent's legal rights, the parent shall be informed that the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law." MCR 3.804(C)(2). "Failure to provide required notice under [MCR 3.804(C)] does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent." MCR 3.804(C)(3).

3. Verified Statement

A verified statement must be submitted with a parent's or guardian's out-of-court consent. MCL 710.44(5); MCL 710.44(8)(c). For a detailed discussion on a parent's or guardian's verified statement, see Section 10.5.

4. Relinquishment of Parental Rights Statement

"[T]he adoption attorney representing the parent or guardian who witnessed the out-of-court consent and a caseworker from the child placing agency who witnessed the out-of-court consent shall fully explain to the parent or guardian his or her legal rights and the fact that the parent or guardian by virtue of the out-of-court consent voluntarily relinquishes permanently his or her rights to the child." MCL 710.44(6).

The statement regarding relinquishment of parental rights must include all of the following:

> "(*i*) The right to have or to seek care and custody of the child.
>
> (*ii*) The right to have or to seek parenting time with the child.
>
> (*iii*) The right to inherit from the child or have the child inherit from the parent.
>
> (*iv*) The right to services and earnings of the child.
>
> (*v*) The right to determine the child's schooling, religious training, and parenting practices." MCL 710.44(8)(c).

C. Terminating Parental Rights After Execution of an Out-of-Court Consent

After an out-of-court consent is signed, "not sooner than 5 days, excluding weekends and holidays, after the out-of-court consent was signed, the court shall issue an order terminating the rights of the parent or guardian to that child." MCL 710.44(6).

The court must serve the parent or guardian with a copy of the termination order, an advice of rights,[58] a pamphlet on release of adoption information, and a parent's consent/denial to the release of identifying information. See MCL 710.27a(4). See Chapter 9 for a detailed discussion of releasing information.

> **Note:** The court must inform each parent that unless he or she files a statement with the central adoption registry denying the release of information, there is a presumption of consent to release information

[58] See the SCAO form, *Advice of Rights After Order Terminating Parental Rights (Adoption Code)*, or *Advice of Rights After Order Terminating Parental Rights to Indian Child (Adoption Code)*.

specifying the biological parent's name at the time of parental termination and the biological parent's current name and address. MCL 710.27a(4). The court must also explain "the parent's right to file, update, or revoke the denial at any time[.]" *Id*.

D. Termination of Court's Jurisdiction

Entry of an order terminating parental rights (or rights of persons in loco parentis) also terminates any court's jurisdiction over the child in any divorce or separate maintenance action. MCL 710.51(3).

E. Revocation of Out-of-Court Consent

A petition to revoke an out-of-court consent may be filed by the parent or guardian who signed the consent. MCL 710.44(9). For additional discussion on revocation of a consent to adopt in general, see Section 2.6(H).

1. Filing Petition

"[A] parent or guardian who has signed an out-of-court consent but wishes to request revocation of the out-of-court consent shall submit a request for revocation to the adoption attorney representing the parent or guardian or the child placing agency that witnessed the out-of-court consent not more than 5 days, excluding weekends and holidays, after the out-of-court consent was signed. The request for revocation from the parent or guardian must be submitted in writing by the parent or guardian who signed the out-of-court consent to the adoption attorney representing the parent or guardian or a caseworker from the child placing agency that witnessed the out-of-court consent." MCL 710.44(9).

"The request for revocation is timely if delivered to the adoption attorney or a caseworker from the child placing agency not more than 5 days, excluding weekends and holidays, after the out-of-court consent was signed. Upon receipt of a timely request for revocation, the adoption attorney or the child placing agency receiving the request for revocation shall assist the parent or guardian in filing the petition to revoke the out-of-court consent with the court as soon as practicable[,]" or the "parent or guardian may file this petition with the court on his or her own . . . not more than 5 days, excluding weekends and holidays, after the out-of-court consent was signed." MCL 710.44(9).

2. Hearing on Petition

"If a petition to revoke an out-of-court consent is filed with the court, timely notice of revocation does not immediately result in the return of the child to the parent or guardian." MCL 710.44(11). "The court in which the out-of-court consent was filed may deny the request for revocation under [MCL 710.44(11) and MCL 710.44(12)]." MCL 710.44(10).

"A hearing before a judge is required to determine all of the following unless the adoptive parent or parents agree to the revocation:

> (a) Whether the request for revocation was given in a timely and proper manner.
>
> (b) Whether good cause exists to determine that the out-of-court consent was not signed voluntarily. If the court finds that the out-of-court consent was not signed voluntarily, the out--of-court consent is invalid and custody shall be returned to the parent or guardian. If the court finds that the out-of-court consent was signed voluntarily, the court shall proceed under subdivision (c).
>
> (c) Whether the best interest of the child will be served by any of the following:
>
> > (*i*) Returning custody of the child to the parent or guardian.
> >
> > (*ii*) Continuing the adoption proceeding commenced or intended to be commenced by the adoptive parent or parents.
> >
> > (*iii*) Disposition appropriate to the child's welfare as authorized by [MCL 712A.18] under an ex parte order entered by the court." MCL 710.44(11).

"In determining the best interest of the child . . ., the court shall determine if the parent or guardian seeking revocation is fit and immediately able to properly care for the child if the court returned the child to the parent or guardian." MCL 710.44(12).

a. Court Finds Parent or Guardian Fit

If the court determines the parent or guardian seeking revocation of an out-of-court consent is fit and

immediately able to properly care for the child if the court returned the child to the parent or guardian, the court must determine the best interest of the child by considering, evaluating, and determining the sum total of the following factors:

> "(a) The child's age and length of time the parent or guardian seeking revocation has had physical custody of the child so that significant love, affection, and other emotional ties exist between the parent or guardian and the child and whether during that time the child has lived in a stable, satisfactory environment.
>
> (b) The capacity and disposition of the prospective adopting individual or individuals and the parent or guardian seeking revocation to give the child love, affection, and guidance, and to educate and create a milieu that fosters the child's religion, racial identity, and culture.
>
> (c) The capacity and disposition of the prospective adopting individual or individuals and the parent or guardian seeking revocation to provide the child with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the state law in place of medical care, and other material needs.
>
> (d) The permanence as a family unit of the prospective adopting individual or individuals and the parent or guardian seeking revocation.
>
> (e) The moral fitness of the prospective adopting individual or individuals and the parent or guardian seeking revocation.
>
> (f) The mental and physical health of the prospective adopting individual or individuals and the parent or guardian seeking revocation.
>
> (g) The home, school, and community record of the child.

(h) The child's reasonable preference, if the child is 14 years of age or less and if the court considers the child to be of sufficient age to express a preference.

(i) The ability and willingness of the prospective adopting individual or individuals to adopt the child's siblings.

(j) Any other factor considered by the court to be relevant to a particular prospective adoptive placement or to a revocation of an out-of-court consent." MCL 710.44(12).

b. Court Finds Parent or Guardian Not Fit

"If the court determines that the parent or guardian is not fit and immediately able to properly care for the child, the court shall deny the revocation." MCL 710.44(12).

2.8 Withholding Consent

When a child is committed to a child placing agency, released to the department, or in the permanent custody of the court, that entity must consent to the child's adoption. See MCL 710.43(1)(b)-(d). If the child placing agency, the department, or the court withholds its consent to the adoption, the adoptive parent may file a motion claiming that consent is arbitrarily and capriciously being withheld. MCL 710.45(2). See Section 7.3 for a detailed discussion.

2.9 Notice of Intent to Consent to Adoption of Expected Child

"In order to provide due notice at the earliest possible time to a putative father who may have an interest in the custody of an expected child or in the mother's intended . . . consent to adoption of the expected child, and in order to facilitate early placement of a child for adoption, a woman pregnant out of wedlock may file with the court an ex parte petition which evidences her intent . . . to consent to the child's adoption[.]"[59] MCL 710.34(1). See Section 3.19 for a detailed discussion of identifying putative fathers.

[59] See the SCAO form *Petition to Issue Notice of Intent to Release or Consent*.

A. Petition Requirements

The ex parte petition must be verified and include all of the following information:

> (1) The approximate date and location of the child's conception.
>
> (2) The expected date of the mother's confinement.
>
> (3) The name(s) of the alleged putative father(s).[60]
>
> (4) A request that the court inform the putative father of his right to file a notice of intent to claim paternity under MCL 710.33.[61] MCL 710.34(1).

B. Issuance of Notice

"Upon the filing of the petition, the court shall issue a notice of intent to . . . consent, which notice shall be served upon the putative father by any officer or person authorized to serve process of the court. Proof of service shall be filed with the court." MCL 710.34(1). See MCR 3.802(A)(1), which also requires the notice of intent to consent under MCL 710.34(1) to "only be served by personal service by a peace officer or a person authorized by the court."

The notice of intent to consent form must be approved by the State Court Administrator and contain all of the following information:[62]

> "(a) Indicate the approximate date and location of conception of the child and the expected date of confinement of the mother.
>
> (b) Inform the putative father of his right under [MCL 710.33(1)) to file a notice of intent to claim paternity before the birth of the child.
>
> (c) Inform the putative father of the rights to which his filing of a notice of intent to claim paternity will entitle him under [MCL 710.33(3)].
>
> (d) Inform the putative father that his failure to file a notice of intent to claim paternity before the expected date of confinement or before the birth of the child,

[60] "The petition may allege more than 1 putative father where circumstances warrant." MCL 710.34(1).

[61] For a detailed discussion on filing a notice of intent to claim paternity under MCL 710.33, see Section 3.18.

[62] See the SCAO form *Notice of Intent to Release or Consent*.

> whichever is later, shall constitute a waiver of his right to receive the notice to which he would otherwise be entitled under [MCL 710.33(3)] and shall constitute a denial of his interest in custody of the child, which denial shall result in the court's termination of his rights to the child." MCL 710.34(2)-(3). See Section 3.18 for a detailed discussion on filing a notice of intent to claim paternity under MCL 710.33.

Part 2: Involuntary Termination

The court may involuntarily terminate a parent's parental rights over a child under the Adoption Code, MCL 710.21 *et seq.*, or the Juvenile Code, MCL 712A.1 *et seq*. See Sections 2.10 and 2.11, respectively, for more information. For overview of the adoption process in involuntary proceedings, see the Michigan Judicial Institute's flowchart, *Involuntary Termination of Parental Rights*.

Because the procedures for involuntary termination of a putative father's parental rights differ from the procedures followed for involuntary termination of a legal father's parental rights, it is important to establish the type of father involved. Briefly, the types of fathers are:

(1) A legal father.

(2) A putative father.

(3) A natural father under the equitable parent doctrine. Once the court recognizes a man as a natural father under the equitable-parent doctrine, that status is a permanent status and he possesses all of the rights and responsibilities of a legal parent. *York v Morofsky*, 225 Mich App 333, 337 (1997). For additional information on the types of fathers, see Section 3.2.

2.10 Termination Pursuant to Adoption Code[63]

Under the Adoption Code, a mother or a legal father's parental rights may only be involuntary terminated under a stepparent adoption. See MCL 710.51(6); MCR 3.903(A)(7); MCR 3.903(A)(18). Involuntary termination of a putative father's parental rights under the Adoption Code may occur under MCL 710.37 (uninterested putative father), MCL

[63]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

710.39 (interested putative father), or MCL 710.51(6) (stepparent adoption).

If an involuntary termination of parental rights occurs under the Adoption Code and the child is or the court has reason to believe the child is an Indian child, ICWA and MIFPA provide additional requirements. See 25 USC 1912; MCL 712B.15. For a detailed discussion on involuntary termination of a parent's parental rights over an Indian child, see Section 11.16(B).

A. Termination of a Putative Father's Parental Rights Under §§ 37 and 39

A putative father has a due process right to notice and a hearing before his parental rights are terminated. *In re Kozak*, 92 Mich App 579, 581-584 (1979) (finding that *res judicata* did not bar the respondent-putative father from filing a request for a rehearing on termination of his parental rights and application of his request for custody of the child under MCL 710.39 three months after the court terminated his parental rights under MCL 710.37(2) where the putative father "claim[ed] he received no notice of the court proceedings, and that the child's mother and her husband had given false testimony to the court concerning the identity of the child's father").

When a putative father appears at the termination hearing, he will either request custody per MCL 710.39(1), or deny his interest in custody per MCL 710.37(1)(a). *In re TMK*, 242 Mich App 302, 305 (2000) (putative father's failure to properly object to the termination of his parental rights by requesting custody as required by MCL 710.39(1) constituted "a denial of interest in custody and permitted the court to terminate his parental rights under MCL 710.37(1)(a)").

1. Uninterested Putative Father – MCL 710.37

a. Identity/Whereabouts Are Known

"If the court has proof that the person whom it determines pursuant to [MCL 710.36] to be the father of the child was timely served with a notice of intent to release or consent pursuant to [MCL 710.34(1)][64] or was served with or waived the notice of hearing required by [MCL 710.36(3)],[65] the court may permanently terminate

[64] MCL 710.34(1) permits a mother, pregnant with a child conceived out of wedlock, to file an ex parte petition seeking a notice of intent to consent or release the expected child for adoption. Once the court issues a notice of intent to release or consent, the notice of intent must be served on the putative father. MCL 710.34(1). For additional information, see Sections 2.4 (release) and 2.9 (consent).

the rights of the putative father under any of the following circumstances:

> (a) The putative father submits a verified affirmation of his paternity and a denial of his interest in custody of the child.
>
> (b) The putative father files a disclaimer of paternity. For purposes of this section the filing of the disclaimer of paternity shall constitute a waiver of notice of hearing and shall constitute a denial of his interest in custody of the child.
>
> (c) The putative father was served with a notice of intent to release or consent in accordance with [MCL 710.34(1)], at least 30 days before the expected date of confinement specified in that notice but failed to file an intent to claim paternity either before the expected date of confinement or before the birth of the child.
>
> (d) The putative father is given proper notice of hearing in accordance with [MCL 710.36(3)] or [MCL 710.36(5)] but either fails to appear at the hearing or appears and denies his interest in custody of the child." MCL 710.37(1).

"If the parental rights of a parent whose identity and whereabouts are known are involuntarily terminated, the court shall notify the parent, either orally or in a writing, that the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law." MCR 3.809(A). "Failure to provide required notice under [MCR 3.809] does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent." MCR 3.809(C).

If the court denies the termination petition, the court must indicate the reasons for the denial on the record or in writing. MCL 710.63.

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[65] Once the mother files a petition to identify a putative father and the court determines a hearing will be held, the petition and notice of hearing must be served on the putative father. MCR 3.802(A)(2). For additional information, see Section 3.19.

b. Identity/Whereabouts Are Unknown

When a child's mother cannot identify or locate the putative father's identity or whereabouts after a diligent search, she "must file proof of the efforts made to identify or locate the father in a statement verified under MCR 1.109(D)(3).[66] No further service is necessary before the hearing to identify the father and to determine or terminate his rights." MCR 3.802(B)(1). See Section 3.19 for additional information.

At the hearing, the court must take evidence regarding the mother's attempt to identify or locate the putative father. MCL 710.37(2); MCR 3.802(B)(2).

Reasonable attempt to identify or locate. If the court finds that a reasonable attempt was made to identify and locate the putative father, the court may terminate the putative father's parental rights if any of the following circumstances exist:

> "(a) The putative father, whose identity is not known, has not made provision for the child's care and did not provide support for the mother during her pregnancy or during her confinement.
>
> (b) The putative father, whose identity is known but whose whereabouts are unknown, has not provided support for the mother, has not shown any interest in the child, and has not made provision for the child's care, for at least 90 days preceding the hearing required under [MCL 710.36]." MCL 710.37(2); MCR 3.802(B)(2).

No reasonable attempt to identify or locate. If the court finds that the child's mother did not make a reasonable attempt to identify or locate the putative father, the court must adjourn the hearing and order one of the following:

> (a) The child's mother to diligently attempt to identify or locate the putative father and properly serve him.

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[66] The affidavit or declaration may be verified by: "(a) oath or affirmation of the party or of someone having knowledge of the facts stated; or (b) except as to an affidavit, including the following signed and dated declaration: 'I declare under the penalties of perjury that this _____ has been examined by me and that its contents are true to the best of my information, knowledge, and belief.' . . . ." MCR 1.109(D)(3). See the SCAO form *Declaration of Inability to Identify/Locate Father*.

(b) The child's mother to serve the putative father in an alternative manner except by publication. MCL 710.36(7); MCR 3.802(B)(2).

If the court denies the termination petition, the court must indicate the reasons for the denial on the record or in writing. MCL 710.63.

2. Interested Putative Fathers – MCL 710.39

MCL 710.39 "classifies putative fathers into two groups, each having a different level of legal protection for their parental rights[:]"

(1) A *non-established custodial father* ("do nothing" father) who is a putative father that expresses an interest in the child but has not established a custodial relationship with the child or provided substantial and regular support or care to the mother or the child.

(2) The *established custodial father* ("do something" father) is a putative father who has established a custodial and/or support relationship with the child. *In re BKD*, 246 Mich App 212, 216, 221 (2001), citing MCL 710.39(1)-(2); see also *In re Baby Boy Barlow*, 404 Mich 216, 229 (1978).

Note: MCL 710.39 does not violate the equal protection rights of unwed fathers by placing them into categories or distinguishing them from mothers or married fathers when determining which standard to apply for terminating parental rights.[67] *In re BKD*, 246 Mich App 212, 225-226 (2001) (no equal protection violation for terminating the putative father's parental rights under MCL 710.39(1) where the putative father had "subjective doubts about his paternity"); *In re RFF*, 242 Mich App 188, 209-211 (2000) (no equal protection violation for terminating the putative father's parental rights under MCL 710.39(1) where the child's mother deceived the putative father about his paternity).

[67] Note, however, that application of a gender-based distinction between an unwed mother and an unwed father *in all circumstances* where adoption of a child is at issue, will violate the father's equal protection rights. *Caban v Mohammed*, 441 US 380, 392-393, 394 (1979).

"Admitting paternity does not, by itself, entitle a putative father to the protections of [MCL 710.39(2)]." *In re BKD*, 246 Mich App at 224 (2001). Rather, he must establish a custodial or support relationship. See MCL 710.39(1)-(2). A custodial relationship is an established relationship between a parent and his or her child whereby "the parent exercises responsibility for the care, supervision, and upbringing of the child." *In re Lang*, 236 Mich App 129, 138 (1999).

A putative father with an established custodial relationship with his child has a higher constitutional protection than a putative father who fails to take the necessary steps of establishing a relationship with his child beyond a mere biological link. *Lehr v Robertson*, 463 US 248, 261, 266-268 (1983). Even where a mother deceives a putative father about her pregnancy, the putative father must have provided substantial and regular care and support to the mother during pregnancy or to the mother or child after the child's birth in order to merit the greater protections afforded putative fathers with an established relationship. *In re RFF*, 242 Mich App 188, 199-201 (2000) (refusing to find a deceived father exception to the substantial and regular care and support requirement in MCL 710.39(2)).

a. Non-Established Custodial Father ("Do Nothing" Father)

MCL 710.39(1) "determines the rights of putative fathers who have failed to establish a custodial [relationship with the child] or [provide substantial and regular] support[or care to the mother or the child] according to a less rigorous best interests standard." *In re BKD*, 246 Mich App 212, 222 (2001).

"If the putative father does not come within the provisions of [MCL 710.39(2)[68]], and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him.[69] If the court finds that it would not be in the best interests of the child to grant custody to the

[68] See Section 2.10(A)(2)(b) for additional information on *established custodial fathers* (do something fathers) under MCL 710.39(2).

[69] Automatically denying an unwed father a hearing regarding his fitness as a parent before removing the child from his care is a violation of his equal protection rights. *Stanley v Illinois*, 405 US 645, 649-650 (1972).

putative father, the court shall terminate his rights to the child." MCL 710.39(1). See *In re LMB*, 504 Mich 869, 869 (2019) (where "[t]he evidence related to the [best interest of the child] factors in MCL 710.22(g) at the [MCL 710.39] hearing established that it would not have been in the best interests of the child to grant custody to [the putative father,]" "[t]he trial court abused its discretion by declining to terminate [the putative father's] parental rights following that hearing").

Once the putative father's parental rights are terminated, the court must notify the putative father, "either orally or in a writing, that the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law." MCR 3.809(A).

> **Note:** When determining whether it would be in the child's best interests to grant a putative father custody, MCL 710.39(1) clearly requires the court to examine the putative father's fitness and ability to care for the child without regard to the fitness or ability of any prospective adoptive parents. *In re Dawson*, 232 Mich App 690, 698-699 (1998).

If the court does not terminate the putative father's parental rights under MCL 710.39(1), the court must do all of the following:

> "(a) Terminate the temporary placement made under [MCL 710.23d].
>
> (b) Return custody of the child to the mother or the guardian unless the mother's parental rights have been terminated[70] . . . and are not restored under [MCL 710.62].
>
> (c) Deny the order of adoption and dismiss the pending adoption proceeding." MCL 710.39(3).

[70] "The fact that the mother or guardian executed or proposed to execute a release or consent relinquishing the mother's parental rights or the guardian's rights to the child and sought termination of the putative father's parental rights under [MCL 710.36, MCL 710.37, or MCL 710.39] shall not be used against the mother or guardian in any proceeding under the child custody act of 1970, 1970 PA 91, MCL 722.21 to [MCL 722.31], after the court has completed the provisions in [MCL 710.39(3)]." MCL 710.39(4).

If the court denies the termination petition, the court must indicate the reasons for the denial on the record or in writing. MCL 710.63.

If the mother's parental rights have been terminated and are not restored under MCL 710.62, and the court grants the putative father custody, the court must issue an order legitimating the child. MCL 710.39(5).

b. Established Custodial Father ("Do Something" Father)

MCL 710.39(2) "determines the rights of putative fathers who have established a relationship [with the child or provided substantial and regular support or care to the mother or the child] according to the more rigorous standard applied to mothers and married fathers." *In re BKD*, 246 Mich App 212, 222 (2001), citing MCL 710.39(2).

"If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance with the putative father's ability to provide support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with [MCL 710.51(6), stepparent adoptions] or [MCL 712A.2, child protective proceedings]."[71] MCL 710.39(2). See *In re MGR*, 504 Mich 852, 855 (2019) ("The trial court abused its discretion when it ruled that [the putative father] was entitled to the protections of MCL 710.39(2) because the record d[id] not support a finding that he provided substantial and regular support or care for the birth mother during her pregnancy or the birth mother or child during the 90 days before he received service of the notice of the [MCL 710.39] hearing, despite having the ability to do so.").

"The filing of a notice of intent to claim paternity is not 'support or care' for the purposes of MCL 710.39(2)." *In re Dawson*, 232 Mich App 690, 695 (1998) (finding that "[n]othing in [MCL 710.33] or [MCL 710.39] reflects that the Legislature intended the filing of a notice of intent to

[71] See Section 2.10(B) for a detailed discussion of termination pursuant to stepparent adoptions, and Section 2.11 for a detailed discussion of termination pursuant to the Juvenile Code.

claim paternity to constitute support or care for the purposes of [MCL 710.39(2)]").[72]

"[T]he word 'support' in [MCL 710.39(2)] includes court-ordered support[.]" *In re Schnell*, 214 Mich App 304, 311-312 (1995) (because "[n]othing in the statutory language [of MCL 710.39(2)] suggests that the Legislature intended that only a certain kind or quality of support be considered in determining whether a father has 'provided support' under [MCL 710.39(2), and] . . . the court-ordered nature of the support is irrelevant in determining whether [the putative father] 'provided support' within the meaning of [MCL 710.39(2),]" the trial court erred in terminating the putative father's parental rights under MCL 710.39(1) where the putative father had provided support within the meaning of MCL 710.39(2) under a court income withholding order).[73]

B. Stepparent Adoption

A parent's parental rights may be involuntarily terminated in the course of a stepparent adoption. A stepparent adoption occurs when a custodial parent marries and his or her spouse petitions to adopt the custodial parent's child and terminate the other parent's parental rights.[74] MCL 710.51(6). The other parent may be any one of the following:

(1) A divorced parent;

(2) A father that has acknowledged paternity, see Section 3.4; or

(3) A putative father who has an established custodial relationship with his child or has provided regular

[72] Note that MCL 710.39(2) has been amended since the *Dawson* case was published to specify that the support or care must be "substantial and regular" and "in accordance with the putative father's ability to provide support or care[.]" It is unclear if or how these changes would impact this holding.

[73] Note that MCL 710.39(2) has been amended since the *Schnell* case was published to specify that the support or care must be "substantial and regular" and "in accordance with the putative father's ability to provide support or care[.]" It is unclear if or how these changes would impact this holding.

[74] See the SCAO form *Petition for Adoption*.

support or care to the mother or child,[75] see Section 2.10(A)(2)(b). MCL 710.51(6).

"[I]f a parent having custody of the child according to a court order subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent[76] if both of the following occur:

> "(a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child 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. A child support order stating that support is $0.00 or that support is reserved shall be treated in the same manner as if no support order has been entered.
>
> (b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition." MCL 710.51(6).

"[A] parent is only entitled to petition for termination under MCL 710.51(6) if the petitioning parent, at the time of the petition, has custody of the child who is at issue according to a court order." *In re AGD*, 327 Mich App 332, 353 (2019) (trial court properly denied the mother's and stepfather's request to terminate the parental rights of the minor child's legal father under the stepparent adoption statute, MCL 710.51(6), where "[t]here [was] no dispute that petitioner mother, although she had custody of the child, did not have custody according to a court order when petitioners filed their petition under MCL 710.51(6) and when the trial court ruled on that petition").[77]

During the pendency of a stepparent adoption proceeding, grandparents of the adoptee may seek an order for grandparenting time pursuant to MCL 722.27b of the Child Custody Act. MCL 710.60(3).

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[75] "[T]his Court must look to MCL 710.39(2) to decide who qualifies as a 'putative father' for purposes of MCL 710.51(6). *In re AGD*, 327 Mich App 332, 350 (2019) ("MCL 710.39 acts to determine the parental rights of a putative father '[w]hen the parents of a child are unmarried[.]' This is necessary because, although a putative father is one who, by definition, has not legally established his paternity, 'the Due Process and Equal Protection Clauses bar the state from terminating the parental rights of the father of an illegitimate child without the same showing of unfitness that would be necessary to terminate the rights of a mother or a married father[.]'") (internal citations omitted).

[76] See the SCAO form *Order Terminating Parental Rights (Stepparent Adoption)*.

For additional information on stepparent adoptions, see Section 8.3.

2.11 Termination Pursuant to Juvenile Code[78]

The court may involuntarily terminate a parent's parental rights as a result of child protective proceedings under the Juvenile Code. MCL 712A.19b(3).

A discussion of the involuntary termination of parental rights under the Juvenile Code is outside the scope of this benchbook. See the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*.

2.12 Special Notice Provisions for Incarcerated Parties

Where a party is incarcerated and under the jurisdiction of the Michigan Department of Corrections, that party is entitled to specific notice requirements. See MCR 2.004. See also *In re BAD*, 264 Mich App 66, 75-76 (2004) (finding MCR 2.004 does not apply to departments of correction in other states or jurisdictions).

Specifically, MCR 2.004 applies to:

(1) Domestic relation cases that involve minor children;

(2) Cases involving custody, guardianship, neglect, or foster care placements of minor children; and

(3) Cases involving the termination of parental rights. MCR 2.004(A).

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[77] The Court of Appeals concluded that it was "not bound to follow *In re AJR*[, 496 Mich 346 (2014)]'s construction of former MCL 710.51(6) because that construction was clearly superseded by 2016 PA 143[(effective September 5, 2016)]. Importantly, 2016 PA 143 directly amended the operative statutory language [of MCL 710.51(6)] that our Supreme Court relied upon in deciding *In re AJR*: the phrase '*the* parent having *legal* custody of the child' was changed to '*a* parent having custody of the child *according to a court order*[.]' As held in *In re AJR*, 496 Mich at 348-349, the former version of MCL 710.51(6) required the parent to have 'sole legal custody' of the child. However, the new language is clear that only 'a' parent, rather than 'the' parent, must have custody according to a court order—a much broader requirement. Consequently, 2016 PA 143 clearly superseded *In re AJR*'s construction of MCL 710.51(6), and this Court is therefore no longer bound to follow that construction." *In re AGD*, 327 Mich App 332, 341-342 (2019) (fourth alteration in original) ("this Court remains bound to follow the [Michigan] Supreme Court's interpretation of a since-amended statute if the intervening amendment merely '*undermined*' the foundations of the [Michigan] Supreme Court's prior decision, but not if the intervening amendment '*clearly* . . . superseded' the [Michigan] Supreme Court's interpretation"), quoting *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191-192 (2016).

[78] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

A. Petitioner's Responsibility

A petitioner must:

(1) Contact the Department of Corrections to confirm that the party is indeed incarcerated;

(2) Confirm the incarcerated party's prison identification number and location;

(3) Serve the incarcerated party;

(4) File proof of service with the court;

(5) File the petition or motion with the court stating that the party is incarcerated and providing the incarcerated party's prison identification number and location; and

(7) Ensure that the petition's or motion's caption states that a "telephonic or video hearing is required by this rule[.]" MCR 2.004(B).

B. Court's Responsibility

"When all the requirements of [MCR 2.004(B)] have been accomplished to the court's satisfaction, the court shall issue an order requesting the department, or the facility where the [incarcerated] party is located if it is not a department facility, to allow [the incarcerated party] to participate with the court or its designee by way of a noncollect and unmonitored telephone call or by videoconferencing technology in a hearing or conference, including a friend of the court adjudicative hearing or meeting. The order shall include the date and time for the hearing or conference, and the [incarcerated party's] name and prison identification number, and shall be served at least 7 days before the hearing or conference by the court upon the parties and the warden or supervisor of the facility where the incarcerated party resides." MCR 2.004(C).

"The initial telephone call or videoconference shall be conducted in accordance with [MCR 2.004(E)]. If the [incarcerated party] indicates an interest in participating in subsequent proceedings following an initial telephone call or videoconference pursuant to [MCR 2.004(E)], the court shall issue an order in accordance with this subrule for each subsequent hearing or conference." MCR 2.004(C).

"The purpose of the initial telephone call or videoconference with the incarcerated party, as described in [MCR 2.004(C)], 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 by way of additional telephone calls or videoconferencing technology as permitted by the Michigan Court Rules, 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).

C. Documentation and Correspondence to Incarcerated Party

"All court documents or correspondence mailed to the incarcerated party concerning any matter covered by this rule shall include the name and the prison number of the incarcerated party on the envelope." MCR 2.004(D).

D. 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, a court may take immediate action it deems necessary to temporarily protect a minor child. *Id.*

An incarcerated party must be offered the opportunity to participate in the proceedings through a telephone call or video conference. See MCR 2.004(F). The opportunity must be offered for each proceeding, and "participation through 'a telephone call' 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*, 486 Mich 142, 154-155 (2010) (noting that "[e]ach proceeding generally involves different issues and decisions by the court").

"[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).

E. Sanctions

"The court may impose sanctions if it finds that an attempt was made to keep information about the case from an incarcerated party in order to deny that party access to the courts."MCR 2.004(G).

Chapter 3: Identifying the Child's Father

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3.1 Overview of Chapter

One of the most important steps in the adoption process is identifying a child's father or determining he cannot be found. In identifying the father, it is important to note the type of father involved because the type of father involved will dictate which procedure the court must follow to properly proceed with an adoption. This chapter addresses the different types of fathers found in the law.

This chapter also provides an overview on the ways to establish paternity, the ways to obtain relief from paternity, and the procedures used to identify a putative father.

3.2 Types of Fathers

It is important to establish the type of father involved because the type of father will dictate which procedures the court must follow to properly proceed with an adoption.

The different types of fathers found in the law relevant to adoption proceedings are:

(1) An acknowledged father;

(2) An affiliated father;

(3) An alleged father;

(4) A genetic father;

(4) A legal father;

(5) A natural father under the equitable-parent doctrine;

(6) A presumed father; and

(7) A putative father.

Part 1: Establishing Paternity

In order to establish paternity, the court must determine the child's 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. See MCR 3.903(A)(7). If the man is married to the child's mother at any time between the child's conception to the child's birth, the child is presumed to be an issue of the marriage. See *In re CAW*, 469 Mich 192, 199 (2003); *Serafin v Serafin*, 401 Mich 629, 636 (1977). However, under the Revocation

of Paternity Act, MCL 722.1441, "[i]f a child has a presumed father, a court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity if an action is filed by the child's mother[, the presumed father, the alleged father, or, if the child is being supported by public assistance, the DHHS.]"[1] A man fathering a child out of wedlock may be considered the child's legal father under an order of filiation, judgment of paternity, or through an acknowledgment of paternity. See MCR 3.903(A)(7)(c); MCR 3.903(A)(7)(e).

Statutes that "deal[] . . . with the determination of a child's legal father" include the Acknowledgment of Parentage Act, MCL 722.1001 *et seq.*, the Paternity Act, MCL 722.711 *et seq.*, and the Revocation of Paternity Act, MCL 722.1431 *et seq.*,[2] and courts should "construe these statutes in *pari materia*."[3] *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 *In re E R Moiles (Moiles II)*, 495 Mich 944 (2014).[4]

For a discussion on establishing paternity under the Paternity Act, see Section 3.3, under the Acknowledgment of Parentage Act, see Section 3.4, and under the Revocation of Paternity Act, see Section 3.5.

3.3 Paternity Under the Paternity Act[5]

The following individuals have standing to file a paternity action under the Paternity Act:

(1) The child's mother.

(2) The child's father.[6]

(3) The child.[7]

---

[1] "An action may not be brought under this act if the child is under 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 this act would be in the best interests of the child." MCL 722.1443(15).

[2] Note that MCL 722.1465(b) prohibits the Genetic Parentage Act, MCL 722.1461 *et seq.*, from being used to determine paternity where "[t]he child is subject to a pending adoption proceeding under the Michigan [A]doption [C]ode, . . . MCL 710.21 to [MCL] 710.70, or if the child is subject to a pending adoption proceeding in another state."

[3] Paternity actions are "fundamentally civil in nature." *Bowerman v MacDonald*, 431 Mich 1, 16 (1988). See also *Larrabee v Sachs*, 201 Mich App 107 (1993). Paternity proceedings are governed by the court rules generally applicable in civil proceedings, unless modified by MCR 3.217 and the Paternity Act. *Larrabee v Sachs*, 201 Mich App 107, 108 (1993); MCL 722.714(1); MCR 3.217(A).

[4] For more information on the precedential value of an opinion with negative subsequent history, see our note.

[5] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[6] See Section 3.2 for a list of the different types of fathers.

Note: "It is unnecessary in any proceedings under [the Paternity Act] commenced by or against a minor to have a next friend or guardian ad litem appointed for the minor unless required by the circuit judge. A minor may prosecute or defend any proceedings in the same manner and with the same effect as if he or she were of legal age." MCL 722.714(11).

(4) The Department of Health and Human Services (DHHS) on a child's behalf when the child is supported in whole or in part (including medical assistance) by public assistance. See MCL 722.714(1); MCL 722.714(12).

"In order to have standing to seek relief under the Paternity Act, [the] plaintiff must allege that the child was born out of wedlock."[8] *Altman v Nelson*, 197 Mich App 467, 475-476 (1992). For purpose of maintaining an action under the Paternity Act,[9] the child is born out of wedlock only if:

- the child's mother was not married for the entire time from conception to the child's birth. MCL 722.711(a); *Spielmaker v Lee*, 205 Mich App 51, 58, 61 (1994) (putative father lacked standing to bring a paternity action under Paternity Act where the mother married another man two months before the child was born).

  Note: Merely alleging in a complaint that a child is born to an unmarried woman without providing any evidence to support the woman's marital status from the time of conception to the child's birth, is insufficient to prove that a child is born out of wedlock. See *Squires v Roberts*, 41 Mich App 96, 97 (1972).

- the court previously determined that the child was not an issue of that marriage before the paternity action under the Paternity Act was filed. MCL 722.711(a); *Girard v Wagenmaker*, 437 Mich 231, 235 (1991) (putative father

[7] The Paternity Act permits a child who reached the age of 18 between August 15, 1984 and June 2, 1986, to bring a paternity action. MCL 722.714(1). However, the Court in *Opland v Kiesgan*, 234 Mich App 352, 367-368 (1999), found that even if the child did not fit the age classification requirement under the Paternity Act, a child born out of wedlock has a constitutional right to bring a paternity action.

[8] MCL 722.711(a), which defines the term *child born out of wedlock* for purposes of the Paternity Act, "does not authorize a paternity action brought by a purported father, except with regard to a child born out of wedlock; that is the case regardless of the timing of the action." *Numerick v Krull*, 265 Mich App 232, 235 (2005) (despite the putative father filing a paternity action under the Paternity Act before the child's mother married another man, the child was not born out of wedlock for purposes of MCL 722.711(a) when the mother was married before the child was born).

[9] Unlike the Paternity Act, the Revocation of Paternity Act provides an alleged father with standing to maintain a paternity action if the mother is married and certain conditions are met. See Section 3.5 for more information.

> lacked standing to bring a paternity action under the Paternity Act where the child was born while the mother was married to another man and there was no prior court determination that the mother's husband was not the father); *Dep't of Social Services v Baayoun*, 204 Mich App 170, 174-175 (1994) (the DHHS, the child, and the child's mother lacked standing to bring a paternity action under the Paternity Act where the child was conceived while the mother was married to another man and there was no prior court determination that the child was not an issue of that marriage).

Identification of a child's natural father under the equitable-parent doctrine 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, 383, 388-389 (2006) ("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.").

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.[10] MCL 722.714(2).

Where a person "does not have standing to *bring* an action under the Paternity Act, he [or she] is not entitled to discovery to assist in *developing* a paternity claim." *Sprenger v Bickle*, 302 Mich App 400, 405 (2013).

A. Initiating Paternity Action

To initiate a paternity action under the Paternity Act, a complaint may be filed during a mother's pregnancy or at any time before the child reaches the age of 18. MCL 722.714(3). When a complaint is filed during a mother's pregnancy and the child is not born by the time set for trial, the defending parent must agree to proceed or the case may not continue until after the child is born. MCL 722.715(2).

The prosecuting attorney is required to initiate paternity proceedings when any of the following occur:

> (1) "[T]he county [DHHS] of the county in which the mother or alleged father resides first determines that

[10] For a discussion on an acknowledgment of parentage and revocation of the acknowledgment, see Section 3.4. For a discussion on adjudication of paternity in another state, see Section 3.7.

> she or he has physical possession of the child and is eligible for public assistance or without means to employ an attorney[.]"
>
> (2) The DHHS is the complainant.
>
> (3) The child's mother, the child, or the alleged father receives services under Title IV-D of the Social Security Act, 42 USC 651 *et seq*. MCL 722.714(4).

"The prosecuting attorney and the [DHHS] may enter into an agreement to transfer the prosecutor's responsibilities under [the 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 722.714(5).

"A proceeding under [MCL 722.714] is conducted on behalf of the state and not as the attorney for any other party." MCL 722.714(6).

1. Complaint Requirements

The complaint must be verified by oath or affirmation and contain all of the following information:

> (1) The name of the person believed to be the child's father.
>
> (2) An approximate time the child was conceived.
>
> (3) An approximate location where the child was conceived. MCL 722.714(4); MCL 722.714(7).

a. DHHS Files the Complaint

When the DHHS files a complaint on the child's behalf, the child's mother or alleged father must be added as a plaintiff and the facts stated must be based on information and belief. MCL 722.714(7); MCL 722.714(12). The complaint must be verified by the DHHS Director (or his or her designated representative) or the County DHHS Director in the county where the action is filed (or his or her designated representative). MCL 722.714(12).

b. Falsifying Father's Identity

A person who falsely identifies a man as a child's father in a complaint is guilty of a misdemeanor, unless the person is an authorized representative of the DHHS who identified the man in good faith. MCL 722.722.

2. Venue

"A complaint shall be filed in the county where the mother or child resides. If both the mother and child reside outside of this state, then the complaint shall be filed in the county where the putative father resides or is found. The fact that the child was conceived or born outside of this state is not a bar to entering a complaint against the putative father." MCL 722.714(1).

> **Note:** "MCL 722.714(1) does not expressly limit the circuit court's subject-matter jurisdiction[; r]ather, [it] concerns venue and indicates where a paternity action should be filed." *Teran v Rittley*, 313 Mich App 197, 206 (2015).

The DHHS must file its complaint in the county where the child resides. MCL 722.714(12).

3. Summons

"Upon the filing of a complaint, the court shall issue a summons against the named defendant." MCL 722.714(8). If the DHHS files the complaint, the child's mother or alleged father, being made a plaintiff to the proceedings, must also receive a summons notifying him or her of the paternity action hearing. MCL 722.714(12).

The summons must contain notification that the paternity action may determine a party's child support obligations, and custody and parenting time rights. MCL 722.714a(1).

"The summons issued under MCL 722.714 must include a form advising the alleged father of the right to an attorney as described in [MCR 3.217(C)(2)[11]], and the procedure for requesting the appointment of an attorney. The form must be served with the summons and the complaint, and the proof of service must so indicate." MCR 3.217(C)(1).

[11] For additional information on the father's right to counsel, see Section 3.3(C).

4. Service Requirements

The complaint and summons must be "served in the same manner as is provided by court rules for the service of process in civil actions." MCL 722.714(3).

MCR 2.105(A) provides that "[p]rocess may be served on a resident or nonresident individual by

> (1) delivering a summons and a copy of the complaint to the defendant personally; or
>
> (2) sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the defendant acknowledges receipt of the mail. A copy of the return receipt signed by the defendant must be attached to proof showing service under subrule (A)(2)."

MCR 2.105(B) discusses substituted service, and provides in relevant part that "[s]ervice of process may be made

> (1) on a nonresident individual, by
>
> > (a) serving a summons and a copy of the complaint in Michigan on an agent, employee, representative, sales representative, or servant of the defendant, and
> >
> > (b) sending a summons and a copy of the complaint by registered mail addressed to the defendant at his or her last known address;
>
> (2) on a minor, by serving a summons and a copy of the complaint on a person having care and control of the minor and with whom he or she resides;
>
> (3) on a defendant for whom a guardian or conservator has been appointed and is acting, by serving a summons and a copy of the complaint on the guardian or conservator[.]" MCR 2.105.

"On a showing that service of process cannot reasonably be made as provided by [MCR 2.105], the court may by order permit service of process to be made in any other manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard." MCR 2.105(I)(1).

"A request for an order under the rule must be made in a verified motion dated not more than 14 days before it is filed. The motion must set forth sufficient facts to show that process cannot be served under this rule and must state the defendant's address or last known address, or that no address of the defendant is known. If the name or present address of the defendant is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it. A hearing on the motion is not required unless the court so directs." MCR 2.105(I)(2). "Service of process may not be made under [MCR 2.105(I)] before entry of the court's order permitting it." MCR 2.105(I)(3).

If a party to a paternity action is incarcerated, special notice requirements apply. See Section 2.12 for a discussion on notice requirements for incarcerated parties.

5. Responsive Pleading

After the defendant is personally served with a complaint and summons, he or she must file a response to the complaint within 21 days. MCL 722.714(8); MCR 2.108(A)(1). If a named defendant fails to file and serve a responsive pleading within the 21-day period, the court may enter a default judgment without taking any testimony. MCL 722.714(8). See MCR 2.603 for the court rule governing defaults and default judgments.

If the defendant resides outside of Michigan or is served by registered mail, he or she must file a response to the complaint within 28 days. MCR 2.108(A)(2).

B. Court's Jurisdiction in Paternity Cases

The Family Division of the Circuit Court has sole and exclusive subject matter jurisdiction in paternity cases brought under the Paternity Act. MCL 600.1021(1)(h). A party's failure to plead or prove sufficient facts to support his or her standing to file a paternity action does not deprive a court of its jurisdiction. *Altman v Nelson*, 197 Mich App 467, 476 (1992).

"The court has continuing jurisdiction over proceedings brought under [the Paternity Act] to do any of the following:

> (a) Increase or decrease the amount fixed by the order of filiation subject to [MCL 722.717].
>
> (b) Provide for, change, and enforce provisions of the order of filiation relating to the custody or support of or parenting time with the child.

(c) Determine an action to set aside the order of filiation under the [R]evocation of [P]aternity [A]ct."[12] MCL 722.720.

C. Advice of Right to Counsel

An indigent defendant in a paternity case has the right to appointed counsel. See MCR 3.217(C)(2)."If the alleged father appears in court following the issuance of a summons under MCL 722.714, the court must personally advise him that he is entitled to the assistance of an attorney, and that the court will appoint an attorney at public expense, at his request, if he is financially unable to retain an attorney of his choice." MCR 3.217(C)(2). "If the alleged father indicates that he wants to proceed without an attorney, the record must affirmatively show that he was given the advice required by [MCR 3.217(C)(2)] and that he waived the right to counsel."[13] MCR 3.217(C)(3).

Court-appointed counsel is not required to represent any party in disputes over custody or parenting time. MCL 722.717b.

D. Competency of Parents to Testify

"Both the mother and the alleged father of the child shall be competent to testify, and if either gives evidence he or she shall be subject to cross-examination." MCL 722.715(1).

The constitutional protection against self-incrimination does not entitle a putative father to refuse to give any testimony in a paternity action where the putative father cannot show the testimony sought would incriminate him. *Larrabee v Sachs*, 201 Mich App 107, 110 (1993).

E. Excluding the General Public

"The court may exclude the general public from the room where proceedings are held, pursuant to [the Paternity Act], admitting only persons directly interested in the case, including the officers of the court, officers or public welfare agents presenting the case, and witnesses." MCL 722.715(1).

---

[12] See Section 3.17 for additional information on setting aside an order of filiation under the Revocation of Paternity Act.

[13] "If the alleged father does not appear in court following the issuance of a summons under MCL 722.714, [MCR 3.217(C)(3)] does not apply." MCR 3.217(C)(4).

F. Burden of Proof

The plaintiff in a paternity proceeding has the burden to prove paternity by a preponderance of the evidence. *Huggins v Rahfeldt*, 83 Mich App 740, 743 (1978); *Smith v Robbins*, 91 Mich App 284, 292 (1979). See also *Rivera v Minnich*, 483 US 574, 575-577 (1987) (finding that the preponderance of the evidence standard for paternity cases was constitutional).

G. Issuing Order of Filiation

"In an action under [the Paternity Act], the court shall enter an order of filiation declaring paternity and providing for the support of the child under 1 or more of the following circumstances:

> (a) The finding of the court or the verdict determines that the man is the father.
>
> (b) The defendant acknowledges paternity either orally to the court or by filing with the court a written acknowledgment of paternity.[14]
>
> (c) The defendant is served with summons and a default judgment is entered against him or her.
>
> (d) Genetic testing under [MCL 722.716] determines that the man is the father."[15] MCL 722.717(1)(a)-(c).

If the court issues an order of filiation, it must include all of the following:

> (a) The amount of child support to be paid.
>
> (b) Payment of costs associated with the pregnancy and the child's birth.
>
> (c) Payment of funeral expenses if the child has died. MCL 722.717(2).[16]

---

[14] For a discussion on acknowledgment of parentage, see Section 3.4(J).

[15] If a child's mother and alleged father fail to consent to an order of filiation within 21 days of the defendant's receipt of the complaint and service (28 days if the defendant resides outside of Michigan or is served by registered mail), the DHHS may notify the child's mother, the child, and the alleged father that they are required to appear for genetic testing. MCL 722.714(9); MCR 2.108(A)(1)-(2). For a discussion on genetic testing, see Section 3.9.

[16] "A judgment or order entered under [the Paternity Act] providing for the support of a child or payment of expenses connected to the mother's pregnancy or the birth of the child is enforceable as provided in the support and parenting time enforcement act, 1982 PA 295, MCL 552.601 to [MCL] 552.650. If [the Paternity Act] contains a specific provision regarding the contents or enforcement of a support order that conflicts with a provision in the support and parenting time enforcement act, 1982 PA 295, MCL 552.601 to [MCL] 552.650, [the Paternity Act] controls in regard to that provision." MCL 722.717(3).

> **Note:** "If the court makes a determination of paternity and there is no dispute regarding custody, the court shall include in the order of filiation specific provisions for the custody and parenting time of the child as provided in the child custody act of 1970, . . . [MCL] 722.21 to [MCL] 722.29 . . . . If there is a dispute between the parties concerning custody or parenting time, the court shall immediately enter an order that establishes support and temporarily establishes custody of and parenting time with the child. Pending a hearing on or other resolution of the dispute, the court may also refer the matter to the friend of the court for a report and recommendation as provided in [MCL 552.505]. In a dispute regarding custody or parenting time, the prosecuting attorney, an attorney appointed by the county, or an attorney appointed by the court under [MCL 722.714] shall not be required to represent either party regarding that dispute." MCL 722.717b.

"Regardless of who commences an action under [the Paternity Act], an order of filiation entered under [the Paternity Act] has the same effect, is subject to the same provisions, and is enforced in the same manner as an order of filiation entered on complaint of the mother or father." MCL 722.714(14).

Once the court signs an order of filiation, the parties must be served with a copy of the order and a proof of service must be filed with the court. MCL 722.717(6).

"Upon entry of an order of filiation, the clerk of the court shall collect a fee of $9.00 for entering the order and the fee imposed by [MCL 333.2891(9)(a)], from the person against whom the order of filiation is entered.[17] The clerk shall retain the $9.00 fee and remit the fee imposed by [MCL 333.2891(a)], with a written report of the order of filiation, to the director of the department of community health. The report shall be on a form prescribed by or in a manner approved by the director of the department of community health. Regardless of whether the fees required by this section are collected, the clerk shall

[17] For purposes of MCL 722.717, MCR 2.002 permits a waiver of fees for indigent persons. See MCR 2.002 for additional information on fee waiver requests and a determination of indigence for purposes of filing fees. Temporarily, under MCR 2.002, "[c]ourts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process." Administrative Order No. 2020-9, temporarily amending certain court rules "until further order of the Court." See Administrative Order No. 2020-12; Administrative Order No. 2020-19(3). Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

transmit and the department of community health shall receive the report of the order of filiation." MCL 722.717(4).

"If an order of filiation or acknowledgment of parentage is abrogated by a later judgment or order of a court, the clerk of the court that entered the order shall immediately communicate that fact to the director of the department of community health on a form prescribed by the director of the department of community health. An order of filiation supersedes an acknowledgment of parentage." MCL 722.717(5).

H. Authority to Enter Custody or Parenting Time Orders

Although "neither MCL 722.717 [(of the Paternity Act)] nor MCL 722.1445 [(of the ROPA)] explicitly provides a trial court with the authority to enter child custody or parenting-time orders in conjunction with the entry of an order of filiation," where a "plaintiff's complaint . . . present[s] a child custody dispute, . . . upon making a determination of paternity, [a] trial court ha[s] authority under [MCL 722.27(1) of] the Child Custody Act to enter orders regarding child custody and parenting time." *Demski v Petlick*, 309 Mich App 404, 440, 443 (2015).

I. Setting Aside an Order of Filiation

Under the Revocation of Paternity Act, MCL 722.1443(2)(c), the court may "[s]et aside an order of filiation or a paternity order." MCL 722.1439] governs these actions. MCL 722.1435(3). See Section 3.3(I) for a discussion on setting aside an order of filiation under the Revocation of Paternity Act.

J. Appeal

"An appeal in all cases may be taken by either the complainant or the defendant, a guardian ad litem appointed by the court for the child, the mother or her personal representative, from any final order or judgment of any court having jurisdiction of filiation proceedings." MCL 722.724.

"No appeal, however, shall operate as a stay of execution unless the defendant gives the security provided in [MCL 722.719] and further security to pay the costs of such appeal." MCL 722.724.

3.4 Paternity Under the Acknowledgment of Parentage Act[18]

A man may be considered the natural father of a child born out of wedlock if he joins the child's mother in "acknowledg[ing] that child as his child by completing a form that is an acknowledgment of parentage." MCL 722.1003(1). An acknowledgment properly signed and filed with the court will establish a child's paternity, and "[t]he child who is the subject of the acknowledgment shall bear the same relationship to the mother and the man signing as the father as a child born or conceived during a marriage and shall have the identical status, rights, and duties of a child born in lawful wedlock effective from birth."[19] MCL 722.1004.

> **Note:** The Acknowledgment of Parentage Act *does not impact* the validity of any acknowledgments signed before its effective date, June 1, 1997. MCL 722.1012. However, the revocation procedures under the Act impact all acknowledgments, including those signed before the June 1, 1997, effective date. *Id.*

Once the acknowledgment of parentage has been filed, 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 Sections 2.10–2.11 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).

A. Acknowledgment of Parentage Form

It is the state registrar's responsibility to prepare or approve an acknowledgment of parentage form, and make the approved form

[18]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[19] Insofar as custody is concerned, "'[a]lthough MCL 722.1004 affords the *child* the full rights of a child born in wedlock, the statute does not grant a putative father who acknowledges paternity the same legal rights as a father whose child is born in wedlock.'" *Sims v Verbrugge*, 322 Mich App 205, 211-212 (2017) (finding that "[w]hile the Acknowledgment of Parentage Act 'establishes paternity, establishes the rights of the child, and supplies a basis for court ordered child support, custody, or parenting time without further adjudication under the paternity act,' the Child Custody Act, [MCL 722.21 *et seq*.,] provides 'the exclusive means of pursuing child custody rights'"), quoting *Eldred v Ziny*, 246 Mich App 142, 149 (2001) (first alteration in original).

available to the public through the DHHS, prosecuting attorneys, and hospitals.[20] MCL 722.1008.

"The acknowledgment of parentage form shall include at least all of the following written notices to the parties:

(a) The acknowledgment of parentage is a legal document.

(b) Completion of the acknowledgment is voluntary.

(c) The mother has initial custody of the child, without prejudice to the determination of either parent's custodial rights, until otherwise determined by the court or agreed by the parties in writing and acknowledged by the court. This grant of initial custody to the mother shall not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time.

(d) Either parent may assert a claim in court for parenting time or custody.

(e) The parents have a right to notice and a hearing regarding the adoption of the child.

(f) Both parents have the responsibility to support the child and to comply with a court or administrative order for the child's support.

(g) Notice that signing the acknowledgment waives the following:

(*i*) Blood or genetic tests to determine if the man is the biological father of the child.

(*ii*) Any right to an attorney, including the prosecuting attorney or an attorney appointed by the court in the case of indigency, to represent either party in a court action to determine if the man is the biological father of the child.

(*iii*) A trial to determine if the man is the biological father of the child.

(h) That in order to revoke an acknowledgment of parentage, an individual must file a claim as provided

[20] See the DHHS form *Affidavit of Parentage*. *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

> under the revocation of paternity act[, MCL 722.1431 *et seq*.]" MCL 722.1007.

"An acknowledgment of parentage form is valid and effective if signed by the mother and father and those signatures are each notarized by a notary public authorized by the state in which the acknowledgment is signed or witnessed by 1 disinterested, legally competent adult."[21] MCL 722.1003(2). A mother and father may sign the acknowledgment at any time during a child's lifetime. *Id.*

After a mother and father sign an acknowledgment of parentage, the completed original must be filed with the state registrar.[22] MCL 722.1005(1). The state registrar must file a properly completed acknowledgment in a parentage registry in the state registrar's office and the state registrar must maintain the acknowledgment as a permanent record in a manner consistent with MCL 333.2876. MCL 722.1005(1).

A copy of the completed acknowledgment must be provided to both parents at the time the acknowledgment is signed.[23] MCL 722.1003(3).

B. Minor Parent

If either parent is a minor, he or she may sign an acknowledgment of parentage, and the signature has the same effect as if the minor were an adult. MCL 722.1009. The court may appoint a next friend or guardian ad litem to represent the minor parent during the acknowledgment of parentage proceedings. *Id.*

C. Birth Certificate

Once a completed acknowledgment of parentage form has been filed, "the completed acknowledgment form may serve as a basis for preparation of a new certificate of birth as provided in . . . MCL 333.2831." MCL 722.1005(3). MCL 722.1005(3).

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[21] "The witness must be an employee of 1 of the following: a hospital, publicly funded or licensed health clinic, pediatric office, friend of the court, prosecuting attorney, court, department of [health and] human services, department of community health, county health agency, county records department, head start program, local social services provider, county jail, or state prison. The witness must sign and date the acknowledgment of parentage form and provide his or her printed name, address, and place of employment." MCL 722.1003(2).

[22] On receipt of an acknowledgment, the registrar must review the acknowledgment to ensure that it was properly completed and that the mother's and father's signatures were either notarized or witnessed by a disinterested, legally competent adult as set out in MCL 722.1003(2). MCL 722.1005(1).

[23] "The state registrar shall issue a copy of an acknowledgment filed in the parentage registry under the procedures and upon payment of the fee prescribed by . . . MCL 333.2891." MCL 722.1005(2).

D. Parental Rights and Obligations

"After a mother and father sign an acknowledgment of parentage, the mother has initial custody of the minor 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. This grant of initial custody to the mother shall not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time." MCL 722.1006. "[A]lthough the mother receives initial custody of the child through the execution of an [Acknowledgment of Parentage (AOP)], this initial custody is not a judicial determination." *Sims v Verbrugge*, 322 Mich App 205, 212 (2017) (equating an AOP to a judicial determination "would be in direct conflict with the MCL 722.1006 statement that the grant of initial custody 'shall not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time'"), citing *Foster v Wolkowitz* 486 Mich 356, 366 (2010).

"Except as otherwise provided by law, a mother and father who sign an acknowledgment that is filed as prescribed by [MCL 722.1005] are consenting to the general, personal jurisdiction of the courts of record of this state regarding the issues of support, custody, and parenting time of the child. MCL 722.1010. "[T]he acknowledgment may be the basis for court ordered child support, custody, or parenting time without further adjudication under the paternity act, . . . [MCL] 722.711 to [MCL] 722.730 . . . ." MCL 722.1004.

However, an "improperly executed affidavit of parentage does not provide [a putative father] with standing to seek custody of the child." *Aichele v Hodge*, 259 Mich App 146, 156 (2003). A putative 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 and there is no court determination of paternity. *Michael H v Gerald D*, 491 US 110, 121, 124 (1989); *Aichele*, 259 Mich App at 167-168.

E. Validation of Acknowledgment

"'[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 *In re E R Moiles (Moiles II)*, 495 Mich 944 (2014),[24] quoting *In re Daniels Estate*, 301 Mich App 450, 456 (2013).

"[A]n affidavit of parentage can never be properly executed unless a child is born out of wedlock." *Aichele v Hodge*, 259 Mich App 146, 156 (2003) (despite a paternity test revealing another man outside of the marriage was the child's biological father, the trial court properly invalidated the acknowledgment of parentage signed by the child's mother and biological father when the child "was conceived and born during [the mother's] marriage to [someone other than the biological father] and there had been no judicial determination that [the child] was not an issue of the marriage").

F. Revoking an Acknowledgment of Parentage

"[I]n order to revoke an acknowledgment of parentage, an individual must file a claim as provided under the [R]evocation of [P]aternity [A]ct[, MCL 722.1431 *et seq.*]" MCL 722.1007(h). See Section 3.4(F) for a discussion on revoking an acknowledgment of parentage under the Revocation of Paternity Act.

3.5 Paternity Under the Revocation of Paternity Act (ROPA)[25]

"If a child has a presumed father, a court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity if an action is filed by the child's mother[, the presumed father, the alleged father, or, if the child is being supported by public assistance, the DHHS.]"[26] MCL 722.1441(1). MCL 722.1443(2)(e) permits the court to "[m]ake a determination of paternity and enter an order of filiation as provided for under . . . MCL 722.717."

"An action may not be brought under [the ROPA] if the child is under 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 [the ROPA] would be in the best interests of the child." MCL 722.1443(15).

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[24] For more information on the precedential value of an opinion with negative subsequent history, see our note.

[25] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[26] "[T]he [Revocation of Paternity Act] does not define the term 'born out of wedlock'; however, the commonly understood meaning is reflected in the definition supplied by the Paternity Act, MCL 722.711 *et seq*., which provides that one aspect of the definition is to be 'born or conceived during a marriage but not the issue of that marriage,' MCL 722.711(a). It is this definition that is relevant [to MCL 722.1441]." *Jones v Jones*, 320 Mich App 248, 254 n 2 (2017).

A. Initiating Paternity Action

"An action under [MCL 722.1441] may be brought by a complaint filed in an original action or by a motion filed in an existing action, as appropriate under this act and rules adopted by the supreme court." MCL 722.1441(5).

An original action filed under the Revocation of Paternity Act seeking a determination of paternity and an order of filiation as provided under MCL 722.717, must "be filed in the circuit court for the county in which the mother or the child resides or, if neither the mother nor the child reside in this state, in the circuit court for the county in which the child was born. If an action for the support, custody, or parenting time of the child exists at any stage of the proceedings in a circuit court of this state or if an action under . . . [MCL 712A.2(b)] is pending in a circuit court of this state, an action under this act shall be brought by motion in the existing case under [the Michigan Court Rules]."[27] MCL 722.1443(1).

B. Child's Mother Files Paternity Action

"If a child has a presumed father, a court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity if an action is filed by the child's mother[28] and either of the following applies:

(a) All of the following apply:

(*i*) The mother identifies the alleged father by name in the complaint or motion commencing the action.

(*ii*) The presumed father, the alleged father, and the child's mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child.

(*iii*) The action is filed within 3 years after the child's birth. The requirement that an action be filed within 3 years after the child's birth does not apply to an action filed on or before 1 year after the effective date of this act[, June 12, 2012].

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[27] For a discussion on filing a civil action in general, see the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 2.

[28] "[N]othing in the plain language of [MCL 722.1441(1)(a)] require[s a] plaintiff to challenge the presumption of legitimacy in . . . divorce proceedings or prevents [a] plaintiff from . . . seeking to challenge [the presumed father's] paternity after entry of the judgment of divorce." *Glaubius v Glaubius*, 306 Mich App 157, 172 (2014).

(*iv*) Either the court determines the child's paternity or the child's paternity will be established under the law of this state or another jurisdiction if the child is determined to be born out of wedlock.

(b) All of the following apply:

(*i*) The mother identifies the alleged father by name in the complaint or motion commencing the action.

(*ii*) Either of the following applies:

(A) The presumed father, having the ability to support or assist in supporting the child, has failed or neglected, without good cause, to provide regular and substantial support for the child for a period of 2 years or more before the filing of the action 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 action.

(B) The child is less than 3 years of age and the presumed father lives separately and apart from the child. The requirement that the child is less than 3 years of age at the time an action is filed does not apply to an action filed on or before 1 year after the effective date of this act[, June 12, 2012].

(*iii*) Either the court determines the child's paternity or the child's paternity will be established under the law of this state or another jurisdiction if the child is determined to be born out of wedlock." MCL 722.1441(1).

Evidentiary hearing. "[A] trial court is not obligated to hold an evidentiary hearing under MCL 722.1441(1)(a) absent a threshold showing that there are contested factual issues that must be resolved in order for the trial court to make an informed decision." *Parks v Parks*, 304 Mich App 232, 240, 243 (2014) ("defendant's allegations [that the plaintiff made statements mutually and openly acknowledging the alleged father as the biological father] failed to meet the threshold requirement which would have potentially entitled her to an evidentiary hearing" where "[t]here were no disputed facts before the court," and even if the plaintiff's statements were accepted as true, "the statements themselves failed to raise a

question regardng whether there was a mutual acknowledgment of [the alleged father's] biological relationship to the child").

C. Presumed Father Files Paternity Action

"If a child has a presumed father, a court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity if an action is filed by the presumed father within 3 years after the child's birth or if the presumed father raises the issue in an action for divorce or separate maintenance between the presumed father and the mother." MCL 722.1441(2). This timing requirement "does not apply to an action filed on or before 1 year after the effective date of [the Revocation of Paternity Act, June 12, 2012]. *Id*.

MCL 722.1441(2) permits a presumed father to raise the issue of paternity "in a paternity action filed within three years of the child's birth OR in a divorce action (without regard to the child's age)." *Taylor v Taylor*, 323 Mich App 197, 199, 201 (2018) (holding that the three-year limitation in MCL 722.1441(2) "does not apply if the issue is raised in a divorce action" between the presumed father and the mother; accordingly, the trial court erred by denying the defendant-presumed father's motions for a paternity determination under MCL 722.1443(1) and to join the possible biological father on the basis that the issue was raised in the divorce action more than three years after the child's birth).

Judgment of divorce is not paternity determination. "When the parties to a divorce action have proceeded in keeping with [the] presumption of legitimacy and do not contest the issue of paternity in the course of the divorce, . . . the resulting divorce judgment does not signify a determination in court that the husband is the father of the child for purposes of the Revocation of Paternity Act. Rather, the divorce judgment merely recognizes the continued adherence to the presumption of legitimacy without answering the distinct question whether the husband is the child's father." *Glaubius v Glaubius*, 306 Mich App 157, 171 (2014). Accordingly, a presumed father maintains that status and "[does] not become an affiliated father by operation of the divorce judgment." *Id*.

D. Alleged Father Files Paternity Action

"If a child has a presumed father, a court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity if an action is filed by an alleged father and any of the following applies:

(a) All of the following apply:

(*i*) The alleged father did not know or have reason to know that the mother was married at the time of conception.

(*ii*) The presumed father, the alleged father, and the child's mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child.

(*iii*) The action is filed within 3 years after the child's birth. The requirement that an action be filed within 3 years after the child's birth does not apply to an action filed on or before 1 year after the effective date of this act[, June 12, 2012].

(*iv*) Either the court determines the child's paternity or the child's paternity will be established under the law of this state or another jurisdiction if the child is determined to be born out of wedlock.

(b) All of the following apply:

(*i*) The alleged father did not know or have reason to know that the mother was married at the time of conception.

(*ii*) Either of the following applies:

(A) The presumed father, having the ability to support or assist in supporting the child, has failed or neglected, without good cause, to provide regular and substantial support for the child for a period of 2 years or more before the filing of the action 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 action.

(B) The child is less than 3 years of age and the presumed father lives separately and apart from the child. The requirement that the child is less than 3 years of age at the time an action is filed does not apply to an action filed on or before 1 year after the effective date of this act[, June 12, 2012].

(*iii*) Either the court determines the child's paternity or the child's paternity will be

established under the law of this state or another jurisdiction if the child is determined to be born out of wedlock.

(c) Both of the following apply:

(*i*) The mother was not married at the time of conception.

(*ii*) The action is filed within 3 years after the child's birth. The requirement that an action be filed within 3 years after the child's birth does not apply to an action filed on or before 1 year after the effective date of this act[, June 12, 2012]." MCL 722.1441(3).

"[I]f conception occurred during wedlock, [MCL 722.1441(3)(a)] needs to be further examined and [MCL 722.1441(3)(c)] is rendered irrelevant or unsupportable, whereas if conception occurred out of wedlock, [MCL 722.1441(3)(c)] is triggered and [MCL 722.1441(3)(a)] is rendered irrelevant or unsupportable." *Sprenger v Bickle*, 307 Mich App 411, 418-419 (2014).

"Working together, [MCL 722.1441(3)(a)] and [MCL 722.1441(3)(c)] can give an alleged father standing even if it is impossible to determine whether conception occurred before or after the finalization of a divorce. In that circumstance, if the alleged father did not know or have reason to know before entry of a divorce judgment that a child's mother was married, and if the other requirements in [MCL 722.1441(3)(a)(*ii*)-(*iv*)] were satisfied, the alleged father could proceed because either [MCL 722.1441(3)(a)] or [MCL 722.1441(3)(c)] would have been definitively established, despite being unable to pinpoint the specific subsection that was established." *Sprenger*, 307 Mich App at 419 n 2.

1. Court's Discretion on Out of Wedlock Determination

"MCL 722.1441(3) indicates that the trial court 'may' determine that the child is born out of wedlock when the elements [of MCL 722.1441(3)] are met; it does not state that such action is mandatory." *Demski v Petlick*, 309 Mich App 404, 425 (2015).

2. Child Conceived Due to Criminal Sexual Conduct

"An alleged father may not bring an action under [the Revocation of Paternity Act] 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).

3. Standing Issues

a. Constitutionality of Standing Requirements

"[A] putative father . . . who seeks to establish paternity with regard to a child conceived and born during the mother's marriage to another man has no constitutional due-process right to claim paternity, whether under the Revocation of Paternity Act or any other statute." *Grimes v Van Hook-Williams*, 302 Mich App 521, 530, 532 (2013) (finding that "the standing requirements contained in the Revocation of Paternity Act are constitutional," and the putative father lacked standing to bring a paternity action under the Revocation of Paternity Act where he knew or had reason to know that the child was born and conceived while the child's mother was married to another man).

b. No Knowledge of Marriage

"MCL 722.1441(3)(a) clearly envisions and applies to circumstances in which a male has sexual intercourse with a married female, not knowing her to be a married woman at the time and without adequate information such that he should have known about her marital status." *Sprenger v Bickle*, 307 Mich App 411, 419 (2014). "When there is uncertainty about whether conception occurred before or after entry of a divorce judgment, the better-framed question for purposes of analyzing MCL 722.1441(3)(a)(*i*) might involve asking whether the alleged father knew or had reason to know that the child's mother was married before her divorce was finalized." *Sprenger*, 307 Mich App at 419 (holding that the alleged father lacked standing to commence a paternity action under the Revocation of Paternity Act, MCL 722.1441(3)(a)(*i*), where his testimony established that he knew that the child's mother was married at the time of conception).

"The [alleged father] lacked standing to commence [a paternity] action under the Revocation of Paternity Act[, MCL 722.1441(3)(a)(*i*),]" where "[the alleged father] fully admit[ted] that he was aware of [the mother's] marriage when he began dating her[, and i]n the absence of any proof of an intervening divorce, it was unreasonable for [the alleged father] to presume that [the mother] did not remain legally married to [her husband at the time of the child's conception]." *Grimes v Van Hook-Williams*, 302 Mich App 521, 529 (2013).

c. Child Conceived Outside of Wedlock

To bring a paternity action under MCL 722.1441(3)(c), conception of the child must have occurred outside of wedlock. *Sprenger v Bickle*, 307 Mich App 411, 416-417 (2014).

The alleged father lacked standing to commence a paternity action under the Revocation of Paternity Act, MCL 722.1441(c)(*i*), where the expert witnesses for both parties "concurred that the most likely time of conception" was before the mother's divorce was finalized, the alleged father's expert testified there was a "'95 to 97 percent' [chance] that conception occurred during th[e] pre-divorce-judgment time frame," and "the [chances] that [the mother] conceived [after the judgment of divorce was finalized] was '1 to 2 percent.'" *Sprenger*, 307 Mich App at 420.

4. No Violation of Equal Protection

a. Treating Presumed Father and Alleged Father differently

MCL 722.1441, which permits a court to determine that a "child is born out of wedlock" and effectively "grant[s] the biological father of a child standing to establish paternity pursuant to the Paternity Act," does not implicate the Equal Protection Clauses of the Michigan and United States Constitutions. *Demski v Petlick*, 309 Mich App 404, 464 (2015). "Because the constitutional guarantees of equal protection do not require that persons in different circumstances be treated the same," a presumed father and an alleged father may be treated differently under MCL 722.1441 if the alleged father is the child's biological father. *Demski*, 309 Mich App at 464. "[T]he actual effect of the [Revocation of Paternity Act], combined with the Paternity Act, is to provide a mechanism for determining *which* man is the father of a minor child, and therefore in possession of a fundamental liberty interest in his relationship with the child." *Id*.

b. Treating Child's Mother and Alleged Father Differently

"[T]he Legislature's decision to prescribe different statutory standing requirements for a child's mother and alleged father in the Revocation of Paternity Act does not

> offend equal protection[] . . . [b]ecause married mothers and alleged fathers are not 'actually similarly situated' in the area covered by the Revocation of Paternity Act[.]" *Grimes v Van Hook-Williams*, 302 Mich App 521, 530, 536-537 (2013) (finding that "the standing requirements contained in the Revocation of Paternity Act are constitutional," and requiring an alleged father, in order to have standing to bring a paternity action under the Revocation of Paternity Act, to "'not know or have reason to know that the mother was married at the time of conception,' but imposing no similar knowledge requirement on the child's mother" does not violate the alleged father's equal protection rights).

E. DHHS Files Paternity Action

"If a child has a presumed father and the child is being supported in whole or in part by public assistance, a court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity if an action is filed by the [DHHS] and both of the following apply:

> (a) Either of the following applies:
>
> > (*i*) The presumed father, having the ability to support or assist in supporting the child, has failed or neglected, without good cause, to provide regular and substantial support for the child for a period of 2 years or more before the filing of the action 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 action.
> >
> > (*ii*) The child is less than 3 years of age and the presumed father lives separately and apart from the child. The requirement that the child is less than 3 years of age at the time an action is filed does not apply to an action filed on or before 1 year after the effective date of this act[, June 12, 2012].
>
> (b) Either the court determines the child's paternity or the child's paternity will be established under the law of this state or another jurisdiction if the child is determined to be born out of wedlock." MCL 722.1441(4).

F. Extending Time to File Paternity Action

The court may extend the time for filing an action or motion under the Revocation of Paternity Act if the request for extension is "supported by an affidavit signed by the person requesting the extension stating facts that the person satisfied all the requirements for filing an action or motion under [the Revocation of Paternity Act] but did not file the action or motion within the time allowed under [the Revocation of Paternity Act] because of 1 of the following:

> (a) Mistake of fact.[29]
>
> (b) Newly discovered evidence that by due diligence could not have been found earlier.
>
> (c) Fraud.
>
> (d) Misrepresentation or misconduct.
>
> (e) Duress." MCL 722.1443(12).

