# Child Protective Proceedings Benchbook—Fourth Edition

## A Guide to Abuse & Neglect




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## *Michigan Supreme Court*

- The Honorable Megan K. Cavanagh, *Chief Justice*
- The Honorable Noah P. Hood, *MJI Liaison Justice*
- The Honorable Brian K. Zahra, *Justice*
- The Honorable Richard H. Bernstein, *Justice*
- The Honorable Elizabeth M. Welch, *Justice*
- The Honorable Kyra Harris Bolden, *Justice*
- The Honorable Kimberly A. Thomas, *Justice*
- The Honorable Thomas P. Boyd, *State Court Administrator*
- Elizabeth Rios-Jones, *Deputy State Court Administrator*
- Alicia Moon, *Supreme Court General Counsel*
- Daniel Brubaker, *Supreme Court Chief Operating Officer*
- Elizabeth Kingston-Miller, *Supreme Court Clerk*

## *Michigan Judicial Institute Staff*

- John R. Nizol, *Director*
- Amanda Clark, *Judicial Education Analyst*
- Anne M. DeMarco, *Program Assistant*
- Rachael Drenovsky, *Learning Center Coordinator*
- Amy Feinauer, *Program Assistant*
- Aaron D. Hanke, *Research Attorney*
- Michael Hennessy, *E-Learning Instructional Designer and LMS Administrator*
- Phoenix Hummel, *Publications Manager*
- Amanda Joseph, *MCJE Analyst*
- Keeley Kerrins, *MCJE Administrative Assistant*
- Heather Leidi, *Operations Specialist*
- Adam Pfau, *Education Analyst*
- Lindsay E. Poetz, *Research Attorney Specialist*
- Janaya Royal, *Administrative Specialist*
- Lisa Schmitz, *Research Attorney*
- Rebekah L. T. Sellers, *Research Attorney*
- Peter C. Stathakis, *Program Manager*
- Prestina Whitlow, *Administrative Assistant*

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# Note on Precedential Value

The Michigan Judicial Institute endeavors to present accurate, binding precedent when discussing substantive legal issues. "The essence of the common law doctrine of precedent or stare decisis is that the rule of the case creates a binding legal precept." *Hudson v Dep't of Corrections*, ___ Mich App ___, ___ (2025) (quotation marks and citation omitted). "Maintaining consistency in the law is one of the primary benefits of stare decisis, as it provides the public with some level of predictability in how the courts have interpreted the law." *Plachta v Plachta*, ___ Mich App ___, ___ (2026). Generally, trial courts "must follow the published decisions of the Court of Appeals and the Michigan Supreme Court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382 (2007).

**Negative subsequent history.** 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. 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"). However, other cases provide that a "decision that has been reversed on other grounds has no precedential value." *Dunn v Detroit Inter-Ins Exch*, 254 Mich App 256, 262 (2002), citing *Taylor v Kurapati*, 236 Mich App 315 (1999). See also *Horace v City of Pontiac*, 456 Mich 744, 754–755 (1998) (holding that where 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 remain[s] from the Court of Appeals decision"). 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. *Stein*, 303 Mich App at 389.

Because it may be unclear under certain circumstances 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.

**United States Supreme Court.** Michigan courts are bound by "our state Supreme Court precedent, unless the United States Supreme Court has addressed a federal

constitutional question." *People v Beasley*, 239 Mich App 548, 559 (2000). "A plurality opinion of the United States Supreme Court, however, is not binding precedent." *Id*., citing *Texas v Brown*, 460 US 730, 737 (1983).

**Federal appellate and district courts.** "Cases from foreign jurisdictions, which are not binding, can be persuasive." *Bazzy v Citizens Ins Co of America*, ___ Mich App ___, ___ (2025) (cleaned up). Accordingly, state courts are not bound by the decisions of lower federal courts construing federal law, and Michigan courts "are free to follow or reject their authority." *People v Gillam*, 479 Mich 253, 261 (2007).

**Michigan Supreme Court.** A Michigan "Supreme Court opinion becomes binding precedent for intermediate appellate and trial courts at the time a signed opinion is date-stamped and filed with the Clerk of the Supreme Court, unless" the opinion "specifically states that the opinion is effective at a different date." *Riley v Northland Geriatric Center*, 425 Mich 668, 678 (1986). "'The clear rule in Michigan is that a majority of the [Michigan Supreme] Court must agree on a ground for decision in order to make that binding precedent for future cases.'" *People v Sexton*, 458 Mich 43, 65 (1998), quoting *People v Anderson*, 389 Mich 155, 170 (1973). See MCR 7.315(A) ("Except for affirmance of action by a lower court or tribunal by even division of the justices, a decision of the Court must be made by concurrence of a majority of the justices voting."). "Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation binding . . . under the doctrine of *stare decisis*." *Negri v Slotkin*, 397 Mich 105, 109 (1976). However, "a [plurality] decision rendered by less than four justices who nevertheless constitute a majority of a legally constituted quorum is binding on the Court of Appeals and the trial courts." *Id*. at 106. "'If there is merely a majority for a particular result, then the parties to the case are bound by the judgment but the case is not authority beyond the immediate parties.'" *Sexton*, 458 Mich at 65, quoting *Anderson*, 389 Mich at 170. In other words, "plurality opinions in which no majority of the participating justices agree with respect to the reasoning for the holding are not generally considered authoritative interpretations that are binding under the doctrine of stare decisis." *Auto Club Group Ins Co v Booth*, 289 Mich App 606, 613 (2010).

For information regarding the precedential value of an order or judgment issued by the Michigan Supreme Court, see the Michigan Judicial Institute's *Appeals & Opinions Benchbook*, Section 1.4(B).

**Michigan Court of Appeals.** "A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." MCR 7.215(C)(2). Accordingly, "the publication of an opinion of the Court of Appeals creates binding precedent until the Michigan Supreme Court enters a decision altering [the] Court's decisions or its rationale." *Esordi v Macomb Twp*, ___ Mich App ___, ___ (2025) (citation omitted). "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 [MCR 7.215]." MCR 7.215(J)(1). "Under the plain terms of MCR 7.215(C)(2), all published decisions of [the] Court [of Appeals] issued prior to November 1, 1990, are binding, precedential decisions under stare decisis." *Plachta*, ___ Mich App at ___. "They are *not* merely persuasive and are not on par with unpublished decisions." *Id*. at ___. Although the Court of Appeals is "not strictly required to follow uncontradicted opinions . . . decided before November 1, 1990, those opinions are nonetheless considered to be precedent and entitled to significantly greater deference than are unpublished cases." *People v Bensch*, 328 Mich App 1, 7 n 6 (2019) (quotation marks and citation omitted). See also *People v Schurr*, 350 Mich App 47, 76 n 6 (2024) (stating "decisions published before November 1, 1990, are binding only on the trial courts and only if uncontradicted"). In other words, "there is no difference in the precedential effect of a pre- versus post-1990 decision." *Plachta*, ___ Mich App at ___. "Instead, the only difference between a pre- and post-November 1, 1990 decision is that the latter must be followed by a subsequent panel unless it is overruled by a conflict panel or the Supreme Court, while the former must be followed unless a subsequent three-judge panel concludes it is distinguishable or warrants reversal." *Id*. at ___.

For more information regarding the precedential nature of Court of Appeals opinions, see the Michigan Judicial Institute's *Appeals & Opinions Benchbook*, Section 1.4(C).

# Acknowledgments

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MJI gratefully acknowledges the time, helpful advice, and expertise contributed by the Committee members, who are as follows:

- The Honorable Robert J. Butts
  Cheboygan County Probate Court
- The Honorable Susan L. Dobrich
  Cass County Probate Court
- The Honorable John A. Hohman, Jr.
  Monroe County Probate Court
- Ms. Jennifer J. Kitzmiller
  *Attorney Referee*
  Berrien County Trial Court
- Ms. Jodi M. Latuszek
  *Management Analyst Child Welfare Services*
  State Court Administrative Office, State of Michigan
- Mr. Tobin L. Miller
  *Senior Executive Assistant*
  Department of Health and Human Services, Office of Legal Services
- Ms. Jenifer L. Pettibone
  *Manager*
  Department of Health and Human Services, Federal Compliance Division
- Ms. Maribeth D. Preston,
  *Management Analyst Child Welfare Services*
  State Court Administrative Office, State of Michigan
- Mr. Frank E. Vandervort
  *Clinical Professor of Law*
  Juvenile Justice Clinic, University of Michigan Law School

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

The **Michigan Judicial Institute** was created in 1977 by the Michigan Supreme Court. MJI is responsible for providing educational programs and written materials for Michigan judges and court personnel. In addition to formal seminar offerings, MJI is engaged in a broad range of publication activities, services, and projects that are designed to enhance the professional skills of all those serving in the Michigan court system. MJI welcomes comments and suggestions. Please send them to **Michigan Judicial Institute, Hall of Justice, P.O. Box 30048, Lansing, MI 48909. (517) 373-7171.**

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## Appendix A: Table Summarizing Michigan Statutes and Court Rules Related to Child Protective Proceedings

## Appendix B: Table of Time and Notice Requirements in Child Protective Proceedings

## Appendix C: Table Summarizing Application of the Rules of Evidence and Standards of Proof in Child Protective Proceedings

# Chapter 1: Introduction


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## *In this chapter . . .*

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

Included in this benchbook, are also the following appendices:

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

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

Michigan Legal Help also created a *Child Protective Services (CPS) Process Flowchart* to help provide a basic understanding of the CPS process for non-Indian children.

## 1.1 Summary of Benchbook Contents

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

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

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

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

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

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

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

- Chapter 3 explains the procedures for obtaining temporary protective custody of a child with or without a court order.
- Chapter 4 explains the court's authority to act when there are allegations of child abuse or neglect.
- Chapter 5 summarizes the time and notice requirements applicable to all stages of a child protective proceeding.
- Chapter 6 discusses the procedures required for identifying a child's father or determining that he cannot be found.
- Chapter 7 discusses petition requirements and the court's option of using a preliminary inquiry if the child is not in custody and custody is not requested. Chapter 7 also details the procedures required at a preliminary hearing, during which the court must decide whether to authorize the petition to be filed and whether to place the child outside of his or her home pending trial. The court may also order a child's alleged abuser out of the child's home, rather than removing the child from the home.
- Chapter 8 discusses the court's obligation to determine whether to order a child out of his or her home, or to return the child to his or her home pending a trial on the allegations in a petition. Chapter 8 also details the court's placement options.

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

- Chapter 9 discusses pretrial conferences, discovery, and motions.
- Chapter 10 explains the procedures for taking a parent's plea of admission or no contest.
- Chapter 11 discusses common evidentiary issues in child protective proceedings.

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

If the court takes jurisdiction over the child, the case moves into the "dispositional phase." During the dispositional phase, the family must participate in court-ordered services and counseling designed to improve the conditions leading to court jurisdiction and, if possible, to reunify the family. If, at the initial dispositional hearing, regularly held review hearings, or a permanency planning hearing, the court determines that the family should not be reunified, a hearing on termination of parental rights will be held. The dispositional phase is described in the following chapters of this benchbook:

- Chapter 13 discusses initial dispositional hearings.

- Chapter 14 contains an overview of funding sources that may be used to pay the costs of child protective proceedings and child placements.

- Chapter 15 explains the procedures for conducting dispositional review hearings, and for conducting emergency removal hearings when the agency supervising a child who was not removed from the home believes that the child is in immediate danger of harm.

- Chapter 16 discusses permanency planning hearings, which are held to decide upon a permanent plan for the child, and whether to proceed with a hearing on termination of parental rights.

- Chapter 17 explains in detail the procedures required for terminating parental rights to a child, either at an initial dispositional hearing or at a later hearing.

- Chapter 18 explains the post-termination review process, during which efforts to find a permanent adoptive or foster family are monitored by the court.

- Chapter 19 explains the heightened procedural requirements that must be observed in child protective proceedings involving Indian children.

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

- Chapter 20 discusses appeals in child protective proceedings.

- Chapter 21 explains the court's recordkeeping obligations, confidentiality of and access to records, and the retention and destruction of records and files.

## 1.2 Purpose of Child Protective Proceeding

"'Child protective proceedings are not criminal proceedings,' and unlike criminal proceedings, the 'purpose of child protective proceedings is *the protection of the child*' rather than to determine a defendant's guilt or innocence. 'The juvenile code[, which governs child protective proceedings,] is intended to protect children from unfit homes rather than to punish their parents.'" *In re Richardson*, 329 Mich App 232, 254 (2019), quoting *In re Brock*, 442 Mich 101, 107-108 (1993). "[P]roceedings may be initiated by anyone who has information that a child is in need of the court's protection.[2] To maximize protection of the child, and at the same time safeguard the interests of parents whose children are the subject of a petition, the court rules provide for expedited proceedings. The [trial] court's protective function is also promoted by procedure which allows for a rehearing or a new trial whenever new evidence comes to light suggesting that the child needs court protection."[3] *People v Gates*, 434 Mich 146, 161-162 (1990) (protective proceedings distinguished from criminal proceedings).

## 1.3 General Overview of Child Protective Proceedings

"Child protective proceedings are governed by the juvenile code, MCL 712A.1 *et seq.*, and Subchapter 3.900 of the Michigan Court Rules." *In re Ferranti*, 504 Mich 1, 14 (2019).

"A child protective proceeding is a single continuous proceeding that begins with a petition, proceeds to an adjudication, and—unless the family has been reunified—ends with a determination of whether a respondent's parental rights will be terminated." *Ferranti*, 504 Mich at 23 (internal citations and quotation marks omitted).

**Petition.** A petition must be filed to initiate child protective proceedings.[4] MCR 3.961(A). "[The] petition must contain, among other things, '[t]he essential facts' that, if proven, would allow the trial court to assume jurisdiction over the child." *Ferranti*, 504 Mich at 15, citing MCR 3.961(B)(3) and MCL 712A.2(b). "After receiving the petition, the trial court must hold a preliminary hearing and may authorize the filing of

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

[3] See Section 12.12 for a detailed discussion of rehearings and new trials.

[4] See Chapter 3 for a detailed discussion of protective custody of a child, and Chapter 6 for a detailed discussion of petitions.

the petition upon a finding of probable cause that one or more of the allegations are true and could support the trial court's exercise of jurisdiction under MCL 712A.2(b)."[5] *Ferranti*, 504 Mich at 15.

**Adjudicative phase.** "If the court authorizes the petition, the adjudication phase follows. The question at adjudication is whether the trial court can exercise jurisdiction over the child (and the respondents-parents) under MCL 712A.2(b) so that it can enter dispositional orders, including an order terminating parental rights. The court can exercise jurisdiction if a respondent-parent enters a plea of admission or no contest to allegations in the petition, see MCR 3.971, or if the Department proves the allegations at a trial, see MCR 3.972. 'If a trial is held, the respondent is entitled to a jury, the rules of evidence generally apply, and the petitioner has the burden of proving by a preponderance of the evidence one or more of the statutory grounds for jurisdiction alleged in the petition.' . . . The adjudication divests the parent of her constitutional right to parent her child and gives the state that authority instead." *In re Ferranti*, 504 Mich at 15, quoting *In re Sanders*, 495 Mich 394, 405-406 (2014) (internal citation omitted). For a discussion on pleas of admission or no contest, see Chapter 10, a discussion on evidentiary issues, see Chapter 11, and a discussion on trials, see Chapter 12.

**Dispositional phase.** "Once the trial court's jurisdiction is established, the case moves to the dispositional phase. In this phase, the trial court has 'broad authority' to enter orders that are '"appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained."' During the dispositional phase the court must hold review hearings 'to permit court review of the progress made to comply with any order of disposition and with the case service plan [i.e., the family treatment plan] . . . and court evaluation of the continued need and appropriateness for the child to be in foster care. If the child is removed from the family home, the court must conduct a permanency planning hearing within 12 months from the date of removal. MCL 712A.19a(1); MCR 3.976(B)(2). This hearing results in either the dismissal of the petition and family reunification, or the court ordering the Department to petition for the termination of parental rights. MCL 712A.19a(4); MCR 3.976(A)." *Ferranti*, 504 Mich at 16, quoting *Sanders*, 495 Mich at 406. A dispositional hearing also permits "the court to approve or disapprove of the child's initial or continued placement in a qualified residential treatment program." MCR 3.975(A). For a discussion on the dispositional phase and review hearings, see Chapter 13 and Chapter 15, and a discussion on the permanency planning hearings, see Chapter 16.

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[5] "If the child is not in protective custody and the petition does not request placement outside the family home, then a preliminary hearing is not required. Instead the probable-cause determination (and the appropriate course of action) is made through a preliminary inquiry, a comparatively less formal process." *Ferranti*, 504 Mich at 15 n 6. See Section 7.5 for a discussion on preliminary inquiries, and Section 7.6 for a discussion on preliminary hearings.

> **Termination of parental rights.** "If the Department files a termination petition, the court holds a termination hearing. See MCR 3.977. The court acts as fact-finder, MCR 3.977(I), and the rules of evidence generally do not apply [at the hearing], MCR 3.977(H)(2)." *Ferranti*, 504 Mich at 16. "Parties shall make disclosures as detailed in MCR 3.922(A) at least 21 days prior to the termination hearing and have rights to discovery consistent with that rule." MCR 3.977(H)(2). "If the court determines that one or more statutory grounds for termination exist and that termination is in the child's best interests, the court must enter an order terminating the respondent's parental rights and order that additional efforts for reunification not be made. MCL 712A.19b(5)." *Ferranti*, 504 Mich at 16. For a discussion on termination hearings, see Chapter 17.

**Indian child.** The Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq.*, apply if the child is an Indian child. For a discussion on child custody proceedings involving an Indian child, see Chapter 19.

## 1.4 Application of Michigan Court Rules to Family Division Proceedings[6]

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

MCR 3.901(A) provides in relevant part:

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

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

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

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

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

- MCR 2.003 (disqualification of a judge);[7]
- MCR 2.004 (notice and opportunity to participate in proceedings for incarcerated parties);[8]
- MCR 2.104(A) (proof of service of a summons);[9]
- MCR 2.106(G)(1) and MCR 2.106(G)(3) (proof of service by publication);[10]
- MCR 2.107(D)[11] (proof of service of documents other than a summons);[12]
- MCR 1.109(D)(3) (verification of petitions);[13]
- MCR 2.117(B) (appearance of attorney);[14]
- MCR 2.119 (motion practice);[15]
- MCR 2.313 (sanctions for disclosure or discovery violations);[16]

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[7] See MCR 3.912(D).

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

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

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

[11] "Notwithstanding any other provision of [MCR 2.107], until further order of the Court, all service of process except for case initiation 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) but should otherwise comply as much as possible with the provisions of [MCR 2.107(C)(4)]." MCR 2.107(G).

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

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

[14] See MCR 3.915(C).

[15] See MCR 3.922(D).

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

- MCR 2.401 (scope and effect of pretrial conferences, "except as otherwise provided in or inconsistent with the rules of [subchapter 3.900]");[17]
- MCR 2.406 (filing of records using facsimile communication equipment);[18]
- MCR 2.506 (service of subpoenas);[19]
- MCR 2.508-MCR 2.516, except as modified by MCR 3.911 (jury procedure in child protective cases);[20]
- MCR 2.602(A)(1)-(2) (form and signing of judgments);[21]
- MCR 2.613 (limitations on correction of error);[22]
- MCR 3.205 (manner of notice from Family Division to another Michigan court with jurisdiction over a child);[23]
- MCR 1.109(D)(2) (required case initiation information and identification of other Family Division matters involving members of the same family);[24]
- MCR 3.606 (contempts committed outside the presence of the court);[25]
- MCR 1.109(D) (form and filing of papers);[26]
- MCR 1.112 (filings by incarcerated individuals);[27]

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[17] See MCR 3.922(E).

[18] See MCR 3.929.

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

[20] See MCR 3.911(C).

[21] See MCR 3.925(C).

[22] See MCR 3.902(A).

[23] See MCR 3.927.

[24] See MCR 3.961(A).

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

[26] See MCR 3.961(A).

[27] A pleading or other document filed by an individual who is not represented by an attorney and who is incarcerated in a prison or jail "must be deemed timely filed if it was deposited in the institution's outgoing mail on or before the filing deadline." MCR 1.112. Proof that the document was timely filed "may include a receipt of mailing, a sworn statement setting forth the date of deposit and that postage has been prepaid, or other evidence (such as a postmark or date stamp) showing that the document was timely deposited and that postage was prepaid." *Id.*

- Chapter 7 of the Michigan Court Rules, except as modified by MCR 3.993 (appeals);[28] and

- MCR 8.108 or as provided by statute (records of proceedings).[29]

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

MCR 2.603, which governs defaults and default judgments in civil cases, does *not* apply to child protective proceedings. *In re Collier*, 314 Mich App 558, 569 (2016) (finding that the Michigan Court Rules "are clear that a default cannot be entered in child protective proceedings[;] MCR 3.901(A)(1) sets forth the court rules that are applicable to child protective proceedings[, and] the rule pertaining to defaults, MCR 2.603 *et seq*., is not among the rules specifically incorporated in juvenile or child protective proceedings").

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

> "(A) *In General.* The rules are to be construed to secure fairness, flexibility, and simplicity. The court shall proceed in a manner that safeguards the rights and proper interests of the parties. Limitations on corrections of error are governed by MCR 2.613.
>
> (B) *Philosophy.* The rules must be interpreted and applied in keeping with the philosophy expressed in the Juvenile Code. The court shall ensure that each minor coming within the jurisdiction of the court shall:
>
> > (1) receive the care, guidance, and control, preferably in the minor's own home, that is conducive to the minor's welfare and the best interests of the public; and
> >
> > (2) when removed from parental control, be placed in care as nearly as possible equivalent to the care that the minor's parents should have given the minor."[30]

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

[29] See MCR 3.925(B).

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

## 1.5 Application of the Michigan Rules of Evidence to Family Division Proceedings

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

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

## 1.6 Applicable Federal Law and Regulations

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

- **Title IV-E of the Social Security Act, 42 USC 670 *et seq*.** This act requires courts to make certain findings regarding removal of a child from the home, including findings that continued custody by the parent or legal guardian would be "contrary to the child's welfare" and that "reasonable efforts" have been made to prevent removal or to reunify the family. The act also provides for review and permanency hearings.[31]

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

- **Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*.** This act sets out the procedures required when an Indian child is involved in a child protective or other custody proceeding.[32]

- **Regulations implementing ICWA, 25 CFR Part 23.** These regulations detail required court and agency procedures.

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[31] See Chapter 14 for a detailed discussion of Title IV-E. "Despite the public health crisis that exists, it is critical that child welfare agencies and courts work together to ensure that the requisite judicial proceedings continue during this time of uncertainty." See the Department of Health & Human Services, Children's Bureau Letter to Child Welfare and Judicial Leaders, which details the judicial determinations and proceedings that must be held in order to satisfy Title IV-E requirements as well as suggestions for ensuring courts continue "to practice in a manner consistent with constitutional principles and to serve the best interest of children[.]"*Note*: The link to the previous resource was created using Perma.cc and directs the reader to an archived record of the page.

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

## 1.7 Use of Videoconferencing Technology in Child Protective and Juvenile Guardianship Proceedings

MCR 3.904(B) provides:

> "(1) Except as provided in subrule (B)(2), courts may allow the use of videoconferencing technology by any participant, as defined in MCR 2.407(A)(1),[33] in any proceeding.
>
> (2) As long as the respondent is either present in the courtroom or has waived the right to be present, on motion of either party showing good cause, the court may use videoconferencing technology to take testimony from an expert witness or any person at another location in the following proceedings:
>
> > (a) removal hearings under MCR 3.967 and evidentiary hearings; and
> >
> > (b) termination of parental rights proceedings under MCR 3.977 and trials, with the consent of the parties. A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting."

"The use videoconferencing technology under this rule 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 3.904(C).[34]

When a party has specifically consented to the use of videoconferencing technology to conduct a hearing, the court is not required to separately advise the party that he or she has "a right to be present in-person" during the hearing. *In re Smith-Taylor*, 339 Mich App 189, 208 (2021), rev'd on other grounds 509 Mich 935 (2022).

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[33] MCR 2.407(A)(1) defines *participant* as including, but not limited to, "parties, counsel, and subpoenaed witnesses, but do[es] not include the general public."

[34] Pursuant to Administrative Order No. 2014-25, the State Court Administrative Office established the Michigan Trial Court Standards for Courtroom Technology, which sets forth standards for digital recording, video recording, and videoconferencing technology.

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


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## *In this chapter. . .*

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

[1] "'Central registry' means a repository of names of individuals who are identified as perpetrators related to a central registry case in the [DHHS's] statewide electronic case management system." MCL 722.622(c). See MCL 722.622(t), which defines *department* as "the [DHHS]."

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

## 2.1 General Overview of the Child Protection Law

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

The Child Protection Law defines *child abuse* as "harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse,[3] sexual exploitation,[4] or maltreatment, by a parent, a legal guardian, any other person responsible for the child's health or welfare, a teacher, a teacher's aide, a member of the clergy, or an individual 18 years of age or older who is involved with a youth program."[5] MCL 722.622(g).

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

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

[3] MCL 722.622(q) defines *confirmed sexual abuse* as "a confirmed case that involves sexual penetration, sexual contact, attempted sexual penetration, or assault with intent to penetrate as those terms are defined in . . . MCL 750.520a." *Confirmed case* "means the [DHHS] has determined, by a preponderance of evidence, that child abuse or child neglect occurred by a person responsible for the child's health, welfare, or care." MCL 722.622(n).

[4] MCL 722.622(r) defines *confirmed sexual exploitation* as "a confirmed case that involves allowing, permitting, or encouraging a child to engage in prostitution, or allowing, permitting, encouraging, or engaging in the photographing, filming, or depicting of a child engaged in a listed sexual act as that term is defined in . . . MCL 750.145c."MCL 750.145c." *Confirmed case* "means the [DHHS] has determined, by a preponderance of evidence, that child abuse or child neglect occurred by a person responsible for the child's health, welfare, or care." MCL 722.622(n).

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

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

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

## A. Person Responsible for Child's Health or Welfare

> A "'[p]erson responsible for the child's health or welfare' means a parent, legal guardian, individual 18 years of age or older who resides for any length of time in the same home in which the child resides,[6] or, except when used in [MCL 722.627(1)(e) or MCL 722.628(8)[7]], nonparent adult; or an owner, operator, volunteer, or employee of 1 or more of the following:
>
> > (*i*) A licensed or registered child care organization.[8]
> >
> > (*ii*) A licensed or unlicensed adult foster care family home or adult foster care small group home as defined in . . . MCL 400.703.

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[6] Persons who reside in the child's home may include "live-in adult friends of the parent or foster parent, adult siblings and relatives, roomers, boarders, live-in sitters, housekeepers, etc." DHHS's Children Protective Services Manual (PSM), *Department Responsibilities and Operational Definitions PSM 711-5*, p 1, Note: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[7] MCL 722.627(1)(e) pertains to accessing the DHHS's central registry, and MCL 722.628(8) pertains to the DHHS interviewing a child at his or her school or other institution.

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

(*iii*) A court-operated facility as approved under . . . MCL 400.14." MCL 722.622(cc).

**Note:** A *nonparent adult* is "a person who is 18 years of age or older and who, regardless of the person's domicile, meets all of the following criteria in relation to a child:

(*i*) Has substantial and regular contact with the child.

(*ii*) Has a close personal relationship with the child's parent or with a person responsible for the child's health or welfare.

(*iii*) Is not the child's parent or a person otherwise related to the child by blood or affinity to the third degree." MCL 722.622(aa). See also MCR 3.903(C)(7), which contains substantially similar language.

A foster parent is a person responsible for his or her foster child's health or welfare as contemplated by MCL 722.622(cc).[9] *Spikes v Banks*, 231 Mich App 341, 351 (1998).

## B. Religious Exemptions Under Child Protection Law

"A parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian. This section shall not preclude a court from ordering the provision of medical services or nonmedical remedial services recognized by state law to a child where the child's health requires it nor does it abrogate the responsibility of a person required to report child abuse or neglect."[10] MCL 722.634.

"[T]he word 'legitimately' modifies the word 'practicing.'" *In re Piland* (*Piland III*), 336 Mich App 713, 727 (2021). The proper inquiry into the issue of a parent's religious beliefs regarding his or her decisions involving a minor's medical care is whether the parent was "'legitimately practicing'" a religious belief. *Id*. "[I]n order to be 'legitimately practicing' his or her religious beliefs, the parent or guardian must have been actually practicing his or her religious beliefs at the time that he or she did not provide his or her child with specified medical treatment." *Id*.

[9] Formerly MCL 722.622(x).

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

"MCL 722.634 applies to child protective proceedings. . . . [I]n a proceeding under MCL 712A.2(b)(1), the availability of an instruction based on MCL 722.634 does not depend on whether the respondents' failure to provide specified medical treatment for a child is characterized as an act of neglect or an act of refusal[; rather] . . . the respondents' entitlement to a jury instruction based on MCL 722.634 depends on the evidence that is ultimately presented at the respondents' adjudication trial. . . . [T]he trial court must provide an instruction that is consistent with MCL 722.634 if such an instruction is requested by the respondents and if a rational view of the evidence supports the conclusion that the failure to provide medical treatment was based on the respondents' legitimate practice of their religious beliefs." *In re Piland (Piland II)*, 503 Mich 1032 (2019), aff'ing in part, vacating in part 324 Mich App 337 (2018). On the respondent's appeal of the trial court's refusal on remand to deliver the jury instruction required by MCL 722.634, the Court of Appeals concluded that the trial court's decision was error, reversal was required, and remand to the trial court was proper. *Piland III*, 336 Mich App at 729-732.

In remanding the case to the trial court, the Court instructed that the legitimate exercise of a religious belief means "that the parent or guardian's reason for not providing treatment cannot be a false or spurious reason." *Piland III*, 336 Mich App at 735. The Court noted that "the record contain[ed] substantial evidence showing that respondents['] actual practice of their religious beliefs was the reason they did not seek medical treatment for [the child], a rational view of the evidence supported the jury instruction and the trial court erred by not giving it." *Id*.

## C. Safe Families for Children Act

The Safe Families for Children Act, MCL 722.1551 *et seq*., permits "a parent or guardian of a minor child[11] [to] temporarily delegate to another person his or her powers regarding care, custody, or property of the minor child[.]" [12, 13] MCL 722.1555(1). The act of "[a] parent or guardian executing a power of attorney does not, by itself, constitute evidence of abandonment, child abuse, child neglect, delinquency, or other maltreatment of a minor child unless the

[11] For purposes of the Safe Families for Children Act, *minor child* is "an individual less than 18 years of age." MCL 722.1553(f).

[12] "A parent or guardian cannot delegate, under this act, his or her power to consent to adoption of the minor child, consent to an abortion or inducement of an abortion to be performed on or for the minor child, or to terminate parental rights to the minor child." MCL 722.1555(1). "A parent is not authorized to consent to the marriage of a child who is under the legal age of marriage." *Id*.

[13] "The parent or guardian executing a power of attorney may revoke or withdraw the power of attorney at any time." MCL 722.1555(2).

parent or guardian fails to take custody of the minor child when a power of attorney expires." MCL 722.1565(1). The Safe Families for Children Act does not, however, "prevent or delay an investigation of child abuse, child neglect, abandonment, delinquency, or other mistreatment of a minor child." *Id.* For more information on evidentiary issues in child protective proceedings, see Chapter 11. For information on the procedures and requirements under the Act, see the Safe Families for Children Act, MCL 722.1551 *et seq*.

## 2.2 Reporting Suspected Child Abuse or Child Neglect

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

The DHHS will not investigate allegations of parental substance abuse if that is the only allegation made. DHHS's Children Protective Services Manual (PSM), *CPS Intake - Special Cases PSM 712-6*, p 15.[14] Rather, "[t]he complaint must include an allegation of child abuse and/or neglect as a result of the substance use to be appropriate for investigation[, unless the] complaint alleg[es] that methamphetamine is being smoked in a home where children reside[.]" *CPS Intake - Special Cases PSM 712-6, supra* at p 15.

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

The DHHS will not investigate complaints that contain only allegations of domestic violence. *CPS Intake - Special Cases PSM 712-6*, *supra* at p 6. To be accepted for investigation, a complaint must "include information indicating the [domestic violence] has resulted in harm or threatened harm to the child."[15] *Id.* In cases involving domestic violence, the

[14]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[15] For additional information on "harm or threatened harm" to a child, see DHHS's Children Protective Services Manual (PSM), *Special Investigative Situations PSM 713-08*, pp 1-2. *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page

presence of any of the following factors may indicate threatened harm to a child:

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

## A. Mandatory Reporters of Suspected Abuse or Neglect

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

- physicians;
- dentists;
- physician's assistants;
- registered dental hygienists;
- medical examiners;
- nurses;
- persons licensed to provide emergency medical care;
- audiologists;
- psychologists;
- marriage and family therapists;

- licensed professional counselors;
- social workers;
- licensed master's social workers;
- licensed bachelor's social workers;
- registered social service technicians;
- social service technicians;
- Friend of the Court (FOC) employees working in a professional capacity in any FOC office;
- school administrators;
- school counselors or teachers;
- law enforcement officers;
- members of the clergy;[16]
- regulated child care providers;
- any of the following DHHS employees:

  "(*i*) Eligibility specialist.

  (*ii*) Family independence manager.

  (*iii*) Family independence specialist.

  (*iv*) Social services specialist.

  (*v*) Social work specialist.

  (*vi*) Social work specialist manager.

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

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

  **Note:** "[MCL 330.1707[17]] does not relieve a mental health professional from his or her duty to report

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

> suspected child abuse or neglect under . . . MCL 722.623 . . . ." MCL 330.1707(5).

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

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

A mandatory reporter "who has reasonable cause to suspect child abuse or child neglect shall make an immediate report to centralized intake[18] by telephone, or, if available, through the online reporting system,[19] of the suspected child abuse or child neglect." MCL 722.623(1)(a). "Within 72 hours after making an oral report by telephone to centralized intake, the reporting person shall file a written report as required in [the Child Protection Law]. If the immediate report has been made using the online reporting system and that report includes the information required in a written report under [MCL 722.623(2)], that report is considered a written report for the purposes of this section and no additional written report is required."[20] MCL 722.623(1)(a).

> **Note:** "If the reporting person is a member of the staff of a hospital, agency, or school, the reporting person shall notify the person in charge of the hospital, agency, or school of his or her finding and that the report has been made, and shall make a copy of the written or electronic report available to the person in charge."[21] MCL 722.623(1)(a). "One report from a hospital, agency, or school is adequate to meet the reporting requirement." *Id.*

MCL 722.623(2) requires "[t]he written report or a report made using the online reporting system [to] contain the name of the

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

[18] MCL 722.622(e) defines *centralized intake* as "the [DHHS's] statewide centralized processing center for reports of suspected child abuse and child neglect."

[19] MCL 722.622(bb) defines *online reporting system* as "the electronic system established by the [DHHS] for individuals identified in [MCL 722.623(1)] to report suspected child abuse or child neglect."

[20] See DHHS form DHS-3200, *Report of Actual or Suspected Child Abuse or Neglect*. *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

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

child and a description of the child abuse or child neglect[,] [and] [i]f possible, . . . the names and addresses of the child's parents, the child's guardian, the persons with whom the child resides, and the child's age[,] [as well as] . . . other information available to the reporting person that might establish the cause of the child abuse or child neglect, and the manner in which the child abuse or child neglect occurred."

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

"The written report . . . shall be mailed or otherwise transmitted to centralized intake." MCL 722.623(4).

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

The imposition of a duty to report suspected child abuse or child neglect under MCL 722.623(1)(a) is based on the type of relationship between the child and the perpetrator rather than on the occurrence of the alleged abuse or neglect. *Doe v Doe (Doe I) (On Remand)*, 289 Mich App 211, 216 (2010). Thus, MCL 722.623(1)(a) imposes a duty to report only if the alleged perpetrator is the "parent, legal guardian, teacher, teacher's aide, clergyman 'or any other person responsible for the child's health or welfare,' including a 'nonparent adult,' as those terms are defined by [MCL 722.622(cc)[22]] and [MCL 722.622(aa)[23]]."[24] *Doe I*, 289 Mich App at 216 (an ambulance driver was not required to report suspected child abuse under MCL 722.623(1)(a) where he suspected his partner had sexually molested a child being transported in their ambulance).

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

"Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication is abrogated and shall

[22] Formerly MCL 722.622(x).

[23] Formerly MCL 722.622(v).

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

not constitute grounds for excusing a report otherwise required to be made . . . pursuant to [the Child Protection Law]." MCL 722.631.

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

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

### 4. Child Suspected of Abuse or Neglect Taken to Hospital

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

> Note: "When a child suspected of being an abused or neglected child is seen by a physician, the physician shall make the necessary examinations, which may include physical examinations, x-rays, photographs, laboratory studies, and other pertinent studies." MCL 722.626(2). "The physician's written report to the [DHHS] shall contain summaries of the evaluation, including medical test results."[25] *Id.*

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

> (1) order that the child remain in the hospital or some other suitable place pending a preliminary hearing under MCL 712A.14.[26]
>
> (2) order that the child be released to the child's parent, guardian, or custodian. MCL 722.626(1).

## 5. Child Surrendered Under Safe Delivery of Newborns Law

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

> **Note:** "A hospital that takes a newborn into temporary custody under [the Safe Delivery of Newborns Law] shall have the newborn examined by a physician." MCL 712.5(2). If the examining physician determines that there is reason to suspect the newborn experienced neglect or abuse (other than the parent surrendering the child to an emergency service provider), or if the examining physician believes the child is not a newborn, the mandatory reporting requirements of MCL 722.623(1) require the examining physician to immediately report the suspected child abuse to centralized intake.[27] MCL 712.5(2); MCL 722.623(1).

## 6. Failure to Report

A mandatory reporter who fails to report suspected child abuse or neglect is "civilly liable for the damages proximately caused by the failure." MCL 722.633(1). However, a mandatory

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

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

[27] MCL 722.622(e) defines *centralized intake* as "the [DHHS's] statewide centralized processing center for reports of suspected child abuse and child neglect."

reporter's civil liability under MCL 722.633(1), is limited to "claims for damages by the identified abused child about whom no report was made[,]" and "only for 'damages proximately caused by the failure [to report abuse].'" *Marcelletti v Bathani*, 198 Mich App 655, 659, 662 (1993) (defendant-physician's liability did not extend to an infant injured at the hands of his babysitter where the defendant-physician did not treat the injured infant but a different child injured by the same babysitter, and the defendant-physician's failure to report suspected child abuse of the other child was not the proximate cause of the harm suffered by the infant in the instant case).

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

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

"While the mandatory reporting provision [of MCL 722.633(1)] imposes liability when an individual named in the statute fails to report suspected abuse or neglect, that liability is limited by governmental immunity[;]"[28] thus, when reading the mandatory reporting statute, MCL 722.633(1), together with the governmental immunity statute, MCL 691.1407, "[i]t follows that, in order for [the mandatory reporter] to be liable [for failing to report suspected child abuse or neglect] under [MCL 722.633(1)], [the mandatory reporter's] conduct must [be] grossly negligent and *the* proximate cause of [the alleged harm]." *Jones v Bitner*, 300 Mich App 65, 68, 77 (2013) ("[the] plaintiff's claim [against the defendant-police officer for failing to report suspected neglect] [was] barred by [governmental] immunity" where "[the] defendant[-police officer's] alleged failure to report [knowing that the child's mother illegally

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

distributed drugs from the child's home and in the child's presence] could *not* have been the proximate cause of [the child's] death" when the court record showed that "only [the child's mother's] acts or omissions were the proximate cause of the [child's] death").[29]

> **Note:** MCL 722.623(1)(a) may not be the basis of a civil claim for damages under MCL 722.633(1) against mandatory reporters who fail to report their own abusive conduct. See *IS v Crestwood Sch Dist*, ___ Mich App ___, ___ (2024). "[T]o the extent that [the] plain language of MCL 722.623(1)(a) requires a mandatory reporter who abuses a child to self-report his or her own abuse, we conclude that MCL 722.623(1)(a) is unconstitutional." *IS*, ___ Mich App at ___ ("requiring such a disclosure falls afoul of the constitutional privilege against self-incrimination"). "As a result, plaintiff cannot maintain a claim for relief against [defendant, a school social worker at the child's school] based upon MCL 722.623(1)(a)." *IS*, ___ Mich App at ___ (affirming the trial court's order granting defendant summary disposition on that claim).

## 7. Constitutionality of Mandatory Reporting Law

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

> "[The] [d]efendant[-psychologist] [] claims . . . that the Child Protection Law, MCL 722.621 *et seq*., is unconstitutionally overbroad because it violates [the] defendant[-psychologist's] First Amendment rights to associate in legal endeavors and invades the privacy of the family and those in association to cure private family problems.
>
> * * *
>
> In the context of a family, [MCL 722.623] invades its privacy to the extent that the family members' collective desire to seek treatment for the offender

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

> and risk the continued abuse of the victim rather than initiating criminal proceedings may not be honored. However, we do not believe that this invasion constitutes a constitutionally impermissible violation of a family's First Amendment right of privacy. A family does not have a protected First Amendment right to undertake a course of action which may do little or nothing to protect the child victim from continued abuse.
>
> * * *
>
> Further, a person generally lacks standing to challenge overbreadth where his [or her] own conduct is clearly within the contemplation of the statute. This is so even where there is some marginal application which might infringe on First Amendment activities. In this case, the [9-year-old] victim told [the] defendant[-psychologist], and the victim's father did not deny, that the abuse occurred. Therefore, [the] defendant[-psychologist] had more than a 'reasonable suspicion' of its occurrence."

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

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

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

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

> "[The] defendant[-father] and the trial court [found] 'unfair' the fact that on the basis of 'confidential' information voluntarily provided by the defendant to the counselor, the agency filed a report with the [DHHS] indicating [the] defendant[-father] was suspected of abusing his stepdaughter. Thus, in effect, [the] defendant[-father] is challenging the mandatory reporting requirement set forth in [MCL 722.623] on grounds that the reporting is generally 'unfair' when a defendant voluntarily seeks help and is contrary to public policy because it will dissuade persons such as [the] defendant[-father] from seeking help and thus hinder the discovery and removal of children from homes where they are abused.
>
> This argument overlooks the fact that public policy issues are best addressed by the Legislature. Given enactment of the reporting requirement, as well as the section abrogating any legally recognized privileged communications except those between attorney and client, MCL 722.631, it appears the Legislature found the public policy arguments supporting general detention, and thus likely prosecution, MCL 722.623, more compelling than those promoting self-reporting and self-sought treatment.
>
> * * *
>
> Although we agree that the agency erred in failing to inform [the] defendant[-father] of its duty to

> report suspected child abuse when specifically questioned by [the] defendant[-father] regarding the confidentiality of his treatment, we do not find any support for [the] defendant[-father's] proposed remedy—immunity from prosecution for criminal acts of sexual abuse committed against his stepdaughter.
>
> * * *
>
> We find no support for the trial court's holding [the] defendant[-father] absolutely immune from prosecution on the basis of some generalized notion of fairness. There was no egregious conduct. The information reported was neither coerced nor solicited from [the] defendant[-father], but was given voluntarily. Dismissal of the information charging [the] defendant[-father] was improper."

A mandatory reporter whose own conduct is abusive to a child cannot be compelled to self-report under MCL 722.623(1)(a). See *IS v Crestwood Sch Dist*, ___ Mich App ___, ___ (2024). "[I]t is immediately apparent that such a requirement would violate the Fifth Amendment to the United States Constitution and the Michigan Constitution, Const 1963, art 1, § 17, both of which include the guarantee that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . .'" *IS*, ___ Mich App at ___ (second alteration in original). The protection "applies in any situation in which a criminal prosecution might follow, regardless of how likely or unlikely that outcome may seem." *Id*. at ___. Accordingly, "the privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory." *Id*. at ___ (cleaned up).

