Flowchart: Voluntary Guardianship Proceedings Under ICWA and MIFPA $^{f 1}$ 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. MCR 5.402(E)(2); MCR 5.404(B)(2)(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).

NO

Did both parents or Indian custodian consent to a petition for guardianship of the Indian child on their own free will and without threat of removal? 25 CFR 23.2; MCL 712B.13(1); MCR 5.404(B).

Petition MUST state whether or not the minor is an Indian child or whether that fact is unknown. MCR 5.404(A)(1). 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).

Hold guardianship consent hearing. Videoconferencing technology may be used. MCR 5.404(B)(1). 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)

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

Does the petition for guardianship indicate the minor is an Indian child? *Note: Petition must state whether or not the minor is an Indian child or whether that fact is unknown. MCR 5.404(A)(1).

YES

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(B)(2).

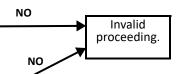
*Parties must receive notice at least 10 days before hearing; 15 days if parent/ Indian custodian or Indian tribe is unknown. MCL 712B.13(1)(b); MCL 712B.27(3). See the Michigan Judicial Institute's Notice Requirements Under ICWA and MIFPA Flowchart.

YES

Is consent valid? Valid consent requires both parents or Indian custodian and:

- execution of written consent on a SCAO-approved form;
- •contains all the information required under MCL 712B.13(2);
- •is recorded before a judge of a court of competent jurisdiction; and
- •is accompanied by presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and fully understood by the parent/Indian custodian AND the parent/ Indian custodian fully understood the explanation in English or that it was interpreted into a language the parent/Indian custodian understood. MCL 712B.13(1)-(2); MCR 5.404(B)(1)-(2).

Stop proceeding, and require notice be sent. See MCL 712B.9(1); MCR 5.404(B)(2).



Is child more than 10 days old? 25 USC 1913(a); 25 CFR 23.125(e); MCL 712B.13(1)(a); MCR 5.404(B)(1).

- explain before accepting consent that the parent/Indian custodian has a right to withdraw consent for any reason, at any time, and have the child returned. 25 CFR 23.125(B)(2)(i).
- •determine if it is in the child's best interest to appoint a guardian. MCR 5.404(B)(2)(c).
- •determine if a L-GAL should be appointed to represent the Indian child. MCR 5.404(B)(2)(d).
- •conduct guardianship proceeding in accordance with court rules, MCL 700.5204-MCL 700.5205, and MCL 712B.25. MCL 712B.13(1)(c).
- *If the child is discovered to be an Indian child after guardianship is ordered, the court <u>must</u> follow the procedures set out under <u>MCR</u> 5.402(E)(5) and MCL 712B.25(6).

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

Glossary

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.

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).

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)

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").

except that it uses the term *citizen* and *citizenship* synonymously with *member* and *membership*.

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.