"MCL 722.1443(12) requires that the person requesting the extension show that [he or] she did not timely file the action *because* . . . one of the five listed exceptions" prevented him or her "from meeting the filing deadline[.]" *Kalin v Fleming*, 322 Mich App 97, 103-104 (2017) (finding that "the trial court erred by determining that MCL 722.1443(12) allowed an extension in this case because [the petitioner's] affidavit did not establish an exception to the general rule that a parent must file an action to revoke parentage within three years of the child's birth" where the petitioner asserted the acknowledged father's "mistaken belief that he was the child's biological father as the mistake of fact[, but] . . . [the petitioner] did not alleged that *she* was previously unaware of the child's paternity, nor did she allege that a mistaken belief contributed to her delay[, and the petitioner's] affidavit did not describe a mistake of fact that prevented her from seeking revocation of the acknowledgment of parentage within the three-year deadline"). "Whether [the petitioner's] affidavit described a mistake of fact that excused the filing deadline is a separate question from whether [the acknowledged father's] mistake of fact could support a timely revocation action."[30] *Kalin*, 322 Mich App at 103-104.

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[29] "A 'mistake of fact' is '"a misunderstanding, misapprehension, error, fault, or ignorance of a material fact, a belief that a certain fact exists when in truth and in fact it does not exist."' '[E]vidence that a party acted in part on an erroneous belief is sufficient under MCL 722.1437(2) to establish a mistake of fact.'" *Kalin v Fleming*, 322 Mich App 97, 102-103 (2017), quoting *Rogers v Wcisel*, 312 Mich App 79, 95-96 (2015).

[30] For additional discussion on affidavit requirements following a timely filed revocation of action, see Section 3.15(C).

"If the court finds that an affidavit under [MCL 722.1443(12)] is sufficient, "the court may allow the action or motion to be filed and take other action the court considers appropriate." MCL 722.1443(13). "The party filing the request to extend the time for filing has the burden of proving, by clear and convincing evidence, that granting relief under this act will not be against the best interests of the child considering the equities of the case." MCL 722.1443(13).

G. Representation

"If the case is a [T]itle IV-D case, the court may appoint an attorney approved by the office of child support to represent this state's interests with respect to an action or motion under [the Revocation of Paternity Act]. The court may appoint a guardian ad litem to represent the child's interests with respect to the action or motion." MCL 722.1443(6).

H. Presumed Father is a Necessary Party to Paternity Action

Because "the custodial rights of a presumed father . . . are significant and warrant due process protection, . . . [and t]he [Revocation of Paternity Act's] definition of a 'presumed father' clearly implies that [he] is afforded the legal right of parenthood, unless that presumption is rebutted in a successful action under the act, . . . [a presumed father] is a necessary party [to an action under the Revocation of Paternity Act] under MCR 2.205(A)." *Graham v Foster (Graham I)*, 311 Mich App 139, 144-145 (2015), aff'd in part and vacated in part on other grounds by *Graham v Foster (Graham II)*, 500 Mich 23 (2017)[31, 32] (finding that the mother's husband, the child's presumed father, "[was] a necessary party under MCR 2.205(A)[to the putative father's paternity action filed under the Revocation of Paternity Act,]" because the presumed father had "interests that would not be adequately addressed if he were not a party to the [putative father's paternity action filed] under the [Revocation of Paternity Act,] . . . [and a] successful action by [the putative father] would strip [the presumed father] of interests that must not be set aside without [the presumed father's] fair chance to defend those interests").

[31] For more information on the precedential value of an opinion with negative subsequent history, see our note.

[32] "MCR 2.205(A) addresses the issue of when the joinder of parties is necessary" and applies to Revocation of Paternity Act cases. *Graham v Foster (Graham I)*, 311 Mich App 139, 143 (2015), aff'd in part and vacated in part on other grounds by *Graham v Foster (Graham II)*, 500 Mich 23 (2017). "[A] party is necessary to an action if that party 'has an interest of such a nature that a final decree cannot be made without affecting that interest, or leaving the controversy in such a condition that is final determination may be wholly inconsistent with equity and good conscience.'" *Graham I*, 311 Mich App at 143, quoting *Mather Investors, LLC v Larson*, 271 Mich App 254, 257-258 (2006).

I. Ordering Genetic Testing

"The court shall order the parties to an action or motion under this 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.[33] The 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).

J. Costs and Fees

"Except for an action filed under [MCL 722.1445(2) (revocation of paternity action filed for a child conceived as a result of nonconsensual sexual penetration)], a court, in its discretion, may order a person who files an action or motion under [the Revocation of Paternity Act] to post an amount of money with the court, obtain a surety, or provide other assurances that in the court's determination will secure the costs of the action and attorney fees if the person does not prevail. The court, in its discretion, may order a nonprevailing party, including a mother who is a nonprevailing party under [MCL 722.1445(2)], to pay the reasonable attorney fees and costs of a prevailing party." MCL 722.1443(11).

K. Court Determination

1. Refusing to Enter Order Determining Child Born Out of Wedlock

"A court may refuse to enter an order . . . determining that a child is born out of wedlock if the court finds evidence that the order would not be in the best interests of the child." MCL 722.1443(4). See also *Demski v Petlick*, 309 Mich App 404, 426 (2015) (holding that "a court may properly decline to rule that a child was born out of wedlock when the court finds under MCL 722.1443(4) that the ruling would not be in the child's best interests").

In determining whether to enter the order on the record, "[t]he court may consider the following factors:

> (a) Whether the presumed father is estopped from denying parentage because of his conduct.

[33] See Section 3.9 for additional information on genetic testing under MCL 722.716.

> (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 assessment under MCL 722.1443(4)." *Demski*, 309 Mich App at 432 n 10.

"The court shall state its reasons for refusing to enter an order [determining a child is born out of wedlock] on the record." MCL 722.1443(4). See *Jones v Jones*, 320 Mich App 248, 256-257 (2017) (where "the trial court ultimately did alter the presumed father's status, the court . . . was not required to express its particular reasons"; explicit findings with respect to specific best-interest factors under MCL 722.1443(4) are required "to be made on the record [only] when [the court] *refuses* to enter the order, i.e., when it does not alter the presumed father's status").

2. Determining Paternity and Entering Order of Filiation

The court may "[m]ake a determination of paternity and enter an order of filiation as provided for under . . . MCL 722.717." MCL 722.1443(2)(e). If an alleged father brings an action under the Revocation of Paternity Act, and "proves by clear and convincing evidence that he is the child's father, the court may make a determination of paternity and enter an order of filiation as provided for under . . . MCL 722.717." MCL 722.1445(1). For a discussion on issuing an order of filiation under MCL 722.717, see Section 3.3(G).

> "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 [Revocation of Paternity Act] 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").

L. Authority to Enter Custody or Parenting Time Orders

Although "neither MCL 722.717 [(of the Paternity Act)] nor MCL 722.1445 [(of the Revocation of Paternity Act)] explicitly provides a trial court with the authority to enter child custody or parenting-time orders in conjunction with the entry of an order of filiation," where a "plaintiff's complaint . . . present[s] a child custody dispute, . . . upon making a determination of paternity, [a] trial court ha[s] authority under [MCL 722.27(1) of] the Child Custody Act to enter orders regarding child custody and parenting time." *Demski v Petlick*, 309 Mich App 404, 440, 443-444 (2015).

M. Child Conceived After Nonconsensual Sexual Penetration

The court must "[m]ake a determination of paternity regarding an alleged father and enter an order of revocation of paternity for that alleged father," if a mother brings an action under the Revocation of Paternity Act and "after a fact-finding hearing, proves by clear and convincing evidence that the child was conceived as a result of nonconsensual sexual penetration[.]" MCL 722.1445(2)(d).

MCL 722.1445(2) "does not apply if, after the date of the alleged nonconsensual sexual penetration described in [MCL 722.1445(2)], the biological parents cohabit and establish a mutual custodial environment for the child." MCL 722.1445(3).

The court may also order "a mother who is a nonprevailing party under [MCL 722.1445(2)] to pay the reasonable attorney fees and costs of [the] prevailing party." MCL 722.1443(11).

N. Standard of Review

The Court of Appeals "reviews a trial court's factual findings in proceedings under the [Revocation of Paternity Act] for clear error.

'The trial court has committed clear error when [the] Court [of Appeals] is definitely and firmly convinced that it made a mistake.'" *Jones v Jones*, 320 Mich App 248, 253 (2017), quoting *Demski v Petlick*, 309 Mich App 404, 431 (2015) (quotation marks and citation omitted in original).

The Court of Appeals "reviews de novo the interpretation and application of statutory provisions." *Jones*, 329 Mich App at 253, citing *Parks v Parks*, 304 Mich App 232, 237 (2014).

3.6 Paternity or Maternity Under Safe Delivery of Newborns Law[34]

A brief discussion on determining paternity or maternity and terminating a parent's parental rights through the Safe Delivery of Newborns Law is contained in this section. For additional information on the Safe Delivery of Newborns Law in general, see Section 5.9.

The Safe Delivery of Newborns Law, MCL 712.1 *et seq.*, regulates a parent's surrender of a newborn child. Once a child is taken into temporary protective custody under the Safe Delivery of Newborns Law, the child placing agency must, among other responsibilities, make a reasonable effort to identify, locate, and provide notice of the newborn's surrender to the nonsurrendering parent (including "by publication in a newspaper of general circulation in the county where the newborn was surrendered" if the identify and address of the nonsurrendering parent are unknown). MCL 712.7(f).

The Safe Delivery of Newborns Law defines the term *newborn* as "a child who a physician reasonably believes to be not more than 72 hours old." MCL 712.1(2)(k). The Safe Delivery of Newborns Law does not define the terms *parent*, *surrendering parent*, *or nonsurrendering parent*. *In re Miller*, 322 Mich App 497, 503 (2018).

A. Determine Paternity or Maternity

If the surrendering or nonsurrendering parent timely files a petition for custody of the surrendered newborn,[35] the court must, within seven days of the filed petition and before holding a custody hearing, "conduct a hearing to make the determinations of paternity or maternity as described in [MCL 712.11]." MCL 712.10(3).

[34]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[35] See SCAO form *Petition of Parent for Custody of Surrendered Newborn Child*.

For purposes of determining paternity and maternity following the filing of a petition for custody, "the court shall order the child and each party claiming paternity to submit to blood or tissue typing determinations or DNA identification profiling, as described in . . . the paternity act, 1958 PA 205, MCL 722.716."[36] MCL 712.11(1)-(2). However, maternity need not be established through DNA if "the birth was witnessed by the emergency service provider and sufficient documentation exists to support maternity[.]" MCL 712.11(2). See the SCAO form *Order for Blood or Tissue Typing or DNA Profile (Safe Delivery of Newborn Act)*.

"If the probability of paternity or maternity determined by the blood or tissue typing or DNA identification profiling is 99% or higher and the DNA identification profile and summary report are admissible, paternity or maternity is presumed and the petitioner may move for summary disposition on the issue of paternity or maternity." MCL 712.11(3). "If the result of the paternity or maternity testing is admissible and establishes that the petitioner could not be the parent of the newborn, the court shall dismiss the petition for custody." MCL 712.11(5). See the SCAO form *Order Determining Maternity/Paternity of Surrendered Newborn Child*.

"The court may order the petitioner to pay all or part of the cost of the paternity or maternity testing." MCL 712.11(4).

B. Terminate Parental Rights

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 must immediately petition the court to determine if the release will be accepted and whether the court will terminate the surrendering parent's parental rights. MCL 712.17(2).

If a nonsurrendering parent fails to file a petition for custody within 28 days after notice of the surrender was published, the child placing agency must immediately petition the court to determine whether the court will terminate the nonsurrendering parent's parental rights. MCL 712.17(3).

The court must schedule a hearing within 14 days of receiving the child placing agency's petition. MCL 712.17(4). The court must terminate the surrendering and nonsurrendering parents' parental rights[37] if it finds by a preponderance of the evidence that the child placing agency demonstrated all of the following:

[36] For additional information on court-ordered genetic testing under MCL 722.716, see Section 3.11.

(1) The surrendering parent knowingly released his or her rights to the newborn.

(2) Reasonable efforts were made to locate, identify, and provide notice to the nonsurrendering parent.

(3) A custody action was not filed. MCL 712.17(5).

The Safe Delivery of Newborns Law applies to the mother and the legal father of the surrendered child in its termination proceedings. *In re Miller*, 322 Mich App 497, 504, 506-507 (2018) (reversing the trial court's order denying a child placement agency's petitions to terminate the parental rights of the surrendering parent and the nonsurrendering parent based on the conclusion that the Safe Delivery of Newborns Law only applied to the mother of the surrendered children but not to the legal father). "'[A] child may have only one legal father,' so the legal father of a child born or conceived during a marriage is presumed to be the mother's husband until that presumption is defeated, [and] [t]he Safe Delivery of Newborns law tests this presumption through DNA testing of 'each party claiming paternity' and attempting to gain custody of the child, leaving only one as the true legal father." *Id*. at 505-506 (explaining that "[i]f the trial court terminates the parental rights of the nonsurrendering parent and the husband of the surrendering mother later seeks to assert his parental rights, he would have to demonstrate that he was not the biological father to show that the order terminating parental rights did not apply to him[; h]owever, in doing so, he would be defeating the presumption of paternity, and he would be without parental rights to assert to disrupt an adoption") (citations omitted).

3.7 Paternity Under an Adjudication of Paternity in Another State[38]

"The establishment of paternity under the law of another state has the same effect and may be used for the same purposes as an acknowledgment of paternity or an order of filiation under [the Paternity Act]." MCL 722.714b.

"Before a court is bound by a judgment rendered in another state, however, it may inquire into its jurisdictional basis, and if either personal or subject-matter jurisdiction is lacking, full faith and credit is not due." *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 315 (2011) (Michigan courts

[37] See SCAO form *Order After Hearing on Petition to Accept Release and Terminate Rights to Surrendered Newborn Child*.

[38] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

not required to give effect to a New York order of filiation determining that the putative father was the child's biological father under the Full Faith and Credit Clause of the United States Constitution where "the New York court concluded that it lacked personal jurisdiction over [the legal father], a necessary party to the paternity proceedings").

3.8 Paternity Under the Uniform Interstate Family Support Act (UIFSA)[39]

Among other purposes, the Uniform Interstate Family Support Act (UIFSA) provides a means for establishing paternity across state lines and foreign countries subject to the Convention. See MCL 552.2305(2)(a); MCL 552.2402; MCL 552.2704(2)(c).

UIFSA cases may be initiated in Michigan and transferred to another state or foreign country for the establishment of paternity 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. MCL 552.2301(2); MCL 552.2305(2)(a); MCL 552.2402.

"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 of this state in a proceeding involving an 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.

Part 2: Genetic Testing

A brief discussion on genetic testing as it relates to the Paternity Act and the Revocation of Paternity Act is contained in this section. However, a more detailed and scientific discussion of genetic testing is outside the scope of this benchbook.

Both the Paternity Act and the Revocation of Paternity Act require genetic testing when certain conditions are met. See MCL 722.716(1),

[39]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

which requires the court, on its own motion or pursuant to a party's request, to order the mother, child, and alleged father to submit to genetic testing "to determine whether the alleged father is likely to be, or is not, the father of the child"; MCL 722.1443(5), which requires the court, on the filing of an action or motion under the Revocation of Paternity Act, to order the parties to submit to genetic testing conducted in accordance with MCL 722.716 "to assist the court in making a determination under this act."

3.9 Requesting Genetic Testing

"A petition for blood or tissue typing tests under MCL 722.716 must be filed at or before the pretrial conference or, if a pretrial conference is not held, within the time specified by the court. Failure to timely petition waives the right to such tests, unless the court, in the interest of justice, permits a petition at a later time." MCR 3.217(B).

A. Department of Health and Human Services (DHHS)

"If, after service of process, the parties fail to consent to an order naming the man as the child's father as provided in [the Paternity Act] within the time permitted for a responsive pleading,[40] then the [DHHS] or its designee may file and serve both the mother and the alleged father with a notice requiring that the mother, alleged father, and child appear for genetic paternity testing as provided in [MCL 722.716]." MCL 722.714(9).

"If the mother, alleged father, or child does not appear for genetic paternity testing as provided in [MCL 722.716(9)], then the [DHHS] or its designee may apply to the court for an order compelling genetic paternity tests as provided in [MCL 722.716] or may seek other relief as permitted by statute or court rule." MCL 722.714(10).

B. Party's Request

A party to the paternity action may file a request for genetic testing. See MCL 722.716(1) (Paternity Act), which requires the court to order the child's mother, the child, and the alleged father to submit to genetic testing on a party's request; MCL 722.1438(1)-(3) (Revocation of Paternity Act), which require the court to order genetic testing upon a sufficient[41] action[42] filed by the mother, genetic father, or alleged father.

[40] MCR 2.108(A)(1)-(2) require a responsive pleading within 21 days of being served with the summons and complaint, and within 28 days of service if the defendant is served outside of Michigan or is served by registered mail.

C. Court's Request

Under the Paternity Act, the court may on its own motion order the child's mother, the child, and the alleged father to submit to genetic testing. MCL 722.716(1).

3.10 Notice of the Testing

Under the Paternity Act, "[t]he [DHHS] or its designee that requires a party to appear for genetic paternity testing as provided in [MCL 722.714], or the party requesting genetic paternity testing if a court orders genetic paternity testing for an individual as provided in [MCL 722.714], shall serve notice of the testing on the mother and the alleged father. The notice shall include explanations of all the following:

(a) The test to be performed.

(b) The purpose and potential uses of the test.

(c) How the test results will be used to establish paternity or nonpaternity as provided in [MCL 722.716].

(d) How the individual will be provided with the test results.

(e) The individual's right to keep the test results confidential as provided in [MCL 722.716a]." MCL 722.714a(2).

3.11 Court-Ordered Testing[43]

"In a proceeding under [the Paternity Act] before trial, the court, upon application made by or on behalf of either party, or on its own motion, shall order that the mother, child, and alleged father submit to blood or tissue typing determinations that may include, but are not limited to, determinations of red cell antigens, red cell isoenzymes, human leukoctye 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).

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[41] The actions must be supported by an affidavit signed by the filer that states at least one of the following facts: "(a) [t]he genetic tests that established the man as a child's father were inaccurate"; "(b) [t]he man's genetic material was not available to the child's mother"; or "(c) [a] man who has DNA identical to the genetic father is the child's father." MCL 722.1438(2).

[42] The action may be "brought by a complaint in an original action or by a motion in an existing action[.]" See MCL 722.1438(5).It must 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).

[43]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

When a verified complaint is filed in accordance with the Paternity Act, neither a search warrant nor an evidentiary hearing is required before a court may order blood tests. *Bowerman v MacDonald*, 431 Mich 1, 19-21 (1988).

In a proceeding under the Revocation of Paternity Act, "[t]he court shall order the parties to an action or motion under this act to participate in and pay for blood or tissue typing or DNA identification profiling to assist the court in making a determination under this act[, and the] [b]lood or tissue typing or DNA identification profiling shall be conducted in accordance with . . . MCL 722.716."[44] MCL 722.1443(5).

"A blood or tissue typing or DNA identification profiling shall be 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." MCL 722.716(2).

"The court shall fix the compensation of an expert at a reasonable amount and may direct the compensation to be paid by the county or by any other party to the case, or by both in the proportions and at the times the court prescribes. Before blood or tissue typing or DNA identification profiling is conducted, the court may order a part or all of the compensation paid in advance. If the [DHHS] paid for the genetic testing expenses, the court may order repayment by the alleged father if the court declares paternity. Documentation of the genetic testing expenses is admissible as evidence of the amount, which evidence constitutes prima facie evidence of the amount of those expenses without third party foundation testimony." MCL 722.716(3).

3.12 Refusing Court-Ordered Testing

"If the court orders a blood or tissue typing or DNA identification profiling to be conducted and a party refuses to submit to the typing or DNA identification profiling, in addition to any other remedies available, the court may do either of the following:

> (a) Enter a default judgment at the request of the appropriate party.
>
> (b) If a trial is held, allow the disclosure of the fact of the refusal unless good cause is shown for not disclosing the fact of refusal." MCL 722.716(1).

[44] See the SCAO form *Order for Genetic Testing (Revocation of Paternity Act)*.

3.13 Genetic Testing Results

"Subject to subsection [MCL 722.716(5)], the result of blood or tissue typing or a DNA identification profile and the summary report shall be served on the mother and alleged father. The summary report shall be filed with the court." MCL 722.716(4).

"Objection to the DNA identification profile or summary report is waived unless made in writing, setting forth the specific basis for the objection, within 14 calendar days after service on the mother and alleged father. The court shall not schedule a trial on the issue of paternity until after the expiration of the 14-day period." MCL 722.716(4). If an objection:

- is *not* filed, "the court shall admit in proceedings under [the Paternity Act] the result of the blood or tissue typing or the DNA identification profile and the summary report without requiring foundation testimony or other proof of authenticity or accuracy";

- *is* filed "within the 14-day period, on the motion of either party, the court shall hold a hearing to determine the admissibility of the DNA identification profile or summary report." MCL 722.716(4).

"The objecting party has the burden of proving by clear and convincing evidence by a qualified person described in [MCL 722.716(2)[45]] that foundation testimony or other proof of authenticity or accuracy is necessary for admission of the DNA identification profile or summary report." MCL 722.716(4).

"If the probability of paternity determined by the qualified person described in [MCL 722.716(2)] conducting the blood or tissue typing or DNA identification profiling is 99% or higher, and the DNA identification profile and summary report are admissible as provided in [MCL 722.714(4)], paternity is established. If the results of the analysis of genetic testing material from 2 or more persons indicate a probability of paternity greater than 99%, the contracting laboratory shall conduct additional genetic paternity testing until all but 1 of the putative fathers is eliminated, unless the dispute involves 2 or more putative fathers who have identical DNA." MCL 722.716(5).

[45] "A blood or tissue typing or DNA identification profiling shall be 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." MCL 722.716(2).

MCL 722.716 "does not abrogate the right of either party to child support from the date of birth of the child if applicable under [MCL 722.717]."[46] MCL 722.716(7).

3.14 Disclosure of Genetic Testing

"A contracting laboratory, the [DHHS] or its designee, or another entity involved with the genetic paternity testing are all required to protect the confidentiality of genetic testing material, except as required for a paternity determination under [the Paternity Act]. The court, its officers, and the [DHHS] shall not use or disclose genetic testing material for a purpose other than the paternity determination as authorized by [the Paternity Act]." MCL 722.716a(3). For additional information on the disclosure, admissibility, and retention of genetic testing under the Paternity Act, see MCL 722.716a.

Part 3: Relief Available Under Revocation of Paternity Act

In a Revocation of Paternity action, the court may revoke an acknowledgment of parentage, determine that a genetic father is not a child's father, or set aside an order of filiation or paternity order.[47] MCL 722.1443(2). The Revocation of Paternity Act does not "establish a basis for termination of an adoption and does not affect any obligation of an adoptive parent to an adoptive child," nor does it "establish a basis for vacating a judgment establishing paternity of a child conceived under a surrogate parentage contract as that term is defined in . . . MCL 722.853." MCL 722.1443(8); MCL 722.1443(9).

"An action may not be brought under this act if the child is under 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 this act would be in the best interests of the child." MCL 722.1443(15).

[46] For a discussion on MCL 722.717, see Section 3.3(G).

[47] The Revocation of Paternity Act also permits the court to establish paternity. See Section 3.5 for additional information.

3.15 Revoke Acknowledgment of Parentage[48]

MCL 722.1443(2)(a) permits the court to "[r]evoke an acknowledgment of parentage." MCL 722.1437 governs these actions. MCL 722.1435(1).

"The [child's] mother, the acknowledged father, an alleged father, or a prosecuting attorney[49] may file an action for revocation of an acknowledgment of parentage." MCL 722.1437(1). However, "[a]n alleged father may not bring an action under [the Revocation of Paternity Act] 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).

"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. Initiating Request for Revocation

An original action filed under the Revocation of Paternity Act seeking a revocation of an acknowledgment of parentage must "be filed in the circuit court for the county in which the mother or the child resides or, if neither the mother nor the child reside in this state, in the circuit court for the county in which the child was born. If an action for the support, custody, or parenting time of the child exists at any stage of the proceedings in a circuit court of this state or if an action under . . . [MCL 712A.2(b)] is pending in a circuit court of this state, an action under this act shall be brought by motion in the existing case under [the Michigan Court Rules]."[50] MCL 722.1443(1).

B. Time Requirements

An action for revocation of an acknowledgment of parentage under MCL 722.1437 must "be filed within 3 years after the child's birth or within 1 year after the date that the acknowledgment of parentage was signed, whichever is later."[51] MCL 722.1437(1). "MCL 722.1437 provides no basis under which a parent may file an action for revocation of paternity later than three years after the child's birth or

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[48] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[49] "The prosecuting attorney and the [DHHS] may enter into an agreement to transfer the prosecutor's responsibilities under this act to 1 one of the following: (a) [t]he friend of the court, with the approval of the chief judge of the circuit court"; "(b) [a]n attorney employed or contracted by the county under . . . MCL 49.71"; "(c) [a]n attorney employed by, or under contract with, the [DHHS]." MCL 722.1437(2).

[50] For a discussion on filing a civil action in general, see the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 2.

[51] This timing requirement "does not apply to an action filed on or before 1 year after the effective date of [the Revocation of Paternity Act, June 12, 2012]. Id.MCL 722.1437(1).

later than one year after the signing of the acknowledgment of parentage. However, MCL 722.1443 provides an exception under which a party may request an extension of time to seek revocation of an acknowledgment of parentage[.]" *Kalin v Fleming*, 322 Mich App 97, 101-102 (2017).

The court may extend the time for filing an action or motion if the request for extension is "supported by an affidavit signed by the person requesting the extension stating facts that the person satisfied all the requirements for filing an action or motion under [the Revocation of Paternity Act] but did not file the action or motion within the time allowed under [the Revocation of Paternity Act] because of 1 of the following:

> (a) Mistake of fact.
>
> (b) Newly discovered evidence that by due diligence could not have been found earlier.
>
> (c) Fraud.
>
> (d) Misrepresentation or misconduct.
>
> (e) Duress." MCL 722.1443(12).

"If the court finds that an affidavit under [MCL 722.1443(12)] is sufficient, the court may allow the action or motion to be filed and take other action the court considers appropriate. The party filing the request to extend the time for filing has the burden of proving, by clear and convincing evidence, that granting relief under this act will not be against the best interests of the child considering the equities of the case." MCL 722.1443(13).

C. Affidavit Requirement

"An action for revocation under [MCL 722.1437] shall be supported by an affidavit signed by the person filing the action that states facts that constitute 1 of the following:

> (a) Mistake of fact.[52]
>
> (b) Newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed.

[52] See *Kalin v Fleming*, 322 Mich App 97, 103-104 (2017) (noting that "[w]hether [the petitioner's] affidavit described a mistake of fact that excused the filing deadline is a separate question from whether [the acknowledged father's] mistake of fact could support a timely revocation action"). For additional discussion on affidavit requirements following a request for an extension of time, see Section 3.15(B).

(c) Fraud.

(d) Misrepresentation or misconduct.

(e) Duress in signing the acknowledgment." MCL 722.1437(4).

"In an action to set aside an acknowledgment of parentage, the circuit court must make factual findings concerning the sufficiency of the plaintiff's supporting affidavit. . . . If the plaintiff's affidavit is sufficient, the circuit court must then determine whether to revoke the acknowledgment of parentage." *Helton v Beaman*, 304 Mich App 97, 102 (2014) (opinion by O'Connell, J.) (internal citations omitted); *id*. at 119 (Kelly, J., concurring) (agreeing with opinion by Judge O'Connell on these steps), aff'd on other grounds 497 Mich 1001 (2015).

1. Mistake of Fact

"[A] mistake of fact [is] defined as 'a misunderstanding, misapprehension, error, fault, or ignorance of a material fact, a belief that a certain fact exists when in truth and in fact it does not exist.'" *Rogers v Wcisel*, 312 Mich App 79, 95 (2015), (turning to case law for a definition of the term *mistake of fact* where neither the Revocation of Paternity Act nor the Acknowledgment of Parentage Act defined the term and the Legislature did not show an intent to alter the meaning of the term "as understood in our law"), quoting *Montgomery Ward & Co v Williams*, 330 Mich 275, 279 (1951).[53]

"The law . . . does not require that a party have no knowledge that a fact might be untrue to create a mistake of fact[; i]nstead, the party must act in part upon an erroneous belief." *Rogers*, 312 Mich App at 96 ("trial court committed clear error by not finding that [the acknowledging father] had established a mistake of fact" under MCL 722.1437(4)(a),[54] where, although the acknowledging father "had doubt about whether he was the biological father," he signed the affidavit of parentage under the belief he was, but DNA testing later proved that he was not the biological father).

"[U]nchallenged DNA evidence alone is [in]sufficient to establish a mistake of fact under the [Revocation of Paternity Act]." *Rogers*, 312 Mich App at 94. Rather, "[b]iological evidence is . . . a second and separate factor to be considered in the

[53] "Since *Montgomery Ward* was decided in 1951, th[e Court of Appeals] has consistently cited the same definition." *Rogers*, 312 Mich App at 95.

[54] Formerly MCL 722.1437(2)(a).

revocation of an acknowledgment of parentage after the trial court finds the moving party's affidavit sufficient under MCL 722.1437(2)." *Rogers*, 312 Mich App at 95. However, DNA evidence together with a mistaken belief that the acknowledging father is the child's biological father at the time of signing the acknowledgment of parentage is sufficient to establish a mistake of fact. *People v Nugent*, 276 Mich App 183, 190 (2007) (a mistake of fact was made when an acknowledging father signed an affidavit of parentage under the belief he was the biological father, but DNA test results later proved he was not the child's biological father[55]); *Helton v Beaman*, 304 Mich App 97, 105 (2014), aff'd on other grounds 497 Mich 1001 (2015) (opinion by O'Connell, J.) (the parties' belief that the acknowledging father was the child's biological father at the time he signed the affidavit of parentage, but was later proved otherwise through DNA testing, was sufficient to show mistake of fact under MCL 722.1437(4)(a)[56] when the acknowledging father's "decision to sign [the] affidavit of parentage was based in part on [his] mistaken belief that he [was] the child's biological father"); *Helton*, 304 Mich App at 119 (Kelly, J., concurring) (agreeing with opinion by Judge O'Connell on sufficiency as it relates to mistake).

2. Fraud

The parties' knowledge that the acknowledging father may not be the child's biological father was insufficient to show fraud under MCL 722.1437(4)(c)[57] because the Acknowledgment of Parentage Act does not require an acknowledging father "to attest that he is the [child's] biological father." *In re E R Moiles (Moiles II)*, 495 Mich 944 (2014), rev'g in part 303 Mich App 59 (2013).

3. Misrepresentation or Misconduct

The parties' knowledge that the acknowledging father may not be the child's biological father was insufficient to show misrepresentation under MCL 722.1437(4)(d)[58] because the Acknowledgment of Parentage Act does not require an acknowledging father "to attest that he is the [child's] biological father". *In re E R Moiles (Moiles II)*, 495 Mich 944 (2014), rev'g in part 303 Mich App 59 (2013).

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[55] The *Nugent* case refers to the former MCL 722.1011(2)(a), which was replaced with MCL 722.1437(4)(a).

[56] Formerly MCL 722.1437(2)(a).

[57] Formerly MCL 722.1437(2)(c).

[58] Formerly MCL 722.1437(2)(d).

D. Ordering Genetic Testing

"If the court in an action for revocation under [MCL 722.1437] finds that an affidavit under [MCL 722.1437(4)] is sufficient, the court shall order blood or tissue typing or DNA identification profiling as required under [MCL 722.1443(5)]." MCL 722.1437(5).

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 this act. Blood or tissue typing or DNA identification profiling shall be conducted in accordance with . . . MCL 722.716.[59] The 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), aff'd on other grounds 497 Mich 1001 (2015) ("DNA results are not binding on a court making a determination under the [Revocation of Paternity Act], 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"); *Helton*, 304 Mich App at 123 (Kelly, J., concurring) (agreeing with Judge O'Connell's discussion related to DNA results).

E. Representation

1. No Right to Representation

"Whether an action for revocation under [MCL 722.1437] 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, the friend of the court, or an attorney appointed by the court is not required to represent any party regarding the action for revocation." MCL 722.1437(7).

2. Court-Appointed Representation

"If the case is a [T]itle IV-D case, the court may appoint an attorney approved by the office of child support to represent this state's interests with respect to an action or motion under [the Revocation of Paternity]. The court may appoint a guardian ad litem to represent the child's interests with respect to the action or motion." MCL 722.1443(6).

[59] See Section 3.9 for additional information on genetic testing under MCL 722.716.

F. Burden of Proof

"The person filing the action has the burden of proving, by clear and convincing evidence, that the acknowledged father is not the father of the child." MCL 722.1437(5).

G. Costs and Fees

"Except for an action filed under [MCL 722.1445(2) (revocation of paternity action filed for a child conceived as a result of nonconsensual sexual penetration)], a court, in its discretion, may order a person who files an action or motion under [the Revocation of Paternity Act] to post an amount of money with the court, obtain a surety, or provide other assurances that in the court's determination will secure the costs of the action and attorney fees if the person does not prevail. The court, in its discretion, may order a nonprevailing party, including a mother who is a nonprevailing party under [MCL 722.1445(2)], to pay the reasonable attorney fees and costs of a prevailing party." MCL 722.1443(11).

H. Court Determination

Because "an order revoking an acknowledgment of parentage constitutes an order 'setting aside a paternity determination' . . ., [it] is subject to a best interest analysis under MCL 722.1443(4)." *Helton v Beaman*, 497 Mich 1001, 1001 (2015) (affirming "the result reached" in 304 Mich App 97 (2014) "[f]or the reasons explained in section II of the concurring opinion," 304 Mich App at 116-124 (K. F. Kelly, J., concurring)).

1. Refusing to Revoke Acknowledgment

"A court may refuse to enter an order . . . revoking an acknowledgment of parentage . . . if the court finds evidence that the order would not be in the best interests of the child." MCL 722.1443(4). MCL 722.1443(4) sets out factors the court may consider, including in relevant part, "[t]he age of the child"; "[t]he harm that may result to the child"; "[o]ther factors that may affect the equities arising from the disruption of the father-child relationship"; and "[a]ny other factor that the court determines appropriate to consider."

"The court shall state its reasons for refusing to enter an order [revoking an acknowledgment of parentage] on the record." MCL 722.1443(4). See *Jones v Jones*, 320 Mich App 248, 256-257 (2017) (where "the trial court ultimately did alter the presumed father's status, the court . . . was not required to express its particular reasons"; explicit findings with respect to specific

best-interest factors under MCL 722.1443(4) are required "to be made on the record [only] when [the court] *refuses* to enter the order, i.e., when it does not alter the presumed father's status").

2. Issuing Order of Revocation

If the court enters an order revoking the acknowledgment of parentage, the court clerk must send a copy of the order of revocation to the state registrar. MCL 722.1437(6). "The state registrar shall vacate the acknowledgment of parentage and may amend the birth certificate as prescribed by the order of revocation." *Id*.

"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 [Revocation of Paternity Act] 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").

I. Child Conceived After Nonconsensual Sexual Penetration

The court must "[r]evoke an acknowledgment of parentage for an acknowledged father," if a mother brings an action under the Revocation of Paternity Act, and "after a fact-finding hearing, proves by clear and convincing evidence that the child was conceived as a result of nonconsensual sexual penetration[.]" MCL 722.1445(2)(a).

MCL 722.1445(2) "does not apply if, after the date of the alleged nonconsensual sexual penetration described in [MCL 722.1445(2)], the biological parents cohabit and establish a mutual custodial environment for the child." MCL 722.1445(3).

The court may also order "a mother who is a nonprevailing party under [MCL 722.1445(2)] to pay the reasonable attorney fees and costs of [the] prevailing party." MCL 722.1443(11).

J. Standard of Review

The Court of Appeals "reviews a trial court's factual findings in proceedings under the [Revocation of Paternity Act] for clear error.

'The trial court has committed clear error when [the] Court [of Appeals] is definitely and firmly convinced that it made a mistake.'" *Jones v Jones*, 320 Mich App 248, 253 (2017), quoting *Demski v Petlick*, 309 Mich App 404, 431 (2015) (quotation marks and citation omitted in original).

The Court of Appeals "reviews de novo the interpretation and application of statutory provisions." *Jones*, 320 Mich App at 253, citing *Parks v Parks*, 304 Mich App 232, 237 (2014).

See also *In re E R Moiles (Moiles I)*, 303 Mich App 59, 66 (2013), rev'd in part and vacated in part on other grounds by *In re E R Moiles (Moiles II)*, 495 Mich 944 (2014)[60] ("[a] trial court's findings concerning the sufficiency of an affidavit and whether there is clear and convincing evidence that a man is not a child's father under [MCL 722.1437(5)[61]]" is reviewed for clear error, whereas conclusions of law are reviewed de novo).

3.16 Determine Genetic Father is Not Child's Father[62]

MCL 722.1443(2)(b) permits the court to "[d]etermine that a genetic father is not a child's father." MCL 722.1438 governs these actions. MCL 722.1435(2).

"The mother, the genetic father, an alleged father, or a prosecuting attorney may file an action for an order determining that a genetic father is not a child's father." MCL 722.1438(1). However, "[a]n alleged father may not bring an action under [the Revocation of Paternity Act] 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).

A. Initiating Request for Determining Genetic Father is Not the Child's Father

An original action filed under the Revocation of Paternity Act seeking a determination that the genetic father is not the child's father must "be filed in the circuit court for the county in which the mother or the child resides or, if neither the mother nor the child reside in this state, in the circuit court for the county in which the child was born. If an action for the support, custody, or parenting time of the child exists at

[60] For more information on the precedential value of an opinion with negative subsequent history, see our note.

[61] Formerly MCL 722.1437(3).

[62] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

any stage of the proceedings in a circuit court of this state or if an action under . . . [MCL 712A.2(b)] is pending in a circuit court of this state, an action under this act shall be brought by motion in the existing case under [the Michigan Court Rules]."[63] MCL 722.1443(1).

B. Time Requirements

An action for court determination that a genetic father is not the child's father under MCL 722.1438 must "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).

The court may extend the time for filing an action or motion if the request for extension is "supported by an affidavit signed by the person requesting the extension stating facts that the person satisfied all the requirements for filing an action or motion under [the Revocation of Paternity Act] but did not file the action or motion within the time allowed under [the Revocation of Paternity Act] because of 1 of the following:

> (a) Mistake of fact.
>
> (b) Newly discovered evidence that by due diligence could not have been found earlier.
>
> (c) Fraud.
>
> (d) Misrepresentation or misconduct.
>
> (e) Duress." MCL 722.1443(12).

"If the court finds that an affidavit under [MCL 722.1443(12)] is sufficient, the court may allow the action or motion to be filed and take other action the court considers appropriate. The party filing the request to extend the time for filing has the burden of proving, by clear and convincing evidence, that granting relief under [the Revocation of Paternity] will not be against the best interests of the child considering the equities of the case." MCL 722.1443(13).

C. 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:

[63] For a discussion on filing a civil action in general, see the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 2.

(a) The genetic tests that established the man as a child's father were inaccurate.

(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).

D. Ordering Genetic Testing

"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)]. . . . The court may order the person filing the action to repay the cost of the genetic test to the state." MCL 722.1438(3).

MCL 722.1443(5) requires the court to "order the parties to an action or motion under [the Revocation of Paternity] 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]. Blood or tissue typing or DNA identification profiling shall be conducted in accordance with . . . MCL 722.716.[64] The 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]" MCL 722.1443(5).

E. Representation

1. 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).

2. Court-ordered Representation

"If the case is a [T]itle IV-D case, the court may appoint an attorney approved by the office of child support to represent this state's interests with respect to an action or motion under [the Revocation of Paternity]. The court may appoint a guardian ad litem to represent the child's interests with respect to the action or motion." MCL 722.1443(6).

[64] See Section 3.9 for additional information on genetic testing under MCL 722.716.

F. Burden of Proof

"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).

G. Costs and Fees

"Except for an action filed under [MCL 722.1445(2) (revocation of paternity action filed for a child conceived as a result of nonconsensual sexual penetration)], a court, in its discretion, may order a person who files an action or motion under [the Revocation of Paternity] to post an amount of money with the court, obtain a surety, or provide other assurances that in the court's determination will secure the costs of the action and attorney fees if the person does not prevail. The court, in its discretion, may order a nonprevailing party, including a mother who is a nonprevailing party under [MCL 722.1445(2)], to pay the reasonable attorney fees and costs of a prevailing party." MCL 722.1443(11).

H. Court Determination

1. Refusing to Determine Genetic Father is Not the 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). MCL 722.1443(4) sets out factors the court may consider, including in relevant part, "[t]he age of the child"; "[t]he harm that may result to the child"; "[o]ther factors that may affect the equities arising from the disruption of the father-child relationship"; and "[a]ny other factor that the court determines appropriate to consider."

"The court shall state its reasons for refusing to enter an order [determining that a genetic father is not a child's father] on the record." MCL 722.1443(4). See *Jones v Jones*, 320 Mich App 248, 256-257 (2017) (where "the trial court ultimately did alter the presumed father's status, the court . . . was not required to express its particular reasons"; explicit findings with respect to specific best-interest factors under MCL 722.1443(4) are required "to be made on the record [only] when [the court] *refuses* to enter the order, i.e., when it does not alter the presumed father's status").

2. Determining Genetic Father is Not the Child's Father

"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).

"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 [Revocation of Paternity Act] 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").

I. Child Conceived After Nonconsensual Sexual Penetration

The court must "[d]etermine that a genetic father is not the child's father," if a mother brings an action under the Revocation of Paternity Act and "after a fact-finding hearing, proves by clear and convincing evidence that the child was conceived as a result of nonconsensual sexual penetration[.]" MCL 722.1445(2)(d).

MCL 722.1445(2) "does not apply if, after the date of the alleged nonconsensual sexual penetration described in [MCL 722.1445(2)], the biological parents cohabit and establish a mutual custodial environment for the child." MCL 722.1445(3).

The court may also order "a mother who is a nonprevailing party under [MCL 722.1445(2)] to pay the reasonable attorney fees and costs of [the] prevailing party." MCL 722.1443(11).

J. Standard of Review

The Court of Appeals "reviews a trial court's factual findings in proceedings under the [Revocation of Paternity Act] for clear error. 'The trial court has committed clear error when [the] Court [of Appeals] is definitely and firmly convinced that it made a mistake.'" *Jones v Jones*, 320 Mich App 248, 253 (2017), quoting *Demski v Petlick*,

309 Mich App 404, 431 (2015) (quotation marks and citation omitted in original).

The Court of Appeals "reviews de novo the interpretation and application of statutory provisions." *Jones*, 320 Mich App at 253, citing *Parks v Parks*, 304 Mich App 232, 237 (2014).

3.17 Set Aside Order of Filiation or Paternity Order[65]

MCL 722.1443(2)(c) permits the court to "[s]et aside an order of filiation or a paternity order." MCL 722.1439 governs these actions. MCL 722.1435(3).

"If a child has an affiliated father and paternity was determined based on the affiliated father's failure to participate in the court proceedings, the mother, an alleged father, or the affiliated father may file a motion with the court that made the determination to set aside the determination."MCL 722.1439(1). However, "[a]n alleged father may not bring an action under [the Revocation of Paternity Act] 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).

A. Initiating Request for Revocation

An original action filed under the Revocation of Paternity Act seeking an order to set aside an order of filiation or a paternity order must "be filed in the circuit court for the county in which the mother or the child resides or, if neither the mother nor the child reside in this state, in the circuit court for the county in which the child was born. If an action for the support, custody, or parenting time of the child exists at any stage of the proceedings in a circuit court of this state or if an action under . . . [MCL 712A.2(b)] is pending in a circuit court of this state, an action under this act shall be brought by motion in the existing case under [the Michigan Court Rules]."[66] MCL 722.1443(1).

B. Time Requirements

A motion under MCL 722.1439 to set aside an order of filiation must "be filed within 3 years after the child's birth or within 1 year after the date of the order of filiation, whichever is later." MCL 722.1439(2).

[65]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[66] For a discussion on filing a civil action in general, see the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 2.

This timing requirement "does not apply to an action filed on or before 1 year after the effective date of [the Revocation of Paternity Act, June 12, 2012]. *Id*.

The court may extend the time for filing an action or motion if the request for extension is "supported by an affidavit signed by the person requesting the extension stating facts that the person satisfied all the requirements for filing an action or motion under [the Revocation of Paternity Act] but did not file the action or motion within the time allowed under [the Revocation of Paternity Act] because of 1 of the following:

> (a) Mistake of fact.
>
> (b) Newly discovered evidence that by due diligence could not have been found earlier.
>
> (c) Fraud.
>
> (d) Misrepresentation or misconduct.
>
> (e) Duress." MCL 722.1443(12).

"If the court finds that an affidavit under [MCL 722.1443(12)] is sufficient, the court may allow the action or motion to be filed and take other action the court considers appropriate. The party filing the request to extend the time for filing has the burden of proving, by clear and convincing evidence, that granting relief under [the Revocation of Paternity Act]. will not be against the best interests of the child considering the equities of the case." MCL 722.1443(13).

C. Ordering Genetic Testing

MCL 722.1443(5) requires the court to "order the parties to an action or motion under this 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.[67] The 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).

D. Court-Appointed Representation

"If the case is a [T]itle IV-D case, the court may appoint an attorney approved by the office of child support to represent this state's

[67] See Section 3.9 for additional information on genetic testing under MCL 722.716.

interests with respect to an action or motion under [the Revocation of Paternity]. The court may appoint a guardian ad litem to represent the child's interests with respect to the action or motion." MCL 722.1443(6).

E. Costs and Fees

"Except for an action filed under [MCL 722.1445(2) (revocation of paternity action filed for a child conceived as a result of nonconsensual sexual penetration)], a court, in its discretion, may order a person who files an action or motion under [the Revocation of Paternity Act] to post an amount of money with the court, obtain a surety, or provide other assurances that in the court's determination will secure the costs of the action and attorney fees if the person does not prevail. The court, in its discretion, may order a nonprevailing party, including a mother who is a nonprevailing party under [MCL 722.1445(2)], to pay the reasonable attorney fees and costs of a prevailing party." MCL 722.1443(11).

F. Court Determination

1. Refusing to Set Aside Paternity Determination

"A court may refuse to enter an order setting aside a paternity determination . . . if the court finds evidence that the order would not be in the best interests of the child." MCL 722.1443(4). MCL 722.1443(4) sets out factors the court may consider, including in relevant part, "[t]he age of the child"; "[t]he harm that may result to the child"; "[o]ther factors that may affect the equities arising from the disruption of the father-child relationship"; and "[a]ny other factor that the court determines appropriate to consider."

"The court shall state its reasons for refusing to enter an order [revoking an acknowledgment of parentage] on the record." MCL 722.1443(4). See *Jones v Jones*, 320 Mich App 248, 256-257 (2017) (where "the trial court ultimately did alter the presumed father's status, the court . . . was not required to express its particular reasons"; explicit findings with respect to specific best-interest factors under MCL 722.1443(4) are required "to be made on the record [only] when [the court] *refuses* to enter the order, i.e., when it does not alter the presumed father's status").

"If the court determines that a motion under [MCL 722.1439] should be denied and the order of filiation not be set aside, the court shall order the person who filed the motion to pay the reasonable attorney fees and costs incurred by any other party because of the motion." MCL 722.1439(3).

2. Setting Aside Paternity Determination

"A judgment entered under [the Revocation of Paternity Act] 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 [Revocation of Paternity Act] 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").

G. Child Conceived After Nonconsensual Sexual Penetration

The court must "[s]et aside an order of filiation for an affiliated father," if a mother brings an action under the Revocation of Paternity Act and "after a fact-finding hearing, proves by clear and convincing evidence that the child was conceived as a result of nonconsensual sexual penetration[.]" MCL 722.1445(2)(d).

MCL 722.1445(2) "does not apply if, after the date of the alleged nonconsensual sexual penetration described in [MCL 722.1445(2)], the biological parents cohabit and establish a mutual custodial environment for the child." MCL 722.1445(3).

The court may also order "a mother who is a nonprevailing party under [MCL 722.1445(2)] to pay the reasonable attorney fees and costs of [the] prevailing party." MCL 722.1443(11).

H. Standard of Review

The Court of Appeals "reviews a trial court's factual findings in proceedings under the [Revocation of Paternity Act] for clear error. 'The trial court has committed clear error when [the] Court [of Appeals] is definitely and firmly convinced that it made a mistake.'" *Jones v Jones*, 320 Mich App 248, 253 (2017), quoting *Demski v Petlick*, 309 Mich App 404, 431 (2015) (quotation marks and citation omitted in original).

The Court of Appeals "reviews de novo the interpretation and application of statutory provisions." *Jones*, 320 Mich App at 253, citing *Parks v Parks*, 304 Mich App 232, 237 (2014).

Part 4: Identifying the Putative Father

In order for a man to be identified as a child's putative father, the child must have been born out of wedlock. *In re KH*, 469 Mich 621, 630 (2004). The Adoption Code, MCL 710.21 *et seq.*, sets forth procedures for identifying putative fathers who fall under one of the following categories:

> (A) A man claiming to be the biological father of a child born out of wedlock. See Section 3.18.
>
> (B) A man who a child's mother claims is the biological father to a child born out of wedlock. See Section 3.19.
>
> (C) 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. See Section 3.20.

Once a child has a legal father, there cannot be a putative father. See *In re KH*, 469 Mich at 635-637. For additional information on determining a child's legal father, see Section 3.9.

3.18 Notice of Intent to Claim Paternity

"Before the birth of a child born out of wedlock, a person claiming under oath to be the father of the child may file a verified notice of intent to claim paternity with the court in any county of this state. The form of the notice shall be prescribed by [DHHS] and provided to the court.[68] The notice shall include the claimant's address." MCL 710.33(1).

On receipt of the notice, the court must forward the notice of intent to claim paternity to the DHHS vital records division by the next business day.[69] MCL 710.33(1). If the mother's address is indicated on the notice, the vital records division must send a copy of the notice by first-class mail to the child's mother.[70] *Id.*

"A person filing a notice of intent to claim paternity shall be presumed to be the father of the child for purposes of [the Adoption Code] unless the mother denies that the claimant is the father. Such a notice is admissible in a paternity proceeding under [the Paternity Act, MCL 722.711, *et seq.*],

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[68] See the DHHS form *Request for Verification of Notice of Intent to Claim Paternity*. *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[69] A case code is available "for handling certain adoption-related filings[, including notices of intent to claim paternity,] that precede the filing of a petition for adoption and for which a petition for adoption might not be subsequently filed." SCAO Memorandum, *New Case-Type Code for Adoption-Related Matters.*

[70] MCL 710.33 is silent on how the vital records division is to handle a notice that does not indicate the mother's address.

and shall create a rebuttable presumption as to the paternity of that child for purposes of that act.[71] Such a notice shall create a rebuttable presumption as to paternity of the child for purposes of dependency or neglect proceedings under [the Juvenile Code, MCL 712A.2 *et seq*.]"[72] MCL 710.33(2).

"A person who timely files a notice of intent to claim paternity shall be entitled to notice of any hearing involving that child to determine the identity of the father of the child and any hearing to determine or terminate his parental rights to the child." MCL 710.33(3).

3.19 Determining the Putative Father[73]

"If a child is claimed to be born out of wedlock and the mother executes or proposes to execute a release or consent relinquishing her rights to the child or joins in a petition for adoption filed by her spouse, and the release or consent of the natural father cannot be obtained, the judge shall hold a hearing as soon as practical to determine whether the child was born out of wedlock, to determine the identity of the father, and to determine or terminate the rights of the father as provided in [MCL 710.36, MCL 710.37, MCL 710.39]."[74] MCL 710.36(1).

A child born out of wedlock may not be placed for adoption until the consent or release of the child's biological father is obtained or the court terminates the father's parental rights.[75] See MCL 710.31(1).

For checklists on terminating a putative father's parental rights, see the Michigan Judicial Institute's Adoption Proceedings Quick Reference Materials, *Terminating Father's Parental Rights*.

A. Notice of Hearing

1. Service Requirements

"Notice of the hearing[76] shall be served upon the following:

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[71] For a discussion on paternity proceedings under the Paternity Act, see Section 3.3.

[72] For a detailed discussion on abuse and neglect proceedings under the Juvenile Code, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*.

[73] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[74] For additional information on a release of parental rights, see Sections 2.2-2.4, a consent to adoption, see Sections 2.6-2.9, and a stepparent adoption, see Section 8.3.

[75] A putative father has a due process right to notice and a hearing before his parental rights are terminated. *In re Kozak*, 92 Mich App 579, 581-584 (1979).

[76] See the SCAO form *Notice of Hearing to Identify Father and Determine or Terminate His Rights*.

> (a) A putative father who has timely filed a notice of intent to claim paternity as provided in [MCL 710.33] or [MCL 710.34].[77]
>
> (b) A putative father who was not served a notice of intent to release or consent at least 30 days before the expected date of confinement specified in the notice of intent to release or consent.
>
> (c) Any other male who was not served according to [MCL 710.34(1)] with a notice of intent to release or consent and who the court has reason to believe may be the child's father." MCL 710.36(3).

"Proof of service of a notice of intent to release or consent or the putative father's verified acknowledgment of notice of intent to release or consent shall be filed with the court, if the notice was given to the putative father. The court shall request the vital records division of the department to send to the court a copy of any notice of intent to claim paternity of the particular child that the division has received." MCL 710.36(2).

"Notice of a petition to identify a putative father and to determine or terminate his rights . . . must be served on the individual or the individual's attorney in the manner provided in: (a) MCR 2.107(C)(1) or [MCR 2.107(C)](2),[78] or (b) MCR 2.105(A)(2), but service is not made for purpose of this subrule until the individual or the individual's attorney receives the notice or petition."[79] MCR 3.802(A)(2). "If service cannot be made under [MCR 3.802(A)(2)] because the identity of the father of a child born out of wedlock or the whereabouts of the identified father has not been ascertained after diligent inquiry,

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[77] MCL 710.33 permits a putative father to file a notice of intent to claim paternity of an expected child. MCL 710.34 permits "a woman pregnant out of wedlock [to] file with the court an ex parte petition which evidences her intent to release her expected child for adoption or to consent to the child's adoption," and requires notice of her intent to be provided to the putative father that informs him of his right to file a notice of intent to claim paternity under MCL 710.33. For a discussion on filing a notice of intent to claim paternity under MCL 710.33, see Section 3.18, notice of an expected mother's intent to release her expected child, see Section 2.4, and notice of an expected mother's intent to consent to her expected child's adoption, see Section 2.9.

[78] Temporarily, "all service of process under [MCR 2.107] must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) during the effective period of this order, but should otherwise comply as much as possible with the provisions of MCR 2.107(C)(4)." Administrative Order No. 2020-9, temporarily amending certain court rules "until further order of the Court." See Administrative Order No. 2020-12; Administrative Order No. 2020-19(3). Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[79] If the putative father is incarcerated, see Section 2.12 for the notice requirements for incarcerated parties.

the petitioner must file proof of the efforts made to identify or locate the father in a statement verified under MCR 1.109(D)(3).[80] No further service is necessary before the hearing to identify the father and to determine or terminate his rights." MCR 3.802(B)(1).

2. Required Content

"The notice of hearing shall inform the putative father that his failure to appear at the hearing constitutes a denial of his interest in custody of the child, which denial shall result in the court's termination of his rights to the child." MCL 710.36(4).

3. Proof of Service

"Proof of service of the notice of hearing required by [MCL 710.36(3)] shall be filed with the court. A verified acknowledgment of service by the party to be served is proof of personal service. Notice of the hearing shall not be required if the putative father is present at the hearing. A waiver of notice of hearing by a person entitled to receive it is sufficient." MCL 710.36(5).

B. Court Determination

"The court shall receive evidence as to the identity of the father of the child. In lieu of the mother's live testimony, the court shall receive an affidavit or a verified written declaration from the mother as evidence of the identity and whereabouts of the child's father. If the court determines that the affidavit or verified written declaration is insufficient, the court shall allow amendment of the affidavit or verified written declaration. If the court determines that the amendment of the affidavit or verified written declaration is insufficient, the court may receive live testimony from the mother. Based upon the evidence received, the court shall enter a finding identifying the father or declaring that the identity of the father cannot be determined." MCL 710.36(6).

If the identity or whereabouts of the father is unascertainable, the court must "take evidence concerning the attempt to identify or locate the father. If the court finds that a reasonable attempt was made, the court shall proceed under MCL 710.37(2).[81] If the court finds that a

[80] The affidavit or declaration may be verified by: "(a) oath or affirmation of the party or of someone having knowledge of the facts stated; or (b) except as to an affidavit, including the following signed and dated declaration: 'I declare under the penalties of perjury that this _____ has been examined by me and that its contents are true to the best of my information, knowledge, and belief.' . . . ." MCR 1.109(D)(3). See the SCAO form *Declaration of Inability to Identify/Locate Father*.

reasonable attempt was not made, the court shall adjourn the hearing under MCL 710.36(7) and shall

> (a) order a further attempt to identify or locate the father so that service can be made under [MCR 3.802(A)(2)(a)], or
>
> (b) direct any manner of substituted service of the notice of hearing except service by publication." MCR 3.802(B)(2).

"If the court finds that the child's father is a person who did not receive either a timely notice of intent to release or consent according to [MCL 710.34(1)] or a notice required under [MCL 710.36(3)], and who has neither waived his right to notice of hearing nor is present at the hearing, the court shall adjourn further proceedings until that person is served with a notice of hearing." MCL 710.36(7).

3.20 Rebutting Presumption of Legitimacy

A putative father can only exist where a child has no legal father. *In re KH*, 469 Mich 621, 635-637 (2004). If a man is married to the child's mother at any time between the child's conception and the child's birth, the child is presumed to be an issue of the marriage. See *In re CAW*, 469 Mich 192, 199 (2003); *Serafin v Serafin*, 401 Mich 629, 636 (1977).

"Only the mother and the presumed legal father may challenge the presumption of legitimacy. In order for a third party to have standing to rebut this presumption, there must first have been a 'judicial determination arising from a proceeding between the husband and the wife that declares the child is not the product of the marriage.' . . . Unless and until [the child's mother] and her husband ask a court to declare that the child was born out of wedlock, [the putative father] lacks standing to claim paternity under the Paternity Act." *Sprenger v Bickle*, 302 Mich App 400, 404 (2013), quoting *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 306, 313 (2011), (internal citations omitted). See also *In re KH*, 460 Mich at 635 (recognizing that only the child's mother and legal father can rebut the presumption of legitimacy). "The presumption of legitimacy . . . can be overcome only by a showing of clear and convincing evidence." *Id*. at 634.

> **Note:** "[A] court determination under MCL 722.711(a) that a child is not 'the issue of the marriage' requires that there be an affirmative finding regarding the child's paternity in a

[81] MCL 710.37(2) permits the court to terminate the putative father's parental rights under certain circumstances. For additional information on terminating a putative father's parental rights under MCL 710.37, see Section 2.10(A).

> prior legal proceeding that settled the controversy between the mother and the legal father." *Barnes v Jeudevine*, 475 Mich 696, 705-706 (2006) (holding that neither a default judgment of divorce indicating there were no children born or expected during the marriage, a birth certificate nor an affidavit of parentage are court determinations sufficient to establish that a child is not the issue of a marriage).

"When a minor child has a presumptive father, the [Revocation of Paternity Act] allows an [alleged father] to come forward under certain circumstances and allege his paternity and legal fatherhood. See MCL 722.1441(3). A successful [alleged father] can obtain a judicial determination that a child was born out of wedlock,[82] a determination of his own biological paternity, and an appropriate order of filiation. MCL 722.1443(2)(d) and [MCL 722.1443(2)](e)." *Graham v Foster (Graham II)*, 500 Mich 23, 26 (2017). For a detailed discussion on determining whether a child is born out of wedlock for the purpose of establishing paternity under the Revocation of Paternity Act, see Section 3.5.

"There has yet to be any determination in this state that a putative father of a child born in wedlock, without a court determination of paternity, has a protected liberty interest with respect to a child he claims as his own." *Aichele v Hodge*, 259 Mich App 146, 168 (2003). See also *Michael H v Gerald D*, 491 US 110, 121, 124 (1989) (putative father did not have due process right to establish and maintain a relationship with a child born in wedlock).

[82] "[T]he [Revocation of Paternity Act] does not define the term 'born out of wedlock'; however, the commonly understood meaning is reflected in the definition supplied by the Paternity Act, MCL 722.711 *et seq*., which provides that one aspect of the definition is to be 'born or conceived during a marriage but not the issue of that marriage,' MCL 722.711(a). It is this definition that is relevant [to MCL 722.1441]." *Jones v Jones*, 320 Mich App 248, 254 n 2 (2017).

Chapter 4: Adoption Eligibility, Venue, Jurisdiction, Foreign Language Interpreter, Lawyer-Guardian Ad Litem

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4.1 Overview of Chapter[1]

This chapter discusses who is and is not eligible to adopt, and the role of lawyer-guardian ad litems. It also includes a discussion on venue, and jurisdiction in intrastate, interstate, and international adoptions. However, it does not contain an exhaustive discussion on jurisdiction in all circumstances. See Chapter 7 for a detailed discussion of jurisdiction over post-adoption appeals, and Chapter 11 for a detailed discussion of jurisdiction over Indian children.

4.2 Who May Adopt

A. Persons Eligible to Adopt

Persons eligible to adopt a child or an adult are:

> (1) A single person.
>
> (2) A married person and his or her spouse.
>
> (3) A married person individually "without his or her spouse joining in the petition" if the individual is adopting an adult and "if all of the interested parties consent."
>
> (4) A married person individually "without his or her spouse joining in the petition" if the individual is adopting a child and "if the failure of the other spouse to join in the petition or to consent to the adoption is excused by the court for good cause shown or in the best interest of the child." MCL 710.24(1)-(2).

B. Persons Not Eligible to Adopt

1. Persons Convicted of Child Abuse or Criminal Sexual Conduct

Before an adoptive parent is approved for child placement, the Adoption and Safe Families Act (ASFA) requires a criminal record check be conducted on the prospective adoptive parent. See 42 USC 671(a)(20)(A) (requiring, for purposes of federal funding, Michigan to conduct a criminal record check for a prospective adoptive parent before the adoptive parent is approved for child placement).[2]

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[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

The prospective adoptive parent may not adopt a child if his or her criminal record shows that the adoptive parent has been convicted of child abuse or criminal sexual conduct. See MCL 710.22a, which specifically provides:

> "A child shall not be placed with a prospective adoptive parent and an adoption order shall be not issued if a person authorized to place the child or the court authorized to issue the order has reliable information that the prospective adoptive parent has been convicted under any of the following:
>
> > (a) . . . [accosting, enticing, or soliciting a child for immoral purpose under] MCL 750.145a and [child sexually abusive activity or material under MCL] 750.145c.
> >
> > (b) . . . [criminal sexual conduct or assault with intent to commit criminal sexual conduct under] MCL 750.520b to [MCL] 750.520g.
> >
> > (c) A law of another state substantially similar to 1 of the sections included in subdivision (a) or (b)."

For additional information on the enumerated crimes listed in MCL 710.22a, see the Michigan Judicial Institute's *Sexual Assault Benchbook*.

2. Unrelated Adults or Unmarried Partners (Second Parent Adoptions)

Although Michigan trial courts are seeing unrelated persons petitioning together to adopt a child or adult, the statutory authority holds firm to limiting the group of prospective adoptive parents to single persons, married persons filing a joint petition for adoption with his or her spouse, and a married person individually filing a petition for adoption "without his or her spouse joining in the petition" in certain limited circumstances. See MCL 710.24(1)-(2).

However, a second parent adoption properly entered in one State must be recognized in its sister States under the United States Constitution's Full Faith and Credit Clause. *VL v EL*, 577 US ___, ___ (2016) (reversing the Alabama Supreme Court and remanding for further proceedings on the adoptive parent's request for child custody because the Alabama Supreme Court

[2] For additional information on federal funding subsidies, see Section 10.8.

was obligated under the United State Constitution's Full Faith and Credit Clause to recognize an adoption judgment entered by a Georgia court that had subject-matter jurisdiction to hear and decide an adoption petition that resulted in it entering a "final decree of adoption [that] allow[ed the biological mother's same-sex partner] to adopt the children and recogniz[ed] both [the biological mother and her same-sex partner] as [the children's] legal parents"). See also *Giancaspro v Congleton,* unpublished opinion per curiam of the Court of Appeals, issued February 19, 2009 (Docket No. 283267)[3] (finding that, where a single parent internationally adopted three children from China and an Illinois court permitted the adoptive parent's partner to adopt the children under a second parent adoption, "[t]he trial court correctly concluded that the Judgment of Adoption entered in Illinois [was] entitled to full faith and credit under the United States Constitution, establishing each party as an adoptive parent of the minor children, irrespective of their relationship with each other and irrespective of whether they could have jointly adopted the children in Michigan[, but t]he trial court erred in failing to recognize that, as a consequence, [the partner] ha[d] validly stated a claim on which relief c[ould] be granted under the Child Custody Act in Michigan.").

C. Considerations of Age, Race, National Origin, Religious Affiliation, Disability, or Income

A prospective adoptive parent must not be refused services based solely on his or her age, race, religious affiliation, disability, or income level.[4] MCL 722.957(1). However, religious affiliation may be considered when the adoption facilitator is a private child placing agency operated, supervised, or controlled by a religious institution or organization. MCL 722.957(2).

For purposes of federal funding, the Adoption and Safe Families Act (ASFA) requires that Michigan have a state plan in place that prohibits the state or any other entity within the state from denying a person the opportunity to become an adoptive parent or have a

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

[4] But see *In re ASF*, 311 Mich App 420, 435 (2015) (finding that the MCI Superintendent did not violate MCL 722.957(1) by considering the petitioners' ages where the MCI Superintendent "did not withhold consent to adopt *solely* on the basis of [the] petitioners' ages"; "[rather, the] petitioners' ages were only one factor that [was] considered[among] . . . many other factors involved in [the] decision to withhold consent"). The Court also found that the MCI Superintendent did not violate the Michigan Civil Rights Act (CRA), MCL 37.2302(a), by considering the petitioners' ages when the "consent for adoption was denied because the [MCI S]uperintendent found that adoption by [the] petitioners was not in [the child's] best interests in light of a number of factors, including [the] petitioners' ability and willingness to provide long-term care for a then four-year-old child."

child placed for adoption with him or her on the basis of the race, color, or national origin of the person, or of the child involved, and prevents Michigan from delaying or denying the placement of a child for adoption on the basis of the race, color, or national origin of the adoptive parent or the child. 42 USC 671(a)(18)(A)-(B). For additional information on federal funding subsidies, see Section 10.8.

Moreover, it is a violation of the federal Civil Rights Act, 42 USC 2000d *et seq.*, to delay or deny an adoptive or foster parent the opportunity of child placement on the basis of race, color, or national origin. 42 USC 1996b(1)-(2).

But see the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq.*, which requires certain placement preferences be followed when the adoptee is an Indian child. See Chapter 11 for information on the ICWA and the MIFPA.

4.3 Venue[5]

A. Proper Venue

An adoptive parent must file an adoption petition[6] with the court in the county where "the petitioner resides, where the adoptee is found or, where the parent's parental rights were terminated or are pending termination." MCL 710.24(1). "If both parents' parental rights were terminated at different times and in different courts, a petition filed under [MCL 710.24] shall be filed in the court of the county where parental rights were first terminated." MCL 710.24(1).

If the child has already been temporarily placed, the adoptive parent must file a petition with the court that received the temporary transfer report.[7] MCL 710.24(1). See MCL 710.23d(2), which requires the temporary transfer report to be filed in the county where the child's parent or guardian resides, the prospective parent resides, or where the child is located.

"In an adoption proceeding in which there is more than 1 applicant, the petition for adoption shall be filed with the court of the county where the parent's parental rights were terminated or are pending termination. If both parents' parental rights were terminated at

[5]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[6] For a discussion on adoption petitions, see Section 6.6.

[7] See Section 5.5(E) for a detailed discussion of transfer reports.

different times and in different courts, a petition filed under this section shall be filed in the court of the county where parental rights were first terminated." MCL 710.24(3); MCL 710.45(4).

B. Change of Venue[8]

A motion for change of venue must be filed before or at the time an answer is filed.[9] MCR 2.221(A). Untimeliness, however, is not grounds for denying a motion for change of venue "if the court is satisfied that the facts on which the motion is based were not and could not with reasonable diligence have been known to the moving party more than 14 days before the motion was filed." MCR 2.221(B). "An objection to venue is waived if it is not raised within the time limits imposed by this rule." MCR 2.221(C).

When venue is proper, the court may not change venue on its own initiative, but may change venue only on a party's motion. MCR 2.222(B). Once a party files a motion for change of venue, the court may grant the motion "for the convenience of parties and witnesses or when an impartial trial cannot be had where the action is pending." MCR 2.222(A). "MCR 2.222 does not limit which party may initiate a change of venue." *Dawley v Hall*, 501 Mich 166, 171 (2018).

When venue is improper, the court must order a change of venue on a defendant's timely filed motion or may order a change of venue on the court's own initiative if the parties receive notice and an opportunity to be heard on the venue question. MCR 2.223(A). See also *Dawley*, 501 Mich at 168, 170 (when venue is improper, MCR 2.223(A) "provides two avenues for changing venue: the defendant's timely motion or the court's order on its own initiative"; "[b]ecause plaintiff's motion is neither a motion by defendant nor an action on the court's 'own initiative,' . . . plaintiff cannot file a motion for change of venue under MCR 2.223(A)").

"If venue is changed because the action was brought where venue was not proper, the action may be transferred only to a county in which venue would have been proper." MCR 2.223(A).

[8]For more information on changing venue and the accompanying requirements, see the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 2.

[9] Venue in adoption proceedings is governed by the Michigan Court Rules. MCR 3.800(A).

4.4 Jurisdiction in Adoption Proceedings[10]

A. Exclusive Jurisdiction

The Family Division of the Circuit Court has sole and exclusive jurisdiction over adoption cases. MCL 600.1021(1)(b).

B. Concurrent Jurisdiction

In adoption proceedings, cases may arise where two courts have concurrent jurisdiction over a child. When one court retains jurisdiction over a minor, concurrent jurisdiction will arise if proceedings are then commenced in another Michigan court on separate jurisdictional grounds affecting that same minor. See MCR 3.205(A). MCR 3.205(A) does not require the subsequent court to exercise a waiver or transfer of jurisdiction.

1. Notice of Adoption Proceedings

If it is known that a minor is subject to the prior continuing jurisdiction of a Michigan court, the party initiating a subsequent proceeding involving the same minor must send notice of the proceeding to the prior court's court clerk or register, and the appropriate official. MCR 3.205(B)(2). The notice must be sent 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 send the notice as soon as it becomes known. *Id.*

"The notice requirement of [MCR 3.205(B)] is not jurisdictional and does not preclude the subsequent court from entering interim orders before the expiration of the 21-day period, if required by the best interests of the minor." MCR 3.205(B)(4). 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) (although the subsequent court failed to give notice regarding commencement of an adoption proceeding, waiver or transfer of jurisdiction was not required for the full and valid exercise of the subsequent court's jurisdiction).

[10]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

2. 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). 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).

3. Duties of Prior and Subsequent Courts

Once a prior court receives notice of subsequent proceedings, the appropriate official of the prior court 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 of 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 appropriate official of 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). The appropriate official of the prior court must take any necessary steps to implement subsequent court orders. MCR 3.205(D)(4).

When a guardian is awarded custody of a minor under MCL 722.26b,[11] the clerk of the circuit court must automatically send a copy of the judgment or order to the probate court with continuing jurisdiction over the child as a result of guardianship proceedings, with or without a request. MCR 3.205(D)(3).

C. Special Findings on Issues of Special Immigrant Juvenile Status

"[A] state juvenile court has authority to issue factual findings pertinent to a juvenile's [special immigrant juvenile (SIJ)] status"; while "[t]he ultimate determination whether to grant SIJ status to a juvenile 'rests squarely with the federal government, Congress chose to rely on state courts to make initial factual findings because of their special expertise in making determinations as to abuse and neglect, evaluating the best interest factors, and ensuring safe and

[11] MCL 722.26b contemplates an appointed guardian gaining custody of a child.

appropriate custodial arrangements.'" *In re LFOC*, 319 Mich App 476, 485-486 (2017), quoting *HSP v JK*, 223 NJ 196, 209 (2015). In *In re LFOC*, the trial court, in a stepparent adoption proceeding involving an undocumented juvenile immigrant, "erred to the extent that it found that it lacked authority to make predicate factual findings pertaining to the issue of SIJ status"; the trial court was a juvenile court for purposes of the SIJ statute, and thus possessed the authority to issue predicate factual findings pertinent to the issue of child's potential SIJ status. *In re LFOC*, 319 Mich App at 487-488.

"8 USC 1101(a)(27)(J) and 8 CFR 204.11 (2017) afford 'undocumented children, under the jurisdiction of a juvenile court, the ability to petition for special immigrant juvenile status in order to obtain lawful permanent residence in the United States.' . . . Predicate factual findings of the state juvenile court are used to petition for SIJ status in the federal system." *In re LFOC*, 319 Mich App 476, 484-485 (2017), quoting *In the Interest of Luis G*, 17 Neb App 377, 385 (2009). "'If the application is granted, the juvenile may become a lawful permanent resident who, who after five years, is eligible to become a United States citizen. Denial of SIJ status renders the applicant subject to deportation.'" *In re LFOC*, 319 Mich App at 486, quoting *In re Estate of Nina L ex rel Howerton*, 2015 Ill App 152223 (2015).