### 8. Mandatory Reporting Statute's Implication of Defendant's Right of Confrontation[30]

A defendant has an absolute right of face-to-face confrontation "for all 'testimonial' evidence unless a witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." *People v Jemison*, 505 Mich 352, 361-362 (2020). "[A] statement cannot fall within the Confrontation Clause

[30] This sub-subsection contains a very brief discussion of the Defendant's Right of Confrontation under the Sixth Amendment as it relates to the mandatory reporting statute. For a thorough discussion of the Confrontation Clause, see the Michigan Judicial Institute's *Evidence Benchbook,* Chapter 3.

unless its primary purpose was testimonial[;[31]] '[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.'" *Ohio v Clark*, 576 US 237, 245, 247, 249 (2015) (finding that "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution[;]" in this case, the child-victim's statements to his teacher identifying his abuser were not made with the primary purpose of creating evidence for prosecution, and accordingly, were not testimonial, where "[t]he teachers' questions were meant to identify the abuser in order to protect the victim from future attacks").

Although statements to individuals who are not law enforcement officers "are much less likely to be testimonial than statements to law enforcement officers[,]" "statements to persons other than law enforcement officers [may be] subject to the Confrontation Clause[, b]ecause at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns[.]" *Clark*, 576 US at 246-248 ("declin[ing] to adopt a categorical rule excluding [statements to individuals who are not law enforcement officers] from the Sixth Amendment's reach[]" and further noting that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause").

## B. Non-Mandatory Reporters of Suspected Abuse or Neglect

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

## C. Reasonable Cause to Suspect Child Abuse or Child Neglect

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

[31] For a thorough discussion of what constitutes a testimonial statement, see the Michigan Judicial Institute's *Evidence Benchbook,* Chapter 3.

"For purposes of [the Child Protection Law], the pregnancy of a child less than 12 years of age or the presence of a sexually transmitted infection in a child who is over 1 month of age but less than 12 years of age is reasonable cause to suspect child abuse or child neglect has occurred." MCL 722.623(8).

An individual identified as a mandatory reporter under MCL 722.623(1)[32] who knows or has reasonable cause to suspect from the infant's symptoms that a newborn infant has any amount of alcohol, a controlled substance, or a metabolite of a controlled substance in his or her body must report the information to the DHHS, unless the reporter knows that the substance is present due to treatment of the mother or newborn. MCL 722.623a. See MCL 722.623(1), which specifically requires the mandatory reporter to immediately report suspected child abuse or child neglect to centralized intake (the DHHS's "statewide centralized processing center for reports of suspected child abuse and child neglect[,]" MCL 722.622(e)).

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

A person required to report under MCL 722.623 is "not free to arrogate to himself [or herself] the right to foreclose the possibility of a legal investigation by the state" where he or she has a reasonable suspicion of child abuse or child neglect. *People v Cavaiani*, 172 Mich App 706, 715 (1988). In *Cavaiani*, 172 Mich App at 708-709, the defendant-psychologist was charged with a misdemeanor for failing to report suspected child abuse after his 9-year-old patient informed him that her father fondled her breasts.[33] Instead of reporting the suspected child abuse, the defendant-psychologist talked with the child's father and determined that if any touching occurred it was accidental. *Id.* at 709. The trial court dismissed the misdemeanor charge against the defendant-psychologist reasoning that the "defendant[-psychologist], in the course of exercising professional judgment, might have concluded that the information supplied to him indicating that the victim was being abused was inaccurate or some kind of fantasy." *Id.* at 715. In reversing the trial court, the Court of Appeals found that despite the defendant-psychologist's personal belief of whether child abuse occurred, he was still obligated to report the possibility of the child abuse to the DHHS to permit the state to do their own investigating. *Id.* at 715. Specifically, the Court of Appeals concluded:

[32] See Section 2.2(A) for a list of mandatory reporters.

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

> "In this case, . . .[the] [d]efendant[-psychologist] had reasonable suspicion of child abuse, but concluded that his suspicions were not factually founded. With respect to [the] defendant[-psychologist's] legal obligations under [MCL 722.623], it was not for him to make this determination, but for the responsible investigative agencies, such as the [DHHS], to make. While [the] defendant[-psychologist] is free to decide that the victim's allegations are untrue for purposes of rendering professional treatment, he is not free to arrogate to himself [or herself] the right to foreclose the possibility of a legal investigation by the state. The state has different interests, and its sovereignty is offended by child abuse." *Cavaiani*, 172 Mich App at 715.

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

## D. False Report

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

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

Because MCL 722.624 "expressly contemplates reporting of child abuse by mandatory *and* nonmandatory reporters, the plain meaning of the reference in MCL 722.633(5) to '[a] person who intentionally makes a false report of child abuse or neglect *under this act*' covers both mandatory and nonmandatory reporters." *People v Mullins*, 322 Mich App 151, 160-162, 173 (2017) (emphasis added) (disagreeing with the defendant's argument that she cannot be held criminally liable under MCL 722.633(5) for "us[ing] her daughter and school officials to make a false report of felony child abuse against her daughter's father[]" "because [the] defendant and [her minor daughter] were not mandatory reporters, and the statute only criminalizes false reports by mandatory reporters"). "[T]he phrase ['under this act'] clarifies that the activity criminalized by MCL 722.633(5) is the making of a specific report to CPS as authorized by the Child Protection Law, as opposed to some other kind of report not involving abuse or neglect of a child or made to some person or entity other than CPS or law enforcement."

Although "other provisions of Michigan law criminalize false reports of criminal activity by nonmandatory reporters, . . . the same activity can violate more than one criminal provision."*Mullins*, 322 Mich App at 160-161 (rejecting the defendant's argument that "because other provisions of Michigan law criminalize false reports of criminal activity by nonmandatory reporters, MCL 722.633(5) must be read to be limited solely to mandatory reporters of felony child abuse or neglect[]").

"MCL 722.633(5) is not ambiguous with respect to holding liable someone who uses an innocent agent[34] to make a false report of child abuse." *Mullins*, 322 Mich App at 165 "Considering the facts of this case in line with the innocent-agent doctrine, [the Court of Appeals found] no error with charging and convicting defendant under MCL 722.633(5)[ when the] . . . defendant repeatedly used [her daughter] and others as agents to make false reports of child abuse against [her daughter's father.] . . . [D]efendant used [her daughter] to report to her teacher [that she was sexually abused by her father], who then reported the matter to the school principal, who in turn reported the matter to CPS. Neither [the defendant's daughter], the teacher, nor the school principal intended to make a false report; instead, they were acting as the innocent agent of defendant's malicious plan. Nor was the chain of agents too attenuated under the facts of this case, as [the defendant's daughter]

[34] "Under [the innocent-agent] doctrine, when a defendant uses an innocent person to accomplish a crime on the defendant's behalf, the defendant is guilty of the crime as a principal, rather than under any of the accomplice-liability theories. Under the doctrine, the innocent agent is not the one who actually commits the offense, but is a mere 'instrumentality' through whom the defendant commits the offense." *Mullins*, 322 Mich App at 163, citing *People v Hack*, 219 Mich App 299, 303 (1996).

was a minor and both the teacher and principal were mandatory reporters under MCL 722.623, meaning that they had no choice or discretion under the law but to report the allegations in accordance with the Child Protection Law." *Mullins*, 322 Mich App at 164-165

## 2.3 Investigating Allegations of Child Abuse or Child Neglect

Any person who suspects child abuse or neglect may report the matter to the Department of Health and Human Services (DHHS), a law enforcement agency, or the court.[35] MCL 712A.11(1); MCL 722.624; MCL 722.632. Once reported to the DHHS, the DHHS has 24 hours to either commence its own investigation or refer the case to the prosecuting attorney and the local law enforcement agency.[36] MCL 722.628(1). Following the investigation, either a Children's Protective Services (CPS) worker or a prosecuting attorney acting on behalf of the DHHS drafts and files a petition seeking court jurisdiction over a child suspected of being abused or neglected.[37] See MCL 712A.11(1); MCL 712A.17(5); MCR 3.914(C).

> **Note:** Within 24 hours of receiving a report for suspected child abuse or neglect, the DHHS "shall refer the report to the prosecuting attorney and the local law enforcement agency if the report meets the requirements of [MCL 722.628(3)(a), MCL 722.628(3)(b), or MCL 722.628(3)(c)] or [MCL 722.623(6) or MCL 722.623(9)] or shall commence an investigation of the child suspected of being abused or neglected." MCL 722.628(1).
>
> Within 24 hours of receiving a report for suspected child abuse or neglect from a reporting person or the DHHS, "the local law enforcement agency must refer the report to the [DHHS] if the report meets the requirements of [MCL 722.623(7)] or must commence an investigation of the child suspected of being abused or neglected or exposed to or who has had contact with methamphetamine production."[38] MCL 722.628(1).

In the course of an investigation, the DHHS must:

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

[36] For additional information on the DHHS's responsibility to receive and investigate complaints, see DHHS's Children Protective Services Manual (PSM), *Responsibility to Receive and Investigate Complaints PSM 711-6*. *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[37] See Section 7.4 for a detailed discussion of petitions, including when the DHHS must submit a petition seeking the court's jurisdiction over a child suspected of being abused or neglected.

- determine whether the child is abused or neglected;
- "cooperate with law enforcement officials, courts of competent jurisdiction, and appropriate state agencies providing human services in relation to preventing, identifying, and treating child abuse and child neglect;"
- "provide, enlist, and coordinate the necessary services, directly or through purchasing services from other agencies and professions;" and
- "take necessary action to prevent further abuses, to safeguard and enhance the child's welfare, and to preserve family life where possible."[39] MCL 722.628(2).

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

> (a) Child abuse or child neglect is the suspected cause of a child's death.
>
> (b) The child is the victim of suspected sexual abuse or sexual exploitation.
>
> (c) Child abuse or child neglect resulting in serious physical harm to the child.
>
> (d) Law enforcement intervention is necessary for the protection of the child, a [DHHS] employee, or another person involved in the investigation.
>
> (e) The alleged perpetrator of the child's injury is not a person responsible for the child's health or welfare.[40]
>
> (f) The child has been exposed to or had contact with methamphetamine production."[41] MCL 722.628(3).
>
> **Note:** "Involvement of law enforcement officials [in an investigation] does not relieve or prevent the [DHHS]

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

[39] For additional information on the overview of the investigation process, see DHHS's Children Protective Services Manual (PSM), *CPS Overview PSM 711-2*. *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

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

> from proceeding with its investigation or treatment if there is reasonable cause to suspect that the child abuse or child neglect was committed by a person responsible for the child's health or welfare." MCL 722.628(5).

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

On completion of an investigation, "the law enforcement agency or the [DHHS] may inform the person who made the report as to the disposition of the report." MCL 722.628(15). "If the person who made the report is mandated to report under [MCL 722.623], upon completion of the investigation by the [DHHS], the [DHHS] must inform the person in writing as to the disposition of the case and must include in the information at least all of the following:

> (a) What determination the [DHHS] made under [MCL 722.628(12)] and the rationale for that decision.[42]
>
> (b) Whether legal action was commenced and, if so, the nature of that action.
>
> (c) Notification that the information being conveyed is confidential." MCL 722.628(16).

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

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[41] For additional information on the DHHS's coordination with the prosecuting attorney and law enforcement, see DHHS's Children Protective Services Manual (PSM), *Coordination With Prosecuting Attorney and Law Enforcement PSM 712-3*. *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[42] MCL 722.628(12) requires the DHHS to "determine in which single category, prescribed by [MCL 722.628d], to classify the allegation of child abuse or child neglect and determine whether the child abuse or child neglect must be classified as a central registry case." See Section 2.3(D) for additional information.

## A. Investigation Involves Indian Child

"In every investigation of alleged child abuse or neglect, the family must be asked whether the child is known to have American Indian heritage[;] [t]his inquiry must be documented in the case record and appropriate action taken." DHHS's Children Protective Services Manual (PSM), *Special Case Situations - American Indian Child PSM 716-1*, p 1, available at http://www.mfia.state.mi.us/olmweb/ex/PS/Public/PSM/716-1.pdf.

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

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

## B. Interviewing Abused or Neglected Child

### 1. Interview Child Outside Presence of Suspected Abuser

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

### 2. Required Procedures for Contacting Child at School

"A school or other institution must cooperate with the [DHHS] during an investigation of a report of child abuse or neglect." MCL 722.628(8).[43] "Cooperation includes allowing access to the child without parental consent if access is determined by the [DHHS] to be necessary to complete the investigation or to prevent child abuse or child neglect[.]"[44] *Id.*

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

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

> **Note:** In OAG, 1995, No 6869, p 92 (September 6, 1995),[45] the Attorney General found that a school administration may not impose conditions upon a Children's Protective Services (CPS) worker's interview of a child at school, and the school may not deny access to a child, require that the CPS worker establish in writing the need to interview the child, require that a school employee be present during the interview, or require parental consent before allowing access to the child.

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

> **Note:** The DHHS is not required to notify a nonparent adult[46] after interviewing a child at a school or other institution. See MCL 722.622(cc) (excluding a nonparent adult from its definition of a "[p]erson responsible for the child's health and welfare" when that term appears in MCL 722.628(8)).

Unless the DHHS has obtained a court order,[47] "[a] child must not be subjected to a search at a school that requires the child to remove his or her clothing to expose his buttocks or genitalia or her breasts, buttocks, or genitalia[.]" MCL 722.628(10).

### 3. Videorecording a Child's Statement

A DHHS employee, an investigating law enforcement agency, a prosecuting attorney or assistant attorney general, or another person designated to do so under a county protocol established under MCL 722.628(6) may take a child's videorecorded statement. MCL 712A.17b(5). "The videorecorded statement shall be admitted at all proceedings

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

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

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

except the adjudication stage instead of the live testimony of the witness." MCL 712A.17b(5). See *In re Martin*, 316 Mich App 73, 83-84 (2016) (reversing the trial court's order of adjudication with respect to the respondent-father and the order terminating his parental rights where the trial court erroneously relied on the child's videorecorded statement contained in a DVD instead of live testimony to adjudicate the respondent-father).[48]

The child must be "an alleged victim of [child abuse or neglect, MCL 712A.17b(2)(b),]" who is under 16 years of age or over age 16 and developmentally disabled.[49] MCL 712A.17b(1)(e).

> **Note:** MCL 712A.17b(7) permits "[a] custodian of the videorecorded statement[50] [to] release or consent to the release or use of a videorecorded statement or copies of a videorecorded statement to a law enforcement agency, an agency authorized to prosecute the criminal case to which the videorecorded statement relates, or an entity that is part of county protocols established under . . . MCL 722.628."

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

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[48] "[A] videorecorded statement taken in compliance with MCL 712A.17b must be admitted at a [pretrial] tender-years hearing and can be used by the trial court to assess whether a proposed witness who took the videorecorded statement should be permitted to testify at trial about the statement, i.e., to assess whether 'the circumstances surrounding the giving of the statement provide[d] adequate indicia of trustworthiness.'" *In re Martin*, 316 Mich App at 83, quoting MCR 3.972(C)(2)(a). "MCR 3.972 works in tandem with MCL 712A.17b(5) . . . ." *In re L A LeDee*, ___ Mich App ___, ___ (2026). Pursuant to MCR 3.972(C)(2)(a), the referee in *LeDee* properly admitted a minor witness's videorecorded statements made at a tender-years hearing about respondent's abuse and took testimony from the forensic interviewer to determine that the minor's statements were supported by "adequate indicia of trustworthiness." ___ Mich App at ___. However, in *In re Martin*, "the forensic interviewer [whose recorded questioning of the child raised claims by the child of sexual abuse by the respondent-father] did not testify at trial with respect to the child's statements made in the interview[, and t]he trial court did not employ the [videorecorded statement] to determine whether the forensic interviewer should be allowed to testify under MCR 3.972(C)(2)(a)[, but the trial court instead erroneously] . . . . used the [videorecorded statement], in and of itself, to adjudicate [the] respondent-father." *In re Martin*, 316 Mich App at 83. For additional information on MCR 3.972(C)(2)(a), see Section 11.4(B).

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

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

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

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

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

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

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

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

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

## C. Physician Suspecting Child Abuse or Child Neglect

When a physician attends to a child suspected of being abused or neglected, the physician must conduct the necessary examinations and include summaries of those evaluations, including medical test results, in a written report[51] to the DHHS.[52] MCL 722.626(2). See MCL 722.623(1), which specifically requires the physician to immediately report suspected child abuse or child neglect to centralized intake (the DHHS's "statewide centralized processing center for reports of suspected child abuse and child neglect[,]" MCL 722.622(e)).

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

"If a report is made by a person other than a physician, or if the physician's report is not complete, the [DHHS] may request a court order for a medical evaluation of the child."[53] MCL 722.626(3). "The [DHHS] shall have a medical evaluation made without a court order if either of the following occurs:

> (a) The child's health is seriously endangered and a court order cannot be obtained.
>
> (b) The child is displaying symptoms suspected to be the result of exposure to or contact with methamphetamine production." MCL 722.626(3).
>
> > **Note:** The court, a child placing agency, or the department[54] may consent to routine, nonsurgical

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[51] Where available, the attending physician may immediately report the suspected child abuse or child neglect through the online reporting system ("the electronic system established by the [DHHS] for individuals identified in [MCL 722.623(1) as a mandatory reporter] to report suspected child abuse or child neglect[,]" MCL 722.622(bb)), and "if the immediate report has been made using the online reporting system and that report includes the information required in a written report under [MCL 722.623(2)], that report is considered a written report for the purposes of [MCL 722.623(1)] and no additional written report is required." MCL 722.623(1). See Section 2.2(A) for additional information on mandatory reporters filing a written or electronic report.

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

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

> medical care, or emergency medical and surgical treatment *if the minor is placed outside the home*. MCL 722.124a(1). See Section 3.3 for a detailed discussion of ordering medical treatment for a child.

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

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

After a petition is filed initiating child protective proceedings, the court may make orders to further investigate the allegations of abuse or neglect, including an evaluation or examination of a child or a parent, guardian, or legal custodian by a physician, dentist, psychologist, or psychiatrist. MCL 712A.12; MCR 3.923(B).[55]

However, "a trial court in a child protection proceeding [does not] have the authority to order a minor child alleging sexual assault to submit to a court-ordered forensic sexual-assault examination[.]" *In re Bell*, 341 Mich App 596, 602 (2022) (explaining that a complainant's allegation of sexual assault "does not put his or her physical condition at issue [as does] a plaintiff alleging physical injury in a tort suit"). In *Bell*, the respondent petitioned the trial court to order the complainant to undergo an independent medical examination (IME) to determine whether there was evidence that the complainant had been sexually assaulted. *Id*. at 600. The trial court erred in its analysis of the factors in *Mathews v Eldridge*, 424 US 319 (1976), to balance the interests involved—(1) the respondent's "fundamental interest in the companionship, custody, care, and management of [her child], an element of liberty protected by the due process provisions in the federal and state Constitutions," (2) the child's "interest in her own general welfare, which includes her

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[54] For purposes of the Child Care Licensing Act, MCL 722.111 *et seq.*, "[d]epartment means 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(1)(m).

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

interests in privacy and bodily autonomy," and (3) the state's "legitimate interest in safeguarding the health and welfare of children." *In re Bell*, 341 Mich App at 606-608 (quotation marks and citation omitted). "Balancing the highly invasive nature of an IME and its potentially harmful effect on an unconsenting minor against the limited evidentiary value that an IME may provide [given the facts of the case], the trial court erred by concluding that a court-ordered IME to look for evidence of sexual assault was necessary to afford respondent-mother the due process to which she was entitled." *Id*. at 611-612.

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

## E. Category Classifications and DHHS Required Response Following Investigation

Based on the results of its completed investigation, the DHHS must classify the allegation of child abuse or child neglect under a single category listed in MCL 722.628d.[56] MCL 722.628(12). The DHHS must also "determine whether the child abuse or child neglect must be classified as a central registry case." *Id*.

The categories appearing in MCL 722.628d, and the response required by the DHHS for each category, are:

- **Category V.** No services are needed. MCL 722.628d(1)(a). After conducting its field investigation, an allegation is classified as category V if "the [DHHS] determines that there is no evidence of child abuse or child neglect." *Id*.

- **Category IV.** Community services are recommended. MCL 722.628d(1)(b). An allegation is classified as category IV after the DHHS has conducted its field investigation when "the [DHHS] determines that there is not a preponderance of evidence of child abuse or child neglect, but the structured decision-making tool indicates that there is future risk of harm to the child." *Id*. Allegations classified as category IV require the DHHS to "assist the child's family in voluntarily participating in community-based services commensurate with the risk to the child." *Id*.

[56] For additional information on the categories listed under MCL 722.628d, see the DHHS's Children's Protective Services Manual (PSM), *Post-Investigative Services PSM 714-1*.

- **Category III.** Community services are needed. MCL 722.628d(1)(c). An allegation is classified as category III when "[t]he [DHHS] determines that there is a preponderance of evidence of child abuse or child neglect, and the structured decision-making tool indicates a low or moderate risk of future harm to the child." *Id*. Allegations classified as category III require the DHHS to "assist the child's family in receiving community-based services commensurate with the risk to the child." *Id*. "If the family does not voluntarily participate in services, or the family voluntarily participates in services, but does not progress toward alleviating the child's risk level, the [DHHS] must consider reclassifying the case as category II." *Id*.

- **Category II.** Child protective services are required. MCL 722.628d(1)(d). An allegation is classified as category II when "[t]he [DHHS] determines that there is evidence of child abuse or child neglect, and the structured decision-making tool indicates a high or intensive risk of future harm to the child." *Id*. In category II cases, "[t]he [DHHS] must open a protective services case and provide the services necessary under [the Child Protection Law]." *Id*.

- **Category I.** A court petition is required. MCL 722.628d(1)(e). An allegation is classified as category I when the DHHS, after having conducted its field investigation, determines that (1) there is evidence of child abuse or child neglect, *and* (2) any of the following are true:

    - Another provision of the Child Protection Law requires a court petition. MCL 722.628d(1)(e)(*i*).

    - A petition for removal of the child is needed because the child is not safe. MCL 722.628d(1)(e)(*ii*).

    - The case was previously classified as category II, and the child's family has failed to voluntarily participate in services. MCL 722.628d(1)(e)(*iii*).

    - There is a violation involving the child for any of the following crimes:

        - assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g,

        - a felonious attempt to commit or a felonious conspiracy to commit criminal sexual conduct,

        - an assault punishable as a felony,

        - child sexually abusive material or child sexually abusive activity, MCL 750.145c,

- or first- or second-degree child abuse, MCL 750.136b. MCL 722.628d(1)(e)(*i*)-(*iv*). See also MCL 722.628a(1)(b)-(d), and MCL 722.628a(1)(f).

According to MCL 722.628d(2), when responding to a category I classification, the DHHS must do *both* of the following:

> "(a) If a court petition is not required under another provision of [the Child Protection Law], submit a petition for authorization by the court under . . . [MCL 712A.2(b)].
>
> (b) Open a protective services case and provide the services necessary under [the Child Protection Law]." MCL 722.628d(2).
>
> .

"If a case involves a child's death, serious physical harm of a child, or sexual abuse or sexual exploitation of a child, the [DHHS] must refer the case to the prosecuting attorney[57] for the county in which the child is located." MCL 722.628b(1).

In addition, the DHHS must refer a central registry case to the prosecuting attorney[58] for the county where the child is located if the case involves "a child's exposure to or contact with methamphetamine production[.]" MCL 722.628b(2).

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

"Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy[59] in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds . . . for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to [the Child Protection Law]."[60] MCL 722.631.

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[57] "The prosecuting attorney must review the investigation of the case to determine if the investigation complied with the protocol adopted as required by [MCL 722.628(6)]. MCL 722.628b(2).

[58] "The prosecuting attorney must review the investigation of the case to determine if the investigation complied with the protocol adopted as required by [MCL 722.628(6)]. MCL 722.628b(2).

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

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

## A. Medical Records

"A hospital is required, absent a parental release, to allow access to medical information on children to [DHHS] staff conducting a protective services investigation under the Child Protection Act since allowing such access does not violate the physician-patient privilege." OAG, 1978, No 5406, p 724 (December 15, 1978). In addition, when a physician attends to a child suspected of being abused or neglected, the physician must conduct the necessary examinations and include summaries of those evaluations, including medical test results, in a written report[61] to the DHHS.[62] MCL 722.626(2). See MCL 722.623(1), which specifically requires the physician to immediately report suspected child abuse or child neglect to centralized intake (the DHHS's "statewide centralized processing center for reports of suspected child abuse and child neglect[,]" MCL 722.622(e)).

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

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

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

[61] Where available, the attending physician may report the suspected child abuse or child neglect through the online reporting system ("the electronic system established by the [DHHS] for individuals identified in [MCL 722.623(1) as a mandatory reporter] to report suspected child abuse or child neglect[,]" MCL 722.622(bb)), and "if the immediate report has been made using the online reporting system and that report includes the information required in a written report under [MCL 722.623(2)], that report is considered a written report for the purposes of [MCL 722.623(1)] and no additional written report is required." MCL 722.623(1). See Section 2.2(A) for additional information on mandatory reporters filing a written or electronic report.

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

the individual to whom the record or information pertains."

> **Note:** The Department of Public Health must provide access to the records or information within 14 days of receiving a written request from a DHHS caseworker or administrator directly involved in the investigation. MCL 333.2640(3). Consent to release the records or information is not required. *Id.*

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

> "If there is a compelling need for records or information to determine whether child abuse or child neglect has occurred or to take action to protect a child where there may be a substantial risk of harm, a [DHHS] caseworker or administrator directly involved in the child abuse or neglect investigation shall notify a licensee or registrant that a child abuse or neglect investigation has been initiated regarding a child who has received services from the licensee or registrant and shall request in writing the child's medical records and information that are pertinent to that investigation. Upon receipt of this notification and request, the licensee or registrant shall review all of the child's medical records and information in the licensee's or registrant's possession to determine if there are medical records or information that is pertinent to that investigation. Within 14 days after receipt of a request made under this subsection, the licensee or registrant shall release those pertinent medical records and information to the caseworker or administrator directly involved in the child abuse or neglect investigation."

> **Note:** See also 45 CFR 164.512(b)(1)(*ii*) (under the Health Insurance Portability & Accountability Act of 1996, PL 104-191, a "covered entity" may disclose "protected health information" to a governmental agency charged with receiving reports of child abuse or neglect); MCL 333.16648(1), (2)(h) (disclosure requirements apply to dentists); MCL 333.18117 (disclosure requirements apply to licensed professional counselors and limited licensed counselors); and MCL 333.18237 (disclosure requirements apply to psychologists).

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

- the physician-patient privilege under MCL 600.2157;
- the dentist-patient privilege under MCL 333.16648;
- the licensed professional counselor-client privilege, and the limited licensed counselor-patient privilege under MCL 333.18117;
- the psychologist-patient privilege under MCL 333.18237; and
- any other health professional-patient privilege created or recognized by law. MCL 333.16281(2).

## B. School Records

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

## C. Records of Drug Counseling

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

- the patient consents in writing. 42 USC 290dd-2(b)(1).
- a court may order disclosure of any or all portions of the record it deems necessary on a showing of good cause. 42 USC 290dd-2(b)(2)(C); 42 CFR 2.64(d). To make a good cause determination, "the court must find that:

  (1) Other ways of obtaining the information are not available or would not be effective; and

  (2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services." 42 CFR 2.64(d).[63]

Before ordering disclosure of confidential information, the circuit court should make a record of the findings that constitute good cause under 42 CFR 2.64(d). *In re Petition of Attorney General for Subpoenas*, 506 Mich 997 (2020). In *Petition for Subpoenas*, the circuit court erred when it failed to determine "whether other ways of obtaining the information in question were available or effective." *Id.*; 42 CFR 2.64(d)(1). Although "[p]etitioner asserted the subpoena was the *most* effective method [of obtaining the information], . . . . that is not the inquiry 42 CFR 2.64(d)(1) requires." *Petition for Subpoenas*, 506 Mich at 997. In addition, the circuit court failed to make the second finding required to constitute good cause—whether the public interest and need for the disclosure outweighed potential injury to the patient, to the relationship between the patient and his or her physician, and to the treatment services. *Id.*; 42 CFR 2.64(d)(2). In *Petition for Subpoenas*, 506 Mich at 997, the petitioner asserted that the court's order for disclosure incorporated in it the contents of the petition, but the order did not expressly indicate that it did so. According to the Michigan Supreme Court, "[e]ven assuming such an incorporation would have satisfied 42 CFR 2.64(d), the best practice would clearly be for a circuit court to memorialize this type of analysis in a written order or at least on the record to facilitate appellate review." *Petition for Subpoenas*, 506 Mich at 997.

> **Note:** "Upon the granting of [a disclosure] order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure." 42 USC 290dd-2-2(b)(2)(C). Safeguards against unauthorized disclosure include "requir[ing] the deletion of patient identifying information from any documents made available to the public" (when the disclosure is being ordered in the context of a criminal or administrative investigation of a record holder); "limit[ing] disclosure to those parts of the patient's records which are essential to fulfill the objective of the order; [l]imiting disclosure to those persons whose need for information is the basis for the order; and [i]nclude such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; [for example, sealing from public scrutiny the record of any proceeding for

[63] See 42 USC 290dd-2(b)(2)(C), which also requires the court to "weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services" when assessing good cause.

which disclosure of a patient's record has been ordered]." 42 CFR 2.64(e); 42 CFR 2.66(d)(1).

All administrative hearings pertaining to the disclosure of confidential information need *not* "be closed and sealed from public scrutiny." *Petition for Subpoenas*, 506 Mich at 997 n 1. "[C]ourtroom closure and sealing of records are examples of procedural safeguards a court may order [under 42 CFR 2.64(e)], but the regulation does not require these steps be fulfilled in every case so long as all necessary measures are taken to protect a patient, the patient-physician relationship, and treatment services." *Petition for Subpoenas*, 506 Mich at 997 n 1.

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

No hearing is required before the circuit court may issue a subpoena pursuant to 42 CFR 2.66. *Petition for Subpoenas*, 506 Mich at 997.

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

## D. Mental Health Records

"Case records filed with the court under the mental health code are public except as otherwise indicated in court rule or statute." MCR 5.731.

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

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

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

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

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

## E. Friend of the Court Records

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

If the DHHS is investigating a suspected abused or neglected child and determines that there is an open FOC case regarding the

child,[64] the DHHS must "notify the office of the [FOC] in the county in which the [FOC] case is open that there is an investigation being conducted under [the Child Protection Law] regarding that child[.]" MCL 722.628(21).

> **Note:** "The [DHHS] must determine whether there is an open [FOC] case regarding a child who is suspected of being abused or neglected if a child protective services investigation of child abuse and child neglect allegations result in any of the following dispositions:
>
> (a) A finding that a preponderance of evidence indicates that there has been child abuse or child neglect.
>
> (b) Emergency removal of the child for child abuse or child neglect before the investigation is completed.
>
> (c) The family court takes jurisdiction on a petition and a child is maintained in his or her own home under the supervision of the [DHHS].
>
> (d) If 1 or more children residing in the home are removed and 1 or more children remain in the home.
>
> (e) Any other circumstances that the [DHHS] determines are applicable and related to child safety." MCL 722.628(20).

"Unless the release is otherwise prohibited by law, a[n] [FOC] office must provide access to all nonconfidential and confidential records[65] to . . . [t]he [DHHS], as necessary to report suspected abuse or neglect or to allow the [DHHS] to investigate or provide services to a party or child in the case."[66] MCR 3.218(C)(2). The court rule requires the FOC to provide access to other entities, as well. See MCR 3.218(C) for a complete list.

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[64] If the DHHS determines that there is an open FOC case involving a child suspected of being abused or neglected, the DHHS must provide the child's noncustodial parents with a form explaining how to change a court order regarding custody or parenting time. MCL 722.628(23).

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

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

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

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

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

"[The DHHS] must maintain a statewide, electronic case management system to carry out the intent of [the Child Protection Law]." MCL 722.627j(1). The central registry is one of the products of the statewide electronic case management system; the *central registry* is "a repository of names of individuals who are identified as perpetrators related to a central registry case in the [DHHS's] statewide electronic case management system." MCL 722.622(c).

### A. DHHS Classifies Central Registry Cases

*Confirmed cases* refer to those situations in which "the [DHHS] has determined, by a preponderance of evidence, that child abuse or child neglect occurred by a person responsible for the child's health, welfare, or care." MCL 722.622(n). All central registry cases are confirmed cases. See MCL 722.622(d).

A *central registry case* refers to a case in which "the [DHHS has] *confirmed* that a person responsible for the child's health or welfare committed serious abuse or neglect, sexual abuse, or sexual exploitation of a child, or allowed a child to be exposed to or have contact with methamphetamine production." MCL 722.622(d) (emphasis added). See also MCL 722.627j(2).

The confirmed cases that must be classified as central registry cases are:

- *Confirmed serious abuse or neglect* "means a confirmed case of mental injury or physical injury or neglect to a child that involves any of the following:

  (*i*) Battering, torture, or other serious physical harm.

  (*ii*) Loss or serious impairment of an organ or limb.

  (*iii*) Life-threatening injury.

  (*iv*) Murder or attempted murder.

  (*v*) Serious mental harm." MCL 722.622(p).

- *Confirmed sexual abuse* "means a confirmed case that involves sexual penetration, sexual contact, attempted sexual penetration, or assault with intent to penetrate as those terms are defined in . . . MCL 750.520a." MCL 722.622(q).

- *Confirmed sexual exploitation* "means a confirmed case that involves allowing, permitting, or encouraging a child to engage in prostitution, or allowing, permitting, encouraging, or engaging in the photographing, filming, or depicting of a child engaged in a listed sexual act as that term is defined in . . . MCL 750.145c." MCL 722.622(r).

- *Confirmed case of methamphetamine production* "means a confirmed case that involved a child's exposure or contact with methamphetamine production." MCL 722.622(o).

## B. Courts and Classification of Central Registry Cases

In addition to the DHHS's obligation to classify certain allegations as central registry cases, a trial court entering a conviction for any one of several specific offenses *must* request that the DHHS classify the conviction as a central registry case.[67] MCL 722.627j(3). The specific convictions giving rise to the court's duty to ask that the DHHS classify a conviction as a central registry case are:

- a conviction for violating MCL 750.136b (first-, second-, third-, and fourth-degree child abuse);

- a conviction for violating MCL 750.520a to MCL 750.520o involving a minor victim (criminal sexual conduct offenses in the Michigan Penal Code);

[67] "The [DHHS], with cooperation from the state court administrative office, must promulgate rules to regulate this referral process." MCL 722.627j(3).

- a conviction for violating MCL 750.145c (child sexually abusive material or child sexually abusive activity); and
- any conviction involving a child's death.[68] MCL 722.627j(3).

## C. Notification of Central Registry Case Classification

After the DHHS classifies a central registry case, it must make certain notifications within 30 days after classification. MCL 722.627j(6). The DHHS must provide written notice to "each person who is named in the record as a perpetrator of the confirmed serious abuse or neglect, confirmed sexual abuse, confirmed sexual exploitation, or confirmed case of methamphetamine production." *Id*.

The notice must meet the following requirements:

- The notice must be sent by registered or certified mail, delivery must be restricted to the addressee, and the notice must be return receipt requested. MCL 722.627j(6)(a).
- The notice must indicate that the addressee has a right to request expunction of the record, and if the DHHS refuses to expunge the record, the person has a right to a hearing. MCL 722.627j(6)(b).
- The notice must indicate that the record is subject to release under MCL 722.627d. MCL 722.627j(6)(c).
- The notice must not contain the identity of the individual who reported the suspected child abuse or child neglect. MCL 722.627j(6)(d).

## D. Central Registry Cases That Must Be Referred To Prosecuting Attorney

The DHHS must refer a central registry case that involves a child's death or a child's contact with or exposure to methamphetamine production to the prosecuting attorney[69] for the county where the child is located. MCL 722.628b(1)-(2).

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[68] MCL 722.628b(1) requires the DHHS to refer a case to the prosecuting attorney for the county where the child is located when the "case involves a child's death, serious physical harm of a child, or sexual abuse or sexual exploitation of a child." The prosecuting attorney is obligated to review the DHHS's investigation for compliance with the protocol prescribed in MCL 722.628(6).

[69] "The prosecuting attorney must review the investigation of the case to determine if the investigation complied with the protocol adopted as required by [MCL 722.628(6)]. MCL 722.628b(2).

### E. Confirming Placement on the Central Registry

An individual, office, or agency authorized to receive information confirming placement on the central registry may make a written request for the information, and the DHHS may provide it to the authorized individual, office, or agency. MCL 722.627j(12).[70]

## 2.6 Amending, Removing, or Expunging Information in the Central Registry[71]

### A. Length of Time Information Appears in the Central Registry

Except as otherwise ordered in MCL 722.627j, the information about the perpetrator that appears in the central registry must be maintained "until the [DHHS] receives reliable information that the perpetrator is dead." MCL 722.627j(11).

### B. Request To Amend Inaccurate Report or Record

"An individual who is the subject of a report or record made under [MCL 722.627j] may request the [DHHS] amend an inaccurate report or record from the central registry and local office file."[72] MCL 722.627j(7). MCL 722.627j(7) does not apply to an individual whose order of conviction entered under MCL 722.627j(3).[73] MCL 722.627j(7).

### C. Denial of Request For Amendment

If the DHHS denies an individual's request to amend a report or record made under MCL 722.627j about the individual, the individual may request a hearing to review his or her request for amendment.[74] MCL 722.627j(8). The individual must request the

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[70] MCL 722.627j(13)-(18) contain additional information about providing confirmation of placement on the central registry to authorized individuals and entities.

[71] The statutory provisions throughout MCL 722.627j that address changes to the placement of information in the central registry refer to amendments, expungements, and removals without apparent distinction.

[72] For additional information on "amend[ing] an inaccurate report or record from the central registry and local office file[,]" see DHHS's Children's Protective Services Manual (PSM), *Amendment or Expunction PSM 717-2*.

[73] MCL 750.136b (child abuse), MCL 750.520a to MCL 750.520o involving a minor victim (criminal sexual conduct offenses), MCL 750.145c (child sexually abusive material or activity), and MCL 722.627j(3) (any conviction involving the death of a child). MCL 722.627j(3).

[74] MCL 722.627j(8) does not apply to an individual against whom a court entered a conviction described in MCL 722.627j(3). MCL 722.627j(8).

hearing within 180 days from the date on which he or she was served with notice of his or her right to a hearing. *Id.*

For good cause, the DHHS may hold a hearing under MCL 722.627j(9)[75] after the expiration of the 180-day period, if the DHHS determines that the subject of the report made the request for a hearing within 60 days after expiration of the initial 180-day period. MCL 722.627j(9).

MCL 722.627j(9) does not apply to an individual against whom a court entered a conviction described in MCL 722.627j(3). MCL 722.627j(9).

## D. Hearing

"The [DHHS] must hold a hearing to determine by a preponderance of the evidence whether the report or record in whole or in part meets the statutory requirement of confirmed serious abuse or neglect, confirmed sexual abuse, confirmed sexual exploitation, or confirmed case of methamphetamine production and should be amended or expunged from the central registry." MCL 722.627j(9).

An administrative law judge must preside at the hearing and the hearing must be conducted as required by the administrative procedures act, MCL 24.201 to MCL 24.328. MCL 722.627j(9).

MCL 722.627j(9) does not apply to an individual against whom a court entered a conviction described in MCL 722.627j(3). MCL 722.627j(9).

### 1. Removal of Information From the Central Registry

If an investigation under MCL 722.627j

> "does not show serious child abuse or child neglect, sexual abuse, sexual exploitation, or methamphetamine production by a preponderance of the evidence . . . the information identifying the subject of the report must be expunged from the central registry after a party has exhausted all appellate remedies and an appellate review does not find that the child is within the jurisdiction of the court." MCL 722.627j(10).

Similarly,

[75] The hearing requested under MCL 722.627j(8).

> "if a court dismisses a petition based on the merits of the petition filed under [MCL 712A.2(b)] because the petitioner has failed to establish, or a court has failed to find, that the child comes within the jurisdiction of the court following an adjudication hearing, the information identifying the subject of the report must be expunged from the central registry after a party has exhausted all appellate remedies and an appellate review does not find that the child is within the jurisdiction of the court." MCL 722.627j(10).[76]

### 2. Retention of Information in the Central Registry

If a preponderance of the evidence indicates that child abuse or child neglect exists, or if the court takes jurisdiction of the child under MCL 712A.2(b), the perpetrator's information in the central registry remains in the registry. MCL 722.627j(10). In those cases "the [DHHS] must maintain the information and must maintain the perpetrator's information in the central registry if the case is determined to be a confirmed case of methamphetamine production, confirmed serious abuse or neglect, confirmed sexual abuse, or confirmed sexual exploitation." *Id*.

MCL 722.627j(10) does not apply to an individual against whom a court entered a conviction described in MCL 722.627j(3). MCL 722.627j(10).

## E. Request For Removal From the Central Registry—Individual Listed After Conviction Under § 627j(3)

An individual who was placed on the central registry under MCL 722.627j(3) (convictions that require a court to request that the conviction be classified as a central registry case[77]) may at any time request, and the court must request, that his or her name be removed from the central registry if the individual has succeeded in a motion to the convicting court for the following reasons:

- the individual was not convicted of an offense listed in MCL 722.627j, MCL 722.627j(4)(a), or

[76] MCL 722.627j(10) does not apply to individuals whose orders of conviction were entered under MCL 722.627j(3). MCL 722.627j(10).

[77] MCL 750.136b (child abuse), MCL 750.520a to MCL 750.520o involving a minor victim (criminal sexual conduct offenses), MCL 750.145c (child sexually abusive material or activity), and MCL 722.627j(3) (any conviction involving the death of a child). MCL 722.627j(3).

- the individual demonstrates that the conviction resulting in his or her placement on the central registry has been expunged, MCL 722.627j(4)(b).

An individual on the central registry for a conviction under MCL 722.627j(3)[78] may make a motion in the convicting court for removal from the central registry no more than once every 10 years after placement on the central registry. MCL 722.627j(5).

In a hearing on the motion, the individual who was placed on the central registry "is presumed to be a risk to children, and the burden is on the individual requesting to be removed from the central registry. If the individual demonstrates that the presumption is unreasonable, the court shall request that the [DHHS] remove the individual from the central registry." MCL 722.627j(5).

## F. Request For Removal From the Central Registry—Individual Listed For Conviction *Not* Ordered Under § 627(j)(3)

An individual listed on the central registry may request a hearing to be removed from the central registry not more than once every 10 years. MCL 722.627j(11). Excluding confirmed sexual abuse or confirmed sexual exploitation, the DHHS must hold a hearing to decide whether the information should continue to be included in the central registry. *Id*.

The hearing to determine whether the information should be maintained in the central registry must be heard by an administrative law judge and adhere to the administrative procedures act, MCL 24.201 to MCL 24.328. MCL 722.627j(11).

At a hearing to be removed from the central registry, "the individual is presumed to be a risk to children and the burden of proof is on the individual requesting to be removed from the central registry." MCL 722.627j(11). The individual may be removed from the central registry if the individual proves by a preponderance of the evidence that the presumption is unreasonable. *Id*.

The facts and circumstances involved in the individual's original placement on the central registry are not subject to review; only the facts and circumstances in the years following the individual's placement on the central registry list have any bearing on the risk to children posed by the individual in the future. MCL 722.627j(11).

[78] MCL 750.136b (child abuse), MCL 750.520a to MCL 750.520o involving a minor victim (criminal sexual conduct offenses), MCL 750.145c (child sexually abusive material or activity), and MCL 722.627j(3) (any conviction involving the death of a child). MCL 722.627j(3).

MCL 722.627j(11) does not apply to individuals whose orders of conviction were entered as provided in MCL 722.627j(3).

## G. Requests Made By Individuals on the Central Registry Before November 1, 2022

An individual listed on the central registry before November 1, 2022,[79] "may submit a request to the [DHHS] for an administrative review for the expungement of the individual's name from the statewide electronic case management system created under [MCL 722.627j]." MCL 722.627*l*(1). Within 180 days of receiving a request for an administrative review, the DHHS must review the matter and notify in writing the individual who requested the review "of the final decision to expunge the individual from the central registry under the statewide electronic case management system created under [MCL 722.627j] or to classify the individual's case as a confirmed case of methamphetamine production, confirmed serious abuse or serious neglect, confirmed sexual abuse, or confirmed sexual exploitation and keep the individual on the central registry in the statewide electronic case management system." MCL 722.627*l*(1).

