Flowchart: Involuntary Guardianship Proceedings Under ICWA and MIFPA¹

Does ICWA/MIFPA apply to this proceeding?

NOT SURE. See the Michigan Judicial Institute's Are ICWA and MIFPA Requirements Applicable to the Case Flowchart.

YES or POSSIBLY. Make sure the State court has jurisdiction? For assistance, see the Michigan Judicial Institute's *Jurisdiction Requirements Under ICWA and MIFPA Flowchart*.

*Case must be dismissed if tribal court has exclusive jurisdiction. MCL 712B.25(2)(a); MCR 5.402(E)(2); MCR 5.404(C)(1)(a). **NO.** ICWA and MIFPA requirements do *NOT* apply. Follow normal State procedures. See Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, B.1 (2016).

Did <u>both</u> parents or <u>Indian custodian</u> consent to a petition for guardianship of the <u>Indian child</u> on their own free will and without threat of removal, and can get the child back <u>upon demand?</u> 25 CFR 23.2; MCL 712B.13(1); MCR 5.404(B).

Guardianship is considered VOLUNTARY. MCL 712B.25(3); MCR 5.404(A)(3). Refer to the Michigan Judicial Institute's *Voluntary Guardianship Proceedings Under ICWA and MIFPA Flowchart* instead.

Guardianship is considered INVOLUNTARY. Petition MUST state:

- •whether the minor is an Indian child or whether that fact is unknown. MCR 5.404(A)(1).
- •what active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. MCR 5.404(A)(3).

▼ YES

On filing of petition, State court MAY (1) appoint a GAL to represent minor's interests; and (2) order an investigation of proposed guardianship. MCR 5.404(A)(2).*If investigation conducted, written report of the investigation must contain information required in MCL 712B.25(1), filed with the court, and served within 7 days of the hearing. If petition indicates Indian child status is unknown, investigation must include inquiry into Indian tribal membership. MCR 5.404(A)(2).



NO

Hold consent hearing. Videoconferencing technology may be used at request of any participant or sua sponte. MCR 5.140(A). If subject of hearing wants to be physically present, the court must allow it. MCR 5.140(C).

A minor's right to be present at the minor's guardianship hearing applies only if minor is age 14 or older. *Id.* "Subject to this right to be present [at specified proceedings] and to MCR 2.407(B)(5), the use of videoconferencing technology is presumed in all uncontested petitions or motions in guardianship, conservatorship, protected individual and decedent estates." MCR 5.140(C).

Does the petition for guardianship indicate the minor is an Indian child?

Inquire if the child or either parent is a member of an Indian tribe. If child is a member or parent is a member and child is eligible for membership in the tribe, court must either DISMISS the petition or permit petitioner to file an AMENDED petition in compliance with MCR 5.404(A)(1). MCR 5.404(D).

Was NOTICE of hearing provided to persons prescribed in MCR 5.125(A)(8) and MCR 5.125(C)(20). MCR 5.402(E)(3); MCR 5.404(C)(1).

*Parties must receive notice at least 10 days before consent hearing; 15 days if parent/Indian custodian or Indian tribe is unknown. 25 USC 1912(a); 25 CFR 23.112(a)-(b); MCL 712B.9(2)-(3); MCL 712B.15(1)(a). See the Michigan Judicial Institute's Notice Requirements Under ICWA and MIFPA Flowchart.

NO Stop proceeding, and require notice be sent. See MCL 712B.9(1); MCR 5.404(C)(1).

NO

NO

NO

▼ \

- Court MUST determine:
 if placement with the guardian meets the placement requirements in MCR
 5.404(C)(2)-(3).
- •if it is in the child's best interest to appoint a guardian.
- •if an L-GAL should be appointed to represent the Indian child.
- whether each parent wants to consent to the guardianship (if so, refer to the Michigan Judicial Institute's Voluntary Guardianship Proceedings Under ICWA and MIFPA Flowchart). MCL 712B.25(2)(b)-(d); MCR 5.404(C)(1)(b)-(e).

Is there proof by <u>clear and convincing evidence</u> that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, but were proved unsuccessful? MCL 712B.15(2); MCR 5.404(F)(1).

*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); MCR 5.404(F)(1).

*MCL 712B.3(a) and 25 CFR 23.2 provide a list of specific services that must be met in order to satisfy the

*MCL 712B.3(a) and 25 CFR 23.2 provide a list of specific services that <u>must</u> be met in order to satisfy the active efforts requirement.

Is there proof by <u>clear and convincing evidence</u> that continued custody of the child by the parent/Indian custodian is likely to result in serious emotional or physical damage to the child. MCL 712B.15(2); MCR 5.404(F)(1).

Is the child's removal supported by at least 1 qualified expert witness, who is a member of the child's tribe, approved by the tribe, or who can speak to the tribe's customs regarding family organizations and child rearing practices? MCL 712B.15(2); MCL 712B.17; MCR 5.404(F)(1).

☐ YES

Placement with guardian is PERMITTED. *If the child is discovered to be an Indian child after guardianship is ordered, the court must follow the procedures set out under MCR 5.402(E)(5) and MCL 712B.25(6).

Placement NOT permitted.
Dismiss case and refer petitioner to DHHS for child protective services or the tribe for services.
MCL 712B.15(2);
MCR 5.404(F)(1).

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¹ See the Michigan Judicial Institute's *Adoption Proceedings Benchbook* and *Child Protective Proceedings Benchbook* for more information.

Glossary

Α

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.
 - (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*.
- 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.

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.

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 but parental rights have not been terminated, for temporary placement in, and not limited to, 1 or more of the following:
 - (A) Foster home or institution.
 - (B) The home of a guardian or limited guardian under...the estates and protected individuals code, ... MCL 700.5201 to [MCL] 700.5219.
 - (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.
 - (*iii*) Preadoptive placement. Temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but before or in lieu of adoptive placement.
 - (*iv*) Adoptive placement. Permanent placement of an Indian child for adoption, including an action resulting in a final decree of adoption.
 - (*v*) An Indian child is charged with a status offense in violation of [MCL 712A.2(a)(2)-(4)] or [MCL 712A.2(d)].

(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.

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 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.

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.

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

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).

I

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," (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*.

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]." 25 CFR 23.2.

² 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").

See also MCL 712B.3(*l*), MCR 3.002(13), MCL 712B.3(*l*), and 25 USC 1903(5), which contain substantially similar definitions 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 term includes the Indian tribe where the Indian child has the more or most 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 tribe or tribe

For purposes of an Indian child, Indian tribe or 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.

P

Parent

• 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." 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 parent, except that, where the Indian child has been adopted, they all require the adopter to be an Indian.

R

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

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.

T

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.

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.

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.