"It is therefore clear that a state juvenile court has authority to issue factual findings pertinent to a juvenile's SIJ status. . . . '[T]he juvenile court is charged with making the factual inquiry relevant to SIJ status when an unmarried, resident alien child is found to be dependent on the court[, and t]he SIJ statute[, 8 USC 1101(a)(27)(J),] affirms the institutional competence of state courts as the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child's best interests.'" *In re LFOC*, 319 Mich App at 485-486, quoting *In re JJXC*, 318 Ga App 420, 425 (2012). Specifically, 8 USC 1101(a)(27)(J) "'implements a two-step process in which a state court makes predicate factual findings — soundly within its traditional concern for child welfare — relative to a juvenile's eligibility. The juvenile then presents the family court's factual findings to [the United States Citizenship and Immigration Services (USCIS)], which engages in a much broader inquiry than state courts and makes the ultimate decision as to whether or not the juvenile's application for SIJ status should be granted. Thus the findings made by the state court only relate to matters of child welfare, a subject traditionally left to the jurisdiction of the states. All immigration decisions remain in the hands of USCIS, the agency charged with administering the [federal immigration statute].'" *In re LFOC*, 319 Mich App at 486-487, quoting *HSP*, 223 NJ at 209 (last alteration in original).

For a detailed discussion, including information on laws and regulations, policies, and best practices, see the National Immigrant Women's Advocacy Project (NIWAP), *Special Immigrant Juvenile Status Bench Book*.[12] For information specific to unaccompanied immigrant children, see the *Guide for State Courts in Cases Involving Unaccompanied Immigrant Children*, and the *Unaccompanied Immigrant Children and the State Courts Information Card*.

D. Interstate Adoptions

The Interstate Compact on the Placement of Children (ICPC), MCL 3.711 *et seq.*, regulates the activities of a child's adoptive placement across state lines. 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)-(d). The ICPC does not apply when:

> "(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)-(b).

In Michigan, the Department of Health and Human Services (DHHS) is responsible for coordinating interstate adoptions. See DHHS's Interstate Compact Manual (ICM), *Interstate Adoption Procedures ICM 120*.[13]

Under the Adoption and Safe Families Act (ASFA), federal adoption assistance funding is available if Michigan, among other things, assures that it pursues adoptions across county and state lines. 42 USC 622(a)-(b). For additional information on federal funding subsidies under the ASFA, see Section 10.8.

[12]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[13]*Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

1. 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).

Before a child is placed in a foster care or a preadoptive placement in the receiving state, the sending agency must provide written notice to the appropriate public authorities of the intent to place the child in the receiving state. MCL 3.711, Article III (2). The notice must contain the following:

> (1) The child's name and date and place of birth.
>
> (2) The parents' or legal guardian's name(s) and address(es).
>
> (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) Any evidence supporting the authority for placement.
>
> (6) Any additional evidence the receiving state requests. MCL 3.711, Article III (2)(a)-(d), (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, notice must not be sent to the sending agency until the sending agency provides evidence that it has the necessary authority to consent to the adoption. MCL 3.715; MCL 710.51(4).

2. 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. Violations may be punished or penalized in either the receiving state or the sending state in accordance with that state's laws. *Id.*

Any violation of the ICPC conditions will also result in 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.

3. Retention of Jurisdiction

a. Sending Agency Located in Michigan

A sending agency located in Michigan must retain jurisdiction over a child on all matters relating to the custody, supervision, care, treatment, and disposition of the child, which includes the power to

> effect or cause a child's return or transfer to another placement.

The sending agency also continues to have financial responsibility for the support and maintenance of the child during the period of placement. MCL 3.711, Article V (1).

Michigan's sending agency must retain jurisdiction over the child until the child is "adopted, reaches majority, becomes self-supporting, or is discharged with the concurrence of the appropriate authority in the receiving state." MCL 3.711, Article V (1). However, a receiving state exercising jurisdiction over a delinquent child or a criminal matter takes precedence over a sending agency's retained jurisdiction. See *id*.

b. Placement Made in Michigan

"A placement made into this state pursuant to the [ICPC] for the purpose of adoption shall be in compliance with [MCL 710.51(4)]." MCL 3.715. Specifically, MCL 710.51(4) provides:

> "Without making the child a ward of the court, the court may approve placement of a child if the child is placed for adoption in this state by a public or licensed private agency of another state or country and if the law of the sending state or country prohibits the giving of consent to adoption at the time of placement. Before placement of the child in that instance, the sending agency shall tender evidence as the court requires to demonstrate that the agency possesses the necessary authority to consent to the adoption at the time of entry of the final order of adoption.

> After the sending agency has given evidence of its ability to consent, the agency shall not do anything to jeopardize its ability to grant the required consent before entry of the final order of adoption. After the sending agency gives its consent for the adoption, that consent shall not be withdrawn."

"Accordingly, the making of such a placement by a sending agency of or in another state party to the compact shall constitute a discharge of the child within the meaning of subsection (1) of Article V of the compact and a concurrence therein by any and all concerned persons or agencies in this state. The appropriate authorities in this state shall not furnish a sending agency in another state with a notice pursuant to subsection (4) of Article III of the compact to the effect that the placement does not appear to be contrary to the interests of the child until it is ascertained that [MCL 710.51(4)], will be promptly satisfied." MCL 3.715.

E. International Adoptions

This subsection contains a very brief discussion on international adoptions. For a more thorough discussion, see the United States Citizenship and Immigration Services (USCIS) website, and the United States Department of State Intercountry Adoption website.

The United States is among several countries that agreed to implement a multilateral treaty, the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (Convention), to establish uniform standards of practices for intercountry adoptions and establish safeguards to ensure that an intercountry adoption is in the child's best interests.[14] See 42 USC 14901(a). The Intercountry Adoption Act (IAA), 42 USC 14901 *et seq.*, was enacted to implement the Convention.

Adoptions may also take place between the United States and countries not party to the Convention under the Immigration and Nationality Act (INA), 8 USC 1101 *et seq*. The two ways of adopting a child not habitually residing in a Convention country are:

> (1) When the prospective adoptive parent petitions the court after he or she had legal custody of a child under the age of 16, and the child lived with him or her for at

[14] For a list of Convention countries, see the Bureau of Consular Affairs, Intercountry Adoptions, *Convention Countries*.

least two years. 8 USC 1101(b)(1)(E)(*i*). See the USCIS form *Petition for Alien Relative*.

(2) When the prospective adoptive parent adopts or intends to adopt an orphan (orphan adoption). 8 USC 1101(b)(1)(F)(i).

1. Adoption Process

In order to adopt a child across country lines, three different sets of law apply: the adoptee's country of birth, the United States federal law, and the State where the adoptive parent resides. Bureau of Consular Affairs, Intercountry Adoption, *How to Adopt*.

The adoptee's country of birth will determine whether this is a Convention adoption or a non-Convention adoption. For a table comparing and contrasting Convention adoptions and non-Convention adoptions, see *Table: Comparison of Adoptions From Convention vs. Non-Convention Countries*.[15]

a. Convention Adoptions

In a Convention adoption, the prospective adoptive parent must complete in order the following six steps:

> "1. Choose a US accredited or approved adoption service provider[,]
>
> 2. Apply to USCIS to be found suitable and eligible to adopt a child from a Convention country[,]
>
> 3. Be matched with a child by authorities in the child's country of origin[,]
>
> 4. Apply to USCIS for the child to be found eligible for immigration to the United States and receive US provisional approval to proceed with the adoption[,]
>
> 5. Adopt or gain legal custody of the child in the child's country of origin[, and]
>
> 6. Obtain a US immigrant visa for the child and bring [the] child home." the Bureau of

[15]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

> Consular Affairs, Intercountry Adoption, *Hague Adoption Process*.

For a detailed discussion on each of these steps, see the *Hague Adoption Process*.

b. Non-Convention Adoptions

In a non-Convention adoption, the prospective adoptive parent must complete in order the following six steps:

> 1. Choose a licensed adoption service provider,
>
> 2. Apply to USCIS to be found suitable and eligible to adopt a child,
>
> 3. Be matched with a child by authorities in the child's country of origin,
>
> 4. Adopt or gain legal custody of the child in the child's country of origin, and
>
> 5. Apply to USCIS for the child to be found eligible for immigration to the United States,
>
> 6. Obtain a US immigrant visa for the child and bring [the] child home." the Bureau of Consular Affairs, Intercountry Adoption, *Non-Hague Adoption Process*.

For a detailed discussion on each of these steps, see the *Non-Hague Adoption Process*.

2. Adoption Certification

A prospective adoptee may be adopted abroad or brought to the United States for adoption.

a. Adoption Abroad

"A court order or decree establishing the relationship of parent and child by adoption and issued by a court in another country is presumed to be issued in accordance with the laws of that country and shall be recognized in this state. The rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the order or decree were issued by a court of this state." MCL 710.21b.

See also 42 USC 14931(b), which provides "[a] final adoption in another Convention country, certified by the Secretary of State pursuant to [42 USC 14931(a)] . . ., shall be recognized as final valid adoption for purposes of all Federal, State, and local laws of the Untied States." In order to issue the certification, the Secretary of State must receive appropriate notification from the child's country of origin verifying that the federal adoption requirements were met. 42 USC 14931(a)(1).

Once the adoptive parent proves his or her United States citizenship and officially adopts the child, the child automatically becomes a citizen of the United States. See 8 USC 1431(a)-(b). 8 USC 1431(c) requires the "Certificate of Citizenship or other Federal document issued . . . [to] reflect the child's name and date of birth as indicated on a State court order, birth certificate, certificate of foreign birth, certificate of birth abroad, or similar State vital records document issued by the child's State of residence in the United States after the child has been adopted . . . in that State."

b. Adoption in the United States

"In the case of a child who has entered the United States from another Convention country for the purpose of adoption, an order declaring the adoption final shall not be entered unless the Secretary of the State has issued the certificate provided for in [42 USC 14931(a)] with respect to the adoption." 42 USC 14931(c). In order to issue the certification, the Secretary of State must receive appropriate notification from the child's country of origin that verifies the preadoption requirements were met. 42 USC 14931(a)(1).

Once the adoptive parent proves his or her United States citizenship and receives permanent legal and physical custody of the child, the child automatically becomes a citizen of the United States. 8 USC 1431(a). 8 USC 1431(c) requires the "Certificate of Citizenship or other Federal document issued . . . [to] reflect the child's name and date of birth as indicated on a State court order, birth certificate, certificate of foreign birth, certificate of birth abroad, or similar State vital records document issued by the child's State of residence in the United States after the child has been adopted . . . in that State.

3. Adoptions of Children Emigrating from the United States

When a prospective adoptee is emigrating from the United States to a Convention country, "the accredited agency or approved person providing adoption services, or the prospective adoptive parent or parents acting on their own behalf (if permitted by the laws of such other Convention country in which they reside and the laws of the State in which the child resides)" must provide the State court having jurisdiction over the case with all of the following:[16]

> "(A) documentation of the matters described in [42 USC 14932(a)(1)];[17]
>
> (B) a background report (home study) on the prospective adoptive parent or parents (including a criminal background check) prepared in accordance with the laws of the receiving country; and
>
> (C) a declaration by the central authority (or other competent authority) of such other Convention country—
>
> > (i) that the child will be permitted to enter and reside permanently, or on the same basis as the adopting parent, in the receiving country; and
> >
> > (ii) that the central authority (or other competent authority) of such other Convention country consents to the adoption, if such consent is necessary under the laws of such country for the adoption to become final." 42 USC 14932(a)(2).

Before a state court enters an adoption or custody order involving a child emigrating from the United States, the court must:

> (1) Receive a background report on the child.

[16] 42 USC 14932(a)(3) also requires certain information be provided to the United States Central Authority.

[17] 42 USC 14932(a)(1) requires completion of a background study on the child, reasonable efforts to have been made to "actively recruit and make a diligent search for prospective adoptive parents to adopt the child in the United States[,]" and a finding that the prospective adoptive parent is in the child's best interests.

(2) Receive evidence that reasonable efforts were made to place the child with an adoptive parent in the United States.

(3) Receive evidence that the placement is in the child's best interests.

(4) Find that:

(a) The child is adoptable.

(b) The placement is in the child's best interests.

(c) The consent process and all of the following have been met:

(*i*) The biological parents received counseling, if necessary.

(*ii*) The biological parents were informed of the effects of the adoption process, including termination of their parental rights.

(*iii*) Assurances that no payment was exchanged for the consents.

(*iv*) The consents were legal and voluntarily given after a child's birth.

(d) Central Authority approved the adoption, if the Convention applies. 42 USC 14932(b).

For additional information on emigration from the United States to a Convention country, see *The Hague Convention on Intercountry Adoption: A Guide to Outgoing Cases from the United States*.[18]

4. Access to Records

The United States Secretary of State and the Attorney General have established a case registry that contains all adoptions (both Convention and non-Convention) involving both immigration and emigration as required by 42 USC 14912(d)-(e). The case registry website is only accessible by specific representatives of adoption service providers, and more information is available at https://travel.state.gov/content/

[18]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

adoptionsabroad/en/information-for-you/agencies/adoption-tracking-service.html.

For purposes of a Convention adoption, the Secretary of State or the Attorney General may disclose a Convention adoption record if the record is maintained under the INA and disclosure is permitted by federal law. 42 USC 14941(b)(1). Unlawful disclosure of a Convention adoption record is punishable by federal law. 42 USC 14941(b)(3).

For purposes of a non-Convention adoption, the Secretary of State or the Attorney General may disclose a non-Convention adoption record if disclosure is permitted by the applicable state law. 42 USC 14941(c). See Chapter 9 for information on Michigan's release of information requirements.

4.5 Court-Appointed Foreign Language Interpreter

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).[19]

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).

For more information on foreign language interpreters, see the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 1.

4.6 Lawyer-Guardian Ad Litem

Because an adoption may result from a child protective proceeding, a brief discussion of lawyer-guardian ad litems is included. For a detailed discussion of lawyer-guardian ad litems, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*.

During a child protective proceeding, the court must appoint a lawyer-guardian ad litem to represent the child, and the child may not waive the lawyer-guardian ad litem's assistance. MCL 712A.17c(7). The MIFPA also permits the court to appoint a lawyer-guardian ad litem for an Indian child if the court finds the appointment to be in the child's best interests.

[19] 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).

MCL 712B.21(2). For additional information on the ICWA and the MIFPA requirements as they pertain to an Indian child, see Chapter 11.

A lawyer-guardian ad litem is appointed to represent the interests of a child. MCL 712A.13a(1)(g); MCL 712A.17d(1). The lawyer-guardian ad litem's powers and duties include:

(1) Respecting the attorney-client privilege.

(2) Serving as independent representation for the child's best interests.

(3) Entitlement to full and active participation in 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 anyone else who may be necessary, and reviewing relevant reports and any other relevant information).

(5) Reviewing the agency case file before disposition and before the parental termination hearing.

(6) Reviewing all updated material as it is provided to the court and parties.

(7) Meeting with or observing the child[20] and assessing his or her needs and wishes in regards 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 pending of a supplemental petition.

(g) At other times as ordered by the court. Unless directed by the court, adjourned or continued hearings do not require additional visits.

[20] The court may permit the lawyer-guardian ad litem an alternative means to contact the child on good cause shown. MCL 712A.17d(1)(e).

(8) Explaining to the child the child's lawyer-guardian ad litem's role.

(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.

> **Note:** Although relevant to the best-interest determination, the lawyer-guardian ad litem must weigh the child's wishes against the child's competence and maturity, and the best-interest determination may not reflect the child's wishes.

(13) Informing the court of the child's wishes and preferences in a manner consistent with the attorney-client privilege.

(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 purpose.

> **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 purpose.

(15) Consistent with the rules of professional responsibility, identifying common interests among the parties and, to the extent possible, promoting a cooperative resolution of the matter through consultation with the child's parents, foster care provider, guardian, and caseworker.

(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).

The lawyer-guardian ad litem and the Michigan Children's Institute (MCI) superintendent must consult with one another if the lawyer-guardian ad litem has an objection or concern regarding the child's placement or permanency plan. MCL 400.204(2).

A court-appointed lawyer-guardian ad litem must serve until he or she is discharged by the court. MCL 712A.17c(9). If a lawyer-guardian ad litem was appointed in a child protective proceeding, "the court shall not discharge the lawyer-guardian ad litem for the child as long as 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. If the child remains subject to the jurisdiction, control, or supervision of the court, or the [MCI] or other agency, the court shall immediately appoint another lawyer-guardian ad litem to represent the child." *Id.*

Chapter 5: Temporary Placements and Safe Delivery of Newborns Law

5.1 Overview of Chapter 5-2
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5.1 Overview of Chapter[1]

This chapter discusses what a temporary placement means, who may temporarily place a child for adoption, and what procedures and documentation are necessary to complete the placement. Included in this chapter is also a discussion on investigation and disposition reports as well as procedures for resolving custody disputes after a child is temporarily placed.

This chapter also discusses the Safe Delivery of Newborns Law and the procedures and requirements associated with the law.

5.2 Temporary Placement of Child[2]

Prior to an adoption, an adoptee may be temporarily placed with a prospective adoptive parent. See MCL 710.22(s); MCL 710.22(x).

A temporary placement does not become a formal placement until the court orders "the termination of the rights of the parent or parents or the guardian and approves placement under [MCL 710.51]." MCL 710.23a(1). Note, however, that "[a] formal placement under [MCL 710.51] is not required to be preceded by a temporary placement." MCL 710.23a(1). For a discussion on formal placements, see Section 6.2.

For checklists on temporary placements, see the Michigan Judicial Institute's Adoption Proceedings Quick Reference Materials, *Temporary Placements*.

5.3 Who May Make a Temporary Placement[3]

Under MCL 710.55(1), only the following may temporarily place a child for adoption:

> (1) A parent or guardian, with legal and physical custody of the child, making a direct placement, MCL 710.23a(1).
>
> (2) A child placing agency with written authorization to temporarily place the child, MCL 710.23b(1).

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[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[2]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[3]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

"A person who violates [MCL 710.55(1)] is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both, for the first violation, and of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both, for each subsequent violation. The court may enjoin from further violations any person who violates [MCL 710.55]." MCL 710.55(2).

A. Parent or Guardian Placement

"A parent or guardian having legal and physical custody of a child may make a direct placement of the child for adoption by making a temporary placement under [MCL 710.23d.]" MCL 710.23a(1).

MCL 710.23a(2) requires the parent or guardian to "personally select a prospective adoptive parent in a direct placement[,]" and prohibits the selection from being delegated. However, "[a] child placing agency may assist a parent or guardian to make a direct placement under [MCL 710.23a]." MCL 710.23b(1).

For a detailed discussion on direct placement adoptions, see Section 8.2.

B. Agency Placement

"In a written document signed by a witness and by the parent or guardian in the presence of the witness, a parent or guardian having legal and physical custody of a child may authorize a child placing agency to make a temporary placement of the child under [MCL 710.23d]. If the parent of the child being temporarily placed is an unemancipated minor, the authorization is not valid unless it is also signed in the presence of the witness by a parent or guardian of that minor parent." MCL 710.23b(3).

"A child placing agency that acquires written authorization pursuant to [MCL 710.23b(3)] from the parent or guardian having legal custody of a child may make a temporary placement of the child under [MCL 710.23d]."[4] MCL 710.23b(1).

"In an agency placement, a child placing agency or the department may involve the parent or guardian of a child in the selection of an adoptive parent and may facilitate the exchange of identifying information or meetings between a biological parent and an adoptive parent." MCL 710.23b(2). If the "parent or guardian selects or participates in the selection of the adoptive parent, an adoption

[4] See SCAO form *Statement of Parent/Guardian Authorizing Temporary Placement of Child for Adoption*.

facilitator shall allow the parent or guardian the option of selecting from the adoption facilitator's entire pool of potential adoptive parents who have been determined suitable to be adoptive parents of adoptees."MCL 722.957(3). For a discussion on adoption facilitators, see Section 8.2(B)(2).

5.4 Unregulated Custody Transfer[5]

"Except as provided in [MCL 750.136c(4)], a person shall not do any of the following, whether or not the person receives money or other valuable consideration for doing so:

> (a) Transfer or attempt to transfer the legal or physical custody of a child with the intent to permanently divest a parent of parental responsibility, except by order of a court of competent jurisdiction.
>
> (b) Arrange for or assist in the permanent transfer, adoption, adoptive placement, or any other permanent physical placement of a child, except for the performance of adoption activities under . . . MCL 722.111 to [MCL] 722.128, in the performance of the person's duties.
>
> (c) Assist, aid, abet, or conspire in the commission of an act described in subdivision (a) or (b)." MCL 750.136c(3).

"A person who violates this section is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $100,000.00, or both." MCL 750.136c(5).

A. Exceptions to Prohibited Transfers

The prohibited transfers in MCL 750.136c(3) "do[] not apply to the placement of a child under 1 or more of the following conditions:

> (a) With a relative, a child placing agency, or the department.
>
> (b) By a child placing agency or the department.
>
> (c) In accordance with the interstate compact on placement of children, 1984 PA 114, MCL 3.711 to [MCL] 3.717.

[5]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

(d) In which the child will be returned in less than 180 days.

(e) With the specific intent that the child will be returned, that the placement benefits the child, and that it is based on the temporary needs of the family, including, but not limited to, 1 or more of the following:

(*i*) Respite for the child and family.

(*ii*) A vacation or school-sponsored activity or function.

(*iii*) A temporary inability of the parent or legal guardian to provide care for the child due to incarceration, military service, medical treatment, or other incapacity of the parent or legal guardian." MCL 750.136c(4).

B. Powers of Attorney Permitting Delegation of Parent's/ Guardian's Powers

Although MCL 700.5103(1) permits a parent or guardian through a properly executed power of attorney to "delegate to another person, for a period not exceeding 180 days,[6] any of the parent's or guardian's powers regarding care, custody, or property of the minor child or ward, except the power to consent to marriage or adoption of a minor ward or to release . . . a minor ward for adoption[,]"[7] MCL 700.5103(2), prevents a parent from "knowingly and intentionally delegat[ing] his or her powers under [MCL 700.5103] regarding care and custody of the parent's minor child for longer than 180 days for the purpose of permanently transferring custody of the child in violation of [MCL 750.136c(3)]."

5.5 Procedural and Documentary Requirements[8]

In order to temporarily place a child, the following requirements must be met:

[6] This 180-day limitation may be extended for parents or guardians serving in the United States armed forces or on deployment to a foreign nation. MCL 700.5103(3).

[7] If the guardian "delegates any power under [MCL 700.5103], the guardian shall notify the court within 7 days after execution of the power of attorney and provide the court the name, address, and telephone number of the attorney-in-fact." MCL 700.5103(4).

[8] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

(1) The compilation and distribution of nonidentifying information. See Section 5.5(A).

(2) The compilation and distribution of identifying information. See Section 5.5(B).

(3) A preplacement assessment with a finding of suitability that was completed within one year before the transfer date. See Section 5.5(C).

(4) The transfer statements. See Section 5.5(D).

(5) The transfer report. See Section 5.5(E).

A. Nonidentifying Information

"Before placement of a child for adoption,[9] a parent or guardian, a child placing agency, the department, or the court that places the child shall compile and provide to the prospective adoptive parent a written document containing all of the following nonidentifying information that is not made confidential by state or federal law and that is reasonably obtainable from the parents, relatives, or guardian of the child; from any person who has had physical custody of the child for 30 days or more; or from any person who has provided health, psychological, educational, or other services to the child:

(a) Date, time, and place of birth of the child including the hospital, city, county, and state.

(b) An account of the health and genetic history of the child, including an account of the child's prenatal care; medical condition at birth; any drug or medication taken by the child's mother during pregnancy; any subsequent medical, psychological, psychiatric, or dental examination and diagnosis; any psychological evaluation done when the child was under the jurisdiction of the court; any neglect or physical, sexual, or emotional abuse suffered by the child; and a record of any immunizations and health care the child received while in foster or other care.

(c) An account of the health and genetic history of the child's biological parents and other members of the child's family, including any known hereditary condition or disease; the health of each parent at the child's birth; a summary of the findings of any medical, psychological, or psychiatric evaluation of each parent

[9] MCL 710.27 does not apply to stepparent and relative adoptions. MCL 710.27(6).

at the time of placement; and, if a parent is deceased, the cause of and the age at death.

(d) A description of the child and the child's family of origin, including all of the following:

(*i*) Given first name of the child at birth.

(*ii*) The age and sex of siblings of the child.

(*iii*) The child's enrollment and performance in school, results of educational testing, and any special educational needs.

(*iv*) The child's racial, ethnic, and religious background, and a general description of the child's parents, including the age of the child's parents at the time of termination of parental rights, and the length of time the parents had been married at the time of placement.

(*v*) An account of the child's past and existing relationship with any relative, foster parent, or other individual or facility with whom the child has lived or visited on a regular basis. The account shall not include names and addresses of individuals.

(*vi*) The levels of educational, occupational, professional, athletic, or artistic achievement of the child's family.

(*vii*) Hobbies, special interests, and school activities of the child's family.

(*viii*) The circumstances of any judicial order terminating the parental rights of a parent for abuse, neglect, abandonment, or other mistreatment of the child.

(*ix*) Length of time between the termination of parental rights and adoptive placement and whether the termination was voluntary or court-ordered.

(*x*) Any information necessary to determine the child's eligibility for state or federal benefits, including financial, medical, or other assistance." MCL 710.27(1).

"Information required by [MCL 710.27(1)] that is unobtainable before temporary placement shall be submitted by the time of formal placement if reasonably obtainable.[10] The information required by [MCL 710.27(1)] shall be supplemented by other nonidentifying background information that the parent or guardian, child placing agency, department, or court considers appropriate." MCL 710.27(2).

MCL 710.27(4) requires "the child placing agency, the department, or court that places the child or, in the case of a direct placement by a parent or guardian, by the court that approves the placement[]" to maintain the compiled nonidentifying information.[11]

In a direct placement adoption, the parent or guardian must transfer to the court all compiled nonidentifying information before parental rights can be terminated. MCL 710.27(4).

B. Identifying Information

Except in stepparent and relative adoptions, "[a] parent or guardian, the department, a child placing agency, or a court that places an adoptee under this chapter shall compile all of the following identifying information if reasonably obtainable:

> (a) Name of the child before placement in adoption.
>
> (b) Name of each biological parent at the time of termination of parental rights.
>
> (c) The most recent name and address of each biological parent.
>
> (d) Names of the biological siblings at the time of termination." MCL 710.27(3); MCL 710.27(6).

MCL 710.27(4) requires "the child placing agency, the department, or court that places the child or, in the case of a direct placement by a parent or guardian, by the court that approves the placement[]" to maintain the compiled identifying information.[12] In a direct placement adoption, the parent or guardian must transfer all identifying information compiled to the court before parental rights can be terminated.[13] MCL 710.27(4).

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[10] For a detailed discussion on formal placements, see Chapter 6.

[11] For a detailed discussion on recordkeeping requirements and release of information, Chapter 9.

[12] For a detailed discussion on recordkeeping requirements and release of information, Chapter 9.

[13] For a detailed discussion on direct placement adoptions, see Section 8.2.

The identifying information is not provided to the prospective adoptive parent. See MCL 710.27(1); MCL 710.27(3). However, the parent or guardian and the prospective adoptive parent may agree to exchange identifying information in a direct placement adoption. MCL 710.27(7).

If the parties elect not to exchange identifying information, see the SCAO form *Statement of Identifying Information*.

C. Preplacement Assessments

In order to temporarily place a child with a prospective adoptive parent in a direct placement or an agency placement, the prospective adoptive parent must have completed a preplacement assessment "within 1 year before the date of the transfer with a finding that the prospective adoptive parent is suitable to be a parent of an adoptee." MCL 710.23d(1)(a). The preplacement assessment must be reviewed before the child is placed with the prospective adoptive parent. See MCL 710.23d(1)(c)(*iv*).

In a direct placement adoption, an individual seeking to adopt may request, at any time, that a child placing agency prepare a preplacement assessment. MCL 710.23f(1). The requesting individual does not have to locate a potential adoptee when the request is made or completed, nor is the requesting individual limited to one preplacement assessment request. MCL 710.23f(2)-(3). Once requested, the requesting individual may ask the child placing agency to stop the assessment.[14] MCL 710.23f(3).

"If an individual is seeking to adopt a child from a particular child placing agency, the agency may require the individual to be assessed by its own employee, even if the individual has already had a favorable preplacement assessment completed by another child placing agency." MCL 710.23f(4).

1. Basis for Preplacement Assessment

A preplacement assessment is based on:

(1) Personal interviews.

(2) Residential visits.

(3) Interviews with individuals knowing the prospective adoptive parent.

(4) Assessment reports. MCL 710.23f(5).

[14] For additional information on direct placement adoptions, see Section 8.2.

The preplacement assessment must include a list of all the sources relied on during the assessment. MCL 710.23f(8).

2. Contents of Preplacement Assessment

A preplacement assessment must contain all of the following information about the prospective adoptive parent:

(1) Age, nationality, race or ethnicity, and any religious preference.[15]

(2) Marital and family status and history (including the number of children or adults in the household and their relationship to the adoptive parent).

(3) Physical and mental health (including history of substance abuse).[16]

(4) Educational and employment history.

(5) Any special skills and interests.

(6) Any property and income (including financial obligations).

(7) Reasons for wanting to adopt.

(8) Previous assessment request(s) and the outcome of the assessment(s).

(9) Prior adoptive placement involvement and the outcome of the placement.

(10) Any charges of domestic violence and the outcome of the charges.

(11) Any charges of child abuse or neglect and the outcome of the charges.

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[15] For additional information on age, nationality, race or ethnicity, and religious considerations, see Section 4.2(C).

[16] "A child placing agency shall request an individual seeking a preplacement assessment to undergo a physical examination conducted by a licensed physician, a licensed physician's assistant, or a certified nurse practitioner to determine that the individual is free from any known condition that would affect his or her ability to care for an adoptee. If an individual has had a physical examination within the 12 months immediately preceding his or her request for a preplacement assessment, he or she may submit a medical statement that is signed and dated by the licensed physician, licensed physician's assistant, or certified nurse practitioner verifying that he or she has had a physical examination within the previous 12-month period and is free from any known condition that would affect his or her ability to care for an adoptee. This subsection does not require new or additional third party reimbursement or worker's compensation benefits for services rendered." MCL 710.23f(7).

(12) Any criminal convictions.[17] See Section 4.2(B).

(13) If an adoptee is found, a brief description of the biological parent(s) and child.

(14) Any relevant fact or circumstance that raises a specific concern[18] about the prospective adoptive parent's suitability (including quality of the home environment, current children's behavior, and adoptive parent's familial, social, psychological, or financial background). MCL 710.23f(5)(a)-(k).

3. Determination of Suitability

If the child placing agency determines the assessed information suggests that placement with the prospective adoptive parent:

- does *not* raise a specific concern, the agency must find that the prospective adoptive parent is suitable for adoption;
- *does* raise a specific concern, the agency must find that the prospective adoptive parent is not suited for adoption, and must support its conclusion "by a written account of how 1 or more specific concerns pose a risk of the physical or psychological well-being of any child or a particular child." MCL 710.23f(8).

See MCL 710.23f(5)(k), which requires the preplacement assessment to contain information regarding "[a]ny fact or circumstance that raises a specific concern about the suitability of the individual as an adoptive parent, including the quality of the environment in the home, the functioning of other children in the household, and any aspect of the individual's familial, social, psychological, or financial circumstances that may be relevant to a determination that the individual is not suitable. A specific concern is one that suggests that placement of any child, or a particular child, in the home of the individual

[17] "A child placing agency shall request an individual seeking a preplacement assessment to provide a document from the Michigan state police and the federal bureau of investigation describing all of the individual's criminal convictions as shown by that agency's records, or stating that the agency's records indicate that the individual has not been convicted of a crime. Upon request of the individual and receipt of a signed authorization, the child placing agency shall obtain the criminal record from the law enforcement agency on the individual's behalf." MCL 710.23f(6).

[18] "A specific concern is one that suggests that placement of any child, or a particular child, in the home of the [prospective adoptive parent] would pose a risk of harm to the physical or psychological well-being of the child." MCL 710.23f(5)(k).

would pose a risk of harm to the physical or psychological well-being of the child."

"If the conclusion of a preplacement assessment regarding the suitability of the individual differs from the conclusion in a prior assessment, the child placing agency shall explain and justify the difference." MCL 710.23f(8).

4. Review of Finding of Unsuitability

"An individual who receives a preplacement assessment with a conclusion of unsuitability may seek a review of the assessment by the court after filing an adoption petition.[19] The court may order an agent or employee of the court to make an investigation and report to the court before the hearing. If, at the hearing, the court finds by clear and convincing evidence that the *conclusion of unsuitability is not justified*, the person with legal custody of the child may place the child with that individual. If the court determines that the *conclusion of unsuitability is justified*, it shall order that the child shall not be placed with the individual." MCL 710.23f(9) (emphasis added).

D. Transfer Statements

A transfer statement is a statement evidencing the transfer of physical custody of a child and is one of the requirements necessary for effectuating a temporary placement. See MCL 710.23d(1)(c).

1. Parent's, Guardian's, or Child Placing Agency Representative's Transfer Statement

"In the presence of a witness who also signs the document, the parent, guardian, or representative of the child placing agency signs a statement evidencing the transfer of physical custody of the child. If the parent making the temporary placement is an unemancipated minor, the statement is not valid unless it is also signed in the presence of the witness by a parent or guardian of that minor parent. The statement shall contain all of the following:

(*i*) The date of the transfer of physical custody.

(*ii*) Language providing that the transfer is for the purpose of adoption by the prospective adoptive parent.

[19] For a detailed discussion on adoption petitions, see Section 6.6.

(*iii*) Language indicating that unless the parent or guardian and the prospective adoptive parent agree otherwise, the prospective adoptive parent has the authority to consent to all medical, surgical, psychological, educational, and related services for the child[20] and language indicating that the parent or guardian otherwise retains full parental rights to the child being temporarily placed and that the temporary placement may be revoked by the filing of a petition under [MCL 710.23d(5)[21]].

(*iv*) Language providing that the person making the transfer has read a preplacement assessment of the prospective adoptive parent completed or updated within 1 year before the date of the transfer with a finding that the prospective adoptive parent is suitable to be a parent of an adoptee.[22] If a child placing agency makes the transfer of physical custody, the statement shall include a verification that the child placing agency has given the parent or guardian who authorized the temporary placement an opportunity to review the preplacement assessment.

(*v*) Even if only 1 parent is making the temporary placement, the name and address of both parents of the child, including in the case of a child born out of wedlock, the name and the address of each putative father of the child, if known."[23] MCL 710.23d(1)(c).

For the parent's or guardian's transfer statement, see the SCAO form *Statement of Parent/Guardian Transferring Physical Custody of Child for Adoption*.

For the child placing agency's transfer statement, see the SCAO form *Statement of Child-Placing Agency Transferring Physical Custody of Child for Adoption*.

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[20] "Except as otherwise agreed to by the parties, the prospective adoptive parent with whom a child is temporarily placed under this section may consent to all medical, surgical, psychological, educational, and related services for the child." MCL 710.23d(8).

[21] For information on revoking a temporary placement under MCL 710.23d(5), see Section 5.8.

[22] For information on preplacement assessments, see Section 5.5(C).

[23] For information on identifying a child's father, see Chapter 3.

2. Prospective Adoptive Parent's Transfer Statement

"In the presence of a witness who also signs the document, the prospective adoptive parent signs a statement setting forth the date of the transfer of physical custody and the name and address of the prospective adoptive parent and attesting to all of the following:

> (*i*) That the prospective adoptive parent understands that the temporary placement will not become a formal placement until the parents consent or release their parental rights and the court orders the termination of parental rights and approves the placement and that the prospective adoptive parent must relinquish custody of the child within 24 hours after being served with an order under [MCL 710.23e(2)[24]].
>
> (*ii*) That, if the prospective adoptive parent is a Michigan resident, the prospective adoptive parent agrees to reside with the child in Michigan until formal placement occurs.
>
> (*iii*) That the prospective adoptive parent agrees to obtain approval in compliance with the interstate compact on the placement of children[(ICPC)], . . . MCL 3.711 to [MCL] 3.717,[25] before the child is sent, brought, or caused to be sent or brought into a receiving state as that term is defined in . . . MCL 3.711.
>
> (*iv*) That the prospective adoptive parent submits to this state's jurisdiction." MCL 710.23d(1)(d).

For the prospective adoptive parent's transfer statement, see the SCAO form *Statement of Prospective Adoptive Parent Transferring Physical Custody of Child for Adoption*.

E. Transfer Report

"Not later than 2 days, excluding weekends and holidays, after a transfer of physical custody of a child in accordance with [MCL 710.23d(1)], the adoption attorney[26] or child placing agency who assists with the temporary placement or the child placing agency

[24] For information on revocation of a temporary placement under MCL 710.23e(2), see Section 5.8(B).

[25] For information on the ICPC, see Section 4.4(D).

[26] For information on adoption attorneys, see Section 8.2(B).

that makes the temporary placement shall submit to the court in the county in which the child's parent or guardian or the prospective adoptive parent resides, or in which the child is found, a report that contains all of the following:

(a) The date of the transfer of physical custody.

(b) The name and address of the parent or guardian or the child placing agency who made the temporary placement.

(c) The name and address of the prospective adoptive parent with whom the temporary placement was made.

(d) Even if only 1 parent is making the temporary placement, the name and address of both parents of the child, including, in the case of a child born out of wedlock, the name of each putative father, if known.[27]

(e) The documents required under [MCL 710.23d(1)(c)] and [MCL 710.23d(1)(d)] and, if applicable, the authorization required under [MCL 710.23b]."[28] MCL 710.23d(2).

5.6 Investigative Report

Within 30 days of a child's temporary placement, an adoption petition should be filed.[29] See MCL 710.23d(3)-(4). "Upon the filing of an adoption petition, the court shall direct a full investigation by an employee or agent of the court, a child placing agency, or the department. The court may use the preplacement assessment described in [MCL 710.23f[30]] and may order an additional investigation by an employee or agent of the court or a child placing agency. The following shall be considered in the investigation:

(a) The best interests of the adoptee.

(b) The adoptee's family background, including names and identifying data regarding the parent or parents, if obtainable.

[27] For information on identifying a child's father, see Chapter 3.

[28] For information on the documents required under MCL 710.23d(1)(c)-(d), see Section 5.5(D), and information on the authorization required under MCL 710.23b, see Section 5.3.

[29] For information on adoption petitions, see Section 6.6.

[30] For information on preplacement assessments under MCL 710.23f, see Section 5.5(C).

> (c) The reasons for the adoptee's placement away from his or her parent or parents." MCL 710.46(1).

Within three months of the court-ordered investigation, a written report must be filed. MCL 710.46(2). However, there is no penalty or sanction provided if the written report is not filed within the three-month requirement. *In re DaBaja*, 191 Mich App 281, 287 (1991).

On a petitioner's motion, the court may waive a full investigation if an adoptee was placed for foster care with the petitioner for 12 months or more, and a foster family study was completed or updated within 12 months of the filed petition. MCL 710.46(3). "The foster family study, with information added as necessary to update or supplement the original study, may be substituted for the written report required under [MCL 710.46(2)]." *Id.*

5.7 Disposition Report

"Not later than 30 days after the transfer of physical custody of a child under [MCL 710.23d], the adoption attorney[31] or child placing agency who assists with the temporary placement or the child placing agency that makes the temporary placement shall submit to the court that received the [transfer] report described in [MCL 710.23d(2)[32]] a report indicating whether or not 1 of the following dispositions has occurred:

> (a) A petition for adoption of the child has been filed.
>
> (b) The child has been returned to the agency or to a parent or other person having legal custody."[33] MCL 710.23d(3).

"If the court has not received [the disposition] report required under [MCL 710.23d(3)] within 45 days after the transfer of physical custody of a child, the court shall immediately investigate and determine whether an adoption petition has been filed or the child has been returned to a parent or other person having legal custody. If the [disposition] report required under [MCL 710.23d(3)] or the court's investigation reveals that neither disposition has occurred, the court shall immediately report to the prosecutor[.]"[34] MCL 710.23d(4).

If a prosecutor receives a court's report that indicates a child was temporarily placed for adoption and 45 days have elapsed without an

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[31] For information on adoption attorneys, see Section 8.2(B).

[32] For information on transfer reports under MCL 710.23d(2), see Section 5.5(E).

[33] For the adoption attorney's or child placing agency's disposition report, see the SCAO form *Follow-up Report After Temporary Placement of Child for Adoption*.

[34] See the SCAO form *Clerk's Report to Prosecuting Attorney*.

adoption petition being filed or a child being returned to his or her parent or guardian, the prosecutor must immediately file a petition for disposition[35] unless:

> (1) A parent or guardian filed a petition to revoke the temporary placement.
>
> (2) A prospective adoptive parent is unwilling or unable to proceed with the adoption and filed a petition for disposition of the child.
>
> (3) A child placing agency is unwilling or unable to proceed with the adoption and filed a petition for disposition of the child.[36] MCL 710.23d(4).

If the prosecutor, prospective adoptive parent, or child placing agency files a petition for disposition, the court must hold a hearing to determine custody of the child within 14 days of receiving the petition.[37] MCL 710.23e(1). See Section 5.8 for more information.

5.8 Resolving Custody Disputes After a Temporary Placement[38]

The Adoption Code, MCL 710.21 *et seq.*, provides the exclusive remedy for all custody disputes arising out of a temporary adoptive placement. MCL 710.23e(7).

Once a child is temporarily placed, the parent or guardian, the prospective adoptive parent, or the child placing agency may elect to change the placement. In order to change the temporary placement, a petition must be filed. See MCL 710.23d(5)-(7).

A. Petition for Disposition or Revocation of a Temporary Placement

1. Parent or Guardian

> "A parent or guardian who wishes to regain custody of a child who has been placed temporarily shall file a petition in the

[35] See the SCAO form *Petition to Determine Custody of Child Temporarily Placed for Adoption*.

[36] For information on a petition for disposition or revocation of a temporary placement, see Section 5.8(A).

[37] For information on a hearing to determine custody, see Section 5.8(B)(2).

[38] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

court that received the [transfer] report described in [MCL 710.23d(2)[39]] requesting that the temporary placement be revoked and that the child be returned to the parent or guardian. Upon request of the parent or guardian, the adoption attorney[40] or child placing agency who assisted in making the temporary placement shall assist the parent or guardian in filing the petition to revoke the temporary placement. If the temporary placement was made by a child placing agency under [MCL 710.23b(3)[41]], the child placing agency shall file the petition on behalf of a parent or guardian who wishes to regain custody of the child." MCL 710.23d(5).

For a parent's or guardian's petition to request revocation of a temporary placement and for the child's return, see the SCAO form *Petition by Parent/Guardian for Return of Child and Ex Parte Order*.

2. Prospective Adoptive Parent

"If a prospective adoptive parent with whom a child has been temporarily placed is either unwilling or unable to proceed with the adoption, the prospective adoptive parent may file a petition in the court that received the [transfer] report described in [MCL 710.23d(2)[42]] for disposition of the child as required by [MCL 710.23e]." MCL 710.23d(6).

For a prospective adoptive parent's petition for disposition of the child, see the SCAO form *Petition to Determine Custody of Child Temporarily Placed for Adoption*.

3. Child Placing Agency

"If a child placing agency that temporarily placed a child is unable to proceed with an adoption because of the unavailability of a parent or guardian to execute a release, or if a child placing agency with legal custody of a child decides not to proceed with the adoption by a prospective adoptive parent with whom the child has been temporarily placed and the prospective adoptive parent refuses upon the agency's request to return the child to the agency, the child placing agency shall file a petition in the court that received the [transfer] report

[39] For information on transfer reports, see Section 5.5(E).

[40] For information on adoption attorneys, see Section 8.2(B).

[41] For information on agency placements under MCL 710.23b(3), Section 5.3(A).

[42] For information on transfer reports, see Section 5.5(E).

described in [MCL 710.23d(2)] for disposition of the child as required by [MCL 710.23e]." MCL 710.23d(7).

For a child placing agency's petition for disposition of the child, see the SCAO form *Petition to Determine Custody of Child Temporarily Placed for Adoption*.

B. Hearing to Determine Custody

1. Revocation of Temporary Placement

After a parent or guardian files a petition to revoke a temporary placement under MCL 710.23d(5),[43] the court must immediately issue an ex parte order requiring the prospective adoptive parent to return the child to the parent or guardian with legal custody within 24 hours of receiving the order, unless the court proceeds under MCL 710.23e(3) by appointing an attorney to represent the child or referring the matter to DHHS.[44] MCL 710.23e(2). Under MCL 710.23e(3), "[t]he attorney or the [DHHS] may file a petition on the child's behalf requesting the court to take jurisdiction under [MCL 712A.2(b)[45]]. If that petition has not been filed within 14 days after the court appoints an attorney or refers the matter to the [DHHS] under this section, the court shall order the return of the child to the parent or guardian with legal custody." MCL 710.23e(3).

> **Note:** "During the period before the petition for jurisdiction under [MCL 712A.2(b)] is filed and a preliminary hearing is held or the return of the custody is ordered, the court shall remove the child from the home of the prospective adoptive parent and make a temporary disposition appropriate for the welfare of the child as authorized by [MCL 712A.18]."[46] MCL 710.23e(3).

If the child placing agency has obtained legal custody of the child, the court may order that the child be returned to the child placing agency. MCL 710.23e(5).

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[43] For information on a parent's or guardian's petition to revoke a temporary placement and for return of the child under MCL 710.23d(5), see Section 5.8(A)(1).

[44] See the SCAO form *Order to Determine Custody of Child Temporarily Placed for Adoption*.

[45] For a detailed discussion on child protective proceedings, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*.

[46] For a detailed discussion on dispositional orders available under MCL 712A.18, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*.

"Subject to [MCL 710.23e(2)], the court may appoint a guardian under the estates and protected individuals code, . . . MCL 700.1101 to [MCL] 700.8102, in response to a petition filed by the prospective adoptive parent or another individual interested in the child's welfare, and make a temporary disposition appropriate for the child's welfare as authorized by [MCL 712A.18] until an order of guardianship is entered." MCL 710.23e(4).

2. Petition to Determine Custody

MCL 710.23e(1) requires that the court hold a hearing to determine custody of a child temporarily placed within 14 days of any of the following petitions being filed:

> (1) A prosecutor filing a petition to determine custody under MCL 710.23d(4).[47]
>
> (2) A prospective adoptive parent filing a petition to determine custody under MCL 710.23d(6).[48]
>
> (3) The child placing agency filing a petition to determine custody under MCL 710.23d(7).[49]

"The court may appoint an attorney to represent the child or refer the matter to the department. The attorney or the department may file a petition on the child's behalf requesting the court to take jurisdiction under [MCL 712A.2(b)[50]]. If that petition has not been filed within 14 days after the court appoints an attorney or refers the matter to the department under this section, the court shall order the return of the child to the parent or guardian with legal custody." MCL 710.23e(3).

> **Note:** "During the period before the petition for jurisdiction under [MCL 712A.2(b)] is filed and a preliminary hearing is held or the return of the custody is ordered, the court shall remove the child from the home of the prospective adoptive parent and make a temporary disposition

[47] For information on a prosecutor's petition for determination of custody under MCL 710.23d(4), see Section 5.7.

[48] For information on a prospective adoptive parent's petition for determination of custody under MCL 710.23d(6), see Section 5.8(A)(2).

[49] For information on the child placing agency's petition for determination of custody under MCL 710.23d(7), see Section 5.8(A)(3).

[50] For a detailed discussion on child protective proceedings, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*.

> appropriate for the welfare of the child as authorized by [MCL 712A.18]."[51] MCL 710.23e(3).

If the child placing agency has obtained legal custody of the child, the court may order that the child be returned to the child placing agency. MCL 710.23e(5).

"Subject to [MCL 710.23e(2)[52]], the court may appoint a guardian under the estates and protected individuals code, . . . MCL 700.1101 to [MCL] 700.8102, in response to a petition filed by the prospective adoptive parent or another individual interested in the child's welfare, and make a temporary disposition appropriate for the child's welfare as authorized by [MCL 712A.18] until an order of guardianship is entered." MCL 710.23e(4).

a. Interested Parties

On a petition to determine custody, every interested party in a temporary placement must receive notice of the hearing. See MCR 2.107(A)(1); MCR 3.805.

"Interested parties in a hearing related to temporary placement are all of the following:

> (a) The parent or guardian who made or authorized the temporary placement.
>
> (b) The parent or guardian of an unemancipated minor parent of the adoptee.
>
> (c) A child placing agency that was authorized under [MCL 710.23b] to make the temporary placement.
>
> (d) If only 1 parent made or authorized the temporary placement, the other parent and each putative father of the adoptee.[53]
>
> (e) The prospective adoptive parent with whom temporary placement was made.
>
> (f) The prosecutor who filed a petition under [MCL 710.23d].

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[51] For a detailed discussion on dispositional orders available under MCL 712A.18, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*.

[52] For information on MCL 710.23e(2), see Section 5.8(B)(1).

[53] For information on identifying a child's father, see Chapter 3.

(g) The guardian ad litem of any interested party, if a guardian ad litem has been appointed."[54] MCL 710.24a(5).

Note: "The court shall not appoint a guardian of the adoptee or of a parent solely for the purpose of defeating that parent's status as an interested party under [MCL 710.24a]." MCL 710.24a(7).

"If the court knows or has reason to know the adoptee is an Indian child, in addition to [the parties listed in MCL 710.24a(5)], the persons interested are the Indian child's tribe and the Indian custodian, if any, and, if the Indian child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior."[55] MCR 3.800(B)(1)-(2).

The court may require additional parties to be served in the interest of justice. MCL 710.24a(6).

If an interested party's whereabouts are unknown, an attempt to serve the party at his or her last known address will suffice. MCR 3.805(B). However, if the identity of a putative father is unknown or the putative father's whereabouts are unknown and he did not join in the temporary placement, the putative father does not need to be served notice of the hearing. MCR 3.805(C).

b. Service Timing Requirements

Serving the notice of hearing must be completed:

- at least three days before the set hearing date for personal service under MCR 2.107(C)(1) or MCR 2.107(C)(2), e-mail service under MCR 2.107(C)(4), or electronic service under MCR 1.109(G)(6)(a). MCR 3.805(A)(1).

- at least seven days before the set hearing date for first-class mail under MCR 2.107(C)(3). MCR 3.805(A)(2).

Temporarily, "all service of process under [MCR 2.107] must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s)

[54] The court may appoint a guardian ad litem for the child or for a child's minor parent. MCL 710.23e(6).

[55] For additional information on adoption proceedings involving an Indian child, see Chapter 11.

during the effective period of this order, but should otherwise comply as much as possible with the provisions of MCR 2.107(C)(4)." Administrative Order No. 2020-9, temporarily amending certain court rules "until further order of the Court." See Administrative Order No. 2020-12; Administrative Order No. 2020-19(3). Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

5.9 Safe Delivery of Newborns Law[56]

The Safe Delivery of Newborns Law, MCL 712.1 *et seq.*, provides procedures for the safe, legal, and anonymous surrender of a newborn to an emergency service provider.[57]

"If a parent surrenders a child who may be a newborn to an emergency service provider, the emergency service provider shall comply with the requirements of this section under the assumption that the child is a newborn. The emergency service provider shall, without a court order, immediately accept the newborn, taking the newborn into temporary protective custody."[58] MCL 712.3(1). MCL 712.2(1) provides the court with jurisdiction over the surrendered newborn.

"An emergency service provider that is not a hospital and that takes a newborn into temporary protective custody under [MCL 712.3] shall transfer the newborn to a hospital. The hospital shall accept a newborn who an emergency service provider transfers to the hospital in compliance with [the Safe Delivery of Newborns Law], taking the newborn into temporary protective custody." MCL 712.5(1). If the newborn is surrendered under the Safe Delivery of Newborns Law, the hospital is required to report the live birth "in the same manner as provided in [MCL 333.2822(1)(a)], except that the parents shall be listed as 'unknown' and the newborn shall be listed as 'baby doe'." MCL 333.2822(1)(c). See also *In re Miller*, 322 Mich App 497, 501 n 1 (2018) (noting that "a birth certificate for a newborn surrendered under the Safe Delivery of Newborns Law must list the parents as '"unknown"' and the newborn as '"Baby Doe"'").

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[56]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[57] The Safe Delivery of Newborns Law does not define the terms *parent*, *surrendering parent*, or *nonsurrendering parent*. *In re Miller*, 322 Mich App 497, 503 (2018).

[58] For the requirements the emergency service provider must comply with, see MCL 712.3. "An emergency service provider that is not a hospital and that takes a newborn into temporary protective custody under [MCL 712.3] shall transfer the newborn to a hospital. The hospital shall accept a newborn who an emergency service provider transfers to the hospital in compliance with this chapter, taking the newborn into temporary protective custody." MCL 712.5(1).

"The court may appoint a lawyer-guardian ad litem to represent a newborn in proceedings under this chapter." MCL 712.2(1). For information on a lawyer-guardian ad litem's powers and duties, see Section 4.6.

A. Effect of Other Statutory Provisions

"Except as provided in [MCL 712.5[59]], the reporting requirement of . . . MCL 722.623, does not apply regarding a child surrendered to an emergency service provider as provided in [MCL 712.3]." MCL 712.2(2).

"Unless this chapter specifically provides otherwise, a provision in another chapter of this act does not apply to a proceeding under this chapter. Unless this chapter specifically provides otherwise, the child custody act of 1970, 1970 PA 91, MCL 722.21 to [MCL] 722.30, does not apply to a proceeding under this chapter." MCL 712.2(3).

B. Immunity from Civil Action

"A hospital and a child placing agency, and their agents and employees, are immune in a civil action for damages for an act or omission in accepting or transferring a newborn under this chapter, except for an act or omission constituting gross negligence or willful or wanton misconduct. To the extent not protected by the immunity conferred by [the Governmental Immunity Act,] 1964 PA 170, MCL 691.1401 to [MCL] 691.1415, an employee or contractor of a fire department or police station has the same immunity that this subsection provides to a hospital's or child placing agency's agent or employee." MCL 712.2(4).

C. Duties of Child Placing Agency

Once the hospital informs a child placing agency that it has taken a newborn into temporary protective custody, a child placing agency must do all of the following:

> "(a) Immediately assume the care, control, and temporary protective custody of the newborn.

[59] MCL 712.5(2) provides that "[a] hospital that takes a newborn into temporary protective custody under this chapter shall have the newborn examined by a physician. If a physician who examines the newborn either determines that there is reason to suspect the newborn has experienced child abuse or child neglect, other than being surrendered to an emergency service provider under [MCL 712.3], or comes to a reasonable belief that the child is not a newborn, the physician shall immediately report to the department as required by . . . the child protection law, 1975 PA 238, MCL 722.623."

(b) If a parent is known and willing, immediately meet with the parent.

(c) Unless otherwise provided in this subdivision, make a temporary placement of the newborn with a prospective adoptive parent who has an approved preplacement assessment.[60] If a petition for custody is filed under [MCL 712.10[61]], the child placing agency may make a temporary placement of the newborn with a licensed foster parent.

(d) Unless the birth was witnessed by the emergency service provider, immediately request assistance from law enforcement officials to investigate and determine, through the missing children information clearinghouse, the national center for missing and exploited children, and any other national and state resources, whether the newborn is a missing child.

(e) Not later than 48 hours after a transfer of 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. The petition shall include all of the following:

(*i*) The date of the transfer of physical custody.

(*ii*) The name and address of the emergency service provider to whom the newborn was surrendered.

(*iii*) Any information, either written or verbal, that was provided by and to the parent who surrendered the newborn. The emergency service provider that originally accepted the newborn as required by section 3 of this chapter shall provide this information to the child placing agency.[62]

(f) Within 28 days, make reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent. The child placing agency shall file a written report with the court that issued the order placing the child.[63] The report shall state the efforts the child placing agency made in

[60] For information on preplacement assessments, see Section 5.5(C).

[61] For information on the filing of a custody petition under MCL 712.10, see Section 5.9(D).

[62] See the SCAO form *Petition for Placement Order of Surrendered Newborn Child*.

[63] See the SCAO form *Order Placing Surrendered Newborn With Prospective Adoptive Parents*.

attempting to identify and locate the nonsurrendering parent and the results of those efforts. If the identity and address of the nonsurrendering parent are unknown, the child placing agency shall provide notice of the surrender of the newborn by publication[64] in a newspaper of general circulation in the county where the newborn was surrendered." MCL 712.7.

D. Parent Petitions for Custody

1. Petition

A parent who surrenders a newborn to an emergency service provider may subsequently request custody of the newborn by filing a petition for custody within 28 days after the newborn was surrendered. MCL 712.10(1). A person claiming to be the nonsurrendering parent of the surrendered newborn may request custody of the newborn by filing a petition for custody within 28 days after notice of the surrender was published.[65] *Id.*

"The surrendering parent or nonsurrendering parent shall file the petition for custody in 1 of the following counties:

> (a) If the parent has located the newborn, the county where the newborn is located.
>
> (b) If subdivision (a) does not apply and the parent knows the location of the emergency service provider to whom the newborn was surrendered, the county where the emergency service provider is located.
>
> (c) If neither subdivision (a) nor (b) applies, the county where the parent is located."[66] MCL 712.10(1).

"If the court in which the petition for custody is filed did not issue the order placing the newborn, the court in which the petition for custody is filed shall locate and contact the court

[64] The published notice must conform to the procedural, substantive, and service requirements set forth in MCR 3.802(D).

[65] MCL 712.7(f) requires the child placing agency to identify and locate the nonsurrendering parent, and if unable to locate or identify the nonsurrendering parent, publish notice of a newborn's surrender in a newspaper of general circulation in the county where the newborn was surrendered.

[66] See the SCAO form *Petition of Parent for Custody of Surrendered Newborn Child*.

that issued the order and shall transfer the proceedings to that court." MCL 712.10(2).

2. Determining Paternity or Maternity

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 make the determinations of paternity or maternity as described in [MCL 712.11]." MCL 712.10(3).

For purposes of determining paternity and maternity following the filing of a petition for custody, "the court shall order the child and each party claiming paternity to submit to blood or tissue typing determinations or DNA identification profiling, as described in . . . the paternity act, 1958 PA 205, MCL 722.716."[67] MCL 712.11(1)-(2). However, maternity need not be established through DNA if "the birth was witnessed by the emergency service provider and sufficient documentation exists to support maternity[.]" MCL 712.11(2). See the SCAO form *Order for Blood or Tissue Typing or DNA Profile (Safe Delivery of Newborn Act)*.

"If the probability of paternity or maternity determined by the blood or tissue typing or DNA identification profiling is 99% or higher and the DNA identification profile and summary report are admissible, paternity or maternity is presumed and the petitioner may move for summary disposition on the issue of paternity or maternity." MCL 712.11(3). "If the result of the paternity or maternity testing is admissible and establishes that the petitioner could not be the parent of the newborn, the court shall dismiss the petition for custody." MCL 712.11(5). See the SCAO form *Order Determining Maternity/Paternity of Surrendered Newborn Child*.

"The court may order the petitioner to pay all or part of the cost of the paternity or maternity testing." MCL 712.11(4).

3. Determining Custody

"In a custody action under this chapter, the court shall determine custody of the newborn based on the newborn's best interest. The court shall consider, evaluate, and make findings on each factor of the newborn's best interest with the goal of achieving permanence for the newborn at the earliest possible date." MCL 712.14(1).

[67] For additional information on court-ordered genetic testing under MCL 722.716, see Section 3.11.

"A newborn's best interest in a custody action under this chapter is all of the following factors regarding a parent claiming parenthood of the newborn:

> (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.
>
> (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).

"Based on the court's finding under [MCL 712.14], the court may issue an order that does 1 of the following:

> (a) Grants legal or physical custody, or both, of the newborn to the parent and either retains or relinquishes jurisdiction.
>
> (b) Determines that the best interests of the newborn are not served by granting custody to the petitioner parent and orders the child placing agency to petition the court for jurisdiction under [MCL 712A.2(b)].
>
> (c) Dismisses the petition."[68] MCL 712.15.

[68] See the SCAO form *Order Determining Custody of Surrendered Newborn Child*.

E. No Parental Request for Custody

"A parent who surrenders a newborn under [MCL 712.3] and who does not file a custody action under [MCL 712.10] is presumed to have knowingly released his or her parental rights to the newborn." MCL 712.17(1). "If the surrendering parent has not filed a petition for custody of the newborn within 28 days of the surrender, the child placing agency with authority to place the newborn shall immediately file a petition with the court to determine whether the release shall be accepted and whether the court shall enter an order terminating the rights of the surrendering parent."[69] MCL 712.17(2).

"If the nonsurrendering parent has not filed a petition for custody of the newborn within 28 days of notice of surrender of a newborn under [MCL 712.10], the child placing agency with authority to place the newborn shall immediately file a petition with the court to determine whether the court shall enter an order terminating the rights of the nonsurrendering parent."[70] MCL 712.17(3).

"The court shall schedule a hearing on the petition from the child placing agency within 14 days of receipt of that petition. At the hearing, the child placing agency shall 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." MCL 712.17(4). "If the court finds by a preponderance of the evidence that the surrendering parent has knowingly released his or her rights to the child and that reasonable efforts were made to locate the nonsurrendering parent and a custody action has not been filed, the court shall enter an order terminating parental rights of the surrendering parent and the nonsurrendering parent under this chapter."[71] MCL 712.17(5).

The Safe Delivery of Newborns Law applies to the mother and the legal father of the surrendered child in its termination proceedings. *In re Miller*, 322 Mich App 497, 504, 506-507 (2018) (reversing the trial court's order denying a child placement agency's petitions to terminate the parental rights of the surrendering parent and the nonsurrendering parent based on the conclusion that the Safe Delivery of Newborns Law only applied to the mother of the surrendered children but not to the legal father). "'[A] child may have only one legal father,' so the legal father is presumed to be the mother's husband until that presumption is defeated, [and] [t]he

[69] See the SCAO form *Petition to Accept Release and Terminate Rights to Surrendered Newborn Child*.

[70] See the SCAO form *Petition to Accept Release and Terminate Rights to Surrendered Newborn Child*.

[71] See the SCAO form *Order After Hearing on Petition to Accept Release and Terminate Rights to Surrendered Newborn Child*.

Safe Delivery of Newborns law tests this presumption through DNA testing of 'each party claiming paternity' and attempting to gain custody of the child, leaving only one as the true legal father." *Id*. at 505-506 (explaining that "[i]f the trial court terminates the parental rights of the nonsurrendering parent and the husband of the surrendering mother later seeks to assert his parental rights, he would have to demonstrate that he was not the biological father to show that the order terminating parental rights did not apply to him[; h]owever, in doing so, he would be defeating the presumption of paternity, and he would be without parental rights to assert to disrupt an adoption") (citations omitted).

F. Closed Hearings[72]

All hearings held under the Safe Delivery of Newborns Law are closed to the public. MCL 712.2a(1).

G. Record Confidentiality

Records of the proceedings are confidential "except that the record is available to any individual who is a party to the proceeding." MCL 712.2a(1).

All of the child placing agency's records created under the Safe Delivery of Newborns Law are confidential "except as otherwise provided in the provisions of this chapter." MCL 712.2a(2).

"An 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 guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $100.00, or both. An 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 disclosure of that information." MCL 712.2a(3).

[72]Please see our COVID-19: Procedures Affected webpge for information on temporarily conducting certain hearings remotely and adjourning other matters.

Chapter 6: Formal Placement and Adoption Procedures

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6.1 Overview of Chapter[1]

This chapter discusses what a formal placement means, who may formally place a child for adoption, and what procedures and documentation are necessary to complete the placement, the compilation of nonidentifying and identifying information, and the requirements for an adoption petition and the entry and effects of an adoption order. It also touches on the requirements necessary for an adult adoption.

6.2 Formal Placement of the Child[2]

Formal placement is "a placement that is approved by the court under [MCL 710.51]" after the parents' parental rights have been terminated. MCL 710.22(p).

Although a formal placement need not be preceded by a temporary placement, a temporary placement becomes a formal placement once parental rights have been terminated and the court approves the placement under MCL 710.51. MCL 710.23a(1). See Chapter 5 for a detailed discussion of temporary placements.

"Unless otherwise ordered by the court, the prospective adoptive parents with whom a child is placed according to a court order approving placement under [MCL 710.51] may consent to all medical, surgical, psychological, educational, and related services for the child." MCL 710.51(7).

For checklists on finalizing an adoption, see the Michigan Judicial Institute's Adoption Proceedings Quick Reference Materials, *Finalizing Adoption*.

6.3 Who May Make a Formal Placement

Under MCL 710.55(1), only the following may formally place a child for adoption:

> (1) A parent or guardian, with legal and physical custody of the child, making a direct placement, MCL 710.23a(1).

[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[2]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

(2) A child placing agency or the department with legal and physical custody of a child pursuant to a release of parental rights or the Juvenile Code, MCL 710.23b(1).

(3) A court with legal and physical custody of a child under the Juvenile Code, MCL 710.23c.

"A person who violates [MCL 710.55] is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both, for the first violation, and of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both, for each subsequent violation. The court may enjoin from further violations any person who violates [MCL 710.55]." MCL 710.55(2).

A. Parent or Guardian Placement

"A parent or guardian having legal and physical custody of a child may make a direct placement of the child for adoption by making . . . a formal placement under [MCL 710.51.]" MCL 710.23a(1). MCL 710.23a(2) requires the parent or guardian to "personally select a prospective adoptive parent in a direct placement[,]" and prohibits the selection from being delegated. However, "[a] child placing agency may assist a parent or guardian to make a direct placement under [MCL 710.23a]." MCL 710.23b(1).

"[A]n adoption facilitator shall allow the parent or guardian the option of selecting from the adoption facilitator's entire pool of potential adoptive parents who have been determined suitable to be adoptive parents of adoptees."MCL 722.957(3). For a discussion on adoption facilitators, see Section 8.2(B)(2).

MCL 710.23a(4) also permits "[a] parent or guardian having legal and physical custody of a child [to] make a formal placement of the child for adoption under [MCL 710.51] with a stepparent or a relative."

For a detailed discussion on direct placement adoptions, stepparent adoptions, and relative adoptions, see Sections 8.2–8.4.

B. Agency Placement

"A child placing agency or the department that acquires legal and physical custody of a child pursuant to [MCL 710.29] may formally place a child for adoption under [MCL 710.51]." MCL 710.23b(1). The child placing agency or the department "may involve the parent or guardian of a child in the selection of an adoptive parent and may facilitate the exchange of identifying information or

meetings between a biological parent and an adoptive parent." MCL 710.23b(2). If the "parent or guardian selects or participates in the selection of the adoptive parent, an adoption facilitator shall allow the parent or guardian the option of selecting from the adoption facilitator's entire pool of potential adoptive parents who have been determined suitable to be adoptive parents of adoptees."MCL 722.957(3).

For a discussion on adoption facilitators, see Section 8.2(B)(2).

6.4 Unregulated Custody Transfer

"Except as provided in [MCL 750.136c(4)], a person shall not do any of the following, whether or not the person receives money or other valuable consideration for doing so:

> (a) Transfer or attempt to transfer the legal or physical custody of a child with the intent to permanently divest a parent of parental responsibility, except by order of a court of competent jurisdiction.
>
> (b) Arrange for or assist in the permanent transfer, adoption, adoptive placement, or any other permanent physical placement of a child, except for the performance of adoption activities under . . . MCL 722.111 to [MCL] 722.128, in the performance of the person's duties.
>
> (c) Assist, aid, abet, or conspire in the commission of an act described in subdivision (a) or (b)." MCL 750.136c(3).

"A person who violates this section is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $100,000.00, or both." MCL 750.136c(5).

A. Exceptions to Prohibited Transfers

The prohibited transfers in MCL 750.136c(3) "do[] not apply to the placement of a child under 1 or more of the following conditions:

> (a) With a relative, a child placing agency, or the department.
>
> (b) By a child placing agency or the department.
>
> (c) In accordance with the interstate compact on placement of children, 1984 PA 114, MCL 3.711 to [MCL] 3.717.

(d) In which the child will be returned in less than 180 days.

(e) With the specific intent that the child will be returned, that the placement benefits the child, and that it is based on the temporary needs of the family, including, but not limited to, 1 or more of the following:

(*i*) Respite for the child and family.

(*ii*) A vacation or school-sponsored activity or function.

(*iii*) A temporary inability of the parent or legal guardian to provide care for the child due to incarceration, military service, medical treatment, or other incapacity of the parent or legal guardian." MCL 750.136c(4).

B. Powers of Attorney Permitting Delegation of Parent's/ Guardian's Powers

Although MCL 700.5103(1) permits a parent or guardian through a properly executed power of attorney to "delegate to another person, for a period not exceeding 180 days,[3] any of the parent's or guardian's powers regarding care, custody, or property of the minor child or ward, except the power to consent to marriage or adoption of a minor ward or to release of a minor ward for adoption[,]"[4] MCL 700.5103(2), prevents a parent from "knowingly and intentionally delegat[ing] his or her powers under [MCL 700.5103] regarding care and custody of the parent's minor child for longer than 180 days for the purpose of permanently transferring custody of the child in violation of [MCL 750.136c(3)]."

6.5 Procedural and Documentary Requirements[5]

In order to formally place a child, the following requirements must be met:

[3] This 180-day limitation may be extended for parents or guardians serving in the United States armed forces or on deployment to a foreign nation. MCL 700.5103(3).

[4] If the guardian "delegates any power under [MCL 700.5103], the guardian shall notify the court within 7 days after execution of the power of attorney and provide the court the name, address, and telephone number of the attorney-in-fact." MCL 700.5103(4).

[5] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

(1) Nonidentifying information must be compiled and distributed. See Section 6.5(A).

(2) Identifying information must be compiled and distributed. See Section 6.5(B).

(3) Verified accounting statements and other verified statements must be filed. See MCL 710.54(7), requiring the filing of verified accounting statements and other verified statements "[a]t least 7 days before formal placement of a child under [MCL 710.51]." For additional information on reporting and accounting requirements, see Section 10.5.

(4) The adoptee must consent, if 14 years of age or older. See MCL 710.43(2).

(5) An investigative report must be completed. See MCL 710.51(1), requiring the court to examine an investigative report before terminating parental rights. For additional information on investigative reports, see Section 5.6.

(6) An order terminating parental rights must be entered. See MCL 710.51(1), requiring the court to enter an order terminating the rights of the person or entity consenting to the adoption before a child is formally placed. For additional information on termination of parental rights before formal placement, see Section 6.7(A).

A. Nonidentifying Information

Except in stepparent or relative adoptions,[6] "[b]efore placement of a child for adoption, a parent or guardian, a child placing agency, the department, or the court that places the child shall compile and provide to the prospective adoptive parent a written document containing all of the following nonidentifying information that is not made confidential by state or federal law and that is reasonably obtainable from the parents, relatives, or guardian of the child; from any person who has had physical custody of the child for 30 days or more; or from any person who has provided health, psychological, educational, or other services to the child:

(a) Date, time, and place of birth of the child including the hospital, city, county, and state.

(b) An account of the health and genetic history of the child, including an account of the child's prenatal care; medical condition at birth; any drug or medication

[6] See MCL 710.27(6).

taken by the child's mother during pregnancy; any subsequent medical, psychological, psychiatric, or dental examination and diagnosis; any psychological evaluation done when the child was under the jurisdiction of the court; any neglect or physical, sexual, or emotional abuse suffered by the child; and a record of any immunizations and health care the child received while in foster or other care.

(c) An account of the health and genetic history of the child's biological parents and other members of the child's family, including any known hereditary condition or disease; the health of each parent at the child's birth; a summary of the findings of any medical, psychological, or psychiatric evaluation of each parent at the time of placement; and, if a parent is deceased, the cause of and the age at death.

(d) A description of the child and the child's family of origin, including all of the following:

(*i*) Given first name of the child at birth.

(*ii*) The age and sex of siblings of the child.

(*iii*) The child's enrollment and performance in school, results of educational testing, and any special educational needs.

(*iv*) The child's racial, ethnic, and religious background, and a general description of the child's parents, including the age of the child's parents at the time of termination of parental rights, and the length of time the parents had been married at the time of placement.

(*v*) An account of the child's past and existing relationship with any relative, foster parent, or other individual or facility with whom the child has lived or visited on a regular basis. The account shall not include names and addresses of individuals.

(*vi*) The levels of educational, occupational, professional, athletic, or artistic achievement of the child's family.

(*vii*) Hobbies, special interests, and school activities of the child's family.

> (*viii*) The circumstances of any judicial order terminating the parental rights of a parent for abuse, neglect, abandonment, or other mistreatment of the child.
>
> (*ix*) Length of time between the termination of parental rights and adoptive placement and whether the termination was voluntary or court-ordered.
>
> (*x*) Any information necessary to determine the child's eligibility for state or federal benefits, including financial, medical, or other assistance." MCL 710.27(1).

"Information required by [MCL 710.27(1)] that is unobtainable before temporary placement shall be submitted by the time of formal placement if reasonably obtainable.[7] The information required by [MCL 710.27(1)] shall be supplemented by other nonidentifying background information that the parent or guardian, child placing agency, department, or court considers appropriate." MCL 710.27(2).

MCL 710.27(4) requires "the child placing agency, the department, or court that places the child or, in the case of a direct placement by a parent or guardian, by the court that approves the placement[]" to maintain the compiled nonidentifying information.[8]

In a direct placement adoption, the parent or guardian must transfer to the court all compiled nonidentifying information before parental rights can be terminated. MCL 710.27(4).

B. Identifying Information

Except in stepparent and relative adoptions,[9] "[a] parent or guardian, the department, a child placing agency, or a court that places an adoptee under this chapter shall compile all of the following identifying information if reasonably obtainable:

> (a) Name of the child before placement in adoption.
>
> (b) Name of each biological parent at the time of termination of parental rights.

[7] For a detailed discussion on temporary placements, see Chapter 5.