If, after conducting its administrative review under MCL 722.627*l*(1), the DHHS's final decision "is to expunge the individual from the central registry under the statewide electronic case management system created under [MCL 722.627j], then the [DHHS] shall notify the director of the department responsible for the licensure of that individual or the director's designee within 45 days of the final decision." MCL 722.627*l*(2).

## H. Amendment or Expungement of Category I, II, or III Classifications That Are Not Central Registry Cases

When an individual is the subject of a report or record under MCL 722.628 that is classified as a Category I, II, or III case but that is *not* identified as a central registry case under MCL 722.628d, the individual may ask that the DHHS amend any inaccuracies in a report or record kept in the local office file. MCL 722.628(13).

The DHHS must provide written notice to each individual who is named as a perpetrator of confirmed serious abuse or neglect in a report or record. MCL 722.628. The notice must be issued within 30 days after the confirmed case was classified as a category I, II, or III but not placed on the central registry, and the notice must satisfy the following requirements:

[79] 2022 PA 72 added MCL 722.627*l* to the Child Protection Law, effective November 1, 2022.

> "(a) Must be sent by first-class mail to the identified perpetrator.
>
> (b) Must set forth the person's right to request amendment of the record and the right to an administrative review conducted by the department.
>
> (c) Must state that the record may be released under [MCL 722.627d], and may impact future employment or licensing opportunities.
>
> (d) Must not identify the person reporting the suspected child abuse or child neglect." MCL 722.628(13).

An individual's request to have an inaccuracy in the report or record amended must be made within 180 days after receiving notice that the case naming the individual as a perpetrator has been confirmed.[80] MCL 722.628(14).

## I. Expunging a Record

"The plain language of [MCL 722.627] grants exclusive jurisdiction to [the DHHS] to control expunction[81] from the central registry." *In re Harper*, 302 Mich App 349, 355, 361 (2013) ("Because respondent failed to exhaust her administrative remedies before seeking judicial intervention, the trial court did not have jurisdiction to enter an order removing her from the central registry.").

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

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

## J. Access to DHHS's Central Registry

A brief discussion of accessing the DHHS's central registry is contained in this subsection. For a detailed discussion, see the DHHS's Service Requirements Manual (SRM), *Confidentiality SRM-131*.[82]

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[80] The central registry is discussed in more detail in Section 3.3.

[81] For additional information on "expung[ing] from the central registry a report or record[,]" see DHHS's Children Protective Services Manual (PSM), *Amendment or Expunction PSM 717-2*. *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

"Unless made public as specified information[83] released under [MCL 722.627d], a written report, document, or photograph filed with the [DHHS] is a confidential record available only to [certain persons or entities.]"[84] MCL 722.627(1).

"Except for records available under [MCL 722.627(1)(a), MCL 722.627(1)(b), and MCL 722.627(1)(n)[85]], the identity of a reporting person is confidential subject to disclosure only with the consent of that person or by judicial process." MCL 722.625.

The DHHS must not include a police report related to an ongoing investigation of suspected child abuse or child neglect when releasing information to authorized persons or entities. MCL 722.627(3). The DHHS may, however, release reports of a person's convictions of crimes related to child abuse or child neglect. *Id.*

### 1. Persons or Entities With Access to DHHS Central Registry

MCL 722.627(1) lists the persons or entities who have access to the DHHS's central registry:

> "(a) A legally mandated public or private child protective agency investigating a report of known or suspected child abuse or child neglect or a legally mandated public or private child protective agency or foster care agency prosecuting a disciplinary action against its own employee involving child protective services or foster care records.
>
> (b) A police agency or other law enforcement agency investigating a report of known or suspected child abuse or child neglect.
>
> (c) A physician who is treating a child whom the physician reasonably suspects may be abused or neglected.

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[82] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

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

[84] See Section 2.6(J)(1) for a list of persons or entities who have access to the DHHS central registry.

[85] MCL 722.627(1)(a)-(b) refer to public or private child protective agencies and law enforcement agencies investigating suspected abuse or neglect, and MCL 722.627(1)(n) refers to the child advocate.

> (d) A person legally authorized to place a child in protective custody when the person is confronted with a child whom the person reasonably suspects may be abused or neglected and the confidential record is necessary to determine whether to place the child in protective custody.
>
> (e) A person, agency, or organization, including a multidisciplinary case consultation team, authorized to diagnose, care for, treat, or supervise a child or family who is the subject of a report or record under [the Child Protection Law], or who is responsible for the child's health or welfare.[86]
>
> (f) A person named in the report or record as a perpetrator or alleged perpetrator of the child abuse or child neglect or a victim who is an adult at the time of the request, if the identity of the reporting person is protected as provided in [MCL 722.625].
>
> (g) A court for the purposes of determining the suitability of a person as a minor's guardian or that otherwise determines that the information is necessary to decide an issue before the court, or in the event of a child's death, a court that had jurisdiction over that child under [MCL 712A.2(b).]
>
> (h) A grand jury that determines the information is necessary to conduct the grand jury's official business.
>
> (i) A person, agency, or organization engaged in a bona fide research or evaluation project. . . . The [DHHS] director may authorize release of information to a person, agency, or organization described in this subdivision if the release contributes to the purposes of [the Child Protection Law] and the person, agency, or organization has appropriate controls to maintain the confidentiality of personally identifying information for a person named in a report or record made under [the Child Protection Law].[87]

[86] See Section 2.1(A) for the definition of "person responsible for the child's health or welfare" as defined under MCL 722.622(x). However, MCL 722.622(x) limits a nonparent adult's access to information on the DHHS's central registry.

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

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

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

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

(n) The child advocate appointed under the [Office of the Child Advocate Act, MCL 722.921-MCL 722.932].

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

(p) A county medical examiner or deputy county medical examiner appointed under . . . MCL 52.201

[87] "The person, agency, or organization shall not release information identifying a person named in the report or record unless that person's written consent is obtained. The person, agency, or organization shall not conduct a personal interview with a family without the family's prior consent and shall not disclose information that would identify the child or the child's family or other identifying information." MCL 722.627(1)(i).

> to [MCL] 52.216, for the purpose of carrying out his or her duties under that act.
>
> (q) A citizen review panel established by the [DHHS]. Access under this subdivision is limited to information the department determines necessary for the panel to carry out its prescribed duties.
>
> (r) A child care regulatory agency.
>
> (s) A foster care review board for the purpose of meeting the requirements of . . . MCL 722.131 to [MCL] 722.139a.
>
> (t) A local friend of the court office.
>
> (u) A [DHHS] employee actively representing himself or herself in a disciplinary action, a labor union representative who is actively representing a [DHHS] employee in a disciplinary action, or an arbitrator or administrative law judge conducting a hearing involving a [DHHS] employee's dereliction, malfeasance, or misfeasance of duty, for use solely in connection with that action or hearing. Information disclosed under this subdivision must be returned not later than 10 days after the conclusion of the action or hearing. A recipient must not receive further disclosures under this subdivision while he or she retains disclosed information beyond the deadline specified for return.
>
> (v) A federal or state governmental agency that may, by law, conduct an audit or similar review of the [DHHS's] activities under [the Child Protection Law].
>
> (w) A children's advocacy center[88] in the course of providing services to a child alleged to have been the victim of child abuse or child neglect or to that child's family.
>
> (x) A tribal representative, agency, or organization, including a multidisciplinary team, authorized by the Indian child's tribe, to care for, diagnose, treat,

[88] MCL 722.622(*l*) defines *children's advocacy center* as "an entity accredited as a child advocacy center by the National Children's Alliance or its successor agency or an entity granted associate or developing membership status by the National Children's Alliance or its successor agency."

> review, evaluate, or monitor active efforts regarding an Indian child, parent, or Indian custodian. As used in this subdivision, 'active efforts', 'Indian child', 'Indian child's tribe', 'Indian custodian', and 'parent' mean those terms as defined in . . . MCL 712B.3."[89]
>
> (y) A child caring institution[90] licensed under [MCL 722.111 to MCL 722.128], for the purpose of investigating an applicant for employment or an employee of a child caring institution to determine suitability of the applicant or employee for initial or continued employment. The child caring institution must disclose the information to the applicant or employee.

## 2. Dissemination of Information

"Subject to [MCL 722.627(4)], a person or entity to whom information described in [MCL 722.627(1)] is disclosed shall make the information available only to a person or entity described in [MCL 722.627(1)]." MCL 722.627(2).

> **Note:** MCL 722.627(4) provides that "[a] member or staff member of a citizen review panel[91] shall not disclose identifying information about a specific child protection case to an individual, partnership, corporation, association, governmental entity, or other legal entity."

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[89] For additional discussion on custody proceedings involving an Indian child, including the definitions contained in MCL 712B.3, see Chapter 19.

[90] *Child caring institution* "means 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 . . . MCL 333.20101 to [MCL] 333.22260, a boarding school licensed under . . . MCL 380.1335, a hospital or facility operated by the state or licensed under . . . MCL 330.1001 to [MCL] 330.2106, or an adult foster care family home or an adult foster care small group home licensed under . . . MCL 400.701 to [MCL] 400.737, in which a child has been placed under [MCL 722.115(6)]." MCL 722.111(c).

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

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

"Documents, reports, or records authored by or obtained from another agency or organization shall not be released or open for inspection under [MCL 722.627(1)] unless required by other state or federal law, in response to an order issued by a judge, magistrate, or other authorized judicial officer, or unless the documents, reports, or records are requested for a child abuse or child neglect case or for a criminal investigation of a child abuse or child neglect case conducted by law enforcement." MCL 722.627(5).

"Notwithstanding [MCL 722.627(1)[92]], information or records in the possession of the [DHHS] or the department of licensing and regulatory affairs [LARA] may be shared to the extent necessary for the proper functioning of the [DHHS] or the [LARA] in administering child welfare or child care organization licensing under . . . MCL 722.111 to [MCL] 722.128,[93] or in an investigation conducted under . . . MCL 400.43b. Information or records shared under this subsection shall not be released by either the [DHHS] or the [LARA]

[92] MCL 722.627(1) addresses the confidentiality of written reports, documents, or photographs filed with the DHHS with accessibility limited to certain persons or entities (unless the information is publicly released under MCL 722.627d). For the list of persons or entities who have access to the DHHS central registry under MCL 722.627(1), see Section 2.6(J)(1).

[93] MCL 722.128 repealed the Child Care Licensing Act. See Executive Reorganization Order No. 2018-6, which provided that "[a]ny authority, powers, duties, functions, and responsibilities of child welfare licensing and regulation of child caring institutions (including but not limited to children's therapeutic group homes), child placing agencies, foster family homes, foster family group homes, and court-operated facilities under the Child Care Organizations Act, . . . MCL 722.111 to [MCL] 722.128, and the Social Welfare Act, . . . MCL 400.1 to [MCL] 400.122[,] are transferred from the Department of Licensing and Regulatory Affairs to the Department of Health and Human Services."

> unless otherwise permitted under [the Children Protection Law] or other state or federal law. Neither the [DHHS] nor the [LARA] shall release or open for inspection any document, report, or record authored by or obtained from another agency or organization unless 1 of the conditions of [MCL 722.627(5)] applies." MCL 722.627(6).

## 2.7 Death of Child Under Court's Jurisdiction

If a child dies while under the court's jurisdiction under MCL 712A.2(b), the DHHS must notify the court in writing or electronically within one business day of the child's death.[94] MCL 722.627k(1). The DHHS must also notify the child advocate within one business day of a child's death when any of the following apply:

> "(a) The child died during an active child protective services investigation or an open child protective services case.
>
> (b) The [DHHS] received a prior child protective services complaint concerning the child's caretaker.
>
> (c) The child's death may have resulted from child abuse or child neglect." MCL 722.627k(2).

> **Note:** MCL 722.627b requires a "citizen review panel[95] [to] review each child fatality that involves allegations of child abuse or child neglect for each child who, at the time of death or within 12 months preceding the death, was under the court's jurisdiction under . . . [MCL 712A.2(b)]." MCL 722.627b(6).

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

> (a) The number of children who died while under court jurisdiction for child abuse or neglect regardless of placement setting.
>
> (b) The number of children who died as a result of child abuse or neglect after a parent had 1 or more child protective

[94] The DHHS must also notify "the state senator and state representative who represent the district in which that court is located, and the child advocate." MCL 722.627k(1).

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

services complaints within the 2 years preceding the child's death and the category dispositions of those complaints.[96]

(c) The total number of children as identified in subdivisions (a) and (b) who died in the preceding year.

(d) The child protective services disposition of the child fatality." MCL 722.627b(11).

## 2.8 Civil and Criminal Immunity Under Michigan Law

This section provides a general overview of civil and criminal immunity under Michigan law in the context of a child abuse or neglect case. Immunity of state and local agencies and their agents under 42 USC 1983 is beyond the scope of this benchbook.

### A. Immunity Under the Child Protection Law

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

> "A person acting in good faith who makes a report,[97] cooperates in an investigation, or assists in any other requirement of [the Child Protection Law] is immune from civil or criminal liability that might otherwise be incurred by that action. A person making a report or assisting in any other requirement of [the Child Protection Law] is presumed to have acted in good faith. This immunity from civil or criminal liability extends only to acts done according to [the Child Protection Law] and does not extend to a negligent act that causes personal injury or death or to the malpractice of a physician that results in personal injury or death."

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

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

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

cause of his frequent bone fractures and erroneously filed a child abuse report against his mother).

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

> "Reading [MCL 722.624[98] and MCL 722.625] together, it is apparent a person who has 'reasonable cause to suspect child abuse' is by definition 'acting in good faith' when reporting the suspicions. Thus, immunity extends to reports of 'suspected' child abuse regardless of the outcome of a subsequent investigation. The purpose of the immunity is to facilitate the public policy behind the act, which is to encourage reporting of suspected child abuse.
>
> Here, whether [the] defendant[-reporter] learned of [the plaintiff-father's] sexual abuse of his daughter from her husband or from [the plaintiff-father] himself is irrelevant to the question of [the] defendant[-reporter's] 'reasonable cause to suspect child abuse.' Either source of the information would be sufficient to constitute reasonable cause. [The Court of Appeals] agree[d] with the trial court that [the] defendant[-reporter's] alleged animosity toward [the] plaintiff[-father] did not render [the] defendant[-reporter's] reporting one of bad faith. . . . '[G]ood faith' pertains to the existence of a reasonable suspicion, not the motive behind the decision to report." *Warner*, 211 Mich App at 559-560.

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

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

However, immunity under MCL 722.625 does not extend to good-faith acts that violate other requirements set out under the Child Protection Law. *Lavey*, 248 Mich App at 255-257 (police officer and CPS worker were not entitled to immunity under MCL 722.625 where they violated MCL 722.626(3)[99] by taking a child to a doctor's office and authorizing a gynecological examination without a court order and without evidence that the child's health was seriously endangered).

## B. Immunity under the Safe Delivery of Newborns Law

An employee or agent of a hospital or child placing agency, and an employee or contractor of a fire department or police station is immune from damages arising in a civil action for an act or omission in accepting or transferring a newborn under the Safe Delivery of Newborns Law.[100] MCL 712.2(4).

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

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

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

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

[100] MCL 712.5(2) requires a physician to report to the DHHS, as required by MCL 722.623, if he or she "examines [a] newborn [and] determines that there is reason to suspect the newborn has experienced child abuse or neglect, other than being surrendered to an emergency service provider under [MCL 712.3], or comes to a reasonable belief that the child is not a newborn[.]" See MCL 722.623(1), which specifically requires the physician to immediately report suspected child abuse or child neglect to centralized intake (the DHHS's "statewide centralized processing center for reports of suspected child abuse and child neglect[,]" MCL 722.622(e)). See Section 2.2 for a detailed discussion of reporting suspected child abuse or child neglect.

## C. Governmental Immunity Act

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

"A guardian ad litem is immune from civil liability for an injury to a person or damage to property if he or she is acting within the scope of his or her authority as guardian ad litem." MCL 691.1407(6). The governmental immunity protections under MCL 691.1407(6) extend to lawyer-guardian ad litems (LGALs), as well. *Farris v McKaig*, 324 Mich App 337, 353 (2018).

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

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause[101] of the injury or damage."[102] MCL 691.1407(2).

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

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

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

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

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

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

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

## E. Immunity for Foster Parent and Legal Guardian

MCL 722.163 bars a negligence action against a foster parent or legal guardian under certain circumstances. MCL 722.163 specifically allows "[a] foster child [to] maintain an action against his or her [licensed] foster parent . . . , and a child [to] maintain an action against his or her legal guardian[103] for injuries suffered as a result of the alleged ordinary negligence of the foster parent or legal guardian[,]" unless "the alleged negligent act involves an exercise of reasonable parental authority over the child[ or] [] the alleged negligent act involves an exercise of reasonable parental discretion

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

with respect to the provision of food, clothing, housing, medical and dental services, and other care."

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

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


3.1 Acquiring Physical Custody of a Child ..... 3-2
3.2 Required Procedures ..... 3-11
3.3 Ordering Medical Treatment for a Child ..... 3-16


## *In this chapter. . .*

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

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

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

# 3.1 Acquiring Physical Custody of a Child

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

In an effort to provide trial courts with a quick practical guide through the process of issuing orders for protective custody, the State Court Administrative Office (SCAO) developed the *Order for Protective Custody—Judicial Bench Card*. See *CWS Toolkit for Judges and Attorneys (Child Welfare Services)*.

## A. Custody of a Child With Court Order

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

### 1. Court Order

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

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

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[1] See SCAO form JC 05b, *Order to Take Child(ren) Into Protective Custody (Child Protective Proceedings)*.

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

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

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

"Essentially, the court rules bifurcate the emergency removal process into two stages: (1) an order to take the children into emergency protective custody, for which advance notice is not required but the court must make specific findings of fact under MCR 3.963(B)(1) to justify the order; followed by (2) an emergency removal hearing, in which notice must be given as soon as the hearing is scheduled, and if the respondent does not appear, then the court may either adjourn to secure her appearance or proceed without her upon finding that a reasonable attempt to provide notice was made." *In re Shimmons/Hare*, ___ Mich App ___, ___ (2026).

## 2. Title IV-E Funding

The court must make a finding that it is *contrary to the welfare of the child* to remain in the home in order to establish a child's eligibility for federal participation in the costs of foster care

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[3] See Section 7.6 for a discussion of MCR 3.965 (preliminary hearings).

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

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

under Title IV-E of the Social Security Act, 42 USC 670 *et seq*. 42 USC 672(a)(1)-(2).[6] See Chapter 14.

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

> (c) *Contrary to the welfare determination.* Under [42 USC 672(a)(2)], a child's removal from the home must have been the result of a judicial determination (unless the child was removed pursuant to a voluntary placement agreement) to the effect that continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interest, of the child. The contrary to the welfare determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from home. ***If the determination regarding contrary to the welfare is not made in the first court ruling pertaining to removal from the home, the child is not eligible for title IV-E foster care maintenance payments for the duration of that stay in foster care.***[7]
>
> (d) *Documentation of judicial determinations.* The judicial determination[] regarding contrary to the welfare . . . must be explicitly documented and must be made on a case-by-case basis and so stated in the court order.

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[6] Failure to make this finding renders the child ineligible for title IV-E funds. See the Department of Health & Human Services, Children's Bureau Letter to Child Welfare and Judicial Leaders, which details the judicial determinations and proceedings that must be held in order to satisfy Title IV-E requirements as well as suggestions for ensuring courts continue "to practice in a manner consistent with constitutional principles and to serve the best interest of children[.]" *Note*: The link to the previous resource was created using Perma.cc and directs the reader to an archived record of the page.

[7] "[T]he requirement that the state obtain a judicial determination that it was contrary to the welfare of the child to remain in the home for purposes of Title IV-E foster-care funding eligibility [is] not triggered" unless a child is "[removed] from the home and into [foster] care." *Ayotte v Department of Health and Human Services*, 326 Mich App 483, 495 (2018). The temporary detention order for the 16-year-old plaintiff to serve three days in a juvenile detention center pursuant to a juvenile delinquency petition regarding criminal acts was not an order removing him from his home and into foster care, therefore, the fact that this order did not include a "contrary to the welfare" finding under 42 USC 672(a)(2)(A)(ii), did not preclude plaintiff's eligibility for Title IV-E foster-care funding. "It was the [subsequent] order that indicated that plaintiff's removal from the home and into care was justified based on adverse family circumstances," which contained the requisite language making the plaintiff eligible for Title IV-E foster-care funding). Ayotte, 326 Mich App at 495.

> (1) If the . contrary to the welfare judicial determination[ is] not included as required in the court orders identified in paragraph[] . . . (c) of this section, a transcript of the court proceedings is the only other documentation that will be accepted to verify that [this] required determination[ has] been made.
>
> (2) Neither affidavits nor nunc pro tunc orders will be accepted as verification documentation in support of . . . contrary to the welfare judicial determinations[.]
>
> (3) Court orders that reference State . . . law to substantiate judicial determinations are not acceptable, even if [State] law provides that a removal must be based on a judicial determination that remaining in the home would be contrary to the child's welfare . . . . [Emphasis added.]

## B. Custody of a Child Without Court Order

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

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

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

"An officer who takes a child into protective custody under [MCL 712A.14a or MCR 3.963(A)] shall immediately notify the [DHHS]."[8]

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

MCL 712A.14a(1); MCR 3.963(A)(2). "While awaiting the arrival of the [DHHS], the child shall not be held in a detention facility." MCL 712A.14a(1); MCR 3.963(A)(2).

"If a child taken into protective custody under [MCR 3.963(A)] is not released, the [DHHS] shall immediately contact the designated judge or referee as provided in [MCR 3.963(D)] to seek an ex parte court order for placement of the child pursuant to [MCR 3.963(B)(4)]."[9] MCR 3.963(A)(3).

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

> **Note:** A Children's Protective Services (CPS) worker is not included under the definition of an officer under MCR 3.903(A)(17), nor does a CPS worker have authority under MCL 712A.14a(1) to remove a child from his or her home. Thus, a CPS worker must not remove a child from his or her home or arrange placement of a child outside the home without a court order. See the DHHS's Children's Protective Services Manual (PSM), *Removal and Placement of Children PSM 715-2*, p 1.[10]

## C. Custody of a Child Admitted to a Hospital

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

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

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

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

[10] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

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

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

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

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

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

> **Note:** See Section 4.2(D) for the court's jurisdiction over a newborn child surrendered to an emergency service provider, Section 7.10(A) for appointment of a Lawyer-Guardian Ad Litem, and Section 8.14 for information on the placement of a child under the Safe Delivery of Newborns Law.

An emergency service provider is any of the following:

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

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

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

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

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

## 1. Emergency Service Provider's Responsibilities

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

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

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

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

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

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

(a) In surrendering a newborn, the parent is releasing the newborn to a child placing agency for adoption.

(b) After surrendering a newborn, the parent has 28 days to petition the court to regain custody of the newborn.

(c) Once the 28-day period elapses, a court hearing is held to determine and terminate parental rights.

(d) There will be public notification of the court hearing, but it will not contain the parent's name.

(e) The parent will not receive personal notice of the court hearing.

(f) Any information the parent provides to an emergency service provider will not be made public.

(g) A parent may contact the safe delivery hotline for additional information.[11] MCL 712.3(1)(a)-(d).

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

(1) Encourage the parent to provide relevant family and medical information.[12]

(2) Provide the parent with the DHHS's pamphlet on the Safe Delivery of Newborns Program.[13]

(3) Inform the parent that he or she may receive counseling or medical attention.

(4) Inform the parent that information he or she provides will not be made public.

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

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

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

(8) Inform the parent that he or she may sign a release for the newborn that could be used at the termination of parental rights hearing.[14] MCL 712.3(2)(a)-(g).

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

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

[12] See DHHS form DHS-4819, *Confidential Voluntary Medical Background Form for a Surrendered Newborn*. *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

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

[14] See DHHS form DHS-4820, *Voluntary Release for Adoption of a Surrendered Newborn by Parent*. *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

Although MCL 722.623 requires that suspected child abuse or child neglect be reported,[15] the reporting requirements do not apply to a newborn solely on the basis of his or her surrender to an emergency service provider who is transferring the newborn to a hospital. MCL 712.2(2).

### 2. Hospital's Responsibilities

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

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

## E. Newborns Under the Born Alive Infant Protection Act

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

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

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

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

# 3.2 Required Procedures

## A. Ex Parte Placement Order

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

"If a judge finds all the factors in [MCR 3.963(B)(1)(a)-(e)] are present, the judge may issue a placement order; if a referee finds all the factors in [MCR 3.963(B)(1)(a)-(e)] are present, the referee may issue an interim placement order pending a preliminary hearing.[16] The written order shall contain specific findings of fact. It shall be communicated, electronically or otherwise, to the [DHHS]." MCR 3.963(B)(4). For the list of factors set out in MCR 3.963(B)(1)(a)-(e), see Section 3.1(A)(1).

## B. Before Placing a Child With Relatives Pending Preliminary Hearing

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

> **Note:** In all cases, when a child must be removed from his or her home, the DHHS seeks to place the child with a noncustodial parent or a relative caregiver. See the DHHS's Children's Protective Services Manual (PSM), *Removal and Placement of Children PSM 715-2*, p 7.[17] In addition to the required central registry and criminal background clearances, the DHHS will immediately conduct risk and needs assessments of a noncustodial parent's household. *Removal and Placement of Children PSM 715-2, supra* at p 7. To maintain

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

[17] The link to this resource was created using Perma.cc and directs the reader to the page.

placement of a child initially placed in their homes, relative caregivers must agree to be licensed as foster parents or waive licensure in writing. DHHS's Children's Foster Care Manual (FOM), *Placement Selection and Standards FOM 722-03*, p 10.[18] The DHHS will allow a relative to waive licensure when it is determined that it is in a child's best interest to be placed or remain with an unlicensed relative and exceptional circumstances exist.[19] *Placement Selection and Standards FOM 722-03*, *supra* at p 15.

## C. Temporary Placement of a Child Pending Preliminary Hearing

Once a child is taken into protective custody, with or without a court order, the officer or other person who took the child into custody must "immediately bring the child to the court for [a] preliminary hearing, or immediately contact the court for instructions regarding placement [of the child] pending the hearing[.]" MCR 3.963(C)(3). See Chapter 8 for a detailed discussion of placements.

> **Note:** MCR 3.903(C)(10) defines *placement* as a "court-approved transfer of physical custody of a child to foster care, a shelter home, a hospital, or a private treatment agency." However, MCL 712A.15(4) prevents a child taken into protective custody from being placed in a secure facility[20] or in a cell or other part of a secure facility designed to incarcerate adults.[21] See also *Dwayne B v Granholm*, settlement agreement of the United States District Court for the Eastern District of Michigan, filed July 3, 2008 (Docket No. 2:06-cv-13548), which prohibits the DHHS from placing a child taken into protective custody in a jail, correctional facility, or detention facility.[22]

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[18] The link to this resource was created using Perma.cc and directs the reader to the page.

[19] For additional information on relative licensing waivers, including a list of exceptional circumstances that must exist to forgo licensing, see the DHHS's Children's Foster Care Manual (FOM), *Placement Selection and Standards FOM 722-03*, pp 15-16. *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[20] A *secure facility* is "any public or private licensed child caring institution identified by the department as designed to physically restrict the movements and activities of the alleged or adjudicated juvenile offender that has the primary purpose of serving juveniles who have been alleged or adjudicated delinquent, other than a juvenile alleged or adjudicated under [MCL 712A.2(a)(2)-(4)]." MCL 712A.1(1)(t).

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

[22] See the Settlement Agreement in *Dwayne B v Ganholm* to view the agreement in its entirety. *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page. See also http://www.childrensrights.org/reform-campaigns/legal-cases/michigan/ for a summary of the action taken since Governor Snyder took office.

For a child in protective custody following an emergency removal under MCL 712A.14a, MCL 712A.14a(2) requires "the officer[23] or the [DHHS] [to] immediately contact the designated judge or referee as provided in [MCL 712A.14a(3)], to seek a court order for placement of the child pending a preliminary hearing." MCL 712A.14a(2). MCL 712A.14a(3) requires a "judge or referee [to] be designated as the contact when a placement order is sought for a child in protective custody under [MCL 712A.14a]."

"[I]f the court is not open, [the] DHHS must contact the person designated under [MCR 3.963(D)[24]] for permission to place the child pending the hearing." MCR 3.963(C)(4).

## D. Designated Court Contact

"When the [DHHS] seeks a placement order for a child in protective custody under [MCR 3.963(A)] or [MCR 3.963(B)], [the DHHS] shall contact a judge or referee designated by the court for that purpose."[25] MCR 3.963(D)(1).

"If the court is closed, the designated judge or referee may issue an ex parte order for placement upon receipt, electronically or otherwise, of a petition or affidavit of facts.[26] The order must be communicated in writing, electronically or otherwise, to the appropriate county DHHS office and filed with the court the next business day." MCR 3.963(D)(2). See also MCL 712A.14a(3), which contains substantially similar language for a child in protective custody following an emergency removal under MCL 712A.14a.

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

## E. After a Child Is in Protective Custody

### 1. Notification

An officer or other person who takes a child into protective custody must immediately attempt to notify the child's parent,

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

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

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

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

guardian, or legal custodian of the protective custody. MCR 3.963(C)(1).

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

> **Note:** MCR 3.903(A)(11) defines a *guardian* as "a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or [MCL] 700.5205, by a court of another state under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202, or a juvenile guardian appointed pursuant to MCL 712A.19a or MCL 712A.19c."
>
> MCR 3.903(A)(13) defines a *juvenile guardian* as "a person appointed guardian of a child by a Michigan court pursuant to MCL 712A.19a or MCL 712A.19c. A juvenile guardianship is distinct from a guardianship authorized under the Estates and Protected Individuals Code."
>
> MCR 3.903(A)(14) defines a *legal custodian* as "an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. It also includes the term 'Indian custodian' as defined in MCR 3.002(15)."[27]

"The notice requirements for child protective proceedings must be strictly construed." *In re Shimmons/Hare*, ___ Mich App ___, ___ (2026) (quotation marks and citation omitted). "'After a party's first appearance before the court, subsequent notice of proceedings and pleadings shall be served on that party or, if the party has an attorney, on the attorney for the party as provided in [MCR 3.920(D)].'" *Shimmons*, ___ Mich App at ___, quoting MCR 3.920(G). For a child placed outside the home, "'notice of the preliminary hearing or an emergency removal hearing under MCR 3.974(C)(3) must be given to the parent of the child as soon as the hearing is scheduled. The notice may be in person, in writing, on the record, or by telephone.'" *Shimmons*, ___ Mich App at ___, quoting MCR 3.920(D)(2)(b).[28]

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

## 2. Preliminary Hearing

The preliminary hearing must begin within 24 hours of a child being taken into protective custody unless the preliminary hearing is adjourned for good cause, or the child must be released. MCL 712A.14(2);[29] MCR 3.965(A)(1). The 24-hour time period does not include Sundays or holidays. MCR 3.965(A)(1). See Chapter 7 for a detailed discussion of preliminary hearings.

During the preliminary hearing on the status of the child, the judge or referee must authorize the filing of a complaint[30] or the child must be released to his or her parent or parents, guardian, or custodian. MCL 712A.14(2).

> **Note:** The "'[p]etition authorized to be filed' refers to written permission given by the court to proceed with placement on the formal calendar. Until a petition is authorized, it remains on the informal calendar." MCR 3.903(A)(21).

## 3. Petition

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

> **Note:** A *petition* is "a complaint or other written allegation, verified in the manner provided in MCR 1.109(D)(3), that a parent, guardian, nonparent adult, or legal custodian has harmed or failed to properly care for a child . . . ." MCR 3.903(A)(20).

## 4. Custody Statement

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

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[28] For more information on preliminary hearing notice requirements, see Section 7.6(A). For more information on emergency removal proceedings requirements, see Section 15.8(A).

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

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

(a) a specific and detailed account of the circumstances that led to the emergency removal, and

(b) the names of persons notified and the times of notification or the reason for failure to notify."[31] MCR 3.963(C)(6).

## 3.3 Ordering Medical Treatment for a Child

### A. Consent to a Child's Treatment

When a child is placed outside the home, a child placing agency, the department,[32] or the court may consent to "routine, nonsurgical medical care, or emergency medical and surgical treatment" of a child. MCL 722.124a(1).

> **Note:** The court may also enter a dispositional order to provide a child with appropriate "medical, dental, surgical, or other health care" it considers necessary after the court takes jurisdiction over the child. See MCL 712A.18(1)(f); *In re AMB*, 248 Mich App 144, 176-177 (2001). "[A]fter a [respondent-]parent has been [adjudicated as] unfit, MCL 712A.18(1)(f) affords [trial] courts the broad authority to make medical decisions for a child under their jurisdiction, and [the] respondent[-parent] cannot rely on provisions in the Public Health Code to trump this broad grant of judicial authority." *In re Deng*, 314 Mich App 615, 629 (2016) (finding "[t]he [J]uvenile [C]ode includes no provision restricting the trial court's authority to enter dispositional orders affecting a child's medical care on the basis of a parent's [religious] objections to vaccinations, and it would be inappropriate to graft on such an exception from the Public Health Code[]").

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[31] See SCAO form JC 01, *Complaint (Request for Action, Child Protective Proceedings)*, at https://www.courts.michigan.gov/4a7f4f/siteassets/forms/scao-approved/jc01.pdf, and SCAO form JC 05b, *Order to Take Child(ren) Into Protective Custody (Child Protective Proceedings)*, at https://www.courts.michigan.gov/4a7f10/siteassets/forms/scao-approved/jc05b.pdf.

[32] For purposes of the Child Care Licensing Act, MCL 722.111 *et seq.*, "[d]epartment means 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(1)(m).

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

> **Note:** A child care *organization* is "a governmental or nongovernmental organization having as its principal function receiving minor children for care, maintenance, training, and supervision, notwithstanding that educational instruction may be given. Child care organization includes organizations commonly described as child caring institutions, child placing agencies, children's camps, children's campsites, children's therapeutic group homes, child care centers, day care centers, nursery schools, parent cooperative preschools, foster homes, group homes, or child care homes." MCL 722.111(1)(b).

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

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

## B. Ordering Emergency and Nonemergency Treatment

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

Even if a child has yet to live with a foster family or the department[33] still needs to arrange for a foster family to be involved

in the child's care while in the hospital, in cases where the child has a medical emergency the court has the authority to order medical or surgical treatment of a child under MCL 722.124a(1) once the placement order is issued for out-of-home care. *In re AMB*, 248 Mich App at 180-182.

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

> **Note:** The Court of Appeals has defined psychological evaluations as routine care for emotionally disturbed children in temporary custody. *In re Trowbridge*, 155 Mich App 785, 787-788 (1986).

A parent established as unfit during the adjudicative phase "must yield to the trial court's [dispositional] orders regarding the child's welfare[; c]onsequently, during the dispositional [phase], the trial court has the authority to order vaccination of a child when the facts proved and ascertained demonstrate that immunization is appropriate for the welfare of the juvenile and society." *In re Deng*, 314 Mich App 615, 625, 627 (2016) (finding "a parent who has been adjudicated as unfit [does not have] the right during the dispositional phase of the child protective proceedings to object to the inoculation of her children on religious grounds[;]" "following adjudication, which affords a parent due process for the protection of his or her liberty interests, the parent is no longer presumed 'fit' to make decisions for the child and that power, including the power to make medical decisions involving immunizations, rests instead with the court[34]"), citing MCL 712A.18(1)(f) and *In re Sanders*, 495 Mich 394, 409-410, 418 (2014).

A parent's failure to provide a child with medical treatment on the basis of his or her religious beliefs does not preclude a court from

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[33] For purposes of the Child Care Licensing Act, MCL 722.111 *et seq.*, "[d]epartment means 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(1)(m).

[34] "[T]he facts proved and ascertained [must] demonstrate that immunization is appropriate for the welfare of the juvenile and society." *In re Deng*, 314 Mich App at 625 (physician recommendations sufficed in this case), citing MCL 712A.18(1)(f).

ordering medical or nonmedical treatment where necessary. MCL 722.634.

## C. Withdrawal of Life Support

### 1. Court's Authority to Order Cessation of Treatment

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

In *In re AMB*, the child was born with severe heart and other defects that required her to remain on life support systems. *In re AMB*, 248 Mich App at 149, 151-152. She had a poor prognosis for long-term survival. *In re AMB*, *supra* at 149. The child's putative father was also the father of the child's mother, who was 17 years old at the time and allegedly developmentally delayed.[35] *Id*. at 150. The DHHS filed an original petition alleging the sexual abuse of the child's mother and the mother's inability to care for the child. *Id*. at 152. Following a preliminary hearing, a referee entered an order authorizing the petition, requiring that the child receive all necessary treatment to sustain her life, and placing the child in foster care or with a relative. *Id*. at 152-153. Four days later, the DHHS filed an amended petition alleging that the child was being kept alive by life support systems, that the child's mother was incapable of making an informed decision regarding the child's condition, and that the DHHS was requesting the court to make a determination of the child's best interests. *Id*. at 154-156. Following a second preliminary hearing (where the court received testimony from a treating physician indicating that the life support measures had ceased to be treatment and were futile), the referee entered an order authorizing the hospital to end life support. *Id*. at 156-161, 182. The Court of Appeals found that the lower court had statutory grounds to authorize the hospital's removal of life support, but warned that the lower court's authority to withdraw life support "depend[ed] on the circumstances of each case. . . . [Alt]hough MCL 722.124a(1) enabled the family court to act in this case even before holding an adjudication, [the Court] stress[ed] that

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

parties and family courts involved in protective proceedings must make *every* possible effort to hold an adjudication before authorizing withdrawal of life support." *In re AMB*, 248 Mich App at 182.

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

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

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

> **Note:** It may be appropriate for a court to intervene when a parent has a conflict of interest regarding withdrawal of life support that may interfere with his or her ability to act in the child's best interests. "[T]he parent accused of causing the injury may face more severe criminal penalties should the child die rather than surviving for some time in a severely impaired or vegetative state. Medical providers may have significant concerns regarding the parent's ability to act in the child's best interest. When this situation presents itself, doctors will look to institutional ethics committees and the courts for guidance regarding end of life and other critical medical decisions." Paulsci and Stoika, *End of Life Decisions in Children With Concerns of Child Maltreatment*, 5 Mich Child Welfare L J 25 (2001). It is well established that a patient's removal from life support is not an intervening cause of the patient's death absolving a criminal defendant from criminal liability. See *People v Bowles*, 461 Mich 555, 559-560 (2000).

## 3. Standards for Withdrawing Life Support

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

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

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

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

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

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

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

**Note:** In applying the best interests standard, the court may examine "'[e]vidence about the patient's present

> level of physical, sensory, emotional, and cognitive functioning; the degree of physical pain resulting from the medical condition, treatment, and termination of the treatment, respectively; the degree of humiliation, dependence, and loss of dignity probably resulting from the condition and treatment; the life expectancy and prognosis for recovery with and without treatment; the various treatment options; and the risks, side effects, and benefits of each of those options.'" *In re AMB*, 248 Mich App at 200, citing *In re Rosebush,* 195 Mich App at 690 (additional citations omitted).

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

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

> (a) establish "that the person who would otherwise act as the surrogate decisionmaker for the incompetent patient is also incompetent to make the critical medical decision at issue[]"; and
>
> (b) be clear and convincing that an incompetency actually exists that prevents a parent or other surrogate from making a decision concerning the patient's care. *In re AMB*, 248 Mich App at 204-206.
>
> > **Note:** According to *In re AMB*, "jurisdiction over the child *alone* is not reason enough for a court to make a decision to withdraw life support. Rather, the record *must* provide clear and convincing evidence to support the court's determination that it, not a parent or other surrogate, must make the

decision to withdraw life support." *In re AMB*, 248 Mich App at 206.

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

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

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

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

## D. Psychotropic Medications

It may be beneficial for a child who suffers from emotional or behavioral disorders to use psychotropic medications as part of a mental health plan. However, psychotropic medications must not be used to discipline or control a child. *Dwayne B v Granholm*, settlement agreement of the United States District Court for the Eastern District of Michigan, filed July 3, 2008 (Docket No. 2:06-cv-13548).[36]

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

For additional information on the administration of psychotropic medication to children in foster care, see the DHHS's Children's Foster Care Manual (FOM), *Psychotropic Medication in Foster Care FOM 802-1*,[37] and the American Bar Association Center on Children and the Law, *Psychotropic Medication and Children in Foster Care: Tips for Advocates and Judges*, available at https://www.courts.michigan.gov/4a6716/siteassets/court-administration/standardsguidelines/childprotectionjuvdel/psychotropic-medication-and-children-in-foster-care-tips-for.pdf.

[36] See the Settlement Agreement in *Dwayne B v Granholm* to view the agreement in its entirety. *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page. See also http://www.childrensrights.org/reform-campaigns/legal-cases/michigan/ for a summary of the action taken since Governor Snyder took office.

[37] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

# Chapter 4: Jurisdiction, Venue, and Transfer


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## *In this chapter. . .*

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

# 4.1 Venue

## A. Proper Venue

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

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

## B. Change of Venue

### 1. Motion for Change of Venue

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

"The transferring court must enter all necessary orders pertaining to the certification and transfer of the action to the receiving court." MCR 3.926(F). The court ordering the change of venue must also bear all the costs of the proceeding. MCR 3.926(D).

### 2. Transfer of Case to County of Residence

If a child is brought before the court in a county other than the county where the child resides, the court may, before a hearing, enter an order transferring jurisdiction over the matter to the court of the county of residence. MCR 3.926(B). The transfer may occur before trial. *Id.* "The court shall not order transfer of the case until the court to which the case is to be transferred has granted the request to accept the transfer." *Id.*

#### a. Presumption of Child's County of Residence

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

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

(2) The child resides in the county with:

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

(b) a guardian;

(c) a legal custodian; or

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

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

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

### b. Criteria to Determine County of Residence

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

(1) The parent's, guardian's, or legal custodian's county of residence.

(2) Length of time a child has lived in a county, if ever he or she lived in the county.

(3) A parent's move to another county since inception of the case.

(4) Another court's previous continuing jurisdiction over the child.

(5) Existence of a court order that places a child in a county for purposes of adoption.

(6) A child's intent to live in a county.

(7) Any other factor the court deems relevant. MCR 3.926(B)(2).

## 3. Bifurcated Proceedings

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

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

## C. Responsibility for Costs of Disposition

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

# 4.2 Subject Matter Jurisdiction

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

## A. Exclusive Jurisdiction

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

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

A *child protective proceeding* is a "proceeding concerning an offense against a child." MCR 3.903(A)(2). Specifically, an *offense against a child* means "an act or omission by a parent, guardian, nonparent adult, or legal custodian asserted as grounds for bringing the child within the jurisdiction of the court pursuant to the Juvenile Code." MCR 3.903(C)(9).

However, child protective proceedings are not criminal proceedings. MCL 712A.1(2). See *People v Ali*, 328 Mich App 538, 548 (2019) ("these proceedings are fundamentally different: one is civil, the other criminal; they both serve different purposes and implicate different state interests (enforcement of the criminal laws and the safety and security of the child); each involves different burdens of proof and different procedural requirements; and criminal proceedings tend to be more adversarial in nature").

Because MCL 712A.2(b) specifically grants the Family Division of the Circuit Court subject matter jurisdiction over cases concerning children under the age of eighteen, the family courts have jurisdiction over a large area of cases involving children. *In re AMB*, 248 Mich App 144, 167 (2001). In *In re AMB*, the trial court had

subject matter jurisdiction over the child protective proceeding based on the original petition alleging that a critically-ill premature infant's mother was not able to provide her infant with proper custody or a fit home.[1] *In re AMB*, *supra* at 168. After the infant's health dramatically changed and doctors recommended changing her treatment from sustentation of life to withdrawal of life support, an amended petition was filed requesting the trial court render a decision in the infant's best interests. *Id.* at 168-170. The infant's attorney argued on appeal that the trial court was stripped of its subject matter jurisdiction when the amended petition changed the focus from protecting the infant to ending her life. *Id*. at 165-166. The Court of Appeals disagreed and found that

> "The amended petition raised questions of fact and law that depended entirely on the statutory bases for subject-matter jurisdiction in this case. While [the infant's] health status may have been changing, her underlying need to have someone make decisions for her and to care for her remained the same throughout the proceedings. Thus, this request for a best interests ruling still was within the 'class' of cases or issues concerning which the family court may make a decision.
>
> Though [the infant's attorney] attempts to distinguish between the family court's responsibility to protect children and the effect of removing life support, the request for relief in the amended petition, at least arguably, did not ask the family court to abandon its duty to protect [the infant]. Rather, the amended petition asked for a ruling on what course of conduct would be in [the infant's] best interests." *In re AMB*, 248 Mich App at 170-171.