[8] For a detailed discussion on recordkeeping requirements and release of information, Chapter 9.

[9] See MCL 710.27(6).

(c) The most recent name and address of each biological parent.

(d) Names of the biological siblings at the time of termination." MCL 710.27(3).

MCL 710.27(4) requires "the child placing agency, the department, or court that places the child or, in the case of a direct placement by a parent or guardian, by the court that approves the placement[]" to maintain the compiled identifying information.[10] In a direct placement adoption, the parent or guardian must transfer all identifying information compiled to the court before parental rights can be terminated.[11] MCL 710.27(4).

The identifying information is not provided to the prospective adoptive parent. See MCL 710.27(1); MCL 710.27(3). However, the parent or guardian and the prospective adoptive parent may agree to exchange identifying information in a direct placement or agency placement adoption. MCL 710.27(7).

If the parties elect not to exchange identifying information, see the SCAO form *Statement of Identifying Information*.

6.6 Adoption Petition[12]

In order to adopt a child or an adult, the adoptive parent must properly file a petition for adoption with the court. MCL 710.24(1). The court may not refuse to accept an adoption petition because it was not prepared by an attorney. See Const 1963, art 1, § 13.

If an adoptive parent is seeking adoption subsidies, the certification for a support subsidy *must* be made and both the adoptive parent and the department must have signed an adoption assistance agreement before the adoption is finalized. MCL 400.115g(1)(c). See Section 10.6 for information on adoption subsidies.

A. Petition Requirements

A single person, a married person jointly with his or her spouse, or in certain limited circumstances as set out under MCL 710.24(2), a married person individually without his or her spouse may petition the court for adoption. MCL 710.24(1)-(2). See Section 4.1.

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[10] For a detailed discussion on recordkeeping requirements and release of information, Chapter 9.

[11] For a detailed discussion on direct placement adoptions, see Section 8.2.

[12] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

"The petition for adoption shall be verified by each petitioner and shall contain the following information:

> (a) The name, date and place of birth, and place of residence of each petitioner, including the maiden name of the adopting mother.
>
> (b) Except as otherwise provided in [MCL 710.24(7)], the name, date and place of birth, and place of residence if known of the adoptee.
>
> (c) The relationship, if any, of the adoptee to the petitioner.
>
> (d) The full name by which the adoptee shall be known after adoption.
>
> (e) The full description of the property, if any, of the adoptee.
>
> (f) Unless the rights of the parents have been terminated by a court of competent jurisdiction or except as otherwise provided in [MCL 710.24(7)], the names of the parents of the adoptee and the place of residence of each living parent if known.
>
> (g) Except as otherwise provided in [MCL 710.24(7)], the name and place of residence of the guardian of the person or estate of the adoptee, if any has been appointed."[13] MCL 710.24(4).

MCL 710.24(7) permits "[i]n a direct placement adoption in which the parties have elected not to exchange identifying information,[14] the information required by [MCL 710.24(4)(f)] and [MCL 710.24(4)(g)] and the surname and place of residence of the adoptee required under [MCL 710.24(4)(b)] [to] be omitted[, but requires t]he attorney or child placing agency assisting in the adoption [to] file a verified statement containing the omitted information."

For a detailed discussion on direct placement adoptions, see Section 8.2.

[13] See the SCAO form *Petition for Adoption*. Because additional information is required for direct placement adoptions and a different SCAO form is used, see Section 8.2 for a detailed discussion of direct placement adoptions.

[14] For additional information on identifying information, see Section 6.5(B).

B. Filing Requirements

The adoptive parent must file a petition for adoption where venue is proper. For a detailed discussion on proper venue, see Section 4.3(A).

C. Service Requirements

Adoption petitions "may be served by mail under MCR 2.107(C)(3), e-mail under MCR 2.107(C)(4),[15] or electronic service under MCR 1.109(G)(6)(a)." See MCR 3.802(A)(4).

"If the court knows or has reason to know an Indian child is the subject of an adoption proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(6),

> (a) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by personal service or by registered mail with return receipt requested and delivery restricted to the addressee, of the pending proceedings on a petition for adoption of the Indian child and of their right of intervention on a form approved by the State Court Administrative Office. If the identity or location of the parent or Indian custodian, or of the Indian child's tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested.
>
> (b) the court shall notify the parent or Indian custodian and the Indian child's tribe of all other hearings pertaining to the adoption proceeding as provided in this rule. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice of the hearings shall be given to the Secretary of the Interior. Such notice may be made by first-class mail."[16] MCR 3.802(A)(3).

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[15] Temporarily, "all service of process under [MCR 2.107] must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) during the effective period of this order, but should otherwise comply as much as possible with the provisions of MCR 2.107(C)(4)." Administrative Order No. 2020-9, temporarily amending certain court rules "until further order of the Court." See Administrative Order No. 2020-12; Administrative Order No. 2020-19(3). Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[16] See Chapter 11 for a detailed discussion of adoption proceedings involving an Indian child.

D. Interested Parties

Every interested party to an adoption must be served. See MCR 2.107(A)(1).

In a petition for adoption, the interested parties are:

(1) The petitioner(s).

(2) The adoptee, if over 14 years of age.

(3) The biological parents, unless:

(a) The parent's parental rights were terminated or released.

(b) A guardian (for either the adoptee or the parent) has been appointed with specific authority to consent to an adoption.

(c) The parent's rights have been released.

(d) The parent already consented to the adoption.

Note: Only the parent whose parental rights must be terminated in order to grant the adoption needs to consent. *In re Munson*, 210 Mich App 500, 503 (1995), superseded by statute on other grounds.[17]

(4) "The department or a child placing agency to which the adoptee has been, or for purposes of [MCL 710.24a(3)[18]] is proposed to be, released or committed by an order of the court."

(5) An unemancipated minor parent's parent, guardian, or guardian ad litem.

(6) The court with permanent custody of the adoptee.

(7) A court with continuing jurisdiction over the adoptee.

(8) Another state or country's child placing agency with authority to consent to the adoption.

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[17] See MCL 710.24(2) (permits a person to individually file a petition for adoption "without his or her spouse joining in the petition" in certain limited circumstances).

[18] MCL 710.24a(3) pertains to release proceedings. For a discussion on the interested parties to a release proceeding, see Section 2.2(A).

(9) Any interested party's guardian or guardian ad litem.

(10) "If the court knows or has reason to know the adoptee is an Indian child," in addition to the parties listed above, the Indian child's tribe and Indian custodian (if applicable), or where the Indian child's parent, Indian custodian, or tribe is unknown, the Secretary of the Interior.[19] MCL 710.24a(1); MCR 3.800(B)(1)-(2).

In the interest of justice, the court may require additional parties to be served. MCL 710.24a(6).

MCL 710.24a(1) does not include a grandparent as an interested party, even if the grandparent had court-ordered visitation rights. *In re Toth*, 227 Mich App 548, 555 (1998).

Even if a guardian ad litem is appointed for a minor child, the guardian ad litem must have specific authority to consent to an adoption to be an interested party under MCL 710.24a(1). *In re Toth*, 227 Mich App at 555-556.

E. Required Supporting Documentation

At the time the adoption petition is filed, or after the petition is filed but before the petition hearing is held, the following documentation must be filed:

(1) A copy of each release or parental termination order, unless the parents have consented to the adoption.

(2) A copy of the commitment order, if the child was committed to a child placing agency or the department.

(3) Proof of a guardian's appointment and his or her authorization to execute a release or consent to the child's adoption.

(4) A copy of the consent to the child's adoption.[20]

(5) "A copy of the adoptee's birth certificate, verification of birth, hospital birth registration, or other satisfactory

[19] See Chapter 11 for a detailed discussion of adoption proceedings involving an Indian child.

[20] If a child placing agency, the department, or the court has authority to consent to the child's adoption, the consent must be filed with the adoption petition, unless a motion on withholding consent to adopt has been filed. MCL 710.26(1)(d); MCL 710.45(1). For a discussion on the petitioner's filing of a motion for withholding consent, see Section 7.3.

proof of date and place of birth, if obtainable, unless this filing is waived by written order of the judge."

(6) Any investigative reports prepared under MCL 710.46.[21]

(7) An affidavit verifying any allegations on the petition that a parent failed to support and communicate with his or her child as described in MCL 710.51(6).[22]

(8) Any additional facts the court considers necessary. MCL 710.26(1).

In a direct placement adoption, the petitioner must also attach to the petition a verified statement certifying that he or she was informed of the availability of counseling services and whether he or she received the counseling. MCL 710.24(5). See Section 8.2 for information on direct placement adoptions, and Section 10.5 for more information on verified statements.

F. Additional Requirements

At or before the adoption petition hearing, the court must:

- "inform the adoptee, if he or she is 14 years old or older, and the adoptive parents of the provisions described in [MCL 710.27a (consenting to or denying release of identifying information)], [MCL 710.27b (central adoption registry)], [MCL 710.68 (releasing of identifying and nonidentifying information)], [MCL 710.68a (information pamphlet on releasing information)], and [MCL 710.68b (confidential intermediary)]."[23] MCL 710.26(2).

- "provide the adoptee, if he or she is 14 years of age or older, and the adoptive parents with a list of adoption support groups."[24] MCL 710.26(3).

MCL 710.26(2)-(3) also applies to stepparent and relative adoptions.

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[21] For a detailed discussion on investigative reports under MCL 710.46, see Section 5.6.

[22] For a discussion on nonsupport and noncommunication by a parent as described in MCL 710.51(6), see Section 2.10(B).

[23] For a discussion on identifying and nonidentifying information, see Sections 6.5(A)-(B), a discussion on consenting to or denying release of identifying information under MCL 710.27a, see Section 9.3(B), a discussion on the central adoption registry under MCL 710.27b, see Section 9.3, a discussion on releasing identifying and nonidentifying information under MCL 710.68, see Sections 9.7-9.8, and a discussion on confidential intermediaries, see Section 9.10.

[24] See the Michigan Adoption Resource Exchange's website for a list of county specific post-adoption resources.

6.7 Order of Adoption[25]

A. Termination of Parental Rights

Unless a child is temporarily placed under MCL 710.23d:

- "a child shall not be placed in a home for the purpose of adoption until an order terminating parental rights has been entered pursuant to [the Adoption Code] or [the Juvenile Code] and the court has formally approved placement under [MCL 710.51]."[26] MCL 710.41(1).

- "if a child is born out of wedlock and the release or consent of the biological father cannot be obtained, the child shall not be placed for adoption until the parental rights of the father are terminated by the court as provided in [MCL 710.37] or [MCL 710.39], by the court pursuant to [the Juvenile Code], or by a court of competent jurisdiction in another state or country."[27] MCL 710.31(1).

  Note: For a discussion on terminating parental rights under the Adoption Code and the Juvenile Code, see Chapter 2, and a discussion on establishing paternity, see Chapter 3.

"If an order terminating parental rights is entered pursuant to [the Adoption Code] or [the Juvenile Code], the child may be placed in a home for the purpose of adoption during the period specified for a rehearing or an appeal as of right and the period during which a rehearing or appeal as of right is pending. When a child placing agency, the court, or the department formally places a child or the court approves placement of a child pursuant to this subsection, the child placing agency, court, or department shall inform the person or persons in whose home the child is placed that an adoption will not be ordered until 1 of the following occurs:

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[25] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[26] "After an order terminating parental rights has been entered, the court shall enter any appropriate orders pursuant to [MCL 710.45], [MCL 710.46], and [MCL 710.51]. Such orders shall not be withheld because the period specified for a rehearing or an appeal as of right has not expired, or because of the pendency o f any rehearing or appeal as of right." MCL 710.41(1).

[27] "Pending the termination or other disposition of the rights of the father of a child born out of wedlock, the mother may execute a release terminating her rights to the child. If the mother releases the child, the child placing agency or department to which the child is released may file a petition of dependency or neglect pursuant to [the Juvenile Code]. Pending disposition of the dependency or neglect petition, the court may enter an order authorizing temporary care of the child." MCL 710.31(2). For a discussion on temporary placements, see Chapter 5.

(a) The petition for rehearing is granted, at the rehearing the order terminating parental rights is not modified or set aside, and subsequently the period for appeal as of right to the court of appeals has expired without an appeal being filed.

(b) The petition for rehearing is denied and the period for appeal as of right to the court of appeals has expired without an appeal being filed.

(c) There is a decision of the court of appeals affirming the order terminating parental rights."[28] MCL 710.41(2). For additional information on MCL 710.41(2), legal risk adoptions, see Section 8.5.

MCL 710.41 does not apply to stepparent adoptions, and does not prevent a child residing in a licensed foster home from being adopted by the foster parents. MCL 710.41(3)-(4).

B. Supervisory Period

"Subject to [MCL 710.52(2)], during the period before entry of the order of adoption, the child shall be supervised at the direction of the court by an employee or agent of the court, a child placing agency, or the department, who shall make reports regarding the adjustment of the child in the home as the court orders. The investigations shall be made under reasonable circumstances and at reasonable intervals." MCL 710.52(1). MCL 710.52(2) requires "[i]n a direct placement, the child [to] be supervised during the period before entry of the order of adoption by the child placing agency that investigated the placement under [MCL 710.46] or, in the court's discretion, by another child placing agency."[29]

The length of the supervisory period depends on the adoptee's age at the time the adoption petition is filed:

- If the adoptee is one year of age or older at the time the petition is filed, the supervisory period lasts six months after formal placement, unless
    - the court finds, on the petitioner's motion, that a waiver of all or a portion of the six-month period is in the child's best interests; or

[28] See the SCAO form *Notice to Adopting Parents on Pending or Potential Appeal/Rehearing*.

[29] For a discussion on consent adoptions under MCL 710.46, see Section 2.6.

- the court finds, after holding a hearing, that an extension of the six-month period is in the child's best interests.[30]

- If the adoptee is less than one year old at the time the adoption petition is filed, the supervisory period lasts three months after formal placement, unless the court finds, on the petitioner's motion, that a waiver of all or a portion of the three-month period is in the child's best interests. MCL 710.56(1).

C. Action on the Adoption Petition

The decision to grant or deny a petition for adoption is within the discretion of the trial court. *In re Kyung Won Kim*, 72 Mich App 85, 88 (1976).

Once the respective supervisory period expires, the court may enter an adoption order, "unless the court determines that circumstances have arisen that make adoption undesirable[.]" MCL 710.56(1). If an adoption is not ordered within 18 months of formal placement, the court must hold a hearing to determine whether to grant or deny the adoption order. MCL 710.56(1). If the child was formally placed under MCL 710.41(2) (a legal risk adoption), "the court may extend the 6-month period for an additional period, that may exceed 18 months from the time of formal placement, until an order for adoption may be entered under [MCL 710.56(2)]."[31] MCL 710.56(1).

If an adoption hearing is held, the court may permit an adoptee to attend. MCL 710.23a(5).

1. Cannot Grant Adoption Petition While Court Action is Pending

A trial court must not grant an adoption petition while an appeal is pending in the Court of Appeals or the Supreme Court. *In re JK*, 468 Mich 202, 219 (2003). See also *In re Jackson*, 498 Mich 943, 943 (2015) and MCR 3.808 (requiring the trial court to issue specific findings regarding appellate activity before finalizing an adoption). In addition, a trial court must not order an adoption while a petition for rehearing or a

[30] The court "may extend the 6-month period for an additional period of time not exceeding 18 months from the time of formal placement for adoption." MCL 710.56(1). Note, however, "the court may extend the 6-month period for an additional period, that may exceed 18 months from the time of formal placement, until an order for adoption may be entered under [MCL 710.56(2)]" for placements under MCL 710.41(2), legal risk adoptions. MCL 710.56(1). For a discussion on legal risk adoptions, see Section 8.5.

[31] For a discussion on legal risk adoptions, see Section 8.5.

motion challenging the withholding of consent is pending. MCL 710.56(2); MCL 710.56(4); MCR 3.808.

"Except as provided in [MCL 710.56(3)], if a petition for rehearing or an appeal as of right from an order terminating parental rights has been filed, the court shall not order an adoption until 1 of the following occurs:

> (a) The petition for rehearing is granted, and at the rehearing the order terminating parental rights is not modified or set aside, and subsequently the period for appeal as of right to the court of appeals has expired without an appeal being filed.
>
> (b) The petition for rehearing is denied and the period for appeal as of right to the court of appeals has expired without an appeal being filed.
>
> (c) The court of appeals affirms the order terminating parental rights." MCL 710.56(2).

"If an application for leave to appeal has been filed with the supreme court, the court shall not order an adoption until 1 or more of the following occurs:

> (a) The application for leave to appeal is denied.
>
> (b) The supreme court affirms the order terminating parental rights." MCL 710.56(3).

"If a motion brought under [MCL 710.45 (motion challenging the withholding of consent)] has been filed, the court shall not order an adoption until 1 of the following occurs:

> (a) The motion is decided and subsequently the period for appeal as of right to the court of appeals has expired without an appeal being filed.
>
> (b) The motion is decided, an appeal as of right to the court of appeals has been filed, the court of appeals issues an opinion, and subsequently the period for filing an application for leave to the supreme court has expired without an application being filed.
>
> (c) The supreme court denies an application for leave or, if an application is granted, the supreme court issues an opinion." MCL 710.56(4).

For a discussion on rehearings, appeals, and motions challenging withholding of consent, see Chapter 7.

2. Adoption of Adult

"If the person to be adopted is an adult,[32] the court may enter an order of adoption after all of the following occur:

> (a) The person to be adopted consents to the adoption according to [MCL 710.43(3)].
>
> (b) The written report of investigation required by [MCL 710.46(2)] is filed.
>
> (c) Notice has been served upon interested parties described in [MCL 710.24a]." MCL 710.56(5).

MCL 710.43(3) requires the adult adoptee to consent to his or her adoption "before the court may enter an order of adoption, but consent by any other individual is not required."

For a discussion on investigative reports required by MCL 710.46(2), see Section 5.6, and a list of interested parties described in MCL 710.24a, see Section 6.6(D).

3. Granting the Adoption Petition

"Before entering a final order of adoption, the trial court shall determine that the adoptee is not the subject of any pending proceedings on rehearing or reconsideration, or on appeal from a decision to terminate parental rights. The trial court shall make the following findings on the record:

> 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." MCR 3.808.[33]

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[32] An adult adoptee is an individual 18 years of age or older. See MCL710.22(j) (defining a child for purposes of the Adoption Code as "an individual less than 18 years of age[]").

[33] "The addition of MCR 3.808 is consistent with . . . MCL 710.56. This new rule arises out of *In re JK*, 468 Mich 202 (2003), and *In re Jackson*, 498 Mich 943 (2015), which involved cases where a final order of adoption was entered despite pending appellate proceedings involving the adoptee children. Although the Michigan Court of Appeals has adopted a policy to suppress in its register of actions and online case search tool the names of children (and parents) who are the subject of appeals from proceedings involving the termination of parental rights, this information remains open to the public. Therefore, in order to make the determination required of this new rule, a trial court may contact the clerk of the Michigan Court of Appeals, the Michigan Supreme Court, or any other court where proceedings may be pending." Staff Comment to ADM File No. 2015-26 ("[t]his staff comment is not an authoritative construction by the [Michigan Supreme] Court," and adoption of MCR 3.808 "in no way reflects a substantive determination by [the Michigan Supreme] Court").

"When the court enters an order of adoption, certified copies shall be given to the adopting parent or parents. If the consent to the adoption was given by a duly authorized representative of the department, of a child placing agency, or of a public or licensed private agency of another state or country, a certified copy of the order of adoption shall be furnished by the court to the department or agency."[34] MCL 710.58.

Within 15 days of entering an order of adoption under MCL 710.56, "the court shall forward to the department . . . either of the following:

> (a) A public information form filled out and filed with the court by the primary adoption facilitator and completed by the court as provided in [MCL 710.58a(2)[35]].
>
> (b) If the primary adoption facilitator has not filed a form, a public information form completed by the court that consists only of the name of the primary adoption facilitator and the confidential information as prescribed by [MCL 722.124d.]" MCL 710.58a(1).

Within 15 days of entering a final adoption order in a direct placement adoption, the court must forward a public information form to the DHHS. MCL 710.58a(1). See Section 8.2(B) for a discussion on primary adoption facilitators and public information forms.

4. Denying the Adoption Petition

"If the court denies an order of adoption, the court may return the child to the parents or original custodian and restore their rights, or make a disposition appropriate for the welfare of the ward as is authorized by [MCL 712A.18]." MCL 710.62.

A court that denies an adoption petition or fails to issue an order of adoption must "state the reason for that action on the record or in writing." MCL 710.63.

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[34] See the SCAO form *Order of Adoption* or *Order of Adoption (alternative format suitable for framing)*.

[35] "If the primary adoption facilitator has filed a public information form with the court and has indicated that he or she does not have access to certain information required on the public portion of the form, the court shall complete the form by filling in missing information that is contained in court records to which the primary adoption facilitator does not have access. The court shall complete all public information forms filed with the court by filling in the information required on the confidential portion of the form." MCL 710.58a(2).

6.8 Child Support Obligation

If a parent's parental rights have been terminated, the court's entry of an adoption order severs the parent's continued obligation to support his or her child. See MCR 3.804(C) (requiring that the parent be informed of this obligation before executing a release or consent to adoption); MCR 3.809 (requiring that the court provide oral or written notice of this obligation).

6.9 Report of Adoption

Once an order of adoption is entered, "the court shall prepare a report of adoption on a form prescribed and furnished by the state registrar. The report shall:

> (a) Include the facts necessary to locate and identify the certificate of live birth of the individual adopted.
>
> (b) Provide information necessary to establish a new certificate of live birth of the individual adopted.
>
> (c) Identify the adoption order.
>
> (d) Be certified by the probate register or clerk." MCL 333.2829(1).
>
> > **Note:** If an adoption order is "amended, annulled, or rescinded, the court shall prepare a report which include the facts necessary to identify the original report and the facts amended in the adoption order necessary to properly amend the birth record. The report of a rescission of adoption shall include the current names and addresses of the petitioners." MCL 333.2829(2). When an adoption is annulled or rescinded, the original birth certificate is restored. MCL 333.2832(2).

"Not later than the tenth day of the calendar month, the probate register or clerk shall forward:

> (a) To the state registrar, reports of adoption orders, and amendments, annulments, and rescissions of the orders, entered during the preceding month for individuals born in this state.
>
> (b) To the appropriate registration authority in another state, the United States department of state, or the United States immigration and naturalization service, reports of adoption orders, and amendments, annulments, and rescissions of the orders, entered during the preceding month for individuals born outside this state." MCL 333.2829(3).

6.10 Delayed Registration of Birth

"When a resident of this state adopts a child whose birth occurred outside the United States, a territory of the United States, and Canada, the order of adoption issued by the probate court shall constitute a delayed registration of birth. The court order shall contain a statement of the date and place of birth." MCL 326.38(1). "If the date and place of birth cannot be documented from foreign records, or a medical assessment of the development of a child indicates that the date of birth stated in immigration records is not correct, the court shall determine the facts, establish a date and place of birth, and issue a delayed registration of birth."[36] MCL 326.38(2). "The clerk of the court which issues a delayed registration of birth shall file a true copy of the order with the department of public health."[37] MCL 326.38(4).

A court may also issue a delayed registration of foreign birth on an adoptive parent's motion:[38]

> "(1) If a child whose birth occurred outside the United States, a territory of the United States, or Canada is adopted by a resident of this state under the laws of this state or under the laws of a foreign country, the probate court, on motion of the adopting parent, may file a delayed registration of birth on a form provided by the department. The delayed registration shall contain the date and place of birth and other facts specified by the department.
>
> (2) If the date and place of birth of a child described in subsection (1) cannot be documented from foreign records or a medical assessment of the development of the child indicates that the date of birth as stated in the immigration records is not correct, the court shall determine the facts and establish a date and place of birth and may file a delayed registration of birth as provided in subsection (1).
>
> (3) Upon the petition of a child adopted in this state whose birth occurred outside the United States, a territory of the United States, or Canada, or a petition of the child's adoptive parents, the court that issued an order of adoption for that

[36] "Upon a petition of an adopted child whose birth occurred outside the United States, a territory of the United States, and Canada, or a petition of the child's adoptive parent, the court which issued an order of adoption for that child before [June 18, 1976,] may amend its order for the purpose of issuing a delayed registration of birth." MCL 326.38(3).

[37] "The department of public health shall forward a certificate of amendment to the United States immigration and naturalization service or the United States department of state with a request that the recipient agency correct its records accordingly." MCL 326.38(4).

[38] See the SCAO form *Petition and Order for Delayed Registration of Foreign Birth*.

> child before [September 30, 1978,] may issue a delayed registration of birth for the adopted child as provided in subsection (1).
>
> (4) A probate court may, at the request of the adopting parent when filing a delayed registration of birth under subsection (1), enter a new name for the child on the delayed registration of birth. After the filing of a delayed registration of birth that includes a change of name, the new name shall be the legal name of the adopted child." MCL 333.2830.

"The entire record for delayed registration of birth is confidential. Except as otherwise ordered by the court, only the legal parent or parents and the child may gain access to the confidential file, and no information relating to a confidential record, including whether the record exists, shall be accessible to the general public." MCR 3.617.

6.11 New Birth Certificate

The state registrar must issue an adoptee a new birth certificate when the adoptee was born in this state and the state registrar receives "[a] report of adoption as provided in [MCL 333.2829], a report of adoption prepared and filed under the laws of another state or foreign country, or a certified copy of the adoption order, together with the information necessary to identify the original certificate of birth and to establish a new certificate of live birth." MCL 333.2831(a). However, a new birth certificate will not be issued upon such request by the court ordering the adoption, the adopting parent, or an adult adoptee. MCL 333.2831(a).

"[T]he original birth certificate on file for the adoptee [must be] sealed and . . . a new birth certificate [must be] prepared in conformance with [MCL 710.67]." MCL 710.68(15). The adoptee's new birth certificate must conform as close as possible to the appearance of an original birth certificate, not disclose the adoption, and be provided to the adoptive parent.MCL 710.67(3). See also MCL 333.2829(4), which requires the birth certificate to conform to the requirements of MCL 710.67 and MCL 710.68.

6.12 Name Change

If an adoptee's name is to change, the adoptee must be called by the new name once the order of adoption is entered. MCL 710.60(1).

"Where the parents or surviving parent has given consent to an adoption and the petitioner desires to change the name of the adopted child, the order of adoption and exemplification of record shall not contain the

name of the child's natural parents or the name bestowed upon the child before the adoption." MCL 710.59.

At the adoptive parent's request, the court may enter a new name for an adopted child on a delayed registration of foreign birth.[39] MCL 333.2830(4). Once the adoptive parent files a motion for a delayed registration of foreign birth that includes a name change, "the new name shall be the legal name of the adopted child." *Id*.

6.13 Parental Rights and Obligations

After an order of adoption is entered, the adoptive parent becomes the adoptee's legal parent, is treated as if he or she is the adoptee's natural parent, becomes liable for all parental duties, and is entitled to all parental rights over the adoptee. MCL 710.60(1). The adoptive parent's parental rights include the right to custody, control, services, and earnings of the adopted child. MCL 722.2.

Once a child is adopted, the biological parents' legal relationship, including all rights and obligations, to the child is severed, and the adoptive parent becomes the legal parent. *Theodore v Packing Materials, Inc*, 396 Mich 152, 162-163 (1976). The adoption of a child also legally severs the child's sibling relationships with other children born to the biological parents. *Wilson v King*, 298 Mich App 378, 382 (2012) (adoptive parent's "adoption of the three older children legally severed their sibling relationship with [the youngest child subsequently born to the biological mother;]" "[t]his adoption legally severed, at law, the three older children's 'prior, natural family relationship' and created 'a new and complete substitute relationship after adoption[]'").

6.14 Adopted Child's Inheritance

"After entry of the order of adoption, there is no distinction between the rights and duties of natural progeny and adopted persons, and the adopted person becomes an heir at law of the adopting parent or parents and an heir at law of the lineal and collateral kindred of the adopting parent or parents. After entry of the order of adoption, except as provided in [MCL 700.2114(2)], an adopted child is no longer an heir at law of a parent whose rights have been terminated under [the Adoption Code] or [the Juvenile Code] or the lineal or collateral kindred of that parent, nor is an adopted adult an heir at law of a person who was his or her parent at the time the order of adoption was entered or the lineal or collateral kindred of that person, except that a right, title, or interest that

[39] For a discussion on a delayed registration of foreign birth, see Section 6.10.

has vested before entry of the final order of adoption is not divested by that order." MCL 710.60(2).

Regarding intestate succession, MCL 700.2114 provides in relevant part:

> "(2) An adopted individual is the child of his or her adoptive parent or parents and not of his or her natural parents, but adoption of a child [through a stepparent adoption] by the spouse of either natural parent has no effect on either the relationship between the child and that natural parent or the right of the child or a descendant of the child to inherit from or through the other natural parent. An individual is considered to be adopted for purposes of this subsection when a court of competent jurisdiction enters an interlocutory decree of adoption that is not vacated or reversed.
>
> (3) The permanent termination of parental rights of a minor child by an order of a court of competent jurisdiction; by a release for purposes of adoption given by the parent, but not a guardian, to the [DHHS] or a licensed child placement agency, or before a probate or juvenile court; or by any other process recognized by the law governing the parent-child status at the time of termination, excepting termination by emancipation or death, ends kinship between the parent whose rights are so terminated and the child for purposes of intestate succession by that parent from or through that child.
>
> (4) Inheritance from or through a child by either natural parent or his or her kindred is precluded unless that natural parent has openly treated the child as his or hers, and has not refused to support the child."

6.15 Grandparenting Time

A brief discussion on grandparenting time as it relates to adoptions is contained in this section. For additional information on grandparenting time in general, including the required procedures, see Michigan's grandparenting time statute, MCL 722.27b.

The Adoption Code, MCL 710.60(3), "does not prohibit the filing of an action or entry of an order for grandparenting time as provided in . . . MCL 722.27b." Under MCL 722.27b, "[a] child's grandparent may seek a grandparenting time order" if one or more of the circumstances outlined in MCL 722.27b(1) are met.

"Except as otherwise provided in [MCL 722.27b], adoption of a child or placement of a child for adoption under the Michigan adoption code, . . . MCL 710.21 to [MCL] 710.70, terminates the right of a grandparent to commence an action for grandparenting time with that child." MCL 722.27b(13). See *In re Keast*, 278 Mich App 415, 436 (2008) (finding that the maternal grandparents were not entitled to grandparenting time under MCL 722.27b where the grandchildren were placed for adoption with a foster parent, the Michigan Children's Institute (MCI) superintendent granted consent to adopt to that foster parent, and "MCL 722.27b(13) clearly provide[d] that the placement of [the grand]child[ren] for adoption terminate[d] the rights of [the maternal] grandparent[s] to commence an action for grandparenting time").

"Adoption of a child by a stepparent under the Michigan adoption code, . . . MCL 710.21 to [MCL] 710.70, does not terminate the right of the parent of a deceased parent of the child to commence an action for grandparenting time with that child." MCL 722.27b(13). Moreover, MCL 722.27b(5) (requiring the court to dismiss a request for grandparenting time if 2 fit parents sign an affidavit in opposition of an order for grandparenting time) "does not apply if 1 of the fit parents is a stepparent who adopted a child under the Michigan adoption code, . . MCL 710.21 to [MCL] 710.70, and the grandparent seeking the order is the natural or adoptive parent of a parent of the child who is decease or whose parental rights have been terminated."

> **Note:** "A court shall not permit a parent of a father who has never been married to the child's mother to seek an order for grandparenting time under this section unless the father has completed an acknowledgment of parentage under the acknowledgment of parentage act, . . . MCL 722.1001 to [MCL] 722.1013, an order of filiation has been entered under the paternity act, . . . MCL 722.711 to [MCL] 722.730, or the father has been determined to be the father by a court of competent jurisdiction. The court shall not permit the parent of a putative father to seek an order for grandparenting time unless the putative father has provided substantial and regular support or care in accordance with the putative father's ability to provide the support or care." MCL 722.27b(2). For a discussion on establishing paternity, see Chapter 3.

"A grandparenting time order entered under [MCL 722.27b] does not create parental rights in the individual or individuals to whom grandparenting time rights are granted. The entry of a grandparenting time order [under MCL 722.27b] does not prevent a court of competent jurisdiction from acting upon the custody of the child, the parental rights of the child, or the adoption of the child." MCL 722.27b(10).

Chapter 7: Rehearings, Appeals, Rescissions, and Dissolutions

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7.1 Overview of Chapter[1]

This chapter discusses how a party may petition the court to rehear an entered order, the requirements to file and respond to a petition for rehearing, and the court's decisionmaking process. It also discusses the process by which an adoptive parent may challenge a child placing agency, the department, or the court when consent to adopt is withheld, as well as the process by which an adoptive parent, adoptee, or guardian may appeal a subsidy determination.

Further, this chapter briefly discusses how a party may appeal to the Michigan Court of Appeals and the Michigan Supreme Court, the requirements of filing and responding to an appeal, and the court's decisionmaking process.

Finally, this chapter discusses the steps necessary to rescind a stepparent adoption or dissolve an adoption.

7.2 Rehearings[2]

Once an order is entered under the Adoption Code, a party to the order may petition the court for a rehearing. See MCL 710.64(1); MCR 3.806(A).

"Pending a ruling on the petition for rehearing, the court may stay any order, or enter another order in the best interest of the minor." MCR 3.806(D).

For checklists on rehearings, see the Michigan Judicial Institute's Adoption Proceedings Quick Reference Materials, *Rehearings*.

A. Rehearing Requirements

"A party may seek rehearing under MCL 710.64(1) by timely filing a petition stating the basis for rehearing." MCR 3.806(A). The petitioner has 21 days after an order is entered to petition the court for a rehearing. MCL 710.64(1). Generally, if a petitioner fails to petition the court within the 21-day period, he or she does not have a due process right to a rehearing. *In re Myers*, 131 Mich App 160, 165-166 (1983).

[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[2]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

1. Exception to 21-day Filing Period

In cases of positive fraud,[3] the court may grant a petition for rehearing filed outside of the 21-day period. *In re Kozak*, 92 Mich App 579, 581, 583 (1979) (trial court erroneously denied the biological father's petition for rehearing filed three months after entry of the termination order where the father claimed he did not receive notice of the court proceedings and the child's mother lied about knowing he was the father).

2. Notice and Response Requirements

"Immediately upon filing the petition, the petitioner must give all interested parties notice of its filing in accordance with MCR 3.802. Any interested party may file a response within 7 days of the date of service of notice on the interested party." MCR 3.806(A). MCL 710.24a and MCR 3.800(B) list the interested parties for various hearings conducted under the Adoption Code.

B. Court Determination

"[A]fter due notice to all interested parties, the judge may grant a rehearing and may modify or set aside the order." MCL 710.64(1). "The court must base a decision on whether to grant a rehearing on the record, the pleading filed, or a hearing on the petition. The court may grant a rehearing only for good cause. The reasons for its decision must be in writing or stated on the record." MCR 3.806(B).

1. Granting the Petition for Rehearing

"If the court grants a rehearing, the court may, after notice, take new evidence on the record. It may affirm, modify, or vacate its prior decision in whole or in part. The court must state the reasons for its action in writing or on the record." MCR 3.806(C). The court has 21 days after the rehearing to enter an order on the contested matter. MCL 710.64(2). The court's finding on rehearing may be appealed to the Court of Appeals. MCL 710.65(1).

Generally, harmless error is not grounds for disturbing a judgment or order. See MCR 2.613(A),[4] which provides that "[a]n error in the admission or the exclusion of evidence, an

[3] See Section 7.8 for more information on "positive fraud" as it relates to revoking an adoption.

[4] "Except as modified by the rules in this chapter, adoption proceedings are governed by Michigan Court Rules." MCR 3.800(A).

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 . . . disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice."

The trial court may rely on the best interests of a child for guidance during a rehearing. *In re Burns*, 236 Mich App 291, 292-293 (1993) ("[b]ecause petitioner's release was both knowing and voluntary and because petitioner sought rehearing on the specific ground of a change of heart, the family court properly relied on the best interests of the child for guidance when determining whether to vacate petitioner's release[]").

The court's finding on rehearing may be appealed to the Court of Appeals. MCL 710.65(1). See Section 7.4 for a detailed discussion of appealing a decision to the Court of Appeals.

2. Denying the Petition for Rehearing

If the court denies the petition, it must state the reason for the denial on the record or in writing. MCL 710.63. The court's decision to deny rehearing may be appealed to the Court of Appeals. MCL 710.65(1). See Section 7.4 for a detailed discussion of appealing a decision to the Michigan Court of Appeals.

Where a parent knowingly and voluntarily releases his or her parental rights, a court may not abuse its discretion by denying the petition for rehearing based solely on a change of heart. See *In re Curran*, 196 Mich App 380, 385 (1992).

C. Videoconferencing Technology

"Except for a consent hearing involving an Indian child pursuant to MCL 712B.13, the court may allow the use of videoconferencing technology under [subchapter 3.800 of the Michigan Court Rules] in accordance with MCR 2.407."[5] MCR 3.804(B)(3).

[5] For a discussion on consent hearings involving an Indian child under MCL 712B.13, see Section 11.15(B)(2).

7.3 Adoption Petitioner's Motion Regarding Withholding Consent to Adopt[6]

When a child is released to a child placing agency, the department, or the court, the child placing agency, the department, or the court to which the child is released must consent to the child's adoption.[7] MCL 710.43(1)(b)-(d). If the child placing agency, the department, or the court withholds its consent to adopt, the adoption petitioner may file a motion claiming the decision to withhold consent is arbitrary and capricious. MCL 710.45(2). However, the motion may not be filed under MCL 710.45 if:

> (1) The child placing agency, the department, or the court consented to the child's adoption by another adoptive parent;
>
> (2) The child has been placed for adoption with the other adoptive parent according to another order under MCL 710.51; and
>
> (3) An adoption order has already been entered *or* 56 days have elapsed since entry of the placement order. MCL 710.45(3).

"[A] hearing under [MCL 710.45] is not . . . an opportunity for a petitioner to make a case relative to why the consent should have been granted, but rather is an opportunity to show that the representative acted arbitrarily and capriciously in withholding that consent. It is only after the petitioner has sustained the burden of showing by clear and convincing evidence that the representative acted arbitrarily and capriciously that the proceedings may then proceed to convincing the probate court that it should go ahead and enter a final order of adoption." *In re Cotton*, 208 Mich App 180, 184 (1994).

A. Motion Requirements

"If an adoption petitioner has been unable to obtain the consent required by [MCL 710.43(1)(b), (c), or (d)], the petitioner may file a motion with the court alleging that the decision to withhold consent was arbitrary and capricious. A motion under this subsection shall contain information regarding both of the following:

> (a) The specific steps taken by the petitioner to obtain the consent required and the results, if any.

[6]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[7] For a discussion on consent, see Section 2.6.

(b) The specific reason why the petitioner believes the decision to withhold consent was arbitrary and capricious." MCL 710.45(2).

1. Proper Venue

A motion regarding withheld consent should be filed in the same county as the adoption petition. See Section 4.3(A) for a discussion of proper venue for adoption petitions.

2. Notice

"The court shall provide notice of a motion brought under [MCL 710.45] to all interested parties as described in [MCL 710.24a(1)], the guardian ad litem of the prospective adoptee if one has been appointed during a child protection proceeding, and the applicant who received consent to adopt." MCL 710.45(5). "If the court knows or has reason to know the adoptee is an Indian child," the court must also provide notice of the motion to the Indian child's tribe and Indian custodian (if applicable), or where the Indian child's parent, Indian custodian, or tribe is unknown, the Secretary of the Interior. MCR 3.800(B)(1)-(2).

For a discussion on interested parties as described under MCL 710.24a(1) and MCR 3.800(B), see Section 6.6(D). For a discussion on adoption proceedings involving an Indian child, see Chapter 11.

B. Court Determination

On the filing of an adoption petition, MCL 710.46(1) requires the court to direct an employee or agent of a child placing agency, the department, or the court, to conduct a full investigation.[8] If a motion regarding withheld consent is filed with the adoption petition, the court may waive or modify the full investigation of the petition. MCL 710.45(6).

"The court shall decide the motion [regarding withheld consent] within 91 days after the filing of the motion unless good cause is shown." MCL 710.45(6). If the court is withholding consent, the adoptive parent's motion must be heard by a visiting judge. MCL 710.45(9).

[8] For a detailed discussion on investigative reports, see Section 5.6.

"To decide whether a denial of consent to adopt was arbitrary and capricious, a trial court initially focuses [at the § 45 hearing] on the reasons for withholding consent to the adoption. 'It is the absence of any good reason to withhold consent, rather than the presence of good reasons to grant it, that indicates that the decision maker has acted arbitrarily and capriciously.'" *In re ASF*, 311 Mich App 420, 429-430 (2015), quoting *In re Keast*, 278 Mich App 415, 425 (2008).

On review of the decision to withhold consent, "the trial court [must] ma[k]e findings of fact and conclusions of law as required by MCR 2.517." See *In re ASF*, 311 Mich App at 432. "[T]he fact that [the] petitioners disagree with the trial court's findings regarding the conflicting evidence does not render the trial court's findings inadequate under MCR 2.517." *In re ASF*, 311 Mich App at 432-433 (finding that "the trial court applied the correct legal standard, and its findings were sufficient to satisfy MCR 2.517" where "the trial court clearly identified the superintendent's primary reasons for denial: [the petitioner's] vacillation on the adoption, [both] petitioners' potential difficulty parenting [the child] into the future, and the availability of another relative to adopt [the child] that would allow [the child] to continue a relationship with [both] petitioners as [the child's] grandparents[, and w]hile the trial court's explanation was relatively concise, the trial court was plainly aware of the issues involved and its '[b]rief, definite, and pertinent findings and conclusions' regarding these issues were sufficient 'without 'overelaboration of detail or particularization of facts.' MCR 2.517(A)(2).") (ninth alteration in original).

1. Granting or Denying the Motion

The petitioner bears the burden of proof and must establish by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious. See MCL 710.45(7); *In re ASF*, 311 Mich App 420, 438 (2015) ("at the close of petitioners' proofs, it was appropriate for the trial court to consider whether petitioners were entitled to relief given the facts and the law without providing the [lawyer-guardian ad litem (LGAL)] an opportunity to present a case separate from petitioners[]").[9]

[9] In *In re ASF*, the Court noted that "when an LGAL has been appointed during child abuse and neglect proceedings, some participation by an LGAL is anticipated during ensuing adoption proceedings that occur during the LGAL's continued representation of the child. This participation does not, however, make an LGAL for an adoptee under age 14 an 'interested party' or a 'petitioner.' Because the LGAL was not a petitioner or an interested party, the trial court could grant a motion for involuntary dismissal under MCR 2.504(B)(2) before the LGAL completed her presentation of evidence." *In re ASF*, 311 Mich App at 438-439 n 5 (citations omitted). For additional information on LGALs appointed during child protective proceedings, see the Michigan Judicial Institute's *Child Protective Proceedings*, Chapter 7. For a list of interested parties in a child's adoption, see Section 2.6(B).

When the court decides whether a child placing agency, the department, or the court arbitrarily and capriciously withheld consent, the judge must not substitute his or her judgment for that of the person or agency withholding consent. *In re Cotton*, 208 Mich App 180, 184 (1994). Specifically, the Court indicated:

> "[T]he clear and unambiguous language terms of [MCL 710.45] indicate that the decision of the representative of the agency to withhold consent to an adoption must be upheld unless there is clear and convincing evidence that the representative acted arbitrarily and capriciously. Thus, the focus is not whether the representative made the 'correct' decision or whether the . . . judge would have decided the issue differently than the representative, but whether the representative acted arbitrarily and capriciously in making the decision. . . .
>
> Because the initial focus is whether the representative acted arbitrarily and capriciously, the focus of such a hearing is not what reasons existed to authorize the adoption, but the reasons given by the representative for withholding the consent to the adoption. That is, if there exist good reasons why consent should be granted and good reasons why consent should be withheld, it cannot be said that the representative acted arbitrarily and capriciously in withholding that consent even though another individual, such as the . . . judge, might have decided the matter in favor of the petitioner. Rather, it is the absence of any good reason to withhold consent, not the presence of good reasons to grant it, that indicates that the representative was acting in an arbitrary and capricious manner." *In re Cotton*, 208 Mich App at 184-185.

a. Granting the Motion

"If the court finds by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court shall issue a written decision and may terminate the rights of the appropriate court, child placing agency, or department and may enter further orders in accordance with [the Adoption Code] or [MCL 712A.18] as the court considers appropriate. In addition, the court may grant to the petitioner reimbursement for

petitioner's costs of preparing, filing, and arguing the motion alleging the withholding of consent was arbitrary and capricious, including a reasonable allowance for attorney fees." MCL 710.45(8).

b. Denying the Motion

If the petitioner fails to demonstrate by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court must deny the motion and dismiss the petition for adoption. MCL 710.45(7). See *In re ASF*, 311 Mich App 420, 433-434 (2015) (finding that "the trial court did not clearly err when, at the close of petitioners' case, it determined, based on the facts and laws, that petitioners were not entitled to relief because they had not shown by clear and convincing evidence that the [MCI S]uperintendent's denial of consent was arbitrary and capricious[]" where there was "underlying factual support for the [MCI S]uperintendent's determinations[]").

In denying the motion, the court must state the reason for the denial on the record or in writing. MCL 710.63.

2. Appealing the Court's Decision

The court's decision is appealable by right to the Court of Appeals. MCL 710.45(10). Under MCL 710.45(10) generally, the Court of Appeals "has subject-matter jurisdiction over appeals from a trial court's decision on a motion under MCL 710.45." *In re ASF*, 311 Mich App 420, 425 fn 3 (2015) (where the petitioning party does not initiate the appeal under MCL 710.45(10) but timely files a cross-appeal, "[the] cross-appeal may be prosecuted to its conclusion even if th[e Court of Appeals] dismisses the initial appeal[]").[10]

See Section 7.4 for a detailed discussion of appealing a decision to the Court of Appeals.

[10] In *In re ASF*, the child's lawyer-guardian ad litem (LGAL), having been appointed during the child protective proceedings and continuing representation during the adoption proceedings, filed the initial appeal. *In re ASF*, 311 Mich App at 425 n 3. Even though LGALs of "adoptee[s] under the age of 14 [are] not considered an 'interested party' in adoption proceedings[,]" the Court of Appeals considered the LGAL's arguments on appeal where the LGAL was appointed to the child during the child abuse and neglect proceedings and the LGAL's responsibilities to the child continued while the child remained under the MCI's supervision. *Id*. See MCL 712A.17d(1)(b), which provides the LGAL with, among other powers and duties, "entitle[ment] to full and active participation in all aspects of the litigation." For additional information on LGALs appointed during child protective proceedings, see the Michigan Judicial Institute's *Child Protective Proceedings*, Chapter 7.

7.4 Appealing 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*.

"A party aggrieved by an order that is entered by the court under [the Adoption Code], including an order entered after a rehearing, may appeal the order to the court of appeals as of right not later than 21 days after the order is entered by the court or not later than 21 days after a petition for a rehearing is denied." MCL 710.65(1). Included as an aggrieved party under MCL 710.65(1) is an adoption petitioner when his or her petition to adopt is denied. *In re Draime*, 356 Mich 368, 371-372 (1959).

"In an appeal following the involuntary termination of parental rights, if the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order transcripts prepared at public expense." MCR 3.810.

"Unless otherwise provided by rule, statute, or court order, an execution may not issue and proceedings may not be taken to enforce an order or judgment until expiration of the time for taking an appeal of right." MCR 7.209(E)(1).

Filing an appeal does not stay enforcement of a court order, unless the trial court or the Court of Appeals orders otherwise. MCL 710.65(2); MCR 7.209(A)(1). For purposes of adoption, an appeal does not stay execution unless:

- "The trial court grants a stay with or without bond, or with a reduced bond, as justice requires or as otherwise provided by statute[.]" MCR 7.209(E)(2)(b).
- The Court of Appeals issues a stay after good cause is shown and the terms are deemed appropriate. MCL 710.65(2).

A. Docket Priority

An appeal of a court order entered under the Adoption Code must take precedence over all other matters in the Court of Appeals, unless the Supreme Court or a specific statutory provision gives another matter priority. MCL 710.65(3).

B. Standard of Review

On appeal, questions of statutory interpretation and a trial court's grant of summary disposition are reviewed de novo. *In re AJR*, 496 Mich 346, 352 (2014); *In re Talh*, 302 Mich App 594, 597 (2013).

The Court of Appeals reviews a trial court's factual findings for clear error. *In re Hill*, 221 Mich App 683, 691-692 (1997). "A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." *Id.*

The Court of Appeals reviews a trial court's order denying revocation of a release or a consent to adopt for an abuse of discretion. *In re Nord*, 149 Mich App 817, 821 (1986). A trial court's decision to grant or deny a petition for adoption is also reviewed for an abuse of discretion. *In re TMK* 242 Mich App 302, 304 (2000).

7.5 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).

"In an appeal following the involuntary termination of parental rights, if the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order transcripts prepared at public expense." MCR 3.810.

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).

7.6 Rescission of Stepparent Adoption

"If an adult adoptee who was adopted by a stepparent and the adult adoptee's parent whose rights have been terminated desire to rescind the adoption by the stepparent and restore the parental rights of that parent, they shall file a rescission petition[11] with the court of the county in which the adoption by the stepparent was confirmed. This section applies to an adult adoptee who was adopted by a stepparent regardless of whether the adoptee was a minor at the time of adoption." MCL 710.66(1). For a discussion on stepparent adoptions, see Section 8.3.

A. Petition Requirements

"The rescission petition shall be verified by both the adult adoptee and the parent whose rights were terminated, and shall contain the following information:

> (a) The present name of each petitioner, the name of the adoptee at the time of birth and immediately after an adoption if different from the adoptee's present name, the name of the parent at the time of termination of parental rights, the date and place of the adoptee's birth, and the present place of residence of each petitioner.
>
> (b) The name, date and place of birth, and address of the parent whose rights were not terminated and whose spouse adopted the adoptee, if known to either of the petitioners.
>
> (c) The name of the stepparent at the time of the order of adoption, including the maiden name of the stepparent if applicable and if known, and the stepparent's date and place of birth." MCL 710.66(2).

The petitioners must serve notice of the rescission petition to all interested parties. MCL 710.66(4). The "interested parties in a rescission petition are all of the following:

> (a) The petitioners.
>
> (b) The stepparent who adopted the adult adoptee.

[11] See SCAO form *Petition for Rescission of Adoption and Order*.

(c) The spouse of the parent whose rights were terminated." MCL 710.24a(4)

"Subsequent to or concurrent with the filing of the rescission petition but before the hearing on the rescission petition by the court, the petitioners shall file with the court a copy of the adoptee's new certificate of live birth if a new certificate was established by the department of public health." MCL 710.66(3). For additional discussion on new birth certificates, see Section 6.11.

B. Court Determination[12]

"Upon receipt of a rescission petition, the court shall conduct a hearing after notice is served by petitioners on the interested parties. The court may order an investigation by an employee or agent of the court and may enter an order of rescission of the adoption that restores the parental rights of the parent who filed the petition. The rescission of the adoption shall be effective from the date of the order of rescission." MCL 710.66(4).

"Certified copies of the order of rescission shall be given to each petitioner, and a copy shall be sent to the department of public health together with any other information required by . . . the public health code, [MCL] 333.2829." MCL 710.66(5). When an adoption order is rescinded, MCL 333.2829(2) requires the court to prepare a report that includes "the facts necessary to identify the original adoption report and the facts amended in the adoption order necessary to properly amend the birth record." The report must also include the current names and addresses of the petitioners. *Id*. For a discussion on creation of the original adoption report, see Section 6.9.

"After entry of an order of rescission, the adult adoptee becomes an heir at law of the parent whose parental rights have been restored and of the lineal and collateral kindred of that parent. After entry of the order of rescission, the adult adoptee is no longer an heir at law of a person who was his or her stepparent at the time of the order of rescission or an heir at law of the lineal or collateral kindred of that person, except that a right, title, or interest vesting before entry of the order of rescission shall not be divested by that order." MCL 710.66(6).

[12]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

7.7 Amendment, Annulment, or Rescission of Adoption Order[13]

"When an adoption order is amended, annulled, or rescinded, the court shall prepare a report which shall include the facts necessary to identify the original adoption report and the facts amended in the adoption order necessary to properly amend the birth record. The report of a rescission of adoption shall include the current names and addresses of the petitioners." MCL 333.2829(2). For a discussion on creation of the original adoption report, see Section 6.9.

7.8 Revocation of Adoption[14]

"[T]here is authority for the proposition that the power of equity includes the power to set aside an adoption where fraud at the time of adoption is shown, despite the lack of a statutory basis for revocation of an adoption. . . . The fraud which justifies equitable interference with a [court] order must be fraud in obtaining the order and not merely constructive, but positive, fraud. Because Michigan courts are extremely reluctant to set aside adoptions, a case of significant fraud must be made out." *In re Neagos*, 176 Mich App 406, 411-412 (1989). In *Neagos*, the Court of Appeals "agree[d] with the [trial] court that there was an inadequate showing of fraud to justify reopening the matter on equitable grounds[] . . . [where the] petitioner[-biological mother's] psychological stress and legal awareness at the time she gave her consent to adoption [were] not allegations of positive fraud perpetrated upon herself or the court, but a collateral attack on the [adoption] proceedings. Nor [did the mother's] allegation that [the adoptive parents] broke their promise to allow visitation with the children amount to a positive fraud in the adoption process[]" because "she agreed to relinquish all rights to the children[,]" which "negate[d her] claim of fraud regarding possible 'side agreements.'" *Id.*, citing *In re Leach*, 373 Mich 148 (1964) and *In re Kozak*, 92 Mich App 579 (1979).

[13]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

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Chapter 8: Direct Placement Adoption, Stepparent Adoption, Relative Adoption, and Legal Risk Adoption

8.1 Overview of Chapter 8-2
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8.1 Overview of Chapter[1]

This chapter discusses the requirements for direct placement, stepparent, relative, and legal risk adoptions. All four types of adoptions have many of the same requirements as any other adoption, except as indicated in this chapter. This chapter is intended to supplement the information provided in other chapters.

8.2 Direct Placement Adoption[2]

"A parent or guardian having legal and physical custody of a child may make a direct placement of the child for adoption[.]" MCL 710.23a(1). "'Direct placement' means a placement in which a parent or guardian selects an adoptive parent for a child, other than a stepparent or an individual related to the child within the fifth degree by marriage, blood, or adoption, and transfers physical custody of the child to the prospective adoptive parent." MCL 710.22(o). See Section 8.3 for a discussion on stepparent adoptions, and Section 8.4 for a discussion on relative adoptions.

Voluntary termination of a parent's parental rights does not automatically terminate the parent's obligation to provide support for the child; rather, a parent's "obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law." See MCR 3.804(C) (requiring that the parent be informed of this obligation before executing a release or consent to adoption).

The procedural and documentary requirements for a direct placement adoption are the same as those for other types of adoptions, with a few exceptions. This section discusses the *additional* procedural and documentary requirements. For a discussion on the procedural and documentary requirements of consent adoptions in general, see Chapter 2, *Part 1C—Consent Adoptions*.

A. Selection of Prospective Adoptive Parent

"A parent or guardian shall personally select a prospective adoptive parent in a direct placement. The selection shall not be delegated." MCL 710.23a(2). "[A]n adoption facilitator[3] shall allow the parent

[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[2]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

or guardian the option of selecting from the adoption facilitator's entire pool of potential adoptive parents who have been determined suitable to be adoptive parents of adoptees."[4] MCL 722.957(3).

After a prospective adoptive parent is selected, the parent or guardian may directly place the child temporarily or formally with the adoptive parent. MCL 710.23a(1). Although a formal placement need not be preceded by a temporary placement, a temporary placement will turn into a formal placement once parental rights have been terminated and the court approves the placement. *Id*. For a discussion on temporary placements, see Chapter 5, and a discussion on formal placements, see Chapter 6.

B. Adoption Attorney or Agency Assistance

If a parent or guardian is directly placing the child temporarily with an adoptive parent, the parent or guardian must be assisted by an adoption attorney or a child placing agency. MCL 710.23d(1)(b). See also MCL 710.23b(1) ("A child placing agency may assist a parent or guardian to make a direct placement under [MCL 710.23a]."). Note, however, that Const 1963, art 1, § 13, prohibits the court from turning away a party because they do not have an attorney.

MCL 710.55a(1) requires an attorney involved in a direct placement adoption to be an adoption attorney, and prohibits "[a]n attorney or law firm [from] serv[ing] as the attorney for, or provid[ing] legal services to, both a parent or guardian and a prospective adoptive parent."

1. Minor Parent

An adoption attorney or child placing agency providing adoption services to an unrepresented minor parent in a direct placement adoption must "provide the minor parent with an opportunity to discuss with an attorney who is not associated with the adoption attorney or child placing agency the legal ramifications of a consent or release, or of the termination of parental rights, before the execution of a consent or release or the termination of parental rights." MCL 710.55a(2).

2. Adoption Facilitator

A child placing agency or an adoption attorney is also known as an adoption facilitator. See MCL 722.952(d).

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[3] For additional information on adoption facilitators, Section 8.2(B)(2).

[4] For more information on determining suitability, see Section 5.5(C)(3).

The adoption facilitator must provide certain services and information to the biological parent or guardian and the prospective adoptive parent. For a list of these services and information see MCL 722.956.

For additional information on adoptions in Michigan, including an overview of the state's adoption program, see the Michigan Department of Health & Human Service's website.

3. Public Information Form

"Not later than 10 days after the entry of an order of adoption under . . . MCL 710.56, the primary adoption facilitator for that adoption shall file with the [family division of circuit court[5]] a completed public information form setting forth information including costs connected with the adoption as prescribed by [MCL 722.124d]. The public information form shall be authenticated by verification under oath by the primary adoption facilitator, or, in the alternative, contain the following statement immediately above the date and signature of the facilitator: 'I declare that this public information form has been examined by me and that its contents are true to the best of my information, knowledge, and belief.'." MCL 722.124c(1).[6]

a. Required Nonconfidential Information

"The department shall develop a public information form for the reporting of the following nonconfidential information:[7]

(a) The name and address of the primary adoption facilitator.

(b) The type of adoption, as follows:

(*i*) Direct placement or agency placement.

(*ii*) Intrastate, interstate, or intercountry.[8]

[5] MCL 722.124c(1) references to the probate court, but see MCL 600.1009, which provides that "[a] reference to the former juvenile division of probate court in any statute of this state shall be construed to be a reference to the family division of circuit court."

[6] MCL 722.124c "does not apply to a stepparent adoption; the adoption of a child related to the petitioner within the fifth degree by blood, marriage, or adoption; or an adoption in which the consent of a court or the department is required." MCL 722.124c(2).

[7] See the Michigan Department of Health and Human Services form *Adoption Facilitator Clearing House Record Non-Confidential Information*.

(c) The name of the agency and individual who performed the preplacement assessment or the investigation required under . . . [MCL] 710.46, and the cost of the assessment or investigation.[9]

(d) The name of each individual who performed counseling services for a biological parent, a guardian, or the adoptee; the individual's agency affiliation, if any; the number of hours of counseling performed; and the cost of that counseling.

(e) The name of each individual who performed counseling services for an adoptive parent; the individual's agency affiliation, if any; the number of hours of counseling performed; and the cost of that counseling.

(f) The total amount paid by an adoptive parent for hospital, nursing, or pharmaceutical expenses incurred by a biological parent or the adoptee in connection with the birth or any illness of the adoptee.

(g) The total amount paid by an adoptive parent for a biological mother's living expenses.

(h) The total amount paid by an adoptive parent for expenses incurred in ascertaining the information required under . . . [MCL] 710.27.[10]

(i) The name of any attorney representing an adoptive parent, the number of hours of service performed in connection with the adoption, and the total cost of the attorney's services performed for the adoptive parent.

(j) The name of any attorney representing a biological parent, the number of hours of

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[8] See Section 4.4(D) for a discussion on interstate adoptions, and Section 4.4(E) for a discussion on international adoptions.

[9] See Section 5.5(C) for a discussion on preplacement assessments, and Section 5.6 for a discussion on investigative reports.

[10] See Section 6.5(A) and Section 6.5(B) for a discussion on the compilation of nonidentifying and identifying information under MCL 710.27.

service performed in connection with the adoption, and the total cost of the attorney's services performed for the biological parent.

(k) The name of any agency assisting a biological parent or adoptive parent, and the cost of all services provided by the agency other than services specifically described in subdivisions (c), (d), and (e).

(*l*) The total amount paid by an adoptive parent for a biological parent's travel expenses.

(m) Any fees or expenses sought but disallowed by the court.[11]

(n) The total amount of all expenses connected with the adoption that were paid for by the adoptive parent.

(o) An explanation of any special circumstances that made costs of the adoption higher than would normally be expected." MCL 722.124d(1).

b. Required Confidential Information

The public information form must solicit the following confidential information in a detachable section:

"(a) The age, sex, and race of each biological parent.

(b) The age, sex, and race of the adoptee.

(c) The name, age, sex, and race of each adoptive parent.

(d) The county in which the final order of adoption was entered.

(e) The county, state, and country of origin of the adoptee.

(f) The legal residence of biological parents.

(g) The legal residence of adoptive parents.

[11] See Section 10.3(F) for a discussion on the services a person must not pay without court approval.

(h) The dates of the following actions related to the adoption:

(*i*) The first contact of the birth parent with the primary adoption facilitator.

(*ii*) The first contact of the adoptive parent with the primary adoption facilitator.

(*iii*) The temporary placement, if applicable.[12]

(*iv*) The formal placement.[13]

(*v*) The order of the court finalizing the adoption." MCL 722.124d(2).

c. Court Must Forward Public Information Form to Department

"[T]he court shall forward to the department, not later than 15 days after the entry of an order of adoption pursuant to [MCL 710.56], either of the following:

(a) A public information form filled out and filed with the court by the primary adoption facilitator and completed by the court as provided in [MCL 710.58a(2)[14]].

(b) If the primary adoption facilitator has not filed a form, a public information form completed by the court that consists only of the name of the primary adoption facilitator and the confidential information as prescribed by [MCL 722.124d.]" MCL 710.58a(1).

"Beginning on July 1, 1995, the department shall accept from the probate court of each county and maintain in a central clearinghouse completed public information

[12] See Section 5.2 for a discussion on temporary placements.

[13] See Section 6.2 for a discussion on formal placements.

[14] "If the primary adoption facilitator has filed a public information form with the court and has indicated that he or she does not have access to certain information required on the public portion of the form, the court shall complete the form by filling in missing information that is contained in court records to which the primary adoption facilitator does not have access. The court shall complete all public information forms filed with the court by filling in the information required on the confidential portion of the form." MCL 710.58a(2).

forms for each adoption completed in this state." MCL 722.124d(4).

C. Out-of-Court Consent

"In a direct placement, a parent or guardian may sign an out-of-court consent after the child's birth. An out-of-court consent signed under [MCL 710.44(8)] must comply with all of the [provisions set out in MCL 710.44(8).]" MCL 710.44(8). Those requirements are discussed in detail in Section 2.7.

If the parent is a minor and has not been emancipated, then the out-of-court consent must also be signed by the minor's parent or guardian in the presence of the minor-parent's adoption attorney and the child placing agency."[15] MCL 710.44(8).

If a consent to adoptive placement is executed under the Adoption Code and the child is or the court has reason to believe the child is an Indian child, ICWA and MIFPA provide additional requirements. See MCL 712B.13(1); MCL 712B.27(1). For a detailed discussion on consenting to adoptive placement of an Indian child, see Section 11.15(B).

For a discussion on consent to adopt in general, see Section 2.6.

D. Exchange of Information

"In a direct placement the prospective adoptive parent, an adoption attorney, or a child placing agency shall provide information about a prospective adoptive parent to the parent or guardian before placement. This information shall include the specific information contained in a preplacement assessment as described in [MCL 710.23f[16]], and may include additional information requested by the parent or guardian. The information does not have to include identifying information described in [MCL 710.27(3)[17]]. The parent or guardian and the prospective adoptive parent shall determine whether to exchange identifying information and whether to meet each other."[18] MCL 710.23a(3).

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[15] Although MCL 710.44(8) does not directly specify who must witness the signing of the consent, it presumes that the signing was witnessed by the parent's or guardian's adoption attorney and the child placing agency. See MCL 710.44(8)(e).

[16] For a discussion on the information required in a preplacement assessment as described in MCL 710.23f, see Section 5.5(C).

[17] MCL 710.27(3) requires the biological parent or guardian, department, a child placing agency, or the court to compile a list of certain identifying information. For the list of identifying information required under MCL 710.27(3), see Section 6.5(B).

Note: If the parties elect not to exchange identifying information, see the SCAO form *Statement of Identifying Information*.

Before placing a child in a direct placement adoption, MCL 710.27(1) requires the parent or guardian to compile and provide to the prospective adoptive parent a list of certain nonidentifying information. For the list of nonidentifying information required under MCL 710.27(1), see Section 6.5(A).

The parent or guardian must transfer to the court all compiled identifying and nonidentifying information before parental rights can be terminated. MCL 710.27(4). The court that approves the parent's or guardian's placement must maintain the compiled identifying and nonidentifying information. *Id.* For additional information on recordkeeping requirements and release of information see Chapter 9.

E. Required Additional or Different Documentation

Direct placement adoptions generally require the same documentation as any other adoption. However, specific provisions of the Adoption Code alter some requirements for direct placement adoptions.; this section discusses the *additional and different* documentation requirements.

1. Verified Statements and Verified Accounting Statements

In order to ensure that the persons or agencies involved in an adoption have complied with the consideration provisions of the Adoption Code, MCL 710.54 and MCL 710.55, the persons and agencies involved in an adoption must file verified statements and verified accounting statements with the court. See MCL 710.54(7). For a more detailed discussion on verified statements, including the petitioner's, child placing agency's, and the department's reporting and accounting requirements, see Section 10.5.

a. Attorney's Verified Statement

At least seven days before formal placement of a child under MCL 710.51, the attorney for each petitioner and each parent of the adopted child must file a signed verified statement that "itemiz[es] the services performed

[18] "[MCL 710.27] does not prevent a parent or guardian and prospective adoptive parent from exchanging identifying information or meeting pursuant to [MCL 710.23a] and [MCL 710.23b]." MCL 710.27(7).

and any fee, compensation, or other thing of value received by, or agreed to be paid to, the attorney for, or incidental to, the adoption of the child."[19] MCL 710.54(7)(b); MCL 710.54(7)(c).

In a direct placement adoption where the attorney is an adoption attorney, the verified statement must also state the following:

> "(*i*) The attorney meets the requirements for an adoption attorney under [MCL 710.22].
>
> (*ii*) The attorney did not request or receive any compensation for services described in [MCL 710.54(2)]." MCL 710.54(7)(b); MCL 710.54(7)(c).

b. Parent's or Guardian's Verified Statement

The parent or guardian must sign a verified statement at the time a consent for direct placement is filed with the court.[20] MCL 710.44(5); MCL 710.44(8)(c).

"In a direct placement, a consent by a parent or guardian shall be accompanied by a verified statement signed by the parent or guardian that contains all of the following:

> (a) That the parent or guardian has received a list of support groups and a copy of the written document described in [MCL 722.956(1)(c)].
>
> (b) That the parent or guardian has received counseling related to the adoption of his or her child or waives the counseling with the signing of the verified statement.
>
> (c) That the parent or guardian has not received or been promised any money or anything of value for the consent to adoption of the child, except for lawful payments that are itemized on a schedule filed with the consent.
>
> (d) That the validity and finality of the consent is not affected by any collateral or

[19] See SCAO form *Statement of Services Performed by Attorney*.

[20] See SCAO form *Statement to Accompany Consent in Direct Placement*

separate agreement between the parent or guardian and the adoptive parent.

(e) That the parent or guardian understands that it serves the child's welfare for the parent to keep the child placing agency, court, or department informed of any health problems that the parent develops that could affect the child.

(f) That the parent or guardian understands that it serves the child's welfare for the parent or guardian to keep his or her address current with the child placing agency, court, or department in order to permit a response to any inquiry concerning medical or social history from an adoptive parent of a minor adoptee or from an adoptee who is 18 years or older." MCL 710.44(5).

c. Verified Statement When Indian Child Involved

If the direct placement involves an Indian child, MCL 712B.13(6) requires the "consent by a parent or guardian [to] be accompanied by a verified statement signed by the parent or guardian that contains all of the following:

(a) That the parent or guardian has received a list of community and federal resource supports and a copy of the written document described in [MCL 722.956(1)(c)].

(b) As required by [MCL 710.29] and [MCL 710.44], that the parent or guardian has received counseling related to the adoption of his or her Indian child or waives the counseling with the signing of the verified statement.

(c) That the parent or guardian has not received or been promised any money or anything of value for the consent to adoption of the Indian child, except for lawful payments that are itemized on a schedule filed with the consent.

(d) That the validity and finality of the consent are not affected by any collateral or separate agreement between the parent or guardian and the adoptive parent.

> (e) That the parent or guardian understands that it serves the welfare of the Indian child for the parent to keep the child placing agency, court, or department informed of any health problems that the parent develops that could affect the Indian child.
>
> (f) That the parent or guardian understands that it serves the welfare of the Indian child for the parent or guardian to keep his or her address current with the child placing agency, court, or department in order to permit a response to any inquiry concerning medical or social history from an adoptive parent of a minor adoptee or from an adoptee who is 18 years or older."

For additional information on the ICWA and the MIFPA requirements, see Chapter 11.

2. Adoption Petition

In order to adopt a child, the adoptive parent must properly file a petition for adoption with the court.[21] MCL 710.24(1). For a discussion on adoption petitions in general, see Section 6.6.

In a direct placement adoption where the parties elect not to exchange identifying information, the parties may omit from the adoption petition "the information required by [MCL 710.24(4)(f) (names and addresses of the adoptee's parents)] and [MCL 710.24(4)(g) (name and address of any appointed guardians)] and the surname and place of residence of the adoptee required under [MCL 710.24(4)(b)] may be omitted. The attorney or child placing agency assisting in the adoption shall file a verified statement containing the omitted information."[22] MCL 710.24(7).

In a direct placement adoption, the petitioner must also include with the adoption petition:

- a verified statement certifying that he or she was informed of the availability of counseling services and whether he or she received the counseling. MCL 710.24(5). For more information on verified statements in general, see Section 10.5.

[21] See SCAO form *Petition for Direct Placement Adoption*.

[22] For additional information on identifying information, see Section 6.5(B).

- certain preplacement assessment information. MCL 710.24(6). For a list of the required information set out in MCL 710.24(6), see Section 8.2(E)(3)(c).

3. Preplacement Assessment

This sub-subsection discusses preplacement assessments as it specifically relates to direct placement adoptions. For a discussion on preplacement assessments in general, see Section 5.5(C).

a. Seeking to Adopt

At any time in a direct placement adoption, an individual seeking to adopt may request that a child placing agency prepare a preplacement assessment. MCL 710.23f(1). The requesting individual does not have to locate a potential adoptee when the request is made or completed, nor is the requesting individual limited to one preplacement assessment request. MCL 710.23f(2)-(3). Once requested, the requesting individual may ask the child placing agency to stop the assessment. MCL 710.23f(3).

b. Temporary Placement of Child

In order to temporarily place a child with a prospective adoptive parent in a direct placement, the prospective adoptive parent must have had a preplacement assessment completed "within 1 year before the date of the transfer with a finding that the prospective adoptive parent is suitable to be a parent of an adoptee." MCL 710.23d(1)(a). The parent or guardian making the transfer must review or be given the opportunity to review the preplacement assessment before the child is placed with the prospective adoptive parent. See MCL 710.23d(1)(c)(*iv*).

c. Petitioning for Adoption

The petitioner in a direct placement adoption must attach the following to a petition for adoption:[23]

- "a copy of a preplacement assessment of the petitioner completed or updated within 1 year before the petition is filed with a finding that the

[23] For additional requirements on the filing of an adoption petition in a direct placement adoption, see Section 8.2(E)(2).

petitioner is suitable to be a parent of an adoptee,"

- "copies of all other preplacement assessments of the petitioner, if any others have been completed, and"

- "a verified statement stating that no preplacement assessments of the petitioner have been completed other than those attached to the petition and explaining any preplacement assessments of the petitioner that have been initiated but not completed." MCL 710.24(6).

"If the petitioner is seeking review of a preplacement assessment under [MCL 710.23f(8) (finding of unsuitability)], the petitioner may comply with [MCL 710.24(6)] by attaching a copy of that preplacement assessment and a copy of the application for review, together with copies of all other preplacement assessments and the verified statement required by [MCL 710.24]." MCL 710.24(6).

F. Supervision of Placement

"In a direct placement, the child shall be supervised during the period before entry of the order of adoption by the child placing agency that investigated the placement under [MCL 710.46] or, in the court's discretion, by another child placing agency."[24] MCL 710.52(2). For additional information on supervision of placement, see Section 6.7(B).

8.3 Stepparent Adoption[25]

The unique nature of a stepparent adoption necessitates a different set of procedures for the adoption process. The following section outlines the required procedures for stepparent adoptions contained in the Adoption Code.

A stepparent adoption occurs when the custodial parent marries and his or her spouse petitions to adopt the custodial parent's child.[26] MCL 710.23a(4); MCL 710.43(7); MCL 710.51(6).

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[24] For a discussion on consent adoptions under MCL 710.46, see Section 2.6.

[25] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[26] See SCAO form *Petition for Adoption*.

Effective September 5, 2016, 2016 PA 143 amended MCL 710.51(6)(a) to no longer require the petitioner's spouse (i.e. the biological parent) to have sole legal custody of the child before the other parent's parental rights can be terminated. Thus, the "other parent" may not necessarily be a "noncustodial parent." The court rule has not yet been amended to reflect this change, but MJI has inserted "other" in place of "noncustodial" throughout this subsection to avoid confusion.

A. Termination of Other Parent's Parental Rights

During the course of a stepparent adoption, the other parent's parental rights over the child are terminated, either voluntarily or involuntarily. See MCL 710.43(7); MCL 710.51(5). The court does not terminate the custodial parent's parental rights in a stepparent adoption. See MCL 710.43(7); MCL 710.51(5).

Termination of a other parent's parental rights does not automatically terminate the parent's obligation to provide support for the child; rather, a parent's "obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law." See MCR 3.804(C) (requiring that the parent be informed of this obligation before executing a release or consent to adoption); MCR 3.809 (requiring that the court provide oral or written notice of this obligation to a parent whose parental rights are involuntarily terminated).

1. Other Parent Consents to Adoption

A parent "who does not have custody of the child and whose parental rights have not been terminated" may consent to a stepparent adoption.[27] See MCL 710.43(1); MCL 710.43(7). The court must accept the other parent's consent for the stepparent adoption and terminate that parent's parental rights if it finds that the consent is genuine, the parent has the authority to consent to the adoption, and it is in the adoptee's best interests. MCL 710.51(1)(a)-(b). For a discussion on all the required steps of a consent adoption, see Section 2.6.

"If the petitioner for adoption is married to the parent having legal custody of the child and that parent has joined the petitioner in filing the petition for adoption, that parent shall not execute a consent to the adoption." MCL 710.43(7).

[27] For a discussion on establishing paternity, see Chapter 3.

2. Involuntarily Terminating Other Parent's Parental Rights

"If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity[28] or is a putative father who meets the conditions in [MCL 710.39(2)[29]], and if a parent having custody of the child according to a court order subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:[30]

> (a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child 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. A child support order stating that support is $0.00 or that support is reserved shall be treated in the same manner as if no support order has been entered.
>
> (b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition." MCL 710.51(6).

"[A] parent is only entitled to petition for termination under MCL 710.51(6) if the petitioning parent, at the time of the petition, has custody of the child who is at issue according to a court order." *In re AGD*, 327 Mich App 332, 353 (2019) (trial court properly denied the mother's and stepfather's request to terminate the parental rights of the minor child's legal father under the stepparent adoption statute, MCL 710.51(6), where "[t]here [was] no dispute that petitioner mother, although she had custody of the child, did not have custody according to a

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[28] For additional discussion on acknowledging paternity, see Section 3.4.

[29] "[T]his Court must look to MCL 710.39(2) to decide who qualifies as a 'putative father' for purposes of MCL 710.51(6). *In re AGD*, 327 Mich App 332, 350 (2019) ("MCL 710.39 acts to determine the parental rights of a putative father '[w]hen the parents of a child are unmarried[.]' This is necessary because, although a putative father is one who, by definition, has not legally established his paternity, 'the Due Process and Equal Protection Clauses bar the state from terminating the parental rights of the father of an illegitimate child without the same showing of unfitness that would be necessary to terminate the rights of a mother or a married father[.]'") (internal citations omitted). For additional discussion on the conditions set out in MCL 710.39(2), see Section 2.10(A)(2)(b).

[30] See SCAO form *Order Placing Child (Stepparent Adoption)*.

court order when petitioners filed their petition under MCL 710.51(6) and when the trial court ruled on that petition").[31]

There is no incarcerated parent exception to the two-year period under MCL 710.51(6). *In re Caldwell*, 228 Mich App 116, 119-122 (1998) (noting "an incarcerated parent may still retain the ability to comply with the support and contact requirements of [MCL 710.51(6)]").

After the court terminates the other parent's parental rights, the child in a stepparent adoption does not become a ward of the court. MCL 710.51(3). See MCL 710.51(5), which provides that the court does not terminate the rights of the custodial parent who is married to the person petitioning for adoption of the custodial parent's child.

a. Burden of Proof

In a stepparent adoption, "[t]he petitioner has the burden to prove by clear and convincing evidence that termination of the [other] parent's rights is warranted." *In re ALZ*, 247 Mich App 264, 272 (2001), citing *In re Hill*, 221 Mich App 683, 691 (1997).

b. Right to Jury Trial

In a stepparent adoption, there is no right to a jury for termination of a parent's parental rights. *In re Colon*, 144 Mich App 805, 816-819 (1985).

c. Court-Appointed Counsel

The court may appoint counsel to assist a nonconsenting other parent in contesting a termination of parental rights. *In re Sanchez*, 422 Mich 758, 770 (1985). "In

[31] The Court of Appeals concluded that it was "not bound to follow *In re AJR*[, 496 Mich 346 (2014)]'*s* construction of former MCL 710.51(6) because that construction was clearly superseded by 2016 PA 143[(effective September 5, 2016)]. Importantly, 2016 PA 143 directly amended the operative statutory language [of MCL 710.51(6)] that our Supreme Court relied upon in deciding *In re AJR*: the phrase '*the* parent having *legal* custody of the child' was changed to '*a* parent having custody of the child *according to a court order*[.]' As held in *In re AJR*, 496 Mich at 348-349, the former version of MCL 710.51(6) required the parent to have 'sole legal custody' of the child. However, the new language is clear that only 'a' parent, rather than 'the' parent, has to have custody according to a court order—a much broader requirement. Consequently, 2016 PA 143 clearly superseded *In re AJR*'s construction of MCL 710.51(6), and this Court is therefore no longer bound to follow that construction." *In re AGD*, 327 Mich App 332, 342 (2019) (fourth alteration in original) ("this Court remains bound to follow the [Michigan] Supreme Court's interpretation of a since-amended statute if the intervening amendment merely '*undermined*' the foundations of the [Michigan] Supreme Court's prior decision, but not if the intervening amendment '*clearly* . . . superseded' the [Michigan] Supreme Court's interpretation"), quoting *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191-192 (2016).

exercising such 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." *Id*. at 770-771.

d. Service Requirements and Interested Parties

"The interested persons in a petition to terminate the rights of the [other] parent pursuant to MCL 710.51(6) are:

> (a) the petitioner;
>
> (b) the adoptee, if over 14 years of age;
>
> (c) the [other] parent; and
>
> (d) if the court knows or has reason to know the adoptee is an Indian child, the Indian child's tribe and the Indian custodian, if any, and, if the Indian child's parent or Indian custodian, or tribe is unknown, the Secretary of the Interior."[32] MCR 3.800(B)(3).

"[A] natural, custodial parent is not a necessary party to a stepparent's adoption petition filed pursuant to MCL 710.51(6)." *In re Stowe*, 162 Mich App 27, 29-30, 33-34 (1987) (trial court did not lose its jurisdiction to proceed with the termination of the other parent's parental rights in a stepparent adoption following the custodial parent's death when "[n]othing in the statute indicate[d] that the custodial natural parent [had to] join in the petition," and the custodial parent's death occurring after the stepparent adoption petition was filed but before the termination hearing was held "d[id] not prevent the action from proceeding").

Notice of a petition to terminate the parental rights of the other parent must be personally served on that parent or his or her attorney "in the manner provided in: (a) MCR 2.107(C)(1) or [MCR 2.107(C)](2),[33] or (b) MCR 2.105(A)(2), but service is not made for purposes of this subrule until the individual or the individual's attorney receives the notice or petition." MCR 3.802(A)(2). If the

[32] See Chapter 11 for a detailed discussion of adoption proceedings involving an Indian child.

other parent is incarcerated, see Section 2.12 for information regarding notice to an incarcerated party.

"If service of a petition to terminate the parental rights of a parent pursuant to MCL 710.51(6) cannot be made under [MCR 3.802(A)(2)] because the whereabouts of that parent have not been ascertained after diligent inquiry, the petitioner must file proof of the efforts made to locate that parent in a statement verified under MCR 1.109(D)(3).[34] If the court finds, on reviewing the statement, that service cannot be made because the whereabouts of the person have not been determined after reasonable efforts, the court may direct any manner of substituted service of the notice of hearing, including service by publication."[35] MCR 3.802(C).

> **Note:** The affidavit or declaration may be verified by a party's oath or affirmation, someone that has knowledge of the facts, or a signed and dated declaration (not applicable to affidavits) indicating "'I declare under the penalties of perjury that this _____ has been examined by me and that its contents are true to the best of my information, knowledge, and belief.' . . . ." MCR 1.109(D)(3).

e. Continuation of Other Parent's Support Obligation

i. Identity/Whereabouts Known

"If the parental rights of a parent whose identity and whereabouts are known are involuntarily terminated, the court shall notify the parent, either orally or in a writing, that the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation,

[33]Temporarily, "all service of process under [MCR 2.107] must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) during the effective period of this order, but should otherwise comply as much as possible with the provisions of MCR 2.107(C)(4)." Administrative Order No. 2020-9, temporarily amending certain court rules "until further order of the Court." See Administrative Order No. 2020-12; Administrative Order No. 2020-19(3). Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[34] See the SCAO form *Declaration of Inability to Identify/Locate Father.*

[35] For serving by publication, see MCR 3.802(D).

an order of adoption is entered, or the child is emancipated by operation of law." MCR 3.809(A). "Failure to provide required notice under [MCR 3.809] does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent." MCR 3.809(C).

ii. Identity Known/Whereabouts Unknown

If a parent whose identity is known but whereabouts are unknown has his or her parental rights involuntarily terminated, the court must notify the parent orally, in a writing, or through a notice of hearing provided under MCR 3.802(C) "that the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law." MCR 3.809(A)-(B). "Failure to provide required notice under [MCR 3.809] does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent." MCR 3.809(C).

f. Court Determination

Because MCL 710.51(6) permits, but does not require, the termination of a parent's parental rights, a court may exercise its discretion, including considering best interest factors, when ruling on a termination petition. *In re Hill*, 221 Mich App 683, 696 (1997).

If the court denies the termination petition, the court must indicate the reasons for the denial on the record or in writing. MCL 710.63.

i. Impact of Child Support Order

Since the "ability to pay is already factored into a child support order, and it would be redundant to require a petitioner [in a stepparent adoption] under the Adoption Code[, MCL 710.51(6)(a),] to prove the natural parent's ability to pay as well as that parent's noncompliance with a support order[,]" the petitioner does not have to prove that a other parent had the ability to pay court-ordered child support. *In re Colon*, 144 Mich App 805, 812 (1985). "In cases where a child support order has

been entered, MCL 710.51(6)(a) may be satisfied by a showing that the natural parent has 'failed to substantially comply with the [support] order, for a period of 2 years or more before the filing of the petition.'" *In re Colon*, 144 Mich App at 812, quoting MCL 710.51(6)(a) (alteration in original). But see *In re Kaiser*, 222 Mich App 619, 621 (1997) ([t]he adoption statute focuses on 'ability to pay,' and not merely on income as narrowly defined in the income-withholding statutes"; accordingly, while the "respondent's receipt of a legal settlement, rental income, and money from her parents [could] not constitute 'income[under MCL 552.602],' those receipts, combined with the wages she earned at various jobs, nevertheless show[ed] an ability to contribute to her children's support"); *In re Martyn*, 161 Mich App 474, 480 (1987) (the trial court has discretion to consider or disregard reasons for noncompliance with a support order).

ii. Lack of Contact With Child

Custodial parent refusing to allow contact with child. The custodial parent cannot refuse the other parent's contact with his or her child and then use that lack of contact in support of a petition for stepparent adoption. *In re ALZ*, 247 Mich App 264, 273-277 (2001) (petitioner failed to prove by clear and convincing evidence that the putative father had the ability to contact, visit, or communicate with the child for two years preceding filing of a petition for stepparent adoption where the mother refused visitation, despite the putative father's written requests, and the putative father had no legal right to visit his child until paternity was established). But see *In re SMNE*, 264 Mich App 49, 51 (2001) (other parent failed to show she was prevented from having regular and substantial contact with her child when she failed to seek the court's assistance in enforcing the visitation rights to which she was entitled under a divorce judgment).

Relying on court order. The other parent could not rely on a court order denying visitation to prove he was unable to contact his child for purposes of avoiding termination of his parental rights under a stepparent adoption when he never requested

visitation and did nothing to show that visitation was in his child's best interests. *In re Simon*, 171 Mich App 443, 449 (1988). But see *In re Kaiser*, 222 Mich App 619, 623-629 (1997) (reversing the trial court's termination order where the other parent was prevented from seeing her children by a court order that required she first receive a psychological evaluation and at the time the petition for stepparent adoption was filed, the mother was attending court-ordered counseling).

"Substantial failure" standard. The other parent who made two visits and one phone call to his child within a two-year period, and who did not visit his child once during the last 20 months of the two-year period, substantially failed to visit, contact, or communicate with the child for purposes of MCL 710.51(6)(b). *In re Martyn*, 161 Mich App 474, 482 (1987). The Court "express[ed] some doubt that the phrase ['substantially failed'] can be reduced to a specific number of visits within two years." *Id*. However, the Court "would, for instance, be less likely to consider a specific number of visits late in the two-year period to be 'substantial failure.' [The Court] would also be less likely to consider a specific number of visits 'substantial failure' if they required the respondent to overcome significant legal, physical or geographic obstacles. *Id*.

B. Identifying and Nonidentifying Information

Although the compilation of information does not apply to stepparent adoptions, the release of *identifying* and *nonidentifying* information does. MCL 710.27(6); MCL 710.68(17). For a discussion on the compilation of identifying and nonidentifying information, see Section 9.2, and for a discussion on releasing the identifying and nonidentifying information, see Sections 9.7-9.8.

C. Grandparenting Time

A brief discussion on grandparenting time as it relates to stepparent adoptions is contained in this subsection. For additional information on grandparenting time in general, including the required procedures, see Michigan's grandparenting time statute, MCL 722.27b.

The Adoption Code, MCL 710.60(3), "does not prohibit the filing of an action or entry of an order for grandparenting time as provided in . . . MCL 722.27b." Under MCL 722.27b, "[a] child's grandparent may seek a grandparenting time order" if one or more of the circumstances outlined in MCL 722.27b(1) are met.

"Except as otherwise provided in [MCL 722.27b], adoption of a child or placement of a child for adoption under the Michigan adoption code, . . . MCL 710.21 to [MCL] 710.70, terminates the right of a grandparent to commence an action for grandparenting time with that child. Adoption of a child by a stepparent under the Michigan adoption code, . . . MCL 710.21 to [MCL] 710.70, does not terminate the right of the parent of a deceased parent of the child to commence an action for grandparenting time with that child." MCL 722.27b(13). Moreover, MCL 722.27b(5) (requiring the court to dismiss a request for grandparenting time if 2 fit parents sign an affidavit in opposition of an order for grandparenting time) "does not apply if 1 of the fit parents is a stepparent who adopted a child under the Michigan adoption code, . . MCL 710.21 to [MCL] 710.70, and the grandparent seeking the order is the natural or adoptive parent of a parent of the child who is decease or whose parental rights have been terminated."

> **Note:** "A court shall not permit a parent of a father who has never been married to the child's mother to seek an order for grandparenting time under this section unless the father has completed an acknowledgment of parentage under the acknowledgment of parentage act, . . . MCL 722.1001 to [MCL] 722.1013, an order of filiation has been entered under the paternity act, . . . MCL 722.711 to [MCL] 722.730, or the father has been determined to be the father by a court of competent jurisdiction. The court shall not permit the parent of a putative father to seek an order for grandparenting time unless the putative father has provided substantial and regular support or care in accordance with the putative father's ability to provide the support or care." MCL 722.27b(2). For a discussion on establishing paternity, see Chapter 3.

"A grandparenting time order entered under [MCL 722.27b] does not create parental rights in the individual or individuals to whom grandparenting time rights are granted. The entry of a grandparenting time order [under MCL 722.27b] does not prevent a court of competent jurisdiction from acting upon the custody of the child, the parental rights of the child, or the adoption of the child." MCL 722.27b(10).

8.4 Relative Adoption[36]

The unique nature of a relative adoption requires different procedures during the adoption process; this section outlines those required procedures.

A relative adoption occurs when a parent or guardian[37] with legal and physical custody of a child formally places the child for adoption with a relative.[38] MCL 710.23a(4).

A. Termination of Parent's Parental Rights

A parent may voluntarily relinquish his or her parental rights and consent to the child's placement with a relative. See MCL 710.22(*l*); MCL 710.22(s); MCL 710.23a(4). However, to formally place a child with a relative, the other parent's parental rights over the child must also be terminated, voluntarily or involuntarily. See MCL 710.31(1); MCL 710.41(1). For a discussion on consent adoptions, see Section 2.6, voluntary termination during a child protective proceeding, see Section 2.5, and involuntary termination, see *Part 2: Involuntary Termination*.

The child is formally placed once the court approves the placement and both parents' parental rights are terminated. See MCL 710.22(p); MCL 710.51. For a discussion on formal placements, see Chapter 6.

B. Continuation of Support Obligation

Voluntary or involuntary termination of a parent's parental rights does not automatically terminate the parent's obligation to provide support for the child; rather, a parent's "obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law." See MCR 3.804(C) (requiring that the parent be informed of this obligation before executing a release or consent to adoption); MCR 3.809 (requiring that the court provide oral or written notice of this obligation to a parent whose parental rights are involuntary terminated).

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[36] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[37] For a discussion on a guardian's ability to execute a consent to adopt, see Section 2.6(C)(2).

[38] See SCAO form *Petition for Adoption*.

C. Identifying and Nonidentifying Information

Although the compilation of information does not apply to relative adoptions, the release of *identifying* and *nonidentifying* information does. MCL 710.27(6); MCL 710.68(17). For a discussion on the compilation of identifying and nonidentifying information, see Section 9.2, and for a discussion on releasing the identifying and nonidentifying information, see Sections 9.7-9.8.

8.5 Legal Risk Adoption[39]

Once a court enters an order terminating parental rights, a child may be formally placed for adoption. MCL 710.41(1).[40] The child's placement is referred to as a legal risk adoption if the placement occurs before the expiration of:

> (1) The 21-day period for filing a petition for a rehearing. See Section 7.2.
>
> (2) The time for filing of an appeal of right. See Section 7.4.
>
> (3) The period while a petition for or decision on a rehearing is pending.
>
> (4) The period while an appeal is pending.[41] See MCL 710.41(2).

When a child is placed in a legal risk adoption, the child placing agency, the department, or the court must inform the prospective adoptive parent that the adoption petition will not be granted until one of the following occurs:

> "(a) The petition for rehearing is granted, at the rehearing the order terminating parental rights is not modified or set aside, and subsequently the period for appeal as of right to the court of appeals has expired without an appeal being filed.
>
> (b) The petition for rehearing is denied and the period for appeal as of right to the court of appeals has expired without an appeal being filed.

[39] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[40] For a discussion on termination of parental rights, see Chapter 2, and a discussion on formal placements, see Chapter 6.

[41] See SCAO form *Notice to Adopting Parents on Pending or Potential Appeal/Rehearing*.

> (c) There is a decision of the court of appeals affirming the order terminating parental rights." MCL 710.41(2).

When a child is placed in a legal risk adoption, a trial court must not grant an adoption petition while an appeal is pending in the Court of Appeals *or* the Supreme Court. *In re JK*, 468 Mich 202, 219 (2003) (trial court erroneously permitted the prospective adoptive parent to adopt the child under an *at risk* adoption while the respondent-mother's application for leave to appeal was pending). See also *In re Jackson*, 498 Mich 943, 943 (2015) (during the pendency of the father's appeal to the Michigan Supreme Court, "the trial court finalized the adoption of the minor child, in violation of *In re JK*, 468 Mich 202 (2003)[, where i]t appear[ed] that no one informed the trial court of the father's appeal of the termination of his parental rights"). In addition, a trial court must not order an adoption while a petition for rehearing or a motion challenging the withholding of consent is pending. MCL 710.56(2); MCL 710.56(4); MCR 3.808.

Before finalizing an adoption, a trial court must issue specific findings on the record determining that the adoptee is not subject to any pending rehearing proceedings, reconsideration proceedings, or appellate activity. *In re Jackson*, 498 Mich at 943; MCR 3.808. Specifically, MCR 3.808 requires:

> "Before entering a final order of adoption, the trial court shall determine that the adoptee is not the subject of any pending proceedings on rehearing or reconsideration, or on appeal from a decision to terminate parental rights. The trial court shall make the following findings on the record:
>
> > 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." MCR 3.808.[42]

[42] "The addition of MCR 3.808 is consistent with . . . MCL 710.56. This new rule arises out of *In re JK*, 468 Mich 202 (2003), and *In re Jackson*, 498 Mich 943 (2015), which involved cases where a final order of adoption was entered despite pending appellate proceedings involving the adoptee children. Although the Michigan Court of Appeals has adopted a policy to suppress in its register of actions and online case search tool the names of children (and parents) who are the subject of appeals from proceedings involving the termination of parental rights, this information remains open to the public. Therefore, in order to make the determination required of this new rule, a trial court may contact the clerk of the Michigan Court of Appeals, the Michigan Supreme Court, or any other court where proceedings may be pending." Staff Comment to ADM File No. 2015-26 ("[t]his staff comment is not an authoritative construction by the [Michigan Supreme] Court," and adoption of MCR 3.808 "in no way reflects a substantive determination by [the Michigan Supreme] Court").

"A person who violates [MCL 710.41] is, upon conviction, guilty of a misdemeanor, and upon any subsequent conviction, is guilty of a felony." MCL 710.69.

MCL 710.41 does not apply to stepparent adoptions, and does not prevent a child residing in a licensed foster home from being adopted by the foster parents. MCL 710.41(3)-(4). For a discussion on stepparent adoptions, see Section 8.3

Chapter 9: Recordkeeping Requirements and Release of Information

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9.1 Overview of Chapter[1]

This chapter discusses the compilation of identifying and nonidentifying information for purposes of adoption proceedings, the accessibility and restrictions of adoption proceeding records, and the role of a confidential intermediary. This chapter also discusses the creation of and role the central adoption registry has in maintaining adoption proceeding records.

9.2 Compiling Nonidentifying and Identifying Information

"Before placement of a child for adoption, a parent or guardian, a child placing agency, the department, or the court that places the child shall compile and provide to the prospective adoptive parent a written document containing all of the . . . nonidentifying information [set out in MCL 710.27(1)[2]] that is not made confidential by state or federal law and that is reasonably obtainable from the parents, relatives, or guardian of the child; from any person who has had physical custody of the child for 30 days or more; or from any person who was provided health, psychological, educational, or other services to the child[.]" MCL 710.27(1).

"A parent or guardian, the department, a child placing agency, or a court that places an adoptee under [the Michigan Adoption Code] shall compile all of the . . . identifying information [set out in MCL 710.27(3)[3]] if reasonably obtainable[.]" MCL 710.27(3). Identifying information is not provided to the prospective adoptive parent. Compare MCL 710.27(1) (statutory language specifically requires nonidentifying information to be provided to prospective adoptive parent), with MCL 710.27(3) (no statutory language specifically requiring identifying information to be provided to prospective adoptive parent). A parent or guardian and the prospective adoptive parent may agree to exchange identifying information in a direct placement adoption. MCL 710.27(7). For information on direct placement adoptions, see Section 8.2.

MCL 710.27(1)-(2) do not apply to stepparent and relative adoptions. MCL 710.27(6).

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[1] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[2] For a list of the nonidentifying information set out in MCL 710.27(1), see Section 5.5(A) (temporary placements) and Section 6.5(A) (formal placements).

[3] For a list of the identifying information set out in MCL 710.27(3), see Section 5.5(B) (temporary placements) and Section 6.5(B) (formal placements).

MCL 710.27(4) requires "the child placing agency, the department, or court that places the child or, in the case of a direct placement by a parent or guardian, by the court that approves the placement" to maintain the compiled identifying and nonidentifying information.[4] In a direct placement adoption, the parent or guardian must transfer to the court all compiled identifying and nonidentifying information before parental rights can be terminated. MCL 710.27(4).

If a child placing agency stops operating, its adoption records must be forwarded to the department. MCL 710.27(5). For a list of closed agencies and the office that holds their adoption records, see the Michigan Department of Health and Human Services (MDHHS), *Closed Adoption Agencies and who holds their records*.

9.3 Central Adoption Registry

"The department shall establish and maintain a central adoption registry to control the release of identifying information described in [MCL 710.27(3)]." MCL 710.27b(1). For a list of identifying information set out in MCL 710.27(3), see Section 5.5(B) (temporary placements) and Section 6.5(B) (formal placements).

A. Indian Child is Involved

If an Indian child is involved, the department must maintain the record for every Indian child's voluntary or involuntary foster care, preadoptive, and adoptive placement in the central adoption registry. 25 USC 1915(e); 25 CFR 23.141(a). Each record must at least contain "the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences."[5] 25 CFR 23.141(b). "It is recommended that the record include any documentation of preferred placements contacted and, if any were found ineligible as a placement, an explanation as to the ineligibility." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, J.1 (2016).[6]

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[4] "An employee or agent of a child placing agency, the court, or the department who intentionally destroys information required to be maintained under [MCL 710.27] is guilty of a misdemeanor." MCL 710.27(4).

[5] "A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency." 25 CFR 23.141(c).

[6] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

> **Note:** The record must be made available to the Indian child's tribe or the Secretary of the Interior upon request within 14 days. 25 USC 1915(e); 25 CFR 23.141(a).

MCL 712B.37 also requires "[t]he department [to] publish annually a census with no individually identifiable information of all Indian children in the department'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 [MIFPA].
>
> (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."

See Section 11.22 for a detailed discussion of the Indian Child Welfare Act's (ICWA) and the Michigan Indian Family Preservation Act's (MIFPA) recordkeeping and disclosure of information requirements.

B. Consent to or Denial of Release of Identifying Information

1. Former Parents

"A former parent, including a former parent whose parental rights were terminated under [the Safe Delivery of Newborns Law, MCL 712.1 *et seq.*[7]], may file with the central adoption registry a statement consenting to or denying the release of the identifying information about that parent specified in [MCL 710.27(3)(b)] and [MCL 710.27(3)(c)]. The consent or denial may be filed, updated, or revoked at any time." MCL 710.27a(1). Consent to the release of a former parent's name and address at the time of a parent's termination of parental

[7] For information on the Safe Delivery of Newborns Law, see Section 5.9.

rights is presumed unless that parent files a statement with the central adoption registry denying the release of information. See MCL 710.27a(4).

The department must create forms for the former parents to use to consent to, deny, or revoke the release of identifying information. MCL 710.27b(3). The forms must include the former parent's current name and address and be made available to the child placing agency and the court. *Id.* The denial form must also contain a space for the former parent to indicate, if desired, the reasons for the denial. *Id.* See the DHHS form *Parent's Consent/Denial to Release Information to Adult Adoptee*.

"The central adoption registry shall keep on file the statements of former parents consenting to or denying the release of identifying information[.]" MCL 710.27b(2).

2. Adult Former Siblings

"An adult former sibling may file a statement with the central adoption registry providing notice that a former parent is deceased. A copy of the former parent's death certificate or other evidence of the former parent's death shall be attached to the statement." MCL 710.27a(2).

"An adult former sibling who knows the birth name of an adoptee may file with the central adoption registry a statement consenting to the release of the adult former sibling's name and address to the adult adoptee. The statement may be filed, updated, or revoked at any time." MCL 710.27a(3).

The department must create forms for the adult former sibling to use to provide notice of a former parent's death and to consent to the release of identifying information. MCL 710.27b(3). The forms must include the adult former sibling's current name and address and be made available to the child placing agency and the court. *Id.* See the DHHS forms *Release of Information to Adult Adoptee by Brother/Sister as Proxy For Deceased Parent* and *Adult Former Sibling Statement to Release Information to Adult Adoptee*.[8]

The central adoption registry must keep the adult former sibling's notice of a former parent's death and his or her consent to the release of information on file. MCL 710.27b(2).

[8]The links to these resources were created using Perma.cc and they direct the reader to an archived record of each page.

C. Clearance Request and Reply Forms

The department must "develop and distribute clearance request and reply forms to be used by child placing agencies, the department, and the court to request and receive information from the central adoption registry pursuant to [MCL 710.68(5) (adult adoptee's request for the former parent's identifying information)] and [MCL 710.68(8) (adult adoptee's request for the adult former sibling's name and address)]." MCL 710.27b(3).

1. Clearance Request For Former Parent's Identifying Information

When the central adoption registry receives a clearance request form from a child placing agency, the department, or the court under MCL 710.68(5),[9] the central adoption registry must send a clearance reply form that indicates:

> (1) whether the former parent filed a consent to or a denial of the release of identifying information, and a copy of the consent or denial, or
>
> (2) whether the former parent is deceased. MCL 710.27b(4).

"Once a request for information has been received by the central adoption registry, a subsequent statement submitted by a former parent consenting to the release of identifying information or revoking a previous denial of release of identifying information shall be transmitted to the person who requested the information." MCL 710.27b(4).

2. Clearance Request For Adult Former Sibling's Name and Address

When the central adoption registry receives a clearance request form from a child placing agency, the department, or the court under MCL 710.68(8),[10] the central adoption registry must send "to the requester a statement from an adult former sibling consenting to the release of the adult former sibling's name and address to an adult adoptee." MCL 710.27b(5).

"Once a request for information has been received by the central adoption registry, a subsequent statement submitted by an adult former sibling consenting to the release of the adult

[9] For information on MCL 710.68(5), see Section 9.8(A).

[10] For information on MCL 710.68(8), see Section 9.8(C).

former sibling's name and address shall be transmitted to the person who requested the information." MCL 710.27b(5).

9.4 Restrictions on Accessibility of Adoption Proceeding Records

"[R]ecords of proceedings in adoption cases, including a notice filed under [MCL 710.33(1) (notice of intent to claim paternity)[11]], and a petition filed under [MCL 710.34(1) (notice of intent to release or consent)[12]], and the papers and books relating to the proceedings shall be kept in separate locked files and shall not be open to inspection or copy except[:]"

- on "order of a court of record for good cause shown expressly permitting inspection or copy."
- as otherwise provided in MCL 710.67(4), which permits the children's ombudsman to inspect closed adoption records in connection with investigations authorized under the Children's Ombudsman Act, MCL 722.921 *et seq*.
- as otherwise provided in MCL 710.68, which permits the release of information under certain circumstances.[13] MCL 710.67(1).

After 21 days following entry of the final order of adoption, the court "shall not permit copy or inspection of the adoption proceedings except[:]"

- on "a sworn petition setting forth the purpose of the inspection or copy."

  Note: "The court may order notice and a hearing on the petition. The court shall grant or deny the petition in writing within 63 days after the petition is filed, except that for good cause the court may grant or deny the petition after the 63-day period but not later than 182 days after the petition is filed." MCL 710.67(1).

- as otherwise provided in MCL 710.67(4), which permits the children's ombudsman to inspect closed adoption records in connection with investigations authorized under the Children's Ombudsman Act, MCL 722.921 *et seq*.

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[11] For information on notices of intent to claim paternity, see Section 3.19.

[12] For information on petitions filed under MCL 710.34(1), see Sections 2.4 and 2.9.

[13] For information on releasing information under MCL 710.68, see Sections 9.6-9.9.

- as otherwise provided in MCL 710.68, which permits the release of information under certain circumstances.[14] MCL 710.67(1).

9.5 Accessibility of Biological or Adoptive Parents' Names

A person in charge of adoption records must not disclose the names of the biological parents or adoptive parents, unless:

(1) ordered to do so by the court;

(2) the children's ombudsman is conducting an investigation pursuant to MCL 710.67(4) and must have access to the information for purposes of the investigation;

(3) the release of information is authorized under MCL 710.68;[15] or

(4) the Director of Public Health is creating a new birth certificate in the adoptive name and sealing the original birth certificate.[16] MCL 710.67(2).

9.6 Accessibility of Court's or Child Placing Agency's Identity

"If the department or a child placing agency receives a request for adoption record information in its possession from an adult adoptee, former parent, or adult former sibling, the department or child placing agency shall provide the individual requesting the information with the identity of the court that confirmed the adoption within 28 days after receipt of the request. If a court receives such a request, the court shall provide the individual requesting the information with the identity of the child placing agency that handled the adoption." MCL 710.68(3).

"If the court that terminated parental rights receives from the former parents or adult former siblings of the adult adoptee a request for the identity of the agency, court, or department to which the child was committed, the court shall provide in writing the name of that agency, court, or department, if known, within 28 days after receipt of the request." MCL 710.68(4).

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[14] For information on releasing information under MCL 710.68, see Sections 9.6-9.9.

[15] For information on releasing a parent's name under MCL 710.68, see Section 9.8.

[16] For information on creating a new birth certificate for an adoptee, see Section 6.11.

9.7 Accessibility of Nonidentifying Information

MCL 710.68 governs the accessibility of nonidentifying information. For a discussion on the compilation of nonidentifying information, see Section 9.2, and a list of the nonidentifying information to be compiled, see Section 5.5(A) (temporary placements) and Section 6.5(A) (formal placements).

"A child placing agency, a court, and the department may require a fee for supplying information under [MCL 710.68]. The fee shall be $60.00 or the actual cost of supplying the information, whichever is less. The child placing agency, court, or department may waive a part or all of the fee in case of indigency or hardship." MCL 710.68(19).

The release of nonidentifying information applies to stepparent and relative adoptions. MCL 710.27(6); MCL 710.68(17).

A. Release to Adoptive Parent, Adult Adoptee, Former Parent, or Adult Former Sibling

"Within 63 days after a request for nonidentifying information is received, a child placing agency, a court, or the department shall provide in writing to the adoptive parent, adult adoptee, former parent, or adult former sibling requesting the information all of the nonidentifying information described in [MCL 710.27(1)] and [MCL 710.27(2)]." MCL 710.68(1). For a list of the nonidentifying information set out in MCL 710.27(1)-(2), see Section 5.5(A) (temporary placements) and Section 6.5(A) (formal placements).

B. Release to Adult Adoptee's Direct Descendant

If an adult adoptee is deceased, the adoptee's direct descendant may request the nonidentifying information. MCL 710.68(20). The child placing agency, the department, or the court must release to the direct descendant any information to which the deceased adult adoptee would have been entitled. *Id.*

C. Release to Children's Ombudsman

"A child placing agency, a court or the department shall permit the children's ombudsman to inspect adoption records in its possession in connection with an investigation authorized under the children's ombudsman act, . . . MCL 722.921 [*et seq.*] The ombudsman shall not disclose information obtained by an inspection under [MCL 710.68]. If the children's ombudsman requires further information from an individual whose identity is protected in closed adoption records, the ombudsman shall contact the individual discreetly and

confidentially. The ombudsman shall inform the individual that his or her participation in the investigation is confidential, is strictly voluntary, and will not alter or constitute a challenge to the adoption. The ombudsman shall honor the individual's request not to be contacted further." MCL 710.68(21). For additional information on the children's ombudsman, see MCL 722.923.

9.8 Accessibility of Identifying Information

MCL 710.68 governs the accessibility of identifying information. "An employee or agent of a child placing agency, a court, or the department, who intentionally releases identifying information in violation of [MCL 710.68], is guilty of a misdemeanor." MCL 710.68(16). For a discussion on the compilation of identifying information, see Section 9.2, and a list of the identifying information to be compiled, see Section 5.5(B) (temporary placements) and Section 6.5(B) (formal placements).

"A child placing agency, a court, and the department may require a fee for supplying information under [MCL 710.68]. The fee shall be $60.00 or the actual cost of supplying the information, whichever is less. The child placing agency, court, or department may waive a part or all of the fee in case of indigency or hardship." MCL 710.68(19).

The release of identifying information applies to stepparent and relative adoptions. MCL 710.27(6); MCL 710.68(17).

A. Release to Adult Adoptee

"Upon receipt of a written request for identifying information from an adult adoptee,[17] a child placing agency, a court, or the department, if it maintains the adoption file for that adoptee, shall submit a clearance request form to the central adoption registry. Within 28 days after receipt of a clearance reply form from the central adoption registry, the child placing agency, court, or department shall notify the adoptee in writing of the identifying information to which the adoptee is entitled under [MCL 710.68(6)] or [MCL 710.68(7)], or, if the identifying information cannot be released under those subsections, the reason why the information cannot be released. The child placing agency, court, or department shall retain a copy of the notice sent to the adult adoptee." MCL 710.68(5). For information on clearance request and reply forms, see Section 9.3(C).

[17] See the DHHS form *Request by Adult Adoptee For Identifying Information*. The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

"If a child placing agency, a court, or the department provides an adoptee with the name of 1 of the adoptee's former parents, that child placing agency, court, or department shall notify the department of community health of that fact. Upon receipt of notification by the child placing agency, court, or department, the department of community health shall insure that the original birth certificate on file for the adoptee has been sealed and that a new birth certificate has been prepared in conformance with [MCL 710.67]." MCL 710.68(15). For information on issuing an adoptee a new birth certificate, see Section 6.11.

1. Termination of Parental Rights Before May 28, 1945

If parental rights were terminated before May 28, 1945 and a former parent did *not* file a denial of consent for release of identifying information with the central adoption registry, the child placing agency, or court, or department that made the clearance request for information from the central adoption registry "shall deliver to the adult adoptee a copy of the clearance reply form it received from the central adoption registry." MCL 710.68(9).

a. Accessing Adoption Record

If parental rights were terminated before May 28, 1945 and a former parent did *not* file a denial of consent for release of identifying information with the central adoption registry, then a child placing agency, a court, or the department must release to the adult adoptee:

> (1) the identifying information compiled under MCL 710.27(3) containing:
>
> > "(a) Name of the child before placement in adoption.
> >
> > (b) Name of each biological parent at the time of termination of parental rights.
> >
> > (c) The most recent name and address of each biological parent.
> >
> > (d) Names of the biological siblings at the time of termination."
>
> (2) any additional information set out in MCL 710.27b that the central adoption registry has on file.[18] MCL 710.68(7).

However, if a former parent filed a denial of consent for release of identifying information with the central adoption registry, an adult adoptee is *not* entitled to:

> (1) that parent's name at the time of parental termination compiled under MCL 710.27(3)(b).
>
> (2) that parent's current name and address compiled under MCL 710.27(3)(c). MCL 710.68(7).

A former parent's denial of consent for the release of identifying information is no longer effective once that parent is deceased. MCL 710.68(7).

b. Accessing Original Birth Certificate

If parental rights were terminated before May 28, 1945 and a former parent did *not* file a denial of consent for release of identifying information with the central adoption registry, an adult adoptee may use the clearance reply form he or she received from the child placing agency, court, or department to obtain a copy of his or her original birth certificate under MCL 333.2882. MCL 710.68(9).

2. Termination of Parental Rights Between May 28, 1945 and September 11, 1980

a. Accessing Adoption Record

If parental rights were terminated between May 28, 1945 and September 11, 1980, then a child placing agency, a court, or the department must release to the adult adoptee or to a confidential intermediary appointed under MCL 710.68b the identifying information set out in MCL 710.27(3) and any additional information set out in MCL 710.27b that the central adoption registry has on file[19] in the following manner:

> (1) If *both* former parents filed consents to release identifying information or are deceased, the adult adoptee is entitled to the following identifying information:

[18] For information on information on the central adoption registry, see Section 9.3.

[19] For information on the central adoption registry, see Section 9.3.

> "(a) Name of the child before placement in adoption.
>
> (b) Name of each biological parent at the time of termination of parental rights.
>
> (c) The most recent name and address of each biological parent.
>
> (d) Names of the biological siblings at the time of termination."
>
> (2) If *one* former parent filed a consent to release or is deceased, the adult adoptee is entitled to the following identifying information:
>
> (a) His or her name before the adoption placement;
>
> (b) That former parent's name at the time parental rights were terminated;
>
> (c) That former parent's current name and address; and
>
> (d) The names of any biological siblings at the time of parental rights termination.
>
> (3) If a confidential intermediary appointed under MCL 710.68b presents a certified copy of the order of appointment, the confidential intermediary is entitled to all of the identifying information compiled under MCL 710.27(3) and any additional information to assist the intermediary in locating former family members.[20] The child placing agency or the department may release the identifying information to the court for release to the confidential intermediary. MCL 710.68(6). See also MCL 710.27(3).

Where the adoption record does not indicate that a former parent filed a consent to release identifying information, the court must look at MCL 710.67 authorizes the release of identifying information may "only . . . if the court finds 'good cause'"; to find good cause, the court must balance the adoptee's

[20] For information on a confidential intermediary appointed under MCL 710.68b, see Section 9.10.

interests, the biological parents' interests, and the state's interests. *In re Dixon*, 116 Mich App 763, 767-768 (1982). See also *In re Hanson*, 188 Mich App 392, 393-394, 397 (1991) (where parental rights were terminated between May 28, 1945 and September 11, 1980 and the adoption record did not indicate that the biological mother filed a consent to release identifying information, the adult adoptee "demonstrated good cause as a matter of law for the release of any information regarding her biological mother which could assist in establishing her tribal affiliation").

> **Note:** "[I]n cases in which the biological parents have not consented [to the release of identifying information and the court finds good cause to release the information exists], the manner in which that information is released should be tailored to best protect the privacy rights of the biological parents." *Hanson*, 188 Mich App at 398, citing *Dixon*, 116 Mich App at 768-769.

b. Accessing Original Birth Certificate

If parental rights were terminated between May 28, 1945 and September 11, 1980, the release of an adult adoptee's original birth certificate is by court order. See the Michigan Department of Health and Human Services (MDHHS), *Closed Adoption Records*.

3. Termination of Parental Rights After September 11, 1980

If parental rights were terminated after September 11, 1980 and a former parent did *not* file a denial of consent for release of identifying information with the central adoption registry, then the child placing agency, or court, or department that made the clearance request for information from the central adoption registry "shall deliver to the adult adoptee a copy of the clearance reply form it received from the central adoption registry." MCL 710.68(9).

MCL 710.68(9) "does not apply to adoptions in which the former parents' parental rights were terminated under [the Safe Delivery of Newborns Law, MCL 712.1 *et seq*,]."

a. Accessing Adoption Records

If parental rights were terminated after September 11, 1980 and a former parent did *not* file a denial of consent for release of identifying information with the central adoption registry, a child placing agency, a court, or the department must release to the adult adoptee:

> (1) the identifying information compiled under MCL 710.27(3) containing:
>
> > "(a) Name of the child before placement in adoption.
> >
> > (b) Name of each biological parent at the time of termination of parental rights.
> >
> > (c) The most recent name and address of each biological parent.
> >
> > (d) Names of the biological siblings at the time of termination."
>
> (2) any additional information set out in MCL 710.27b that the central adoption registry has on file. MCL 710.68(7).

However, if a former parent filed a denial of consent for release of identifying information with the central adoption registry, an adult adoptee is *not* entitled to:

> (1) that parent's name at the time of parental termination compiled under MCL 710.27(3)(b).
>
> (2) that parent's current name and address compiled under MCL 710.27(3)(c). MCL 710.68(7).

A former parent's denial of consent for the release of identifying information is no longer effective once that parent is deceased. MCL 710.68(7).

MCL 710.68(7) "does not apply to adoptions in which the former parents' rights were terminated under [the Safe Delivery of Newborns Law, MCL 712.1 *et seq*,] unless the former parent has filed a statement with the central adoption registry consenting to the release of identifying information."

b. Accessing Original Birth Certificate

If parental rights were terminated after September 11, 1980 and a former parent did *not* file a denial of consent for release of identifying information with the central adoption registry, then an adult adoptee may use the clearance reply form he or she received from the child placing agency, court, or department to obtain a copy of his or her original birth certificate under MCL 333.2882. MCL 710.68(9).

MCL 710.68(9) "does not apply to adoptions in which the former parents' parental rights were terminated under [the Safe Delivery of Newborns Law, MCL 712.1 *et seq*,]."

B. Release of Biological Sibling's Identifying Information to Adult Adoptee

"Upon receipt of a written request from an adult adoptee for the name and address of an adult former sibling,[21] a child placing agency, a court, or the department, if it maintains the adoption file for that adoptee, shall submit a clearance request form to the central adoption registry. Within 28 days after receipt of a clearance reply form from the central adoption registry, the child placing agency, court, or department shall notify the adoptee in writing of the name and address of an adult former sibling whose statement was forwarded by the central adoption registry." MCL 710.68(8). For information on clearance request and reply forms, see Section 9.3(C).

C. Release of Adult Adoptee's Identifying Information to Former Parent or Adult Former Sibling

"Within 63 days after a request for identifying information about an adult adoptee is received,[22] a child placing agency or court or the department shall provide in writing to the former parent or adult former sibling requesting the information the adult adoptee's most recent name and address if the adult adoptee has given written consent to release of the information pursuant to [the Adoption Code]." MCL 710.68(2).

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[21] See the DHHS form *Request by Adult Adoptee for Identifying Information*. The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[22] See the DHHS form *Release of Information Authorization Adult Adoptee*. The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

If the adult adoptee has not given written consent to the release of identifying information:

- "the child placing agency, the court, or the department shall, upon presentation of a certified copy of the order of appointment, give the adult adoptee's name and address to a confidential intermediary appointed under [MCL 710.68b[23]], together with any other information in its possession that would help the confidential intermediary locate the adult adoptee. At the option of agency or the department, the information may be released to the court for release to the confidential intermediary." MCL 710.68(2).

- release the identifying information on a good cause showing. *In re Creed*, 126 Mich App 32, 37 (1983).

D. Release to Direct Descendant

If an adult adoptee is deceased, the adoptee's direct descendant may request the identifying information. MCL 710.68(20). The child placing agency, the department, or the court must release to the direct descendant any information to which the deceased adult adoptee would have been entitled. *Id.*

E. Release to Children's Ombudsman

"A child placing agency, a court or the department shall permit the children's ombudsman to inspect adoption records in its possession in connection with an investigation authorized under the children's ombudsman act, . . . MCL 722.921 to [MCL] 722.935. The ombudsman shall not disclose information obtained by an inspection under [MCL 710.68]. If the children's ombudsman requires further information from an individual whose identity is protected in closed adoption records, the ombudsman shall contact the individual discreetly and confidentially. The ombudsman shall inform the individual that his or her participation in the investigation is confidential, is strictly voluntary, and will not alter or constitute a challenge to the adoption. The ombudsman shall honor the individual's request not to be contacted further." MCL 710.68(21). For additional information on the children's ombudsman, see MCL 722.923.

[23] For information on a confidential intermediary appointed under MCL 710.68b, see Section 9.10.

9.9 Release of Medical Information

A. Life-Threatening Medical Information

"If a child placing agency, a court, or the department receives written information concerning a physician-verified medical or genetic condition of an individual biologically related to an adoptee and a request that the information be transmitted to the adoptee because of the serious threat it poses to the adoptee's life, the child placing agency, court, or department shall send a written copy of the information by first-class mail within 7 days after the request is received to the adoptee at his or her last known address. If the adoptee is less than 18 years of age, the information shall be sent by first-class mail within 7 days after the request is received to the adoptive parents at their last known address." MCL 710.68(10). If this information "is returned undelivered, the agency, court, or department shall make a reasonable effort to find the most recent address of the adoptee or minor adoptee's parents and shall again send the information by first-class mail within 21 days after receiving the returned letter." MCL 710.68(11).

"If a child placing agency, a court, or the department receives written information concerning a physician-verified medical or genetic condition that threatens the life of an adoptee and for which a biologically related person could give life-saving aid, and receives a request from or on behalf of the adoptee that the information be transmitted, the child placing agency, court, or department shall send a written copy of the information by first-class mail within 7 days after the request is received to the biological parents or adult biological siblings of the adoptee at their last known address." MCL 710.68(13). If this information "is returned undelivered, the agency, court, or department shall make a reasonable effort to find the most recent address of the biological parents or adult biological siblings and shall again send the information by first-class mail within 21 days after receiving the returned letter." MCL 710.68(14).

B. Nonlife-Threatening Medical Information

"If a child placing agency, a court, or the department receives written information concerning a physician-verified medical or genetic condition of a person biologically related to an adoptee, and the condition is not life-threatening to the adoptee, the child placing agency, court, or department shall place the information in its adoption files. If the child placing agency, court, or department receives a written request for the information from the adult adoptee or minor adoptee's adoptive parents, it shall release a written copy of the information to the adult adoptee or to the minor

adoptee's adoptive parents within 63 days after the request for the information was made." MCL 710.68(12).

9.10 Confidential Intermediaries

A. Petition for Appointment

"An adult adoptee, an adoptive parent of a minor adoptee, or an adult child of a deceased adoptee may petition the court in which the final order of adoption was entered to appoint a confidential intermediary to search for and contact a former family member. A former family member may petition the court in which the final order of adoption was entered to appoint a confidential intermediary to search for and contact an adult adoptee or an adult child of a deceased adoptee.[24] Upon receipt of a petition under this section, the court shall contact the central adoption registry to determine whether there is currently on file a statement from the individual being sought that denies consent to the release of identifying information.[25] If no denial of consent is currently on file for that individual, the court shall by written order appoint as confidential intermediary an individual who meets the requirements of [MCL 710.68b(3)]. The court shall provide the confidential intermediary with a certified copy of the order of appointment." MCL 710.68b(2).

B. Qualification Requirements

An individual may serve as a confidential intermediary after he or she has completed the required training, filed an oath of confidentiality, and been approved by the court. MCL 710.68b(3). For a list of approved confidential intermediaries, see the Child & Family Services of Michigan, Inc., website.

The oath of confidentiality must substantially state:

> "I, ... , signing under penalty of perjury, affirm all of the following:
>
> > (a) I will not disclose to a petitioner, directly or indirectly, any identifying information in sealed records without written consent of the individual to whom the information pertains.

[24] See SCAO form *Petition and Order to Appoint Confidential Intermediary*.

[25] For information on the central adoption registry, see Section 9.3.

(b) I will conduct a reasonable search for an individual being sought. I will make a discreet and confidential inquiry as to whether the individual consents to the release of information to the petitioner, or to meeting or communicating with the petitioner, and I will report to the petitioner and the court the results of my search and inquiry.

(c) If the petitioner and the individual being sought consent in writing to meet or communicate with each other, I will act in accordance with the instructions of those persons and, if applicable, the instructions of the court to facilitate any meeting or communication between them.

(d) I will not charge or accept any fee for my services except for reimbursement from the petitioner for actual expenses incurred in performing my services, or as authorized by the court.

(e) I recognize that I may be subject to contempt of court sanctions and dismissal by the court if I permit the release of confidential information without authorization."

C. Responsibilities

"A confidential intermediary shall make a reasonable search for an individual whose identity is sought by a petitioner under [MCL 710.68b]. The confidential intermediary shall first search the court records. If it is necessary to obtain information from an agency or the department, the confidential intermediary shall provide a certified copy of the order of appointment to the agency or the department before requesting the records." MCL 710.68b(4).

1. Intermediary Locates the Sought Individual

"If the confidential intermediary locates the individual being sought, the intermediary shall discreetly and confidentially contact the individual to ascertain whether the individual is willing to release information to the petitioner or to meet or communicate with the petitioner. If the individual consents in writing to the release of information, the intermediary shall release the information to the petitioner. Upon the mutual written consent of the petitioner and the individual, the intermediary may facilitate a meeting or other communication between the petitioner and the individual. If the individual

refuses to authorize the release of information sought by the petitioner, the intermediary shall report the refusal to the petitioner and the court. If an individual sought under this section is deceased, the intermediary shall report that fact to the petitioner and the court." MCL 710.68b(4).

2. Intermediary Does Not Locate the Sought Individual

When the confidential intermediary fails to contact a former family member within six months of the confidential intermediary's appointment, the adult adoptee may petition the court for release of the following information:[26]

> (1) his or her name prior to the adoption placement.
>
> (2) the biological parents' names at the time parental rights were terminated.
>
> (3) the biological parents' current names and addresses.
>
> (4) the names of any biological siblings at the time of parental rights termination.
>
> (5) any additional information the confidential intermediary obtained. MCL 710.68b(6); MCL 710.27(3).

Before the court conducts a hearing on the adult adoptee's petition, the confidential intermediary must submit a written report describing "all efforts made to locate the former family member and all information obtained." MCL 710.68b(6).

After the hearing on the petition, the court must do one of the following:

> "(a) Order the confidential intermediary to search for another 6-month period.
>
> (b) Appoint a new confidential intermediary to search for a 6-month period.
>
> (c) Release to the adult adoptee the identifying information described in [MCL 710.27(3)] and any other information that the court considers appropriate, if the court finds that a diligent search has been made and that there is good cause to

[26] See SCAO form *Petition and Order For Release of Information From Confidential Intermediary and Court*.

> release the information. The court's finding shall be made on the record." MCL 710.68b(6).

D. Access to Original Birth Certificate

A confidential intermediary may request a copy of an adult adoptee's original birth certificate:

> "Upon written request of a confidential intermediary appointed under . . . MCL 710.68b, presentation of a certified copy of the order of appointment, identification of the name of the adult adoptee, and payment of the required fee, the state registrar shall issue to the confidential intermediary a copy of the original certificate of live birth of the adult adoptee on whose behalf the intermediary was appointed." MCL 333.2882(3).

E. Compensation

"Except for a reasonable fee approved by the court and reimbursement for actual expenses incurred in performing services, a confidential intermediary shall not request or accept any money or other thing of value for serving as a confidential intermediary."[27] MCL 710.68b(5).

F. Dismissal of Confidential Intermediary

"The court may dismiss an intermediary if the intermediary engages in conduct that violates professional or ethical standards." MCL 710.68b(2). A confidential intermediary may also be held in contempt of court for releasing identifying information without authorization. See MCL 710.68b(3)(e).

[27] See SCAO form *Petition and Order For Approval of Confidential Intermediary Fee*.

Chapter 10: Paying the Costs of Foster Care & Adoption

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10.1 Overview of Chapter[1]

This chapter contains an overview of sources used to pay the costs of adoption proceedings, the adoption services covered, and what reporting and accounting requirements must be filed. The chapter also discusses the adoption subsidies available for adopted children.

10.2 Foster Care Funding

"If the rights of both parents, the surviving parent, or the guardian have been terminated, the court shall issue an order committing the child to the child placing agency or department to which the release was given." MCL 710.29(8). When a child is committed under MCL 710.29(8), the child is referred to as an Act 296 ward, and "[w]here appropriate, the court may authorize foster care funding following release for a youth committed as a 296 ward." SCAO Memorandum, *AU Case-Type Code and Release to Adopt*, p 2. For additional information on MCL 710.29(8), see Section 2.2(E) and Section 2.3(D).

If the child is committed to a child placing agency, the court must authorize foster care funding "pending expiration of the period of appeal or rehearing as provided in [MCL 710.64 and MCL 710.65], and pending disposition of any appeal or rehearing[2] . . . . Foster care funding authorized under this subsection shall exclude the administrative costs of the child placing agency. The costs of foster care shall be paid through the use of the child care fund as provided by . . . the social welfare act, . . . MCL 400.117c, or by any successor statute. When foster care funding is authorized according to this subsection, the court shall send a copy of the order to the department. Upon receiving a copy of this order, the department shall reimburse the court child care fund of the county where the court order for foster care funding was made in the total amount of the court ordered payment. The reimbursement shall be made monthly." MCL 710.29(9).

10.3 Compensation for Adoption Services

"MCL 710.54 of the Adoption Code governs authorized charges and fees in adoption cases." *In re MJG*, 320 Mich App 310, 321 (2017).

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[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[2] See Section 7.2 for a detailed discussion of rehearing on a release.

A. Court Approval of Adoption Services Payments

Although "courts normally do not interject themselves into contractual matters between competent parties when no party takes exception to how the contract was performed, . . . MCL 710.54[] requires courts to review payments made in connection with Michigan adoptions." *In re MJG*, 320 Mich App 310, 316 (2017). This review includes "the power to prohibit certain fees paid by adoptive parents 'in connection with the adoption.'" *Id*. However, this power, derived from MCL 710.54(10), is limited: "the court only has authority to approve or disapprove fees for services that were required to be submitted to the court for approval in the first instance." *In re MJG*, 310 Mich App at 318. In other words, "[t]he approval process of MCL 710.54 is only implicated if the fee at issue is for a service that is connected with the adoption itself." *In re BGP*, 320 Mich App 338, 348 (2017). Accordingly, "before a court disapproves any submitted fees, it should determine whether the fees actually fall under the scope of the statute." *In re MJG*, 310 Mich App at 318.

The Michigan Court of Appeals created a framework for trial courts to use when analyzing fees under MCL 710.54. *In re MJG*, 310 Mich App at 327. The analysis involves these inquiries:

- Do the adoption service fees fall within the scope of MCL 710.54 (i.e. are they related to the adoption)? If not, then the court has no authority to disapprove the fees. See Section 10.3(B) for examples of fees that have been determined to *not* be related to the adoption.

- If the fees are related to the adoption, does MCL 710.54(1) or MCL 710.54(2) prohibit them? See Section 10.3(C) for more information on the prohibitions in MCL 710.54(1)-(2).

- If the fees are not prohibited by MCL 710.54(1) or MCL 710.54(2), does MCL 710.54(3) permit them? See Section Section 10.3(E) for more information on the fees permitted by MCL 710.54(3).

Caution: "Because the failure to properly disclose fees can be a criminal offense, MCL 710.54(11), petitioners may be inclined to list more than is actually required under the statute." *In re BGP*, 320 Mich at 350 n 9. Accordingly, "[i]t is incumbent on the circuit court, when disapproving fees, to ensure that they fall under the scope of the statute." *Id*.

To facilitate the determination regarding requested fees for services, verified statements must be filed with the court at least seven days before the child is formally placed under MCL 710.51. See Section 10.5 for more information on the verified statements.

MCL 710.54(10) requires the court to approve or disapprove all fees and expenses disclosed in the verified statements. Note, however, "[t]he label [assigned] to the fees [in a verified statement submitted under MCL 710.54(7)] does not end the inquiry nor does it justify the rejection of all fees simply and solely because of the label." *In re MJG*, 320 Mich App at 328 (finding that "[t]he trial court should not have rejected the entirety of [certain] fees simply because [the adoptive parents] labeled them as attorney fees"). The court need only enter one order approving the fees, and it cannot be entered until after the verified statement has been updated. MCR 3.803(B)(1).

The court does not need to hold a formal hearing to approve or disapprove fees and expenses under MCL 710.54. See *In re BGP*, 320 Mich App at 343-344 (finding that an adoption agency "failed to prove any plain error by virtue of the fact that no formal hearing was held" before the circuit court disallowed, under MCL 710.54, the adoptive parents' payment of administrative fees to the agency; although the agency "may not have been formally invited to participate in the proceedings in the circuit court because it was not a party to the adoption," the agency was not denied due process where "the court received materials to consider [the adoptive parents'] request to approve the fees," including the agency's "letter outlining what the administrative fees covered"). The court may require a sworn statement from anyone directly or indirectly involved in any contract or arrangement that led to the child being placed for adoption. MCL 710.54(9).

B. Fees That Are NOT Related to the Adoption

Fees for the following services have been found to be outside the scope of the adoption, and thus, outside the purview of the court's authority to approve/disapprove:

- **Preliminary and administrative service fees.** Services performed for *prospective clients* "are not connected to any adoption," and therefore "do not fall within the scope of MCL 710.54[.]" *In re MJG*, 320 Mich App 310, 319, 329 (2017). Examples of preliminary and administrative services include consulting prospective clients, assisting prospective clients with completing confidential adoption questionnaires, assessing the prospective clients' objectives and challenges, and assisting with other paperwork. See *In re MJG*, 320 Mich at 328-329.

- **Overhead service fees.** Overhead expenses that are "not specifically related to any particular adoption" are not subject to court approval. *In re BGP*, 320 Mich App 338, 350 (2017). Examples of overhead service fees include general contract labor, IT services, payroll, health insurance, professional insurance, office supplies, and rent. See *id*.

- **Marketing service fees.** "Marketing services involve efforts to expose [potential adoptive parents] to birth mothers throughout the United States"; they are not done "in connection with the adoption" and are therefore not subject to court approval under MCL 710.54. *In re MJG*, 320 Mich App at 318-319, 330. "[T]hese [types of] services [are] performed without the identification of any potential adoptee or birth mother and without any guarantee that an adoption ultimately w[ill] take place, . . . [and] the status of any adoption at this time necessarily would have been speculative[.]" *Id*. at 330.

C. Fees That Are Generally Prohibited[3]

1. Prohibitions Under MCL 710.54(1)

"[A]bsent any authorization from a court, the expenses listed in MCL 710.54(1) are squarely prohibited." *In re MJG*, 320 Mich App 310, 326 (2017).

Unless approved by the court, a person must not "pay or give, offer to pay or give, or request, receive, or accept any money or other consideration or thing of value, directly or indirectly, in connection with any of the following:

(a) The placing of a child for adoption.[4]

(b) The registration, recording, or communication of the existence of a child available for adoption.[5]

(c) A release.[6]

(d) A consent.[7]

(e) A petition."[8] MCL 710.54(1)(a)-(e).

In effectively prohibiting surrogacy contracts, MCL 710.54(1) does not infringe on a married couple's constitutional right to bear children because it does not prohibit them from having a

[3] See Section 10.3(A) for more information on court approval of adoptions fees and services.

[4] For information on temporary placements, see Section 5.2, and for information on formal placements, see Section 6.2.

[5] Fees associated with "[p]resenting an adoption opportunity to the clients (i.e., prospective adoptive parents) is akin to the 'communication of the existence of a child available for adoption,' MCL 710.54(1)(b)[.]" *In re MJG*, 320 Mich App 310, 331-332 (2017).

[6] For information on releases Section 2.2.

[7] For information on consents, see Section 2.6.

[8] For information on adoption petitions, see Section 6.6.

child as planned, but rather prohibits them from paying a surrogate mother to bear their child and to sign over her consent to the adoption. *Doe v Attorney General*, 106 Mich App 169, 173-174 (1981).

2. Prohibitions Under MCL 710.54(2)

MCL 710.54(2) sets out certain activities for which fees and charges are generally prohibited. Payment for the listed activities is prohibited, "unless they are done for particular purposes and performed by a 'child placing agency[.]'" *In re MJG*, 320 Mich App 310, 326 (2017).

Under MCL 710.54(2), "[e]xcept for a child placing agency's preparation of a preplacement assessment described in [MCL 710.23f] or investigation under [MCL 710.46],[9] a person shall not be compensated for the following activities:

> (a) Assisting a parent or guardian in evaluating a potential adoptive parent.
>
> (b) Assisting a potential adoptive parent in evaluating a parent or guardian or adoptee.
>
> (c) Referring a prospective adoptive parent to a parent or guardian of a child for purposes of adoption.
>
> (d) Referring a parent or guardian of a child to a prospective adoptive parent for purposes of adoption."

Specifically, the following activities have been found noncompensable under MCL 710.54(2):

- "[g]enerating a profile for the birth mother and comparing the preferences of the birth mother to the preferences of the adoptive parents [which] is akin to assisting the birth mother and adoptive parents in evaluating one another," MCL 710.54(2)(a)-(b);
- "apprising the [adoptive parents] of various birth mothers" which is akin to "'[a]ssisting a potential adoptive parent in evaluating a parent or guardian or adoptee' and '[r]eferring a prospective adoptive parent to a parent or guardian of a child for purposes of adoption,'" MCL 710.54(2)(b)-(c);

[9] For information on preplacement assessments, see Section 5.5(C), and for information on investigation reports, see Section 5.6.

- "[p]resenting an adoption opportunity to the [adoptive parents which] is akin to . . . '[r]eferring a parent or guardian of a child to a prospective adoptive parent for purposes of adoption,' MCL 710.54(2)(d)";

- "services related to introducing the birth mother to the [adoptive parents,]" MCL 710.54(2)(c)-(d). *In re MJG*, 320 Mich App at 329, 331-333.

D. Services for Which Adoptive Parents Must Pay[10]

An adoptive parent must pay for preparing the preplacement assessment, any additional investigation ordered under MCL 710.46, and counseling for the parent or guardian related to the adoption (unless waived). MCL 710.54(4)-(5). These provisions "list fees that adoptive parents must pay, and, thus, the circuit court is also required to approve fees that fall under these subsections." *In re MJG*, 320 Mich App 310, 327 (2017) ("the plain language of MCL 710.54(10) requires court approval of '*all* fees and expenses'" if the fees are for "services made 'in connection with the adoption,'" including those required by MCL 710.54(4)-(5)).

1. Counseling

At the time of a release of parental rights or a consent to adoption (direct placement), a parent must indicate in the verified statement whether he or she has received counseling or is waiving it. MCL 710.29(6)(b) and MCL 710.44(5)(b).[11] If the parent or guardian has received counseling related to the adoption, the prospective adoptive parent must pay for the service. MCL 710.54(5).

2. Preplacement Assessment and Additional Investigation

"An adoptive parent shall pay the reasonable and actual charge for preparation of the preplacement assessment and any additional investigation ordered pursuant to [MCL 710.46]." MCL 710.54(4). For information on preplacement assessments, see Section 5.5(C), and for information on investigative reports prepared under MCL 710.46, see Section 5.6.

[10] See Section 10.3(A) for more information on court approval of adoptions fees and services.

[11] For information on verified statements, see Section 10.5, for information on releases, see Section 2.2, and for information on consents, see Section 2.6.

E. Services Adoptive Parents May Pay[12]

MCL 710.54(3) sets out the charges that adoptive parents may pay. Accordingly, if the fees are for services connected to the adoption, "the circuit court must approve fees that fall under this subsection if they represent reasonable and actual charges." *In re MJG*, 320 Mich App 310, 318, 325, 327 (2017) ("the plain language of MCL 710.54(10) requires court approval of '*all* fees and expenses'" if the fees are for "services made 'in connection with the adoption'" including those authorized by MCL 710.54(3)).

"[T]he list of permissible expenses in [MCL 710.54(3)] *is* exhaustive." *In re MJG*, 320 Mich App at 327, 334. Under MCL 710.54(3), "[a]n adoptive parent may pay the reasonable and actual charge for all of the following:

> (a) The services of a child placing agency in connection with an adoption.
>
> (b) Medical, hospital, nursing, or pharmaceutical expenses incurred by the birth mother or the adoptee in connection with the birth or any illness of the adoptee, if not covered by the birth parent's private health care payment or benefits plan or by Medicaid.
>
> (c) Counseling services related to the adoption for a parent, a guardian, or the adoptee.[13]
>
> (d) Living expenses of a mother before the birth of the child and for no more than 6 weeks after the birth.
>
> (e) Expenses incurred in ascertaining the information required under this chapter about an adoptee and the adoptee's biological family.[14]
>
> (f) Legal fees charged for consultation and legal advice, preparation of papers, and representation in connection with an adoption proceeding, including legal services performed for a biological parent or a guardian and necessary court costs in an adoption proceeding.

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[12] See Section 10.3(A) for more information on court approval of adoptions fees and services.

[13] "[F]ee for counseling services for . . . the adopt[ive parents are] not permitted under MCL 710.54(3)(c) because that provision only allows fees for counseling services provided to the prospective adoptee and the prospective adoptee's parents or guardians." *In re MJG*, 320 Mich App 310, 334-335 (2017) (noting, however, that such fees "would be payable if [the] counseling services fell outside the purview of [MCL 710.54] by failing to meet the threshold criteria of being performed 'in connection with the adoption'" under MCL 710.54(7)(a)).

[14] For the compilation of information required by the Adoption Code, see Section 6.5.

(g) Traveling expenses necessitated by the adoption."

The Michigan Court of Appeals has identified specific fees that are permissible under MCL 710.54(3): fees for intake meetings with birth mothers, for assisting the birth mother in obtaining a physical evaluation, screenings, testing, insurance, and counseling, for mentoring support services, and for continued support to the birth mother during and after the adoption, MCL 710.54(3)(c); fees for obtaining medical and statistical information about the birth parents and child and for providing to the adoptive parents any medical records regarding the birth mother's obstetrical care, MCL 710.54(3)(e); fees for the birth mother's pregnancy-related needs and transportation, MCL 710.54(3)(d) and MCL 710.54(3)(g); and legal analysis fees for analyzing the legal requirements and applicable laws, MCL 710.54(3)(f). *In re MJG*, 320 Mich App at 332, 334 (further finding that fees for services related to "[r]eferring [adoptive parents] to agencies, social workers, and attorneys; managing the adoption plan; and communicating with legal entities are *not* enumerated services under MCL 710.54(3)" and are therefore not allowable) (emphasis added).

"A payment authorized by [MCL 710.54(3)] shall not be made contingent on the placement of the child for adoption, release of the child, consent to the adoption, or cooperation in the completion of the adoption." MCL 710.54(6). If the adoption is not completed, any payments made under MCL 710.54(3) are not recoverable. MCL 710.54(6).

F. Fees That Require Court Approval

Unless approved by the court, a person must not "pay or give, offer to pay or give, or request, receive, or accept any money or other consideration or thing of value, directly or indirectly, in connection with any of the following:

(a) The placing of a child for adoption.[15]

(b) The registration, recording, or communication of the existence of a child available for adoption.[16]

(c) A release.[17]

[15] For information on temporary placements, see Chapter 5, and for information on formal placements, see Chapter 6.

[16] Fees associated with "[p]resenting an adoption opportunity to the clients (i.e., prospective adoptive parents) is akin to the 'communication of the existence of a child available for adoption,' MCL 710.54(1)(b)[.]" *In re MJG*, 320 Mich App 310, 331-332 (2017).

[17] For information on releases Section 2.2.

(d) A consent.[18]

(e) A petition."[19] MCL 710.54(1)(a)-(e).

"[A]bsent any authorization from a court, the expenses listed in MCL 710.54(1) are squarely prohibited." *In re MJG*, 320 Mich App 310, 326 (2017).

In effectively prohibiting surrogacy contracts, MCL 710.54(1) does not infringe on a married couple's constitutional right to bear children because it does not prohibit them from having a child as planned, but rather prohibits them from paying a surrogate mother to bear their child and to sign over her consent to the adoption. *Doe v Attorney General*, 106 Mich App 169, 173-174 (1981).

10.4 Advertising for, Soliciting, or Recruiting Potential Adoptees and Adoptive Parents

"A prospective adoptive parent may advertise for, solicit, or recruit biological parents or guardians of potential adoptees for the purposes of a court-supervised adoption. A biological parent or guardian, the court, department, or child placing agency with authority to place a child may advertise for, solicit, or recruit potential adoptive parents only to fulfill the purposes of a court-supervised adoption of that child. No other person or entity may advertise for, solicit, or recruit prospective parents for the purpose of facilitating the transfer, adoption, or other permanent placement of a child."[20] MCL 710.55(1).

If the court finds that an individual or agency has violated MCL 710.55, that individual or agency "is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both, for the first violation, and of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both, for each subsequent violation. The court may enjoin from further violations any person who violates [MCL 710.55]." MCL 710.55(2).

[18] For information on consents, see Section 2.6.

[19] For information on adoption petitions, see Section 6.6.

[20] For information on persons/entities with authority to make temporary placements, see Section 5.3, and formal placements, see Section 6.3.

10.5 Reporting and Accounting Requirements

Persons and agencies involved in an adoption are required to file a verified accounting statement and other verified statements with the court:

- A parent or guardian must file a verified statement at the time a release of parental rights or a consent for direct placement is filed with the court. MCL 710.29(5)(c); MCL 710.29(6); MCL 710.44(5); MCL 710.44(8)(c). See Section 10.5(A).
- The petitioner must file a verified accounting statement at least seven days before a child's formal placement. MCL 710.54(7)(a). See Section 10.5(B).
- The attorney for each petitioner and each parent or guardian must file a verified statement at least seven days before a child's formal placement. MCL 710.54(7)(b)-(c). See Section 10.5(C).
- The child placing agency or the department must file a verified statement at least seven days before a child's formal placement. MCL 710.54(7)(d). See Section 10.5(D).

A. Parent's or Guardian's Verified Statement

The parent or guardian must sign a verified statement at the time a release of parental rights or a consent for direct placement is filed with the court that contains the following acknowledgments:

(a) The parent or guardian has received a list of support groups and a copy of written information regarding adoption facilitators as required under MCL 722.956(1)(c).

(b) The parent or guardian has received adoption-related counseling or waives counseling by signing the verified statement.

(c) The parent or guardian has not received or been promised money or anything of value in exchange for a release of parental rights or consent to adoption, unless it is a lawful payment itemized on a schedule filed with the release or consent. See Section 10.3 for more information on compensation for adoption services.

(d) The validity and finality of the release or consent is not affected by a collateral or separate agreement with the parent or guardian and the child placing agency or adoptive parent.

(e) The parent or guardian understands the importance of keeping the court, child placing agency or the department informed of any health problems the parent develops that may affect the child.

(f) The parent or guardian understands the importance of keeping his or her address current with the court, child placing agency, or the department in order for an adoptive parent of a minor adoptee or an adult adoptee to address any concerns regarding medical or social history. MCL 710.29(6); MCL 710.44(5).

B. Petitioner's Verified Accounting Statement

At least seven days before a child's formal placement under MCL 710.51,[21] the petitioner must file with the court a signed verified accounting statement that "itemiz[es] all payments or disbursements of money or anything of value made or agreed to be made by or on behalf of the petitioner in connection with the adoption. The accounting shall include the date and amount of each payment or disbursement made, the name and address of each recipient, and the purpose of each payment or disbursement. Receipts shall be attached to the accounting."[22] MCL 710.54(7)(a). See SCAO form *Petitioner's Verified Accounting*.

Generally, the petitioner must file an updated verified accounting statement with the court at least 21 days before entry of a final order of adoption.[23] MCL 710.54(8). However, the petitioner need not file an updated accounting statement if there are no changes to the verified accounting statement already on file with the court. MCR 3.803(A)(2). The updated verified accounting statement "may include by reference the total expenses itemized in the accounting" statement that was previously filed. MCR 3.803(A)(1).