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

## B. Jurisdiction of Proceedings Involving "Dependent" Juveniles

The Family Division of the Circuit Court has jurisdiction over "proceedings concerning a juvenile under 18 years of age" if "the juvenile is dependent and is in danger of substantial physical or psychological harm[]" under certain circumstances. MCL

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

712A.2(b)(3). "The juvenile may be found to be dependent when any of the following occurs:

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

Dependency jurisdiction may also apply to child trafficking victims. For additional information, see the Michigan Department of Health and Human Services, *Human Trafficking of Children Protocol*.[2]

## C. Ancillary Jurisdiction of Guardianship Proceedings

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

## D. Safe Delivery of Newborns Law

The Family Division of the Circuit Court has jurisdiction over a newborn child who has been surrendered to an emergency service provider as provided in the Safe Delivery of Newborns Law. MCL 712.1(2)(b); MCL 712.2(1). See Section 3.1(D) for information on the custody of a child under the Safe Delivery of Newborns Law, and Section 8.14 for information on the placement of a child under the Safe Delivery of Newborns Law.

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[2]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

The court may appoint a lawyer-guardian ad litem to represent the newborn's interests. MCL 712.2(1). See Section 7.10 for information on a lawyer-guardian ad litem's powers and duties.

## 4.3 Personal Jurisdiction

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

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

A determination that the Family Division has jurisdiction over the child under MCL 712A.2(b) is made in one of two ways: following a parent's plea to the allegations in a jurisdictional petition, or a demand for trial by bench or jury to contest the allegations.[4] *In re Thompson*, 318 Mich App 375, 378 (2016). See also MCL 712A.18(1); *In re Brock*, 442 Mich at 108-109. MCR 3.903(A)(27), which defines *trial* as "the fact-finding adjudication of an authorized petition to determine if the minor comes within the jurisdiction of the court[, and] also . . . a specific adjudication of a parent's unfitness to determine whether the parent is subject to the dispositional authority of the court." "An adjudication finding that the court may take jurisdiction over a minor child does not involve an order authorizing any specific consequences for the respondent."*In re Wangler*, 305 Mich App 438, 445 (2014), rev'd on other grounds 498 Mich 911 (2015).[5]

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

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

Appellate review of a trial court's fact-finding in deciding whether to exercise jurisdiction is "deferential"; reversal requires clear error. *In re D V Lange*, ___ Mich ___, ___ (2025) (holding that the trial court did not clearly err by refusing to take jurisdiction of the child under MCL 712A.2(b)(1) or MCL 712A.2(b)(2) and that the Court of Appeals was not "mindful of the deference owed to the trial court's decision" when reversing it). See also *In re C S Alexander*, ___ Mich App ___, ___ (2025) ("[B]ecause respondent-father only was the putative father when the subject petition was filed in May 2023, and he did not establish his paternity to [the child] until approximately two months afterwards, the trial court erred when it terminated his parental rights under MCL 712A.19b(3)(f) because it improperly exercised its jurisdiction over [the child] with respect to respondent-father before his parentage was recognized legally.").

"In order to have an initial disposition, there must *first* be an adjudication."[6] *In re Thompson*, 318 Mich App at 378 (where "the circuit court conducted only a termination hearing and considered jurisdiction as an afterthought" by "[taking] evidence in one sitting and reach[ing] a termination decision before considering whether jurisdiction was appropriate," the Court of Appeals "vacate[d] the adjudicative and termination orders and remand[ed] to the circuit court to handle the[] proceedings in the manner and order dictated by law"). Once the court establishes personal jurisdiction over a child, it may enter a dispositional order. MCL 712A.18(1); MCR 3.973(A). "The dispositional phase of the proceedings concerns the consequences arising from the fact of the adjudication[, and d]uring the dispositional phase of the proceedings, the court can order placement of a minor child, visitation, services, or any other specific action involving the respondent and the minor child that is under the court's jurisdiction."*In re Wangler*, 305 Mich App at 445. See Chapter 13 for a detailed discussion of the dispositional phase.

"[C]ourts may assume jurisdiction over a child on the basis of the adjudication of one parent."[7] *In re Sanders*, 495 Mich 394, 412-413 n 8 (2014). However, "[a]djudication protects the parents' fundamental right to direct the care, custody, and control of their children, while also ensuring that the state can protect the health and safety of the children." *Id.* at 422. Accordingly, "[w]hen the state is concerned that *neither* parent should be entrusted with the care and custody of their children, the state has the authority—and the responsibility—to protect the children's safety and well-being by seeking an adjudication against *both* parents." *In re Sanders,* 495 Mich at 421-22 (2014). "[W]hen the state seeks only to

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

[6] "This Court held that the dispositional hearing [can] be conducted 'immediately following the adjudicative hearing' but the two [cannot] be converged such that there [is] no distinction." *In re Thompson*, 318 Mich App at 379, quoting *In re AMAC*, 269 Mich App 533, 538 (2006).

deprive *one* parent of the right to care, custody[,] and control, the state is only required to adjudicate *that* parent." *Id*. at 422. "*In re Sanders* is a shield to protect the rights of a nonadjudicated parent, not a sword to pierce the rights of an adjudicated parent or child." *In re Detmer/Beaudry*, 321 Mich App 49, 61-62, 64-65 (2017) (where a Native American child was removed from the respondent-mother's care and residence and placed in the care and residence of the child's nonrespondent-father, the trial court correctly found that it did not have the authority to infringe on the nonrespondent-father's parental rights, but erred in concluding that the provisions of the MIFPA did not apply to the placement; "[n]either the holding nor the reasoning of *In re Sanders* negates or otherwise undermines the statutory requirements a trial court must follow before removing a Native American child from an adjudicated parent").[8]

"[T]he fact that there are statutory grounds to assume jurisdiction over one minor child does not automatically mean that there are statutory grounds to assume jurisdiction over a second minor child." *In re Kellogg*, 331 Mich App 249, 254 (2020). See also *In re Christie*, 339 Mich App 1, 6 (2021) (holding that statutory grounds for jurisdiction over the respondent-mother's three-year-old son, who remained in her custody following the death of her daughter, did not establish jurisdiction over the respondent-mother's two teen-aged sons who were not in her custody and who did not otherwise fall within the statutory requirements for jurisdiction). Simply put, the doctrine of anticipatory neglect[9] may not be sufficient in all cases to assume jurisdiction over a second minor child. *Kellogg*, 331 Mich App at 259; *Christie*, 339 Mich App at 6. See also *In re Boshell/Shelton*, ___ Mich App ___, ___ (2025) (holding that the doctrine of anticipatory neglect did not support the trial court's exercise of jurisdiction over respondent's three sons who lived with respondent when the record did not clearly establish that respondent

[7] Note, however, that "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights." *In re Sanders*, 495 Mich at 412-13, n 8, 415 (finding unconstitutional the one-parent doctrine, which permitted the court to "enter dispositional orders affecting parental rights of *both* parents" once "jurisdiction [was] established by adjudication of only *one* parent"). See *In re Dixon (On Reconsideration)*, 347 Mich App 337, 362 (2023), in which the Court of Appeals stated that it "[did] not condone the [trial] court's and DHHS's treatment of [the child's] father or the violation of his constitutional rights" and "reluctantly" affirmed the removal of the child from his home. In *Dixon*, the incarcerated father's constitutional rights were violated by the failure of the trial court and the DHHS to proceed in a timely manner to confirm the incarcerated father's paternity and to name the father as a respondent, failures that delayed the father's ability to participate meaningfully in his child's care and custody, delayed the investigation into the fitness of the father's proposed placement, and delayed the father's receipt of services to which he was entitled. *Dixon*, 347 Mich App at 352, 353. For additional information on the procedural due process rights of the unadjudicated parent, see Section 4.3(C)(2). Further note that the *Sanders* decision applies retroactively "to all cases pending on direct appeal at the time [*Sanders*] was decided." *In re Kanjia*, 308 Mich App 660, 674 (2014).

[8] "[T]he trial court should have considered whether moving [the Native American child] from [the] respondent-mother's care and residence to his nonrespondent-father's care and residence triggered MIFPA's provisions." *In re Detmer/Beaudry*, 321 Mich App at 62. For additional information on MIFPA provisions, see Chapter 19.

[9] See Section 4.3(B) for a discussion of anticipatory neglect.

neglected *any* of her children, specifically her three daughters, two of whom lived with respondent and one of whom lived with the girls' father in whose home one of the father's partner's children died from suspected physical abuse; the father and his partner were arrested for the torture and murder of the child).

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

If the court finds that a child is within its jurisdiction, the court also has the authority to enter orders concerning the child's parents and other adults. But see *In re Sanders*, 495 Mich 394, 414 n 10 (2014), finding that "the court's authority during the dispositional phase is limited by the fact that the state must overcome the presumption of parental fitness by proving the allegations in the [child protective] petition." "[N]either the admissions made by [the adjudicated parent] nor [the unadjudicated parent's] failure to object to those admissions constituted an adjudication of [the unadjudicated parent's] fitness[.]" *In re SJ Temples*, unpublished per curiam opinion of the Court of Appeals, issued March 12, 2015 (Docket No. 323246)[10] (finding that the trial court violated the unadjudicated parent's "due process rights by subjecting him to dispositional orders without first adjudicating him as unfit[]"). See Section 4.10 for a discussion of this authority.

Additionally, "[i]n a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court may [no longer] issue orders affecting a party as necessary[.]" See MCL 712A.2(i). For purposes of child protective proceedings, MCL 712A.2(i)(*ii*) defines *party* as "the petitioner, department, child, respondent, parent, guardian, or legal custodian, and any licensed child caring institution or child placing agency under contract with the department to provide for a juvenile's care and supervision."

## A. Statutory Bases of Personal Jurisdiction

To establish personal jurisdiction, the court must determine by a preponderance of the evidence that a child comes within the requirements of MCL 712A.2(b). *In re Brock*, 442 Mich 101, 108-109 (1993). "A preponderance of the evidence is evidence that, when weighed with that evidence opposed to it, has more convincing force and the greater probability of truth." *In re Boshell/Shelton*, ___ Mich___, ___ (2025) (cleaned up). "MCL 712A.2 'speaks in the

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

present tense, and, therefore, the trial court must examine the child's situation at the time the petition was filed.'" *In re Long*, 326 Mich App 455, 459 (2018), quoting *In re MU*, 264 Mich App 270, 279 (2004). See also *In re Hockett*, 339 Mich App 250, 256 (2021), where the Court determined that jurisdiction over a child was proper even though any threat to the child's well-being had ceased after the child was placed in a residential facility at which the child's mental health needs could be addressed.

MCL 712A.2(b) provides the Family Division with personal jurisdiction over a child under 18 years of age if the child is found within the court's county and one of the following apply:[11]

> (1) A child's parent or other person legally responsible for the child's care and maintenance (when able to do so) neglects or refuses to provide proper or necessary support, education,[12] medical, surgical, or other care necessary for the child's health or morals, MCL 712A.2(b)(1);
>
> > **Note:** MCL 712A.2(b)(1)(A) defines *education* as "learning based on an organized educational program that is appropriate, given the age, intelligence, ability, and psychological limitations of a juvenile, in the subject areas of reading, spelling, mathematics, science, history, civics, writing, and English grammar." Also, proper home schooling may satisfy the requirements for an educational program sufficient to avoid an allegation of educational neglect. See MCL 380.1561(3)(f).
> >
> > For purposes of MCL 712A.2(b)(1), *neglect* means "harm to a child's health or welfare by a person responsible for the child's health or welfare that occurs through negligent treatment, including the

[11] For purposes of child protective proceedings, MCR 3.903(A)(18) defines *parent* as "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)", which defines a *parent* for purposes of applying ICWA and MIFPA to child protective proceedings. Under that court rule, *parent* means "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom . . . [but] does not include the putative father if paternity has not been acknowledged or established." Because none of these definitions include a putative father, "a putative father does not qualify as a father or parent for the purposes of exercising jurisdiction in child protective proceedings." *In re Long*, 326 Mich App 455, 464 (2018). See also *In re C S Alexander*, ___ Mich App ___, ___ (2025) (holding that the trial court improperly exercised its jurisdiction over the child as to respondent-father because respondent-father was only the putative father when the petition was filed).

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

failure to provide adequate food, clothing, shelter, or medical care, though financially able to do so, or the failure to seek financial or other reasonable means to provide adequate food, clothing, shelter, or medical care." MCL 712A.2(b)(1)(B); MCL 722.602(1)(c). "'Negligent,' for purposes of MCL 722.602(1)(d),[13] means 'failing to exercise the care expected of a reasonably prudent person in like circumstances.'" *In re Pacyga*, ___ Mich App ___, ___ (2026) (citation omitted).

"[T]here must be a showing of harm in order for a court to assume jurisdiction over a juvenile under the 'neglects' clause of MCL 712A.2(b)(1)." *In re Smith*, 507 Mich 905 (2021) (determining that where a child "was performing at grade level," a teacher's testimony "that she feared [the minor] would not be able to maintain his academic level in the future" was only speculative and did not constitute a preponderance of evidence showing that the minor suffered any harm as a result of his absences from school).

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

(3) A child is abandoned by his or her parents, guardian,[14] or other custodian,[15] MCL 712A.2(b)(1);

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

**Note:** "'Without proper custody or guardianship' does not mean a parent has placed the [child] with another person who is legally responsible for the care and maintenance of the [child] and who is

[13] MCL 722.602(1)(d) was relettered to MCL 722.602(1)(c) by 2026 PA 60, effective July 23, 2026.

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

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

able to and does provide the [child] with proper care and maintenance." MCL 712A.2(b)(1)(C).

(5) A child's home or environment is an unfit place for the child to live due to neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, MCL 712A.2(b)(2);[16]

**Note:** For purposes of MCL 712A.2(b)(2), *neglect* means "harm to a child's health or welfare by a person responsible for the child's health or welfare that occurs through negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care, though financially able to do so, or the failure to seek financial or other reasonable means to provide adequate food, clothing, shelter, or medical care." MCL 712A.2(b)(2); MCL 722.602(1)(c).

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

(6) The child "is dependent and in danger of substantial physical or psychological harm[,]" MCL 712A.2(b)(3);[17]

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

[16] The court's jurisdiction under MCL 712A.2(b)(2) may extend to a child trafficking victim. For additional information, see the Michigan Department of Health and Human Services, *Human Trafficking of Children Protocol*. *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[17] The court's dependency jurisdiction under MCL 712A.2(b)(3) may extend to a child trafficking victim. For additional information, see the Michigan Department of Health and Human Services, *Human Trafficking of Children Protocol*. *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

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

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

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

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

[18] "[A] putative father does not qualify as a father or parent for the purpose of exercising jurisdiction in child protective proceedings." *In re Long*, 326 Mich App at 464. "[B]ecause the trial court [was] required to 'examine the child's situation at the time the petition was filed,' respondent-father's status as a putative father on the date the petition was filed means that he d[id] not qualify as a 'parent' under MCL 712A.2(b)(6). Therefore, respondent-father's actions in the two years or more preceding the filing of the petition [were] immaterial." *In re Long*, 326 Mich App at 464, quoting *In re MU*, 264 Mich App 270, 279 (2004). "Regardless of any moral obligation, as a putative father, respondent-father had no legal obligation to [the child]. We therefore conclude that to rely on a putative father's action or inaction in the two years preceding the filing of a petition when considering whether to exercise jurisdiction under MCL 712A.2(b)(6) is violative of due process." *In re Long*, *326* Mich App at 464-465. See also *In re C S Alexander*, ___ Mich App ___, ___ (2025) (holding that the trial court improperly exercised its jurisdiction over the child as to respondent-father because respondent-father was only the putative father when the petition was filed).

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

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

> **Note:** For purposes of MCL 712A.2(b)(6), *neglect* means "harm to a child's health or welfare by a person responsible for the child's health or welfare that occurs through negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care, though financially able to do so, or the failure to seek financial or other reasonable means to provide adequate food, clothing, shelter, or medical care." MCL 712A.2(b)(6)(A)-(B); MCL 722.602(1)(c).

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

The following cases construe that portion of MCL 712A.2(b)(1) that allows for assumption of jurisdiction when a parent or other person legally responsible for the care and maintenance of a child is able to provide proper or necessary support or care and neglects[19] or refuses to do so. See *In re Sterling*, 162 Mich App 328, 338–339 (1987), for an explanation of the importance of the phrase "when able to do so." According to the *Sterling* Court:

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

- ***In re D V Lange*, ___ Mich ___, ___ (2025)**: "'[A]ble to do so' as used in MCL 712A.2(b)(1) means that a parent must have 'sufficient power, skill, or

[19] For purposes of MCL 712A.2(b)(1), *neglect* means "harm to a child's health or welfare by a person responsible for the child's health or welfare that occurs through negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care, though financially able to do so, or the failure to seek financial or other reasonable means to provide adequate food, clothing, shelter, or medical care." MCL 712A.2(b)(1)(B); MCL 722.602(1)(c). See *In re D V Lange*, ___ Mich ___, ___ (2025). MCL 722.602(1)(d) was relettered to MCL 722.602(1)(c) by 2026 PA 60, effective July 23, 2026.

resources' to provide necessary care or necessary support." Respondent had taken DVL, who had significant mental health needs, to the hospital for inpatient treatment after he had again attempted to set fire to the family home and threatened suicide. The hospital initially held DVL but cleared him for discharge when DHHS was unable to find an inpatient pediatric psychiatric program for him. Respondent refused to retrieve DVL from the hospital, causing DHHS to petition for jurisdiction under MCL 712A.2(b)(1) and (2). The trial court declined to exercise jurisdiction, finding that respondent had not been neglectful because "respondent has made numerous efforts to have DVL's condition addressed," and "has two other children who would be at risk if respondent brought DVL home." *Lange*, ___ Mich at ___ (cleaned up). The Michigan Supreme Court reversed the Court of Appeals and affirmed the trial court, holding that the trial court did not commit clear error in declining jurisdiction, because "respondent did not have sufficient power, skill, or resources to have DVL return and stay at home because he posed a danger to the other members of the household, as well as himself."

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

- ***In re Adrianson*, 105 Mich App 300, 311-315 (1981), abrogated on other grounds by *In re Gazella*, 264 Mich App 668 (2005), superseded in part on other grounds by *In re Hansen*, 285 Mich App 158 (2009), vacated 486 Mich 1037 (2010):**[20] where the parent failed to provide adequate medical care, the children had poor school attendance, and the parent was incarcerated for a short period, the trial court properly took jurisdiction; however, allegations that there was debris on the front porch and that the

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

parent had a personality conflict with one child were insufficient by themselves to establish jurisdiction.

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

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

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

- ***In re A C Leach*, ___ Mich App ___, ___ (2023):** the trial court properly refused to take jurisdiction over the respondent-father's two children, JSL and AL, when there was no evidence that the respondent-father posed a substantial risk of harm to the children's mental well-being. At the time the petition was filed against the respondent-father seeking termination of his parental rights to the children, JSL and AL lived in a safe and stable home with their mother, and the respondent-father was in jail facing a first-degree child abuse charge for his treatment of JSL, the younger sibling. Although "the fact of incarceration, plus the child's safe placement with another parent, does not eliminate the possibility of mental or emotional harm to a child victimized by the incarcerated person," there is no "bright-line rule requiring a finding of a substantial risk of harm to the child's mental well-being anytime the respondent is charged with violent-conduct against the child." In *A C Leach*, "the petition lacked any factual allegations that either child—at the time the petition was filed—faced a 'substantial risk of harm to his or her mental well-being,'" quoting MCL 712A.2b(1) (emphasis added). The *A C Leach* Court noted, however, that the "respondent-father's continued incarceration and the children's safe placement with their mother [did not] necessarily require[] denial of the petition[.]"[21]

- ***In re Kellogg*, 331 Mich App 249, 254-258 (2020):** on the basis of the same evidence, the lower court took jurisdiction over respondent's two minor children, and respondent appealed the decision only as to the younger child, who was then three years old. After its

review of the evidence, the Court of Appeals found no independent basis to support the lower court's findings as they related to the younger child. Respondent's difficulty with stress, her 10-year-old negative psychological assessment, and her current trouble with anxiety and depression did not rise to the level of establishing that she was unfit to parent her younger child, particularly when it was unknown how removal of her older child, who was the source of significant stress in the home, might affect her ability to parent the younger child. Other circumstances—respondent's failure to consistently take the younger child to "school" for his speech delay when there was no indication that she was required to take him there, and respondent's occasional yelling and swearing at the child, standing over him, and invading his personal space—also failed to establish a substantial risk of harm to the younger child's mental well-being.

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

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

[21]See also *In re KNK*, ___ Mich App ___, ___ (2024), where the Court held that the trial court did not abuse its discretion under MCL 712A.13a(2) when it declined to authorize a petition against respondent who had been removed from the home and was subject to a no-contact order with the minor, KK, due to a pending second-degree criminal sexual conduct case against him involving KK as the victim. The trial court found that the no-contact order in the criminal case adequately protected the child. *Id.* at ___. The *KNK* Court affirmed, citing *In re Leach*, 347 Mich App 26 (2023): "[T]he mere fact that a parent is charged with criminal conduct against a child does not require a finding that the child is at a substantial risk of harm within the meaning of MCL 712A.2b(1)." *KNK*, ___ Mich App at ___.

- ***In re Arntz*, 125 Mich App 634, 636-638 (1983), rev'd on other grounds 418 Mich 941 (1984):**[22] in 1979, the respondent placed her two children with their paternal grandparents and had the grandparents appointed as legal guardians. In 1981, respondent dissolved the guardianship and attempted to have her children returned to her. The Department of Health and Human Services (DHHS) then filed a child protective proceedings action against respondent, alleging emotional neglect.[23] The Court of Appeals found that the assumption of jurisdiction was proper because the mother's failure to visit frequently during the guardianship temporarily deprived the children of emotional well-being. See also *In re Mathers*, 371 Mich 516, 527–529 (1963) (failure of parents to visit for one year or provide support was sufficient to establish jurisdiction).

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

## 3. Abandonment

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

- ***In re Faulkner*, ___ Mich App ___, ___ (2025):** "Abandon" means "'to give up with the intent of never again claiming a right or interest in; to withdraw protection, support, or help from'"; the trial court did not clearly err by declining to exercise jurisdiction on the basis of abandonment where neither respondent-mother's nor respondent-father's actions indicated an intent to abandon the child. After

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

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

the infant's maternal grandparents removed the infant to Michigan from Texas where the infant was born and the infant's parents lived, DHHS failed to establish that either respondent had the ability to travel to Michigan, or that the infant would be released from the grandparents' custody if they did. Moreover, both respondents regularly communicated with the Michigan caseworker and participated at every court proceeding.

- ***In re Nelson,* 190 Mich App 237, 240-241 (1991):** the Court found that the mother's leaving the child with a grandparent without providing monetary support was insufficient to allow assumption of jurisdiction. Instead, placing a child with a relative who will provide proper care evidences concern for the child's welfare.[24]

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

### 4. Without Proper Custody or Guardianship

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

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

- ***In re Faulkner*, ___ Mich App ___, ___ (2025):** "It is clear that the reason for the lack of proper care and custody was because the child was removed from [respondents'] care without permission or apparent legal authority"; affirming the trial court's refusal to exercise jurisdiction where the maternal grandparents removed the child from Texas to

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

Michigan pursuant to an unwritten safety plan without respondent's consent or court order, and when "little effort was made by petitioner to reunify the family."

- ***In re Baham*, 331 Mich App 737, 749-750 (2020)**: Jurisdiction was proper despite the fact that the child was placed with the respondent's brother at the time she entered her plea of admission where the child was in the hospital at the time the petition was filed, "[a]nd, although respondent had been discussing arrangements for [the child's] care with a pregnancy counselor, respondent did not implement any of the potential plans prior to the filing of the petition," and respondent admitted during testimony at the termination hearing that she thought care for the child would be accomplished through a guardianship but that "something happened and the guardianship wasn't done," and "[n]o guardianship was ever established, either before or after the adjudication hearing was held."

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

- ***In re Webster*, 170 Mich App 100, 105-106 (1988):** the DHHS filed a neglect petition against respondent, an unwed mother, alleging that respondent's one-year-old child was "without proper custody or guardianship." On the same date that the petition was filed, respondent executed a power of attorney

delegating her parental powers to the natural father of the child. The natural father had lived with the mother and their child since the child's birth but had not acknowledged paternity. The Court of Appeals affirmed the Probate Court's assumption of jurisdiction, holding that the execution of the power of attorney did nothing to change the child's environment, and that the child was still "without proper custody or guardianship."

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

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

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

## 5. Unfit Home Environment

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

- ***In re Pacyga*, ___ Mich App ___, ___ (2026):** "A preponderance of the evidence support[ed] the trial court's finding that respondent, by reason of neglect,

failed to provide CP a fit home or environment." (Quotation marks and citation omitted.) "The trial court found that respondent's statements to CPS established by a preponderance of the evidence that, at the time the petition was filed, 'there wasn't a home to go to' and that respondent 'was unable to provide proper care and custody for [her] very young child.'" *Id*. at ___. Respondent argued that this was clear error because she was living at the Hope Project Facility; however, respondent acknowledged that the facility's rules "did not allow children to live on site." *Id*. at ___. Respondent's argument failed "because the trial court's task was not to determine whether it had jurisdiction over *respondent* or assess respondent's situation; it was to determine whether it had jurisdiction over the minor child by assessing the *child's* situation at the time the petition was filed." *Id*. at ___ (quotation marks and citation omitted). "[R]espondent had been living at the Hope Project for several months and had not sought to secure or provide different living arrangements for herself or her soon-to-be-born child. Thus, although respondent had a place to live, she was not providing a home for [the child after birth]." *Id*. at ___. "Therefore, the trial court properly assumed jurisdiction." *Id*. at ___.

- ***In re KV*, ___ Mich App ___, ___ (2025)**: The trial court's oral statement "that jurisdiction rested on respondent's 'failure to protect against the molestation by the male children in the home,'" established jurisdiction over the child under MCL 712A.2(b)(2) even though the court omitted the statutory grounds for jurisdiction from its written order. Although "ordinarily, '[a] court speaks through written judgments or orders rather than oral statements,'" when "'an oral ruling clearly communicates the finality of the court's pronouncement,'" it has the same force and effect of a written order. *KV*, ___ Mich App at ___ (citations omitted). The court's findings from the bench "[t]aken together . . . establish jurisdiction under at least MCL 712A.2(b)(2), which authorizes jurisdiction when a parent's neglect, criminality, or depravity renders the home an unfit place for the juvenile to live in." *KV*, ___ Mich App at ___ (cleaned up). The court's oral ruling "adequately communicated finality" as to the basis of its jurisdiction, and the court's findings were not clearly erroneous. *Id*. at ___.

- ***In re D V Lange*, ___ Mich ___ (2025):** Respondent's home was not unfit for DVL under MCL 712A.2(b)(2) due to respondent's "negligent treatment."

"'[N]egligent' for purposes of 722.602(1)(d)[25] [is] failing to exercise the care expected of a reasonably prudent person in like circumstances." *Lange*, ___ Mich at ___. Respondent had not engaged in "negligent treatment." *Id*. at ___. Following a significant number of occasions on which respondent sought care for the DVL, respondent took DVL (who had substantial mental health needs) to the hospital for mental health treatment after DVL again threatened suicide and attempted to set the house on fire. *Id*. at ___. Respondent refused to retrieve DVL from the hospital when it discharged him without treatment after DHHS was unable to locate a pediatric inpatient psychiatric program for him. *Id*. at ___. In affirming the trial court's denial of DHHS' petition, the Michigan Supreme Court stated, "[r]espondent has been trying to get DVL the treatment he needs, as any reasonably prudent person in her circumstance would have. Refusing to take DVL home under the circumstances was precisely what an ordinarily and reasonably prudent person would do, given that DVL posed a danger to himself and others if taken home." *Id*. at ___.

- ***In re Faulkner*, ___ Mich App ___, ___ (2025):** When the child tested positive for multiple controlled substances at birth, petitioner failed to meet its burden to show that jurisdiction was proper where "[t]here was no evidence to refute respondents' claim that they had been unaware of the pregnancy until the child was born, nor was there any conclusive evidence that respondents had engaged in substance abuse after his birth."

- ***In re KNK*, ___ Mich App ___, ___ (2024)**: "The trial court did not abuse its discretion when it found that it was not necessary or appropriate to exercise jurisdiction over [the child]." "[DHHS] did not present any evidence establishing that [the child] was residing in an unfit home within the meaning of MCL 712A.2(B)(1)." *Id*. at ___, citing *In re Leach*, ___ Mich App ___, ___ (2023). Although the trial court found probable cause to believe the allegations that respondent surveilled and photographed the child unclothed, the trial court declined to authorize the petition to terminate respondent's parental rights, because "as a result of the no-contact order [in the criminal case pending against respondent] and respondent's removal from the home, there was no

[25] MCL 722.602(1)(d) was relettered to MCL 722.602(1)(c) by 2026 PA 60, effective July 23, 2026.

risk of harm to [the child], her needs were being met in mother's care, and the home environment was fit and suitable for her." *KNK*, ___ Mich App at ___.

- ***In re Sluiter,*** ___ Mich App ___, ___ (2024)**:** "[L]ooking at the evidence in the light most favorable to the petitioner [the DHHS] and deferring to the jury in determining what evidence is to be believed and the weight to be attached to the evidence, [the Court of Appeals] conclude[d] that there was sufficient evidence to support the jury's conclusion that a preponderance of the evidence established jurisdiction over the minor child as to respondent[-father]." "The testimony presented regarding respondent[-father]'s abuse of respondent-mother, even if not witnessed by [the child], nevertheless reflect[ed] cruelty, criminality, and depravity on respondent[-father]'s part, thus providing an unfit place for [the child] to live." *Id*. at ___.

- ***In re Hockett***, 339 Mich App 250, 255-256 (2021): Jurisdiction over a child is proper under MCL 712A.2(b)(2) when the child's home is unfit for the child. Although "[u]nfitness connotes active wrong doing," a respondent need not be culpable in order for a court to exercise jurisdiction over a child under MCL 712A.2(b)(2). *Hockett*, 339 Mich App at 255. In other words, "'culpability is not a prerequisite for court intervention under [MCL 712A.2(b)(2)].'" *Hockett*, 339 Mich App at 256, quoting *In re Jacobs*, 433 Mich 24, 41 (1989). In *Hockett*, jurisdiction was proper even though the respondent was not *unwilling* to provide a fit environment for her child; rather, respondent was *unable* "to care for [her child's] special needs with the level of assistance she was receiving[.]" *Hockett*, 339 Mich App at 256.

- ***In re Kellogg*, 331 Mich App 249, 257-258 (2020):** "Wholly missing from the record [was] any testimony indicating that the lack of structure and routine and the inconsistent application of rules was actually having a negative impact on [the child's] health or mental well-being or that it was creating an unfit home environment for him under MCL 712A.2(b)(2). There was, however, testimony that respondent had "some difficulties managing [the child's] wants and controlling him," but jurisdiction under MCL 712A.2(b)(1) and (2) "require[s] more than 'some difficulty[.]'" *Kellogg*, 331 Mich App at 258.

- ***In re Long*, 326 Mich App 455, 462 (2018):** where "[a]t the time the petition was filed, it [was] undisputed

that [the child] was living with petitioner[-guardian] and not with respondent-father, . . . [and] there were no allegations made that petitioner's home was an unfit place for [the child] to live," the trial court erred in taking jurisdiction of the child.

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

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

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

> protect the children from an *erroneous* termination of their relationship with their father, not a statutorily proper termination. See *id.* at 113." *In re MU*, 264 Mich App at 282.
>
> The Court of Appeals indicated that the trial court provided no specific reason for excluding evidence of the murder, suggesting only that evidence of the murder would violate the respondent's due process rights. The Court of Appeals reversed and stated "whether the respondent killed [the children's mother] is highly relevant to the issue whether 'criminality' renders the children's home or environment unfit." *In re MU*, 264 Mich App at 284.

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

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

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

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

- ***In re Youmans*, 156 Mich App 679, 685 (1986):** although the evidence showed that the home was dirty, that one child suffered severe diaper rash, and that one child got into a container of valium, the trial court erred in taking jurisdiction of the children,

> "[because] there [we]re no statements that respondents neglected or refused to provide proper or necessary support, education or medical care, that the children were deprived of emotional well-being or that respondents had abandoned them."

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

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

## B. Anticipatory Neglect or Abuse Sufficient for Jurisdiction

"In cases with multiple children, the doctrine of anticipatory neglect may apply to confer jurisdiction. The doctrine of anticipatory neglect recognizes that how a parent treats one child is certainly probative of how that parent may treat other children. Abuse or neglect of the second child is not a prerequisite for jurisdiction of that child and application of the doctrine of anticipatory neglect." *In re Sluiter*, ___ Mich App ___, ___ (2024) (cleaned up) (applying the doctrine of anticipatory neglect when the child's half-sibling disclosed to the CPS investigator—who testified at trial—that he saw respondent-father choking respondent-mother, even though no evidence directly indicated that the child witnessed respondent-father abusing respondent-mother). See also *In re Foster*, 285 Mich App 630, 631 (2009) (conditions that existed at the time of previous adjudication were likely to continue during subsequent child's presence in the parents' home).

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

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

But see *In re KV*, ___ Mich App ___, ___ (2025), which held that the doctrine of anticipatory neglect did not apply to abuse involving step-siblings. Respondent's stepdaughter testified that respondent had sexually abused her and that she had witnessed him sexually abuse his biological daughter. *Id*. at ___. Respondent's stepdaughter also testified that respondent's stepsons sexually abused the girls by "walking in on them while they were dressing in the bathroom and groping them" and that respondent and her mother (respondent's estranged wife) ignored her complaints. *Id*. at ___. Respondent's biological daughter denied that respondent abused her but confirmed that her stepbrothers did. *Id*. at ___. The trial court did not err when it acquired jurisdiction under MCL 712A.2(b)(2) over respondent's biological daughter based on the respondent's neglect of the stepbrothers' abuse "render[ing] the home 'an unfit place for the juvenile to live in'". *Id*. at ___, quoting MCL 712A.2(b)(2). However, the trial court erroneously relied on the doctrine of anticipatory neglect to find that aggravated circumstances under MCL 722.638(1)(a) justified termination of his parental rights to his daughter at the initial disposition. *KV*, ___ Mich App at ___. MCL 722.638(1)(a) "recognizes only a narrow form of anticipatory abuse: it permits an inference that a parent who abuses a child's sibling may also abuse that child. But when the children are not siblings, the statute does not permit extending that inference." *KV*, ___ Mich App at ___. Because the requirements for finding aggravated circumstances were not met—in part because the minor who was abused was not respondent's biological daughter or her sibling—the DHHS was obligated to make reasonable efforts to reunify respondent and his daughter before seeking termination. *Id*. at ___.

"[E]ven though jurisdiction may be properly assumed on the basis of the anticipatory-neglect doctrine, that does not also mean that it will always be sufficient." *In re Kellogg*, 331 Mich App 249, 259 (2020), citing *In re LaFrance Minors*, 306 Mich App 713 (2014) (the probative value of the inference that a parent's treatment of one child may indicate how that parent will treat other children decreases in light of differences between the children, like age and medical conditions). The substantial differences between the children in *Kellogg*—age, length of time in respondent's care, history of trauma, mental-health disorders, and behavioral issues, for example—"severely decrease[d] the probative value of the anticipatory neglect doctrine," so much so that it was not sufficient to establish statutory grounds for jurisdiction. *In re Kellogg*, 331 Mich App at 260.

The doctrine of anticipatory neglect did not support the trial court's assumption of jurisdiction over respondent's three sons, who had a different father than respondent's three daughters and who never visited the unfit home of the daughters' father. *In re Boshell/Shelton*, ___ Mich App ___, ___ (2025). One of respondent's daughters lived with her father, while the respondent's other two daughters and all three of her sons lived with respondent and her sons' father. *Id*. at ___. The daughters' father and his partner were arrested on torture and murder charges after one of the partner's children in the home died from injuries that indicated physical abuse. *Id*. at ___. The trial court took jurisdiction over all three of respondent's daughters under MCL 712A.2(b)(1) due to her "'willful ignorance'" of the conditions at the girls' father's home, and the trial court extended its finding under MCL 712A.2(b)(1) to respondent's sons based on the doctrine of anticipatory neglect. *Boshell/Shelton*, ___ Mich App at ___. After assuming jurisdiction over all six children, the trial court determined that it would be in the children's best interests to terminate respondent's parental rights under MCL 712A.19b(3)(a)(*ii*) and MCL 712A.19b(3)(b)(*ii*). *Boshell/Shelton*, ___ Mich App at ___. The *Boshell/Shelton* Court held in part that the trial court clearly erred in applying the doctrine of anticipatory neglect to respondent's sons because "the boys *never* visited" the girls' father's home, and the living conditions of respondent's home and the living conditions at the girls' father's home were significantly different. *Id*. at ___ (reversed and remanded).

"A court's jurisdiction under MCL 712A.2(b) has two components, one pertaining to the child and the other primarily to the parent." *In re Christie*, 339 Mich App 1, 4 (2021). "While the doctrine of anticipatory neglect may satisfy the parental-conduct component of the jurisdictional statute, it does not satisfy the geographic component relative to the child required by MCL 712A.2(b)." *Christie*, 339 Mich App at 6. In *Christie*, the trial court had proper

jurisdiction over the respondent-mother's son after her daughter died while in her care. *Id*. at 6. The events leading to the death of respondent-mother's daughter were not sufficient to permit the court to exercise jurisdiction over the respondent-mother's two teenaged sons, who did not live with the respondent-mother in the county with jurisdiction over the child protective proceedings following the death of the respondent-mother's daughter; in addition, no offense had been committed against the teenagers in the county with proper jurisdiction. *Id*. at 5. Further, jurisdiction was not proper under MCL 722.638, even though the statute "satisf[ied] the parental-conduct component of MCL 712A.2, it d[id] not indicate that the location of the life-threatening injury to one sibling[] overcomes the geographic component of the jurisdictional statute as it relates to other siblings." *Christie*, 339 Mich App at 7. That is, without satisfaction of the relevant jurisdictional factors in MCL 712A.2, an injury that occurs to one sibling in one county does not give the court in that county jurisdiction over siblings living in a different county. *Christie*, 339 Mich App at 6, 7.

### 1. Unborn Child

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

### 2. Prenatal Treatment

Since a mother's prenatal treatment is probative of how she will treat her child, the court may take jurisdiction over a newborn suffering from symptoms of narcotics withdrawal based on anticipatory neglect or abuse.[26] *In re Baby X*, 97 Mich App at 116. In *In re Baby X*, the court assumed jurisdiction after a newborn began to exhibit symptoms of drug withdrawal within 24 hours of birth. The Court of Appeals found that the

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

court could assume jurisdiction over the newborn. Specifically, the Court indicated that:

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

## C. Jurisdiction Over Child Once Allegations Adjudicated

Although "courts may assume jurisdiction over a child on the basis of the adjudication of one parent[,]" procedural "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights." *In re Sanders*, 495 Mich 394, 407, 412-413 n 8, 415, 422 (2014) (finding unconstitutional the one-parent doctrine, which permitted the court to "enter dispositional orders affecting parental rights of *both* parents" once "jurisdiction [was] established by adjudication of only *one* parent").[27] "[N]either the admissions made by [the adjudicated parent] nor [the unadjudicated parent's] failure to object to those admissions constituted an adjudication of [the unadjudicated parent's] fitness[.]" *In re SJ Temples*, unpublished per curiam opinion of the Court of Appeals, issued March 12, 2015 (Docket No. 323246)[28] (finding that the trial court violated the unadjudicated parent's "due process rights by subjecting him to dispositional orders without first adjudicating him as unfit[]").

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

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

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

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

The court does not obtain jurisdiction over a child under MCL 712A.2(b) unless a trial is held or the *respondent* tenders a valid plea to the allegations in a petition.[29] *In re SLH*, 277 Mich App 662, 671 (2008). In *In re SLH*, the petition alleged that the mother found the respondent sexually abusing one of their children and that the respondent admitted to her he was having sex with the child. At the pretrial hearing, the mother admitted to finding the respondent having sex with their child. *In re SLH*, *supra* at 664. Based on its conclusion that there was an implication that the mother failed to protect her children, the court accepted the mother's plea and exercised jurisdiction over the children. *Id.* at 665. At the subsequent dispositional hearing, the court terminated the respondent-father's parental rights. *Id.* at 667. The Court of Appeals set aside the order terminating the respondent-father's parental rights because the trial court never obtained jurisdiction over the children. *Id.* at 674. Because the petition did not allege any wrongdoing on the mother's part, the mother was not a respondent and could not enter a plea, and the court was without jurisdiction over the children or the respondent-father. *Id.* at 670-671.

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

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

adjudicative hearing on the petition. Because the petition contained no allegations against the mother, she could not "consent to the court's jurisdiction" over the children or plead to the allegations in the petition. *Id.* at 160-161.

Jurisdiction over a respondent may be determined at a jury trial. *In re Sluiter*, ___ Mich App ___, ___ (2024). In *Sluiter*, jurisdiction over respondent-father was determined at a jury trial, and respondent challenged on appeal the sufficiency of the evidence to support the jury's verdict. *Id*. at ___. The Court of Appeals rejected respondent's arguments attacking the credibility of the trial witnesses, holding that "[t]he fundamental flaw in respondent's arguments on appeal is that he focuses on what he believes the jury *should* have concluded rather than what the jury *could* have concluded. That is, respondent ignores the deference that courts give to the jury's role in determining what evidence to believe and what weight to give that evidence." *Id*. at ___. The Court affirmed the verdict in light of testimony "regarding respondent's abuse of respondent-mother" that showed "a home where domestic violence repeatedly occurr[ed, a home that was] not a fit environment in which to raise a child." *Id*. at ___, ___.

## 2. Procedural Due Process

"'Parents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process.'" *In re Sanders*, 495 Mich 394, 409 (2014),[30] quoting *In re JK*, 468 Mich 202, 210 (2003). However, "[a] parent's right to control the custody and care of [his or] her children is not absolute, as the state has a legitimate interest in protecting 'the moral, emotional, mental, and physical welfare of the minor[,]' and in some circumstances 'neglectful parents may be separated from their children.'" *In re Sanders*, 495 Mich at 409-410, quoting *Stanley v Illinois*, 405 US 645, 652 (1972).

"[D]ue process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship." *In re Sanders*, 495 Mich at 422. Accordingly, "all parents 'are constitutionally entitled to a hearing on their fitness before their children are removed from their custody.'"[31] *In re Sanders*, 495 Mich at 412, 422 (quoting *Stanley*, 405 US at 658, and concluding that the one-parent

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

doctrine[32] violated the nonadjudicated parent's constitutional due process rights "[b]ecause [it] allow[ed] the court to deprive a parent of th[e] fundamental right [to the care, custody and control of his or her children] without any finding that he or she [was] unfit").[33] "[N]either the admissions made by [the adjudicated parent] nor [the unadjudicated parent's] failure to object to those admissions constituted an adjudication of [the unadjudicated parent's] fitness[.]" *In re SJ Temples*, unpublished per curiam opinion of the Court of Appeals, issued March 12, 2015 (Docket No. 323246)[34] (finding that the trial court violated the unadjudicated parent's "due process rights by subjecting him to dispositional orders without first adjudicating him as unfit[]").

A parent's constitutional right to direct his or her child's care and custody before the parent is adjudicated is not without limit; "[w]hen a child has been placed into care by an unchallenged order of the court, the state has a legitimate and important interest in protecting the child's health and safety." *In re Dixon (On Reconsideration)*, 347 Mich App 337, 359 (2023). In *Dixon*, the trial court was permitted to continue the child's placement in foster care until the DHHS could properly investigate placement of the child with a nonrelative as proposed by the child's incarcerated father. *Dixon*, 347 Mich App at 360, 361. If "vindication of an unadjudicated parent's custodial right" would require the court to order a change in the child's custody and would terminate the state's custody of the child, the state's interest in protecting the child's health and safety permits it to continue the child's temporary placement with foster parents while an investigation takes place to determine whether the new placement is appropriate. *Id*. at 359.