C. Attorney's Verified Statement

1. Petitioner's Attorney

At least seven days before a child's formal placement under MCL 710.51,[24] the attorney for each petitioner must file with

[21] For additional discussion on formal placements under MCL 710.51, see Chapter 6.

[22] "The order placing the child may be entered before the elapse of the 7-day period required by MCL 710.54(7)." MCR 3.803(B)(2).

[23] "The final order of adoption may be entered before the elapse of the 21-day period required by MCL 710.54(8)." MCR 3.803(B)(3).

[24] For additional discussion on formal placements under MCL 710.51, see Chapter 6.

the court a signed verified statement that "itemiz[es] the services performed and any fee, compensation, or other thing of value received by, or agreed to be paid to, the attorney for, or incidental to, the adoption of the child."[25] MCL 710.54(7)(b). See SCAO form *Statement of Services Performed by Attorney*.

"If an attorney is an adoption attorney representing a party in a direct placement adoption, the verified statement shall contain the following statements:

> (*i*) The attorney meets the requirements for an adoption attorney under [MCL 710.22].
>
> (*ii*) The attorney did not request or receive any compensation for services described in [MCL 710.54(2)]." MCL 710.54(7)(b).

Generally, the attorney must file an updated statement of services with the court at least 21 days before entry of a final order of adoption.[26] MCL 710.54(8). However, the attorney need not file an updated statement if there are no changes to the statement of services already on file with the court. MCR 3.803(A)(2).The updated statement of services "may include by reference the total expenses itemized in the accounting" statement that was previously filed. MCR 3.803(A)(1).

2. Parent's Attorney

At least seven days before a child's formal placement under MCL 710.51,[27] the attorney for each parent of the adoptee must file with the court a signed verified statement that "itemiz[es] the services performed and any fee, compensation, or other thing of value received by, or agreed to be paid to, the attorney for, or incidental to, the adoption of the child."[28] MCL 710.54(7)(c). See SCAO form *Statement of Services Performed by Attorney*.

"If an attorney is an adoption attorney representing a party in a direct placement adoption, the verified statement shall contain the following statements:

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[25] "The order placing the child may be entered before the elapse of the 7-day period required by MCL 710.54(7)." MCR 3.803(B)(2).

[26] "The final order of adoption may be entered before the elapse of the 21-day period required by MCL 710.54(8)." MCR 3.803(B)(3).

[27] For additional discussion on formal placements under MCL 710.51, see Chapter 6.

[28] "The order placing the child may be entered before the elapse of the 7-day period required by MCL 710.54(7)." MCR 3.803(B)(2).

> (*i*) The attorney meets the requirements for an adoption attorney under [MCL 710.22].
>
> (*ii*) The attorney did not request or receive any compensation for services described in [MCL 710.54(2)]." MCL 710.54(7)(c).

Generally, the attorney must file an updated statement of services with the court at least 21 days before entry of a final order of adoption.[29] MCL 710.54(8). However, the attorney need not file an updated statement if there are no changes to the statement of services already on file with the court. MCR 3.803(A)(2). The updated statement of services "may include by reference the total expenses itemized in the accounting" statement that was previously filed. MCR 3.803(A)(1).

D. Child Placing Agency's or the Department's Verified Statement

At least seven days before a child's formal placement under MCL 710.51,[30] the child placing agency or the department must file with the court a signed verified statement that "itemiz[es] the services performed and any fee, compensation, or other thing of value received by, or agreed to be paid to, the child placing agency or the department for, or incidental to, the adoption of the child, and containing a statement that the child placing agency or the department did not request or receive any compensation for services described in [MCL 710.54(2)]."[31] MCL 710.54(7)(d). See SCAO form *Statement of Services Performed by Agency/Department of Human Services*.

Generally, the child placing agency or the department must file an updated statement of services with the court at least 21 days before entry of a final order of adoption.[32] MCL 710.54(8). However, the child placing agency or the department need not file an updated statement if there are no changes to the statement of services already on file with the court. MCR 3.803(A)(2). The updated statement of services "may include by reference the total expenses

[29] "The final order of adoption may be entered before the elapse of the 21-day period required by MCL 710.54(8)." MCR 3.803(B)(3).

[30] For additional discussion on formal placements under MCL 710.51, see Chapter 6.

[31] "The order placing the child may be entered before the elapse of the 7-day period required by MCL 710.54(7)." MCR 3.803(B)(2). See Section 10.3(C)(2) for more information on fees that are generally prohibited under MCL 710.54(2).

[32] "The final order of adoption may be entered before the elapse of the 21-day period required by MCL 710.54(8)." MCR 3.803(B)(3).

itemized in the accounting" statement that was previously filed. MCR 3.803(A)(1).

10.6 Adoption Subsidies

In certain circumstances, the department is permitted to pay a subsidy to adoptive parents of eligible children under portions of the Social Welfare Act, MCL 400.115f *et seq*. "[T]he purpose of [an adoption] subsidy is to encourage the adoption of children who are in foster care . . . by relieving the financial burden of adoption." *In re Klaus*, 108 Mich App 394, 403 (1981) (discussing the purpose of a support subsidy under former MCL 710.48).

Michigan provides three adoption subsidy programs to assist adoptive parents: (1) support subsidies, (2) medical subsidies, and (3) nonrecurring adoption expenses subsidies. MCL 400.115g; MCL 400.115h; MCL 400.115*l*.

"The department shall prepare and distribute to adoption facilitators and other interested persons information describing the adoption process and the adoption assistance and medical subsidy programs established under sections [MCL 400.115f] to [MCL 400.115s]. The state department shall provide the information to each prospective adoptive parent before placing a child with that parent."[33] MCL 400.115m(1). For a list of information the department must provide at a minimum when describing the adoption process, see MCL 400.115m(2).

A. Support Subsidies

The department may pay a support subsidy to an adoptive parent of an adoptee if certain eligibility requirements are met. MCL 400.115g(1). MCL 400.115(y) defines *support subsidy* as a "payment for support of a child who has been placed for adoption from foster care."

Once an adoptive parent has requested a support subsidy, the department has 30 days to complete the certification process to determine whether an adoptive parent is eligible for a support subsidy. MCL 400.115g(5).

1. Eligibility

"The department may pay a support subsidy to an adoptive parent of an adoptee who is placed in the home of the adoptive

[33] See *Michigan's Adoption Subsidy Programs Information for Prospective Adoptive Parents*. The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

parent under the adoption code or under the adoption laws of another state or a tribal government, if all of the following requirements are met:

> (a) The department has certified that the adoptee is a child with special needs.
>
> (b) Certification is made before the adoptee's eighteenth birthday.
>
> (c) Certification is made and the adoption assistance agreement is signed by the adoptive parent and the department before the adoption is finalized." MCL 400.115g(1).

2. Determination of Eligibility

"The department shall determine eligibility for the support subsidy without regard to the income of the adoptive parent. The maximum amount shall be equal to the rate that the child received in the family foster care placement or the rate the child would have received if he or she had been in a family foster care placement at the time of adoption. This rate includes the determination of care rate that was paid or would have been paid for the adoptee in a family foster care placement, except that the amount shall be increased to reflect increases made in the standard age appropriate foster care rate paid by the department. The department shall not implement policy to limit the maximum amount at an amount less than the family foster care rate, including the determination of care rate, that was paid for the adoptee while the adoptee was in family foster care." MCL 400.115g(2).

The department must require an adoptive parent to sign a separate form stating that "he or she either requests or does not request a support subsidy." MCL 400.115g(3). "The adoptive parent shall present to the department the first offer of the amount requested for the support subsidy. The department may accept the adoptive parent's offer or present a counteroffer to the adoptive parent for the support subsidy. The department shall consider the prospective adoptive parent's requested rate if that requested rate is consistent with the needs of the child being adopted and the prospective adoptive family's circumstances, unless the requested rate exceeds the maximum foster care rate the child is receiving or would receive if placed in a licensed family foster home." MCL 400.115g(4).

3. Adoption Assistance Agreement

"If adoption assistance is to be paid, the department and the adoptive parent shall enter into an adoption assistance agreement that includes all of the following:

> (a) The duration of the adoption assistance to be paid.
>
> (b) Notice of potential eligibility for redetermined adoption assistance.
>
> (c) The amount to be paid and, if appropriate, eligibility for medical assistance.[34]
>
> (d) Conditions for continued payment of the adoption assistance as established by statute.
>
> (e) Any services and other assistance to be provided under the adoption assistance agreement.
>
> (f) Provisions to protect the interests of the child in cases in which the adoptive parent moves to another state while the adoption assistance agreement is in effect." MCL 400.115i(1).

The department must provide a copy of the adoption assistance agreement to the adoptive parent. MCL 400.115i(4).

"An adoption assistance agreement . . . does not affect the legal status of the adoptee or the legal rights and responsibilities of the adoptive parent. MCL 400.115i(6).

4. Report

"The adoptive parent shall file a report with the department at least once each year as to the location of the adoptee and other matters relating to the continuing eligibility of the adoptee for adoption assistance[.]" MCL 400.115i(7).

Failing to file a timely annual report is not a proper ground for terminating a support subsidy where the failure to file the report was not willful and there was substantial compliance with the reporting requirement. *In re Klaus*, 108 Mich App 394,

[34] While adoption assistance refers to a support subsidy or a support subsidy with medical assistance, MCL 400.115f(b), medical assistance refers to a federally aided medical assistance program found under the Social Security Act, MCL 400.115f(m). Medical assistance is different from a medical subsidy as indicated in Section 10.6(C).

401-402 (1981) (discussing the termination of a support subsidy under former MCL 710.48).

5. Duration of Adoption Assistance

"Except as provided in [MCL 400.115j(2)] to [MCL 400.115j(5)] and [MCL 400.115t],[35] adoption assistance . . . shall continue until 1 of the following occurs:

(a) The adoptee becomes 18 years of age.

(b) The adoptee is emancipated.

(c) The adoptee dies.

(d) The adoption is terminated.

(e) A determination of ineligibility is made by the department." MCL 400.115j(1).

"Adoption assistance . . . shall continue even if the adoptive parent or the adoptee leaves the state." MCL 400.115j(6).

A support subsidy must continue even if an adopted child is removed from his or her home for delinquency purposes and made a temporary ward of the court under MCL 712A.18. MCL 400.115j(7).

On the death of an adoptive parent, the support subsidy, through state funding, must continue to the adoptee's appointed guardian. MCL 400.115j(8). See MCL 700.5202 and 700.5204 for information on the appointment of a guardian for an unmarried minor.

B. Redetermined Adoption Assistance

If it has sufficient funds, the department must pay redetermined adoption assistance to an adoptee's adoptive parent if the adoptive parent requests the redetermined adoption assistance and certain eligibility requirements are met. MCL 400.115t(1). MCL 400.115f(t) defines *redetermined adoption assistance* as "a payment as determined by a certification that may be justified when extraordinary care or expense is required for a condition that existed or the cause of which existed before the adoption from foster care was finalized."

[35] MCL 400.115j(2)-(5) and MCL 400.115t provide circumstances in which adoption assistance agreements may be extended. See Section 10.6(F) for more information.

"Redetermined adoption assistance does not affect or duplicate any original adoption assistance agreement that may be in place at the time that redetermined adoption assistance eligibility is requested." MCL 400.115t(3).

"An adoptive parent may only request 1 redetermined adoption assistance certification to be made under [MCL 400.115t(1)] or [MCL 400.115t(4)] per adoptee placed in the adoptive parent's home."MCL 400.115t(5).

1. Eligibility

"An adoptive parent of an adoptee who was adopted from foster care between the ages of 0 and 18 and whose adoption was finalized after January 1, 2015 may request redetermined adoption assistance under [MCL 400.115t]."MCL 400.115t(6).

"If sufficient funds are appropriated in the department's annual budget and subject to [MCL 400.115t(4)], beginning January 1, 2015, the department shall pay redetermined adoption assistance to an adoptive parent of an adoptee who is placed in the adoptive parent's home under the adoption code or under the adoption laws of another state or a tribal government, if the adoptive parent requests redetermined adoption assistance and both of the following requirements are met:

> (a) The department has certified that the adoptee requires extraordinary care or expense due to a condition the cause of which existed before the adoption was finalized.
>
> (b) Certification is made before the adoptee's eighteenth birthday." MCL 400.115t(1).[36]

MCL 400.115t(4) permits "[a]n adoptive parent who has an adoption assistance agreement signed and in effect before January 1, 2015 [to] request redetermined adoption assistance under this section in the same manner as provided in this section beginning January 1, 2015 but not after March 31, 2015."

[36]See MCL 400.115f(k) (setting forth circumstances under which a supplemental payment to the standard age appropriate foster care rate, or the "determination of care rate," may be justified when extraordinary care of, or expenses related to, the adoptee is required.)

2. Determination of Eligibility

"Redetermined adoption assistance shall be determined without regard to the income of the adoptive parent and shall be based on 1 or more of the following for which extraordinary care is required of the adoptive parent or an extraordinary expense exists in excess of a support subsidy:

> (a) A physically disabled child for whom the adoptive parent must provide measurably greater supervision and care.
>
> (b) A child with special psychological or psychiatric needs that require extra time and a measurably greater amount of care and attention by the adoptive parent.
>
> (c) A child requiring a special diet that is more expensive than a normal diet and that requires extra time and effort by the adoptive parent to obtain and prepare.
>
> (d) A child whose severe acting out or antisocial behavior requires a measurably greater amount of care and attention of the adoptive parent.
>
> (e) Any other condition for which the department determines that extraordinary care is required of the adoptive parent or an extraordinary expense exists." MCL 400.115t(3).

"If the department denies or the adoptive parent disagrees with the certification, the adoptive parent may request a hearing through an administrative law judge in a manner consistent with the rules promulgated under the administrative procedures act of 1969, . . . MCL 24.201 to [MCL] 24.328." MCL 400.115t(2).

3. Redetermined Adoption Assistance Agreement

"If it is determined that a child is eligible for redetermined adoption assistance under [the Social Welfare Act], the department and the adoptive parent shall enter into a redetermined adoption assistance agreement that includes all of the following:

> (a) The duration of the redetermined adoption assistance to be paid.

(b) The amount of redetermined adoption assistance to be paid.

(c) If appropriate, eligibility for medical assistance.

(d) Conditions for continued payment of the redetermined adoption assistance. Conditions shall be the same as for adoption assistance as established by law.

(e) Any services and other assistance to be provided under the redetermined adoption assistance agreement.

(f) Provisions to protect the interests of the child in cases in which the adoptive parent moves to another state while the redetermined adoption assistance agreement is in effect." MCL 400.115i(2).

The department must provide a copy of the redetermined adoption assistance agreement to the adoptive parent. MCL 400.115i(4).

"[A] . . . redetermined adoption assistance agreement . . . does not affect the legal status of the adoptee or the legal rights and responsibilities of the adoptive parent. MCL 400.115i(6).

4. Report

"The adoptive parent shall file a report with the department at least once each year as to the location of the adoptee and other matters relating to the continuing eligibility of the adoptee for . . . redetermined adoption assistance[.]" MCL 400.115i(7).

5. Duration of Redetermined Adoption Assistance

"Except as provided in [MCL 400.115j(2)] to [MCL 400.115j(5)] and [MCL 400.115t],[37] . . . redetermined adoption assistance shall continue until 1 of the following occurs:

(a) The adoptee becomes 18 years of age.

(b) The adoptee is emancipated.

(c) The adoptee dies.

(d) The adoption is terminated.

[37] MCL 400.115j(2)-(5) and MCL 400.115t provide circumstances in which redetermined adoption assistance agreements may be extended. See Section 10.6(F) for more information.

(e) A determination of ineligibility is made by the department." MCL 400.115j(1).

"[R]edetermined adoption assistance . . . shall continue even if the adoptive parent or the adoptee leaves the state." MCL 400.115j(6).

Redetermined adoption assistance must continue even if an adopted child is removed from his or her home for delinquency purposes and made a temporary ward of the court under MCL 712A.18. MCL 400.115j(7).

On the death of an adoptive parent, the redetermined adoption assistance payments, through state funding, must continue to the adoptee's appointed guardian. MCL 400.115j(8). See MCL 700.5202 and 700.5204 for information on the appointment of a guardian for an unmarried minor.

C. Medical Subsidies

The department may pay a medical subsidy as reimbursement for services either to a service provider or to the adoptive parent of an adoptee if certain eligibility requirements are met. MCL 400.115h(1). MCL 400.115f(n) defines a *medical subsidy* as "a reimbursement program that assists in paying for services for an adopted child who has an identified physical, mental, or emotional condition that existed, or the cause of which existed, before the adoption is finalized."

"The adoptive parent may request a medical subsidy before or after the adoption is finalized. A medical subsidy requested after the adoptee is placed in adoption is effective the date the application request is received by the department if the necessary required documentation is received within 90 calendar days after the date the application is received. In allocating available funding for medical subsidies, the department shall not give preferential treatment to requests that are made before the adoption is finalized, but shall allocate funds based on a child's need for the subsidy." MCL 400.115h(4).

1. Eligibility

"Except as provided in [MCL 400.115h(2)], the department may pay a medical subsidy as reimbursement for services either to a service provider or to the adoptive parent of an adoptee who is placed for adoption in the home of the adoptive parent under the adoption code or the laws of any

other state or a tribal government, if all of the following requirements are met:

> (a) The expenses to be covered by the medical subsidy are necessitated by a physical, mental, or emotional condition of the adoptee that existed or the cause of which existed before the adoption petition was filed or certification was established, whichever occurred first.[38]
>
> (b) The adoptee was in foster care at the time the petition for adoption was filed.
>
> (c) Certification was made before the adoptee's eighteenth birthday." MCL 400.115h(1).

MCL 400.115h(2) prohibits the department from "pay[ing] a medical subsidy to an adoptive parent for providing treatment or services to his or her own adopted child."

"Payment of a medical subsidy for treatment of a mental or emotional condition is limited to outpatient treatment, unless 1 or more of the following apply:

> (a) Certification for the medical subsidy was made before the date the adoption was finalized.
>
> (b) The adoptee was placed in foster care before the petition for adoption was filed.
>
> (c) The adoptee was certified for a support subsidy or redetermined adoption assistance." MCL 400.115h(5).

2. Determination of Eligibility

"The department shall determine the amount of the medical subsidy without respect to the income of the adoptive parent or parents. The department shall not pay a medical subsidy until all other available public money and third party payments have been exhausted. For purposes of this subsection, third party payment is available if an adoptive parent has an option, at or after the time of certification, to obtain from the parent's employer health coverage for the child, with or without cost to the adoptive parent. The department may waive this subsection in cases of undue hardship." MCL 400.115h(3).

[38] For information on adoption petitions, see Section 6.6.

3. Medical Subsidy Agreement

"If medical subsidy eligibility is certified, the department and the adoptive parent shall enter into a medical subsidy agreement covering all of the following:

> (a) Identification of the physical, mental, or emotional condition covered by the medical subsidy.
>
> (b) The duration of the medical subsidy agreement.
>
> (c) Conditions for continued eligibility for the medical subsidy as established by statute." MCL 400.115i(3).

The department must provide a copy of the medical subsidy agreement to the adoptive parent. MCL 400.115i(4).

"[A] . . . medical subsidy agreement does not affect the legal status of the adoptee or the legal rights and responsibilities of the adoptive parent. MCL 400.115i(6).

4. Report

"The adoptive parent shall file a report with the department at least once each year as to the location of the adoptee and other matters relating to the continuing eligibility of the adoptee for . . . a medical subsidy." MCL 400.115i(7).

5. Duration of Medical Subsidy

"Except as provided in [MCL 400.115j(2)] to [MCL 400.115j(5)] and [MCL 400.115t],[39] . . . a medical subsidy . . . shall continue until 1 of the following occurs:

> (a) The adoptee becomes 18 years of age.
>
> (b) The adoptee is emancipated.
>
> (c) The adoptee dies.
>
> (d) The adoption is terminated.
>
> (e) A determination of ineligibility is made by the department." MCL 400.115j(1).

[39] MCL 400.115j(2)-(5) and MCL 400.115t provide circumstances in which medical subsidy agreements may be extended. See Section 10.6(F) for more information.

"[A] medical subsidy shall continue even if the adoptive parent or the adoptee leaves the state." MCL 400.115j(6).

On the death of an adoptive parent, the medical subsidy eligibility, through state funding, must continue to the adoptee's appointed guardian. MCL 400.115j(8). See MCL 700.5202 and 700.5204 for information on the appointment of a guardian for an unmarried minor.

D. Nonrecurring Adoption Expenses

The department must pay nonrecurring adoption expenses to an adoptive parent of an adoptee if certain eligibility requirements are met. MCL 400.115(*l*). MCL 400.115f(p) defines *nonrecurring adoption expenses* as "reasonable and necessary adoption fees, court costs, attorney fees, and other expenses that are directly related to the legal adoption of a child with special needs. Nonrecurring adoption expenses do not include costs or expenses incurred in violation of state or federal law or that have been reimbursed from other sources or funds." MCL 400.115f(p).

"The department shall take all actions necessary and appropriate to notify potential claimants under this section, including compliance with federal regulations." MCL 400.115*l*(3).

1. Eligibility

The department must pay an adoptive parent the nonrecurring adoption expenses if the adopted child is a child with special needs. See MCL 400.115*l*(1).

2. Agreement for Payment of Expenses

If the adoptee is a child with special needs, the department and adoptive parent must enter into an agreement for the "payment of nonrecurring adoption expenses incurred by or on behalf of the adoptive parent. MCL 400.115*l*(1). "The agreement may be a separate document or part of an adoption assistance agreement under [MCL 400.115i]. The agreement under this section shall indicate the nature and amount of nonrecurring adoption expenses to be paid by the department, which shall not exceed $2,000.00 for each adoptive placement meeting the requirements of this section. The department shall make payment as provided in the agreement." MCL 400.115*l*(1).

The agreement "shall be signed at or before entry of an order of adoption under the adoption code. Claims for payment shall

be filed with the department within 2 years after entry of the order of adoption." MCL 400.115*l*(2).

E. Appealing the Department's Adoption Subsidy Determination

"The court has jurisdiction to hear an appeal brought under . . . [MCL] 400.115k[.] The court may set aside, affirm, reverse, or modify a final determination of the department as provided in [MCL] 24.301 to [MCL] 24.306[.]" MCL 710.23; see also MCL 400.115k(1). The department must notify the adoptee and adoptive parent of their right to appeal the department's subsidy determination. MCL 400.115k(2).

See the Michigan Judicial Institute's *Appeals & Opinions Benchbook*, Chapter 2, for more information on administrative appeals.

F. Extension of Adoption Subsidies

Under MCL 400.115j(2)-(5), adoption assistance agreements, redetermined adoption assistance agreements, and medical subsidy agreements may be extended for an adoptee under the age of 21 under certain circumstances.

10.7 Adoption of Child Terminates Guardianship Assistance

In certain circumstances, the department may provide guardianship assistance to a child's guardian under the Guardianship Assistance Act, MCL 722.871 *et seq*. If "[t]he child is adopted by the guardian or another individual under the Michigan adoption code, . . . MCL 710.21 to [MCL] 710.70, or the adoption laws of any other state or country," the department must not provide the guardianship assistance. MCL 722.876(1)(e). For information on guardianship assistance, see the Michigan Judicial Institute's *Child Protective Proceedings*, Chapter 14.

10.8 Federal Funding for Adoption Subsidies

A. Adoption and Safe Families Act (ASFA)

The Adoption and Safe Families Act (ASFA) provides federal funding for Title IV-E agencies (i.e. DHHS in Michigan) if the agency can demonstrate compliance with award requirements. More information on the calculation of awards as well as a history of

awards by state is available on the United States DHHS's Children's Bureau website.

B. Family First Prevention Services Act (FFPSA)

The Family First Prevention Services Act (FFPSA) reforms the federal child welfare financing streams, Title IV-E and Title IV-B of the Social Security Act, to expand funding and eligibility of federal child welfare programs. Specifically, "FFPSA amends the title IV-B, subparts 1 and 2 programs to reauthorize and make other revisions, the title IV-E foster care program to create new optional prevention funding under title IV-E, place title IV-E payment limits on child care institutions, reauthorize the Adoption Incentives Program, and other changes." United States DHHS's Children's Bureau, *Information Memorandum-18-02*.

While the FFPSA was signed into law on February 9, 2018, Michigan requested and received approval for a two-year delay in meeting the FFPSA's requirements. As a result of the 2-year waiver, Michigan has until September 29, 2021, to comply with the FFPSA's requirements. See Pub L 115-123, div E, title VII, §50734(b)(1), §50746; United States DHHS's Children's Bureau, *Information Memorandum-18-02*.

Chapter 11: Adoption Proceedings Involving an Indian Child

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11.1 Overview of Chapter[1]

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 adoptions. ICWA and MIFPA also apply to child protective proceedings filed pursuant to the Juvenile Code, including those that lead to an adoption. A brief discussion of ICWA and MIFPA in the context of child protective proceedings is included in this chapter. However, a detailed discussion of ICWA and MIFPA as they apply to child protective proceedings is beyond the scope of this benchbook. See the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 19, for information on this topic.

11.2 Federal, State, and Tribal Collaboration

"Michigan is privileged to be the home of 12 federally recognized Indian tribes and tribal court systems. Michigan has also enjoyed a long history of collaboration between state and tribal courts. The first Tribal State Court Forum, which was created in 1992, resulted in the creation of the 'Enforcement of Tribal Judgments' court rule, MCR 2.615, and, most recently, the passage of the Michigan Indian Family Preservation Act of 2012 (MIFPA)." AO 2014-12.

AO 2014-12 also established the Michigan Tribal State Federal Judicial Forum to "build[] on the past spirit of cooperation and [to] creat[e] a dialogue among the state, tribal, and federal judiciaries[.]"

A. Enactment of Michigan Court Rule 2.615

"In May 1996, the Michigan Supreme Court adopted Michigan Court Rule 2.615, which was prompted by proposals from the Indian Tribal Court/State Trial Court Forum and the State Bar of Michigan. MCR 2.615 provides for the enforcement of Indian tribal court judgments. Basically, the rule states that a tribal court judgment is recognized as long as the tribe or tribal court has enacted a reciprocal ordinance, court rule, or other binding measure that obligates the tribal court to enforce state court judgments, and that ordinance, court rule, or other measure has been transmitted to the State Court Administrative Office." Michigan One Court of Justice Website, *Native American Tribal Courts*.

[1]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

B. Michigan Tribal State Federal Judicial Forum

The Michigan Tribal State Federal Judicial Forum was established in 2014 and is comprised of judges from each of Michigan's federally recognized tribes, state court judges and justices, federal judges, and other officials. See AO 2014-12.

"[The] Michigan Tribal State Federal Judicial Forum was created . . . to provide an ongoing venue for judges from [the tribal, state, and federal] jurisdictions to convene jointly [to] . . . improve working relations and communication. The work of the Forum is important to all Michigan citizens because it affects how our court systems best serve Michiganders: the ongoing issues regarding jurisdiction among the [tribal, state, and federal court systems] and how they can function cooperatively; enforcement of orders between them; and transferring cases to best serve the parties are some examples of what we are working on together." Michigan Tribal State Federal Judicial Forum, *Michigan's Judicial Success Stories: How Tribal, State, and Federal Courts Are Collaborating to Benefit Michigan Families*, p 2.

"Priorities for the Forum include addressing child welfare issues and ensuring that our respective court systems are meeting the needs of Native American children and families in a way that is culturally sensitive and appropriate. In particular, making certain that our courts are trained in the federal Indian Child Welfare Act (1978) and the Michigan Indian Family Preservation Act (2012) is one of our initiatives." *Michigan's Judicial Success Stories: How Tribal, State, and Federal Courts Are Collaborating to Benefit Michigan Families, supra*.

The Forum released a report highlighting their cooperative efforts to better meet the needs of Native American children and families. The report, *Michigan's Judicial Success Stories: How Tribal, State, and Federal Courts Are Collaborating to Benefit Michigan Families*, highlights success stories to "spotlight the importance of judicial leadership and collaboration between courts, as well as the positive and lasting impact of these relationships on communities, families, and children across the state." *Michigan's Judicial Success Stories: How Tribal, State, and Federal Courts Are Collaborating to Benefit Michigan Families, supra*.

11.3 General Requirements and Purpose of the Indian Child Welfare Act (ICWA)

A. General Requirements of 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[2] from their homes and placing them in foster or adoptive homes. 25 USC 1902. See also 25 CFR Part 23, which "provide[s] minimum Federal standards to ensure compliance with ICWA." 25 CFR 23.106(a).

Because ICWA is federal law, it preempts conflicting state law. It is important to remember that 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 ICWA applies, it must also meet the additional requirements of ICWA. However, several of the procedural requirements of ICWA are less stringent than statutory and court rule requirements in Michigan. When applicable state law "provides a higher standard of protection to the rights of the parent or Indian custodian" than ICWA provides, the court must apply those higher standards. See 25 USC 1921.[3] See also 25 CFR 23.106(b), which contains substantially similar language.

B. Purpose of ICWA

The purpose of ICWA is to protect the best interests of Indian children and to promote the stability and security of Indian Tribes and families. 25 USC 1902.

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[.]" 25 USC 1902. ICWA's purpose also includes "providing . . . assistance to Indian tribes in the operation of child and family service programs."*Id*.

11.4 General Requirements and Purpose of the Michigan Indian Family Preservation Act (MIFPA)

"In Indian child custody proceedings, [the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq.*, requires] the best interests

[2] For a discussion on determining an Indian child's status, see Section 11.6(A).

[3] These higher standards are noted in this chapter when relevant.

of the Indian child [to] be determined, in consultation with the Indian child's tribe, in accordance with the [ICWA], and the policy specified in this section.[4] Courts shall do both of the following:

> (a) Protect the best interests of Indian children and promote the stability and security of Indian tribes and families.
>
> (b) Ensure that the department 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.

11.5 Applicability of ICWA and MIFPA

Generally, ICWA and MIFPA requirements apply whenever an Indian child is the subject of a child-custody proceeding.[5] See 25 USC 1903(1); MCL 712B.3(b); 25 CFR 23.2; 25 CFR 23.103(d). The term *child custody proceeding* is uniquely defined under ICWA and MIFPA as it specifically relates to an Indian child.

Where an Indian child is involved, ICWA and MIFPA protections govern child-custody proceedings for an Indian-parent and a non-Indian parent. See *In re Beers/Lebeau-Beers*, 325 Mich App 653, 668 (2018).

"If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding." 25 CFR 23.103(d).

A. When ICWA and MIFPA Requirements Apply

ICWA and MIFPA requirements "apply whenever an Indian child is the subject of:

> (1) A child-custody proceeding, including:
>
> (*i*) An involuntary proceeding;[6]

[4] For discussions on determining an Indian child's status and determining an Indian child's tribe, see Section 11.6.

[5] For a discussion on determining an Indian child's status, see Section 11.6(A).

(*ii*) A voluntary proceeding[7] that could prohibit the parent or Indian custodian from regaining custody of the child upon demand[8]; and

(*iii*) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, preadoptive, or adoptive placement, or termination of parental rights.

(2) An emergency proceeding." 25 CFR 23.103(a). See also 25 USC 1903(1), (4); MCL 712B.3(b)(*i*)-(*v*); MCL 712B.3(k); MCL 712B.7(2); 25 CFR 23.2.

"In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum." 25 CFR 23.103(c). See also *In re Elliott*, 218 Mich App 196, 203, 206 (1996) (trial court erroneously made an independent determination as to whether the child was being removed from an existing Indian family in deciding whether ICWA applied based on "the lack of involvement by the mother or minor child in Indian culture[;]" "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").

B. When ICWA and MIFPA Requirements Do Not Apply

MIFPA does not apply to:

(1) A Tribal court proceeding;

(2) A proceeding regarding a criminal act that is not a status offense;

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[6] For additional information on involuntary proceedings involving an Indian child, see Section 11.16.

[7] For additional information on voluntary proceedings involving an Indian child, see Section 11.15.

[8] See, for example, a voluntary consent to guardianship, adoptive placement, or termination of parental rights, which require the parent or Indian custodian (where applicable) to follow certain formalities of "fil[ing] a written document with the court or otherwise testify[ing] before the court" in order to withdraw his or her consent and regain custody of the Indian child. 25 CFR 23.127(b); 25 CFR 23.128(c). See also MCL 712B.13(3)-(4), MCL 712B.25(4), MCR 3.804(D), and MCR 5.404(B)(3), which also require the parent or Indian custodian (where applicable) to follow certain formalities in order to withdraw his or her consent. For additional information on withdrawal of consent to guardianship, see Section 11.15(A)(3), and withdrawal of consent to adoptive placement, see Section 11.15(B)(3).

(3) An award of custody of the Indian child to one of the parents in a divorce proceeding. See MCL 712B.3(b)(*vi*); MCL 712B.7(1).

"ICWA does not apply to:

(1) A Tribal court proceeding;

(2) A proceeding regarding a criminal act that is not a status offense;

(3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding;[9] or

(4) A voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand." 25 CFR 23.103(b). See also 25 USC 1903(1).

Note: MCL 712B.13 specifically extends MIFPA's application to certain voluntary placements. For a discussion on MIFPA's application to voluntary placements, see Section 11.15.

11.6 Determining Indian Child and Indian Child's Tribe

"ICWA does not apply simply based on a child['s] or parent's Indian ancestry. Instead, there must be a political relationship to [a federally recognized Indian] Tribe" "either by virtue of the child's own citizenship in the Tribe, or through a biological parent's citizenship and the child's eligibility for citizenship." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, B.1 (2016).[10] Note that MIFPA expands to include children eligible for enrollment regardless of whether a biological parent is enrolled. See MCL 712B.3(k).

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[9] ICWA does not apply to custody disputes between parents, "but can apply to other types of intra-family disputes—including disputes with grandparents, step-parents, or other family members—assuming that such disputes otherwise meet the statutory and regulatory definitions." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, B.2 (2016). *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page. "[I]f a proceeding seeks to terminate the parental rights of one parent, that proceeding falls within ICWA's definition of 'child-custody proceeding' even if the child will remain in the custody of the other parent or a step-parent." *Id.*

[10] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

"[A] parent cannot waive a child's status as an Indian child or any right of the tribe that is guaranteed by ICWA." *In re Morris (Morris III)*, 491 Mich 81, 111 (2012).

A. Determining Indian Child Status

The court must determine whether the child involved in the emergency proceeding or child custody proceeding is an Indian child. See 25 CFR 23.103 (applicability of ICWA arises "whenever an Indian child is the subject of" certain proceedings); 25 CFR 23.107 (requiring the court's inquiry and verification of an Indian child's status); Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, B.7 (2016) (providing that "the court must ultimately determine whether the child is an Indian child for purposes of the child-custody proceeding[]").[11]

MCL 712B.9(3) requires "[t]he department [to] actively seek to determine whether a child at initial contact is an Indian child[, and] [i]f the department 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 department 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 department is unable to make an initial determination as to which tribe or tribes a child may be a member, the department shall, at a minimum, contact in writing the tribe or tribes located in the county where the child is located and the secretary." See *In re Jones*, 316 Mich App 110, 119, 121 (2016) (conditionally reversing the trial court's order terminating the respondent-mother's parental rights due to ICWA and MIFPA noncompliance and remanding to the trial court where there were "multiple references in the record to possible Cherokee heritage, the DHHS had adequate information to make an '*initial* determination' that [the minor] '*may* be a member' of the Cherokee tribe, implicating a duty [under MCL 712B.9(3)] to 'exercise due diligence to contact' the Cherokee tribe 'in writing so that the tribe may verify membership or eligibility for membership[,]'" and, at a minimum, to contact in writing any tribe or tribes in the county where the child was located).

"The petitioner shall document all efforts made to determine a child's membership or eligibility for membership in an Indian tribe and shall provide them, upon request, to the court, Indian tribe,

[11] See also 25 USC 1902 and MCL 712B.5, which mandate that state courts adhere to certain minimum procedural requirements under ICWA and MIFPA when an Indian child is involved. *Note*: The link to the Bureau of Indian Affairs resource was create using Perma.cc and directs the reader to an archived record of the page

Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian."

"It is recommended the agency document the requests to the Tribe to obtain information or verification of a child's or parent's Tribal citizenship and provide this information for the court file." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at B.7.

1. Court Determines Indian Child Status for Purposes of ICWA Application

Generally, the Indian Tribe is exclusively responsible for determining whether a child is a member of the Tribe or is eligible for membership, and "[t]he State court may not substitute its own determination regarding" an Indian child's or parent's membership in a Tribe or a child's eligibility for membership.[12] 25 CFR 23.108(a)-(b).

"While a Tribe is the authoritative and best source regarding Tribal citizenship information, the court must ultimately determine whether the child is an Indian child for purposes of the child-custody proceeding. Ideally, that determination would be based on information provided by the Tribe, but may need to be based on other information if, for example, the Tribe(s) fail(s) to respond to verification requests." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, B.7 (2016).[13]

"[I]f a Tribe fails to respond to multiple requests for verification regarding whether a child is in fact a citizen (or a biological parent is a citizen and the child is eligible for citizenship), and the agency has sought the assistance of the Bureau of Indian Affairs (BIA) in contacting the Tribe, [the] court may make a determination regarding whether the child is an Indian child for purposes of the child-custody proceeding based on the information it has available. *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at B.7. "The State court may rely on facts or documentation indicating a Tribal determination of membership or eligibility for membership" when determining whether a child is an Indian child. 25 CFR 23.108(c). "An example of documentation indicating membership is a document issued by the Tribe, such as Tribal enrollment documentation." *Id*.

[12] For a discussion on determining an Indian child's Tribe, see Section 11.6(B).

[13] The links to this resource was created using Perma.cc and directs the reader to an archived record of the page.

"A [court's] finding that a child is an 'Indian child' applies only for purposes of the application of ICWA to that proceeding, and does not establish that child's membership in a Tribe or eligibility for any Federal programs or benefits for any other purpose. If new evidence later arises, the court will need to consider it and should alter the original determination if appropriate." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at B.7.

2. Is There Reason to Know the Child Is an Indian Child?

"State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child." 25 CFR 23.107(a). "Even if a party fails to assert that ICWA may apply, the court has a duty to inquire as to ICWA's applicability to the proceeding." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, B.1 (2016).[14]

"[25 CFR 23.107(a)] does not require an inquiry at each hearing within a proceeding; but, if a new child-custody proceeding (such as a proceeding to terminate parental rights or for adoption) is initiated for the same child, the court must make a finding as to whether there is 'reason to know' that the child is an Indian child. In situations in which the child was not identified as an Indian child in the prior proceeding, the court has a continuing duty to inquire whether the child is an Indian child." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at B.1.

Committee Tip

The benchbook advisory committee recommends that as soon as attorneys or adoption agencies have reason to believe that an adoptee is an Indian child, they should send a letter to the tribe requesting information about the adoptee, even if court

[14]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

proceedings have not yet been initiated. The response from the tribe should be submitted to the court at the earliest possible time in the proceedings.

"If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an 'Indian child,' the court must:

(1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership);[15] and

[**Note:** "[W]ritten verification from the Tribe(s) . . . [and a] Tribal representative's testimony at a hearing regarding whether the child is a citizen (or a biological parent is a citizen and the child is eligible for citizenship) [are] appropriate method[s] of verification by the Tribe." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at B.7. Other methods may also be appropriate. *Id.*]

(2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an 'Indian child' in this part."[16] 25 CFR 23.107(b).

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[15] "The determination of whether a child is an 'Indian child' turns on Tribal citizenship or eligibility for citizenship. . . . The best source for a court to use to conclude that a child or parent is a citizen of a Tribe (or that a child is eligible for citizenship) is a contemporaneous communication from the Tribe documenting the determination." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at B.1 (noting that "the[] guidelines use the terms 'member' and 'citizen' interchangeably[]"). For additional information on determining an Indian child's Tribe, see Section 11.6(B).

[16] "If there is 'reason to know' the child is an 'Indian child,' the court needs to ensure that due diligence was used to identify and work with all of the Tribes of which there is a reason to know the child may be a member or eligible for membership, to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership). In order to provide the information that the court needs, the State agency or other party seeking placement should ask the child, parents, and potentially extended family which Tribe(s) they have an affiliation with and obtain genealogical information from the family, and contact the Tribe(s) with that information." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at B.1. "If there is no 'reason to know' the child is an 'Indian child,' the State agency (or other party seeking placement) should document the basis for this conclusion in the case file." *Id.*

> **Note:** "The State court may rely on facts or documentation indicating a Tribal determination of membership or eligibility for membership in making a judicial determination as to whether the child is an 'Indian child.' An example of documentation indicating membership is a document issued by the Tribe, such as Tribal enrollment documentation." 25 CFR 23.108(c). "However, for the court's determination as to whether the child is an Indian child, the best source is a contemporaneous communication from the Tribe." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at B.1.

The court "has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

> (1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;
>
> (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;
>
> (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
>
> (4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;[17]
>
> (5) The court is informed that the child is or has been a ward of a Tribal court;[18] or
>
> (6) The court is informed that either parent or the child possesses an identification card indicating

[17] Under MCL 712B.9(4), reason to believe a child is an Indian child may also be found where the residence or domicile is "known by the court to be or is shown to be a predominantly Indian community[]" (i.e., not just a reservation or in an Alaska Native village).

[18] Under MCL 712B.9(4), a "reason to believe" a child is an Indian child exists where "[a]n officer of the court involved in the court proceeding has knowledge that the child may be an Indian child." MCL 712B.9(4)(e).

> membership in an Indian Tribe." 25 CFR 23.107(c). See also MCL 712B.9(4), which, except as otherwise noted above, contains substantially similar language and indicates that its listed circumstances are not limited to those specified in the statute.

"If, based on feedback from the relevant Tribe(s) or other information, the court determines that the child is not an 'Indian child,' then the State may proceed under its usual standards." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at B.1.

B. Determining an Indian Child's Tribe

Generally, in determining an Indian child's Tribe, the Indian Tribe is exclusively responsible for determining whether a child is a member of the Tribe or is eligible for membership: "The Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe, except as otherwise provided by Federal or Tribal law." 25 CFR 23.108(a). The Tribe's determination "is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law." 25 CFR 23.108(b).

> **Note:** "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).[19] "If the Indian child is a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child's Tribe." 25 CFR 23.109(a). If the Indian child may be a member or eligible for membership in more than one Tribe, see Section 11.6(B)(2).

"The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe." 25 CFR 23.108(b). 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 deciding whether ICWA applied, the trial court erroneously made

[19] See *Santa Clara Pueblo v Martinez*, 436 US 49, 72 n 32 (1978), which also provides that a Tribe's determination of its membership is conclusive.

an independent determination as to whether the child was being removed from an existing Indian family based on "the lack of involvement by the mother or minor child in Indian culture[;]" "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").

However, "[t]he State court may rely on facts or documentation indicating a Tribal determination of membership or eligibility for membership in making a judicial determination as to whether the child is an 'Indian child.'[20] An example of documentation indicating membership is a document issued by the Tribe, such as Tribal enrollment documentation."[21] 25 CFR 23.108(c). Enrollment documentation is merely an example of the type of proof that may indicate tribal membership. See *In re IEM*, 233 Mich App 438, 445-446 (1999), overruled on other grounds by *In re Morris (Morris III)*, 491 Mich 81 (2012)[22] (finding that tribes do not always have written rolls, and thus, a parent's enrollment in an Indian Tribe is not necessarily a prerequisite to application of ICWA); *In re NEGP*, 245 Mich App 126, 133 (2001), overruled on other grounds by *In re Morris (Morris III)*, 491 Mich 81 (2012)[23] ("The lack of enrollment in a Native American tribe is not . . . conclusive of the issue whether a child qualifies as an 'Indian child.'").

1. Is Indian Tribe Federally Recognized?

ICWA does not apply to an Indian Tribe that is not federally recognized. *In re Fried*, 266 Mich App 535, 540 (2005) (finding that "because the tribe to which 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 (11)"). See also Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, B.4 (2016) (providing that ICWA applies "only if the Tribe is a federally recognized Indian Tribe").[24]

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[20] For a discussion on determining an Indian child's status, see Section 11.6(A).

[21] "However, for the court's determination as to whether the child is an Indian child, the best source is a contemporaneous communication from the Tribe." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, B.1 (2016). Note: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[22] For more information on the precedential value of an opinion with negative subsequent history, see our note.

[23] For more information on the precedential value of an opinion with negative subsequent history, see our note.

[24] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

The court determines if a Tribe meets ICWA's and MIFPA's definition of Indian Tribe. See *In re NEGP*, 245 Mich App 126, 133-134 (2001), overruled on other grounds by *In re Morris (Morris III)*, 491 Mich 81 (2012).[25] ICWA and MIFPA similarly define *Indian Tribe* as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in [43 USC 1602(c)]." 25 USC 1903(8); see also MCL 712B.3(o).[26] Each year, the BIA publishes, in the Federal Register, a list of federally recognized Tribes in the United States.

2. Designation of Indian Child's Tribe

"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).

"[W]hile a child may meet the definition of 'Indian' through more than one Tribe, ICWA establishes that one Tribe must be designated as the 'Indian child's Tribe' for the purposes of the Act." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, L.10 (2016).[27]

a. One Tribe

"If the Indian child is a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child's Tribe." 25 CFR 23.109(a).

b. Multiple Tribes

"If the Indian child meets the definition of 'Indian child' through more than one Tribe, deference should be given to the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes." 25 CFR 23.109(b). "If [the] Indian child meets the definition of 'Indian child' through more than one Tribe because the child is a member in more than one Tribe or the child is

[25] For more information on the precedential value of an opinion with negative subsequent history, see our note.

[26] See also 25 CFR 23.2 and MCR 3.002(17), which contain substantially similar definitions of *Indian tribe*.

[27] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

not a member of but is eligible for membership in more than one Tribe, the court must provide the opportunity in any involuntary child-custody proceeding[28] for the Tribes to determine which should be designated as the Indian child's Tribe." 25 CFR 23.109(c).

- "If the Tribes are able to reach an agreement, the agreed-upon Tribe should be designated as the Indian child's Tribe." 25 CFR 23.109(c)(1).

- "If the Tribes are unable to reach an agreement, the State court designates, for the purposes of ICWA, the Indian Tribe with which the Indian child has the more significant contacts as the Indian child's Tribe, taking into consideration:

  (*i*) Preference of the parents for membership of the child;

  (*ii*) Length of past domicile or residence on or near the reservation of each Tribe;

  (*iii*) Tribal membership of the child's custodial parent or Indian custodian; and

  (*iv*) Interest asserted by each Tribe in the child-custody proceeding;

  (*v*) Whether there has been a previous adjudication with respect to the child by a court of one of the Tribes; and

  (*vi*) Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify." 25 CFR 23.109(c)(2).

"A determination of the Indian child's Tribe for purposes of ICWA and the regulations in this subpart do not constitute a determination for any other purpose." 25 CFR 23.109(c)(3).

11.7 Confidentiality Concerns

"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

[28] For additional information on involuntary child-custody proceedings, see Section 11.16.

other information sent to the secretary and the tribal enrollment officer of the appropriate Indian tribe described in [MCL 712B.35(1)]."[29] MCL 712B.35(2).

"In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal."[30, 31] 25 CFR 23.107(d). Note, however, that a parent's request for anonymity "does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an 'Indian child.'" *Id.*

25 USC 1915(c) and 25 CFR 23.129(b) require the court to give weight to a consenting parent's desire for anonymity when applying placement preferences. For a discussion on placement preferences, see Section 11.19.

11.8 Notice of Proceedings

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 by *In re Morris (Morris III)*, 491 Mich 81 (2012).[32] See also 25 USC 1912(a); MCL 712B.9(1); MCL 712B.9(3). "[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)." *Morris III*, 491 Mich at 108-109. Under MIFPA, notice requirements may be triggered where information is discovered that suggests a child is an Indian child and where the court has knowledge that the child may be an Indian child. See *In re Jones*, 316 Mich App 110, 117 (2016), citing MCL 712B.9(4)(b); MCL 712B.9(4)(e). Failure to comply with the notice requirements will result in a conditional reversal. See *Morris III*, 491 Mich at 121; *Jones*, 316 Mich App at 119. If, on remand, the trial court concludes that ICWA or MIFPA applies to the case, any orders already issued must

[29] MCL 712B.35(1) requires a court "entering a final decree or order in any Indian child adoptive placement [to] provide the secretary and the tribal enrollment officer of the appropriate tribe with a copy of the decree or order together with other information as may be necessary to show the following: (a) [t]he name, date of birth, and tribal affiliation of the child[;] (b) [t]he names and addresses of the biological parents, if known[;] (c) [t]he names and addresses of the adoptive parents[; and] (d) [t]he identity of any agency having files or information relating to the adoptive placement." See Section 11.21 for additional information.

[30] "A Tribe receiving information related to this inquiry must keep documents and information confidential." 25 CFR 23.107(d).

[31] For additional information on voluntary proceedings, see Section 11.15.

[32] For more information on the precedential value of an opinion with negative subsequent history, see our note.

be vacated, and the proceedings must begin anew. See *Morris III*, 491 Mich at 123; *Jones*, 316 Mich App at 119.

In *Morris III*, 491 Mich at 108-109, the trial courts[33] properly determined "that there existed sufficient indicia of Indian heritage to require tribal notice" where one trial court found 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 other trial court found 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.

The following cases involve conditional reversals for failure to comply with ICWA/MIFPA notice requirements:

- *In re Johnson*, 305 Mich App 328, 330, 332, 336 (2014)

The Court of Appeals conditionally reversed the trial court's order terminating the respondent-mother's parental rights due to ICWA noncompliance and remanded the case to the trial court because ICWA notice requirements were triggered following "the minor child's father['s]

[33] In *In re Morris (Morris III)*, 491 Mich 81 (2012), 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 ICWA.

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 American Indian child."

- *In re Jones*, 316 Mich App 110, 117-118 (2016)

The Court of Appeals conditionally reversed the trial court's order terminating the respondent-mother's parental rights due to ICWA and MIFPA noncompliance and remanded the case to the trial court because "the notice requirements of both 25 USC 1912(a) and MCL 712B.9(1) were triggered" when the respondent-mother, "although unsure, thought that [the child's] father might have Cherokee heritage, and . . . told the trial court that [the child's] father informed her that 'he might be Cherokee.' Given that the DHHS and the trial court had information that at least suggested the possibility of Cherokee heritage, absent mention of any other potential tribal affiliation, notice should have been sent to the Cherokee tribe for purposes of 25 USC 1912(a) and MCL 712B.9(1)[, but t]here [was] no indication in the record that such notice was sent."

A. Parent Cannot Waive Right

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 81, 95-97, 110-111 (2012) (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 ICWA. First, the purported letter to [the grandmother] had nothing to do with 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

> ICWA does not apply to the child custody proceedings." *Morris III*, 491 Mich at 111 n 20.

B. Notice Requirements

Once the court "knows or has reason to know that the subject of an involuntary foster-care-placement or termination-of-parental rights proceeding is an Indian child, the court must ensure that:

> (1) The party seeking placement promptly sends notice[34] of each such child-custody proceeding (including, but not limited to, any foster-care placement or any termination of parental or custodial rights) in accordance with [25 CFR 23.111]; and
>
> (2) An original or a copy of each notice sent under [25 CFR 23.111] is filed with the court together with any return receipts or other proof of service." 25 CFR 23.111(a). See also 25 USC 1912(a); MCL 712B.9(1).[35]

Notice must be sent to "[e]ach Tribe where the child may be a member (or eligible for membership if a biological parent is a member)[.]" 25 CFR 23.111(b)(1).[36] "This notice is required in addition to the informal contacts made with the Tribe, such as those to verify Tribal membership and open the lines of communication." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, D.1 (2016). For additional information on determining an Indian child's status and determining an Indian child's Tribe, see Section 11.6.

> **Note:** "Notice is required for a [termination of parental rights] proceeding, even if notice has previously been given for the child's foster-care proceeding." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at D.1.

Copies of the notice must also be sent to the Midwest Regional Director. See 25 CFR 23.11(a); 25 CFR 23.11(b)(2).[37]

The Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at D.1, recommends that "State agencies

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[34] See the ICWA form *Notice Form*.

[35] **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.

[36] 25 CFR 23.111(b) and MCL 712B.9 also require notification be sent to the child's parent(s) and the child's Indian custodian (if applicable). 25 CFR 23.111(b)(2)-(3); MCL 712B.9(1).

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and/or courts provide notice to Tribes and parents or Indian custodians of:

> [(1)] Each individual hearing within a proceeding;
>
> [(2)] Any change in placement – the statute provides rights to parents, Indian custodians and Tribes (e.g., right to intervene) and a change in circumstances resulting from a change in placement may prompt an individual or Tribe to invoke those rights, even though they did not do so before;
>
> [(3)] Any change to the child's permanency plan or concurrent plan – a change in the ultimate goal may prompt an individual or Tribe to invoke their rights, even though they did not do so before;
>
> [(4)] Any transfer of jurisdiction to another State or receipt of jurisdiction from another State."

C. Service Requirements

"The first step in the [ICWA and MIFPA notification] process is to send the appropriate notification to 'the parent or Indian custodian *and* the Indian child's tribe,' if determinable[, and]" if "'the identity or location of the parent or Indian custodian and the tribe cannot be determined[,]'" written notice must be sent to the tribe(s) in the county where the child is located and the Secretary of the Interior. *In re Jones*, 316 Mich App 110, 117-118, 121 (2016) (conditionally reversing the trial court's order terminating the respondent-mother's parental rights remanding to the trial court because the court did not comply with ICWA or MIFPA when it failed to send notice to the Cherokee Tribe after "the DHHS and the trial court had information that at least suggested the possibility of Cherokee heritage[;]" although notice was sent to the Secretary of the Interior, "such notice only becomes obligatory when 'the identity or location of the parent or Indian custodian and the tribe cannot be determined[]'").

1. Identity and Location of Parents, Indian Custodian, 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),[38] Indian

[38] "If a putative father acknowledges paternity, he must receive notice of the hearing if the child is an Indian child." MCR 3.801(A).

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."[39] MCL 712B.9(1). See also 25 USC 1912(a), which contains substantially similar language, MCR 3.802(A)(3), which contains substantially similar language but also requires restricted delivery to the addressee when mailing by registered mail with return receipt requested, and 25 CFR 23.11(a),[40] which contains substantially similar language except that it requires registered or certified mail with return receipt requested.

In addition to requiring notice to be sent "by registered or certified mail with return receipt requested[, n]otice may also be sent via personal service or electronically, but such alternative methods do not replace the requirement for notice to be sent by registered or certified mail with return receipt requested." 25 CFR 23.111(c).

a. Send Notification to Each Potential Tribe

Notice must be sent to "[e]ach Tribe where the child may be a member (or eligible for membership if a biological parent is a member)[.]" 25 CFR 23.111(b)(1).[41]

For purposes of providing notification to a Tribe:

- "Many Tribes designate an agent for receipt of ICWA notices."[42] 25 CFR 23.105(a). For a published list of current designated Tribal agents by region and alphabetically by Tribe within each region, see the Bureau of Indian Affairs, *Indian Child Welfare Act; Designated Tribal Agents for Service of Notice*, 83 Federal Register 25685, Part A (2018).[43]

- "For a Tribe without a designated Tribal agent for service of ICWA notice, contact the Tribe to

[39] For information on the Tribe's or Indian custodian's right of intervention, see Section 11.12.

[40] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[41] 25 CFR 23.111(b) also requires notification be sent to the child's parent(s) and the child's Indian custodian (if applicable). 25 CFR 23.111(b)(2)-(3).

[42] See 25 CFR 23.12, which permits Indian Tribes to designate an agent other than the Tribal chairman for service of notice of proceedings under ICWA.

[43] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

be directed to the appropriate office or individual." 25 CFR 23.105(b).

- "If you do not have accurate contact information for a Tribe, or the Tribe contacted fails to respond to written inquiries, you should seek assistance in contacting the Indian Tribe from the BIA local or regional office or the BIA's Central Office in Washington, DC[.]" 25 CFR 23.105(c).

In addition to written contact, it is recommended that State agencies contact the Tribal ICWA agent by telephone and/or email. Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*,[44] 81 Federal Register 96476, B.6 (2016). "State agencies should document their conversations with Tribal agents." *Id*.

b. Forward Copies of Notices to Secretary of the Interior's Regional Director

Copies of these notices must be sent "by registered or certified mail with return receipt requested or by personal delivery" to the Secretary of the Interior's Regional Director, which for Michigan is the Midwest Regional Director. 25 CFR 23.11(a); 25 CFR 23.11(b)(2).[45]

2. Identity or Location of Parents, Indian Custodian, or Tribe Cannot be Determined

When the identity or location of the Indian parent(s) or Indian custodian(s), and the Tribe cannot be determined, but there is reason to know the child is an Indian child, notice of the pending child-custody proceeding must be sent by registered mail with return receipt requested to Michigan's Secretary of the Interior's Regional Director, the Midwest Regional Director.[46] 25 USC 1912(a); MCL 712B.9(1); MCR 3.802(A)(3); 25 CFR 23.111(e). See *In re Jones*, 316 Mich App 110, 117 (2016) ("notice [to the Secretary of the Interior] only becomes obligatory when 'the identity or location of the parent or Indian custodian and the tribe cannot be determined'").

[44]THe link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[45]The link to these resources was created using Perma.cc and directs the reader to an archived record of the page.

[46] 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." 25 CFR 23.111(e).

> **Note:** On receipt of notice, the Secretary must make "reasonable documented efforts to locate and notify the child's Tribe and the child's parent or Indian custodian." 25 CFR 23.11(c).[47] The Secretary has 15 days after receiving the notice to notify the child's Tribe and parents or Indian custodian and to send a copy of the notice to the court. 25 USC 1912(a); MCL 712B.9(1); 25 CFR 23.11(c).[48] If, within the 15-day period, the Secretary is unable to verify that the child meets the criteria of an Indian child, or is unable to locate the parents or Indian custodians, the Secretary must notify the court regarding the amount of additional time, if any, needed to complete the verification or the search. 25 CFR 23.11(c).[49] The Secretary must complete all research efforts, even if the research cannot be completed before the child-custody proceeding begins. *Id.*

"If, at any point, it is discovered that someone is a 'parent,' as that term is defined in [25 CFR 23.2], that parent would be entitled to notice." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*,[50] 81 Federal Register 96476, D.2 (2016).

D. Notice Requirements

"Notice [provided to the Indian child's parent(s), Indian custodian(s), and the Indian child's Tribe] must include the requisite information identified in [25 CFR 23.111], consistent with the confidentiality requirement in [25 CFR 23.111(d)(6)(*ix*)]." 25 CFR 23.11(a).[51] Copies of these notices must be sent to the Secretary and must "include the information required by [25 CFR 23.111]." 25 CFR 23.11(a).[52]

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Specifically, 25 CFR 23.111(d) requires "[n]otice [to] be in clear and understandable language and include the following:

> "(1) The child's name, birthdate, and birthplace;
>
> (2) All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;
>
> (3) If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;
>
> (4) The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);
>
> (5) A copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing;
>
> (6) Statements setting out:
>
> > (*i*) The name of the petitioner and the name and address of petitioner's attorney.
> >
> > (*ii*) The right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings.
> >
> > (*iii*) The Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child.
> >
> > (*iv*) That, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel.
> >
> > (*v*) The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings.
> >
> > (*vi*) The right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster-care-placement or termination-of-parental-rights proceeding to Tribal

> court as provided by 25 USC 1911 and [25 CFR 23.115].
>
> (*vii*) The mailing addresses and telephone numbers of the court and information related to all parties to the child-custody proceeding and individuals notified under this section.
>
> (*viii*) The potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian.
>
> (*ix*) That all parties notified must keep confidential the information contained in the notice and the notice should not be handled by anyone not needing the information to exercise rights under ICWA."

Where possible, notice should also include:

> "[(1) g]enograms or ancestry/family charts for both parents;
>
> [(2) a]ll known names of both parents (maiden, married and former names or aliases), including possible alternative spellings;
>
> [(3) c]urrent and former addresses of the child's parents and any extended family;
>
> [(4) b]irthdates and places of birth (and death, if applicable) of both parents;
>
> [(5) a]ll known Tribal affiliation (or Indian ancestry if Tribal affiliation not known) for individuals listed on the ancestry/family charts; and
>
> [(6) t]he addresses for the domicile and residence of the child, his or her parents, or the Indian custodian and whether this is on an Indian reservation or in an Alaska Native village." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*,[53] 81 Federal Register 96476, B.7 (2016).

"If there is a reason to know that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court must provide

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language access services as required by Title VI of the Civil Rights Act[, 42 USC 2000d *et seq*.,] and other Federal laws. To secure such translation or interpretation support, a court may contact or direct a party to contact the Indian child's Tribe or the local BIA office for assistance in locating and obtaining the name of a qualified translator or interpreter."[54] 25 CFR 23.111(f). 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 ICWA, the BIA's regulations, or Michigan case law that [the] petitioner conduct independent research to obtain a parent's detailed genealogical information[;]" rather, the BIA guidelines require notice to include ancestry information *if known*. *In re Morris* (*After Remand*) *(Morris IV)*, 300 Mich App 95, 105, 107 (2013)[55] (where "[the] respondent could not obtain any additional information regarding his [or her] relatives, it would be unreasonable to expect [the] petitioner to find it[; 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 requirement that ICWA tribal notices include every detail of a child's ancestry would undermine 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[]").

E. Procedures After Providing Notice

The court must wait a minimum of 10 days after the parent or Indian custodian 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); 25 CFR 23.112(a). On request, the court must grant the parent, Indian custodian, or an Indian Tribe an additional 20 days to prepare for the proceeding.[56] 25 USC 1912(a); MCL 712B.9(2); 25 CFR 23.112(a); Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*,[57] 81 Federal Register 96476, D.7 (2016). "Any extension beyond the initial extension up to 20 days is subject to the State court's rules and

[54] For a discussion of court-appointed foreign language interpreters, see Section 4.5.

[55] The *Morris IV* case was filed before MIFPA was enacted.

[56] See the ICWA form *Motion for Extension of Time*.

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discretion." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, *supra*.

> **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 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 ICWA does not require the court or [the] petitioner to demand a response from the tribes notified." *In re Morris* (*After Remand*) *(Morris IV)*, 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 by *In re Morris (Morris III)*, 491 Mich 81 (2012).[58] See also *In re IEM*, 233 Mich App 438, 449 (1999), overruled on other grounds by *In re Morris* (*Morris III)*, 491 Mich 81 (2012)[59] ("'[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'"); *Morris IV*, 300 Mich App at 106 (respondent-father failed to meet his burden of proving 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 [the] petitioner and the trial court satisfied their obligations [to comply with 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 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." *Morris IV*, 300 Mich App at 108.

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[58] For more information on the precedential value of an opinion with negative subsequent history, see our note.

[59] For more information on the precedential value of an opinion with negative subsequent history, see our note.

"If the Tribe does not respond to the notice, or responds that it is not interested in participating in the proceeding, the court or agency must still send the Tribe notices of subsequent proceedings for which notice is required (i.e., a subsequent [termination of parental rights] proceeding). In cases where the Tribe does not confirm receipt of the required notice or otherwise does not respond, the [Bureau of Indian Affairs] recommends following up telephonically. The Tribe may decide to intervene or otherwise participate at a later point even if it has previously indicated it is not interested in participating." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*,[60] 81 Federal Register 96476, D.10 (2016).

F. Recordkeeping Requirements to Show Compliance

"While 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."[61] *In re Morris (Morris III)*, 491 Mich 81, 113 (2012). 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.
>
> In 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)." *Morris III*, 491 Mich at 114.

11.9 Advice of Rights

"If a parent or Indian custodian of an Indian child appears in court without an attorney, the court must inform him or her of his or her rights, including any applicable right to appointed counsel, right to request that the child-custody proceeding be transferred to Tribal court, right to object

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[61] The Michigan Supreme Court found in *In re Morris (Morris III)*, 491 Mich 81, 112 (2012), 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."

to such transfer, right to request additional time to prepare for the child-custody proceeding as provided in [25 CFR 23.112], and right (if the parent or Indian custodian is not already a party) to intervene in the child-custody proceedings." 25 CFR 23.111(g).

For a discussion of appointment of counsel for an indigent parent or Indian custodian, see Section 11.11, transfer or objection to transfer of proceeding to Tribal court, see Section 11.10(B), request for additional time, see Section 11.8(E), and intervention in proceedings, see Section 11.12.

11.10 Jurisdiction

"The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and domicile of the Indian child."[62] 25 CFR 23.110(a). This will help guide the court in determining whether it has jurisdiction over the proceeding. Jurisdiction types include exclusive, concurrent, limited due to an emergency, and agreed-upon.

State court jurisdiction. A State court has jurisdiction over an Indian child-custody proceeding in the following situations:

(1) Concurrent jurisdiction where the Indian child is domiciled or resides off an Indian reservation and is not a ward of the Tribal court, 25 USC 1911(b), MCL 712B.7(3); and

(2) Limited emergency jurisdiction where the State has removed the Indian child in an emergency situation to prevent imminent physical damage or harm to the Indian child (applicable to both reservation-resident Indian children temporarily off the reservation or non-reservation-resident Indian children).[63] 25 USC 1922; MCL 712B.7(2); MCR 3.974(C)(1); Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*,[64] 81 Federal Register 96476, C.1 (2016). See also 25 CFR 23.110; 25 CFR 23.113.

Note: The emergency jurisdiction terminates when such removal or placement is no longer necessary to prevent

[62] For additional information on determining an Indian child's status, see Section 11.6(A).

[63] "The court must comply with the emergency removal hearing requirements outlined in [MCR 3.974(C)] and [MCL 712A.13a], [MCL 712A.14], . . . [MCL 712A.14a][,]" MCL 712B.7(2), and the standards for emergency proceedings outlined in 25 CFR 23.113. MCL 712B.7(2). See the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 15, for more information on emergency removals.

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imminent physical damage or harm to the Indian child. 25 USC 1922; MCL 712B.7(2); MCR 3.905(B); 25 CFR 23.113(a).

Tribal court jurisdiction. A Tribe has jurisdiction over an Indian child-custody proceeding in the following situations:

(1) Exclusive jurisdiction where the Indian child is domiciled or resides on an Indian reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings, 25 USC 1911(a), MCL 712B.7(1), MCR 3.002(6), 25 CFR 23.110(a);

(2) Exclusive jurisdiction where the 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), 25 USC 1911(a), MCL 712B.7(1), MCR 3.002(6), 25 CFR 23.110(b); and

(3) Concurrent jurisdiction where the Indian 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).

Tribal-State agreements regarding jurisdiction. The state may enter into agreements with tribes regarding, among other things, jurisdiction over child-custody proceedings.[65] 25 USC 1919(a), MCL 712B.31(1). The agreements "may provide for transfer of jurisdiction on a case-by-case basis" and "concurrent jurisdiction between the state and Indian tribes." MCL 712B.31(1); see also 25 USC 1919(a), which contains substantially similar language.

A. Mandatory Transfer of Case to Tribal Court

If an Indian Tribe has exclusive jurisdiction over an adoption proceeding, the State court must dismiss the matter, notify the Tribe of the pending dismissal, and ensure that the Tribe is sent all information regarding the proceeding. MCR 3.807(B)(1); 25 CFR 23.110(a)-(b).

"To ensure the well-being of the child, State officials should continue to work on the case until the State court officially dismisses the case from State jurisdiction." Bureau of Indian Affairs, *Guidelines*

[65] 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 specified, 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).

for Implementing the Indian Child Welfare Act,[66] 81 Federal Register 96476, F.1 (2016).

1. Child's Domicile or Residence is on an Indian Reservation

"If either the residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings, the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe's exclusive jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record." 25 CFR 23.110(a). See also 25 USC 1911(a), MCL 712B.7(1), MCR 3.002(6), and MCR 3.807(B)(1).

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. 25 USC 1911(a); MCL 712B.7(1); MCR 3.002(6); 25 CFR 23.110(b).

"If the child is a ward of a Tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record." 25 CFR 23.110(b).

B. Non-Mandatory Transfer of Case to Tribal Court (Concurrent Jurisdiction)

When the Indian child is domiciled or resides off the Indian reservation and is not a ward of the Tribal court, the Tribal court and the State court have concurrent jurisdiction. 25 USC 1911(b); MCL 712B.7(3).

Note: If the Tribe does not have exclusive jurisdiction over the adoption proceeding, the court must ensure that the petitioner gave notice of the proceedings to the interested parties. MCR 3.807(B)(2). See MCL 710.24a

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and MCR 3.800(B) for lists of the interested parties. For information on notice requirements, see Section 11.8.

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 the Tribal court, or the Tribal court declines the transfer. 25 USC 1911(b); MCL 712B.7(3); MCR 3.807(B)(2)(a); 25 CFR 23.117.

Note: The State court must not dismiss the case until the transfer has been accepted by the Tribal court. MCR 3.807(B)(2)(b).

1. Request for Transfer of Case to Tribal Court

Either parent, the Indian custodian, or the Indian child's Tribe may request a transfer of the adoption proceeding to a Tribal court at any time. MCL 712B.7(3); MCR 3.807(B)(2)(d). See also 25 CFR 23.115(a), which permits "[e]ither parent, the Indian custodian, or the Indian child's Tribe [to] request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental rights proceeding to the jurisdiction of the child's Tribe."

Note: "The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding." 25 CFR 23.115(b). The transfer provisions "apply to both involuntary and voluntary foster-care and [termination-of-parental-rights] proceedings[,] . . . includ[ing termination-of-parental-rights] proceedings that may be handled concurrently with adoption proceedings." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*,[67] 81 Federal Register 96476, F.2 (2016).

Once the court receives a request to transfer the adoption proceeding to a Tribal court, the court "must ensure that the Tribal court is promptly notified in writing of the [request for transfer]."[68] 25 CFR 23.116. The court's notification to the Tribal court "may request a timely response regarding whether the Tribal court wishes to decline the transfer." *Id.*

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[68] "[I]n addition to the required written notification, State court personnel [should] contact the Tribe by phone as well." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at F.3.

2. Parental Objection to Transfer

Either parent 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); 25 CFR 23.117(a); MCL 712B.7(3); MCR 3.807(B)(2)(a).

"However, if a parent's parental rights have been terminated and this determination is final, they would no longer be considered a 'parent' with a right under [25 CFR 23.117] to object." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*,[69] 81 Federal Register 96476, F.4 (2016).

3. Good Cause Not to Transfer

The court must not transfer the proceeding to the Tribal court if it finds good cause not to transfer it. 25 USC 1911(b); 25 CFR 23.117(c); MCL 712B.7(3); MCR 3.807(B)(2)(a).

"If the State court believes, or any party asserts, that good cause to deny transfer exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child-custody proceeding." 25 CFR 23.118(a). "Any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists." 25 CFR 23.118(b).

Under MIFPA, good cause may exist "only if the person opposing the transfer shows by clear and convincing evidence[70] that either of the following applies:

> (a) The Indian child's tribe does not have a tribal court.
>
> (b) 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." MCL 712B.7(5). See also MCR 3.807(B)(2)(a), which contains substantially similar requirements.

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[70] The Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, F.5 (2016), also recommends the State courts apply a clear and convincing standard of evidence for the determination of whether there is good cause to transfer a proceeding to Tribal court. The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

"[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)").

"By its plain language, good cause not to transfer an Indian child custody proceeding to a tribal court under MCL 712B.7(5)(b) has three components. First, there must be an undue hardship on the parties or witnesses that will be required to present evidence in the tribal court. . . . Second, the undue hardship must stem from the requirement to present evidence in the tribal court. . . . Third, 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 at 671-672 (trial court erred in finding good cause not to 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] were required 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 any anticipated undue hardship").

"In determining whether good cause exists, the court must *not* consider:

> (1) Whether the foster-care or termination-of-parental rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;[71]
>
> (2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;

[71] For purposes of good cause determination, the MIFPA provides higher standards of protection under MCL 712B.5(b) by preventing any timeliness considerations than the ICWA provides under 25 CFR 23.118(c)(1). See 25 USC 1921, which provides that applicable state law prevails if it contains higher standards than the ICWA.

> (3) Whether [the] transfer could affect the placement of the child;
>
> (4) The Indian child's cultural connections with the Tribe or its reservation; or
>
> (5) Socioeconomic conditions or any negative perception of Tribal or [Bureau of Indian Affairs (BIA)] social services or judicial systems." 25 CFR 23.118(c) (emphasis added). See also MCL 712B.7(4) and MCR 3.807(B)(2)(a), which prohibit the court from considering the "adequacy of the tribe, tribal court, or tribal social services" when making a good cause determination.

"[N]othing prohibits the State court from considering[, where appropriate,] the [child's or guardian ad litem's] objection" when determining whether good cause exists. Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*,[72] 81 Federal Register 96476, F.4 (2016).

"The basis for any State-court decision to deny transfer should be stated orally on the record or in a written order." 25 CFR 23.118(d).

4. 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); 25 CFR 23.117(b); MCL 712B.7(3); MCR 3.807(B)(2)(b). On a declination of transfer, the court must apply MIFPA and applicable court rule provisions as they pertain to the Indian child. MCR 3.807(B)(2)(c).

"[T]he State court [should] obtain documentation of the Tribal court's declination to include in the record." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*,[73] 81 Federal Register 96476, F.4 (2016).

5. Acceptance of Transfer

"If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related

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to the proceeding, including, but not limited to, the pleadings and any court record." 25 CFR 23.119(a).

> **Note:** The State court must not dismiss the case until the transfer has been accepted by the Tribal court. MCR 3.807(B)(2)(b).

"The State court should work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family." 25 CFR 23.119(b).

11.11 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 Indian 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."It is a recommended practice, where possible, to appoint the same counsel for the entirety of the trial court case (throughout all proceedings), to ensure parents' rights are addressed consistently throughout the trial court case, rather than appointing different representatives at each stage." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*,[74] 81 Federal Register 96476, D.9 (2016).