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

[32] The one-parent doctrine permitted the court to "enter dispositional orders affecting parental rights of *both* parents" once "jurisdiction [was] established by adjudication of only *one* parent." *In re Sanders*, 495 Mich at 407. **Note:** The Supreme Court's conclusion that the one-parent doctrine violates a nonadjudicated parent's due process rights, *In re Sanders*, 495 Mich 394, 412, 422 (2014), applies retroactively "to all cases pending on direct appeal at the time [Sanders] was decided." *In re Kanjia*, 308 Mich App 660, 674 (2014).

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

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

## D. Termination of Jurisdiction

### 1. Child Reaches 18 Years of Age

The court's ability to take jurisdiction over a child terminates once the child reaches the age of 19. MCL 712A.5. However, if the court has exercised personal jurisdiction over a child pursuant to MCL 712A.2(b) prior to the child's 18th birthday, jurisdiction may continue until the child reaches age 20 unless the court terminates jurisdiction sooner. MCL 712A.2a(1).

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

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

"If the court has appointed a [juvenile] guardian under [MCL 712A.19a] or [MCL 712A.19c][35] for a youth age 16 or older, the court shall retain *jurisdiction of the youth* until the [DHHS] determines the youth's[36] eligibility to receive extended guardianship assistance under the young adult voluntary foster care act[ (YAVFCA)], . . . MCL 400.641 to [MCL] 400.671, that shall be completed within 120 days of the youth's eighteenth birthday. If the [DHHS] determines the youth will receive extended guardianship assistance, the court shall retain *jurisdiction of the youth* until that youth no longer receives guardianship assistance."[37] MCL 712A.2a(4) (emphasis added). But see MCL 712A.19a(12), MCL 712A.19c(9), and MCR 3.979(C)(1)(a), which require the court's *jurisdiction over*

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

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

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

*the child* pursuant to MCL 712A.2(b) to terminate once the juvenile guardian is appointed and a review hearing is conducted under MCL 712A.19.[38]

"Unless terminated by court order, the court's *jurisdiction over a juvenile guardianship* ordered under MCL 712A.19a or MCL 712A.19c for a youth 16 years of age or older shall continue until 120 days after the youth's eighteenth birthday." MCR 3.979(C)(1)(b) (emphasis added). If the DHHS provides the court with notice that it is extending guardianship assistance to a youth beyond the age of 18 under MCL 400.665 (YAVFCA), the court must "retain *jurisdiction over the guardianship* until that youth no longer receives extended guardianship assistance." MCR 3.979(C)(1)(b) (emphasis added). "Upon receipt of notice from the [DHHS] that it will not continue extended guardianship assistance, the court shall immediately terminate the juvenile guardianship." MCR 3.979(D)(1)(c).

## 2. Termination of Parental Rights

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

> **Note:** A commitment to the DHHS is irrevocable. *In re Keast*, 278 Mich App 415, 421-422 (2008). Furthermore, once committed to the MCI, the MCI Superintendent is responsible for decisions regarding the child's placement and care.[39] *In re Keast*, *supra* at 423. See the SCAO Publication, *Conducting Effective Post-Termination Review Hearings*, F(b), at https://www.courts.michigan.gov/4a4b0c/siteassets/educational-materials/cws/supplemental-handouts/cws-conductingeffectiveposterminationreviewhearings2008.pdf.

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

[38] See Section 4.9 for a discussion of juvenile guardianship appointments, Section 14.4(I) for additional information on the extension of guardianship assistance under MCL 400.665, and Section 16.9 for a discussion of the Young Adult Voluntary Foster Care Act (YAVFCA).

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

> (1) the rights of the entity with legal custody are terminated and the child is placed for adoption;[40] or
>
> (2) a juvenile guardian is appointed after a post-termination review hearing is held.[41] MCR 3.978(D)(1)-(2).

See also MCL 712A.19c(9), which requires the court's *jurisdiction over the child* pursuant to MCL 712A.2(b) to terminate after a guardian is appointed and a review hearing is held under MCL 712A.19. But see MCL 712A.2a(4), which requires the court to retain its *jurisdiction over a youth 16 years of age or older* who was appointed a juvenile guardian under MCL 712A.19a or MCL 712A.19c[42] until the DHHS determines whether the youth[43] is eligible to receive extended guardianship assistance under MCL 400.641 (Young Adult Voluntary Foster Care Act (YAVFCA)).[44] If the DHHS determines the youth is eligible for extended guardianship assistance under the YAVFCA, the court must retain jurisdiction until the youth no longer receives the guardianship assistance.[45] MCL 712A.2a(4).

If a juvenile guardian is appointed, the court's *jurisdiction over the juvenile guardianship* continues until released by court order. MCL 712A.19a(13); MCL 712A.19c(10); MCR 3.979(C)(1)(a). "Unless terminated by court order, the court's jurisdiction over [the] juvenile guardianship ordered under MCL 712A.19a or MCL 712A.19c for a youth 16 years of age or older shall continue until 120 days after the youth's eighteenth birthday." MCR 3.979(C)(1)(b). If the DHHS provides the court with notice that it is extending guardianship assistance to a youth beyond the age of 18 under MCL 400.665 (Young Adult Voluntary Foster Care Act), the court must "retain jurisdiction over the guardianship until that youth no longer receives

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

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

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

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

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

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

extended guardianship assistance."[46] MCR 3.979(C)(1)(b). "Upon receipt of notice from the [DHHS] that it will not continue extended guardianship assistance, the court shall immediately terminate the juvenile guardianship." MCR 3.979(D)(1)(c).

### 3. Parental Deportation

A court should not continue its jurisdiction over a child after his or her parents are deported if doing so would constitute an improper *de facto* termination of parental rights. *In re B & J*, 279 Mich App 12, 22-24 (2008). In *In re B & J*, after the respondents were involuntarily deported and separated from their children, the trial court, because it retained jurisdiction over the children after the deportation, terminated the respondents' parental rights based on the respondents' failure to provide proper care or custody of the children. The result of the trial court's continued jurisdiction was an improper *de facto* termination of respondents' parental rights based only on the preponderance of the evidence necessary to support the court's continued jurisdiction. Accordingly, the Court of Appeals held:

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

[46] See Section 4.9 for additional information on the court's jurisdiction following appointment of a juvenile guardian, and Section 14.4(I) for additional information on extension of guardianship assistance under MCL 400.665.

## E. Challenging a Court's Exercise of Jurisdiction

### 1. Direct Appeal

"[T]he collateral bar rule generally prohibits a litigant from indirectly attacking a prior judgment in a later, *separate* action, unless the court that issued the prior judgment lacked jurisdiction over the person or subject matter in the first instance. Instead, the litigant must seek relief by reconsideration of the judgment from the issuing court or by direct appeal. . . . [However,] a child protective proceeding is a single continuous proceeding that begins with a petition, proceeds to an adjudication, and—unless the family has been reunified—ends with a determination of whether a respondent's parental rights will be terminated" and "an appeal of an adjudication error in an appeal from an order terminating parental rights is not a collateral attack. The collateral-bar rule does not apply within one child protective case, barring some issues from review." *In re Ferranti*, 504 Mich 1, 19 n 8, 23, 35 (2019) (citations and quotation marks omitted). According to the *Ferranti* Court, *In re Hatcher*, 443 Mich 426 (1993) "made a foundational mistake; it erroneously applied the rule from *Jackson City Bank & Trust Co v Frederick*, 271 Mich 538 (1935)—that a court's exercise of jurisdiction cannot be collaterally attacked in a second proceeding—to what is a single, continual proceeding." *Ferranti*, 504 Mich at 22. "*Hatcher* was *not* a collateral attack. It was a direct appeal of an (unpreserved) adjudicative error."[47] *Ferranti*, 504 Mich at 20 n 8. "[I]ssue preservation dictates the appellate standard of review; it does not transform direct review into collateral attack." *Id*. at 25.

"If termination [of a parent's parental rights] occurs at the initial disposition as a result of a request for termination contained in the original, or amended, petition for jurisdiction, then an attack on the adjudication is direct and not collateral, as long as the appeal is from an initial order of disposition containing both a finding that an adjudication was held and a finding that the children came within the jurisdiction of the court.' *In re SLH*, 277 Mich App 662, 668-669 (2008).

[47] "This Court's decision in *In re Hatcher*, 443 Mich 426 (1993), generally bar[ring] a parent from raising errors from the adjudicative phase of a child protective proceeding in the parent's appeal from an order terminating his or her parental rights," and prohibiting "a posttermination appeal of a defect in the adjudicative phase . . . because it is a collateral attack . . . was wrongly decided, and we overrule it." *Ferranti*, 504 Mich at 8.

"[A] *Sanders*[48] challenge, raised for the first time on direct appeal from an order of termination, does not constitute a collateral attack on jurisdiction, but rather a direct attack on the trial court's exercise of its dispositional authority." *In re Kanjia*, 308 Mich App 660, 669 (2014). In *Kanjia*, after the trial court found grounds for jurisdiction over the child on the basis of only the mother's plea, the respondent-father was ordered to "comply with a parent-agency treatment plan[,]" and his parental rights were later terminated. *Id*. at 667. On appeal, the respondent-father argued that his due process rights were violated when his parental rights were terminated after never being adjudicated as unfit. *Id*. at 670. The Court of Appeals concluded that the respondent-father was "entitled to raise his *Sanders* challenge on direct appeal from the trial court's order of termination, notwithstanding the fact that he never appealed the initial order of adjudication." *Id*. at 670-671 (noting that under the facts of this case, "it would have been exceedingly difficult, if not effectively impossible, for [the] respondent[-father] to have challenged the trial court's exercise of jurisdiction in a direct appeal from the order of adjudication" where he was never adjudicated, was not named as a respondent in the adjudication order, and he did not have an attorney at the time the trial court entered the order). See also *In re Collier*, 314 Mich App 558, 574-576 (2016) ("[the] respondent's challenge to [his] adjudication was [not] an impermissible collateral attack" even though his appeal was not filed until after his parental rights were terminated; "[the] respondent never effectively received an adjudication regarding his fitness as a parent," and he was therefore "'entitled to raise his . . . challenge on direct appeal from the trial court's order of termination, notwithstanding the fact that he never appealed the initial order of adjudication'"), quoting *Kanjia*, 308 Mich App at 671.

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

[48] In *In re Sanders*, 495 Mich 394, 408, 412, 422 (2014), the Supreme Court concluded that the one-parent doctrine, which allowed a trial court to establish jurisdiction over a child, and then subject both parents to its dispositional authority, after it adjudicated only one parent, violated the nonadjudicated parent's due process rights. A parent's constitutional right to direct his or her child's care and custody before the parent is adjudicated is not without limit; "[w]hen a child has been placed into care by an unchallenged order of the court, the state has a legitimate and important interest in protecting the child's health and safety." *In re Dixon (On Reconsideration)*, 347 Mich App 337, 359 (2023). In *Dixon*, the trial court was permitted to continue the child's placement in foster care until the DHHS could properly investigate placement of the child with a nonrelative as proposed by the child's incarcerated father. *Dixon*, 347 Mich App at 360, 361. If "vindication of an unadjudicated parent's custodial right" would require the court to order a change in the child's custody and would terminate the state's custody of the child, the state's interest in protecting the child's health and safety permits it to continue the child's temporary placement with foster parents while an investigation takes place to determine whether the new placement is appropriate. *Id*. at 359.

### 2. Wrongful Assumption of Jurisdiction

Where the trial court fails to "'properly assume[] jurisdiction, all orders based on the wrongful assumption of jurisdiction are void ab initio.'" *In re Long*, 326 Mich App 455, 465 (2018) ("Because the trial court erred by exercising jurisdiction under MCL 712A.2(b)(2) and [MCL 712A.2(b)(6)], we reverse the trial court's order terminating respondent-father's parental rights."), quoting *Ryan v Ryan*, 260 Mich App 315, 343 (2004).

## 4.4 Concurrent Jurisdiction

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

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

If a petition is filed in the Family Division alleging that the court has jurisdiction over the child under MCL 712A.2(b) and the custody of the child is subject to the prior or continuing order of another court of record of this state, the manner of the required notice and the authority of the Family Division to proceed are governed by MCR 3.205. MCL 712A.2(b); MCR 3.205.[49] MCR 3.205(A) provides:

> "If an order or judgment has provided for continuing jurisdiction of a minor and proceedings are commenced in another Michigan court having separate jurisdictional grounds for an action affecting that minor, a waiver or transfer of jurisdiction is not required for the full and valid exercise of jurisdiction by the subsequent court."

Thus, "the question . . . is whether the child custody issues raised in the [subsequent court case] arose under 'separate jurisdictional grounds' from the child-custody issues that were already pending in the [prior] case." *Mol v Mol*, ___ Mich App ___, ___ (2024). "[W]here two courts' jurisdictional bases are the same, the subsequent court's jurisdictional authority is circumscribed, unless there is a waiver or transfer of jurisdiction of child-custody issues." *Id*. at ___.

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

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

> "There is no authority to preclude a circuit judge from determining custody pursuant to the CCA ancillary to making determinations under the juvenile code. . . . To the contrary, the RJA [(Revised Judicature Act)], as amended by 1996 PA 388, specifically permits a judge presiding over a juvenile matter to consider related actions under the CCA.
>
> * * *
>
> If a court presiding over a juvenile proceeding finds itself in a position in which the matter before it has been consolidated with a related custody matter, it must make clear that it is exercising jurisdiction pursuant to [MCL 600.1021(3)]." *In re AP*, 283 Mich App at 598-599, 607.

## A. Waiver of Jurisdiction in Divorce Proceedings

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

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

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

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

court may conduct a preliminary inquiry to determine an appropriate course of action).

However, the subsequent court is not required to obtain a waiver of jurisdiction by the prior court in order to exercise its own jurisdiction where the subsequent court is statutorily granted jurisdiction. *Krajewski v Krajewski*, 420 Mich 729, 734 (1984); MCR 3.205(A). In *Krajewski*, even though the Circuit Court retained continuing jurisdiction over the child upon entry of a custody order in connection with the child's parents' divorce decree, the Probate Court would properly exercise its jurisdiction without obtaining a waiver from the Circuit Court because a petition filed under MCL 712A.2(b) alleged neglect and sought termination of parental rights. *Krajewski*, *supra* at 734.

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

See also *Mol v Mol*, ___ Mich App ___ (2024). In *Mol*, plaintiff filed for separate maintenance and custody of the parties' children in the Ottawa circuit court ("Ottawa court"), there was a trial, and Ottawa court entered a judgment of separate maintenance that resolved custody, parenting time, and child support. *Id*. at ___. Plaintiff moved to Kent County, and defendant filed for divorce in the Kent circuit court ("Kent court") and asked Kent court to take jurisdiction over the parties' child-custody issues. *Id*. at ___. The Kent court could not properly exercise jurisdiction over the parties' child-custody issues because Ottawa court's and Kent court's jurisdiction over child-custody issues arose from the same jurisdictional ground—MCL 552.16(1). When two courts' jurisdiction over a matter arises from the same jurisdictional ground, MCR 3.205(A) requires a waiver or transfer of jurisdiction by the prior court to the subsequent court before the subsequent court may exercise its plenary jurisdiction. *Id*. at ___.

## B. Notice to the Other Court

A party that initiates a subsequent proceeding involving the same minor must send notice of the proceeding to the court clerk or register of the prior court, and the appropriate official.[50] MCR 3.205(B)(2)(a)-(b).[51]

[50] Although MCR 3.205(B) states that the plaintiff or other initiating party must send the required notice, as a practical matter, the deputy register often sends the notice. See SCAO form MC 28, *Notice to Prior Court of Proceedings Affecting Minor(s)*, which requires the signature of the court clerk, register, or deputy register.

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

The notice must be 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.* However, the notice requirement is not jurisdictional and therefore, does not prevent the subsequent court from entering interim orders that are in the child's best interests before the 21-day period expires. MCR 3.205(B)(4). See also *Krajewski*, 420 Mich at 734 (subsequent court may enter temporary or permanent orders).

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

## C. Prior and Subsequent Orders

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

However, a subsequent court must give due consideration to a prior court's order, and may not enter any orders that are contrary to or inconsistent with a prior court's order unless permitted to do so by law. MCR 3.205(C)(2). Where a juvenile court assumes jurisdiction over a child and the child becomes a court ward under the juvenile code, the juvenile court's orders supersede all previous custody orders, even if inconsistent or contradictory, while the juvenile matter is pending. *In re AP*, 283 Mich App 574, 594 (2009). Specifically,

> "[U]pon entry of a child custody order under the CCA, a child's parents, or other custodians, must abide by the terms of the custody order. However, once a juvenile court assumes jurisdiction over a child and the child becomes a ward of the court under the juvenile code, the juvenile court's orders supersede all previous orders, including custody orders entered by another court, even if inconsistent or contradictory. In other words, the previous custody orders affecting the minor become

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

> dormant, in a metaphoric sense, during the pendency of the juvenile proceedings, but when the juvenile court dismisses its jurisdiction over the child, all those previous custody orders continue to remain in full force and effect. . . . [T]he juvenile court's orders function to supersede, rather than modify or terminate, the custody orders while the juvenile matter is pending because the juvenile orders are entered pursuant to a distinct statutory scheme that takes precedence over the CCA. We note that during the duration of the juvenile proceedings, while the parties subject to the custody order can move to modify the custody order, any modification would remain superseded by the juvenile court's orders." *In re AP*, 283 Mich App at 593-594 (internal citations omitted).

When a subsequent court enters an order, the subsequent court must file notice of the order with the prior court. MCL 712A.3a. A copy of the notice must also be served, personally or by registered mail, to the minor child's parents, guardian, or persons *in loco parentis*, and the prosecuting attorney. *Id.*

> **Note:** The notices must not disclose the allegations or findings of facts set forth in the petitions or orders, or reveal any individual's or organization's name. MCL 712A.3a. However, at the prosecuting attorney's request, or by court order, the confidential information may be disclosed directly to the prosecuting attorney. *Id.*

## D. Duties of Prior and Subsequent Courts

Once a prior court receives notice of subsequent proceedings, the appropriate official must provide the subsequent court with copies of all relevant records, reports, and orders that remain in effect. MCR 3.205(D)(1)(a). The appropriate official from the prior court may also appear in person at subsequent proceedings when the welfare of the minor and the interests of justice require. MCR 3.205(D)(1)(b).

At the prior court's request, the subsequent court must notify the prior court of all subsequent proceedings, and the subsequent court must send copies to the prior court of all subsequent orders entered. MCR 3.205(D)(2). Upon receipt of an order from the subsequent court, the appropriate official of the prior court must take necessary steps to implement the order in the prior court. MCR 3.205(D)(4).

## 4.5 Interstate Cases

This section provides general guidance as to when a Michigan court may exercise jurisdiction in a child protective proceeding under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*.

The UCCJEA prescribes the court's powers and duties in a child-custody proceeding that involves this state and a proceeding or party outside of this state.[52] The UCCJEA does not apply to proceedings involving adoption or the authorization of emergency medical care for a child. MCL 722.1103.[53]

> **Note:** The UCCJEA contains provisions regarding filing and registering a state's custody decrees, judgments, and orders; communication between courts of different states; petition requirements; notice and service of process; evidence; and enforcement of another state's decree, judgment, or order.

Subchapter 3.200 of the Michigan Court Rules, which governs domestic relations actions, applies to actions for custody or parenting time under the UCCJEA; the subchapter also applies to an expedited proceeding to register a foreign judgment or order under the UCCJEA, and to any ancillary or subsequent proceedings related to custody, parenting time, or support. MCR 3.201(A).

The UCCJEA defines a *child custody proceeding* as "a proceeding in which legal custody, physical custody, or parenting time with respect to a child is an issue." MCL 722.1102(d). Child custody proceedings include cases involving:

(1) divorce, separate maintenance, and separation;

(2) neglect, abuse, and dependency;

(3) guardianship matters;

(4) paternity and termination of parental rights; and

(5) protection from domestic violence. MCL 722.1102(d).

An interstate proceeding involving an Indian child is governed by the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA). MCL 722.1104(1). See Chapter 19. However,

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[52] In 2002, the Michigan Legislature adopted the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*., and repealed the Uniform Child Custody Jurisdiction Act, MCL 600.651 *et seq*. MCL 722.1406(1). The UCCJEA took effect April 1, 2002. MCL 722.1406(2).

[53] See Section 3.3 for a detailed discussion of ordering emergency medical treatment for a child.

Indian tribes of other states are treated as states for purposes of the UCCJEA. MCL 722.1104(2). An Indian tribe's custody determination must be recognized and enforced under the UCCJEA if it was made in substantial conformity with the UCCJEA. MCL 722.1104(3).

> **Note:** Subject to its provisions, MCR 2.615 recognizes tribal court judgments as having the same effect as other judicial acts in any other Michigan court. MCR 2.615(A). However, MCR 2.615(D) provides that "[MCR 2.615] does not apply to judgments or orders that federal law requires be given full faith and credit." MCR 2.615(D).

For purposes of child protective proceedings, a Michigan court may exercise temporary emergency jurisdiction over a child. A Michigan court obtains temporary emergency jurisdiction when the child is present in this state and:

> (1) The child has been abandoned; or
>
> (2) The child, the child's sibling, or the child's parent is being mistreated or abused or being threatened with mistreatment or abuse. MCL 722.1204(1).

MCL 722.1204(1) "requires that a child be 'present in this state' for it to apply." *Ramamoorthi v Ramamoorthi*, 323 Mich App 324, 336 (2018) (because the children were not present in Michigan at the time the custody dispute commenced, MCL 722.1204(1) was not applicable).

A Michigan court may issue an order to take a child into custody if it appears likely that a child will suffer imminent physical harm or will be removed from the state. MCL 722.1310(1). If a proceeding has been commenced in or a custody determination has been made by another state's court, a Michigan court's order must specify a time period during which it will remain in effect. MCL 722.1204(3). The time period must be adequate to allow a person to seek an order from the other state's court. *Id*. In such circumstances, the Michigan court must immediately communicate with a court in the other state in order to "resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order." MCL 722.1204(4).

A Michigan court must engage in this communication with the other involved state's court before the Michigan court may decline to exercise jurisdiction over the child. *In re J Thornhill*, 512 Mich 889 (2023). Without having communicated with another state involved with a child's custody before deciding against exercising temporary emergency jurisdiction, "the court lacked sufficient knowledge to make a meaningful determination as to whether to exercise emergency jurisdiction in light of the abuse in Michigan." *Id*. Specifically, the Michigan court "did not know whether the emergency was over or ongoing [and it] did not

know . . . whether [the other state's] courts intend[ed] to exercise jurisdiction over the minor child in light of the abuse in Michigan or whether they believe[d] that Michigan [was] the more appropriate forum for any proceedings." *Id*.

If there is no previous child custody determination or no commencement of a child custody proceeding, entry of a court's order during the temporary emergency will remain in effect until entry of an order by another court having jurisdiction. MCL 722.1204(2). If a child-custody proceeding has not been, and is not, commenced in another state's court with jurisdiction over the matter, the determination made by the Michigan court during the temporary emergency becomes the final child-custody determination, if the Michigan court intends its determination to be final and Michigan becomes the child's home state. *Id.*

## 4.6 Jurisdiction Following Appointment of Guardian

The Probate Court has jurisdiction over guardianship proceedings, and may appoint a full or limited guardian for a child.[54] MCL 600.841(1)(a); MCL 700.1302(c); MCL 700.5204(2); MCL 700.5205(1). The Probate Court also has the authority to order a court-structured placement plan when conditions identified after a guardianship review hearing must be resolved, or, where a limited guardian is appointed, the court must approve, disapprove, or modify a limited guardianship placement plan developed by the parent(s) and proposed limited guardian. See MCL 700.5205(2); MCL 700.5206(1); MCL 700.5207(3)(b).

Once a guardian is appointed, the Family Division of the Circuit Court has ancillary jurisdiction of guardianship proceedings under Article 5 of the Estates and Protected Individuals Code (EPIC),[55] MCL 700.5101 *et seq.* MCL 600.1021(2)(a). The three statutory grounds authorizing the Family Division of the Circuit Court to exercise ancillary jurisdiction over a child arise when:[56]

> (1) A parent has substantially failed, without good cause, to comply with a limited guardianship placement plan

[54] The Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA) apply to guardianships involving Indian children. See Chapter 19.

[55] A court-ordered guardianship is not required for a child to be in the proper custody of a person other than a parent. See Section 4.3(A) for a discussion of the Family Division of the Circuit Court taking jurisdiction over children who are without proper custody or guardianship.

[56] "[A] putative father does not qualify as a father or parent for the purposes of exercising jurisdiction in child protective proceedings." *In re Long*, 326 Mich App 455, 465 (2018). See also *In re C S Alexander*, ___ Mich App ___, ___ (2025) (holding that the trial court improperly exercised jurisdiction over the child as to respondent-father because respondent-father was only the putative father when the petition was filed).

described in MCL 700.5205 regarding the child. MCL 712A.2(b)(4);

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

(3) A child has a guardian and the child's parent:

(a) having the ability to support or assist in supporting the child,

(*i*) has failed or neglected, without good cause, to provide regular and substantial support for the child for two or more years before the filing of the petition; or

(*ii*) if a support order has been entered, has failed to substantially comply with the order for two or more years before the filing of the petition; and

(b) having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected, without good cause, to do so for two or more years before the filing of the petition.[57] MCL 712A.2(b)(6).

**Note:** For purposes of MCL 712A.2(b)(6), *neglect* means "harm to a child's health or welfare by a person responsible for the child's health or welfare that occurs through negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care, though financially able to do so, or the failure to seek financial or other reasonable means to provide adequate food, clothing, shelter, or medical care." MCL 712A.2(b)(6)(A)-(B); MCL 722.602(1)(c).

[57] "MCL 712A.2 'speaks in the present tense, and, therefore, the trial court must examine the child's situation at the time the petition was filed.'" *In re Long*, 326 Mich App at 459. "[B]ecause the trial court [was] required to 'examine the child's situation at the time the petition was filed,' respondent-father's status as a putative father on the date the petition was filed means that he d[id] not qualify as a 'parent' under MCL 712A.2(b)(6). Therefore, respondent-father's actions in the two years or more preceding the filing of the petition [were] immaterial." *In re Long*, 326 Mich App at 459, 464, quoting *In re MU*, 264 Mich App 270, 279 (2004). "Regardless of any moral obligation, as a putative father, respondent-father had no legal obligation to [the child]. We therefore conclude that to rely on a putative father's action or inaction in the two years preceding the filing of a petition when considering whether to exercise jurisdiction under MCL 712A.2(b)(6) is violative of due process." *In re Long*, 326 Mich App at 464-465. See also *In re C S Alexander*, ___ Mich App ___, ___ (2025) (holding that the trial court improperly exercised jurisdiction over the child as to respondent-father because respondent-father was only the putative father when the petition was filed).

> "[T]here must be a showing of harm in order for a court to assume jurisdiction over a juvenile under the 'neglects' clause of MCL 712A.2(b)(1)." *In re Smith*, 507 Mich 905 (2021)[58] (determining that where a child "was performing at grade level," a teacher's testimony "that she feared [the minor] would not be able to maintain his academic level in the future" was only speculative and did not constitute a preponderance of evidence showing that the minor suffered any harm as a result of his absences from school).

## A. Limited Guardianship Placement Plans

A limited guardianship placement plan is a consensual arrangement that is agreed to by the custodial parent, the proposed limited guardian, and the judge of the Probate Court who is assigned to the case. MCL 700.5205(1)-(2); MCL 700.5206(1). Once appointed, the limited guardian has the same powers and duties as a full guardian with the exception of the ability to consent to a child's adoption or release for adoption. MCL 700.5206(4).

A limited guardianship is initiated by a custodial parent,[59] and the custodial parent may petition the court for termination of the guardianship at any time.[60] MCL 700.5205(1); MCL 700.5206(3); MCL 700.5208(1). After notice and hearing on the custodial parent's petition for termination, the court must terminate the guardianship if it finds that the custodial parent has substantially complied with the limited guardianship placement plan.[61] MCL 700.5209(1). However, if the custodial parent substantially fails, without good cause, to comply with the limited guardianship plan, the Family Court may assume jurisdiction over the child in a child protective proceeding.[62] MCL 712A.2(b)(4).

> **Note:** The limited guardianship placement plan form must contain a notice that informs the parent that substantial failure to comply with the plan without

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[58] This case was decided under MCL 712A.2(b)(1), which defines *neglect* to mean that term as defined in MCL 722.602(1)(c) (MCL 722.602(1)(d) was relettered to MCL 722.602(1)(c) by 2026 PA 60, effective July 23, 2026). MCL 712A.2(b)(6), the provision discussed here, also defines *neglect* to mean that term as defined in MCL 722.602(1)(c).

[59] See SCAO form *Petition for Appointment of Limited Guardian of Minor*.

[60] See SCAO form *Petition to Terminate/Modify Guardianship*.

[61] "The court may enter orders to facilitate the minor's reintegration into the home of the parent or parents for a period of up to 6 months before the termination." MCL 700.5209.

[62] See SCAO form *Order Following Hearing to Terminate Minor Guardianship*.

> good cause may result in termination of the parent's parental rights. MCL 700.5205(2).

Specifically, the limited guardianship placement plan[63] must include all of the following:

> (1) Why the parent is requesting the court to appoint a limited guardian for the child;
>
> (2) When and how the parent intends to sufficiently maintain the parent-child relationship;
>
> (3) The length of the limited guardianship;
>
> (4) Financial support for the child; and
>
> (5) Any other provisions agreed upon by the parties for inclusion in the plan. MCL 700.5205(2)(a)-(e); MCR 5.404(E)(1).

The limited guardianship placement plan may also include a schedule of services the parent, child, or guardian should follow and any other additional provisions the court deems necessary. MCR 5.404(E)(2).

A limited guardianship placement plan may be modified under MCR 5.404(E)(3)(a)-(d), which provides:

> "(a) The parties to a limited guardianship placement plan may file a proposed modification of the plan without filing a petition. The proposed modification shall be substantially in the form approved by the state court administrator.
>
> (b) The court shall examine the proposed modified plan and take further action under subrules (c) and (d) within 14 days after the filing of the proposed modified plan.
>
> (c) If the court approves the proposed modified plan, the court shall endorse the modified plan and notify the interested persons of its approval.
>
> (d) If the court does not approve the modification, the court either shall set the proposed modification plan for a hearing or notify the parties of the objection of the court and that they may schedule a hearing or submit another proposed modified plan."

[63] See SCAO form *Limited Guardianship Placement Plan*.

## B. Full Guardianship Placement Plans

A child 14 years of age or older or a person interested in the child's welfare may file a petition requesting appointment of a full guardianship over the child.[64] MCL 700.5204(1); MCR 5.402(B). The court may order the DHHS or a court employee to conduct an investigation of the proposed guardianship and file a written report on the investigation.[65] MCL 700.5204(1).

The probate court may appoint a full guardian for a minor if the court finds at least one of the following:

- The parental rights of both parents or the surviving parent are terminated or suspended by:
  - a prior court order;
  - a judgment of divorce or separate maintenance;
  - a parent's death;
  - a judicial determination of mental incompetency;
  - a parent's disappearance; or
  - a parent's confinement in a place of detention.
- The parent permits the child to reside with another person without providing that person with legal authority over the child's care and maintenance, and the child is not residing with his or her parent at the time the petition is filed.
- The child's biological parents never married, the parent with custodial rights over the child dies or is missing, the other parent does not have court-ordered legal custody, and the petition requests a relative "within the fifth degree by marriage, blood, or adoption" be appointed as the child's guardian. MCL 700.5204(2)(a)-(c).

A parent's constitutional right to the care, custody, and maintenance of his or her child applies in the guardianship context. *In re Versalle Guardianship*, 334 Mich App 173, 179 (2020). With respect to MCL 700.5204(2)(b), the statute implicitly protects this constitutional right if the parent "adequately provides for the child, i.e., is a fit parent." *Versalle*, 334 Mich App at 183. Accordingly, "the statute implicitly affords a parent the constitutional presumption that he or she is a fit

[64] See SCAO form *Petition for Appointment of Guardian of Minor*.

[65] See SCAO form *Order Appointing Person to Review / Investigate Guardianship*.

parent, while also providing a potential guardian the opportunity to rebut that presumption" (finding that granting petition for guardianship of respondent's children did *not* violate his constitutional right because he had stopped providing his children with adequate care when he left the children with petitioner without providing petitioner with legal authority to care for them). *Id*. at 186-187.

### C. Court-Structured Guardianship Placement Plans

The court-structured placement plan must include at least all of the following:[66]

> "(a) visitation and contact with the minor by the parent or parents sufficient to maintain a parent and child relationship;
>
> (b) the duration of the guardianship; [and]
>
> (c) financial support for the minor . . . ." MCR 5.404(E)(1)(a)-(c).

The court-structured placement plan may also include a schedule of services the parent, child, or guardian should follow and any other additional provisions the court deems necessary. MCR 5.404(E)(2).

> **Note:** Although it is not specifically required by statute, the court-structured plan should contain a notice to the parents that failure to comply with the plan may result in the termination of their parental rights.

## 4.7 Review Hearings For Limited Guardianship and Court-Structured Guardianship Placement Plans

Once the Probate Court grants a petition for a full or limited guardianship, it may review the guardianship at any time it deems necessary. MCL 700.5207(1). However, if the child is under the age of six, the court must review the guardianship annually. *Id.*

### A. Guardianship Review

The court itself may conduct the review or it may order the DHHS or a court employee or agent to conduct an investigation of the guardianship and provide the court with a written report of the

[66] Court-structured placement plans share some requirements with limited guardianship placement plans.

factors that must be considered in conducting the review. MCL 700.5207(1)-(2).

The following factors must be considered when reviewing a guardianship:

> "(a) The parent's and guardian's compliance with either of the following, as applicable:
>
> > (*i*) A limited guardianship placement plan.
> >
> > (*ii*) A court-structured plan under [MCL 700.5207(3)(b)(*ii*)(B)] or [MCL 700.5209(2)(b)(*ii*)].
>
> (b) Whether the guardian has adequately provided for the minor's welfare.
>
> (c) The necessity of continuing the guardianship.
>
> (d) The guardian's willingness and ability to continue to provide for the minor's welfare.
>
> (e) The effect upon the minor's welfare if the guardianship is continued.
>
> (f) Any other factor that the court considers relevant to the minor's welfare." MCL 700.5207(1)(a)-(f).

## B. Completion of Guardianship Review

After the guardianship review is completed, the court may take either of the following actions:

> (a) Continue the guardianship.
>
> (b) Schedule and conduct a hearing on the guardianship's status and do any of the following:
>
> > (*i*) If the guardianship is a limited guardianship, do either of the following:
> >
> > > (A) Continue the limited guardianship.
> > >
> > > (B) Order the parties to modify the limited guardianship placement plan as a condition to continuing the limited guardianship.
> >
> > (*ii*) If the guardianship was established under [MCL 700.5204],[67] do either of the following:
> >
> > > (A) Continue the guardianship.

(B) Order the parties to follow a court-structured plan designed to resolve the conditions identified at the review hearing.

(*iii*) Take an action described in [MCL 700.5209(2)].[68] MCL 700.5207(3)(a)-(b).

## 4.8 Termination of Guardianships Involving Limited Guardianship and Court-Structured Guardianship Placement Plans

When a child has lived with the guardian for at least one year and a petition is filed in the Probate Court to terminate a full or limited guardianship because of a parent's failure to comply with a placement plan, the Probate Court may appoint an attorney to represent the minor child or refer the matter to the DHHS. MCL 700.5209(2)(c)-(d). Following the appointment or referral, the attorney or the DHHS may file a petition seeking Family Court jurisdiction under MCL 712A.2(b). MCL 700.5209(2)(d). The attorney or the DHHS must report to the Probate Court, within 21 days of the attorney's appointment or the DHHS referral, whether a petition seeking Family Court jurisdiction was filed. MCR 5.404(H)(3).

Once the attorney or the DHHS files a petition with the Family Court and the Family Court authorizes the petition under MCL 712A.11, the guardianship is terminated. MCR 5.404(H)(3)(b). However, the Family Court may continue the guardianship if it deems the guardianship necessary for the child's well-being. *Id.*

> **Note:** If the attorney or the DHHS does not file a petition seeking Family Court jurisdiction, the Probate Court must take such further action as is necessary. MCR 5.404(H)(3)(a). However, the guardianship cannot continue for more than one year after the hearing on the petition to terminate. *Id.*

### A. Failure to Comply With Placement Plan

The Family Division has jurisdiction over a child protective proceeding when a parent substantially fails, without good cause, to comply with a court-structured plan. MCL 712A.2(b)(5).

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[67] MCL 700.5204 permits a person interested in the child's welfare or the child, if 14 years of age or older, to petition for a court-appointed guardian.

[68] MCL 700.5209(2) specifies conditions under which the guardianship may be terminated and the child may be reintegrated into his or her home.

A parent must comply with a placement plan even if the neglect petition is dismissed due to a child's placement with a guardian, and failure to comply with the placement plan will provide a court with jurisdiction under MCL 712A.2(b)(5).[69] *In re BZ*, 264 Mich App 286, 295-296 (2004). In *In re BZ*, the respondent-mother argued on appeal that no grounds for jurisdiction existed because the neglect petitions regarding the two children had been dismissed after the guardianships were established, and placement with the guardians meant that the children were not without proper custody or guardianship under MCL 712A.2(b)(1)(C).[70] In rejecting this argument, the Court of Appeals indicated that although the original neglect petition was dismissed, the respondent-mother was still subject to the requirements of the placement plan, and her failure to substantially comply with those requirements provided the court with jurisdiction under MCL 712A.2(b)(5). *In re BZ*, 264 Mich App at 294-295.

## B. Failure to Support or Communicate With Child Who Has Guardian

The Family Division may assume jurisdiction over a child protective proceeding if a child has a guardian and there is no placement plan in place, if the child's parent:

> (1) having the ability to support or assist in supporting the child,
>
> > (a) has failed or neglected, without good cause, to provide regular and substantial support for the child for two or more years before the filing of the petition; or
> >
> > (b) if a support order has been entered, has failed to substantially comply with the order for two or more years before the filing of the petition; and
>
> (2) having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected, without good cause, to do so for two or more years before the filing of the petition.[71] MCL 712A.2(b)(6).

For purposes of MCL 712A.2(b)(6), *neglect* means "harm to a child's health or welfare by a person responsible for the child's health or welfare that occurs through negligent treatment, including the

[69] Formerly MCL 712A.2(b)(4).

[70] See Section 4.3(A).

failure to provide adequate food, clothing, shelter, or medical care, though financially able to do so, or the failure to seek financial or other reasonable means to provide adequate food, clothing, shelter, or medical care." MCL 712A.2(b)(6)(A)-(B); MCL 722.602(1)(c).

## 4.9 Jurisdiction Following Appointment of Juvenile Guardian

The court may appoint a juvenile guardian if it determines at a post-termination review hearing or a permanency planning hearing that it is in the child's best interests.[72] MCR 3.979(A). During the process of appointing a juvenile guardian, the court must order the DHHS to:

> (1) submit to the court within seven days a criminal record check and a central registry clearance of the residents in the home; and
>
> (2) perform a home study and submit it to the court within 28 days or submit a copy of a home study conducted within the last 365 days. MCR 3.979(A)(1).
>
> > **Note:** If the child is in foster care, the court must continue the foster care placement. MCR 3.979(A)(2).

If the court finds it to be in the child's best interests, the court may appoint a juvenile guardian once the DHHS submits results from the criminal record check, the central registry clearance, and the home study.[73] MCR 3.979(B). If the proposed guardian is seeking guardianship assistance payments, the assistance agreement must be approved and signed before the order of guardianship is entered.[74] See the DHHS's

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[71] "[A] putative father does not qualify as a father or parent for the purposes of exercising jurisdiction in child protective proceedings." *In re Long*, 326 Mich App 455, 459 (2018). "[B]ecause the trial court [was] required to 'examine the child's situation at the time the petition was filed,' respondent-father's status as a putative father on the date the petition was filed means that he d[id] not qualify as a 'parent' under MCL 712A.2(b)(6). Therefore, respondent-father's actions in the two years or more preceding the filing of the petition [were] immaterial." *In re Long*, 326 Mich App at 459, 464, quoting *In re MU*, 264 Mich App 270, 279 (2004). "Regardless of any moral obligation, as a putative father, respondent-father had no legal obligation to [the child]. We therefore conclude that to rely on a putative father's action or inaction in the two years preceding the filing of a petition when considering whether to exercise jurisdiction under MCL 712A.2(b)(6) is violative of due process." *In re Long*, 326 Mich App at 464-465. See also *In re C S Alexander*, ___ Mich App ___, ___ (2025) (holding that the trial court improperly exercised its jurisdiction over the child as to respondent-father because respondent-father was only the putative father when the petition was filed).

[72] See SCAO form JC 91, *Order Appointing Juvenile Guardian*.

[73] If the child is of Indian heritage, the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA) must be followed. See Chapter 19 for information on the ICWA and the MIFPA.

[74] See Section 14.4 for a detailed discussion of guardianship assistance, and Section 16.8(A) and Section 18.5(A) for a detailed discussion of juvenile guardianship appointments.

Child Guardianship Manual (GDM), *Juvenile Guardianship GDM 600*, p 9.[75]

> **Note:** If parental rights have already been terminated, the court must first obtain written consent from the Michigan Children's Institute (MCI) Superintendent before appointing a juvenile guardian.[76] MCL 712A.19c(3); MCR 3.979(A)(3). However, the court may appoint a juvenile guardian without the MCI Superintendent's consent under certain circumstances. MCL 712A.19c(6); MCR 3.979(A)(3)(c). See Section 18.5(A).

Once a juvenile guardian is appointed, the court's *jurisdiction over the juvenile guardianship* continues until released by court order. MCL 712A.19a(13); MCL 712A.19c(10); MCR 3.979(C)(1)(a). "Unless terminated by court order, the court's jurisdiction over a juvenile guardianship ordered under MCL 712A.19a or MCL 712A.19c[77] for a youth 16 years of age or older shall continue until 120 days after the youth's eighteenth birthday." MCR 3.979(C)(1)(b). If the DHHS provides the court with notice that it is extending guardianship assistance to a youth beyond the age of 18 under MCL 400.665 (Young Adult Voluntary Foster Care Act (YAVFCA)), the court must "retain jurisdiction over the guardianship until that youth no longer receives extended guardianship assistance."[78] MCR 3.979(C)(1)(b). "Upon receipt of notice from the [DHHS] that it will not continue extended guardianship assistance, the court shall immediately terminate the juvenile guardianship." MCR 3.979(D)(1)(c).

The court's *jurisdiction over the child* pursuant to MCL 712A.2(b) terminates once the juvenile guardian is appointed and a review hearing is conducted under MCL 712A.19. MCL 712A.19a(12); MCL 712A.19c(9); MCR 3.979(C)(1)(a). But see MCL 712A.2a(4), which requires the court to retain jurisdiction over a youth 16 years of age or older who was appointed a juvenile guardian under MCL 712A.19a or MCL 712A.19c until the DHHS determines whether the youth[79] is eligible to receive

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[75] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[76] The MCI Superintendent must consult with the child's lawyer-guardian ad litem prior to granting written consent. MCL 712A.19c(3).

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

[78] See Section 4.6 for a discussion of juvenile guardianship appointments, Section 14.4(I) for additional information on the extension of guardianship assistance under MCL 400.665, and Section 16.9 for a discussion of the Young Adult Voluntary Foster Care Act (YAVFC).

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

extended guardianship assistance under the YAVFCA,[80] and if the DHHS determined the youth was eligible for extended guardianship assistance under the YAVFCA, the court must retain jurisdiction until the youth no longer receives the guardianship assistance.[81]

MCR 3.979(C)(1)(a) also contains provisions regarding termination of the court's and the MCI's jurisdiction over a child. When parental rights to a child have not been terminated, the court's jurisdiction over the child is terminated after the court appoints a juvenile guardian and conducts a review hearing under MCR 3.975. MCR 3.979(C)(1)(a). When parental rights to a child have been terminated, the court's and the MCI's jurisdiction over the child are terminated after the court appoints a juvenile guardian and conducts a review hearing under MCR 3.978. MCR 3.979(C)(1)(a).