"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 4.6.

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 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.

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When the court notifies the Secretary of the Interior of the appointment of counsel, the court must also notify the BIA Regional Director in the Midwest Regional Office. 25 CFR 23.11(b)(2);[75] 25 CFR 23.13(a).[76]

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)(1)-(7).[77]

11.12 Right to Intervene/Participate in Proceedings

"In any state court child custody proceeding of 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."[78] MCL 712B.7(6). See also MCR 3.807(B)(3), which contains substantially similar language; 25 USC 1911(c), which provides for a right of intervention, but limits it to a proceeding for foster care placement or termination of parental rights.[79]

"[An] [o]fficial tribal representative[] ha[s] the right to participate in any proceeding that is subject to the [ICWA] and [MIFPA]." MCL 712B.7(7). "An official tribal representative does not need to be an attorney." MCL 712B.3(r).

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[78] See Section 11.6 for a discussion on determining an Indian child's status and an Indian child's Tribe.

[79] See the ICWA form *Motion to Intervene*.

11.13 Participation By Alternative Methods[80]

"If it possesses the capability, the court should allow alternative methods of participation in State-court child-custody proceedings involving an Indian child, such as participation by telephone, videoconferencing, or other methods." 25 CFR 23.133. In Michigan and for purposes of adoption consent and release hearings, "[e]xcept for a consent hearing involving an Indian child pursuant to MCL 712B.13, the court may allow the use of videoconferencing technology under [subchapter 3.800 of the Michigan Court Rules] in accordance with MCR 2.407." MCR 3.804(B)(3). MCR 5.140(A) also permits "upon the request of any participant or sua sponte, the court [to] allow the use of videoconferencing technology under [chapter 5 of the Michigan Court Rules] in accordance with MCR 2.407[]" for purposes of, among others, involuntary guardianship proceedings involving an Indian child "[e]xcept as otherwise prescribed by this rule[.]"[81, 82] However, for purposes of voluntary guardianship proceedings involving an Indian child, the court may not use videoconferencing technology for a consent hearing required under MCL 712B.13 and MCR 5.404(B). MCR 5.140(D); MCR 5.404(B)(1).

See Section 11.6(A) for a discussion on Indian children, and see Section 11.16(C) for a discussion on involuntary guardianship proceedings involving an Indian child.

11.14 Visitation of Indian Child

"At any time during an adoption proceeding, a court may order visitation between [an] Indian child and 1 or more members of the Indian child's tribe and extended family members." MCL 712B.27(2). For a discussion on an Indian child's Tribe, see Section 11.6(B).

11.15 Voluntary Proceedings[83]

A *voluntary proceeding* is "a child-custody proceeding that is not an involuntary proceeding, such as a proceeding for foster-care,

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[80]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

[81] "In a proceeding concerning a conservatorship, guardianship, or protected individual, if the subject of the petition wants to be physically present, the court must allow the individual to be present. The right to be present for the subject of a minor guardianship applies only to a minor 14 years of age or older." MCR 5.140(C).

[82] "The use of videoconferencing technology under [chapter 5 of the Michigan Court Rules] must be in accordance with the standards established by the State Court Administrative Office. All proceedings at which videoconferencing technology is used must be recorded verbatim by the court." MCR 5.140(E).

[83]Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

preadoptive, or adoptive placement that either parent, both parents,[84] or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights." 25 CFR 23.2.

MIFPA provides a proceeding is voluntary when:

- *both* parents or Indian custodian voluntarily consent(s) to a petition for guardianship under MCL 700.5204 or MCL 700.5205, or

- *a* parent consents to "adoptive placement or the termination of his or her parental rights for the express purpose of adoption by executing a release under [MCL 710.28 and MCL 710.29], or consent under [MCL 710.43 and MCL 710.44.]" MCL 712B.13(1).

  Note: For purposes of voluntary proceedings, MIFPA provides higher standards of protection under MCL 712B.13 by specifying certain circumstances that give rise to a voluntary proceeding than ICWA provides under 25 USC 1913. See 25 USC 1921 (providing that applicable state law prevails if it contains higher standards than ICWA). See also 25 CFR 23.103(b)(4) (providing that ICWA does *not* apply to "[a] voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand[]").

"An individual parent's consent is valid only as to himself or herself." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, I.6 (2016).[85]

"The State court must require the participants in a voluntary proceeding to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child, as provided in [25 CFR 23.107]. If there is reason to believe the child is an Indian child, the State court must ensure that the party seeking placement has taken all

[84] "If a parent refuses to consent to the foster-care, preadoptive, or adoptive placement or [termination of parental rights], the proceeding would meet the definition of an 'involuntary proceeding.' Nothing in the statute indicates that the consent of one parent eliminates the rights and protections provided by ICWA to a non-consenting parent." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, L.21 (2016). *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[85] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

reasonable steps to verify the child's status. This may include contacting the Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) to verify the child's status. As described in [25 CFR 23.107], where a consenting parent requests anonymity, a Tribe receiving such information must keep relevant documents and information confidential." 25 CFR 23.124(a)-(b). For a detailed discussion on determining an Indian child's status, finding an Indian child's Tribe, and addressing confidentiality concerns, see Sections 11.6-11.7.

Once the parent(s) or Indian custodian has voluntarily consented, the court must follow ICWA's and MIFPA's placement preferences (unless the child's Tribe has established a different order of preference or good cause is shown to the contrary). See 25 USC 1915; MCL 712B.23; 25 CFR 23.124(c). For a detailed discussion of preferred placements of Indian children, see Section 11.19.

A. Consent to Guardianship of an Indian Child

A brief discussion of guardianships in the context of both parents or Indian custodian voluntarily consenting to a petition for guardianship under MCL 700.5204 and MCL 700.5205 is included in this subsection. Although a detailed discussion of guardianships as it relates to specific requirements of providing notice and petitioning the court for a guardianship are beyond the scope of this benchbook, see the Michigan Judicial Institute's checklist on appointing a guardian for an Indian child.

"A voluntary consent to guardianship of an Indian child must be executed by both parents or the Indian custodian." MCR 5.404(B). See MCR 5.404(A)(3) (requiring the court to proceed under MCR 5.404(B) if the petition for guardianship of a minor "involves an Indian child and both parents intend to execute a consent pursuant to MCL 712B.13 and [MCR 5.404][]").

> **Note:** If *both* parents do not intend to execute a petition for guardianship of a minor Indian child as is required under MCL 712B.13, it is considered an involuntary guardianship and the court must proceed under MCR 5.404(C). MCR 5.404(A)(3). See also MCL 712B.25(3), which provides that "[i]f 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][; i]f 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] must be met." For additional

information on involuntary guardianship proceedings involving an Indian child, see Section 11.16(C).

A petition for guardianship of a minor Indian child must be filed on a form approved by the State Court Administrative Office, and must state "whether or not the minor is an Indian child or whether that fact is unknown." MCR 5.404(A)(1). The petitioner must also "document all efforts made to determine a child's membership or eligibility for membership in an Indian tribe and shall provide them, upon request, to the court, Indian tribe, Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian." MCR 5.404(A)(1).

On the filing of the petition for guardianship of a minor Indian child, "the court may appoint a guardian ad litem to represent the interests of a minor and may order the [DHHS] or a court employee or agent to conduct an investigation of the proposed guardianship and file a written report of the investigation in accordance with MCL 700.5204(1)." MCR 5.404(A)(2). "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."*Id*.

"If the petition involves an Indian child, the report shall contain the information required in MCL 712B.25(1)[and] . . . shall be filed with the court and served no later than 7 days before the hearing on the petition." MCR 5.404(A)(2). MCL 712B.25(1) requires, "[i]n addition to the information required in . . . MCL 700.5204, the report [to] include, but not [be] limited to, the following information:

(a) Whether the child is or is not an Indian child.

(b) The identity and location of the Indian 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 Indian child is a member or eligible for membership.

(*ii*) If the Indian child and family need culturally appropriate and other services to preserve the Indian family.

(*iii*) The identity and location of extended family members and if no extended family members can be found, what efforts were made to locate them."

1. Procedures

A voluntary consent proceeding must meet three requirements:

(a) Valid execution of consent.

(b) Proper notice.

(c) Conform to certain court rule and statutory requirements. MCL 712B.13(1).

a. Valid Execution of Consent

"To be valid, the consent [for guardianship of an Indian child] must contain the information prescribed by MCL 712B.13(2) and be executed on a form approved by the State Court Administrative Office, in writing, recorded before a judge of a court of competent jurisdiction,[86] and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood." MCR 5.404(B)(1).[87] See also MCL 712B.13(1)(a), which contains substantially similar requirements.

> **Note:** "The court may not use videoconferencing technology for the consent hearing required to be held under the [MIFPA] and MCR 5.404(B)." MCR 5.140(D); MCR 5.404(B)(1).

The court must also explain, before accepting the parent's or Indian custodian's consent, that the parent or Indian custodian may withdraw his or her consent "for any reason, at any time, and have the child returned[.]" 25 CFR 23.125(b)(2)(*i*).

A consent given before or within 10 days of an Indian child's birth is not valid. 25 USC 1913(a); MCL 712B.13(1)(a); 25 CFR 23.125(e); MCR 5.404(B)(1).

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[86] For a detailed discussion of jurisdiction, see Section 11.10.

[87] See also 25 USC 1913(a), MCL 712B.13(1)(a), 25 CFR 23.125(a), 25 CFR 23.125(b)(1), and 25 CFR 23.125(c), which contain substantially similar consent requirements.

Confidentiality. "Where confidentiality is requested or indicated, execution of consent need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with [25 CFR 23.125]." 25 CFR 23.125(d). For additional information on confidentiality concerns, see Section 11.7.

Required Content of Consent Document. "Consent described under [MCL 712B.13(1)] must contain the following information:

> (a) The Indian child's name and date of birth.
>
> (b) The name of the Indian child's tribe and any identifying number or other indication of the child's membership in the tribe, if any.
>
> (c) The name and address of the consenting parent or Indian custodian.
>
> (d) A sworn statement from the translator, if any, attesting to the accuracy of the translation.
>
> (e) The signature of the consenting parent, parents, or Indian custodian recorded before the judge, verifying an oath of understanding of the significance of the voluntary placement and the parent's right to file a written demand to terminate the voluntary placement or consent at anytime.
>
> (f) 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.
>
> (g) 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 25 CFR 23.126(b), which requires similar information for a written consent.

"If there are any conditions to the consent, the written consent must clearly set out the conditions." 25 CFR 23.126(a).

b. Notice

"Notice of the pending [voluntary] proceeding must be given as prescribed by Michigan [S]upreme [C]ourt rule, the [ICWA], and [MCL 712B.9(1)]." MCL 712B.13(1)(b); MCL 712B.27(3). For a detailed discussion of notice requirements, see Section 11.8.

c. Conforming to Court Rule and Statutory Requirements

"The voluntary custody proceeding shall be conducted in accordance with [the Michigan Court Rules,] and . . . [i]n a guardianship proceeding under . . . MCL 700.5204 [or MCL 700.5205], [MCL 712B.25] also applies." MCL 712B.13(1)(c)(*i*).

2. Consent Hearing

"If the petition for guardianship of a minor *does not indicate* that the minor is an Indian child as defined in MCR 3.002(12), the court[, at the hearing on the petition,] must inquire if the child or either parent is a member of an Indian tribe. If the child is a member or if a parent is a member and the child is eligible for membership in the tribe, the court shall either dismiss the petition or allow the petitioner to comply with MCR 5.404(A)(1)."[88] MCR 5.404(D) (emphasis added).

If the petition for guardianship of a minor *indicates* the minor is an Indian child, the court must conduct a hearing on the petition in accordance with MCR 5.404 before entering an ordering appointing a guardian. MCR 5.404(B)(2) (emphasis added). "Notice of the hearing on the petition must be sent to the persons prescribed in MCR 5.125(A)(8) and [MCR 5.125(C)(20)] in compliance with MCR 5.109(1)." MCR 5.404(B)(2).

At the consent hearing, the court must determine:

[88] MCR 5.404(A)(1) requires "[a] petition for guardianship of a minor [to] be filed on a form approved by the State Court Administrative Office[, t]he petitioner [to] state in the petition whether or not the minor is an Indian child or whether that fact is unknown[, and t]he 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."

> "(a) if the tribe has exclusive jurisdiction as defined in MCR 3.002(6). The court shall comply with MCR 5.402(E)(2)[(requiring dismissal of the petition if the petition for guardianship involves a minor Indian child and an Indian tribe has exclusive jurisdiction)].[89]
>
> (b) that a valid consent has been executed by both parents or the Indian custodian as required by MCL 712B.13 and [MCR 5.404(B)(1)].
>
> (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."[90] MCR 5.404(B)(2).

"The court may not use videoconferencing technology for the consent hearing required to be held under the [MIFPA] and MCR 5.404(B)." MCR 5.140(D); MCR 5.404(B)(1).

3. Withdrawal of Consent

A parent or Indian custodian may withdraw his or her consent for guardianship of the minor Indian child "at any time by sending written notice to the court substantially in compliance on a form approved by the [S]tate [C]ourt [A]dministrative [O]ffice that the parent or Indian custodian revokes consent and wants his or her Indian child returned." MCL 712B.13(4); MCL 712B.25(4).[91] 25 CFR 23.127(a)-(b) also permits "[t]he parent or Indian custodian [to] withdraw consent to voluntary foster-care placement at any time[] . . . [by] fil[ing] a written document with the court or otherwise testify[ing] before the court."

"Upon receipt of the notice, the court shall immediately enter an ex parte order terminating the guardianship and returning the Indian child to the parent or Indian custodian except, if both parents executed a consent, both parents must withdraw their consent or the court must conduct a hearing within 21 days to determine whether to terminate the guardianship." MCR 5.404(B)(3). See also MCL 712B.25(5), which provides that "[t]he voluntary guardianship is terminated when the court

[89] For additional information on jurisdiction, see Section 11.10.

[90] For additional information on appointments of lawyer-guardian ad litems, see Section 11.11.

[91] See also MCR 5.404(B)(3), which contains substantially similar language.

receives from a parent or Indian custodian notice to withdraw consent to the guardianship, and the Indian child shall be immediately returned to the parent or Indian custodian[;]" 25 CFR 23.127(c), which provides that "[w]hen a parent or Indian custodian withdraws consent to a voluntary foster-care placement, the court must ensure that the Indian child is returned to that parent or Indian custodian as soon as practicable."

4. Discovering Child is Indian Child After Guardianship Ordered

"If the court discovers a child may be an Indian child after a guardianship is ordered, the court shall do all of the following:

> (a) schedule a hearing to be conducted in accordance with MCR 5.404(C) and MCR 5.404(F).
>
> (b) enter an order for an investigation in accordance with MCR 5.404(A)(2). The order shall be on a form approved by the State Court Administrative Office and shall require the guardian to cooperate in the investigation. The court shall mail a copy of the order to the persons prescribed in MCR 5.125(A)(8), [MCR 5.125(C)(20)], and [MCR 5.125(C)(26)] by first-class mail.
>
> (c) provide notice of the guardianship and the hearing scheduled in subrule (5)(a) and the potential applicability of the [ICWA] and the [MIFPA] on a form approved by the State Court Administrative Office to the persons prescribed in MCR 5.125(A)(8), [MCR 5.125(C)(20)], and [MCR 5.125(C)(26)] in accordance with MCR 5.109(1). A copy of the notice shall be served on the guardian." MCR 5.402(E)(5). See also MCL 712B.25(6), which contains substantially similar language.

B. Consent to Adoptive Placement or Termination of Parental Rights for Purposes of Adoption

"[I]f a parent consents to adoptive placement or the termination of his or her parental rights[92] for the express purpose of adoption by executing a release under [MCL 710.28] and [MCL 710.29,] . . . or consent under [MCL 710.43] and [MCL 710.44,]" the requirements set out in MCL 712B.13(1)(a)-(c) must be met.[93] MCL 712B.13(1).

"If the placement is for purposes of adoption, a consent under [MCL 712B.13(1)] of the Indian child's parent must be executed in conjunction with either a consent to adopt, as required by [MCL 710.43] and [MCL 710.44,] . . . or a release, as required by [MCL 710.28] and [MCL 710.29.]" MCL 712B.13(3). "If a release or consent 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). But see MCR 3.804(A)(1), which states that both parents must consent "except in stepparent adoptions under MCL 710.23a(4)[.]"[94]

"The plain language of MCL 712B.13(1) requires only that a parent consent to 'the termination of his or her parental rights for the express purpose of adoption by executing a release under [MCL 710.28] and [MCL 710.29].'" *In re Williams*, 501 Mich 289, 305-307 (2018) (finding the Court of Appeals "erred by construing the language 'in conjunction with' [found in MCL 712B.13(3)] to mean that a consenting parent must complete two separate forms. . . . A consent under MCL 712B.13(1) conjoins with a release under [MCL 710.28] and [MCL 710.29] because a consent under MCL 712B.13(1) is a release under [MCL 710.28] and [MCL 710.29] with more protections"), rev'g 320 Mich App 88 (2017).

1. Procedures

A voluntary custody proceeding must meet three requirements:

(a) Valid execution of consent or release.

(b) Proper notice.

(c) Conform to certain court rule and statutory requirements. MCL 712B.13(1).

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[92] When the court has taken jurisdiction of 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, 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).

[93] See Section 2.2 for information on releasing a child for adoption under MCL 710.28 and MCL 710.29, and Section 2.6 for information on consent to adopt under MCL 710.43 and MCL 710.44.

[94] For additional information on stepparent adoptions, see Section 8.3

a. Valid Execution of Consent or Release

"In addition to the requirements of MCL 710.29[95] or MCL 710.44,[96] if a parent of an Indian child intends to voluntarily consent to adoptive placement or the termination of his or her parental rights for the express purpose of adoption pursuant to MCL 712B.13, the following requirements must be met:

> (1) except in stepparent adoptions under MCL 710.23a(4),[97] both parents must consent.
>
> (2) to be valid, consent must be executed on a form approved by the State Court Administrative Office,[98] in writing, recorded before a judge of a court of competent jurisdiction,[99] and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent. The court shall also certify that either the parent fully understood the explanation in English or that it was interpreted into a language that the parent understood. Any consent given before, or within 10 days after, the birth of the Indian child is not valid.[100]
>
> (3) the consent must contain the information prescribed by MCL 712B.13(2).
>
> (4) in a direct placement, as defined in MCL 710.22(o), a consent by a parent shall be accompanied by a verified statement that complies with MCL 712B.13(6)." MCR 3.804(A).

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[95] MCL 710.29 provides for certain requirements that must be met in order for a parent to properly release his or her parental rights over a child under the Adoption Code. Note that MCL 712B.13 refers to MCL 710.28 and MCL 710.29. See Section 2.2 for additional information.

[96] MCL 710.44 provides for certain requirements that must be met in order for a parent to properly consent to his or her child's adoption. Note that MCL 712B.13 refers to MCL 710.43 and MCL 710.44. See Section 2.6 for additional information.

[97] For additional information on stepparent adoptions, see Section 8.3.

[98] See the SCAO form, *Release of Indian Child by Parent* and *Consent by Parent to Adoption of Indian Child*.

[99] For a detailed discussion of jurisdiction, see Section 11.10.

[100] See also 25 USC 1913(a), MCL 712B.13(1)(a), 25 CFR 23.125(a), 25 CFR 23.125(b)(1), 25 CFR 23.125(c), and 25 CFR 23.125(e), which contain substantially similar consent requirements.

The court must also explain to the parents:

- Before accepting the parent's consent to *termination of parental rights*, the parent may withdraw his or her consent "for any reason, at any time prior to the entry of the final decree of termination and have the child returned[.]" 25 CFR 23.125(b)(2)(*ii*).

- Before accepting the parent's consent to an *adoptive placement*, the parent may withdraw his or her consent "for any reason, at any time prior to the entry of the final decree of adoption, and have the child returned." 25 CFR 23.125(b)(2)(*iii*).

In addition, "[i]f the release follows the initiation of [a child protective proceeding under MCL 712A.2(b),] the court shall make a finding that culturally appropriate services were offered." MCL 712B.13(5). "MCL 712B.13 . . . does not exclude from its coverage parents who are participants in involuntary child protective proceedings when they provide consent as described in MCL 712B.13(1)." *In re Williams*, 501 Mich 289, 308-309 (2018), rev'g 320 Mich App 88, 104 (2017). Accordingly, "if a parent of an Indian child willingly consents to the termination of his or her parental rights for the purpose of adoption, the parent can then count on the added protections of MCL 712B.13. *In re Williams*, 501 Mich at 308-309. However, "when the state seeks to terminate the rights of a parent of an Indian child and the parent does *not* consent, the parent can count on the protections of MCL 712B.15."[101] *In re Williams*, 501 Mich at 308 (emphasis added).

Confidentiality. "Where confidentiality is requested or indicated, execution of consent need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with [25 CFR 23.125]." 25 CFR 23.125(d). See Section 11.7 for additional information on confidentiality concerns.

Required Content of Consent Document. "Consent described in [MCL 712B.13(1)] must contain the following information:

[101] "MCL 712B.15 applies when 'an Indian child is the subject of a child protective proceeding . . . [and] a parent *does not provide consent*' to the termination of his or her parental rights for the express purpose of adoption. MCL 712B.15(1). MCL 712B.13 applies when 'a parent *consents* to adoptive placement or the termination of his or her parental rights for the express purpose of adoption . . . .' MCL 712B.13(1)." *In re Williams*, 501 Mich at 308-309 (alteration in original).

> (a) The Indian child's name and date of birth.
>
> (b) The name of the Indian child's tribe and any identifying number or other indication of the child's membership in the tribe, if any.
>
> (c) The name and address of the consenting parent or Indian custodian.
>
> (d) A sworn statement from the translator, if any, attesting to the accuracy of the translation.
>
> (e) The signature of the consenting parent, parents, or Indian custodian recorded before the judge, verifying an oath of understanding of the significance of the voluntary placement and the parent's right to file a written demand to terminate the voluntary placement or consent at anytime.
>
> (f) 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.
>
> (g) 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). 25 CFR 23.126(b), which requires similar information for a written consent.

"If there are any conditions to the consent, the written consent must clearly set out the conditions." 25 CFR 23.126(a).

Verified Statement Requirement for Direct Placement Adoption. Under a direct placement adoption, a parent or guardian voluntarily relinquishes his or her rights and consents to the child's placement with a specific adoptive parent.[102] See MCL 710.22(*o*). MCL 710.43 governs a

[102] Direct placement adoptions do not include adoptions where a stepparent or relative is involved. MCL 710.22(*o*). For additional information on stepparent adoptions, see Section 8.3, and for additional information on relative adoptions, see Section 8.4.

parent's or guardian's authorization to execute his or her consent for a direct placement adoption.[103]

> **Note:** In a direct placement adoption, the parent or guardian must personally select the prospective adoptive parent. MCL 710.23a(2).

For direct placement adoptions, MCL 712B.13(6) requires the parent's or guardian's consent to be "accompanied by a verified statement signed by the parent or guardian that contains all of the following:

> (a) That the parent or guardian has received a list of community and federal resource supports and a copy of the written document described in [MCL 722.956(1)(c).]
>
> (b) As required by [MCL 710.29] and [MCL 710.44,] . . . that the parent or guardian has received counseling related to the adoption of his or her Indian child or waives the counseling with the signing of the verified statement.
>
> (c) That the parent or guardian has not received or been promised any money or anything of value for the consent to adoption of the Indian child, except for lawful payments that are itemized on a schedule filed with the consent.
>
> (d) That the validity and finality of the consent are not affected by any collateral or separate agreement between the parent or guardian and the adoptive parent.
>
> (e) That the parent or guardian understands that it serves the welfare of the Indian child for the parent to keep the child placing agency, court, or department informed of any health problems that the parent develops that could affect the Indian child.

[103] With a few exceptions, a parent or guardian executes his or her consent to a direct placement adoption under MCL 710.43, which is the same procedural and documentary requirements as those for other types of adoptions. For the procedural and documentary requirements set out under MCL 710.43, see Sections 2.6–2.9, and for the additional procedural and documentary requirements a direct placement adoption requires, see Section 8.2.

> (f) That the parent or guardian understands that it serves the welfare of the Indian child for the parent or guardian to keep his or her address current with the child placing agency, court, or department in order to permit a response to any inquiry concerning medical or social history from an adoptive parent of a minor adoptee or from an adoptee who is 18 years or older."

b. Notice

"Notice of the pending [voluntary] proceeding must be given as prescribed by Michigan [S]upreme [C]ourt rule, the [ICWA], and [MCL 712B.9(1)]." MCL 712B.13(1)(b); MCL 712B.27(3). See Section 11.8 for a detailed discussion of notice requirements.

c. Conforming to Court Rule and Statutory Requirements

"The voluntary custody proceeding shall be conducted in accordance with [the Michigan Court Rules] and . . . [i]n an adoption proceeding, [MCL 712B.27] also applies." MCL 712B.13(1)(c)(*ii*).

2. Consent Hearing

MCR 3.804(B)(2) requires "[a] consent hearing involving an Indian child pursuant to MCL 712B.13 [to] be held in conjunction with either a consent to adopt, as required by MCL 710.44, or a release, as required by MCL 710.29.[104] Notice of the hearing must be sent to the parties prescribed in MCR 3.800(B) in compliance with MCR 3.802(A)(3)."

The court may not use videoconferencing technology for a consent hearing involving an Indian child under MCL 712B.13. MCR 3.804(B)(3).

[104] For a discussion of release hearings under MCL 710.29, see Section 2.2. For a discussion of consent hearings under MCL 710.44, see Section 2.6.

3. Withdrawal of Consent and Vacating Final Order of Adoption

a. Before Entry of Final Order of Termination or Adoption

"A parent who executes a consent under [MCL 712B.13] may withdraw his or her consent at any time *before entry of a final order of adoption* by filing a written demand requesting the return of the Indian child." MCL 712B.13(3) (emphasis added). See also MCR 3.804(D), which contains substantially similar language, and MCL 712B.13(6), which permits "[a] parent who executes a consent to adoption under [MCL 710.43] and [MCL 710.44 to] withdraw that consent at any time *before entry of a final order for adoption* by filing notification of the withdrawal of consent with the court." (Emphasis added.)

MCL 712B.13 permits a parent of an Indian child to withdraw his or her consent up until entry of the adoption order regardless of whether that parent executed a release of parental rights for the purpose of adoption under MCL 710.28 and MCL 710.29 or executed a consent to a specific adoptive placement under MCL 710.43 and MCL 710.44. *In re Williams*, 501 Mich 289, 304-305 (2018) ("agree[ing] with the Court of Appeals that 'a specific adoptive placement was not required under [MCL] 712B.13(1),'" and finding that respondent-father releasing "his children to DHHS rather than to a specific adoptive parent [was] not relevant to his ability to withdraw his consent; . . . [t]he plain language of MCL 712B.13 allows a parent of an Indian child to both consent to the termination of his or her parental rights for the express purpose of adoption by executing a release under [MCL 710.28] and [MCL 710.29] of the Adoption Code and also to withdraw that consent before a final order of adoption is entered"), rev'g and quoting 320 Mich App 88 (2017).

> **Note:** If, during a child protective proceeding, a parent of an Indian child consents to the termination of his or her parental rights for the purpose of adoption and then seeks to withdraw that consent under MCL 712B.13 before a final order of adoption is entered, the parent "may withdraw his [or her] consent, but because he [or she] is still subject to MCL 712B.15, DHHS may refile a termination

petition." *In re Williams*, 501 Mich at 308. For a discussion on MCL 712B.15, see Section 11.16.

But see 25 CFR 23.125(b)(2)(*ii*)-(*iii*) and 25 CFR 23.128(a)-(b), which treat a consent for voluntary termination of parental rights separately from a consent to adoption, and permit a withdrawal of consent for **voluntary termination of parental rights** *for any reason* and at any time *before entry of a final decree of termination*, and a withdrawal of consent to **adoption** *for any reason* and at any time *before entry of a final decree of adoption*.[105] See also 25 USC 1913(c), which permits withdrawal of consent to voluntary termination of parental rights or adoption *for any reason* and at any time *before entry of a final decree of termination or adoption*, *as the case may be*.[106] See also *In re Kiogima*, 189 Mich App 6, 7 (1991) (finding the "respondent[-mother's] right to withdraw her consent [to a voluntary release of her parental rights] pursuant to 25 USC 1913(c) expired with the entry of a final order terminating her parental rights").

Once a written demand requesting the return of the Indian child is filed with the court, the court must order that the child be returned. MCL 712B.13(3); MCR 3.804(D). "[U]nder MCL 712B.13(3), a parent who consents during an involuntary termination proceeding is not entitled to 'return of the Indian child' *to him or her*. Instead, the child returns to the position the child was in before his or her parent consented to the termination of parental rights." *In re Williams*, 510 Mich at 310.

25 CFR 23.128(d) also requires the court with which the withdrawal of consent is filed to promptly notify any person or entity that arranged the voluntary preadoptive or adoptive placement for the Indian child, and to return the child to the parent as soon as is practicable. See also 25 USC 1913(c), which requires a return of the child once a consent is withdrawn.[107]

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[105] Note, however, "if a parent's or Indian custodian's parental rights have already been terminated, then the parent or Indian custodian may no longer withdraw consent to the adoption, because they no longer legally qualify as a parent or Indian custodian." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, I.7 (2016). *Note*: Th link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[106] Note that 25 USC 1913(c) and 25 CFR 23.125(b)(2)(*ii*) permit the parent *or Indian custodian* to consent to the termination of parental rights, and 25 USC 1913(c), 25 CFR 23.125(b)(2)(*iii*), and 25 CFR 23.128(b) permit the parent *or Indian custodian* to consent to adoption. The MIFPA, however, no longer allows an Indian custodian to consent to the termination of parental rights or adoptive placement. See MCL 712B.13(1) and MCL712B.13(3) as amended by 2016 PA 26, effective May 30, 2016.

"Withdrawal of consent under [MCL 712B.13] constitutes a withdrawal of a release executed under [MCL 710.28] and [MCL 710.29] or a consent to adopt executed under [MCL 710.43] and [MCL 710.44.]" MCL 712B.13(3). See also MCR 3.804(D), which contains substantially similar language.

b. After Entry of Final Order of Adoption

"After the entry of a final order of adoption of an Indian child in any state court, the parent may withdraw consent on the grounds that consent was obtained through fraud or duress and may petition the court to vacate the final order of adoption." MCL 712B.27(5). See also 25 USC 1913(d), which contains substantially similar language.

"Upon the parent's filing of a petition to vacate the final decree of adoption of the parent's Indian child, the court must give notice to all parties to the adoption proceedings and the Indian child's Tribe and must hold a hearing on the petition." 25 CFR 23.136(b).

If the court finds that the consent was obtained through fraud or duress, the court *must* vacate the adoption order, order the parent's consent revoked, and return the child to the parent. 25 USC 1913(d); MCL 712B.27(5); 25 CFR 23.136(c). An adoption may not be vacated under 25 USC 1913(d) or MCL 712B.27(5) if the adoption has been effective for at least two years, unless otherwise permitted by law. 25 USC 1913(d); MCL 712B.27(5). See also 25 CFR 23.136(a), which permits the court to invalidate a voluntary adoption of an Indian child on a finding that the parent's consent was obtained through fraud or duress "[w]ithin two years after a final decree of adoption . . . or within any longer period of time permitted by the law of the State[.]"

11.16 Involuntary Proceedings[108]

A brief discussion of ICWA and MIFPA in the context of child protective proceedings is included in this section. However, a detailed discussion of

[107] Note that 25 USC 1913(c) and 25 CFR 23.128(d) require return of the child to the parent *or Indian custodian*. MIFPA, however, no longer allows an Indian custodian to consent to the termination of parental rights or adoptive placement. See MCL 712B.13(1) and MCL 712B.13(3) as amended by 2016 PA 26, effective May 30, 2016.

[108] Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

ICWA and MIFPA as it applies to proceedings involving involuntary foster care placement and termination of parental rights is beyond the scope this benchbook. See the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 19, for additional information on this topic.

An *involuntary proceeding* is "a child-custody proceeding in which the parent does not consent of his or her free will to the foster-care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster-care, preadoptive, or adoptive, placement under threat of removal of the child by a State court or agency."[109] 25 CFR 23.2.

Except for purposes of emergency proceedings involving an Indian child,[110] the court must not hold a foster-care-placement or termination-of-parental-rights proceeding until ten days after the child's parent or Indian custodian (or tribe(s) in the county where the child is located and Secretary of the Interior if the parent or Indian custodian is unknown to the petitioner) **and** the Indian child's Tribe[111] (or tribe(s) in the county where the child is located and Secretary of the Interior if the Indian child's Tribe is unknown to the party seeking placement for the Indian child) receive proper notice of that proceeding. 25 USC 1912(a); MCL 712B.9(2); MCL 712B.9(3); 25 CFR 23.112(a)-(b). For information on providing proper notice to the parent, Indian custodian, or Indian child's Tribe, see Section 11.8.

"MCL 712B.15 provides specific procedures a trial court must follow when 'an Indian child is the subject of a child protective proceeding under [MCL 712A.2(b)].'" *In re Detmer/Beaudry*, 321 Mich App 49, 60 (2017), quoting MCL 712B.15(1). Specifically, MCL 712B.15(1) provides:

> "If an Indian child is the subject of a child protective proceeding under [MCL 712A.2(b)], including instances in

[109] "If a parent refuses to consent to the foster-care, preadoptive, or adoptive placement or [termination of parental rights], the proceeding would meet the definition of an 'involuntary proceeding.' Nothing in the statute indicates that the consent of one parent eliminates the rights and protections provided by ICWA to a non-consenting parent." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, L.21 (2016). *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[110] 25 USC 1922, MCL 712B.7(2), MCR 3.963(A)(1), MCR 3.974(C)(1), 25 CFR 23.11, and Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, C.1 (2016), provide the court with limited emergency jurisdiction where the state has removed the Indian child in an emergency situation to prevent imminent physical damage or harm to the Indian child. *Note*: The links to the last two resource was created using Perma.cc and directs the reader to an archived record of the page. "The court must comply with the emergency removal hearing requirements outlined in the Michigan court rules and [MCL 712A.13a], [MCL 712A.14], and [MCL 712A.14a]." MCL 712B.7(2). See the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 15, for more information on emergency removals.

[111] For a discussion on determining an Indian child's Tribe, see Section 11.6(B).

> which the parent 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 if a parent does not provide consent as described in [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].[112]
> >
> > (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 states that parents involved in child protective proceedings can 'provide consent as described in [MCL 712B.13].'" *In re Williams*, 501 Mich 289, 309 (2018), rev'g 320 Mich App 88 (2017) (alteration in original). "[W]hen the state seeks to terminate the rights of a parent of an Indian child and the parent does not consent, the parent can count on the protections of MCL 712B.15. But if a parent of an Indian child willingly consents to the termination of his or her parental rights for the purpose of adoption, the parent can then count on the added protections of MCL 712B.13, which does not exclude from its coverage parents who are participants in involuntary child protective proceedings when they provide consent as described in MCL 712B.13(1)." *In re Williams*, 501 Mich at 308-309. For a discussion on MCL 712B.13, see Section 11.15(B).

A. Foster Care Placement

> "Foster care placement[is a]ny action removing an Indian child from his or her parent or Indian custodian, and where the parent or Indian custodian cannot have the Indian child returned upon demand[113] 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.

[112] See Section 11.8 for a detailed discussion of notice requirements.

[113] If a parent or Indian custodian has to do more than make a simple verbal request for the child's return, then he or she is prohibited from regaining custody of the child *upon demand*. See 25 CFR 23.2, which defines *upon demand* as permitting "the parent or Indian custodian [to] regain custody [of the child] simply upon verbal request, without any formalities or contingencies."

> (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), MCR 3.002(2)(a), and 25 CFR 23.2, 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[.]"

"An Indian child may be removed[114] 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 active efforts[115] have been made to provide remedial services and rehabilitative programs designed to prevent the breakup[116] of the Indian family,
- that the active efforts were unsuccessful, and
- that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child." MCL 712B.15(2) (bullets added). See also 25 USC 1912(d)-(e), MCR 3.977(A), MCR 3.977(G)(1), 25 CFR 23.120(a), 25 CFR 23.121(a), which contain similar language.

To establish clear and convincing evidence, at least one qualified expert witness with knowledge of the child rearing practices of the Indian child's Tribe must testify "that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child."[117] MCL 712B.15(2). See also 25 CFR 23.121(a), which contains similar language.

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[114] "MIFPA does not define 'removed[,]' [and i]n the absence of a statutory definition," *removed*, as used in MCL 712B.15(2), means "the instance when a court orders that a child be physically transferred or moved from the care and residence of a parent or custodian to the care and residence of some other person or institution." *In re Detmer/Beaudry*, 321 Mich App 49, 62, 64-65 (2017) (where the trial court removed a Native American child from the respondent-mother's care and residence, over her objection, and placed the child in the care and residence of the nonrespondent-father, the child was removed from a parent within the meaning of MCL 712B.15(2) and "the trial court was [therefore] required under MIFPA to make findings on whether active efforts were made to provide remedial services, whether those efforts were successful, and whether respondent-mother's continued custody of [the child] posed a risk of emotional or physical harm to the child[]").

"[T]he evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding." 25 CFR 23.121(c). Without the causal relationship, "evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior[118] does not by itself constitute clear and convincing evidence . . . that continued custody is likely to result in serious emotional or physical damage to the child." 25 CFR 23.121(d). "[T]here must be a demonstrated correlation between the conditions of the home and a threat to the specific child's emotional or physical well-being." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, G.1 (2016).[119]

1. Party's Right to Examine Reports and Documents

"Each party to . . . a foster-care-placement . . . proceeding under State law involving an Indian child has a right to timely examine all reports and other documents filed or lodged with the court upon which any decision with respect to such action may be based."[120] 25 CFR 23.134. See also MCL 712B.11 and 25 USC 1912(c), which contain substantially similar language.

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[115] "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). They must also be documented in detail on the record. 25 CFR 23.120(b). The Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, E.6 (2016), "recommends that the State agency include the following in its documentation of active efforts, among any other relevant information:

- The issues the family is facing that the State agency is targeting with the active efforts (these should be the same issues that are threatening the breakup of the Indian family or preventing reunification);
- A list of active efforts the State agency determines would best address the issues and the reasoning for choosing those specific active efforts;
- Dates, persons contacted, and other details evidencing how the State agency provided active efforts;
- Results of the active efforts provided and, where the results were less than satisfactory, whether the State agency adjusted the active efforts to better address the issues."

See Section 11.17 for a detailed discussion of active efforts. *Note*: the link to *Guidelines for Implementing the Indian Child Welfare Act* was created using Perma.cc and directs the reader to an archived record of the page.

2. Placement Preferences

Once the court has ordered a foster care placement, it must follow ICWA's and 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. For a detailed discussion of preferred placements of Indian children, see Section 11.19.

For a more detailed discussion on ICWA's and MIFPA's requirements for foster care placements, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 19.

B. Termination of Parental Rights

Where a case does "not involve the removal of [an Indian child] from the parental home, but instead involve[s] the termination of . . . parental rights, [25 USC 1912(d), 25 USC 1912(f), MCL 712B.15(3), and MCL 712B.15(4)] govern the outcome[.]" *In re England*, 314 Mich App 245, 253 (2016) (noting that "25 USC 1912(e) and MCL 712B.15(2) pertain to removal decisions, while 25 USC 1912(d) and [25 USC 1912(f)] and MCL 712B.15(3) and [MCL 712B.15(4)] pertain to termination decisions[]").

To terminate a parent's parental rights over an Indian child, the court must find all of the following:

- "[P]roof that active efforts were made to prevent the breakup of the family, 25 USC 1912(d); MCL 712B.15(3); MCR 3.977(G)(1)[.]"

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[116] "[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*, 570 US 637, 651-652 (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"). For a detailed discussion of involuntary termination of a parent's parental rights, see Section 11.16(B).

[117] For a detailed discussion of qualified expert witnesses, see Section 11.18.

[118] "'Nonconforming social behavior' may include behaviors that do not comply with society's norms, such as dressing in a manner that others perceive as strange, an unusual or disruptive manner of speech, or discomfort in or avoidance of social situations." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at G.1.

[119] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[120] See the ICWA form *Request to Produce and Examine*.

- "[P]roof beyond a reasonable doubt that the continued custody of the child by the parent would likely result in serious emotional or physical damage to the child, 25 USC 1912(f); MCL 712B.15(4); MCR 3.977(G)(2); 25 CFR 23.121(b)."

- "'[A]t least one state statutory ground for termination was proven by clear and convincing evidence,' [*In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 58 (2015).]"

- Proof "by a preponderance of the evidence[] 'that termination is in the child's best interests[,]' [*In re Olive/Metts*, 297 Mich App 35, 40 (2012)]." *In re England*, 314 Mich App at 253.

  Note: For the additional requirements under the Juvenile Code for the termination of parental rights, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 19.

"[T]he demands of ICWA, MIFPA, and MCR 3.977(G) govern termination of the parental rights of a non-Indian, biological parent of an Indian child." *In re Beers/Lebeau-Beers*, 325 Mich App 653, 668 n 7 (2018). "Because [the child was] an Indian child and respondent-father [was the child's] biological parent, . . . respondent-father's parental rights should not have been terminated absent compliance with MIFPA, ICWA, and MCR 3.977(G), even though respondent-father himself [was] not of Indian descent." *In re Beers/Lebeau-Beers*, 325 Mich App at 668. Because ICWA and MIFPA were not applied and "[g]iven the record regarding respondent-father" (indicating a clear risk of harm or danger to the child if released to him), "the proper remedy in this case [was] to conditionally reverse the order terminating respondent-father's parental rights to [the child] and remand for the trial court to address and resolve the issues regarding active efforts and the potential of serious emotional or physical damage to [the child] if custody continued with respondent-father, as analyzed under a beyond-a-reasonable-doubt standard." *Id*. at 678.

MCL 712B.13(5) also requires, "[i]f the release follows the initiation of [a child protective proceeding under MCL 712A.2(b),] the court [to] make a finding that culturally appropriate services were offered."

1. Active Efforts to Reunify Family

"Prior to ordering . . . termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful." 25 CFR 23.120(a). See also MCL 712B.15(3),

which requires the party seeking the termination of parental rights to an Indian child under state law to "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." "The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe."[121] MCL 712B.15(2).

> **Note:** "Active efforts must be documented in detail in the record." 25 CFR 23.120(b). The Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*,[122] 81 Federal Register 96476, E.6 (2016), "recommends that the State agency include the following in its documentation of active efforts, among any other relevant information:
>
> - The issues the family is facing that the State agency is targeting with the active efforts (these should be the same issues that are threatening the breakup of the Indian family or preventing reunification);
> - A list of active efforts the State agency determines would best address the issues and the reasoning for choosing those specific active efforts;
> - Dates, persons contacted, and other details evidencing how the State agency provided active efforts;
> - Results of the active efforts provided and, where the results were less than satisfactory, whether the State agency adjusted the active efforts to better address the issues."

"[T]he 'default' evidentiary standard applicable in child protective proceedings—i.e. clear and convincing evidence— . . . appl[ies] to the findings required under MCL 712B.15(3) regarding whether 'active efforts' were made to prevent the breakup of the Indian family."[123] *In re England*, 314 Mich App

[121] See Section 11.17 for a detailed discussion of active efforts.

[122] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[123] "[B]ecause the default standard of proof applies to MCL 712B.15(3), it is not unconstitutionally vague." *In re England*, 314 Mich App 245, 260 (2016).

245, 259-261 (2016) (finding "there was clear and convincing evidence to conclude that active efforts were made" as required by MCL 712B.15(3) where a Child Protective Services (CPS) specialist solicited the involvement of the Indian child's Tribe; maintained regular contact with the respondent, and the respondent's service providers and probation officer, and the Tribe's caseworker; and assisted the respondent in identifying barriers to reunification, developing a service plan, and obtaining counseling and other services through a culturally-appropriate referral service). See also 25 USC 1912(d), which contains substantially similar language as MCL 712B.15(3).

"[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 custodians,' not to facilitate a *transfer* of the child *to* an Indian parent." *Adoptive Couple v Baby Girl*, 570 US 637, 652 (2013).

> **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*, 570 US 637, 651-652 (2013) (first, fourth, and fifth alterations in original). "In such a situation, the 'breakup of the Indian family' has long since occurred, and [25 USC 1912(d)] is inapplicable." *Adoptive Couple*, 570 US at 641, 651-652 (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[]").

2. Continued Custody Will Likely Result in Serious Emotional or Physical Damage to Child

"The court *must not* order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[124] 25 CFR 23.121(b) (emphasis added). See also 25 USC 1912(f), MCL 712B.15(4), MCR 3.977(A), and MCR 3.977(G)(2), which contain substantially similar language.[125]

Continued custody. "[T]he heightened standards of ICWA, MIFPA, and MCR 3.977(G) [may] apply to the termination of respondent-father's parental rights when he never had legal or physical custody rights with regard to [the Indian child]." *In re Beers/Lebeau-Beers*, 325 Mich App 653, 670 (2018). In the *Beers* case, the respondent-father signed an affidavit of parentage, which by operation of law under MCL 722.1006[126] provided the respondent-mother with legal and physical custody of the child, and no court proceedings regarding custody were held. *In re Beers/Lebeau-Beers*, 325 Mich App at 669-670. Although the respondent-father never had any legal or physical custody rights, the heightened beyond a reasonable doubt standard under 25 USC 1912(f), MCL 712B.15(4), and MCR 3.977(G)(2) applied to his termination of parental rights because "for a short period . . . respondent-father, respondent-mother, and [the child] lived together as a familial unit wherein respondent-father was providing some care and custody for [the child,] . . . [DHHS] was providing reunification services[, t]he family unit dissolved only when [the child] was removed by court order, although respondents remained together[, and t]he removal of [the child] discontinued the custodial

[124] For a detailed discussion on qualified expert witnesses, see Section 11.18.

[125] 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*, 311 Mich App 49, 59 (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).

[126] Noting that "[a]llowing the operation of MCL 722.1006 [(providing a mother with initial custody of the minor child without prejudice to the determination of either parent's custodial rights after the mother and father sign an affidavit of parentage)] to negate the protections of ICWA, MIFPA, and MCR 3.977(G) in cases in which the father of an Indian child is providing or has provided care and custody for the Indian child, absent legally-recognized custodial rights, could certainly be viewed as being prejudicial to the father's custodial rights." *In re Beers/Lebeau-Beers*, *325* Mich App at 675.

arrangement that had existed with respect to both respondents and [the child], if not in law, in practice."). See, however, *Adoptive Couple v Baby Girl*, 570 US 637, 643-644, 648-649 (2013), where the biological Indian-parent abandoned his child before the child's birth, did not provide any support to the mother, and never exercised legal or physical custody over the child, 25 USC 1912(f)[127] was inapplicable because there was no custody to continue; 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*, 570 US at 648-649.

Serious emotional or physical damage. "For . . . termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding." 25 CFR 23.121(c). Without the causal relationship, "evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute . . . evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child." 25 CFR 23.121(d).

In terminating the mother's parental rights over her Indian children,[128] the trial court 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

[127] See MCL 712B.15(4) and MCR 3.977(G)(2), which contain the same continued custody language.

[128] In *In re Payne/Pumphrey/Fortson*, 311 Mich App at 64-65, 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 by finding that termination of [the mother's] parental rights [over her two non-Indian children] was in [the children's] best interests."

reasonable doubt." *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 62 (2015).

The trial court correctly concluded that giving the respondent-mother custody of the children "would likely result in serious emotional or physical damage to [the children]" where she failed "to cooperate with and benefit from services designed to address her substance abuse," failed "to acknowledge that she had a substance abuse problem," resisted "therapy and the need for another 18 to 24 months of intensive therapy to address her emotional instability," failed "to take personal responsibility for her children being in care," . . . missed parenting times," and where the tribal expert testified "that the tribe's board of directors believed it was in the best interests of the children to terminate respondent-mother's parental rights." *In re Beers/Lebeau-Beers*, 325 Mich App at 683.

3. Statutory Ground for Termination

In addition to meeting the requirements of ICWA and MIFPA, the petitioner must also establish statutory grounds for termination pursuant to state law. *In re Payne/Pumphrey/Fortson*, 311 Mich App at 58, 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, and
>
> (2) A statutory basis for the termination of parental rights. See MCR 3.977(A), MCR 3.977(E)-(H).

See Sections 2.10–2.11 for statutory grounds for termination of parental rights as well as the standard of proof required to establish each statutory ground.

4. Party's Right to Examine Reports and Documents

"Each party to . . . [a] termination-of-parental-rights proceeding under State law involving an Indian child has a right to timely examine all reports and other documents filed or lodged with the court upon which any decision with respect to such action may be based."[129] 25 CFR 23.134. See also MCL

[129] See the ICWA form *Request to Produce and Examine*.

712B.11 and 25 USC 1912(c), which contain substantially similar language.

5. Placement Preferences

Once the court has terminated the parental rights of an Indian child's parent or Indian custodian, it must follow ICWA's and MIFPA's placement preferences (unless the Indian child's Tribe has established a different order of preference or good cause is shown to the contrary). 25 USC 1915; MCL 712B.23; 25 CFR 23.129. For a detailed discussion on preferred placements of Indian children, see Section 11.19.

6. Invalidation of State Court Action if ICWA or MIFPA Violated

"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 Indian child was removed, and the Indian child's tribe[130] 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). For additional information on invalidation of state court action for violation of ICWA or MIFPA, see Section 11.24.

C. Involuntary Guardianship Proceedings Involving an Indian Child

A brief discussion of involuntary guardianships is included in this subsection. Although a detailed discussion of guardianships as it relates to specific requirements of providing notice and petitioning the court for a guardianship are beyond the scope of this benchbook, see the Michigan Judicial Institute's checklist on appointing a guardian for an Indian child.

If the petition for guardianship of a minor involves an Indian child, but both parents do not intend to execute a consent as required under MCL 712B.13, it is considered an involuntary guardianship and the court must proceed under MCR 5.404(C). MCR 5.404(A)(3). See also MCL 712B.25(3), which provides that "[i]f 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][; i]f the Indian child's parents do not execute a consent under [MCL 712B.13], the petition

[130] For a discussion on determining an Indian child's Tribe, see Section 11.6(B).

is considered to be for an involuntary guardianship and the requirements of [MCL 712B.15] must be met."

> **Note:** If *both* parents or the Indian custodian intend to execute a petition for guardianship of a minor Indian child as is required under MCL 712B.13, it is considered a voluntary guardianship and the court must proceed under MCR 5.404(B). MCR 5.404(A)(3); MCR 5.404(B). For additional information on voluntary guardianship proceedings involving an Indian child, see Section 11.15(B).

A petition for guardianship of a minor Indian child must be filed on a form approved by the State Court Administrative Office, and must state "whether or not the minor is an Indian child or whether that fact is unknown." MCR 5.404(A)(1). "If the petition involves an Indian child and a consent will not be executed [by both parents] pursuant to MCL 712B.13 and [MCR 5.404], the petitioner shall state in the petition what active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family as defined in MCR 3.002(1)." MCR 5.404(A)(3). For additional information on active efforts, see Section 11.17.

The petitioner must also "document all efforts made to determine a child's membership or eligibility for membership in an Indian tribe and shall provide them, upon request, to the court, Indian tribe, Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian." MCR 5.404(A)(1).

On the filing of the petition for guardianship of a minor Indian child, "the court may appoint a guardian ad litem to represent the interests of a minor and may order the [DHHS] or a court employee or agent to conduct an investigation of the proposed guardianship and file a written report of the investigation in accordance with MCL 700.5204(1)."[131] MCR 5.404(A)(2). "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."*Id*.

"If the petition involves an Indian child, the report shall contain the information required in MCL 712B.25(1)[and] . . . shall be filed with the court and served no later than 7 days before the hearing on the petition." MCR 5.404(A)(2). MCL 712B.25(1) requires, "[i]n addition

[131] See also MCL 712B.25(1), which provides "[i]f 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 department or a court employee to conduct an investigation of the proposed guardianship and file a written report of the investigation."

to the information required in . . . MCL 700.5204, the report [to] include, but . . . not [be] limited to, the following information:

> (a) Whether the child is or is not an Indian child.
>
> (b) The identity and location of the Indian 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 Indian child is a member or eligible for membership.
> >
> > (*ii*) If the Indian child and family need culturally appropriate and other services to preserve the Indian family.
> >
> > (*iii*) The identity and location of extended family members and if no extended family members can be found, what efforts were made to locate them."

1. Videoconferencing Technology

"Except as otherwise prescribed by this rule, upon request of any participant or sua sponte, the court may allow the use of videoconferencing technology under this chapter in accordance with MCR 2.407." MCR 5.140(A). "The use of videoconferencing under this chapter must be in accordance with the standards established by the State Court Administrative Office. All proceedings at which videoconferencing technology is used must be recorded verbatim by the court." MCR 5.140(E).

"[I]f the subject of the petition wants to be physically present, the court must allow the individual to be present." MCR 5.140(C). Note, however, "[t]he right to be physically present for the subject of a minor guardianship applies only to a minor 14 years of age or older." MCR 5.140(C).

2. Hearing

"If the petition for guardianship of a minor *does not indicate* that the minor is an Indian child as defined in MCR 3.002(12), the court[, at the hearing on the petition,] must inquire if the child or either parent is a member of an Indian tribe. If the child is a member or if a parent is a member and the child is eligible for membership in the tribe, the court shall either dismiss the petition or allow the petitioner to comply with MCR 5.404(A)(1)." MCR 5.404(D) (emphasis added).

If the petition for guardianship of a minor *indicates* the minor is an Indian child, the court must conduct a hearing on the petition for involuntary guardianship in accordance with MCR 5.404 before entering an order appointing a guardian. MCR 5.404(C)(1) (emphasis added). "Notice of the hearing must be sent to the persons prescribed in MCR 5.125(A)(8) and [MCR 5.125(C)(20)] in compliance with MCR 5.109(1)." MCR 5.404(C)(1).

At the consent 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)[(requiring dismissal of the petition if the petition for guardianship involves a minor Indian child and an Indian tribe has exclusive jurisdiction)].[132]
>
> (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 interests to appoint a guardian.
>
> (d) if a lawyer-guardian ad litem should be appointed to represent the Indian child.[133]
>
> (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)]."[134] MCR 5.404(C)(1). See also MCL 712B.25(2), which contains substantially similar language.

a. Placement

MCR 5.404(C)(2) sets out the following placement requirements:

> "An Indian child shall be placed in the least restrictive setting that most approximates a family and in which his or her special needs,

[132] For additional information on jurisdiction, see Section 11.10.

[133] For additional information on appointments of lawyer-guardian ad litems, see Section 11.11.

[134] For a discussion on MCR 5.404(B) (voluntary consent to guardianship of a minor Indian child), see Section 11.15(A).

> if any, may be met. The child shall be placed within reasonable proximity to his or her home, taking into account any special needs of the child. 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 [DHHS],
> >
> > (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."

b. Deviating From Placement

"The court may order another placement for good cause shown in accordance with MCL 712B.23(3)-(5) and 25 USC 1915(c). If the Indian child's tribe has established a different order of preference than the order prescribed in [MCR 5.404(C)(2)], 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). Where appropriate, the preference of the Indian child or parent shall be considered." MCR 5.404(C)(3). For additional information on deviating from the preferred placements of Indian children, see Section 11.19(C).

3. Evidentiary Requirements for Removal of Indian Child for Placement With Guardian

MCR 5.404(F)(1) sets out the evidentiary requirements under an involuntary guardianship for removal of an Indian child

from the child's parent or Indian custodian for placement with a guardian:

> "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 [MCR 5.404],[135] 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,[136] who has knowledge about the child-rearing practices of 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."

See also MCL 712B.15(2), which provides substantially similar language except that it specifies that to establish clear and convincing evidence, the qualified expert witness must testify that the continued custody will likely result in serious emotional or physical damage to the Indian child.

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[135] For additional information on a valid execution of consent for guardianship of an Indian child under MCL 712B.13 and MCR 5.404, see Section 11.15(A)(1)(a).

[136] For additional information on qualified expert witnesses, see Section 11.18.

4. Termination of Guardianship

"The guardianship of an Indian child established pursuant to [MCR 5.404(C)] shall be terminated in accordance with [MCR 5.404(B)(3)]." MCR 5.404(H)(6). Under MCR 5.404(B)(3), "[a] consent may be withdrawn at any time by sending written notice to the court substantially in compliance with a form approved by the State Court Administrative Office." MCR 5.404(B)(3).

"Upon receipt of the notice, the court shall immediately enter an ex parte order terminating the guardianship and returning the Indian child to the parent or Indian custodian[.]" MCR 5.404(B)(3).

5. Discovering Child is Indian Child After Guardianship Ordered

"If the court discovers a child may be an Indian child after a guardianship is ordered, the court shall do all of the following:

> (a) schedule a hearing to be conducted in accordance with MCR 5.404(C) and MCR 5.404(F).
>
> (b) enter an order for an investigation in accordance with MCR 5.404(A)(2). The order shall be on a form approved by the State Court Administrative Office and shall require the guardian to cooperate in the investigation. The court shall mail a copy of the order to the persons prescribed in MCR 5.125(A)(8), [MCR 5.125(C)(20)], and [MCR 5.125(C)(26)] by first-class mail.
>
> (c) provide notice of the guardianship and the hearing scheduled in subrule (5)(a) and the potential applicability of the [ICWA] and the [MIFPA] on a form approved by the State Court Administrative Office to the persons prescribed in MCR 5.125(A)(8), [MCR 5.125(C)(20)], and [MCR 5.125(C)(26)] in accordance with MCR 5.109(1). A copy of the notice shall be served on the guardian." MCR 5.402(E)(5). See MCL 712B.25(6), which contains substantially similar language.

11.17 Active Efforts

ICWA and MIFPA require the use of active efforts to "provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family."25 USC 1912(d); MCL 712B.3(a).

More effort is required under MIFPA's and ICWA's *active efforts* standard than is required under Michigan's *reasonable efforts* standard.[137] See generally *In re Roe*, 281 Mich App 88 (2008), overruled in part on other grounds by *In re JL*, 483 Mich 300 (2009).[138] "'Active efforts' require affirmative, as opposed to passive, efforts." *In re Beers/Lebeau-Beers*, 325 Mich App 653, 680 (2018).

A. Active Efforts Defined

1. Defined For Purposes of MIFPA

For purposes of MIFPA, *active efforts* are "actions to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to reunify the Indian 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, but are not limited to, 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.[139]

[137] *In re JL* and *In re Roe* were decided before MIFPA was enacted.

[138] For more information on the precedential value of an opinion with negative subsequent history, see our note.

[139] For additional information on preferred placements for Indian children, see Section 11.19.

(*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.

(*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." MCL 712B.3(a). See also MCR 3.002(1), which contains a substantially similar definition of *active efforts*.

2. Defined For Purposes of ICWA

For purposes of ICWA, *active efforts* are "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

(1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;

(2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

(3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to

> participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
>
> (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;
>
> (5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;
>
> (6) Taking steps to keep siblings together whenever possible;
>
> (7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
>
> (8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
>
> (9) Monitoring progress and participation in services;
>
> (10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
>
> (11) Providing post-reunification services and monitoring." 25 CFR 23.2.

B. Proper Standard of Proof

The proper standard of proof for determining whether ICWA's and MIFPA's active efforts standard was met is the clear and convincing evidence standard. *In re Roe*, 281 Mich App 88, 101 (2008), overruled

in part on other grounds by *In re JL*, 483 Mich 300 (2009)[140] (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)); MCL 712B.15(2); *In re England*, 314 Mich App 245, 259-260 (2016) ("the 'default' evidentiary standard applicable in child protective proceedings—i.e. clear and convincing evidence— . . . appl[ies] to the findings required under MCL 712B.15(3) regarding whether 'active efforts' were made to prevent the breakup of the Indian family").[141]

"The factual findings by the trial court are reviewed for clear error, and any issue regarding the interpretation and application of the relevant federal and state statutory provisions is reviewed de novo." *In re Beers/Lebeau-Beers*, 325 Mich App 653, 680 (2018).

C. Impact of Past Active Effort Services on New Termination Proceedings

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 300, 305 (2009). See also *In re Roe*, 281 Mich App 88, 102, 105 (2008), overruled in part on other grounds by *In re JL*, 483 Mich 300 (2009),[142] where the Court held that there was nothing in 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 indicate that] . . . [t]he timing of the services must be judged by reference to the grounds for seeking termination and their

[140] For more information on the precedential value of an opinion with negative subsequent history, see our note.

[141] "[B]ecause the default standard of proof applies to MCL 712B.15(3), it is not unconstitutionally vague." *In re England*, 314 Mich App 245, 260 (2016).

[142] For more information on the precedential value of an opinion with negative subsequent history, see our note.

> 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.

But see 25 CFR 23.120(a) (amended after the *In re JL* case was decided), which requires the court to "conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful" before the court orders an involuntary foster-care placements or termination of parental rights.[143] Note, however, 25 CFR 23.120(a) "reflect[s] that the court must conclude that active efforts were made prior to ordering foster-care placement or [termination of parental rights], but does not require such a finding at each hearing. It is, however, a recommended practice for a court to inquire about active efforts at every court hearing and actively monitor compliance with the active efforts requirement. . . . The court should not solely rely on past findings regarding the sufficiency of active efforts, but rather should routinely ask as part of a foster-care or [termination of parental rights] proceeding whether circumstances have changed and whether additional active efforts have been or should be provided." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, E.5 (2016).[144]

D. Sufficiency of the Evidence (Caselaw Discussing Active Efforts)

Active efforts were made. Active efforts were made and were unsuccessful where "notices of every hearing and copies of the

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[143] 25 CFR 23.120(b) requires the "[a]ctive efforts [to] be documented in detail in the record." The Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, E.6 (2016), "recommends that the State agency include the following in its documentation of active efforts, among any other relevant information:

- The issues the family is facing that the State agency is targeting with the active efforts (these should be the same issues that are threatening the breakup of the Indian family or preventing reunification);
- A list of active efforts the State agency determines would best address the issues and the reasoning for choosing those specific active efforts;
- Dates, persons contacted, and other details evidencing how the State agency provided active efforts;
- Results of the active efforts provided and, where the results were less than satisfactory, whether the State agency adjusted the active efforts to better address the issues." *Note*: The link to the latter resource was created using Perma.cc and directs the reader to an archived record of the page.

[144] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

petitions and reports were provided to the tribe," DHHS "offered or provide respondent-mother with assessments, treatment, counseling, drug screens, and services related to her substance abuse issues," as well as "[p]sychological evaluations, therapy, parenting time, in-home services, and various family programs[.]" *In re Beers/Lebeau-Beers*, 325 Mich App 653, 680-681 (2018). Further, "[f]amily team meetings were held to address respondent-mother's barriers to reunification and to assist her in complying with court orders," the tribe-assigned qualified expert witness "testified that she had received reports and updates from the petitioner, that she had been included in treatment plans, that she had been able to provide input for services, and that she had participated in family team meetings," in addition to the fact that the tribe had offered services to the mother but she "failed to contact the tribe to take advantage" of them. *Id*. at 681. Finally, the mother "was resistant to petitioner's efforts and did not cooperate or benefit from the services that were provided to her. *Id*. "In light of this evidence, respondent-mother's argument that petitioner failed to make the requisite 'active efforts' [was] unavailing." *Id*.

11.18 Qualified Expert Witness

"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.

(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).

Note: "The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child." 25 CFR 23.122(c).

"[The] qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe."[145] 25 CFR 23.122(a).

"[T]he qualified expert witness [should] be someone familiar with that particular child." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, G.2 (2016).[146]

The state has the burden to obtain qualified expert witness testimony. See *In re McCarrick/Lamoreaux*, 307 Mich App 436, 465-467 (2014) (state must provide a qualified expert witness in order to place an Indian child in foster care); *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 62 (2015) (state must provide a qualified expert witness in order to terminate parental rights).[147]

"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 court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses." 25 CFR 23.122(b).

11.19 Preferred Placements of Indian Children

One of the primary purposes of ICWA and 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(b).

25 USC 1915, MCL 712B.23(1), 25 CFR 23.129(a), 25 CFR 23.130(a), and 25 CFR 23.131(a) establish a standard order of preference for foster care, preadoptive, and adoptive placements of Indian children.[148] However, an Indian child's Tribe[149] may establish a different order of preference by resolution, and the department 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); 25 CFR 23.130(b); 25 CFR 23.131(c). Tribal input on placements may also fall under a State-Tribal child welfare agreement. See 25 USC 1919(a).

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[145] For a discussion on an Indian child's Tribe, see Section 11.6(B).

[146] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[147] For a detailed discussion on involuntary foster care placement, see Section 11.16(A), and on termination of parental rights, see Section 11.16(B).

[148] 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[.]"

[149] For a discussion on an Indian child's Tribe, see Section 11.6(B).

> **Note:** "Nothing in [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 department or court must consider the preference of the child or parent when appropriate, and the department or court must give weight to the parent's desire for anonymity when applying either the statutory or Tribal preferences. 25 USC 1915(c); 25 CFR 23.129(b); 25 CFR 23.130(c). See Section 11.7 for a detailed discussion of confidentiality.

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 maintains social and cultural ties, must be considered when meeting the preference requirements. 25 USC 1915(d); MCL 712B.23(8).

The Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, H.3 (2016),[150] "recommends that the State agency or other party seeking placement conduct a diligent search for placements that comply with the placement preferences. The diligent search should be thorough, on-going and in compliance with child welfare best practices. A diligent search should also involve:

- Asking the parents for information about extended family, whether members of an Indian Tribe or not;
- Contacting all known extended family, whether members of an Indian Tribe or not;
- Contacting all Tribes with which the child is affiliated for assistance in identifying placements;
- Conducting diligent follow-up with all potential placements;
- Contacting institutions for children approved or operated by Indian Tribes if other preferred placements are not available."

"It is recommended that the State agency (or other party seeking placement) document the search, so that it is reflected in the record." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at H.3.

[150]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

A. Foster Care or Preadoptive Placements

"In any foster-care or preadoptive placement of an Indian child under State law, including changes in foster-care or preadoptive placements, the child must be placed in the least-restrictive setting that:

> (1) Most approximates a family, taking into consideration sibling attachment;
>
> (2) Allows the Indian child's special needs (if any) to be met; and
>
> (3) Is in reasonable proximity to the Indian child's home, extended family, or siblings." 25 CFR 23.131(a). See also 25 USC 1915(b) and MCL 712B.23(1), which contain similar requirements.

Unless the Indian child's Tribe has established a different order of preference,[151] MCL 712B.23(6) and 25 CFR 23.131(b), or good cause is shown to the contrary, MCL 712B.23(1) and 25 CFR 23.129(c), placement of an Indian child accepted for foster care or preadoptive placement must be in the following order of preference:

> "(a) A member of the Indian child's extended family.[152]
>
> > [**Note:** "[I]f [an Indian child's] sibling is age 18 or older, that sibling is extended family and would qualify as a preferred placement." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*,[153] 81 Federal Register 96476, H.2 (2016).]
>
> (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.

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[151] "If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child, as provided in [25 CFR 23.131(a)]." 25 CFR 23.131(c). For a discussion on an Indian child's Tribe, see Section 11.6(B).

[152] MCL 712B.9(5) requires "[t]he department [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." For more information on relative adoptions, see Section 8.4.

[153] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

(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*) and 25 CFR 23.131(b), which contain substantially similar language.

"The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent." 25 CFR 23.131(d). "This language does not require a court to *follow* a child['s] or parent's preference, but rather requires that it *be considered* where appropriate." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, H.2 (2016) (emphasis added).[154]

"[A] preferred placement may not be excluded from consideration merely because the placement is not located in the State where the proceeding is occurring." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at H.3.

B. Adoptive Placements

Unless the Indian child's Tribe has established a different order of preference,[155] MCL 712B.23(6) and 25 CFR 23.131(b), or good cause is shown to the contrary, MCL 712B.23(2) and 25 CFR 23.129(c), preference for the adoptive placement of an Indian child must be in the following order:

"(a) A member of the child's extended family.[156]

[**Note:** "[I]f [an Indian child's] sibling is age 18 or older, that sibling is extended family and would qualify as a preferred placement." See Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*,[157] 81 Federal Register 96476, H.2 (2016).]

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[154]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[155] "If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply." 25 CFR 23.130(b). For a discussion on an Indian child's Tribe, see Section 11.6(B).

[156] MCL 712B.9(5) requires "[t]he department [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." For more information on relative adoptions, see Sections 8.4-.

[157]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

(b) A member of the Indian child's tribe.

(c) An Indian family." MCL 712B.23(2). See also 25 USC 1915(a) and 25 CFR 23.130(a), which contain substantially similar language.

"The court must, where appropriate, also consider the placement preference of the Indian child or the Indian child's parent." 25 CFR 23.130(c). "This language does not require a court to *follow* a child's or parent's preference, but rather requires that it *be considered* where appropriate." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, H.1 (2016) (emphasis added).[158]

"[A] preferred placement may not be excluded from consideration merely because the placement is not located in the State where the proceeding is occurring." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at H.3.

MIFPA requires "the trial court . . . to give meaningful consideration to [an Indian child's] possible placement with . . . family and make findings as to why that placement should be eliminated before making any determination that there [is] good cause to deviate from the statutory placement criteria[]" set out in MCL 712B.23(2), even if "no alternate petition for adoption [has] yet been filed[.]"*In re KMN*, 309 Mich App 274, 291 (2015). See also *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at H.3, which provides that "[t]he courts should not find that no preferred placement is available simply because the individual has not timely completed the formal steps required, such as filing a petition for adoption."[159] But see *Adoptive Couple v Baby Girl*, 570 US 637, 654 (2013) (finding that the preferences in 25 USC 1915(a) did not apply where the couple wishing to adopt the Indian child "was the only party that sought to adopt [the child;]" "[the] [b]iological [Indian-f]ather [was] not covered by [25 USC 1915(a)] because he did not seek to *adopt* [the Indian child][, but] instead, . . . argued that his parental rights should not [have] be[en] terminated in the first place[]").

C. Good Cause to Deviate From the Order of Preference

A court need not follow the order of preference for a foster care, preadoptive, or adoptive placement if it finds on the record that

[158]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[159] "As a best practice, States may establish that actions such as testifying in court regarding the desire to adopt, or sending a statement to that effect in writing, may substitute for a formal petition for adoption for purposes of applying the placement preferences." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at H.3.

good cause exists to not follow the order of preference. 25 USC 1915(a)-(b); 25 CFR 23.129(c). See also MCL 712B.23. "[The] court's determination of good cause to depart from the placement preferences must be made on the record or in writing[.]" 25 CFR 23.132(c).

Under MIFPA, "[t]he 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." MCL 712B.23(5).

However, effective December 12, 2016, ICWA regulations were updated, and a subsection was added specifying additional conditions a court should consider when determining whether good cause exists to deviate from the order of preference:

> "(c) A court's determination of good cause to depart from the placement preferences . . . should be based on one or more of the following considerations:
>
> > (1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
> >
> > (2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;[160]
> >
> > (3) The presence of a sibling attachment that can be maintained only through a particular placement;
> >
> > (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
> >
> > (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting

[160] It is left "to the fact-finder to make the determination as to age and capacity." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, H.4 (2016). *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of this page.

the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties." 25 CFR 23.132(c).

Note: "[I]f the agency relies on unavailability of placement preferences as good cause for deviating from the placement preferences, it must be able to demonstrate to the court on the record that it conducted a diligent search. This showing would occur at the hearing in which the court determines whether a placement or change in placement is appropriate." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, H.4 (2016).[161]

"The determination of whether a 'diligent search' has been completed is left to the fact-finder and will depend on the facts of each case. As a best practice, a diligent search will require a showing that the agency made good-faith efforts to contact all known family members to inquire about their willingness to serve as a placement, as well as whether they are aware of other family members that might be willing to serve as a placement. A diligent search will also generally require good-faith efforts to work with the child's Tribe to identify family-member and Tribal-community placements. If placements were identified but have not yet completed a necessary step for the child to be placed with them (such as filing paperwork or completing a background check), the fact-finder will need to determine whether sufficient time and assistance has been provided." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at H.4.

[161]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

Before 25 CFR 23.132(c) was created, the Michigan Court of Appeals stated that "good cause is limited to the conditions articulated in MCL 712B.23(5)[(i.e., MIFPA).]" *In re KMN*, 309 Mich App at 290. However, MIFPA applies only to the extent that it "provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under [ICWA.]" See 25 USC 1921.

1. Preference of Indian Child or Indian Child's Parent

25 CFR 23.130(c) and 25 CFR 23.131(d) require the court to consider, where appropriate, "the placement preference of the Indian child or the Indian child's parent." See also 25 CFR 23.132(c)(1), which sets out a condition (among others) for good cause to depart from the placement preferences at "[t]he request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference[,]" and the Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, H.4 (2016),[162] which states that 25 CFR 23.132(c)(1) "reflects that the request of the parent may provide a basis for a 'good cause' determination, if the court agrees."

2. Burden of Proof

The party requesting the deviation "should bear the burden of proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences." 25 CFR 23.132(b). See also MCL 712B.23(3). "If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court." 25 CFR 23.132(a).

3. Before Court Deviates From Preferred Placements

Before the court deviates from the placement preferences, 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

[162]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[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." MCL 712B.23(4).

- "may not depart from the preferences based on the socioeconomic status of any placement relative to another placement." 25 CFR 23.132(d).

- "may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA." 25 CFR 23.132(e).

See *In re KMN*, 309 Mich App 274, 292 (2015) (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[]").