Although a juvenile guardian appointed under the Juvenile Code is distinct from a guardian appointed under the Estates and Protected Individuals Code, a juvenile guardian appointed under MCR 3.979 has all the power and duties described in MCL 700.5215. MCR 3.979(E). See Section 16.8(C) and Section 18.5(A) for a detailed discussion of a juvenile guardian's duties and authority.

## A. Lawyer-Guardian Ad Litem

The appointment of a lawyer-guardian ad litem terminates once the court's jurisdiction over the child under MCL 712A.2(b) terminates. MCR 3.979(C)(3). At the court's discretion, the court may reappoint the lawyer-guardian ad litem or appoint a new lawyer-guardian ad litem once a juvenile guardian is appointed. *Id.* See Section 7.10 for a detailed discussion of a lawyer-guardian ad litem's powers and duties.

## B. Parenting Time

MCL 712A.19a(14) "authorizes a trial court to contemplate an order of parenting time in the context of appointing a guardian under MCL 712A.19a(9)(c)." *In re Ballard*, 323 Mich App 233, 237 (2018). Similarly, at the annual review of the juvenile guardianship, "the trial court is required to consider an abundance of issues and factors, including 'any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent,

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

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

child caring institution, relative with whom the child is placed, or guardian ad litem *in addition to any other evidence, including the appropriateness of parenting time*, offered at the hearing.'" *In re Prepodnik*, 337 Mich App 238, 245 (2021), quoting MCL 712A.19a(14). "Because MCL 712A.19a(14) plainly envisions a trial court having an authoritative role with respect to parenting time *during* the course of a guardianship, . . . MCL 712A.19a(14) . . . provide[s] a court with authority to order parenting time for a parent *after* a juvenile guardianship has been established even if the court did not order parenting time when the guardianship commenced or at the time of the permanency-planning hearing." *In re Ballard*, 323 Mich App at 237 (emphasis added). Accordingly, "the court . . . [has] the authority to increase, decrease, or terminate that parenting time during the [course of the juvenile] guardianship if the circumstances warranted court intervention; the original parenting time order [cannot] be indefinitely fixed." *Id*. at 237 (holding that the trial court had the authority to order parenting time for the petitioner father).

No relative other than a parent or a grandparent may properly request court-ordered visitation with a child subject to a juvenile guardianship, and the court may not order visitation for any relative of the child involved except for the child's parent or grandparent. *In re Prepodnik*, 337 Mich App at 247-249 (further holding that if a parent or grandparent requests visitation with a child in a juvenile guardianship, the parent or grandparent must comply with established procedural steps).

After a juvenile guardianship is established, the court must dismiss the neglect proceedings, and the court may retain jurisdiction over the juvenile guardianship until it orders otherwise. MCL 712A.19a(12)-(13). See also MCR 3.979(C)(1)(a).

In *Prepodnik*, the trial court initially entered a visitation order similar to an order typically issued to facilitate a child's noncustodial parent's visitation. *In re Prepodnik*, 337 Mich App at 241. At the request of his paternal aunt, the court ordered the child to spend alternating holidays, one weekend a month, and half of the summer with his paternal relatives. *Id*. When the initial visitation order was soon to expire and the court was preparing to fashion a subsequent order, the child's juvenile guardian contested entry of a similar order, arguing that the child's paternal aunt had no legal basis to request that the court order visitation for the paternal relatives. *Id*.

The trial court erred when it concluded that it had authority to order the child's juvenile guardian to allow the child to have significant visitation with the child's paternal family. *In re Prepodnik*, 337 Mich App at 243. The child's paternal grandmother did not participate in the proceedings concerning the visitation; it was

believed that the child's paternal aunt arranged the child's visits with his paternal grandmother. *Id*. at 241. But in fact, other than the child's mother, the child's grandparent was the only individual authorized to request court-ordered visitation. *Id*. at 247. To be awarded visitation, the grandparent was required to file a motion and a supporting affidavit; "'a request for grandparenting time is not automatically included in a third-party request for custody.'" *Id*. at 249, quoting *Falconer v Stamps*, 313 Mich App 598, 648 (2015).

## C. Qualified Residential Treatment Program (QRTP)

If the court is presented with placement in a QRTP at a hearing held under MCL 712A.19a, the court must approve or disapprove of the QRTP placement. MCL 712A.19a(14).

## D. Review Hearing

The court must "conduct an annual review of a juvenile guardianship as to the condition of the child until the child's eighteenth birthday." MCR 3.979(D)(1)(a). See also MCL 712A.19a(13); MCL 712A.19c(10).[82] The annual review must be commenced within 63 days after the anniversary date of a juvenile guardian's appointment. MCR 3.979(D)(1)(a).

> **Note:** Because the law does not require the annual review to be a court hearing, the court could satisfy the review requirement by requiring the guardian to submit a report to the court from which the court could then determine whether a hearing was necessary. In order for the court to properly review the guardianship based on a report submitted by the guardian, the SCAO recommends that the court require the guardian to report, at a minimum, the following information:[83]
>
> > "[(1)] The guardian and child's current address and phone number.
> >
> > [(2)] The guardian's willingness and ability to continue to provide for the child's welfare.
> >
> > [(3)] Information about the child's education, including the name of the child's school and current progress, including a copy of the child's

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

[83] See SCAO Memorandum, *New Foster Care / Permanency Planning Laws* (2008 Public Acts 199-203).

> most recent report card, if the child is of sufficient age to attend school.
>
> [(4)] Information about the child's physical and emotional health, specifically if the child is having any medical/dental problems of concern and if the child has experienced any traumatic event during the past year.
>
> [(5)] Information about other members of the guardian's household."

"The review hearing following appointment of the juvenile guardian must be conducted within 91 days of the most recent review hearing if it has been one year or less from the date the child was last removed from the home[.]" MCR 3.979(C)(2). If it has been more than one year from the date of the child's last removal from the home, the court must conduct a review hearing following appointment of the juvenile guardian within 182 days of the most recent review hearing. *Id.*

- "If, under [MCR 3.979(C)(1)(b) (retention of court *jurisdiction over juvenile guardianship* for extended juvenile guardianship assistance)], the [DHHS] has notified the court that extended guardianship assistance has been provided to a youth pursuant to MCL 400.665, the court shall conduct an annual review hearing . . . [until] the youth is on longer eligible for extended guardianship assistance."[84] MCR 3.979(D)(1)(b).

## E. Investigation of Juvenile Guardianship

The court must appoint the DHHS or a court employee to conduct an investigation of the juvenile guardianship if the court deems it necessary or upon petition by the DHHS or another interested person.[85] MCR 3.979(D)(2). If the court orders an investigation, the DHHS or the court employee must file a written report within 28 days of the court's appointment and serve it on the other interested parties listed in MCR 3.921(C). *Id.* See Section 5.2 for a list of interested persons in juvenile guardianships.

The report must include a recommendation on whether the juvenile guardianship should continue or be modified, and whether a hearing needs to be scheduled. MCR 3.979(D)(2). If the report indicates the juvenile guardianship should be modified, the DHHS

[84] For additional information on the extension of guardianship assistance under MCL 400.665, including the annual review requirements, see Section 14.4(I).

[85] See SCAO form JC 95, *Order Appointing Person to Investigate Juvenile Guardianship*.

or the court employee must state the nature of the modification.[86] *Id.*

Upon receipt and informal review of the report, the court must enter an order that:

(1) denies the modification recommendation; or

(2) sets it for hearing within 28 days of the court's review of the report.[87] MCR 3.979(D)(3).

## F. Order of Discharge

Within 14 days of a child's death, the juvenile guardian must provide the court and interested persons with written notice. MCR 3.979(E)(4). Upon notice of a child's death, the court must enter an order of discharge.[88] MCR 3.979(D)(4). However, the court may schedule a hearing before entry of the discharge order. *Id.*

## G. Transfer of Jurisdiction

"[T]he court's *jurisdiction over a juvenile guardianship* ordered under MCL 712A.19a or MCL 712A.19c for a youth 16 years of age or older" continues until 120 days after the youth's 18th birthday or sooner if released by court order.[89] MCR 3.979(C)(1)(a) (emphasis added). See also MCL 712A.19a(13); MCL 712A.19c(10).[90] If the guardian relocates to another county within Michigan, the SCAO recommends that the court that handled the child protective proceeding and determined that appointment of a juvenile guardian was in the child's best interests retain its jurisdiction over the guardianship.[91] However, the court may transfer the guardianship. See MCR 3.926.[92]

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[86] See SCAO form JC 96, *Report After Investigation of Juvenile Guardianship*.

[87] See SCAO form JC 97, *Order Following Investigation and Report on Juvenile Guardianship*.

[88] See SCAO form JC 104, *Order Discharging Juvenile Guardian*.

[89] But see MCL 712A.2a(4), which requires the court to retain its *jurisdiction over a youth 16 years of age or older* who was appointed a juvenile guardian under MCL 712A.19a or MCL 712A.19c until the DHHS determines whether the youth is eligible to receive extended guardianship assistance under MCL 400.641 (Young Adult Voluntary Foster Care Act (YAVFCA)), and if the DHHS determines the youth is eligible for extended guardianship assistance under the YAVFCA, the court must retain jurisdiction until the youth no longer receives the guardianship assistance. See MCR 3.979(C)(1)(b) (emphasis added), which also requires the court to "retain *jurisdiction over the [juvenile] guardianship* until that youth no longer receives extended guardianship assistance" where the DHHS provides the court with notice that it is extending guardianship assistance to a youth beyond the age of 18 under the YAVFCA. For additional information on the extension of guardianship assistance under MCL 400.665, see Section 14.4(I).

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

Prior to transferring the juvenile guardianship, the transferring court should contact the receiving court to make sure the receiving court is willing to accept the juvenile guardianship. If the receiving court is willing to accept the juvenile guardianship, the transferring court should send either the original case file or a certified copy of the file to the receiving court. See the SCAO Memorandum, *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, and the Michigan Trial Court Records Management Standards, Standard 3.3.1.12, for detailed requirements of a case transfer.

Upon revocation of a juvenile guardianship (including any action on a petition to revoke or terminate the guardianship), MCR 3.979(F)(5)-(6) requires that jurisdiction over the child in the previous child protective proceeding be reinstated. Because the transferring court only transferred the juvenile guardianship and not the child protective proceeding, the SCAO recommends that the previous child protective proceeding be reopened in the county that originally handled the child protective proceeding and appointed the juvenile guardian. See Section 4.9(H) for a detailed discussion of revocation of a guardianship.

A dispositional review hearing must be held within 42 days of revocation of a juvenile guardianship. MCR 3.979(F)(7). Therefore, when jurisdiction over a juvenile guardianship has been transferred to another court and the original abuse/neglect case is to be reinstated in the original court, the receiving court should immediately notify and forward copies of the juvenile guardianship file to the transferring court so that the transferring (original) court has the complete history of the case when conducting the dispositional review hearing. See MCR 3.979(F)(7). See also the SCAO Memorandum, *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, and the Michigan Trial Court Records Management Standards, Standard 3.3.1.12, for detailed requirements of a case transfer.

## H. Revocation or Termination of Guardianship

The court may hold a hearing to determine whether to revoke the guardianship, on its own motion or upon petition from the DHHS or the child's lawyer-guardian ad litem.[93] MCL 712A.19a(15); MCL 712A.19c(11); MCR 3.979(F)(1)(a).[94] The court may hold a hearing to

[91] See SCAO Memorandum, *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*. See Michigan Trial Court Records Management Standards, Standard 3.3.1.12, for detailed requirements of a case transfer.

[92] MCR 3.926 was adopted before the introduction of juvenile guardianships and does not provide clear guidance for transferring a juvenile guardianship.

determine whether to terminate the guardianship upon petition from the appointed juvenile guardian or another interested person.[95] MCL 712A.19a(16); MCL 712A.19c(12); MCR 3.979(F)(1)(b).[96]

> **Note:** An appointed guardian seeking permission to terminate a guardianship may include a request for appointment of a successor guardian. MCL 712A.19a(16); MCL 712A.19c(12); MCR 3.979(F)(1)(b).

If the court finds by a preponderance of the evidence that it is not in the child's best interests to continue the guardianship, the court must revoke or terminate the guardianship and either appoint a successor guardian or return the child to the temporary custody of the DHHS. MCL 712A.19a(17); MCL 712A.19c(13); MCR 3.979(F)(5)-(6).

A child who turns 18 while in a juvenile guardianship may receive extended foster care services after the juvenile guardianship is terminated. *In re Hull*, 345 Mich App 562, 568, 569 (2023). Termination of a juvenile guardianship after a child reaches the age of 18 reinstates the child's child protective proceedings case under MCL 712A.2(b), which would allow the child to apply for extended foster-care services under the Young Adult Foster Care Act (YAVFCA), MCL 400.641 *et seq*. *In re Hull*, 345 Mich App at 569, 570.

## 1. Process Required to Revoke or Terminate a Guardianship

### a. Hearing

Once a petition for revocation or termination is filed with the court, the court must hold a hearing within 28 days to determine whether to grant the petition to revoke or terminate the juvenile guardianship. MCR 3.979(F)(2).

"The court may order temporary removal of the child under MCR 3.963 to protect the health, safety, or welfare of the child, pending the revocation or termination hearing. If the court orders removal of the child from the

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[93] See SCAO form JC 99, *Petition to Revoke Juvenile Guardianship, Notice of Hearing, and Order for Investigation*.

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

[95] See SCAO forms, *Petition to Terminate Appointment of Juvenile Guardian,* form for *Notice of Hearing,* and form for *Order for Investigation*.

[96] See Section 5.2 for a list of interested persons in juvenile guardianships.

juvenile guardian to protect the child's health, safety, or welfare, the court must proceed under [MCR 3.974(C)[97]]." MCR 3.979(F)(2). For information on court-ordered temporary removal of a child under MCR 3.963, see Section 4.1(A), and for information on the court procedures set out in MCR 3.974(C), see Section 15.8.

### b. Investigation

To prepare for the revocation or termination hearing, the court must order the DHHS to perform an investigation and file a written report of its findings. MCR 3.979(F)(3). The DHHS must file the report with the court at least seven days before the hearing. *Id.*

The DHHS must include in its report the reason for revoking or terminating the juvenile guardianship and if applicable, a recommendation on a temporary placement for the child. MCR 3.979(F)(3).

### c. Notice

The court must make sure that interested persons receive notice of the hearings as provided in MCR 3.920 and MCR 3.921. MCR 3.979(F)(4). See Section 5.2 for information on notice of hearings and a list of interested persons in juvenile guardianships.

The notice must inform the interested persons that they:

> (1) may participate in the hearing; and
>
> (2) may provide information at the hearing. MCR 3.979(F)(4).
>
> > **Note**: Any information an interested person wishes to provide should be submitted to the court, the agency, the child's lawyer-guardian ad litem, and one of the party's attorneys in advance. MCR 3.979(F)(4).

If proper notice has been given, the court may proceed in the absence of interested persons. MCR 3.979(F)(4).

[97] Formerly MCR 3.974(B).

### d. Order Revoking Juvenile Guardianship

After notice and a hearing on a petition to revoke a juvenile guardianship, the court must enter an order to revoke a juvenile guardianship if it finds that:

> (1) by a preponderance of the evidence the continuation of the juvenile guardianship is not in the child's best interests;
>
> (2) it is contrary to the child's welfare to be placed in or remain in the juvenile guardian's home; and
>
> (3) reasonable efforts were made to prevent removal. MCR 3.979(F)(5).

Upon entry of the revocation order, the child must be placed under the care and supervision of the DHHS.[98] MCR 3.979(F)(5). Additionally, the court's jurisdiction over the child pursuant to MCL 712A.2(b) is reinstated under the previous child protective proceeding. *Id.*

### e. Order Terminating Juvenile Guardianship

If the court finds that terminating the appointment of the juvenile guardian is in the child's best interests after notice and a hearing on the petition to terminate, the court must terminate the appointment and proceed with an investigation and the appointment of a successor juvenile guardian in accordance with MCR 3.979(B).[99] MCR 3.979(F)(6)(b). The court's jurisdiction over the juvenile guardianship continues with the appointment of a successor juvenile guardian. *Id.*

> **Note:** See Section 16.8(A) and Section 18.5(A) for a detailed discussion of juvenile guardian appointments.

However, if the court finds that there is no successor juvenile guardian after notice and a hearing on the petition to terminate, and upon a finding that terminating the appointment of the juvenile guardian is in the child's best interests, the court must place the child under the care and supervision of the DHHS. MCR 3.979(F)(5);

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[98] See SCAO form JC 101, *Order Regarding Revocation of Juvenile Guardianship*.

[99] See SCAO form JC 100, *Order Following Hearing on Petition to Terminate Appointment of Juvenile Guardian*.

MCR 3.979(F)(6)(a). The court's jurisdiction over the child pursuant to MCL 712A.2(b) is also reinstated under the previous child protective proceeding. MCR 3.979(F)(5); MCR 3.979(F)(6)(a).

### f. Dispositional Review Hearing

Within 42 days of revoking a juvenile guardianship, the court must hold a dispositional review hearing pursuant to MCR 3.973 or MCR 3.978. MCR 3.979(F)(7). The DHHS must prepare a case service plan and file it with the court at least seven days before the hearing. *Id.* Any subsequent postdispositional review hearings must be scheduled in conformity with MCR 3.974 and MCR 3.975. MCR 3.979(F)(7).

> **Note:** See Chapter 16 for a detailed discussion of dispositional review hearings.

## 2. Maintaining Title IV-E Funding

To maintain a child's Title IV-E funding eligibility following a juvenile guardianship revocation and reinstatement of the child protective proceeding, the court must make "contrary to the welfare of the child findings" and place the child with the DHHS.[100] The *contrary to the welfare of the child* findings are made against the juvenile guardian (not the child's parents). *Contrary to the welfare of the child* findings do not require that a new petition alleging abuse or neglect be filed against the juvenile guardian.[101]

However, if the child has not lived with the juvenile guardian for the last six consecutive months, the SCAO recommends that the court make both *reasonable efforts* and *contrary to the welfare* findings regarding both the juvenile guardian and the child's parents. If the court fails to make a *reasonable efforts* finding in its order revoking the juvenile guardianship, those findings need to be made within 60 days of the revocation order.

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[100] See SCAO Memorandum, *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*.

[101] See the Department of Health & Human Services, Children's Bureau Letter to Child Welfare and Judicial Leaders, which details the judicial determinations and proceedings that must be held in order to satisfy Title IV-E requirements as well as suggestions for ensuring courts continue "to practice in a manner consistent with constitutional principles and to serve the best interest of children[.]" *Note*: The previous link was created using Perma.cc and directs the reader to an archived record of the page.

## 4.10 Jurisdiction and Authority Over Adults

The court has jurisdiction over adults and may make orders affecting adults where the court determines it to be necessary for a child's physical, mental, or moral well-being. MCL 712A.6.[102] However, entry of an order affecting an adult must be incidental to the court's jurisdiction over the child. *Id.*

> **Note:** The authority to fashion remedies under MCL 712A.6 extends beyond MCL 712A.18, which provides dispositional alternatives. *In re Macomber*, 436 Mich 386, 389-393, 398-400 (1990).[103]

The court may also order a parent, nonparent adult, or other person out of the child's home before trial where: (1) the petition contains allegations of abuse; (2) after a hearing, the court finds probable cause that an adult in the child's home committed the abuse; and (3) the court finds on the record that there is a substantial risk of harm to the child's life, physical health, or mental well-being if the adult alleged to have committed the abuse is permitted to remain in the child's home. MCL 712A.13a(4). If the court does not order the adult to leave the child's home, the child will be placed with an individual in whose custody the child is adequately safeguarded from the risk of harm to the child's life, health, or mental well-being. MCL 712A.13a(5). MCL 712A.6b gives the court authority to enter very specific orders against nonparent adults. See Section 7.6(E) for orders affecting nonparent adults.

> **Note:** MCL 712A.13a(1)(h) defines a nonparent adult as a person, regardless of where he or she lives, who is 18 years of age or older and has substantial and regular contact with the child, has a close personal relationship with the child's parent or person responsible for the child's health or welfare, and is not related to the child by blood or affinity to the third degree.
>
> Although "courts may assume jurisdiction over a child on the basis of the adjudication of one parent[,]" procedural "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights."[104] *In re Sanders*, 495 Mich 394, 407, 412-413 n 8, 415, 422-423 (2014) (finding unconstitutional the one-

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[102] "[MCL 712A.6] does not grant the trial court plenary power, but has inherent limits. . . . '[U]nder [MCL 712A.6], the court may only make orders affecting adults if "necessary" for the child's interest. The word "necessary" is sufficient to convey to probate courts that they should be conservative in the exercise of their power over adults.'" *In re Harper,* 302 Mich App 349, 357 (2013), quoting *In re Macomber*, 436 Mich 386, 389-399 (1990).

[103] See Section 13.9(A).

parent doctrine, which permitted the court to "enter dispositional orders affecting the parental rights of *both* parents" once "jurisdiction [was] established by adjudication of only *one* parent").[105] "[N]either the admissions made by [the adjudicated parent] nor [the unadjudicated parent's] failure to object to those admissions constituted an adjudication of [the unadjudicated parent's] fitness[.]" *In re SJ Temples*, unpublished per curiam opinion of the Court of Appeals, issued March 12, 2015 (Docket No. 323246)[106] (finding that the trial court violated the unadjudicated parent's "due process rights by subjecting him to dispositional orders without first adjudicating him as unfit[]").

A parent's constitutional right to direct his or her child's care and custody before the parent is adjudicated is not without limit; "[w]hen a child has been placed into care by an unchallenged order of the court, the state has a legitimate and important interest in protecting the child's health and safety." *In re Dixon (On Reconsideration)*, 347 Mich App 337, 359 (2023). In *Dixon*, the trial court was permitted to continue the child's placement in foster care until the DHHS could properly investigate placement of the child with a nonrelative as proposed by the child's incarcerated father. *Dixon*, 347 Mich App at 360, 361. If "vindication of an unadjudicated parent's custodial right" would require the court to order a change in the child's custody and would terminate the state's custody of the child, the state's interest in protecting the child's health and safety permits it to continue the child's temporary placement with foster parents while an investigation takes place to determine whether the new placement is appropriate. *Id*. at 359.

## 4.11 Jurisdiction of Contempt Proceedings

This section provides general guidance of contempt proceedings. For a detailed discussion of procedural requirements in contempt cases, see the Michigan Judicial Institute's *Contempt of Court Benchbook* and *Contempt Quick Reference Materials*.

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[104] Note, however, where "a minor faces an *imminent* threat of harm, . . . the state may take the child into custody without prior court authorization or parental consent[;] . . . [s]imilarly, upon the authorization of a child protective petition, the trial court may order *temporary* placement of the child into foster care pending adjudication if the court finds that placement in the family home would be contrary to the welfare of the child." *In re Sanders*, 495 Mich at 416-417 n 12 (limiting the requirement for adjudication over each parent to "the court's exercise of its postadjudication dispositional authority").

[105] See Section 4.3(C)(2) for additional information on the procedural due process rights of the unadjudicated parent, and Chapter 13 for a discussion on the dispositional phase of child protective proceedings.

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

## A. Authority

The court has the authority to hold a person in contempt under the contempt provisions in MCL 600.1701 *et seq.*, when he or she "willfully violates, neglects, or refuses to obey and perform any order or process the court has made or issued to enforce [the Juvenile Code]." MCL 712A.26. See also MCR 3.928(A). However, "[a] juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good faith effort to do so." MCR 3.928(D).

Courts have an inherent power under common law to punish all contempts of court. *In re Scott,* 342 Mich 614, 618 (1955). Through its contempt powers, the court may, after a determination of ability to pay, also enforce its reimbursement orders and orders assessing attorney costs in a child protective proceeding (MCL 712A.17c(8), and MCR 3.915(E)).[107] See generally, *In re Reiswitz,* 236 Mich App 158, 172 (1999).

## B. Procedure

Although courts have inherent authority to punish for contempt, the Legislature has the authority to prescribe penalties for such contempt. *Cross Co v UAW Local No 155 (AFL-CIO),* 377 Mich 202, 223 (1966). Additionally, MCR 3.928(B) provides that contempt of court proceedings are governed by MCL 600.1711, MCL 600.1715, and MCR 3.606.

Pursuant to MCL 600.1711(1), when a person commits contempt in the "immediate view and presence of the court,"[108] the court has the authority to instantly punish the person by fine, imprisonment, or both. However, if a person commits contempt outside the court's presence,[109] the court's authority to punish the person by fine, imprisonment, or both is limited; the court may punish contempt in these cases only "after proof of the facts charged is made by affidavit or other method and opportunity [is] given to defend." MCL 600.1711(2).

[107] See SCAO guidelines for court-ordered reimbursement.

[108] Direct contempt.

[109] Indirect contempt.

# 4.12 Special Findings on Issues of Special Immigrant Juvenile Status

This section contains a brief discussion on Special Immigrant Juvenile Status. For a detailed discussion, including information on laws and regulations, policies, and best practices, see the American Bar Association Children's Immigration Law Academy (CILA) resources for state court judges, specifically *SIJS Flyer for Judges*, and the National Immigrant Women's Advocacy Project (NIWAP), *Special Immigrant Juvenile Status Bench Book*. 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*.

"8 USC 1101(a)(27)(J) and 8 CFR 204.11 (2017) afford 'undocumented children, under the jurisdiction of a juvenile court,[110] the ability to petition for special immigrant[111] juvenile [SIJ] 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). See also *In re DRRR Guardianship*, ___ Mich App ___, ___ (2025)."'If the application is granted, the juvenile may become a lawful permanent resident 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 485, 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 . . . . '[The] juvenile court is charged with making the factual inquiry relevant to SIJ status

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[110] 8 CFR 204.11(a) defines *juvenile court* as "a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 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.

[111] 8 USC 1101(a)(27)(J) defines *special immigrant* to include "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; (*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[.]"

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, 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 (finding 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[;]" noting the Family Division "qualifies as a juvenile court under the federal definition"), quoting *HSP v JK*, 223 NJ 196, 209 (2015) (last alteration in original).

See also *In re Velasquez*, 344 Mich App 118, 142 (2022), where the Court stated that in cases involving a minor's SIJ status, a trial court not only has the authority to make predicate factual findings with regard to a minor's welfare and best interests, but is required to do so.[112] To make the predicate findings, a trial court may consider "'the Child Custody Act factors, some combination of the Adoption Code and Child Custody Act factors, or a unique set of factors developed by the trial court.'" *Id*. at 145, quoting *In re COH*, 495 Mich 184, 203 (2014).

The predicate factual findings that the state court must make are "'that the individual who seeks SIJ status is under the age of 21, unmarried, and (1) dependent on the juvenile court, (2) cannot viably be reunified with one or both of their parents because of neglect, abandonment, or a similar basis found under state law, and (3) the juvenile's best interests would not be served by returning to their country of origin.'" *DRRR*, ___ Mich App at ___, quoting *In re Velasquez*, 344 Mich App at 128.

[112] In *In re Velasquez*, 344 Mich App 118, 145 (2022), the Court found that the trial court abused its discretion by failing to make predicate findings regarding the minor's best interests. That holding, coupled with the language in 8 USC 1101(a)(27)(J) cited by the Court in *Velasquez*, indicates that a trial court not only *may* make predicate findings, but that a trial court *is obligated* to make such findings regarding a minor's welfare.

The trial court in *DRRR* "made several critical errors, resulting in DRRR being denied meaningful access to justice[.]" *DRRR*, ___ Mich App at ___. Despite granting the petition to appoint DRRR's sister as DRRR's full guardian six weeks before DRRR's 18th birthday, the trial court did not rule on the companion motion for special determinations on the issue of SIJ classification status until after DRRR's 18th birthday, when it denied the motion for lack of jurisdiction because DRRR was no longer a minor. *Id*. at ___. The trial court had adjourned the hearing date for DRRR's motion regarding SIJ status because there was no SCAO-certified Spanish translator present, noting that no specific request for a translator had been made for that hearing date. *Id*. at ___. This violated MCR 1.111(B)(1) because the trial court had previously granted petitioner's request and provided a Spanish language interpreter for the hearing on the guardianship motion. *DRRR*, ___ Mich App at ___. Under MCR 1.111(B)(1), the obligation to provide an interpreter is ongoing once the court agrees to appoint one; litigants need not request an interpreter prior to each proceeding. *DRRR*, ___ Mich App at ___. Additionally, the trial court refused to allow petitioner to use a "qualified foreign language interpreter" who was present at the time, which was permitted under MCR 1.111(F)(2). *DRRR*, ___ Mich App at ___. "The proposed interpreter was precisely the type of person referenced in MCR 1.111(F)(2), i.e., a person 'capable of conveying the intent and content of the speaker's words sufficiently to allow the court to conduct' the hearing without prejudice to DRRR . . . ." *DRRR*, ___ Mich App at ___. In light of these errors, and the trial court's failure to make the requisite predicate findings on petitioner's motion regarding DRRR's SIJ status, the Court vacated the trial court's order denying the motion and remanded for entry of its order finding by a preponderance of the evidence on the complete record before it that DRRR met the requirements for SIJ status. *Id*. at ___.

# Chapter 5: Service of Process in Child Protective Proceedings


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## *In this chapter. . .*

This chapter discusses the general requirements for issuing and serving summonses and notices of hearings in child protective proceedings. The statutory requirements for service in termination of parental rights proceedings are particularly important because a failure to meet those requirements renders the proceedings void.

This chapter includes a discussion on waiving notice of hearing or service of process and subsequent services.

This chapter also discusses subpoenas, proof of service, judgment orders, and adjournments in child protective proceedings.

# 5.1 Issuance and Service of Summons in Child Protective Proceedings

After a petition is filed, the court may:

> (1) dismiss the petition; or
>
> (2) issue a summons "reciting briefly the substance of the petition, and requiring the person or persons who have custody or control of the child, or with whom the child may be, to appear personally and bring the child before the court at a time and place stated[.]" MCL 712A.12.

A summons may be issued and served on a party before any juvenile proceeding. MCR 3.920(B)(1). The parties in a child protective proceeding include "the petitioner, child, and respondent" and "the parent, guardian, or legal custodian."[1] MCR 3.903(A)(19)(b)(*i*)-(*ii*).

> **Note:** "'Parent' means the mother, the father as defined in MCR 3.903(A)(7),[2] or both, of the minor. It also includes the term 'parent' as defined in MCR 3.002(20)."[3] MCR 3.903(A)(18). MCR 3.002(20) defines an Indian child's *parent* as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the putative father if paternity has not been acknowledged or established."
>
> "'Guardian' means a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or [MCL] 700.5205, by a court of another state under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202, or a juvenile guardian appointed pursuant to MCL 712A.19a or MCL 712A.19c." MCR 3.903(A)(11).
>
> "'Legal Custodian' means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. It also includes the term 'Indian custodian' as defined in MCR 3.002(15)."[4] MCR

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[1] If the child is of Indian heritage, additional requirements must be followed. See Chapter 19.

[2] Under MCR 3.903(A)(7), "'a putative father does not qualify as a father or parent for the purpose of exercising jurisdiction in child protective proceedings.'" *In re C S Alexander*, ___ Mich App ___, ___ (2025), quoting *In re Long*, 326 Mich App 455, 464 (2018).

[3] Formerly MCR 3.002(10).

> 3.903(A)(14). An *Indian custodian* is "any Indian person who has custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody, and control have been transferred by the child's parent." MCR 3.002(15).

"An order directed to a parent or a person . . . is not effective and binding on the parent or other person unless opportunity for hearing is given by issuance of summons . . . as provided in [MCL 712A.12 and MCL 712A.13] and until a copy of the order, bearing the seal of the court, is served on the parent or other person as provided in [MCL 712A.13]."[5] MCL 712A.18(4).

## A. Contents of Summons

If the court issues a summons, the summons must "direct the person to whom it is addressed to appear at a time and place specified by the court and must:

> (a) identify the nature of the hearing;
>
> (b) explain the right to an attorney and the right to trial by judge or jury, including, where appropriate, that there is no right to a jury at a termination hearing;
>
> (c) if the summons is for a child protective proceeding, include notice that the hearings could result in termination of parental rights; and
>
> (d) have a copy of the petition attached. The confidential case inventory required by MCR 3.931(A) and MCR 3.961(A) shall not be served on any party."[6] MCR 3.920(B)(3).

## B. Service Requirements

"In a child protective proceeding, a summons must be served on any respondent and any nonrespondent parent." MCR 3.920(B)(2)(b). A person who is not a respondent, but is the child's guardian or legal custodian must also be notified of the petition and served with notice of hearing.[7] *Id.*; MCL 712A.12.

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[4] Formerly MCR 3.002(7).

[5] This rule is significant for purposes of collecting reimbursement of the costs of care and service (see Section 14.2), and for other orders affecting adults under MCL 712A.6 and MCL 712A.6b (see Section 4.10). See SCAO guidelines for court-ordered reimbursement.

[6] See SCAO form *Summons: Order to Appear (Child Protective Proceedings)*.

[7] See Section 5.2 for information on notice of hearings.

> **Note:** MCR 3.903(C)(12) defines *respondent* as "the parent,[8] guardian,[9] legal custodian,[10] or nonparent adult[11] who is alleged to have committed an offense against a child." Respondent, in termination of parental rights proceedings, does not include "other persons to whom legal custody has been given by court order, persons who are acting in the place of the mother or father, or other persons responsible for the control, care, and welfare of the child." MCR 3.977(B).[12]
>
> MCR 3.903(C)(8) defines *nonrespondent parent* as "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)."

A noncustodial parent must be personally served with notice of hearing and a copy of the petition.[13] MCL 712A.12; *In re Miller (Julie)*, 182 Mich App 70, 73 (1990).

A summons may also be served on a person having physical custody of the child with the direction to appear with the child for a hearing. MCR 3.920(B)(2)(b). In addition, "[a] [s]ummons may be issued requiring the appearance of any other person whose presence, in the opinion of the judge, is necessary." MCL 712A.12.

The statutory requirements for issuance and service of summonses to custodial parents, or notice of the petition and the time and place of a hearing to a noncustodial parent, are jurisdictional, which means that if they are not fulfilled, an appellate court may declare all proceedings in a case void. *In re Brown (Carrie)*, 149 Mich App 529, 534-542 (1986) (because the jurisdictional requirement in MCL 712A.12, requiring the respondent be personally served, was not complied with, jurisdiction was never established and the Court of Appeals held that orders arising out of the proceedings were void).

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

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

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

Cf. *In re Andeson,* 155 Mich App 615, 618-619 (1986) (proceedings were not void when the respondent-parent was properly served with a summons before the adjudicative hearing, the hearing was adjourned, and the respondent-parent was later mailed a notice of hearing but failed to appear).

"Once personal jurisdiction [is] established [by properly serving the respondent with the original summons and petition,] . . . petitioner's preparation and filing of [an] amended petition[] d[oes] not invalidate [] personal jurisdiction that ha[s] already been obtained" even when the respondent is not served with the amended petition. *In re Dearmon/Harverson-Dearmon*, 303 Mich App 684, 693 (2014) ("[b]ecause [the] respondent was properly served with the initial petition and an accompanying summons," personal jurisdiction was established[ and] it did not evaporate merely upon the *filing* of the amended petitions").

A party's presence at a hearing does not cure a jurisdictional error. *In re Brown (Carrie),* 149 Mich App at 541.

Defective service of process on another party to the proceedings does not render those proceedings void with respect to a person to whom service was required. *In re Terry,* 240 Mich App 14, 21 (2000).

## 1. Manner of Service

The petitioner is "charged with providing [sic] that service of process is accomplished in accordance with the court rules." *In re Adair,* 191 Mich App 710, 715 (1991). See also MCL 712A.13 (judge may designate peace officer or other suitable person to serve summons, notice, or court orders).

Where practicable, service of a summons should be made by personal service. MCL 712A.13. However, if the judge finds that personal service is impracticable, he or she may order

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

[12] "[MCR 3.977] applies to all proceedings in which termination of parental rights is sought." MCR 3.977(A)(1).

[13] As a useful tool to guide the court through the procedures of finding and notifying a noncustodial parent during a child protective proceeding, the State Court Administrative Office (SCAO) developed the *Michigan Absent Parent Protocol: Identifying, Locating, and Notifying Absent Parents in Child Protective Proceedings.*

service by registered mail or publication, or both.[14] *Id.* See also MCR 3.920(B)(4), which states:

> "(a) Except as provided in [MCR 3.920(B)(4)(b)], a summons required under [MCR 3.920(B)(2) (for child protective proceedings)] must be served by delivering the summons to the party personally.
>
> (b) If the court finds, on the basis of testimony or a motion and affidavit, that personal service of the summons is impracticable or cannot be achieved, the court may by ex parte order direct that it be served in any manner reasonably calculated to give notice of the proceedings and an opportunity to be heard, including publication.
>
> (c) If personal service of a summons is not required, the court may direct that it be served in a manner reasonably calculated to provide notice."

**Note:** Violations of statutory notice provisions constitute jurisdictional defects, while violations of court rule requirements do not. *In re Mayfield*, 198 Mich App 226, 230-231 (1993). See also *In re SZ*, 262 Mich App 560 (2004), which discussed a conflict between MCR 3.920(B)(4)(b) (requires court to make its decision to order substitute service "on the basis of testimony or a motion and affidavit") and MCL 712A.13 (allows court to order substitute service if it "is satisfied that it is impracticable" to personally serve the summons). In *In re SZ*, *supra* at 564-565, the respondent argued that the trial court improperly allowed service by publication when it failed to comply with the requirement in MCR 3.920(B)(4)(b) that the court's finding that personal service is impracticable or cannot be achieved be based on "testimony" or "a motion and affidavit," and, therefore, lacked jurisdiction over her. The Court of Appeals concluded that MCL 712A.13, not MCR 3.920, controls the determination of whether a court has established jurisdiction over a respondent:

> "We believe that MCL 712A.13 reflects our Legislature's policy considerations

[14] See SCAO form JC 46, *Motion for Alternative Service*.

> concerning the necessary requirements for obtaining jurisdiction over a parent or guardian of a juvenile. Because the issue of service is a jurisdictional one, the statutory provision governs. The plain language of the statute contains no specific requirements concerning what types of evidence a court must consider in determining whether substitute service is indicated, or the form in which the evidence must be received. By its silence, MCL 712A.13 permits a court to evaluate evidence other than testimony or a motion and affidavit when determining whether notice can be made by substituted service. We believe that the . . . court rule requirements . . . found in MCR 3.920(B)(4)(b) are restrictions affecting jurisdiction in matters that are usually time-sensitive and for which the Legislature's policy is to seek prompt resolution for the sake of the juvenile involved and, as such, conflict with MCL 712A.13. Therefore, the statute prevails." *In re SZ*, 262 Mich App at 568.

"While MCL 712A.13 allows for alternative methods of service of process, it still requires that the trial court first determine that personal service is impracticable." *In re Adair*, 191 Mich App at 714 (trial court erred by ordering notice by publication before determining whether the Department of Health and Human Services (DHHS) made reasonable efforts to locate the respondent-mother for service by registered mail). "In a child protective proceeding, a parent of a child is entitled to *personal service* of the summons and notice of proceedings." *In re Lovitt*, ___ Mich App ___, ___ (2024). In *Lovitt*, the trial court plainly erred by proceeding with a termination hearing in respondent's absence where there was no evidence that respondent had been personally served with the summons and supplemental petition and no evidence that alternate service was requested or granted. *Id*. at ___. The Court noted that "it [was] difficult to conclude from the record how respondent was provided notice, if at all, of the . . . termination hearing." *Id*. at ___. "Because respondent was not served in accordance with the requirements of MCL 712A.13 and the court rules, the trial court lacked jurisdiction to terminate her parental rights . . . ." *Lovitt*, ___ Mich App at ___. Motions for substituted service must show that personal service of process

cannot reasonably be made, and that the substituted method of service is the best method available to provide notice. *Krueger v Williams*, 410 Mich 144, 167-168 (1981). A motion for substituted service should contain sufficient facts to allow the court to determine what specific efforts were made to serve process and why the substituted method should be used. *Krueger, supra* at 168-170.

## 2. Time of Service

MCL 712A.13 provides that "[i]t shall be sufficient to confer jurisdiction if:

> (1) personal service is effected at least 72 hours before the date of hearing;
>
> (2) registered mail is mailed at least five days before the date of hearing if within the state and 14 days if outside the state;
>
> (3) publication is made once in some newspaper printed and circulated in the county in which [the] court is located at least 1 week before the time fixed in the summons or notice for the hearing."[15] MCL 712A.13.

Failure to meet the requirements of MCL 712A.13 may constitute a jurisdictional defect rendering the proceedings void. *In re Mayfield*, 198 Mich App at 230-232.

MCR 3.920(B)(5) provides additional time requirements for service of a summons:

> "(a) A summons shall be personally served at least:
>
> > (*i*) 14 days before hearing on a petition that sets to terminate parental rights or a permanency planning hearing,
> >
> > (*ii*) 7 days before trial or a child protective dispositional review hearing, or
> >
> > (*iii*) 3 days before any other hearing.
>
> (b) If the summons is served by registered mail, it must be sent at least 7 days earlier than [MCR 3.920(B)(5)(a)] requires for personal service of a summons if the party to be served resides in

[15] Sufficient "lead time" for the publication of notices in newspapers should be considered. Depending on the county, a newspaper may require as much as two weeks' "lead in" before publication.

> Michigan, or 14 days earlier than required by [MCR 3.920(B)(5)(a)] if the party to be served resides outside of Michigan.
>
> (c) If service is by publication, the published notice must appear in a newspaper in the county where the party resides, if known, and, if not, in the county where the action is pending. The published notice need not include the petition itself. The notice must be published
>
> > at least once 21 days before a hearing specified in [MCR 3.920(B)(5)(a)(*i*)],
> >
> > 14 days before trial or a hearing specified in [MCR 3.920(B)(5)(a)(*ii*)], or
> >
> > 7 days before any other hearing."

### C. Subsequent Notices After Failure to Appear

"When persons whose whereabouts are unknown fail to appear in response to notice by publication or otherwise, the court need not give further notice by publication of subsequent hearings, except a hearing on the termination of parental rights." MCR 3.921(E).

> Note: If a person fails to appear without reasonable cause after being summoned to do so, he or she may be held in contempt of court and punished accordingly. MCL 712A.13.

## 5.2 Notice of Hearings in Child Protective Proceedings

Generally, notice of a hearing must be given in writing or on the record at least seven days before the hearing. MCR 3.920(D)(1). However, written notice must be given at least 14 days before a permanency planning hearing or a hearing on a petition requesting termination of parental rights in child protective proceedings.[16] MCL 712A.19a(6); MCL 712A.19b(2); MCR 3.920(D)(3).

> Note: Written notice in a permanency planning hearing must also contain "a statement of the purposes of the hearing, including a notice that the hearing may result in further proceedings to terminate parental rights[.]" MCL 712A.19a(6).

[16] See SCAO form JC 45, *Notice of Hearing*, at https://www.courts.michigan.gov/49c068/siteassets/forms/scao-approved/jc45.pdf.

"When a child is placed outside the home, notice of the preliminary hearing or an emergency removal hearing under MCR 3.974(C)(3)[17] must be given to the parent of the child as soon as the hearing is scheduled."[18] MCR 3.920(D)(2)(b). Notice of the preliminary hearing "may be in person, in writing, on the record, or by telephone." *Id.*

"When a party fails to appear in response to a notice of hearing, the court may order the party's appearance by summons or subpoena."[19] MCR 3.920(D)(4).

"An order directed to a parent or a person . . . is not effective and binding on the parent or other person unless opportunity for hearing is given by . . . notice as provided in [MCL 712A.12 and MCL 712A.13] and until a copy of the order, bearing the seal of the court, is served on the parent or other person as provided in [MCL 712A.13]."[20] MCL 712A.18(4).

A respondent whose counsel had attended two previous hearings at which placement of the respondent's younger child was disputed and who was aware that investigations into her fitness as a parent were continuing with regard to both her minor children, the older of whom was already in foster care, was not deprived of due process when her younger child was removed from her custody without formal notice or a removal hearing specifically held for that purpose. *In re Williams*, 333 Mich App 172, 179-180 (2020) (noting that "respondent was on notice that [the child's] placement was subject to ongoing review and reconsideration at any time, including at the pretrial hearing").

## A. Persons Entitled to Notice of Hearings

### 1. Generally

In child protective proceedings, the court must ensure that the following persons are notified of each hearing:

"(a) the respondent,[21]

(b) the attorney for the respondent,

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[17] Formerly MCR 3.974(B)(3).

[18] See Section 7.6 for a detailed discussion of preliminary hearings. See also *In re Shimmons/Hare*, ___ Mich App ___, ___ (2026), quoting MCR 3.920(D)(2)(b).

[19] See Section 5.1 for information on summonses, and Section 5.5 for information on subpoenas.

[20] This rule is significant for purposes of collecting reimbursement of the costs of care and service (see Section 14.2), and for other orders affecting adults pursuant to MCL 712A.6 and MCL 712A.6b (see Section 4.10). See SCAO guidelines for court-ordered reimbursement.

[21] "[T]he state deprived respondent of even minimal due process by failing to adequately notify him of proceedings affecting his parental rights and then terminating his rights on the basis of his lack of participation without attempting to remedy the failure of notice." *In re Rood*, 483 Mich 73, 118 (2009).

(c) the lawyer-guardian ad litem for the child,

(d) subject to [MCR 3.921(D)],[22] the parents, guardian, or legal custodian, if any, other than the respondent,

(e) the petitioner,

(f) a party's guardian ad litem appointed pursuant to these rules,

(g) the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state,

(h) in accordance with the notice provisions of MCR 3.905, if the court knows or has reason to know the child is an Indian child:

(*i*) the child's tribe and, if the tribe is unknown, the Secretary of the Interior, and

(*ii*) the child's parents or Indian custodian, and if unknown, the Secretary of the Interior, and[23]

(i) any other person the court may direct to be notified." MCR 3.921(B)(1).

## 2. Dispositional Review Hearings and Permanency Planning Hearings

Before dispositional review hearings and permanency planning hearings, the court must ensure that the following persons receive written notification of each hearing:

"(a) the agency responsible for the care and supervision of the child,

(b) the person or institution having court-ordered custody of the child,

(c) the parents of the child, subject to [MCR 3.921(D)],[24] and the attorney for the respondent

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[22] MCR 3.921(D) governs establishing paternity in child protective proceedings. See Chapter 6. A putative father must establish paternity before he is entitled to notice of proceedings. *In re Gillespie*, 197 Mich App 440, 443-446 (1992).

[23] See Section 19.5 for additional information on notice of proceedings to the Indian child's parent and tribe or Secretary of the Interior.

> parent, unless parental rights have been terminated,
>
> (d) the guardian or legal custodian of the child, if any,
>
> (e) the guardian ad litem for the child,
>
> (f) the lawyer-guardian ad litem for the child,
>
> (g) the attorneys for each party,
>
> (h) the prosecuting attorney if the prosecuting attorney has appeared in the case,
>
> (i) the child, if 11 years old or older,
>
> (j) if the court knows or has reason to know the child is an Indian child, the child's tribe,[25]
>
> (k) the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state,
>
> (*l*) if the court knows or has reason to know the child is an Indian child and the parents, guardian, legal custodian, or tribe are unknown, to the Secretary of Interior, and
>
> (m) any other person the court may direct to be notified." MCR 3.921(B)(2). See also MCL 712A.19(5); MCL 712A.19a(6).

MCL 712A.19(5)(f) also requires notification in dispositional review hearings to a nonparent adult who is required to comply with a case service plan.

For children in permanent foster family agreements[26] or relative placements[27] intended to be permanent under MCL

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[24] MCR 3.921(D) governs establishing paternity in child protective proceedings. See Chapter 6. A putative father must establish paternity before he is entitled to notice of proceedings. *In re Gillespie*, 197 Mich App at 443-446.

[25] See Section 19.5 for additional information on notice of proceedings to the Indian child's parent and tribe or Secretary of the Interior.

[26] "'Permanent foster family agreement' means an agreement for a child 14 years old or older to remain with a particular foster family until the child is 18 years old under standards and requirements established by the [DHHS], which agreement is among all of the following: (*i*) The child. (*ii*) If the child is a temporary ward, the child's family. (*iii*) The foster family. (*iv*) The child placing agency responsible for the child's care in foster care." MCL 712A.13a(1)(i).

[27] See Section 8.2(A) for a discussion on relative placements.

712A.19(4), the notice provisions of MCL 712A.19(5) apply. MCL 712A.19(5).

### 3. Hearings on Termination of Parental Rights

"Written notice of a hearing to determine if the parental rights to a child shall be terminated must be given to those appropriate persons or entities listed in [MCR 3.921](B)(2), except that if the court knows or has reason to know the child is an Indian child, notice shall be given in accordance with MCR 3.920(C)(1)." MCR 3.921(B)(3). See also MCL 712A.19b(2), which requires the court to ensure that the following persons receive written notification of a hearing on termination of parental rights:

> "(a) The agency. The agency shall advise the child of the hearing if the child is 11 years of age or older.
>
> (b) The child's foster parent or custodian.
>
> (c) The child's parents.
>
> (d) If the child has a guardian, the child's guardian.
>
> (e) If the child has a guardian ad litem, the child's guardian ad litem.
>
> (f) If tribal affiliation has been determined, the Indian tribe's elected leader.[28]
>
> (g) The child's attorney and each party's attorney.
>
> (h) If the child is 11 years of age or older, the child.
>
> (i) The prosecutor." MCL 712A.19b(2).

### 4. Post-termination Review Hearings

"The foster parents (if any) of a child and any preadoptive parents or relative providing care to the child must be provided with notice of and an opportunity to be heard at each hearing." MCR 3.978(B).

### 5. Juvenile Guardianships

In juvenile guardianship proceedings, the following persons are entitled to notice:

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[28] See Section 19.5 for additional information on notice of proceedings to the Indian child's parent and tribe or Secretary of the Interior.

> "(1) the child, if 11 years old or older;
>
> (2) the Department of Health and Human Services [DHHS];
>
> (3) the parents of the child, unless parental rights over the child have been terminated;
>
> (4) the juvenile guardian or proposed juvenile guardian;
>
> (5) any court that previously had jurisdiction over the child in a child protective proceeding, if different than the court that entered an order authorizing a juvenile guardianship;
>
> (6) the attorneys for any party;
>
> (7) the prosecuting attorney, if the prosecuting attorney has appeared in the case;
>
> (8) if the court knows or has reason to know the child is an Indian child, the child's tribe, Indian custodian, or if the tribe is unknown, the Secretary of the Interior;[29]
>
> (9) the Michigan Children's Institute [MCI] superintendent; and
>
> (10) any other person the court may direct to be notified." MCR 3.921(C).

## B. Special Notice Provisions for Physicians

If the child is placed outside the home and the DHHS is required to review the case with the child's physician, "then in a judicial proceeding to determine if the child is to be returned to his or her home, the court must allow the child's attending physician of record during a hospitalization or the child's primary care physician to testify regarding the case service plan."[30] MCL 712A.18f(7). The court must notify each physician of the time and place of the hearing. *Id.*

[29] See Chapter 19 for information on Indian children.

[30] See Section 13.5 for a detailed discussion of required case review and testimony by child's physician.

## C. Special Notice Provisions for Incarcerated Parties

If a party is incarcerated under the jurisdiction of the Michigan Department of Corrections, specific requirements must be met in order to provide proper notice to the party. MCR 2.004; *In re BAD*, 264 Mich App 66, 75-76 (2004).

Specifically, MCR 2.004(A) applies to:

> "(1) domestic relations actions involving minor children, and
>
> (2) other actions involving the custody, guardianship, neglect, or foster-care placement of minor children, or the termination of parental rights."

### 1. Petitioner's Responsibility

The party seeking an order regarding a minor child must

> "(1) contact the [D]epartment [of Corrections] to confirm the incarceration and the incarcerated party's prison number and location;
>
> (2) serve the incarcerated person with the petition or motion seeking an order regarding the minor child, and file proof with the court that the papers were served; and
>
> (3) file with the court the petition or motion seeking an order regarding the minor child, stating that a party is incarcerated and providing the party's prison number and location; the caption of the petition or motion shall state that a telephonic or video hearing is required by this rule." MCR 2.004(B).

### 2. Court's Responsibility

The court must issue an order requesting the Department of Corrections to permit the incarcerated party to participate in a hearing or conference "by way of a noncollect and unmonitored telephone call or by videoconferencing technology[.]" MCR 2.004(C). The court's order must include the date and time of the hearing or conference and the incarcerated party's name and prison identification number, and must 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." *Id.*

"The initial telephone call or videoconference shall be conducted in accordance with [MCR 2.004(E)]. If the prisoner 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).

## 3. Documentation and Correspondence to Incarcerated Party

All court documents or correspondence mailed to an incarcerated party must include the incarcerated party's name and prison number on the envelope. MCR 2.004(D).

### 4. Denial of Relief

If the requirements of MCR 2.004 are not satisfied, the court may not grant the relief requested by the moving party. MCR 2.004(F). However, this provision does not apply "if the incarcerated party actually does participate in a telephone call or video conference or if the court determines that immediate action is necessary on a temporary basis to protect the minor child." *Id.*

"[T]o comply with MCR 2.004, the moving party and the court must offer the [incarcerated party] 'the opportunity to participate in' each proceeding in a child protective action. *In re Mason*, 486 Mich 142, 154 (2010). "[P]articipation through 'a telephone call' [or video conference] during one proceeding will not suffice to allow the court to enter an order at another proceeding for which the [incarcerated party] was not offered the opportunity to participate." *In re Mason*, *supra* at 154-155.

"[E]xcluding a[n incarcerated party from the opportunity to participate] for a prolonged period of the proceedings can[not] be considered harmless error." *In re DMK*, 289 Mich App 246, 255 (2010).

### 5. Sanctions

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

### 6. Parent's Due Process Right to be Present at Hearing

If a respondent-parent is incarcerated, the court must balance the parent's compelling interest in his or her parental rights, the incremental risk of an erroneous deprivation of that interest if the parent is not present at the hearing, and the government's interest in avoiding the burden of securing the parent's presence at the hearing, to determine whether due process requires the parent's presence at a hearing to terminate parental rights. *Mathews v Eldridge*, 424 US 319, 335 (1976); *In re Vasquez*, 199 Mich App 44, 46-50 (1993) (due process did not require presence of parent in prison in Texas, where parent was well represented by counsel at the hearing); *In re Render*, 145 Mich App 344, 348-350 (1985) (due process required presence of parent incarcerated in county jail, where parent's attorney had learned of parent's incarceration the day of the trial).

### D. Notice Requirements Under the Safe Delivery of Newborns Law

The Safe Delivery of Newborns Law,[31] MCL 712.1 *et seq*., regulates a parent's surrender of a newborn child. The law permits a parent to leave a newborn with an emergency service provider without expressing an intent of returning for the newborn. MCL 712.1(2)(n). 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 identity and address of the nonsurrendering parent are unknown). MCL 712.7(f).

## 5.3 Waiving Notice of Hearing or Service of Process

### A. Waiver of Defects by Appearance and Participation in Hearing

If a party appears and participates in a hearing without having been properly served, that party waives any "defects in service with respect to that hearing unless objections regarding the specific facts are placed on the record. If a party appears or participates without an attorney, the court shall advise the party that the appearance and participation waives notice defects and of the party's right to seek an attorney." MCR 3.920(H).

### B. Waiver of Notice of Hearing or Service of Process in Writing

A party may waive notice of hearing or service of process by submitting a waiver in writing.[32] MCR 3.920(F). When a party waives service of a summons that is required by MCR 3.920(B), the party must be advised of:

(1) the nature of the hearing;

(2) the right to counsel;

[31] See Section 8.14 for a detailed discussion of child placements under the Safe Delivery of Newborns Law.

[32] See SCAO Form JC 23, *Waiver of Summons/Notice of Hearing*, at https://www.courts.michigan.gov/49bd3a/siteassets/forms/scao-approved/jc23.pdf.

> (3) the right to trial by judge or jury (unless it is a termination hearing where there is no right to a jury); and
>
> (4) the fact that the hearing could result in termination of parental rights if the summons is for a child protective proceeding. MCR 3.920(B)(3); MCR 3.920(F).

Where only a petition requesting temporary custody of a child has been filed, a respondent-parent's written waiver of service of process and notice of hearing is not effective to waive the parent's rights to service of a petition to terminate parental rights. *In re Atkins,* 237 Mich App 249, 251-252 (1999).

## 5.4 Subsequent Services

"After a party's first appearance before the court, subsequent notice of proceedings and pleadings shall be served on that party or, if the party has an attorney, on the attorney for the party as provided in [MCR 3.920(D)], except that a summons must be served for trial or termination hearing as provided in [MCR 3.920(B)]." MCR 3.920(G).[33]

Failure to personally serve a parent with a summons as required by MCL 712A.12 before termination of that parent's parental rights is a jurisdictional defect that renders the proceedings void with regard to that parent. *In re Atkins,* 237 Mich App 249, 250-251 (1999); *In re Gillespie,* 197 Mich App 440, 442 (1992). See also *In re Lovitt*, ___ Mich App ___, ___ (2024).

Where a dispositional order has been entered placing a child in the temporary custody of the court, the court may not proceed to a hearing on termination of parental rights without issuing and serving a fresh summons. MCL 712A.20; *In re Atkins,* 237 Mich App at 251.

## 5.5 Subpoenas

MCR 3.920(E) states that:

> "(1) The attorney for a party or the court on its own motion may cause a subpoena to be served upon a person whose testimony or appearance is desired.
>
> (2) It is not necessary to tender advance fees to the person served a subpoena in order to compel attendance.

[33] See, e.g., *In re Shimmons/Hare*, ___ Mich App ___, ___ (2026).

(3) Except as otherwise stated in this subrule, service of a subpoena is governed by MCR 2.506."

## 5.6 Proof of Service

A proof of service must identify the papers being served. MCR 3.920(I)(4). For papers being served on a foster parent, preadoptive parent, or relative caregiver, a proof of service must "be maintained in the confidential social file as identified in MCR 3.903(A)(3)(b)(*vii*)." MCR 3.920(I)(4).

If a party fails to file a proof of service, it will not affect the validity of the service. MCR 3.920(I)(5).

### A. Proof of Service For Summons

Proof of service of a summons must be made in accordance with MCR 2.104(A). MCR 3.920(I)(1).

MCR 2.104(A) specifies that proof of service may be made by any of the following:

> "(1) written acknowledgment of the receipt of a summons and a copy of the complaint, dated and signed by the person to whom the service is directed or by a person authorized under these rules to receive the service of process;
>
> (2) a certificate stating the facts of service, including the manner, time, date, and place of service, if service is made within the State of Michigan by
>
> (a) a sheriff,
>
> (b) a deputy sheriff or bailiff, if that officer holds office in the county in which the court issuing the process is held,
>
> (c) an appointed court officer,
>
> (d) an attorney for a party; or
>
> (3) written statement of the facts of service, verified under MCR 1.109(D)(3). The statement shall include the manner, time, date, and place of service, and indicate the process server's official capacity, if any."

> "The place of service must be described by giving the address where the service was made or, if the service was not made at a particular address, by another description of the location." MCR 2.104(A).

## B. Proof of Service For Other Documents

Proof of service of other papers permitted or requiring service must be made in accordance with MCR 2.107(D). MCR 3.920(I)(2).

MCR 2.107(D) specifies that "[e]xcept as otherwise provided by MCR 2.104, [MCR] 2.105, or [MCR] 2.106, proof of service of documents required or permitted to be served must be by written acknowledgment of service, or a written statement by the individual who served the documents verified under MCR 1.109(D)(3). The proof of service may be included at the end of the document as filed. Proof of service must be filed promptly and at least at or before a hearing to which the document relates."

## C. Proof of Service By Publication

Proof of service by publication must be made in accordance with MCR 2.106(G)(1) and MCR 2.106(G)(3), if the publication is accompanied by a mailing. MCR 3.920(I)(3).

MCR 2.106(G)(1) specifies that proof of service by publication may be proven as follows:

> "(1) Publication must be proven by an affidavit of the publisher or the publisher's agent
>
> (a) stating facts establishing the qualification of the newspaper in which the order was published,
>
> (b) setting out a copy of the published order, and
>
> (c) stating the dates on which it was published." MCR 2.106(G)(1).

MCR 2.106(G)(3) specifies that proof of service by publication accompanied by a mailing may be proven as follows:

> "(3) Mailing must be proven by a verified statement. The person signing the verified statement must attach a copy of the order as mailed, and a return receipt."

## 5.7 Judgments and Orders

"The form and signing of judgments are governed by MCR 2.602(A)(1) and [MCR 2.602(A)](2)." MCR 3.925(C).

MCR 2.602(A)(1)-(2) specifically states:

> "(1) Except as provided in this rule and in MCR 2.603, all judgments and orders must be in writing, signed by the court, and dated with the date they are signed.
>
> (2) The date of signing an order or judgment is the date of entry."

"Judgments and orders may be served on a person by first-class mail to the person's last known address, by e-mail under MCR 2.107(C)(4),[34] or electronic service under MCR 1.109(G)(6)(a)." MCR 3.925(C).

## 5.8 Adjournments and Continuances in Child Protective Proceedings

In child protective proceedings, adjourning a trial or hearing should only be granted for good cause after the court takes the child's best interests into consideration and where the adjournment is for as short of a period as possible.[35] MCR 3.923(G). In order for a court to find good cause, "'a legally sufficient or substantial reason' must first be shown." *In re Utrera*, 281 Mich App 1, 10-12 (2008) (although the court erred by failing to find good cause or consider the child's best interests to support its multiple adjournments, reversal was not required when the respondent-mother contributed to the adjournments on several occasions and failed to show how she was prejudiced by them).

The court should not adjourn a hearing or grant a continuance if it is solely upon stipulation of counsel or for a party's convenience. MCL 712A.17(1). Rather, the adjournment must be for good cause with factual findings on the record and where one of the following applies:

> "(a) The motion for the adjournment or continuance is made in writing not less than 14 days before the hearing.

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[34] "Notwithstanding any other provision of [MCR 2.107], until further order of the Court, all service of process except for case initiation 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) but should otherwise comply as much as possible with the provisions of [MCR 2.107(C)(4)]." MCR 2.107(G).

[35] See Section 7.6(D) for a detailed discussion of adjourning preliminary hearings, and Section 12.2 for a detailed discussion of time requirements for trials.

> (b) The court grants the adjournment or continuance upon its own motion after taking into consideration the child's best interests. An adjournment or continuance granted under this subdivision shall not last more than 28 days unless the court states on the record the specific reasons why a longer adjournment or continuance is necessary." MCL 712A.17(1).

# Chapter 6: Establishing Paternity For Child Protective Proceedings


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## 6.1 Identifying a Child's Father

Efforts to include all parents involved in a child's life should begin at the very first hearing in child protective proceedings. National Council of Juvenile and Family Court Judges, *Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, p 82. Early identification, location, and engagement of the father are critical—"there is no paternal side of the family until a determination is made about who the father actually is." *Id*. "Timely resolution of paternity issues is both in the best interests of the child and essential to avoiding delays at subsequent points in the court process. The court must ensure that the efforts of the child welfare agency are thorough and diligent in locating

and involving all legal and putative parents." *Id*. See also National Council of Juvenile and Family Court Judges, *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, p 10; *Michigan Absent Parent Protocol: Identifying, Locating, and Notifying Absent Parents in Child Protective Proceedings*, p 3. The *Absent Parent Protocol* is a useful tool developed by the State Court Administrative Office (SCAO) to guide a court through the procedures of finding and notifying absent/noncustodial parents during a child protective proceeding.[1]

## 6.2 Authorities Governing Paternity and Parental Rights

### A. Court Rules and the Juvenile Code (Child Protective Proceedings)

Practice and procedure in all cases filed in the family division of circuit court under the Juvenile Code, MCL 712A.1 *et seq*.—which includes child protective proceedings—are governed by the court rules in subchapter 1.100 (applicability and construction of court rules), subchapter 3.900 (proceedings involving juveniles), and subchapter 8.100 (general administrative orders). MCR 3.901(A)(1). Other court rules may apply to juvenile cases in the family division of circuit court "only when [subchapter 3.900] specifically provides." MCR 3.901(A)(2). MCR 3.901(B) lists court rules that apply to child protective proceedings: MCR 3.901–MCR 3.906, MCR 3.911-MCR 3.930, and MCR 3.991-MCR 3.993. MCR 3.901(B)(1).

### B. Statutory Authority and Paternity

Statutory authority exists for the determination of paternity for purposes of the Paternity Act,[2] MCL 722.711 *et seq*., the Revocation of Parentage Act,[3] MCL 722.1431 *et seq*., the Adoption Code, MCL 710.21 *et seq*., the Acknowledgment of Parentage Act,[4] MCL 722.1001 *et seq*., the Genetic Parentage Act, MCL 722.1461 *et seq*., the Safe Delivery of Newborns Law,[5] MCL 712.1 *et seq*., the Child Custody Act, MCL 722.21 *et seq*., the Summary Support and

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[1]For more information see the DHHS Children's Foster Care Manual (FOM), *Efforts to Identify and Locate Absent/Putative Parent(s)*, FOM 722-06G.

[2]For a discussion of the Paternity Act, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 3, Section 3.3.

[3]For a discussion of the Revocation of Parentage Act, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 3, Section 3.5.

[4]For a discussion of the Acknowledgment of Parentage Act, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 3, Section 3.4.

[5]For a discussion of the Safe Delivery of Newborns Law, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 3, Section 3.6.

Paternity Act, MCL 722.1491 *et seq*., and the Uniform Interstate Family Support Act (UIFSA),[6] MCL 552.2101 *et seq*. Each of these statutory authorities, directly or indirectly to some degree, "deals with the same subject matter—the determination of a child's legal father—and [they] all serve the interrelated purposes of establishing or disestablishing a child's paternity."[7] *In re E R Moiles (Moiles I)*, 303 Mich App 59, 68-69 (2013), rev'd in part and vacated in part on other grounds by *In re E R Moiles (Moiles II)*, 495 Mich 944 (2014).[8]

"Statutes [that] relate to the same subject or share a common purpose" are *in pari materia* and must be read and construed "together as one law." *Moiles I*, 303 Mich App at 68-69. See also *Aichele v Hodge*, 259 Mich App 146, 161 (2003), where the Court similarly stated "that the Paternity Act, the Acknowledgment of Parentage Act, and the Child Custody Act, which serve interrelated purposes, must be interpreted consistently with each other and read in pari materia." *Id*.

## 6.3 Types of Fathers

### A. *Father* Under Select Provisions of the Court Rules and the Revocation of Parentage Act

One definition of *father* for purposes of child protective proceedings is "[a] man married to the mother at any time from a minor's conception to the minor's birth, 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[.]" MCR 3.903(A)(7)(a). There may be only one legal father. *Sinicropi v Mazurek*, 273 Mich App 149, 164 (2006).

**Presumption of legitimacy.** A child born to a mother who was married at any time from the child's conception to the child's birth is presumed to be the issue of the marriage. *In re CAW*, 469 Mich 192, 199 (2003).

**Adoption.** A legal father is "[a] man who legally adopts the minor[.]" MCR 3.903(A)(7)(b).

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[6] For a discussion of the Uniform Interstate Family Support Act, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 3, Section 3.8.

[7] The Genetic Parentage Act, MCL 722.1461 *et seq*., also deals with the determination of a child's paternity.

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

**Court order.** A legal father is "[a] man who by order of filiation or by judgment of paternity is judicially determined to be the father of the minor[.]" MCR 3.903(A)(7)(c).

Legally, a man that is the subject of a court's order of filiation regarding the minor is known as the "affiliated father." MCL 722.1433(b). Entry of an order of filiation is one method of establishing paternity when a child is born out of wedlock. *Sinicropi*, 273 Mich App at 163. An order of filiation may not be entered if there is a valid acknowledgment of parentage on file. *Id*. To enter an order of filiation under those circumstances, the court must first revoke the acknowledgment of parentage. *Id*.

**Parental rights.** A legal father is "[a] man judicially determined to have parental rights[.]" MCR 3.903(A)(7)(d).

**Acknowledgment of parentage.** A legal father is "[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."[9] MCR 3.903(A)(7)(e).

Legally, any individual who executes an acknowledgment of parentage is known as the "acknowledged parent". MCL 722.1433(a) ("an individual who has affirmatively held themself out to be the child's parent by executing an acknowledgment of parentage"). MCL 722.1433(a). An acknowledgment of parentage is another way to establish a child's paternity when the child was born out of wedlock. *Sinicropi*, 273 Mich App at 163. When an acknowledgment of parentage is properly completed and filed naming one man as a child's father, a court may not enter an order of filiation naming a different man as the child's father. *Id*. at 164-165.

## B. *Putative Father* Under the Court Rules

For purposes of subchapter 3.900 of the Michigan Court Rules, a *putative father* is the alleged biological father of a child whenever there is no legal father. MCR 3.903(A)(24). If, in a child protective proceeding, "the court determines that the minor has no father as defined in MCR 3.903(A)(7), the court may, in its discretion, take appropriate action as described in [MCR 3.921(D)]." MCR 3.921(D).[10]

[9] "For an acknowledgment under the Acknowledgment of Parentage Act, the man and mother must each sign the acknowledgment of parentage before a notary public appointed in this state. The acknowledgment shall be filed at either the time of birth or another time during the child's lifetime with the state registrar." MCR 3.903(A)(7)(e).

## 6.4 *Natural Fathers* Under the Equitable-Parent Doctrine

As it was initially adopted, the equitable-parent doctrine provided standing to nonbiological fathers seeking custody of or parenting time with a child born during their marriage to the child's mother by recognizing the nonbiological fathers as natural fathers under certain circumstances. *Pueblo v Haas*, 511 Mich 345, 351 (2023) (extending the equitable-parent doctrine to same-sex couples who would have married absent the unconstitutional prohibition against same-sex marriage before *Obergefell v Hodges*, 576 US 644 (2015)). "'[B]iological relationships are not [the] exclusive determination of the existence of a family[.] . . . No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in [their] care may exist even in the absence of blood relationship.'" *Pueblo*, 511 Mich at 351, quoting *Smith v Org of Foster Families for Equality & Reform*, 431 US 816, 843-844 (1977).

The equitable-parent doctrine is summarized in *Atkinson v Atkinson*, 160 Mich App 601 (1987), in which the doctrine first appeared. In that case, the Court of Appeals announced that "a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support. We hold that the husband may be considered the equitable parent under these circumstances . . . ."[11] *Id*. at 608-609. See also *York v Morofsky*, 225 Mich App 333, 336 (1997).[12]

In *Pueblo*, the Michigan Supreme Court "narrowly extend[ed] the equitable-parent doctrine" to address and resolve custody disputes occurring between same-sex couples who had been unconstitutionally prevented from marrying. *Pueblo*, 511 Mich at 351. In custody disputes

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[10] MCR 3.921(D) governs the notice that may be given to a putative father of hearings in a child protective proceeding "[*if*] *the court determines that the minor has no father . . . .*" (Emphasis added.)

[11] "It bears noting that the equitable-parent doctrine may be invoked by any married person, though it was initially framed within a husband's bid for custody of nonbiological children of a marriage. See [*Atkinson v Atkinson*, 160 Mich App 601, 608-609 (1987)]; [*Stankevich v Milliron (On Remand)*, 313 Mich App 233, 238-239 (2015)]. Several reasons support this outcome. The doctrine itself is concerned with protecting close de facto parent-child relationships despite the absence of biological connection—the would-be equitable parent's sex is irrelevant. Further, the Equal Protection Clause requires that all persons similarly situated be treated alike under the law. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318 (2010) [citation omitted]. Married women in same-sex marriages are similarly situated to married men in opposite-sex marriages who would be able to pursue custody for children born to or adopted by their spouses through the equitable-parent doctrine. Therefore, women should not be treated differently from men." *Pueblo v Haas*, 511 Mich 345, 367 n 10 (2023).

involving same-sex couples, "[a] person seeking custody who demonstrates by a preponderance of the evidence that the parties would have married before the child's conception or birth but for Michigan's unconstitutional marriage ban is entitled to make their case for equitable parenthood to seek custody." *Id*.

If the court recognizes a man as a natural father under the equitable-parent doctrine, that status is permanent, and the man possesses all of the rights and responsibilities of a legal parent. *York*, 225 Mich App at 337. "There is no distinction at that point between the 'equitable' parent and any other parent; each is endowed with the same rights and responsibilities of parenthood." *Id*. Equitable parenthood is not fluid—that is, equitable-parent status does not ebb and flow over time. *Id*. at 338. "If equitable parenthood could ebb and flow over time, it would be a class of parenthood inferior to natural or adoptive parenthood, which are usually permanent statuses." *Id*. "[I]t is not necessary that a party continually meet the three *Atkinson* criteria any more than it is necessary for a biological or adoptive parent to perpetually meet such criteria in order to retain parental status." *Id*. at 337. A man may be an equitable parent as long as he satisfies the criteria in *Atkinson*, "for a reasonable period at some point . . . ." *Id*.

The *York* Court explained that treating equitable parenthood as "a condition that could change over time—rather than a permanent status, is untenable" for three reasons. *Id*. at 338. First, treating equitable parenthood as fluid "would undermine the principle . . . that equitable parents stand on equal footing with natural and adoptive parents." *Id*. Second, treating equitable parenthood as fluid would fail to recognize that "stability in acknowledged parent-child relationships is generally in the child's best interests." *Id*. Third, treating equitable parenthood as fluid would also fail to recognize that "stability and security in familial relationships are also in the parents' best interests." *Id*. And finally, "a view of equitable parenthood as a permanent status would foster legal certainty and predictability in such collateral areas as inheritance, income tax status, and medical care responsibility." *Id*. at 338-339.

In opposite-sex marriages, the equitable-parent doctrine only applies to a child born or conceived during a marriage between the child's mother and the man to be named the child's equitable father. *Van v Zahorik*, 460

[12]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 v Putnam*, 316 Mich App 247, 256 (2016) ("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.

Mich 320, 330-331 (1999). The Court in *Van* refused "'to extend the doctrine outside the context of marriage . . . .'" *Killingbeck v Killingbeck*, 269 Mich App 132, 141-142 (2005), quoting *Van*, 460 Mich at 331.

"[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 . . . ." *Coble v Green*, 271 Mich App 382, 383, 388-389 (2006).[13] In cases where there exists an equitable parentage order, a mother has no standing to initiate a paternity action regarding that child. *Id*.

## 6.5 Putative Fathers/Alleged Biological Fathers/Natural Fathers and Child Protective Proceedings

### A. Putative Father

A *putative father* is "a man who is alleged to be the biological father of a child who has no father as defined in MCR 3.903(A)(7)." MCR 3.903(A)(24). A court may determine at any time during child protective proceedings that the child has no legal father. MCR 3.921(D). If, at any time during a child protective proceeding, the court determines that the child has no father as father is defined under MCR 3.903(A)(7), the court may inquire into the identity and location of the child's putative, or natural, father. MCR 3.921(D)(1).

Termination of a husband's parental rights under the Juvenile Code to a child born or conceived during his marriage to the child's mother, making him the child's presumed father, is not a determination that a child is not the issue of the marriage and that the husband-father is no longer the child's father, only that the husband-father's parental rights related to the child were terminated. *In re CAW*, 469 Mich 192, 199 (2003). Because termination of a presumed father's parental rights alone does not mean that the child involved has no legal father, such a determination does not confer on a putative father standing to participate in child protective proceedings involving the child. *Id*.

### B. Required Notice

If, after taking initial testimony on the identity and address of the natural father, the court finds probable cause to believe that an

[13] *Coble v Green*, 271 Mich App 382 (2006), was a legal malpractice action involving the biological father of the child at issue in *York v Morofsky*, 225 Mich App 333 (1997). After the child's equitable father, Morofsky, failed to pay child support, the mother initiated a paternity action against the child's biological father. *Coble*, 271 Mich App at 384. Because "'equitable parenthood is a permanent status once it attaches,'" and because equitable parenthood precludes a finding that a child was born out of wedlock, the child's mother had no standing to initiate a paternity action against the child's biological father. *Id*. at 388-389.

identifiable man is the child's natural father, the court must "direct that notice be served on that person in any manner reasonably calculated to provide notice to the putative father[14] . . . ."[15] MCR 3.921(D)(1).[16]

Notice to the putative father may be given by publication "if his whereabouts remain unknown after diligent inquiry." *Id*. "Any notice by publication must not include the name of the putative father." *Id.* If the identity of the child's natural father is unknown, the court must direct that notice by publication be given to the unknown father. *Id*.

## C. Contents of Notice

Notice that a hearing will be held to identify a child's father must include all of the following information:

(1) the child's name (if known).

(2) the name of the child's mother (if known).

(3) the child's birthplace and birthdate (if known).

(4) that a petition has been filed with the court alleging that the child has been harmed or has not been properly cared for.

(5) the time and location of the hearing at which the natural father is to appear to express any interest he has in the child.

(6) a statement informing the natural father that his failure to appear for the hearing will constitute:

(a) a denial of his interest in the child;

(b) a waiver of his right to be given notice of all subsequent hearings; and

(c) a waiver of his right to an appointed attorney.

(7) a statement informing the natural father that his failure to appear for the hearing could result in the

[14]See SCAO form JC 53, *Notice to Putative Father*. See also the DHHS Children's Foster Care Manual (FOM), *Court Review*, FOM 722-10.

[15] See SCAO form JC 53, *Notice to Putative Father*.

[16]MCR 2.004 sets forth the notice requirements that apply when a putative father is incarcerated. See Section 5.2(C) for more information.

termination of his parental rights. MCR 3.921(D)(1)(a)-(d).

## D. Hearing

After satisfying the notice requirements in MCR 3.921(D)(1), the court may conduct a hearing and determine,[17] according to MCR 3.921(D)(2)(a)-(d), and as appropriate, that:

(1) the putative father was properly served with notice of the hearing, that is, in a manner the court finds was reasonably calculated to provide notice to the putative father.

(2) a preponderance of the evidence establishes that the putative father is the child's natural father and that justice requires he be allowed 14 days to establish his paternity as provided in MCR 3.903(A)(7).

**Note:** The 14-day period may be extended for good cause shown. MCR 3.921(D)(2)(b). Unless good cause for delay is shown, the court does not have to allow a putative father to perfect paternity outside of the time set by the court. *In re LE*, 278 Mich App 1, 21 (2008), abrogated on other grounds by *In re Sanders*, 495 Mich 394 (2014).[18] See *In re IM Long*, 326 Mich App 455, 465 (2018).

(3) there is probable cause to believe that another identifiable man is the child's natural father, and if so, the other identifiable man must receive notice as provided in MCR 3.921(D).

(4) the identity of the child's natural father cannot be determined after a diligent search, in which case the court may proceed without giving further notice and without appointing an attorney for the unidentified person.

If the child's natural father has been given proper notice and fails to appear for the hearing, or appears for the hearing but fails to establish his paternity of the child within the time allowed by the court, the court may find that the natural father has waived all rights to further notice, including notice of the termination of his

[17] See SCAO form JC 106, *Findings Following Putative Father Hearing*.

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

parental rights and notice of his right to an attorney. MCR 3.921(D)(3)(a)-(b).

> **Note:** If a putative father, whose whereabouts are unknown, fails to appear at the hearing after notice was given "by publication or otherwise," the court is not required to give further notice by publication of any subsequent hearings, unless the subsequent hearing concerns the termination of parental rights. MCR 3.921(E).

## 6.6 Revocation of Parentage Act[19]

The Revocation of Parentage Act was enacted "to provide procedures to determine the parentage of children in certain circumstances [and] to allow acknowledgments, determinations, and judgments relating to parentage to be set aside in certain circumstances[.]" 2012 PA 159, title.

If paternity has been established or is uncontested and the father has a substantial parent-child relationship with his child, he has a protected liberty interest in that relationship that entitles him to due process of law. *Lehr v Robertson*, 463 US 248, 261-262 (1983); *Caban v Mohammed*, 441 US 380, 392-393 (1979); *Stanley v Illinois*, 405 US 645, 649 (1972).

### A. Application

Different sections of the Revocation of Parentage Act govern the procedures for revoking parentage that had been established under certain circumstances:

- MCL 722.1437 applies to actions to set aside an acknowledgment of parentage. MCL 722.1435(1).
- MCL 722.1438 applies to actions to determine that a child's genetic father is not the child's father. MCL 722.1435(2).
- MCL 722.1439 applies to actions to set aside an order of filiation. MCL 722.1435(3).
- MCL 722.1441 applies to actions to determine that a child's presumed parent is not the child's parent. MCL 722.1435(4).
- MCL 722.1445(2) applies in cases involving a child conceived as a result of nonconsensual sexual penetration[20] to actions to revoke an acknowledgment of

[19]The Revocation of Paternity Act was renamed the Revocation of Parentage Act by 2024 PA 29, effective April 2, 2025.

> parentage, determine that a genetic father is not the child's father, set aside an order of filiation, or determine paternity regarding an alleged father and enter an order revoking paternity.

The Revocation of Parentage Act may not be used to bring an action "concerning the parentage of . . . [a] child conceived through the use of assisted reproduction that does not involve surrogacy if the parents of the child may be determined under the assisted reproduction and surrogacy parentage act [MCL 722.1701 *et seq.*, or a] child conceived under a surrogacy agreement that complies with the assisted reproduction and surrogacy parentage act." MCL 722.1443(11).

## B. Possible Outcomes

In an action filed under the Revocation of Parentage Act, a court may do any of the following:

- revoke an acknowledgment of parentage. MCL 722.1443(2)(a), MCL 722.1445(2)(a).
- determine that a child's genetic father is not the child's father. MCL 722.1443(2)(b), MCL 722.1445(2)(b).
- set aside an order of filiation or other paternity order. MCL 722.1443(2)(c), MCL 722.1445(2)(c).
- determine that a child was born out of wedlock. MCL 722.1443(2)(d).
- determine paternity and enter an order of filiation under MCL 722.717 of the Paternity Act. MCL 722.1443(2)(e).
- in cases involving a child conceived as a result of nonconsensual sexual penetration, determine paternity regarding an alleged father and enter an order of revocation of parentage for that alleged father. MCL 722.1445(2)(d).[21]

A court may refuse to interfere with an existing parentage determination if there is evidence that revoking parentage would

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[20]For purposes of MCL 722.1445, "sexual penetration" means "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."

[21]For purposes of MCL 722.1445, "sexual penetration" means "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."

not be in the child's best interests. MCL 722.1443(4).[22] Specifically, if there is evidence that revoking parentage is not in a child's best interests, "[a] court may refuse to enter an order setting aside a parentage determination, revoking an acknowledgment of parentage, determining that a genetic father is not a child's father, or determining that a child is born out of wedlock . . . ." *Id*.

If the court refuses to revoke parentage, it must state on the record its reasons for the refusal. *Id*. MCL 722.1443(4) only requires such findings and reasons to be made on the record when it *refuses* to enter the order, i.e., when it does not alter the presumed parent's status. *Id*. See also, e.g., *Jones v Jones*, 320 Mich App 248, 256-257 (2017) ("because the trial court ultimately did alter the presumed father's status, the court clearly was not required to express its particular reasons").

> **Note:** The child in *Jones* was conceived using assisted reproductive technology. Effective April 2, 2025, 2024 PA 29 amended MCL 722.1431 *et seq*., to prohibit actions under the Revocation of Parentage Act "concerning the parentage of . . . [a] child conceived through the use of assisted reproduction that does not involve surrogacy if the parents of the child may be determined under the assisted reproduction and surrogacy parentage act [MCL 722.1701 *et seq*., or a] child conceived under a surrogacy agreement that complies with the assisted reproduction and surrogacy parentage act." MCL 722.1443(11).

## C. Factors to Consider

To determine whether to enter an order revoking parentage, the court may consider these factors:

> "(a) Whether the presumed parent is estopped from denying parentage because of the individual's conduct.
>
> (b) The nature of the relationship between the child and the presumed parent or alleged father.
>
> (c) The child's age.

[22]The best-interest findings set forth in MCL 722.1443(4) do not apply to actions brought under MCL 722.1445(2). *Blackman v Millward*, ___ Mich App ___, ___ (2024). ("[T]he trial court did not err by not conducting a best interests analysis under [MCL 722.1443(4)] because that statute does not apply to actions to revoke an AOP [Acknowledgment of Parentage] initiated under [MCL 722.1445].") For more information on actions to revoke an AOP under MCL 722.1445(2), see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Sections 3.5 and 3.15. See also Section 6.6(H).

(d) The harm that may result to the child.

(e) Other factors that may affect the equities arising from the disruption of the parent-child relationship.

(f) Any other factor that the court determines appropriate to consider." MCL 722.1443(4).[23]

## D. Genetic Testing

MCL 722.1443(6) requires the court to "order the parties to an action or motion under [the Revocation of Parentage Act, MCL 722.1431 *et seq*.,] to participate in and pay for blood or tissue typing or DNA identification profiling to assist the court in making a determination under [the Revocation of Parentage Act]." The genetic testing must be conducted as described in MCL 722.716 of the Paternity Act. MCL 722.1443(6).

However, "[t]he results of blood or tissue typing or DNA identification profiling are not binding on a court in making a determination under [the Revocation of Parentage Act]." MCL 722.1443(6). See also *Helton v Beaman*, 304 Mich App 97, 110 (2014)[24] (opinion by O'Connell, J.), aff'd on other grounds 497 Mich 1001 (2015). According to the lead opinion, and agreed with by the concurring opinion, "DNA results are not binding on a court making a determination under [the Revocation of Parentage Act, and that] statutory declaration gives circuit courts discretion to consider other factors when determining whether to revoke an acknowledgment of parentage." *Helton*, 304 Mich App at 110 (O'Connell, J.); *Helton*, 304 Mich App at 123 (K. F. Kelly, J., concurring). In affirming the outcome in *Helton*, the Michigan Supreme Court held that "an order revoking an acknowledgment of parentage constitutes an order 'setting aside a paternity

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[23] MCL 722.1443(4) does not apply to actions brought under MCL 722.1445(2). See *Blackman v Millward*, ___ Mich App ___, ___ (2024): "[MCL 722.1445(2)] was enacted to implement the [Rape Survivor Child Custody Act, 34 USC 21301, *et seq*.]" in which a key provision "was to provide a mechanism to sever the parental rights of a rapist who fathers a child." "[I]f a mother, after a fact-finding hearing, proves by clear and convincing evidence that the child was conceived as a result of nonconsensual sexual penetration, the court shall revoke an Acknowledgment of Parentage [AOP] for an acknowledged father." *Blackman,* ___ Mich App at ___ (cleaned up); see MCL 722.1445(2). The only exception to the mandate that the court revoke the AOP is when "the biological parents cohabit and establish a mutual custodial environment for the child" after the date that the nonconsensual sexual penetration allegedly occurred. MCL 722.1445(3). "[MCL 722.1445(3)] makes no mention of considering the best interests of the child." *Blackman*, ___ Mich App at ___. For more information on actions to revoke an AOP under MCL 722.1445(2), see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Sections 3.5 and 3.15. See also Section 6.6(H).

[24] *Helton v Beaman*, 304 Mich App 97 (2014), is a plurality opinion. "'[A] plurality decision in which no majority of the participating justices agree concerning the reasoning is not binding authority under the doctrine of stare decisis[.]'" *Demski v Petlick*, 309 Mich App 404, 429 (2015), quoting *Burns v Olde Discount Corp*, 212 Mich App 576, 582 (1995).

determination' and, therefore, is subject to a best interest analysis under MCL 722.1443(4)[25]." *Helton*, 497 Mich 1001.

## E. Best-Interest Factors Under the Child Custody Act[26]

The best-interest factors in the Revocation of Parentage Act apply to a court's determination that a child was born out of wedlock even though the child's mother was married at the time of the child's birth. *Demski v Petlick*, 309 Mich App 404, 432 (2015). Consideration of the best-interest factors in the Child Custody Act is also proper:

> "The breadth of the factors available to a court to consider is exemplified by the fact that Factor (h) is '[a]ny other factor that the court determines appropriate to consider.' MCL 722.1443(4)(h).[27] 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.