D. Using Tribe's Order of Preference Where Tribe Sets Its Own Order

The Indian child's Tribe may establish an order of preference, and the court or agency must follow the Tribe's preference. 25 USC 1915(c); MCL 712B.23(6); 25 CFR 23.130(b); 25 CFR 23.131(c). However, ICWA requires "the placement [to be in] the least restrictive setting appropriate to the particular needs of the child[.]" 25 USC 1915(c) (providing for adoptive, foster-care, or preadoptive placement to be in the least restrictive setting appropriate to the particular needs of the Indian child as set out in 25 USC 1915(b)); 25 CFR 23.131(c) (providing for foster-care or preadoptive placement to be the least restrictive setting appropriate to the particular needs of the Indian child as set out in 25 CFR 23.131(a)). See also MCL 712B.23(1), which also requires certain placements to be "in the least restrictive setting that most approximates a family and in which his or her special needs, if any, may be met."

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*, 570 US 637, 654 n 11 (2013). See also MCL 712B.23(1), MCL 712B.23(6),; 25 CFR 23.130(a)-(b), and 25 CFR 23.131(b)-(c) for MIFPA and Code of Federal Regulations provisions that correlate to the cited ICWA provisions.

E. Record of Placement

MCL 712B.23(7) requires "[a] record of each placement of an Indian child [to] be maintained by the department 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 secretary or Indian child's tribe." See Section 11.22 for a detailed discussion of recordkeeping and disclosure requirements, and Section 11.6(B) for a discussion on an Indian child's Tribe.

"All efforts made to identify, locate, and place a child according to [MCL 712B.23] shall 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).

11.20 Change in Placement of Indian Child

A. Change in Adoptive Indian Child's Status

1. Notice of Adoptive Indian Child's Status Change

"If an Indian child has been adopted, the court must notify, by registered or certified mail with return receipt requested, the child's biological parent or prior Indian custodian and the Indian child's Tribe whenever:

> (1) A final decree of adoption of the Indian child has been vacated or set aside; or
>
> (2) The adoptive parent has voluntarily consented to the termination of his or her parental rights to the child." 25 CFR 23.139(a).

a. Content of Notice

"The notice must state the current name, and any former name, of the Indian child, inform the recipient of the right to petition for return of custody of the child, and provide

sufficient information to allow the recipient to participate in any scheduled hearings." 25 CFR 23.139(b).

b. Waiver of Notice

"A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice and filing the waiver with the court." 25 CFR 23.139(c). The court *must*:

> (1) before accepting the waiver, "explain the consequences of the waiver and explain how the waiver may be revoked." 25 CFR 23.139(c)(1).
>
> (2) "certify that the terms and consequences of the waiver and how the waiver may be revoked were explained in detail in English (or the language of the parent or Indian custodian, if English is not the primary language), and were fully understood by the parent or Indian custodian." 25 CFR 23.139(c)(2).

"Where confidentiality is requested or indicated, execution of the waiver need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with [25 CFR 23.139]." 25 CFR 23.139(c)(3).

c. Revocation of Waiver

"The biological parent or Indian custodian may revoke the waiver at any time by filing with the court a written notice of revocation." 25 CFR 23.139(c)(4). "A revocation of the right to receive notice does not affect any child-custody proceeding that was completed before the filing of the notice of revocation." 25 CFR 23.139(c)(5).

2. Petition for Return of Child

A biological parent or prior Indian custodian may petition for the return of custody of an Indian child under the following circumstances:

> (1) The adoptive parents voluntarily consent to the termination of their parental rights to the child; or

> (2) The final decree of adoption has been vacated or set aside. 25 USC 1916(a); MCL 712B.27(6). See Section 11.24 for information on invalidating an adoption, and Section 11.15(B)(3) for information on withdrawing consent to adoption.

25 USC 1916(a) requires the court to grant the petition "unless there is a showing, in a proceeding subject to the provisions of [25 USC 1912], that such return of custody is not in the best interests of the child."[163] The provisions of 25 USC 1912(a)-(f) include requirements governing the following:

> (a) Notice of proceedings and time for preparation. See Section 11.8 for a detailed discussion of notice of proceedings.
>
> (b) Appointment of counsel. See Section 11.11.
>
> (c) The examination of reports or other documents. See Section 11.16(A)(1) and Section 11.16(B)(4).
>
> (d) Remedial services, rehabilitative programs, and preventive measures. See Section 11.17.
>
> (e) Foster care placement orders. For a detailed discussion of preferred placements of Indian children, see Section 11.19.
>
> (f) Orders terminating parental rights. See Section 11.16(B).

B. Change in Foster Care Placement

When an Indian child is removed from foster care for the purpose of further foster care, preadoptive placement, or adoptive placement, the placement must be in accordance with the placement preferences and the provisions of ICWA, except when the Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed. 25 USC 1916(b).

11.21 Central Adoption Registry for Indian Children

Among other responsibilities and duties, the Bureau of Indian Affairs (BIA) serves as the central registry for the adoption records of Indian children. See 25 CFR 23.71(a). See also http://www.bia.gov/WhoWeAre/index.htm.

[163] See also MCL 712B.27(6), which contains substantially similar language.

"Any State court entering a final adoption decree or order in any voluntary or involuntary Indian-child adoptive placement must furnish a copy of the decree or order within 30 days to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW, Mail Stop 3645 MIB, Washington, DC 20240, along with the following information, in an envelope marked 'Confidential':

> (1) Birth name and birthdate of the Indian child, and Tribal affiliation and name of the Indian child after adoption;
>
> (2) Names and addresses of the biological parents;
>
> (3) Names and addresses of the adoptive parents;
>
> (4) Name and contact information for any agency having files or information relating to the adoption;
>
> (5) Any affidavit signed by the biological parent or parents asking that their identity remain confidential;[164] and
>
> (6) Any information relating to Tribal membership or eligibility for Tribal membership of the adopted child."[165] 25 CFR 23.140(a). See also 25 USC 1951(a)(1)-(4), which contains substantially similar language; MCL 712B.35(1), which contains substantially similar language except that it requires the court to also provide "the tribal enrollment officer of the appropriate tribe" with a copy of the decree and order containing the required information.

The information is not subject to the Freedom of Information Act, and it is the BIA's duty to ensure that the information remains confidential. 25 CFR 23.71(c).

11.22 Recordkeeping and Disclosure of Information

A. Maintenance of Records

Michigan must maintain a record of every Indian child's voluntary and involuntary foster care, preadoptive, and adoptive placement,[166] which must be made available to the Indian child's Tribe[167] or the Secretary of the Interior within 14 days of a request.

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[164] For a detailed discussion on confidentiality, see Section 11.7.

[165] "If a State agency has been designated as the repository for all State-court adoption information and is fulfilling the duties described in [25 CFR 23.140(a)], the State courts in that State need not fulfill those same duties." 25 CFR 23.140(b).

[166] For a detailed discussion on Michigan's central adoption registry, see Section 9.3.

[167] For a discussion on an Indian child's Tribe, see Section 11.6(B).

25 USC 1915(e); 25 CFR 23.141(a). Each record must at least contain "the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences."[168] 25 CFR 23.141(b). "It is recommended that the record include any documentation of preferred placements contacted and, if any were found ineligible as a placement, an explanation as to the ineligibility." Bureau of Indian Affairs (BIA), *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, J.1 (2016).[169]

Among other responsibilities and duties, the BIA serves as the central registry for adoption records of Indian children. See 25 CFR 23.71(a).

MIFPA also requires:

- "A record of each placement of an Indian child [to] be maintained by the department 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 secretary or Indian child's tribe." MCL 712B.23(7).

- "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).

B. Disclosure of Information

ICWA provides an adopted Indian child with access to adoption records under 25 USC 1917 and 25 USC 1951(b). MIFPA provides an adopted Indian child with access to adoption records under MCL 712B.27(4).

> **Note:** An adopted Indian child also has the right to access his or her adoption records before the May 7, 1979, enactment of ICWA for purposes of establishing

[168] "A state agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency." 25 CFR 23.141(c).

[169] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

Tribal affiliation. *In re Hanson*, 188 Mich App 392, 396 (1991).

When the adoption record contains no indication of the biological parents' desires, the biological parents' identifying information may be released if the court finds good cause.[170] *In re Dixon*, 116 Mich App 763, 767-768 (1982). In light of 25 USC 1902, the Court of Appeals found that the release of the biological parents' identifying information to establish Tribal affiliation satisfied the good cause requirement. *In re Hanson*, 188 Mich App at 397.

Note: Without an actual consent from the biological parents, "the manner in which [the biological parents' identifying] information is released should be tailored to best protect the privacy rights of the biological parents." *In re Hanson*, 188 Mich App at 398, citing *In re Dixon*, 116 Mich App at 768-769. Without the biological parents' actual consent, the court should release the identifying information to the Indian Tribe, not the adopted Indian child, with the request that the Tribe keep it confidential. *In re Hanson*, 188 Mich App at 398-399. See Section 11.7 for a detailed discussion of confidentiality.

1. Release of Information by the Court

25 USC 1917 and MCL 712B.27(4) permit an adopted Indian child, who is 18 years of age or older, to apply for Tribal information from the court that entered the adoption order.[171] On receipt of the Indian child's application, the court must inform the adopted Indian child of "his or her tribal affiliation, if known, of the individual's biological parents, and provide any information as necessary to protect any rights from the individual's tribal relationship." MCL 712B.27(4). See also 25 USC 1917, MCR 3.807(C), and 25 CFR 23.138, which contain substantially similar language.

If the biological parents have not given consent to release their identity, the court should release the biological parents' identifying information to the Indian Tribe, not the adopted Indian child, with the request that the Tribe keep it confidential. *In re Hanson*, 188 Mich App 392, 398-399 (1991).

[170] For a detailed discussion on release of information, see Chapter 9.

[171] See the ICWA form *Petition to Obtain Adoption Records*.

2. Release of Information by the Secretary of the Interior

25 USC 1951(b) grants an adopted Indian child, who is over the age of 18, the adoptive or foster parents of an Indian child, and an Indian Tribe, the right to access from the Secretary of the Interior all information needed for purposes of Tribal enrollment and for determining Tribal membership rights or benefits. See also 25 CFR 23.71(b), which contains substantially similar language.

"Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe." 25 USC 1951(b). See also 25 CFR 23.71(b), which contains substantially similar language. For a detailed discussion of the biological parents' affidavit requesting confidentiality, see Section 11.21.

> **Note:** Among other responsibilities and duties, the Bureau of Indian Affairs (BIA) maintains the confidential file on all state Indian adoptions. See 25 CFR 23.71(b).

C. Annual Census

MCL 712B.37 requires "[t]he department [to] publish annually a census with no individually identifiable information of all Indian children in the department'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 [MIFPA].
>
> (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."[172]

11.23 Improper Removal

If a party asserts or the court has reason to believe, during a child custody proceeding, that an Indian child has been improperly removed or retained, "the court must expeditiously determine whether there was improper removal or retention." 25 CFR 23.114(a).

"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 25 CFR 23.114(b), which contain substantially similar language.

11.24 Invalidation of State Court Action

A. For Violation of 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:

(1) an Indian child[173] who is or was the subject of any action for foster care placement or termination proceedings under state law,[174]

(2) a parent or Indian custodian from whom the child was removed, and

(3) the Indian child's Tribe.[175] 25 USC 1914; 25 CFR 23.137(a).

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[172] For a discussion on Indian children, see Section 11.6.

[173] For additional information on determining an Indian child's status, see Section 11.6(A).

[174] See Sections 2.10–2.11 for information regarding the termination of parental rights pursuant to Michigan law.

[175] For a discussion on an Indian child's Tribe, see Section 11.6(B).

"To petition for invalidation, there is no requirement that the petitioner's rights under ICWA were violated; rather, a petitioner may challenge the action based on any violations of 25 USC 1911, [25 USC] 1912, or [25 USC] 1913 during the course of the child-custody proceeding." 25 CFR 23.137(c). "One party cannot waive another party's right to seek" invalidation of a state court action for violation of ICWA. Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, K.3 (2016).[176]

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." 25 CFR 23.137(b).

Caselaw. The following cases discuss the invalidation of a state court action that 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 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 American Indian child."[177] *In re Johnson*, 305 Mich App at 330, 332, 336.

- *In re Morris (After Remand) (Morris IV)*, **300 Mich App 95 (2013)**

[176]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[177] 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 336. See the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 19, for more information on the best-interests analysis.

"A remand to ensure proper notice under ICWA that does not lead to any evidence that ICWA applies does not unravel a best-interest determination." *Morris IV*, 300 Mich App at 107-108. Specifically, where nothing in the record "indicate[s] that the minor child is eligible for membership in an Indian tribe, and both petitioner and the trial court satisf[y] their obligations under ICWA[, t]he burden then shift[s] to [the] respondent to prove that ICWA nonetheless applie[s.]" *Id.* at 106.

- ***In re Morris (Morris III)*, 491 Mich 81 (2012), overruling *In re IEM*, 233 Mich App 438 (1999)**[178]

In overruling *In re IEM*, 233 Mich App 438 (1999),[179] the Michigan Supreme Court held "that the proper remedy for ICWA-notice violations [under 25 USC 1912(a)] is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue." *Morris III*, 491 Mich at 121-122. Specifically, "the use of a conditional reversal is . . . 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 . . . .'" *Morris III*, 491 Mich at 120. In addition, "conditional reversal is . . . deferential to tribal interests, as expressed by ICWA, and is . . . likely to ensure these interests are protected by the trial courts. The term 'conditional reversal' sends a clear[] signal to the lower courts and the [DHHS] that they must pay closer attention when ICWA is implicated. In sum, . . . the conditional-reversal remedy is . . . emphatic, . . . consistent with the text and purposes animating ICWA, and . . . likely to encourage compliance with ICWA."*Id.*

> **Note:** In *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 ICWA's protections—if the Indian tribe chose not to intervene[;] [rather,] [i]f the child meets the definition of Indian child, ICWA

[178] The Michigan Supreme Court in *In re Morris (Morris III),* 491 Mich 81, 121 (2012), overruled *In re IEM*, 233 Mich App 438 (1999), "and its progeny[.]"

[179] In *In re IEM*, 233 Mich App at 449-450, the Court of Appeals found termination was proper under state law but that the DHHS failed to satisfy 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."

> applies, regardless of whether the Indian tribe chooses to intervene in the state-court proceedings."

- ***Empson-Laviolette v Crago*, 280 Mich App 620 (2008)**

The Court of Appeals found that 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. *Empson-Laviolette v Crago*, 280 Mich App at 632-633. See Section 11.15(B)(3) for a discussion of a parent's or Indian custodian's right to withdraw consent for guardianship of a minor Indian child.

- ***In re Morgan*, 140 Mich App 594 (1985)**

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, failed to hear qualified expert witness testimony, and failed to establish that remedial or rehabilitative efforts had failed. *In re Morgan*, 140 Mich App at 601-604. See Section 11.16(B) for a detailed discussion of involuntary termination of parental rights.

B. For Violation of MIFPA

A petition asking the court to invalidate a placement or a termination proceeding because the court's actions violated any provision of MCL 712B.7, MCL 712B.9, MCL 712B.11, MCL 712B.13, MCL 712B.15,[180] 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,[181]
>
> (2) a parent or Indian custodian from whom the child was removed, and
>
> (3) the Indian child's Tribe.[182] MCL 712B.39.

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[180] MCL 712B.15(5) also allows "[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 Indian 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 11.16 for a discussion of MCL 712B.15.

[181] See Sections 2.10–2.11 for information regarding the termination of parental rights pursuant to Michigan law.

[182] For a discussion on an Indian child's Tribe, see Section 11.6(B).

C. Right to Appeal

"[A]ny order involving an Indian child that is subject to potential invalidation under [MCL 712B.39] or [25 USC 1914 is appealable to the Michigan Court of Appeals by right], which includes, but is not limited to, an order regarding:

> (a) recognition of the jurisdiction of a tribal court pursuant to MCL 712B.7, MCL 712B.29, or 25 USC 1911;
>
> (b) transfer to tribal court pursuant to MCL 712B.7 or 25 USC 1911;
>
> (c) intervention pursuant to MCL 712B.7 or 25 USC 1911;
>
> (d) extension of full faith and credit to public acts, records, and judicial proceedings of an Indian tribe pursuant to MCL 712B.7 or 25 USC 1911;
>
> (e) removal of a child from the home, placement into foster care, or continuance of an out-of-home placement pursuant to MCL 712B.9, MCL 712B.15, MCL 712B.25, MCL 712B.29, or 25 USC 1912;
>
> (f) termination of parental rights pursuant to MCL 712B.9, MCL 712B.15, or 25 USC 1912;
>
> (g) appointment of counsel pursuant to MCL 712B.21 or 25 USC 1912;
>
> (h) examination of reports pursuant to MCL 712B.11 or 25 USC 1912;
>
> (i) voluntary consent to or withdrawal of a voluntary consent to a foster care placement or to a termination of parental right pursuant to MCL 712B.13, MCL 712B.25, MCL 712B.27, or 25 USC 1913;
>
> (j) foster care, pre-adoptive, or adoptive placement of an Indian child pursuant to MCL 712B.23[.]" MCR 3.993(A)(6).

"In any appeal as of right, an indigent respondent is entitled to appointment of an attorney to represent the respondent on appeal and to preparation of relevant transcripts." MCR 3.993(A).

For additional discussion on filing an appeal with the Michigan Court of Appeals, see Section 7.4.

11.25 Additional ICWA and MIFPA Resources

A. Court Resource Guide

In an effort to "craft a court resource guide designed to provide practical ICWA advice to [Michigan's] state courts[,]" the State Court Administrative Office (SCAO) developed, in collaboration with the Tribal Court Relations Committee of the Court Improvement Program, the *Michigan Indian Family Preservation Act of 2013 and Indian Child Welfare Act of 1978: A Court Resource Guide*.

B. Charts

The SCAO 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."

The SCAO created the *American Indian Child Placement/Evidence Standards Chart* to assist trial courts with the application of MIFPA standards during the removal of an Indian child from the home.

C. Toolkit for Judges and Attorneys

The SCAO 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 ICWA and MIFPA standards and procedures for cases involving Indian children.

D. Checklists and Flowcharts

The Michigan Judicial Institute created quick reference materials on proceedings involving an Indian child to assist trial courts with the application of ICWA and MIFPA standards and procedures.

The Permanency Planning for Children Department of the National Council of Juvenile and Family Court Judges also created a series of checklists[183] "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 QUICWA Compliance Collaborative project developed a QUICWA Performance Checklist[184] that courts can use to record

[183]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

observations of what occurs, who is present, and findings that are made at a number of different types of child welfare court hearings.

[184]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

Glossary

A

Acknowledged father

- For purposes of the Revocation of Paternity Act, *acknowledged father* is "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(a).

Acknowledgment

- For purposes of the Acknowledgment of Parentage Act, *acknowledgment* is "an acknowledgment of parentage executed as provided in this act." MCL 722.1002(a).

Active efforts

- For purposes of the Michigan Indian Family Preservation Act (MIFPA), *active efforts* are "actions to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to reunify the Indian 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 title IV-E of the social security act, 42 USC 670 to [42 USC] 679c, and also include, but are not limited to, 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.[1]

(*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.

(*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

[1] See Section 11.17 for additional information on preferred placements for Indian children.

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." MCL 712B.3(a). See also MCR 3.002(1), which contains a substantially similar definition of *active efforts*.

- For purposes of the Indian Child Welfare Act (ICWA), *active efforts* are "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

  (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;

  (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;

  (3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

  (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to

provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;

(11) Providing post-reunification services and monitoring." 25 CFR 23.2.

Adoptee

- For purposes of MCL 24.303(2), *adoptee* is "a child who is to be or who is adopted." MCL 24.303(2).
- For purposes of MCL 400.115f–MCL 400.115t, *adoptee* is "the child who is to be adopted or who is adopted." MCL 400.115f(a).
- For purposes of the Adoption Code, *adoptee* is "the individual who is to be adopted, regardless of whether the individual is a child or an adult." MCL 710.22(a).
- For purposes of the Foster Care and Adoption Services Act, MCL 722.951 *et seq.*, *adoptee* is "a child who is to be adopted or who is adopted." MCL 722.952(a).

Adoption assistance

- For purposes of MCL 400.115f–MCL 400.115t, *adoption assistance* is "a support subsidy or a support subsidy with medical assistance." MCL 400.115f(b).

Adoption attorney

- For purposes of MCL 722.124b, MCL 722.124c, and MCL 722.124d, the Adoption Code, and the Foster Care and Adoption Services Act, *adoption attorney* is "an attorney acting as counsel in an adoption proceeding or case." MCL 710.22(b). See also MCL 722.124b(a); MCL 722.952(b).

Adoption assistance agreement

- For purposes of MCL 400.115f–MCL 400.115t, *adoption assistance agreement* is "an agreement between the department and an adoptive parent regarding adoption assistance." MCL 400.115f(c).

Adoption code

- For purposes of MCL 400.115f–MCL 400.115t, *adoption code* is "the Michigan adoption code, . . . MCL 710.21 to [MCL] 710.70." MCL 400.115f(d).

- For purposes of the Foster Care and Adoption Services Act, MCL 722.951 *et seq.*, *adoption code* is "the Michigan adoption code, . . . MCL 710.21 to [MCL] 710.70." MCL 722.952(c).

Adoption facilitator

- For purposes of MCL 722.124b, MCL 722.124c, and MCL 722.124d, *adoption facilitator* is "a child placing agency or an adoption attorney who assists biological parents or guardians or prospective adoptive parents with adoptions according to the Michigan adoption code." MCL 722.124b(b).

- For purposes of the Foster Care and Adoption Services Act, *adoption facilitator* is "a child placing agency or an adoption attorney." MCL 722.952(d).

Adoptive parent

- For purposes of MCL 400.115f–MCL 400.115t, *adoptive parent* is "the parent or parents who adopt a child under the adoption code." MCL 400.115f(e).

- For purposes of the Foster Care and Adoption Services Act, *adoptive parent* is "the parent or parents who adopt a child in accordance with the adoption code." MCL 722.952(e).

Adult adoptee

- For purposes of MCL 710.68, *adult adoptee* is "an individual who was adopted as a child who is now 18 years of age or older or an individual who was 18 years of age or older at the time of adoption." MCL 710.68(18).

Adult former sibling

- For purposes of the Adoption Code, *adult former sibling* is "an individual who is 18 years of age or older and is related to an adult adoptee either biologically or through adoption by at least 1 common parent, regardless of whether the adult former sibling ever lived in the same household as the adult adoptee." MCL 710.22(c).

Advertise for, solicit, or recruit

- For purposes of MCL 710.55, *advertise for*, *solicit*, *or recruit* is "to communicate in person, in writing, or via any medium, public or private for the purpose of locating a previously unknown person or entity with whom to temporarily or permanently place a child." MCL 710.55(3).

Affiliated father

- For purposes of the Revocation of Paternity Act, *affiliated father* is "a man who has been determined in a court to be the child's father."[2] MCL 722.1433(b).

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[2] "[A]n order of filiation [is not limited to] . . . the procedures prescribed in the Paternity Act. . . . Had the Legislature . . . intended to restrict affiliated fathers to those identified through paternity actions, the Legislature would have so specified. Absent any indication of such specificity, any judicial order establishing a determination in court that a man is a child's father could demonstrate the determination of an affiliated father within the meaning of [MCL 722.1433(b)]." *Glaubius v Glaubius*, 306 Mich App 157, 168-169 (2014) (finding that there is "nothing in the plain language of [MCL 722.1433(b)] or [MCL 722.1433(f)] to suggest that [the court's determination of a man's paternity and entering an order establishing that determination] in the context of divorce or custody proceedings would not establish a man's status as an affiliated father[]") (internal citation omitted). "[F]or a man to have been 'determined' in a court to be a child's father, there must have been a dispute or question about the 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 (cautioning that "not all divorce proceedings squarely address the question of a child's paternity[, and] . . . 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[]") (internal citation omitted).

Agency

- For purposes of 23 CFR 23.101–23 CFR 23.144, *agency* is "a nonprofit, for-profit, or governmental organization and its employees, agents, or officials that performs, or provides services to biological parents, foster parents, or adoptive parents to assist in the administrative and social work necessary for foster, preadoptive, or adoptive placements." 25 CFR 23.102.

Agency placement

- For purposes of the Adoption Code, *agency placement* is "a placement in which a child placing agency, the department, or a court selects the adoptive parent for the child and transfers physical custody of the child to the prospective adoptive parent." MCL 710.22(d).

Alleged father

- For purposes of the Revocation of Paternity Act, *alleged father* is "a man who by his actions could have fathered the child." MCL 722.1433(c).

Applicant

- For purposes of the Adoption Code, *applicant* is "an individual or individuals who desire to adopt a child and who have submitted an adoption application to a child placing agency." MCL 710.22(e).

Appropriate authority of the receiving state

- For purposes of Interstate Compact on Placement of Children (ICPC), *appropriate authority in the receiving state* with reference to this state is the DHHS director.[3] MCL 3.713(b).

Appropriate official

- For purposes of MCR 3.205, *appropriate official* is "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." MCR 3.205(B)(1).

[3] While the definition says director of "social services", that department is now called the Department of Health and Human Services.

Arbitrary

- "The word[] 'arbitrary' . . . ha[s a] generally accepted meaning[]. The United States Supreme Court has defined the term[] as . . . '[W]ithout adequate determining principle . . . [f]ixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned[.]'" *Bundo v Walled Lake*, 395 Mich 679, 703 n 17 (1976), quoting *United States v Carmack*, 329 US 230, 243 (1946) (fifth alteration in original).

B

Best interests of the child

- For purposes of the Adoption Code, *best interests of the* adoptee or *best interests of the* child is "the sum total of the following factors to be considered, evaluated, and determined by the court to be applied to give the adoptee permanence at the earliest possible date:

  (*i*) The love, affection, and other emotional ties existing between the adopting individual or individuals and the adoptee or, in the case of a hearing under [MCL 710.39],[4] the putative father and the adoptee.

  (*ii*) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under [MCL 710.39], the putative father to give the adoptee love, affection, and guidance, and to educate and create a milieu that fosters the religion, racial identity, and culture of the adoptee.

  (*iii*) The capacity and disposition of the adopting individual or individuals or, in the case of a hearing under [MCL 710.39], the putative father, to provide the adoptee with food, clothing, education, permanence, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

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

[4] MCL 710.39 governs hearings for termination of an interested putative father's parental rights. See Section 2.10(B).

(*v*) The permanence as a family unit of the proposed adoptive home, or, in the case of a hearing under [MCL 710.39], the home of the putative father.

(*vi*) The moral fitness of the adopting individual or individuals, or in the case of a hearing under [MCL 710.39], of the putative father.

(*vii*) The mental and physical health of the adopting individual or individuals or, in the case of a hearing under [MCL 710.39], of the putative father, and of the adoptee.

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

(*ix*) The reasonable preference of the adoptee, if the adoptee is 14 years of age or less and if the court considers the adoptee to be of sufficient age to express a preference.[5]

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

(*xi*) Any other factor considered by the court to be relevant to a particular adoption proceeding, or to a putative father's request for child custody." MCL 710.22(g)(*i*)-(*xi*).

Born out of wedlock

- For purposes of the Adoption Code, *born out of wedlock* is "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." MCL 710.22(h).

C

Capricious

- "The word[] . . . 'capricious' ha[s a] generally accepted meaning[]. The United States Supreme Court has defined the term[] as . . . '[A]pt to change suddenly; freakish; whimsical; humorsome[.]'" *Bundo v Walled Lake*, 395 Mich 679, 703 n 17 (1976), quoting *United States v Carmack*, 329 US 230, 243 (1946) (fifth alteration in original).

[5] If the adoptee is over 14 years of age, the adoptee must consent to the adoption. MCL 710.43(2). See Section 2.6(A)Section (C)(3)(b).

Case or court proceeding

- For purposes of MCR 1.111, *case or court proceeding* is "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).

Central adoption registry

- For purposes of the Adoption Code, *central adoption registry* is "the registry established by the department under [MCL 710.27b] to control the release of identifying adoption information."[6] MCL 710.22(i).

Certification

- For purposes of MCL 400.115f–MCL 400.115t, *certification* is "a determination of eligibility by the department that an adoptee is eligible for a support subsidy or a medical subsidy, or both, or redetermined adoption assistance." MCL 400.115f(f).

Child

- For purposes of the Interstate Compact on the Placement of Children (ICPC), *child* is "a person who, by reason of minority, is legally subject to parental, guardianship, or similar control." MCL 3.711, Article II (a).

- For purposes of the Uniform Interstate Family Support Act, *child* is "an individual, whether over or under the age of majority, who is or is alleged to be owed a duty of support by the individual's parent or who is or is alleged to be the beneficiary of a support order directed to the parent." MCL 552.2102(a).

- For purposes of the Adoption Code, *child* is "an individual less than 18 years of age." MCL 710.22(j).

- For purposes of the Child Custody Act of 1970, *child* is "minor child and children. Subject to . . . MCL 552.605b, for purposes of providing support, child includes a child and children who have reached 18 years of age." MCL 722.22(d).

- For purposes of the Paternity Act, *child* is "a child born out of wedlock." MCL 722.711(b).

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[6] Among other responsibilities and duties, the Bureau of Indian Affairs (BIA) serves as the central registry for the adoption records of Indian children. See 25 CFR 23.71(a).

- For purposes of the Guardianship Assistance Act, *child* is "a person less than 18 years of age." MCL 722.872(a).

- For purposes of the Acknowledgment of Parentage Act, *child* is "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." MCL 722.1002(b).

Child born out of wedlock

- For purposes of the Paternity Act, *child born out of wedlock* is "a child begotten 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."[7, 8] MCL 722.711(a).

Child caring institution

- For purposes of the Child Care Organizations Act, *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. An educational program may be provided, but the educational program shall not be the primary purpose of the facility. Child caring institution includes a maternity home for the care of unmarried mothers who are minors and an agency group home, that is described as a small child caring institution, owned, leased, or rented by a licensed agency providing care for more than 4 but less than 13 minor children. Child caring institution also includes an institution for developmentally disabled or emotionally disturbed minor children. Child caring institution does not include a hospital, nursing home, or home for the aged licensed under . . . the public health code, . . . MCL 333.20101 to [MCL] 333.22260, a boarding school licensed under . . . the revised school code, . . . MCL 380.1335, a hospital or facility operated by the state or

[7] Neither a default judgment of divorce indicating there were no children born or expected during the marriage, a birth certificate, nor an affidavit of parentage are court determinations sufficient to establish that a child is not the issue of a marriage. *Barnes v Jeudevine*, 475 Mich 696, 705-707 (2006) ("hold[ing] that a court determination under MCL 722.711(a) that a child is not 'the issue of the marriage' requires that there be an affirmative finding regarding the child's paternity in a prior legal proceeding that settled the controversy between the mother and the legal father[]").

[8] When determining whether a child was born out of wedlock, a trial court may view the evidence in light of its own general knowledge and experience. *Hinterman v Stine*, 55 Mich App 282, 285 (1974).

licensed under the mental health code, . . . MCL 330.1001 to [MCL] 330.2106, or an adult foster care family home or an adult foster care small group home licensed under the adult foster care facility licensing act, . . . MCL 400.701 to [MCL] 400.737, in which a child has been placed under [MCL 722.115(6)]." MCL 722.111(c).

Child custody proceeding

- For purposes of an Indian child, *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 or Indian custodian, and where the parent or Indian custodian cannot have the Indian child returned upon demand[9] but parental rights have not been terminated, for temporary placement[10] 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 . . . the estates and protected individuals code, . . . MCL 700.5201 to [MCL] 700.5219.[11]

  (C) A juvenile guardianship under [MCL 712A.19a or MCL 712A.19c].

  (*ii*) Termination of parental rights. Any action resulting in the termination of the parent-child relationship.[12]

  (*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.

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[9] If a parent or Indian custodian has to do more than make a simple verbal request for the child's return, then he or she is prohibited from regaining custody of the child *upon demand*. See 25 CFR 23.2.

[10] See Chapter 5 for information on temporary placements.

[11] A parent or Indian custodian, consenting to a voluntary guardianship, is prohibited from regaining custody of the child *upon demand* where he or she has to follow certain formalities of "fil[ing] a written document with the court or otherwise testify[ing] before the court" in order to withdraw his or her consent and regain custody of the Indian child. See 25 CFR 23.2 (defining the term *upon demand*); 25 CFR 23.127(b) (requiring certain formalities to withdraw consent). See also MCL 712B.13(4), MCL 712B.25(4), and MCR 5.404(B)(3), which also require the parent or Indian custodian to follow certain formalities in order to withdraw his or her consent. For additional information on withdrawal of consent to guardianship, see Section 11.15(A)(3).

[12] "[I]f a proceeding seeks to terminate the parental rights of one parent, that proceeding falls within [the] ICWA's definition of 'child-custody proceeding' even if the child will remain in the custody of the other parent or a step-parent." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, B.2 (2016).

(*iv*) Adoptive placement. Permanent placement[13] 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)].

(*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." MCL 712B.3(b).

See also 25 USC 1903(1) and MCR 3.002(2), which both contain substantially similar definitions of *child custody proceeding*; 25 CFR 23.2, which contains a substantially similar definition of *child custody proceeding* except that it uses the phrase "may culminate in one of the following outcomes," rather than the phrase "includes" and specifically excludes emergency proceeding from the definition.[14]

Child placing agency

- For purposes of the Adoption Code, *child placing agency* is "a private organization licensed under 1973 PA 116, MCL 722.111 to [MCL 722.128], to place children for adoption." MCL 710.22(k).

- For purposes of the Child Care Licensing Act, and the Safe Delivery of Newborns Law, *child placing agency* is "a governmental organization or an agency organized under the nonprofit corporation act, 1982 PA 162, MCL 450.2101 to [MCL] 450.3192, for the purpose of receiving children for placement in private family homes for foster care or for adoption. The function of a child 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(e). See also MCL 712.1(2)(a).

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[13] See Chapter 6 for information on formal placements.

[14] 25 CFR 23.2 also clarifies that "[a]n action that may culminate in [(foster-care placement, termination of parental rights, preadoptive placement, or adoptive placement)] is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes. There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings. If a child is placed in foster care or another out-of-home placement as a result of a status offenses, that status offense proceeding is a child-custody proceeding."

Child protective proceeding

- For purposes of subchapter 3.900 of the Michigan Court Rules, *child protective proceeding* is "a proceeding concerning an offense against a child." MCR 3.903(A)(2).

Children's ombudsman

- For purposes of the MCL 710.67(4) and MCL 710.68(21), *children's ombudsman* or *ombudsman* is "the ombudsman appointed pursuant to . . . [MCL 722.923], or his or her designee." MCL 710.67(4); MCL 710.68(21).

Child with special needs

- For purposes of MCL 400.115f–MCL 400.115t, *child with special needs* is "an individual under the age of 18 years for whom the state has determined all of the following:

  (*i*) There is a specific judicial finding that the child cannot or should not be returned to the home of the child's parents.

  (*ii*) A specific factor or condition, or a combination of factors and conditions, exists before the adoption is finalized so that it is reasonable to conclude that the child cannot be placed with an adoptive parent without providing adoption assistance under this act. The factors or conditions to be considered may include ethnic or family background, age, membership in a minority or sibling group, medical condition, physical, mental, or emotional disability, or length of time the child has been waiting for an adoptive home.

  (*iii*) A reasonable but unsuccessful effort was made to place the adoptee with an appropriate adoptive parent without providing adoption assistance under this act or a prospective placement is the only placement in the best interest of the child." MCL 400.115f(g).

Consent

- For purposes of the Adoption Code, *consent* is "a document in which all parental rights over a specific child are voluntarily relinquished to the court for placement with a specific adoptive parent."MCL 710.22(*l*).

Continued custody

- For purposes of an Indian child, *continued custody* is "physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law, that a parent or Indian

custodian already has or had at any point in the past. The biological mother of a child has had custody of a child."[15] 25 CFR 23.2.

Convention

- For purposes of the Uniform Interstate Family Support Act, *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).

Convention adoptee

- For purposes of the Code of Federal Regulations provisions that apply to international adoptions, *convention adoptee* is "a child habitually resident in a Convention country who is eligible to immigrate to the United States on the basis of a Convention adoption." 8 CFR 204.301.

Convention adoption

- For purposes of international adoptions, *Convention adoption* is "an adoption of a child resident in a foreign country party to the Convention by a United States citizen, or an adoption of a child resident in the United States by an individual residing in another Convention country." 42 USC 14902(10).

- For purposes of the Code of Federal Regulations provisions that apply to international adoptions, *Convention adoption* is "the adoption, on or after the Convention effective date, of an alien child habitually resident in a Convention country by a U.S. citizen habitually resident in the United States, when in connection with the adoption the child has moved, or will move, from the Convention country to the United States." 8 CFR 204.301.

Convention country

- For purposes of international adoptions, *Convention country* is "a country party to the Convention[on Protection of Children and Co-operation in Respect of Intercountry Adoption, opened

[15] For purposes of custody, "[a] party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law." 25 CFR 23.2.

for signature at The Hague on May 29, 1993[16]." 42 USC 14902(9); 42 USC 14902(12).

- For purposes of the Code of Federal Regulations provisions that apply to international adoptions, *Convention country* is "a country that is a party to the Convention[on Protection of Children and Co-operation in Respect of Intercountry Adoption, opened for signature at The Hague on May 29, 1993] and with which the Convention is in force for the United States [as of April 1, 2008]." 8 CFR 204.301.

Court

- For purposes of MCL 400.115f–MCL 400.115t, *court* is "the family division of circuit court." MCL 400.115f(i).

- For purposes of the Adoption Code, *court* is "the family division of circuit court of this state, or if the context requires, the court having jurisdiction over adoption in another state or country." MCL 710.22(m).

- For purposes of the Safe Delivery of Newborns Law, *court* is "the family division of circuit court." MCL 712.1(2)(b).

- For purposes of the Paternity Act, *court* is "the circuit court." MCL 722.711(d).

- For purposes of the Acknowledgment of Parentage Act, *court* is "the circuit court." MCL 722.1002(c).

Culturally appropriate services

- For purposes of an Indian child, *culturally appropriates services* are "services 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 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 Indian child and family to the attention of the department 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

[16] Note that the Convention became effective in the United States on April 1, 2008. See https://travel.state.gov/content/adoptionsabroad/en/hague-convention/understanding-the-hague-convention.html.

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." MCL 712B.3(d). See also MCR 3.002(4), which contains a substantially similar definition of *culturally appropriate services*.

Custody

- For purposes of an Indian child, *custody* is "physical custody or legal custody or both, under any applicable Tribal law or Tribal custom or State law. A party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law." 25 CFR 23.2.

D

Department

- For purposes of MCL 400.115f–MCL 400.115t, *department* is "the department of [health and] human services." MCL 400.115f(j).

- For purposes of the Adoption Code, MCL 710.22(n) defines department as the Family Independence Agency. MCL 400.226(A) renamed the Family Independence Agency as the Department of Health and Human Services (DHHS). This benchbook uses "DHHS" as the "department" referred to throughout the text.

- For purposes of the Safe Delivery of Newborns Law, *department* is "the department of [health and] human services." MCL 712.1(2)(c).

- For purposes of an Indian child, *department* is "the department of health and human services or a successor department or agency." MCL 712B.3(e). See also MCR 3.002(5), which contains a substantially similar definition of *department*.

- For purposes of the Child Care Licensing Act, *department* is "the department of health and human services and the department of licensing and regulatory affairs or a successor agency or department responsible for licensure under this act. The department of licensing and regulatory affairs is responsible for licensing and regulatory matters for child care centers, group child care homes, family child care homes, children's camps, and children's campsites. The department of health and human services is responsible for licensing and

regulatory matters for child caring institutions, child placing agencies, children's therapeutic group homes, foster family homes, and foster family group homes." MCL 722.111(m).

- For purposes of the Guardianship Assistance Act, *department* is "the department of health and human services." MCL 722.872(b).

Determination of care rate

- For purposes of MCL 400.115f–MCL 400.115t, *determination of care rate* is "a supplemental payment to the standard age appropriate foster care rate that may be justified when extraordinary care or expense is required. The supplemental payment shall be based on 1 or more of the following for which extraordinary care is required of the foster care provider or an extraordinary expense exists:

  (*i*) A physically disabled child for whom the foster care provider must provide measurably greater supervision and care.

  (*ii*) A child with special psychological or psychiatric needs that require extra time and a measurably greater amount of care and attention by the foster care provider.

  (*iii*) A child requiring a special diet that is more expensive than a normal diet and that requires extra time and effort by the foster care provider to obtain and prepare.

  (*iv*) A child whose severe acting out or antisocial behavior requires a measurably greater amount of care and attention of the foster care provider.

  (*v*) Any other condition for which the department determines that extraordinary care is required of the foster care provider or an extraordinary expense exists." MCL 400.115f(k).

Direct placement

- For purposes of the Adoption Code, *direct placement* is "a placement in which a parent or guardian selects an adoptive parent for a child, other than a stepparent or an individual related to the child within the fifth degree by marriage, blood, or adoption, and transfers physical custody of the child to the prospective adoptive parent." MCL 710.22(o).

DNA identification profile

- For purposes of the Paternity Act and the Safe Delivery of Newborns Law (see MCL 712.12(2)(d)), *DNA identification profile* is "the results of the DNA identification profiling of genetic testing material." MCL 722.711(e).

DNA identification profiling

- For purposes of the Paternity Act and the Safe Delivery of Newborns Law (see MCL 712.12(2)(d)), *DNA identification profiling* is "a validated scientific method of analyzing components of deoxyribonucleic acid molecules in a sample of genetic testing material to identify the pattern of the components' chemical structure that is unique to the individual." MCL 722.711(f).

Domestic violence

- For purposes of the Safe Delivery of Newborns Law, *domestic violence* is "that term as defined in . . . MCL 400.1501." MCL 712.1(2)(e). MCL 400.1501(d) defines that term 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."

Domicile

- For purposes of an Indian child, *domicile* is:

  (1) "For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.

(2) For an Indian child, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent." 25 CFR 23.2.

Duty of support

- For purposes of the Uniform Interstate Family Support Act, *duty of support* is "an obligation imposed or imposable by law to provide support for a child, spouse, or former spouse, including an unsatisfied obligation to provide support." MCL 552.2102(d).

E

Emergency proceeding

- For purposes of an Indian child, *emergency proceeding* "means and includes any court action that involves an emergency removal or emergency placement of an Indian child." 25 CFR 23.2.

Emergency service provider

- For purposes of the Safe Delivery of Newborns Law, *emergency service provider* is "a uniformed or otherwise identified employee or contractor of a fire department, hospital, or police station when that individual is inside the premises and on duty. Emergency service provider also includes a paramedic or an emergency medical technician when either of those individuals is responding to a 9-1-1 emergency call." MCL 712.1(2)(f).

Exclusive jurisdiction

- For purposes of an Indian child, *exclusive jurisdiction* is "an Indian tribe['s] jurisdiction exclusive as to any state over any child custody proceeding as defined [in MCR 3.002(2)] involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the state by existing federal law. Where an Indian child is a ward of a tribal court, the Indian tribe retains exclusive jurisdiction, regardless of the residence or domicile or subsequent change in his or her residence or domicile." MCR 3.002(6).

Extended family members

- For purposes of an Indian child, *extended family members* is "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.1(3)(f). See also 25 USC 1903(2), MCR 3.002(7), and 25 CFR 23.2, which contain substantially similar definitions of *extended family members*.

F

Father

- For purposes of subchapter 3.900 of the Michigan Court Rules, *father* is one of the following:

  "(a) A man married to the mother at any time from a minor's conception to the minor's birth,[17] unless a court has determined, after notice and a hearing, that the minor was conceived or born during the marriage, but is not the issue of the marriage;

  (b) A man who legally adopts the minor;

  (c) A man who by order of filiation or by judgment of paternity is judicially determined to be the father of the minor;

  (d) A man judicially determined to have parental rights; or

  (e) A man whose paternity is established by the completion and filing of an acknowledgment of parentage in accordance with the provisions of the Acknowledgment of Parentage Act, MCL 722.1001 *et seq.*, or a previously applicable procedure. . . ."[18] MCR 3.903(A)(7).

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[17] 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. See *In re CAW*, 469 Mich 192, 199 (2003); *Serafin v Serafin*, 401 Mich 629, 636 (1977).

[18] A biological father is not always the legal father. See *In re KH,* 469 Mich 621, 635 (2004). 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. See MCL 722.2; MCL 700.2103(b).

- For purposes of the Acknowledgment of Parentage Act, *father* is "the man who signs an acknowledgment of parentage of a child." MCL 722.1002(d).

Fire department

- For purposes of the Safe Delivery of Newborns Law, *fire department* is "an organized fire department as that term is defined in . . . the fire prevention code, 1941 PA 207, MCL 29.1." MCL 712.1(2)(g). MCL 29.1(i) defines that term as "a department, authority, or other governmental entity that safeguards life and property from damage from explosion, fire, or disaster and that provides fire suppression and other related services in this state. Organized fire department includes any lawfully organized firefighting force in this state."

Foreign country

- For purposes of the Uniform Interstate Family Support Act (UIFSA), *foreign country* is "a country, including a political subdivision thereof, other than the United States, that authorizes the issuance of support orders and 1 or more of the following:

  (*i*) That has been declared under the law of the United States to be a foreign reciprocating country.

  (*ii*) That has established a reciprocal arrangement for child support with this state as provided in [MCL 552.2308].

  (*iii*) That has enacted a law or established procedures for the issuance and enforcement of support orders that are substantially similar to the procedures under [the UIFSA].

  (*iv*) In which the Convention is in force with respect to the United States." MCL 552.2102(e).

Formal placement

- For purposes of the Adoption Code, *formal placement* is "a placement that is approved by the court under [MCL 710.51]" after the parents' parental rights have been terminated. MCL 710.22(p).

Former family member

- For purposes of MCL 710.68b, *former family member* is "a parent, grandparent, or adult sibling related to the adult adoptee through birth or adoption by at least 1 common parent,

regardless of whether the adult adoptee ever lived in the same household as the former family member." MCL 710.68b(1)(a).

Foster care

- For purposes of MCL 400.115f–MCL 400.115t, *foster care* is "placement of a child outside the child's parental home under the department's supervision by a court of competent jurisdiction." MCL 400.115f(*l*).

Foster home or institution

- For purposes of an Indian child, *foster home or institution* is "a child caring institution as that term is defined in . . . MCL 722.111." See also MCR 3.002(8), which contains a substantially similar definition of *foster home or institution*. MCL 712B.3(g).

G

Genetic father

- For purposes of the Revocation of Paternity Act, *genetic father* is "a man whose paternity has been determined solely through genetic testing under the [P]aternity [A]ct, . . . MCL 722.711 to [MCL] 722.730, the [S]ummary [S]upport and [P]aternity [A]ct, or the [G]enetic [P]arentage [A]ct." MCL 722.1433(d).

Genetic testing material

- For purposes of the Paternity Act, *genetic testing material* is "a sample of an individual's blood, saliva, or tissue collected from the individual that is used for genetic paternity testing conducted under this act." MCL 722.711(h).

Grandparent

- For purposes of the Child Custody Act of 1970, *grandparent* is "a natural or adoptive parent of a child's natural or adoptive parent." MCL 722.22(f).

Gross negligence

- For purposes of the Safe Delivery of Newborns Law, *gross negligence* is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 712.1(2)(h).

Guardian

- For purposes of the Estates and Protected Individuals Code, *guardian* is "a person who has qualified as a guardian of a minor or a legally incapacitated individual under a parental or spousal nomination or a court appointment and includes a limited guardian as described in [MCL 700.5205, MCL 700.5206, and MCL 700.5306]. Guardian does not include a guardian ad litem." MCL 700.1104(n).

- For purposes of an Indian child, *guardian* is "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." MCL 712B.3(h). See also MCR 3.002(9), which contains a substantially similar definition of *guardian*.

- For purposes of the Guardianship Assistance Act, *guardian* is "a person appointed by the court to act as a legal guardian for a child under . . . MCL 712A.19a [or MCL] 712A.19c." MCL 722.872(d).

Guardian ad litem

- For purposes of an Indian child, *guardian ad litem* is "an individual whom the court appoints to assist the court in determining the child's best interests. A guardian ad litem does not need to be an attorney." MCL 712B.3(i). See also MCR 3.002(1), which contains a substantially similar definition of *guardian ad litem*.

Guardianship assistance agreement

- For purposes of the Guardianship Assistance Act, *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 department's administrative rules." MCL 722.872(e).

H

Hearing

- For purposes of an Indian child, *hearing* is "a judicial session held for the purpose of deciding issues of fact, of law, or both." 25 CFR 23.2.

Hospital

- For purposes of the Safe Delivery of Newborns Law, *hospital* is "a hospital that is licensed under . . . the public health code, 1978 PA 368, MCL 333.20101 to [MCL] 333.22260." MCL 712.1(2)(i).

I

Incapacitated individual

- For purposes of the Estates and Protected Individuals Code, *incapacitated individual* is "an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions." MCL 700.1105(a).

Income

- For purposes of Support and Parenting Time Enforcement Act, *income* is "any of the following:

  (*i*) Commissions, earnings, salaries, wages, and other income due or to be due in the future to an individual from his or her employer or a successor employer.

  (*ii*) A payment due or to be due in the future to an individual from a profit-sharing plan, a pension plan, an insurance contract, an annuity, Social Security, unemployment compensation, supplemental unemployment benefits, or worker's compensation.

(*iii*) An amount of money that is due to an individual as a debt of another individual, partnership, association, or private or public corporation, the United States or a federal agency, this state or a political subdivision of this state, another state or a political subdivision of another state, or another legal entity that is indebted to the individual." MCL 552.602(o).

Indian

- For purposes of an Indian child, *Indian* is "any member of any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the secretary because of their status as Indians, including any Alaska native village as defined in . . . [43 USC 1602(c)]. MCL 712B.3(j). See also MCR 3.002(11), which contains a substantially similar definition of *Indian*.

  See also 25 USC 1903(3) and 25 CFR 23.2, which define *Indian* as "any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act, 43 USC 1606."

Indian child

- An *Indian child* is "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 a substantially similar definition of *Indian child*; 25 USC 1903(4), which contains a substantially similar definition 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[,]"[19] (emphasis added); 25 CFR 23.2, which contains a substantially similar definition of *Indian child* as 25 USC 1903(4) except that it uses the term *citizen* and *citizenship* synonymously with *member* and *membership*.

[19] 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[]").

Indian child's Tribe

- For purposes of an Indian child, "*Indian child's Tribe* is:

  (1) The Indian Tribe in which an Indian child is a member or eligible for membership; or

  (2) In the case of an Indian child who is a member of or eligible for membership in more than one Tribe, the Indian Tribe described in [25 CFR 23.109]."[20] 25 CFR 23.2.

  See also MCL 712B.3(*l*), which define *Indian child's Tribe* as "the Indian tribe in which an Indian child is a member or eligible for membership, or 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[;]" MCR 3.002(13), which is substantially similar to MCL 712B.3(*l*); 25 USC 1903(5), which contains a substantially similar definition of *Indian child's Tribe*, except that, where the Indian child is a member of or eligible for membership in more than one Tribe, "the Indian tribe with which the Indian child has the more significant contacts[.]"

Indian custodian

- For purposes of an Indian child, *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 Indian child's parent." MCL 712B.3(n). See also 25 USC 1903(6) and MCR 3.002(15), which both contain substantially similar definitions of *Indian custodian*; 25 CFR 23.2, which contains a substantially similar definition of *Indian custodian* except that it also permits an Indian to "demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law."

Indian foster home

- For purposes of an Indian child, *Indian foster home* is "a foster home where one or more of the licensed or approved foster parents is an 'Indian' as defined in 25 USC 1903(3)."[21] 25 CFR 23.2.

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[20] For a discussion of 25 CFR 23.109 (designation of an Indian child's Tribe where the Indian child is a member of or eligible for membership in more than one tribe), see Section 11.6(A)(2)(b).

[21] "[A] foster home does not meet the definition of an 'Indian foster home' merely by virtue of an Indian child being present in the home; rather, one of the foster parents must meet the definition of 'Indian.'" Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, L.12 (2016).

Indian organization

- For purposes of an Indian child, *Indian organization* is "any group, association, partnership, corporation, or other legal entity owned or controlled by Indians or a Tribe, or a majority of whose members are Indians." 25 CFR 23.102. See also 25 USC 1903(7), MCL 712B.3(p), and MCR 3.002(16), which contain substantially similar definitions of *Indian custodian*.

Indian tribe

- For purposes of an Indian child, *Indian tribe* is "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the secretary 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), MCR 3.002(17), and 25 CFR 23.2, which contain substantially similar definitions of *Indian tribe*.

Involuntary proceeding

- For purposes of an Indian child, *involuntary proceeding* is "a child-custody proceeding in which the parent does not consent of his or her free will to the foster-care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster-care, preadoptive, or adoptive, placement under threat of removal of the child by a State court or agency." 25 CFR 23.2.

J

Juvenile court

- For purposes of special immigrant juveniles (SIJ), *juvenile court* is "a court located in the United States having jurisdiction

under State law to make judicial determinations about the custody and care of juveniles."[22] 8 CFR 204.11(a).

L

Lawyer-guardian ad litem

- For purposes of MCL 712A.13a, MCL 712A.17c, and MCL 712A.17d, *lawyer-guardian ad litem* is "an attorney appointed under [MCL 712A.17c]. A lawyer-guardian ad litem represents the child, and has the powers and duties, as set forth in [MCL 712A.17d]." MCL 712A.13a(1)(g).

- For purposes of the Safe Delivery of Newborns Law, *lawyer-guardian ad litem* is "an attorney appointed under [MCL 712.2]. A lawyer-guardian ad litem represents the newborn, and has the powers and duties, as set forth in [MCL 712A.17d]." MCL 712.1(2)(j).

- For purposes of an Indian child, *lawyer-guardian ad litem* is "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]." MCL 712B.3(q). See also MCR 3.002(18), which contains a substantially similar definition of *lawyer-guardian ad litem*.

Legally incapacitated individual

- For purposes of the Estates and Protected Individuals Code, *legally incapacitated individual* is "an individual, other than a minor, for whom a guardian is appointed under this act or an

[22] The Michigan Court of Appeals has determined that the Family Division of Circuit Court qualifies as a *juvenile court* as contemplated by the federal regulation. See *In re LFOC, Minor*, 319 Mich App 476, 487 (2017).

individual, other than a minor, who has been adjudged by a court to be an incapacitated individual." MCL 700.1105(i).

M

Mailing

- For purposes of MCR 3.802(A)(4), *mailing* is governed by MCR 2.107(C)(3). Under that court rule, *mailing* is "enclosing [the papers] 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." MCR 2.107(C)(3).[23]

Medical assistance

- For purposes of MCL 400.115f–MCL 400.115t, *medical assistance* is "the federally aided medical assistance program under title XIX." MCL 400.115f(m).

Medical subsidy

- For purposes of MCL 400.115f–MCL 400.115t, *medical subsidy* is "a reimbursement program that assists in paying for services for an adopted child who has an identified physical, mental, or emotional condition that existed, or the cause of which existed, before the adoption is finalized." MCL 400.115f(n).

Medical subsidy agreement

- For purposes of MCL 400.115f–MCL 400.115t, *medical subsidy agreement* is "an agreement between the department and an adoptive parent regarding a medical subsidy." MCL 400.115f(o).

Michigan adoption code

- For purposes of MCL 722.124b, MCL 722.124c, and MCL 722.124d, *Michigan adoption code* is "chapter X of the probate

[23]Temporarily, "all service of process under [MCR 2.107] must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) during the effective period of this order, but should otherwise comply as much as possible with the provisions of MCR 2.107(C)(4)." Administrative Order No. 2020-9, temporarily amending certain court rules "until further order of the Court." See Administrative Order No. 2020-12; Administrative Order No. 2020-19(3). Please see our COVID-19: Procedures Affected webpage for information on temporarily conducting certain hearings remotely and adjourning other matters.

code of 1939, 1939 PA 288, MCL 710.21 to [MCL] 710.70." MCL 722.124b(c).

Minor

- For purposes of the Estates and Protected Individuals Code, *minor* is "an individual who is less than 18 years of age." MCL 700.1106(c).

Mother

- For purposes of the Paternity Act, *mother* is "the mother of a child born out of wedlock." MCL 722.711(c).

N

Natural father under the equitable-parent doctrine

- For purposes of the equitable-parent doctrine, "a husband who is not the biological father of a child born or conceived during wedlock may, nevertheless, be considered that child's natural father [under the equitable-parent doctrine.]" *Lake v Putnam*, 316 Mich App 247, 252 (2016). In order for a man to be a natural father under the equitable-parent doctrine, the equitable-parent doctrine requires him to establish all of the following:

  (1) The child was born or conceived during the marriage.

  (2) He is married to the child's mother.

  (3) He is not the child's biological father.

  (4) 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 prior to a filing for divorce.

  (5) He desires to have parental rights over the child.

  (6) He is willing to pay child support.[24] *Lake*, 316 Mich App at 252, 255-256.

Newborn

- For purposes of the Safe Delivery of Newborns Law, *newborn* is "a child who a physician reasonably believes to be not more than 72 hours old." MCL 712.1(2)(k).

Nonrecurring adoption expenses

- For purposes of MCL 400.115f-MCL 400.115t, *nonrecurring adoption expenses* is "reasonable and necessary adoption fees, court costs, attorney fees, and other expenses that are directly related to the legal adoption of a child with special needs." MCL 400.115f(p).

O

Obligee

- For purposes of the Uniform Interstate Family Support Act (UIFSA), *obligee* is "1 or more of the following:

  (*i*) An individual to whom a duty of support is or is alleged to be owed or in whose favor a support order or a judgment determining parentage of a child has been issued.

  (*ii*) A foreign country, state, or political subdivision of a state to which the rights under a duty of support or support order have been assigned or which has independent claims based on financial assistance provided to an individual obligee in place of child support.

  (*iii*) An individual seeking a judgment determining parentage of the individual's child.

  (*iv*) A person that is a creditor in a proceeding under article 7 [of the UIFSA, MCL 552.2701 *et seq*]." MCL 552.2102(p).

Obligor

- For purposes of the Uniform Interstate Family Support Act (UIFSA), *obligor* is "an individual about whom 1 of the following is true, or the estate of a decedent about whom 1 of the following was true before the individual's death:

  (*i*) Owes or is alleged to owe a duty of support.

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[24]Once the court recognizes a man as a natural father under the equitable-parent doctrine, that status is a permanent status and he possesses all of the rights and responsibilities of a legal parent. *York v Morofsky*, 225 Mich App 333, 337 (1997). However, the equitable-parent doctrine only applies to a child born or conceived during the marriage. *Lake*, 316 Mich App at 256 ("conclud[ing] that the equitable-parent doctrine does not extend to unmarried couples, . . . whether the couple involved is a heterosexual or a same-sex couple"); *Van v Zahorik*, 460 Mich 320, 331-334 (1999) (refusing to extend the equitable-parent doctrine to unmarried persons). See also *Killingbeck v Killingbeck*, 269 Mich App 132, 142 (2005), where the Court refused to extend the equitable-parent doctrine to an alleged father who did not marry the child's mother until three years after the child's birth.

(*ii*) Is alleged but has not been adjudicated to be a parent of a child.

(*iii*) Is liable under a support order.

(*iv*) Is a debtor in a proceeding under article 7 [of the UIFSA, MCL 552.2701 *et seq*]." MCL 552.2102(q).

Official tribal representative

- For purposes of an Indian child, *official tribal representative* is "an individual who is designated by the Indian child's tribe to represent the tribe in a court overseeing a child custody proceeding. 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*.

Order of filiation

- For purposes of the Revocation of Paternity Act, *order of filiation* is "a judicial order establishing an affiliated father."[25] MCL 722.1433(f).

Orphan

- For purposes of international adoptions, *orphan* is "a child, under the age of sixteen at the time a petition is filed in his [or her] behalf to accord a classification as an immediate relative under [8 USC 1151(b)], who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States

[25] "[A]n order of filiation [is not limited to] . . . the procedures prescribed in the Paternity Act. . . . Had the Legislature . . . intended to restrict affiliated fathers to those identified through paternity actions, the Legislature would have so specified. Absent any indication of such specificity, any judicial order establishing a determination in court that a man is a child's father could demonstrate the determination of an affiliated father within the meaning of [MCL 722.1433(b)]." *Glaubius v Glaubius*, 306 Mich App 157, 168-169 (2014) (finding that there is "nothing in the plain language of [MCL 722.1433(b)] or [MCL 722.1433(f)] to suggest that [the court's determination of a man's paternity and entering an order establishing that determination] in the context of divorce or custody proceedings would not establish a man's status as an affiliated father[]") (internal citation omitted). "[F]or a man to have been 'determined' in a court to be a child's father, there must have been a dispute or question about the 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 (cautioning that "not all divorce proceedings squarely address the question of a child's paternity[, and] . . . 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[]") (internal citation omitted).

citizen who is at least 25 years of age, at least 1 of whom personally saw and observed the child before or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence; *Provided*, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: *Provided further*, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter[.]" 8 USC 1101(b)(1)(F)(*i*).

Other expenses that are directly related to the legal adoption of a child with special needs

- For purposes of MCL 400.115f–MCL 400.115t, *other expenses that are directly related to the legal adoption of a* child with special needs is "adoption costs incurred by or on behalf of the adoptive parent and for which the adoptive parent carries the ultimate liability for payment, including the adoption study, health and psychological examinations, supervision of the placement before adoption, and transportation and reasonable costs of lodging and food for the child or adoptive parent if necessary to complete the adoption or placement process." MCL 400.115f(q).

P

Parent

- For purposes of subchapter 3.900 of the Michigan Court Rules, *parent* is "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).

- For purposes of an Indian child, *parent* is "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*."[26] MCL 712B.3(s) (emphasis added). See also 25 USC 1903(9), MCR 3.002(20), and 25 CFR 23.2, which contain substantially similar definitions of

[26] See Chapter 3 on establishing paternity.

parent, except that, where the Indian child has been adopted, they all require the adopter to be an Indian.

- For purposes of the Child Custody Act of 1970, *parent* is "the natural or adoptive parent of a child." MCL 722.22(i).

Party

- For purposes of MCR 1.111, *party* is "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).

Person

- For purposes of the Adoption Code, *person* is "an individual, partnership, corporation, association, governmental entity, or other legal entity." MCL 710.22(q).

Petitioner

- For purposes of the Adoption Code, *petitioner*, "except as used in [MCL 710.68b], means the individual or individuals who file an adoption petition with the court." MCL 710.22(r).

- For purposes of MCL 710.68b, *petitioner* is "an individual on whose behalf a confidential intermediary is appointed pursuant to [MCL 710.68b(2)]." MCL 710.68b(1)(b).

Placement

- For purposes of the Interstate Compact on the Placement of Children (ICPC), *placement* is "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." MCL 3.711, Article II (d).

- For purposes of MCL 400.115f–MCL 400.115t, *placement* is "a placement or commitment, including the necessity of removing the child from his or her parental home, as approved by the court under an order of disposition issued under . . . MCL 712A.2." MCL 400.115f(s).

- For purposes of the Adoption Code, *placement* or *to place* is "selection of an adoptive parent for a child and transfer of physical custody of the child to a prospective adoptive parent according to [the Adoption Code]." MCL 710.22(s).

Police station

- For purposes of the Safe Delivery of Newborns Law, *police station* is "that term as defined in . . . the Michigan vehicle code, 1949 PA 300, MCL 257.43." MCL 712.1(2)(*l*). MCL 257.43 defines that term as "every county jail; every police station in any city, village, or township; and the headquarters and every regular subpost of the Michigan state police."

Preplacement assessment

- For purposes of the Safe Delivery of Newborns Law, *preplacement assessment* is "an assessment of a prospective adoptive parent as described in [MCL 710.23f]." MCL 712.1(2)(m).

Presumed father

- For purposes of the Revocation of Paternity Act, *presumed father* is "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."[27] MCL 722.1433(e).

Primary adoption facilitator

- For purposes of MCL 710.58a, MCL 722.124b, MCL 722.124c, and MCL 722.124d, *primary adoption facilitator* is "the adoption facilitator in an adoption who files the court documents on behalf of the prospective adoptive parent." MCL 722.124b(d). See also MCL 710.58a(3).

Public information form

- For purposes of MCL 710.58a, MCL 722.124b, MCL 722.124c, and MCL 722.124d, "a form described in [MCL 722.124d] that is completed by a primary adoption facilitator and maintained in a central clearinghouse by the department for distribution according to [MCL 722.124d] to individuals seeking information about adoption." MCL 722.124b(e). See also MCL 710.58a(3).

Putative father

- For purposes of subchapter 3.900 of the Michigan Court Rules, unless the context indicates otherwise, *putative father* is "a man

[27] "[P]aternity by the husband [is presumed] when a married couple has undergone [assisted reproductive technology (ART)] to conceive[.]" *Jones v Jones*, 320 Mich App 248, 254 (2017).

who is alleged to be the biological father of a child who has no father as defined in MCR 3.903(A)(7)."[28] MCR 3.903(A)(24).

R

Receiving state

- For purposes of the Interstate Compact on the Placement of Children (ICPC), *receiving state* is "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." MCL 3.711, Article II (c).

Redetermined adoption assistance

- For purposes of MCL 400.115f–MCL 400.115t, *redetermined adoption assistance* is "a payment as determined by a certification that may be justified when extraordinary care or expense is required for a condition that existed or the cause of which existed before the adoption from foster care was finalized." MCL 400.115f(*l*).

Redetermined adoption assistance agreement

- For purposes of MCL 400.115f–MCL 400.115t, *redetermined adoption assistance agreement* is "a written agreement regarding redetermined adoption assistance between the department and the adoptive parent of a child." MCL 400.115f(u).

Relative

- For purposes of the Adoption Code, *relative* is "an individual who is related to the child within the fifth degree by marriage, blood, or adoption." MCL 710.22(t).

- For purposes of MCL 712A.13a, *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

[28] Once a child has a legal father, there cannot be a putative father. See *In re KH*, 469 Mich 621, 635-637 (2004).

marriage has ended by death or divorce. A stepparent, ex-stepparent, or the parent who shares custody of a half-sibling 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 . . . the [F]oster [C]are and [A]doption [S]ervices [A]ct, . . . 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 a finding of paternity and does not confer legal standing on the putative father." MCL 712A.13a(1)(j).

Release

- For purposes of the Adoption Code, *release* is "a document in which all parental rights over a specific child are voluntarily relinquished to the department or to a child placing agency." MCL 710.22(u).

Rescission petition

- For purposes of the Adoption Code, *rescission petition* is "a petition filed by an adult adoptee and his or her parent whose rights have been terminated to rescind the adoption in which a stepparent acquired parental rights and to restore parental rights of that parent according to [MCL 710.66]." MCL 710.22(v).

Reservation

- For purposes of an Indian child, *reservation* is "Indian country as defined in 18 USC 1151 and any lands, not covered under that section, title to which is 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." 25 CFR 23.2. See also 25 USC 1903(10), MCL 712B.3(t), and MCR 3.002(21), which contain substantially similar definitions of *reservation*.

S

Secretary

- For purposes of an Indian child, *secretary* is "the Secretary of the Interior or the Secretary's authorized representative acting

under delegated authority." 25 CFR 23.2. See also 25 USC 1903(11), MCL 712B.3(u), and MCR 3.002(22), which define *secretary* as "the Secretary of the Interior."

Sending agency

- For purposes of the Interstate Compact on the Placement of Children (ICPC), *sending agency* is "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 (b).

Sexual penetration

- For purposes of the Revocation of Paternity Act, MCL 722.1445, *sexual penetration* is "that term as defined in . . . MCL 750.520a." MCL 722.1445(4). MCL 750.520a(r) defines *sexual penetration* as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required."

Sibling

- For purposes of MCL 712A.13a, *sibling* is "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*).

Special immigrant

- For purposes of special immigrant juveniles (SIJ), *special immigrant* includes[29] "an immigrant who is present in the United States—

  (*i*) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;

[29] The United States Code sets forth several other instances where a juvenile may be considered a special immigrant. The definition here is relevant to content in the benchbook.

(*ii*) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and

(*iii*) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that–

(*I*) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(*II*) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter[.]" 8 USC 1101(a)(27)(J).

State

- For purposes of MCL 400.115f–MCL 400.115t, *state* is "a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, or a territory or possession of the United States." MCL 400.115f(x).

- For purposes of the Uniform Interstate Family Support Act, *state* is "a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. State includes an Indian nation or tribe." MCL 552.2102(z).

State court

- For purposes of an Indian child, *State court* is "any agent or agency of a state, including the District of Columbia or any territory or possession of the United States, or any political subdivision empowered by law to terminate parental rights or to make foster care placements, preadoptive placements, or adoptive placements." 25 CFR 23.2.

State disbursement unit (SDU)

- For purposes of the Paternity Act, *state disbursement unit* or *SDU* is "the entity established in . . . the office of child support act, . . . MCL 400.236." MCL 722.711(g).

State registrar

- For purposes of the Vital Records part of the Public Health Code, see MCL 333.2801(1), *state registrar* is "the official appointed under [MCL 333.2813] or his or her authorized representative." MCL 333.2805(1).

- For purposes of the Acknowledgment of Parentage Act, *state registrar* is "that term as defined in . . . the public health code, [MCL 333.2805.]" MCL 722.1002(e).

Status offenses

- For purposes of an Indian child, *status offenses* are "offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person's status as a minor (e.g., truancy, incorrigibility)." 25 CFR 23.2.

Suitable to be a parent of an adoptee

- For purposes of the Adoption Code, *suitable to be a parent of an* adoptee is "a conclusion that there is no specific concern with respect to an individual that would suggest that placement of any child, or a particular child, in the home of the individual would pose a risk of harm to the physical or psychological well-being of the child." MCL 710.22(w).

Summary report

- For purposes of the Paternity Act, *summary report* is "a written summary of the DNA identification profile that includes only the following information:

  (*i*) The court case number, if applicable, the laboratory case number or identification number, and the [DHHS] case number.

  (*ii*) The mother's name and race.

  (*iii*) The child's name.

  (*iv*) The alleged father's name and race.

  (*v*) The collection dates and identification numbers of the genetic testing material.

(*vi*) The cumulative paternity index.

(*vii*) The probability of paternity.

(*viii*) The conclusion as to whether the alleged father can or cannot be excluded as the biological father.

(*ix*) The name, address, and telephone number of the contracting laboratory.

(*x*) The name of the individual certifying the report." MCL 722.711(i).

Support order

For purposes of the Uniform Interstate Family Support Act, *support order* is "a judgment, decree, order, decision, or directive, whether temporary, final, or subject to modification, issued in a state or foreign country for the benefit of a child, a spouse, or a former spouse, that provides for monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an individual obligee in place of child support. Support order may include related costs and fees, interest, income withholding, automatic adjustment, reasonable attorney's fees, and other relief." MCL 552.2102(bb).

Support subsidy

- For purposes of MCL 400.115g-MCL 400.115t, *support subsidy* is "payment for support of a child who has been placed for adoption from foster care." MCL 400.115f(y).

Surrender

- For purposes of the Public Health Code and the Safe Delivery of Newborns Law, *surrender* is "to leave a newborn with an emergency service provider without expressing an intent to return for the newborn." MCL 712.1(2)(n). See also MCL 333.2822(2).

T

Temporary placement

- For purposes of the Adoption Code, *temporary placement* is "a placement that occurs before court approval under [MCL

710.51] and that meets the requirements of [MCL 710.23d]." MCL 710.22(x).

Title IV-D case

- For purposes of the Revocation of Paternity Act, *Title IV-D case* is "an action in which services are provided under part D of [T]itle IV of the [S]ocial [S]ecurity [A]ct, 42 USC 651 to [42 USC] 669b." MCL 722.1433(g).

Tribal court

- For purposes of an Indian child, *tribal court* is "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), MCR 3.002(23), and 25 CFR 23.2, which contain substantially similar definitions of *tribal court*.

Tribunal

- For purposes of the Uniform Interstate Family Support Act, *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).

Tribe

- For purposes of an Indian child, *tribe* is "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the secretary because of their status as Indians, including any Alaska native village as defined in . . . [43 USC 1602(c)]." MCL 712B.3(o).

U

Upon demand

- For purposes of an Indian child, *upon demand* allows "the parent or Indian custodian [to] regain custody [of the child]

simply upon verbal request, without any formalities or contingencies." 25 CFR 23.2.

V

Videoconferencing

- For purposes of subchapter 2.400 of the Michigan Court Rules, *videoconferencing* is "the use of an interactive technology that sends video, voice, and data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video codecs, monitors, cameras, audio microphones, and audio speakers." MCR 2.407(A)(2).

Voluntary proceeding

- For purposes of an Indian child, *voluntary proceeding* is "a child-custody proceeding that is not an involuntary proceeding, such as a proceeding for foster-care, preadoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights." 25 CFR 23.2.

W

Ward of tribal court

- For purposes of an Indian child, *ward of tribal court* is "a child over whom an Indian tribe exercises authority by official action in tribal court of by the governing body of the tribe." MCL 712B.3(w). See also MCR 3.002(24), which contains a substantially similar definition of *ward of tribal court*.

Within the fifth degree by marriage, blood, or adoption

- For purposes of the Adoption Code, *within the fifth degree by marriage, blood, or adoption* is "any of the following relationships: parent, step-parent, grandparent, step-grandparent, brother, step-brother, sister, step-sister, uncle, step-uncle, aunt, step-aunt, first cousin, step-first cousin, great aunt, step-great aunt, great uncle, step-great uncle, great grandparent, step-great grandparent, first cousin once

removed, step-first cousin once removed, great great grandparent, step-great great grandparent, great great uncle, step-great great uncle, great great aunt, step-great great aunt, great great great grandparent, or step-great great great grandparent." MCL 710.22(y).

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