## F. What the Revocation of Parentage Act Does Not Do

"A judgment entered under [the Revocation of Parentage Act] does not relieve an individual from a support obligation for the child or the child's parent 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). See *Adler v Dormio*, 309 Mich App 702, 709 (2015) ("MCL 722.1443(3) allows a person who has obtained a judgment under [the Revocation of Parentage Act] to seek relief from prior child support orders under MCR 2.612. MCL 722.1443(3) specifically allows a defendant to resort to applicable court rules to seek relief from prior support orders. MCR 2.612(C)(1) expressly provides for such relief and does not limit the type of orders from which relief may be sought.").

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[25] 2024 PA 29, effective April 2, 2025, amended and re-lettered the required best interest analysis factors under MCL 722.1443(4).

[26] The best-interest findings required to refuse to enter an order affecting paternity under MCL 722.1443(4) do not apply to actions brought under MCL 722.1445(2). See *Blackman v Millward*, ___ Mich App ___, ___ (2024) ("[T]he trial court did not err by not conducting a best interests analysis under [MCL 722.1443(4)], because that statute does not apply to actions to revoke an AOP [Acknowledgment of Parentage] initiated under [MCL 722.1445]."). For more information on actions to revoke an AOP under MCL 722.1445(2), see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Sections 3.5 and 3.15. See also Section 6.6(H).

[27] Formerly MCL 722.1443(4)(f). See 2024 PA 29, effective April 2, 2025.

## G. When an Action Under the Revocation of Parentage Act May Not Be Brought

An action under the Revocation of Parentage Act may not be initiated when the child is subject to a court's jurisdiction under the Juvenile Code, MCL 712A.1 *et seq*., and a petition seeking the termination of parental rights to the child has been filed. MCL 722.1443(17). However, an action under the Revocation of Parentage Act may be brought under these circumstances if the court with jurisdiction over the child under the Juvenile Code "first finds that allowing an action under [the Revocation of Parentage Act] would be in the best interests of the child." *Id*.

"An alleged father may not bring an action under [the Revocation of Parentage Act] if the child [was] 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(16).

## H. When Paternity Must Be Revoked Under the Revocation of Parentage Act

"If an action is brought by a mother who, after a fact-finding hearing, proves by clear and convincing evidence that the child was conceived as a result of nonconsensual sexual penetration,[28] the court shall do 1 of the following:

> (a) Revoke an acknowledgment of parentage for an acknowledged father.
>
> (b) Determine that a genetic father is not the child's father.
>
> (c) Set aside an order of filiation for an affiliated father.
>
> (d) Make a determination of paternity regarding an alleged father and enter an order of revocation of parentage for that alleged father." MCL 722.1445(2).

"2016 PA 178 revised the ROPA by adding subsections [(2)-(4)] to MCL 722.1445 in order to meet the requirement under the federal [Rape Survivor Child Custody Act, 34 USC 21301, *et seq*.] to ensure 'termination of parental rights' of the assailant, as defined at 34 USC 21301(2)." *Blackman v Millward*, ___ Mich App ___, ___ (2024). "[T]he 2016 amendments granted a mother the authority to initiate an

[28]For purposes of MCL 722.1445, "sexual penetration" means "that term as defined by [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."

action to protect herself and the child by terminating her offender's parental rights." *Id*. at ___.

If a mother proves by clear and convincing evidence at a fact-finding hearing that a child was conceived through nonconsensual sexual penetration, then "[t]he directive to revoke the AOP [Acknowledgment of Parentage] is mandatory—the court *shall* revoke the AOP." *Id*. at ___. "This language does not leave any room for a trial court to exercise its discretion otherwise." *Id*. at ___.

"MCL 722.1445(3) provides the only exception to the mandate that the court revoke the AOP [in an action brought under MCL 722.1445]: '[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.'" *Blackman*, ___ Mich App at ___, quoting MCL 722.1445(3). The bases for refusing to set aside a paternity determination, revoking an AOP, determining that a genetic father is not a child's father, or determining that a child is born out of wedlock listed under MCL 722.1443(4) (best interest determination factors) do not apply to actions brought under MCL 722.1445(2). *Blackman*, ___ Mich App at ___.[29]

## 6.7 Presumed Parent and the Revocation of Parentage Act[30]

### A. Presumed Parent

MCL 722.1433(f) defines a *presumed parent* as "an individual who is presumed to be the child's parent by virtue of marriage to the child's mother at the time of the child's conception or birth." A husband is presumed to be the father of a child when he is married to the mother of a child conceived by assisted reproductive technology (ART), specifically, in vitro fertilization (IVF)."*Jones v Jones*, 320 Mich App 248, 254 (2017). See also MCL 333.2824(6).

> **Note:** The child in *Jones* was conceived using assisted reproductive technology. Effective April 2, 2025, 2024 PA 29 amended MCL 722.1431 *et seq*., to prohibit actions under the Revocation of Parentage Act "concerning the

[29]For more information on actions to revoke an Acknowledgment of Parentage under MCL 722.1445(2), see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Sections 3.5 and 3.15.

[30]The Revocation of Paternity Act was renamed the Revocation of Parentage Act by 2024 PA 29, effective April 2, 2025. For more information about presumed fathers and the Revocation of Parentage Act, see the Michigan Judicial Institute's Quick Reference Materials—*Determining That a Child's Presumed Father Is Not a Child's Father*.

> parentage of . . . [a] child conceived through the use of assisted reproduction that does not involve surrogacy if the parents of the child may be determined under the assisted reproduction and surrogacy parentage act [MCL 722.1701 *et seq.*, or a] child conceived under a surrogacy agreement that complies with the assisted reproduction and surrogacy parentage act." MCL 722.1443(11).

"[U]nder the Paternity Act, the custodial rights of a presumed father (i.e., of a man presumed to be a child's father because of his marriage to the child's mother) are significant and warrant due process protection." *Graham v Foster (Graham I)*, 311 Mich App 139, 144 (2015), aff'd in part and vacated in part on other grounds by *Graham v Foster (Graham II)*, 500 Mich 23 (2017),[31] citing *Aichele v Hodge*, 259 Mich App 146, 164 (2003).[32] "[The Revocation of Parentage Act's] definition of a 'presumed father' clearly implies that the presumed father is afforded the legal right of parenthood, unless that presumption is rebutted in a successful action under the act." *Graham I*, 311 Mich App at 144.

"A biological father has no standing to seek a declaration of paternity under the Paternity Act, MCL 722.711 *et seq.*, when the child's mother is married to another man unless a court has previously determined that the child was born out of wedlock." *In re Miller*, 322 Mich App 497, 504 (2018).

## B. Alleged Father

MCL 722.1433(c) defines an *alleged father* as "a man who by his actions could have fathered the child."

## C. Rebutting the Presumption of Parentage: Determining That a Child Was Born Out of Wedlock

MCL 722.1433(e) defines a *presumed parent* as "an individual who is presumed to be the child's parent by virtue of marriage to the child's mother at the time of the child's conception or birth."[33]

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[31] The Michigan Supreme Court agreed with the Court of Appeals that MCR 2.205(A) made the child's presumed father a necessary party to the Revocation of Parentage Act action that sought to establish that the child born during his marriage to the child's mother was born out of wedlock. *Graham II*, 500 Mich at 28-29. However, the Supreme Court vacated the Court of Appeals opinion in part because the Court of Appeals preemptively adjudicated the merits of the presumed father's defense before it could be known if he would raise that defense because he had not yet been made a party to the proceeding. *Id.* at 30.

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

Generally, even when a child has a presumed parent, the Revocation of Parentage Act permits the child's mother, presumed parent, or alleged father to initiate an action to have the court determine that the child was born out of wedlock for the purpose of establishing the child's parentage. MCL 722.1441(1)-(3).[34] Actions under the Revocation of Parentage Act in cases involving a presumed parent are subject to the very specific statutory provisions set forth in MCL 722.1441. The provisions in MCL 722.1441 include time requirements for initiating actions and detailed conditions that must be met before a presumed parent's parentage may be revoked. An alleged father may bring an action to establish paternity as an original action under the Revocation of Parentage Act, but the action must be brought by motion in an existing child protective proceeding under MCL 712A.2(b) involving the child or in an existing action relative to support, custody, or parenting time. MCL 722.1443(1), (17). Specifically, an action may not be brought under the Revocation of Parentage Act if the child involved is under the court's jurisdiction pursuant to the Juvenile Code, and a petition to terminate parental rights to the child has been filed, unless the court finds that permitting an action under the act is in the child's best interests. MCL 722.1443(17). See also MCL 722.1441(5).

In a divorce proceeding, unless a court expressly considers the question of parentage and makes an express determination that a man is a child's father, the court has *not* entered an order of filiation even though the judgment of divorce refers to the man as "defendant-father" and generally acknowledges the child born to the parties during their marriage. *Glaubius v Glaubius*, 306 Mich App 157, 161-162, 170-171 (2014).

## D. Court's Refusal to Enter an Order Determining That a Child Was 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).[35] Factors a court may consider when deciding whether to enter an order determining that a child was born out of wedlock are set forth in

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[33]MCR 3.903(A)(7)(a) also states that a man married to a child's mother at any time from the child's conception to the child's birth is a child's father for purposes of subchapter 3.900 of the Michigan Court Rules (Proceedings Involving Juveniles), "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[.]"

[34]The DHHS may also initiate an action under MCL 722.1441 to have a court determine that a child was born out of wedlock if the child is supported in whole or in part by public assistance. MCL 722.1441(4).

[35]The court may also refuse to enter orders to set aside a parentage determination, revoking an acknowledgment of parentage, or to determine that a genetic father is not a child's father. See MCL 722.1443(4).

MCL 722.1443(4)(a)-(f).[36] If the court refuses to enter an order determining that a child was born out of wedlock, it must state its reasons for the refusal on the record. MCL 722.1443(4).

## 6.8 Affiliated Fathers and the Revocation of Parentage Act[37]

The Paternity Act,[38] MCL 722.711 *et seq*., provides the family division of circuit court with the jurisdiction and authority to compel and provide support for children born out of wedlock. 1956 PA 205, title. "Under the Paternity Act,[39] a party can seek a judicial determination of paternity[.]" *Aichele v Hodge*, 259 Mich App 146, 154 (2003). "Under [the Paternity Act or the Acknowledgment of Parentage Act], paternity can be properly established *only* if the child is 'born out of wedlock.'"[40] *Id*. at 155. See also MCL 722.714.

### A. Affiliated Father

The Revocation of Parentage Act defines an *affiliated father* as "a man who has been determined in a court to be the child's father." MCL 722.1433(b). See also *Glaubius v Glaubius*, 306 Mich App 157, 167 (2014). An order of filiation establishes an affiliated father. MCL 722.1433(g).

"Absent any indication of . . . specificity [that an order of filiation be entered under the Paternity Act], 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)].[41] See also [MCL 722.1433(g)]."[42] *Glaubius*, 306 Mich App at 169.

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[36] See Section 6.6(C) for more information.

[37] The Revocation of Paternity Act was renamed the Revocation of Parentage Act by 2024 PA 29, effective April 2, 2025. For more information, see the Michigan Judicial Institute's Quick Reference Materials—*Setting Aside an Order of Filiation*.

[38] For a discussion of the Paternity Act, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 3, Section 3.3.

[39] For a detailed discussion of the Paternity Act, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 3.

[40] *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." MCL 722.711(a).

[41] Formerly MCL 722.1433(2). See 2014 PA 376, effective March 17, 2015.

[42] Formerly MCL 722.1433(f). See 2024 PA 29, effective April 2, 2025.

## B. Action to Determine Paternity

The parties authorized to file an action to determine paternity under the Paternity Act are the mother, the father, and the Department of Health and Human Services (DHHS). MCL 722.714(1). An action to determine paternity may be brought during the mother's pregnancy or at any time before the child reaches age 18. MCL 722.714(3). The action must be filed in family division of the circuit court where the child or the mother resides unless they both reside out of state, in which case the action must be filed in the county where the putative father resides. MCL 722.714(1); MCL 600.1021(1)(h). The court must enter an order of filiation establishing the child's paternity and providing support for the child if (1) the court or verdict determines that the man is the child's father, (2) the man verbally acknowledges to the court that he is the child's father or files an acknowledgment of parentage, (3) the man receives a summons and a default judgment is entered against him, or (4) genetic testing establishes the man's paternity. MCL 722.717(1)(a)-(d). No matter who initiates the 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).

An action to determine paternity of a child born out of wedlock may not be initiated under the Paternity Act "if the child's father acknowledges paternity under the acknowledgment of parentage act, or if the child's paternity is established under the law of another state."[43] MCL 722.714(2). Parentage established under the law of another state has the same effect in Michigan as in the other state; parentage under the law of another state may be used in the same way as an acknowledgment of parentage or an order of filiation may be used in Michigan. MCL 722.714b.

An affiliated father may initiate an action under the Revocation of Parentage Act to set aside a court's order of filiation if the affiliated father's paternity was decided as a result of the affiliated father's failure to participate in the court proceedings. MCL 722.1439(1).

The time requirements in MCL 722.1441 apply to filing an action under the Revocation of Parentage Act by motion in an existing case when there is a presumed parent. See *Glaubius v Glaubius*, 306 Mich App 157, 173 (2014). According to MCL 722.1441(5), "an action to determine that a child was born out of wedlock may be brought 'by

[43]However, under the Revocation of Parentage Act, "[t]he mother, the acknowledged parent, an alleged father, or a prosecuting attorney may file an action for revocation of an acknowledgment of parentage." MCL 722.1437(1).

a motion filed in an existing action,'" just as the plaintiff brought her action to revoke paternity by motion in the existing divorce case. *Glaubius*, 306 Mich App at 173, quoting MCL 722.1441(5).

## C. Prohibitions on Determinations of Parentage for Children Conceived Through Assisted Reproduction or Surrogacy Agreements

The Paternity Act may not be used to determine the parentage of:

> "(a) A child conceived through the use of assisted reproduction[44] that does not involve surrogacy if the parents of the child may be determined under the assisted reproduction and surrogacy parentage act [MCL 722.1701 *et seq*.].
>
> (b) A child conceived under a surrogacy agreement[45] that complies with the assisted reproduction and surrogacy parentage act [MCL 722.1701 *et seq*.]." MCL 722.714c.

## D. Genetic Testing Under the Paternity Act

*Father* is not expressly defined in the Paternity Act. The terms *putative father*, MCL 722.714(1), and *alleged father*, MCL 722.714(9), are both used to identify the man believed to be the child's father.[46] If the parties do not consent to an order naming the man as the child's father, the mother, alleged father, and child may be required to undergo genetic paternity testing as provided in MCL 722.716.[47] MCL 722.714(9).

Before trial in an action under the Paternity Act the court, on its own motion or on application by either party, must 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

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[44] "Assisted reproduction" is defined as "a method of causing pregnancy through means other than by sexual intercourse" including, but not limited to the methods listed. MCL 722.1703(a).

[45] "Surrogacy agreement" is defined in the Assisted Reproduction and Surrogacy Parentage Act (ARSPA) as "an agreement between 1 or more intended parents and a surrogate in which the surrogate agrees to become pregnant by assisted reproduction and that provides that each intended parent is a parent of a child conceived under the agreement," and, unless otherwise specified, "refers to both a gestational surrogacy agreement and a genetic surrogacy agreement." MCL 722.1703(k).

[46] See also MCL 722.714a, which refers to an *alleged father* and notice to the alleged father of paternity testing and of the matters that may be determined under the Paternity Act.

[47] For more detailed information on genetic testing under the Paternity Act, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 3.

leukocyte antigens, serum proteins, or DNA identification profiling, to determine whether the alleged father is likely to be, or is not, the father of the child." MCL 722.716(1). MCL 722.716 and MCL 722.716a detail the procedure involved when results from the testing are obtained and what may result from a party's failure to submit to the testing.

## E. Court's Continuing Jurisdiction

In all proceedings that occur under the Paternity Act, the court has continuing jurisdiction to decide an action under the Revocation of Parentage Act to set aside an order of filiation. MCL 722.720(c).

## F. Status of a Father After Divorce

In *Glaubius v Glaubius*, 306 Mich App 157, 161 (2014), a child's mother filed for divorce from the child's presumed father. In her complaint she stated that the parties had one child born during the marriage, and in the divorce judgment the parties were addressed as "Plaintiff-Mother" and "Defendant-Father." *Id*. at 161-162. Following the divorce, the child's mother initiated an action to revoke the defendant's paternity. *Id*. at 162.

The trial court in *Glaubius* did not make an express finding in the divorce judgment regarding the defendant's status as the child's father; no challenge to his paternity was raised during the divorce proceedings. *Id*. at 170-171. "[T]he specific definitional dispute at issue relate[d] to whether defendant [was] a 'presumed father,' as contended by plaintiff, or an 'affiliated father,' as maintained by defendant." *Id*. at 166. According to the Court, "on the facts of the present case, defendant qualifies as a presumed father and did not become an affiliated father by operation of the divorce judgment." *Id*. at 171. Therefore, MCL 722.1441(1)(a) applied to the plaintiff's action to revoke the defendant's paternity. *Glaubius*, 306 Mich App at 171.

## G. Court's Refusal to Enter an Order Setting Aside a Parentage Determination

"A court may refuse to enter an order setting aside a parentage determination . . . if the court finds evidence that the order would not be in the best interests of the child." MCL 722.1443(4).[48] Factors a court may consider when deciding whether to set aside a

[48]The court may also refuse to enter orders to revoke an acknowledgment of parentage, to determine that a genetic father is not a child's father, or to determine that a child was born out of wedlock. See MCL 722.1443(4).

parentage determination are set forth in MCL 722.1443(4)(a)-(f).[49] If the court refuses to set aside a parentage determination, it must state its reasons for the refusal on the record. MCL 722.1443(4).

## 6.9 Acknowledged Parents and the Revocation of Parentage Act [50]

### A. Acknowledged Parent

The Revocation of Parentage Act defines an *acknowledged parent* as "an individual who has affirmatively held themself out to be the child's parent by executing an acknowledgment of parentage under the acknowledgment of parentage act MCL 722.1001 to MCL] 722.1013]." MCL 722.1433(a).

The Acknowledgment of Parentage Act defines an *acknowledged parent* as "an individual who has established a parent-child relationship under [MCL 722.1001 *et seq*.]." MCL 722.1002(a). *Child* means "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, a child that the circuit court determines was born or conceived during a marriage but is not the issue of that marriage, or a child that is born to an individual who gave birth to a child conceived through assisted reproduction [as defined by the Assisted Reproduction and Surrogacy Parentage Act (ARSPA), MCL 722.1701 *et seq*.].[51]" MCL 722.1002(c). An acknowledgment of parentage properly signed and filed with the state registrar establishes a child's parentage. MCL 722.1004. "An acknowledgment [of parentage] may be signed any time during the child's lifetime." MCL 722.1003(4). The state form that satisfies the statutory requirements in MCL 722.1007 for a valid acknowledgment of parentage is called an Affidavit of Parentage (DCH-0682). See MCL 722.1008.

The individuals eligible to acknowledge parentage of a child are set forth in MCL 722.1003(1) to MCL 722.1003(3). MCL 722.1004. Those individuals are:

- A man who joins the child's mother in completing a form that is an acknowledgment of parentage for a

[49] See Section 6.6(C) for more information.

[50] The Revocation of Paternity Act was renamed the Revocation of Parentage Act by 2024 PA 29, effective April 2, 2025. For more information, see the Michigan Judicial Institute's Quick Reference Materials—*Setting Aside an Acknowledgment of Parentage*.

[51] "Assisted reproduction" is defined MCL 722.1703(a) as "a method of causing pregnancy through means other than by sexual intercourse" including, but not limited to the methods listed.

child who is born out of wedlock. MCL 722.1003(2). That man is considered the child's natural father. *Id*.

- An individual who joins the individual who gave birth to the child in completing a form that is an acknowledgment of parentage for a child who was conceived by assisted reproduction and born out of wedlock. MCL 722.1003(2). That individual is considered the child's natural parent. *Id*.

- The spouse of an individual who gave birth to a child conceived by assisted reproduction who completes a form that is an acknowledgment of parentage for that child. MCL 722.1003(3). That spouse is considered the child's acknowledged parent. *Id*.

The Court of Appeals concluded that "[n]othing in the Acknowledgment of Parentage Act requires that the man completing the acknowledgment form actually be the child's biological father." *In re Daniels Estate*, 301 Mich App 450, 456 (2013). The Court further noted in support of that observation that a man signing an acknowledgment of parentage waives certain other methods of determining that he is the child's biological father. *Id*. at 456-457.

An acknowledgment of parentage "is the equivalent to an adjudication of parentage . . . and . . . may be the basis for court-ordered child support, custody, or parenting time[52] without further adjudication under the paternity act [MCL 722.711 *et seq*.], or under the assisted reproduction and surrogacy parentage act [MCL 722.1701 *et seq*.]. MCL 722.1004. A child whose parentage is established by acknowledgment "bears the same relationship to the birth parent and the acknowledged parent as a child born or conceived during a marriage and has the identical status, rights, and duties of a child born in lawful wedlock effective from birth." *Id*.[53]

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[52]The initial grant of custody to the mother in an acknowledgment of parentage is "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"; it "does 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; MCL 722.1007(c).

[53]"'MCL 722.1004 affords the *child* the full rights of a child born in wedlock, [but] 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 (2017), quoting *Eldred v Ziny*, 246 Mich App 142, 149 (2001). "[A]cknowledgment of paternity under MCL 722.1003 . . . merely entitles the parties to seek custody, support, or parenting time without the need to first obtain an order of filiation under the Paternity Act, MCL 722.711 *et seq*." *Eldred*, 246 Mich App at 148-149. "[T]he Child Custody Act is the 'exclusive means' of pursuing child custody rights . . . ." *Id*. at 148, quoting *Van v Zahorik*, 460 Mich 320, 328 (1999).

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). Revoking an acknowledgment of parentage requires filing a claim under the Revocation of Parentage Act. MCL 722.1007(h).

## B. Termination of an Acknowledged Parent's Parental Rights

An acknowledged parent's parental rights may be terminated in cases of a stepparent adoption only when the acknowledged parent, for a period of two years or more before the petition for terminating his parental rights was filed, has had the ability to support the child and has failed to do so or has had the ability to communicate or visit with the child and has failed to do so. MCL 710.51(6)(a)-(b). An acknowledged parent's parental rights may also be terminated in accordance with the provisions in the Juvenile Code, MCL 712A.19b. Similarly, the parental rights of a putative father who has established a custodial relationship with a child or who has, according to his ability, provided substantial and regular support to the child or the child's mother during the 90 days before being served with notice of the petition to terminate his parental rights, may only be terminated under the circumstances governing stepparent adoptions, MCL 710.51(6), or under the Juvenile Code, MCL 712A.2.

## C. Setting Aside an Acknowledgment of Parentage

MCL 722.1437 governs setting aside an acknowledgment of parentage under the Revocation of Parentage Act.[54] MCL 722.1435(1).[55]

"The [child's] mother, the acknowledged parent,[56] an alleged father,[57] or a prosecuting attorney may file an action for revocation

[54] MCL 722.1437 does not apply to an action to revoke parentage of a child conceived by nonconsensual sexual penetration under MCL 722.1445(2). *Blackman v Millward*, ___ Mich App ___, ___ (2024). "These two provisions are mutually exclusive and, as a result, apply to disparate factual circumstances." *Id*. at ___. "[MCL 722.1437], enacted in 2012, applies generally when an AOP [Acknowledgment of Parentage] is challenged." *Blackman*, ___ Mich App at ___. "[MCL 722.1445(2)], adopted in 2016 to implement the [Rape Survivor Child Custody Act, 34 USC 21301, *et seq*.], only applies in the specific circumstances where a rape victim bears the child of her assailant." *Blackman*, ___ Mich App at ___. For more information on revoking an AOP for a child conceived after nonconsensual sexual penetration, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Section 3.15.

[55] For a detailed discussion of the Acknowledgment of Parentage Act and the Revocation of Parentage Act, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 3.

of an acknowledgment of parentage." MCL 722.1437(1). An action to revoke 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." MCL 722.1437(1).

A petition to revoke an acknowledgment of parentage must be accompanied by an affidavit sufficient to establish one of the following: (1) mistake of fact, (2) newly discovered evidence that with due diligence could not have been discovered before the acknowledgment of parentage was signed, (3) fraud, (4) misrepresentation or misconduct, or (5) duress in signing the acknowledgment. MCL 722.1437(4)(a)-(e). If the affidavit is sufficient the court must order genetic testing in accordance with MCL 722.1443(6). MCL 722.1437(5).[58]

The genetic testing results are meant to assist the court in its determination under the Revocation of Parentage Act, but the results are not binding on the court. MCL 722.1443(6). The person filing the petition to revoke an acknowledgment of parentage "has the burden of proving, by clear and convincing evidence, that the acknowledged parent is not the father of the child." MCL 722.1437(5).

"[A]n order revoking an acknowledgment of parentage constitutes an order 'setting aside a paternity determination' and, therefore, is subject to a best interest analysis under MCL 722.1443(4)." *Helton v Beaman*, 497 Mich 1001 (2015).

## D. Court's Refusal to Enter an Order Revoking an Acknowledgment of Parentage

"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).[59] Factors a court may consider when deciding whether to enter an order revoking an acknowledgment of parentage are set forth in MCL 722.1443(4)(a)-(f).[60] If the court refuses to enter an

[56] MCL 722.1433(a) defines an *acknowledged parent* as "an individual who has affirmatively held themself out to be the child's parent by executing an acknowledgment of parentage under the acknowledgment of parentage act [ MCL 722.1001 to MCL] 722.1013]."

[57] MCL 722.1433(c) defines an alleged father as "a man who by his actions could have fathered the child."

[58] 2024 PA 29, effective April 2, 2025, renumbered MCL 722.1443(5) to MCL 722.1443(6).

[59] The court may also refuse to enter orders to set aside a paternity determination, to determine that a genetic father is not a child's father, or to determine that a child was born out of wedlock. See MCL 722.1443(4).

[60] See Section 6.6(C) for more information.

order revoking an acknowledgment of parentage, it must state its reasons for the refusal on the record. MCL 722.1443(4).

## 6.10 Genetic Fathers and the Revocation of Parentage Act[61]

### A. Genetic Father

The Revocation of Parentage Act defines a *genetic father* as "a man whose paternity has been determined solely through genetic testing under the paternity act . . . [MCL 722.711 to MCL] 722.730], the summary support and paternity act [MCL 722.1491 to MCL 722.1503,], or the genetic parentage act [MCL 722.1461 to MCL 722.1475]."MCL 722.1433(e). Paternity of a child born out of wedlock may be established under the Paternity Act after the mother, the alleged father, and the child have undergone genetic paternity testing. See MCL 722.714 and MCL 722.716.[62] When genetic testing identifies a man as a child's genetic father, the court may enter an order of filiation, which makes the child's genetic father an affiliated father.[63] See MCL 722.714(14) and MCL 722.717.

If the parties cannot agree to an order naming the man as the child's father, the mother, alleged father, and child may be required to undergo genetic testing, as provided by MCL 722.716 of the Paternity Act, to determine the child's paternity. MCL 722.714(9). If any party fails to appear for genetic paternity testing, the DHHS or its designee may request that the court issue an order compelling the parties to undergo genetic paternity testing. MCL 722.714(10).

If paternity is determined under the Paternity Act, the court may enter an order of filiation as provided in MCL 722.717. MCL 722.714(14). No matter who initiated the action under the Paternity Act, the resulting order of filiation "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." *Id*.

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[61]The Revocation of Paternity Act was renamed the Revocation of Parentage Act by 2024 PA 29, effective April 2, 2025. For more information, see the Michigan Judicial Institute's Quick Reference Materials—*Determining that a Genetic Father Is Not a Child's Father*.

[62]MCL 722.716 and MCL 722.716a set forth details about genetic testing, qualified laboratories, confidentiality, and use of the results of genetic testing

[63]For more information about affiliated fathers, see Section 6.8.

## B. Determining That a Genetic Father Is Not a Child's Father[64]

Under the Revocation of Parentage Act, MCL 722.1443(2)(b), the court may "[d]etermine that a genetic father is not a child's father." "[MCL 722.1438] governs an action to determine that a genetic father is not a child's father." MCL 722.1435(2).

Under MCL 722.1438(1), "[t]he mother, the genetic father, an alleged father,[65] or a prosecuting attorney may file an action for an order determining that a genetic father is not a child's father." "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). "An action under [MCL 722.1438] shall be filed within 3 years after the child's birth or within 1 year after the date that the genetic father was established as a child's father, whichever is later." MCL 722.1438(1). "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).

"An action under [MCL 722.1438] shall be supported by an affidavit signed by the person filing the action that states facts constituting 1 of the following:

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

## C. Court Order for 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(6)[66]]." MCL 722.1438(3). "The court may

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[64] For more information about the procedure to determine that a genetic father is not a child's father, see the Michigan Judicial Institute's Quick Reference Materials—*Determining that a Genetic Father Is Not a Child's Father*.

[65] MCL 722.1433(c) defines an *alleged father* as "a man who by his own actions could have fathered the child."

[66] Formerly MCL 722.1443(5). See 2024 PA 29, effective April 2, 2025.

order the person filing the action to repay the cost of the genetic test to the state." *Id.*

MCL 722.1443(6) requires the court to "order the parties to an action or motion under [the Revocation of Parentage 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 Parentage Act]. Blood or tissue typing or DNA identification profiling shall be conducted in accordance with [MCL 722.716 of the paternity act]." "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 Parentage Act]." MCL 722.1443(6).

"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).

## D. Court's Refusal to Enter an Order Determining That a Genetic Father is Not a Child's Father

"A court may refuse to enter an order . . . determining that a genetic father is not a child's father . . . if the court finds evidence that the order would not be in the best interests of the child." MCL 722.1443(4).[67] Factors a court may consider when deciding whether to enter an order determining that a genetic father is not a child's father are set forth in MCL 722.1443(4)(a)-(f).[68] If the court refuses to enter an order determining that a genetic father is not a child's father, it must state its reasons for the refusal on the record. MCL 722.1443(4).

[67]The court may also refuse to enter orders to set aside a parentage determination, to revoke an acknowledgment of parentage, or to determine that a child was born out of wedlock. See MCL 722.1443(4).

[68]See Section 6.6(C) for more information.

## E. Genetic Parentage Act[69]

### 1. Title IV-D Services Required

The Genetic Parentage Act may, provided that other requirements listed in MCL 722.1467(1) are met, determine paternity for a child born out of wedlock[70] *if the child's alleged father*[71] *or the child's mother is receiving services from a title IV-D*[72] *agency*. MCL 722.1467(1)(a). A title IV-D agency for purposes of the Genetic Parentage Act is an agency defined in MCL 552.602 of the Support and Parenting Time Enforcement Act. MCL 722.1463(h). According to MCL 552.602(*ll*) of the Support and Parenting Time Enforcement Act, a title IV-D agency is "the agency in this state performing the functions under title IV-D and includes a person performing those functions under contract, including an office of the friend of the court or a prosecuting attorney."[73]

### 2. Testing Requirements

"Genetic testing that determines a man is the biological father of a child under [the Genetic Parentage Act] establishes paternity," MCL 722.1469(1), and "may be the basis for court-ordered child support, custody, or parenting time without further adjudication under the paternity act," MCL 722.1469(2).

MCL 722.1467(a) to MCL 722.1467(e) set forth the list of conditions under which a man may be considered the biological father of a child born out of wedlock. The testing must be "conducted by a person accredited for paternity

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[69]A brief overview of the Genetic Parentage Act appears in this section. A comprehensive discussion of the Genetic Parentage Act is beyond the scope of this benchbook. Note that the Revocation of Parentage Act applies to revoking parentage in cases where the genetic father was determined under the Genetic Parentage Act.

[70] MCL 722.1463(b) defines *child born out of wedlock* as "a child conceived and born to a woman who was not married from the conception to the date of birth of the child or a child that the court has determined to be a child born or conceived during a marriage but not the issue of that marriage."

[71]An *alleged father*, for purposes of the Genetic Parentage Act, is "a man who by his actions could have fathered the child." MCL 722.1463(a).

[72]Title IV-D refers to "part D of title IV of the social security act, 42 USC 651 to 669b." MCL 552.602(kk).

[73]Title IV-D functions are summarized in the appropriations authorized by 42 USC 651: "For the purpose of enforcing the support obligations owed by noncustodial parents to their children and the spouse (or former spouse) with whom such children are living, locating noncustodial parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for assistance under a State program funded under part A) for whom such assistance is requested, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part."

determinations by a nationally recognized scientific organization . . . ." MCL 722.1467(1)(c). The probability of paternity must be at least 99%. MCL 722.1467(d).

### 3. When Genetic Testing Establishes Paternity

If genetic testing establishes that a man is a child's biological father, the mother is given initial custody of the child without prejudice to the custodial rights or parenting time of either parent until the court determines, or the parties agree, otherwise. MCL 722.1469(1). An agreement between the parties concerning custody of the child must be in writing and acknowledged by the court. *Id.*

"The child who is the subject of the genetic testing has the same relationship to the mother and the man determined to be the biological father under [the Genetic Parentage Act] as a child born or conceived during a marriage and has identical status, rights, and duties of a child born in lawful wedlock effective from birth." MCL 722.1469(2).

"Except as otherwise provided by law, a mother and father who have genetic tests that are filed as a genetic paternity determination form as prescribed by [MCL 722.1471] are consenting to the general personal jurisdiction of the courts of record of this state regarding the issues of the support, custody, and parenting time of the child." MCL 722.1473.

### 4. When the Genetic Parentage Act May Not Be Used to Establish Parentage

Parentage cannot be established under the Genetic Parentage Act if "[t]he child's parent has previously acknowledged parentage under the acknowledgment of parentage act . . . or if the child's parentage has been established under the law of this or another state." MCL 722.1465(a).

Also, the Genetic Parentage Act may not be used to determine paternity if "[t]he child is subject to a pending adoption proceeding under the Michigan adoption code . . . , or if the child is subject to a pending adoption proceeding in another state."[74] MCL 722.1465(b).

Nor may the Genetic Parentage Act be used to establish parentage for a child conceived through the use of assisted

[74]For more information on genetic testing and adoption, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 3.

reproduction or a surrogacy agreement under the Assisted Reproduction and Surrogacy Parentage Act, MCL 722.1701 *et seq*. MCL 722.1465(c).

## 6.11 Paternity and the Adoption Code

### A. Putative Father

*Putative father* is not expressly defined in the Adoption Code but the term is used in several statutory provisions of the Adoption Code to identify a man who may file a notice of his intent to claim paternity in proceedings involving adoption and the child he is believed to have fathered. See MCL 710.33, MCL 710.34, MCL 710.36, MCL 710.37, MCL 710.39. *Black's Law Dictionary* (11th ed), defines *putative father* as "[t]he alleged biological father of a child born out of wedlock." Although not expressly defined in the Adoption Code, a putative father is recognized as an interested party entitled to notice of "a petition for a hearing to identify the father of an adoptee and to determine or terminate his rights . . . ." MCL 710.24a(2)(b).

A man may not be identified as a child's putative father and a respondent in child protective proceedings unless it has been determined that the child has no legal father as defined in MCR 3.903A)(7). *In re KH*, 469 Mich 621, 630 (2004).

### B. Child Born Out of Wedlock

The Adoption Code defines a child *born out of wedlock* as "a child conceived and born to a woman who was not married from the conception to the date of birth of the child, or a child whom the court has determined to be a child born during a marriage but not the issue of that marriage." MCL 710.22(h).

### C. Notice of Intent to Claim Paternity

Before the birth of a child born out of wedlock, the Adoption Code provides that a man claiming to be the child's father may file a verified notice of intent to claim paternity[75] with the court in any county within Michigan. MCL 710.33(1). The notice must be made under oath and contain the putative father's address. *Id.*

A man filing a notice of intent to claim paternity is presumed to be the child's father for purposes of the Adoption Code, unless the child's mother denies that the man is the child's father. MCL

[75] See DHHS form DCH -0738, *Notice of Intent to Claim Paternity*.

710.33(2). A notice of intent to claim paternity creates a rebuttable presumption that the man who files the intent is the child's father for purposes of the Paternity Act and for purposes of child protective proceedings. *Id*.

"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 paternal rights to the child." MCL 710.33(3).

On the next business day following receipt of the notice, the court must forward the notice of intent to claim paternity to the vital records division of the Michigan Department of Community Health (MDCH). MCL 710.33(1). Once the vital records division receives the notice, it must send a copy of the notice by first-class mail to the child's mother (if her address is indicated on the notice). *Id*.

## D. Termination of Putative Father's Parental Rights to an Adoptee

The Adoption Code provides a detailed procedure for managing the adoption process of an adoptee who was born out of wedlock and whose putative father's identity is unknown or whose putative father's identity is known but whose whereabouts are unknown. See MCL 710.36.

The Adoption Code also describes the procedure for terminating a putative father's parental rights under certain circumstances following notice to the putative father or following the putative father's disclaimer of paternity or affirmation of paternity and denial of interest in custody of the child. See MCL 710.37.

The process required to determine whether a putative father's parental rights should be terminated when the putative father requests custody of the child or has established a custodial relationship with the child or has provided the child's mother or the child with substantial and regular support is set forth in MCL 710.39.[76]

[76] A detailed discussion of these statutory provisions is beyond the scope of this benchbook. For a comprehensive discussion of the Adoption Code and the parental rights of putative fathers, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 2.

# 6.12 Determining Paternity and Maternity Under the Safe Delivery of Newborns Law

## A. Surrender of a Newborn

The Safe Delivery of Newborns Law, MCL 712.1 *et seq.*, regulates a parent's surrender[77] of a newborn[78] to an emergency service provider.[79] A court has jurisdiction over a newborn surrendered under the SDNL and may appoint a lawyer-guardian ad litem to represent the child in proceedings under the SDNL. MCL 712.2(1). Once an emergency service provider has taken the newborn into temporary protective custody under the SDNL, the emergency service provider must "make a reasonable effort to" provide the surrendering parent with information and must "make a reasonable attempt to" obtain certain information from the surrendering parent. MCL 712.3(1)-(2).

If the emergency service provider is not a hospital, the emergency service provider must transfer the newborn to a hospital. MCL 712.5(1). The hospital that receives the newborn must take the child into protective custody and have the newborn examined by a doctor. MCL 712.5(2). If the doctor determines that the newborn may have been subject to child abuse or child neglect or that the child is not a newborn, the doctor must immediately notify the DHHS. *Id*. If the doctor is not required to notify the DHHS, the hospital must inform a child-placing agency that the hospital has taken temporary protective custody of a newborn under the SDNL. MCL 712.5(3). Among other duties, the child-placing agency must, within 28 days, "make reasonable efforts to identify, locate, and provide notice of the surrender of the newborn to the nonsurrendering parent." MCL 712.7(f). The child-placing agency must report its efforts and the results of those efforts in writing to the court that made the placement. *Id*. If the nonsurrendering parent's identity and whereabouts are unknown, the child-placing agency must give notice to the parent "by publication in a newspaper of general circulation in the county where the newborn was surrendered." *Id*.

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[77] *Surrender*, for purposes of the SDNL, "means to leave a newborn with an emergency service provider without expressing an intent to return for the newborn." MCL 712.1(n).

[78] According to the SDNL, a *newborn* is "a child who a physician reasonably believes to be not more than 72 hours old." MCL 712.1(k). *In re Miller*, 322 Mich App 497, 502 (2018).

[79] *Emergency service provider*, for purposes of the SDNL, "means 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(f) (emphasis added).

## B. Petition For Custody Requires Court To Determine Paternity or Maternity of a Surrendered Newborn

If the surrendering or nonsurrendering parent timely files a petition for custody of the surrendered newborn,[80] the court must, within seven days after the petition was filed 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).

For purposes of determining paternity following 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,[81] as described in [MCL 722.716 of the Paternity Act]." MCL 712.11(1).[82] Determining maternity following a petition for custody also requires "the court [to] order the child and each party claiming maternity to submit to blood or tissue typing determinations or DNA identification profiling, as described in [MCL 722.716 of the Paternity Act]." MCL 712.11(2). Blood or tissue typing or DNA profiling is not required to establish maternity when the emergency service provider witnessed the child's birth and there exists documentation sufficient to support the determination of maternity. *Id*.

"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."[83] 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).

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

## C. Terminating Parental Rights to a Surrendered Newborn

A parent who surrenders a newborn under MCL 712.3 and who does not file a petition for custody of the newborn under MCL

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[80] See SCAO form CCFD 03, *Petition of Parent for Custody of Surrendered Newborn Child*.

[81] For purposes of the SDNL, *DNA identification profile* and *DNA identification profiling* "mean those terms as defined in [MCL 722.711 of the Paternity Act]." MCL 712.1(2)(d).

[82] See the SCAO form CCFD 04, *Order for Blood or Tissue Typing or DNA Profile (Safe Delivery of Newborn Act)*.

[83] See the SCAO form CCFD 04a, *Order Determining Maternity/Paternity of Surrendered Newborn Child*.

712.10 within 28 days of the surrender is presumed to have knowingly released their parental rights to the newborn. MCL 712.10(1); MCL 712.17(1). Once the 28 days have expired without a petition for custody having been filed, the child-placing agency authorized to place the newborn must immediately petition 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." 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 authorized to place the newborn must immediately petition the court "to determine whether the court shall enter an order terminating the rights of the nonsurrendering parent."[84] 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 child-placing agency must produce evidence at the hearing demonstrating that the surrendering parent released the newborn. *Id*. Evidence presented at the hearing by the child-placing agency must also demonstrate the efforts made by the child-placing agency "to identify, locate, and provide notice to the nonsurrendering parent." *Id*. The court must terminate the surrendering and nonsurrendering parents' parental rights[85] if it finds by a preponderance of the evidence that:

> (1) The surrendering parent knowingly released their rights to the newborn.
>
> (2) Reasonable efforts were made to locate the nonsurrendering parent.
>
> (3) A custody action had not been filed. MCL 712.17(5).

Termination proceedings conducted under the Safe Delivery of Newborns Law (SDNL) apply to a surrendering newborn's mother and to her husband. *In re Miller*, 322 Mich App 497, 504, 506-507 (2018). "'[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." *Id*. at 505. Under the SDNL, a single legal father is determined by the requirement that each person petitioning for custody and claiming paternity undergo blood or tissue typing or DNA testing "leaving only one as the true legal father." *Id*.; MCL 712.11(1). "[T]he parental

[84] See SCAO form CCFD 07, *Petition to Accept Release and Terminate Rights to Surrendered Newborn Child*.

[85] See SCAO form CCFD 08, *Order After Hearing on Petition to Accept Release and Terminate Rights to Surrendered Newborn Child*.

rights at issue in a surrender proceeding concern the biological father." *Miller*, 322 Mich App at 505. "If a presumed father later appeared to challenge the . . . adoption [of a child born during his marriage to his wife, the surrendering parent], either he would be precluded from asserting paternity because he was the biological father whose parental rights were terminated, or he would have to demonstrate that he was not the biological father whose parental rights were terminated, effectively defeating the presumption of legitimacy."*Id*. In such a case, any basis for a party to challenge the adoption would have been eliminated. *Id*.

## 6.13 The Uniform Interstate Family Support Act (UIFSA)[86]

The purpose of the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq*., is to, "[a]mong other things, . . . provide[] guidelines and procedures for the registration, recognition, enforcement, and modification of foreign support orders from countries that are parties to the [2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance]." House Legislative Analysis, HB 4742, HB 4744, SB 518, and SB 519 (October 4, 2016). See MCL 552.2102(c). In addition, "[t]he [UIFSA] provides for the recognition and enforcement of family support orders across state lines." Senate Legislative Analysis, HB 4742, HB 4744, SB 518, and SB 519 (December, 22, 2015).

The UIFSA also addresses the question of parentage. MCL 552.2402 states: "A tribunal[87] of this state authorized to determine parentage of a child may serve as a responding tribunal[88] in a proceeding to determine parentage of a child brought under [the UIFSA] or a law or procedure substantially similar to [the UIFSA]." The following statutory provisions are instructional when the issue of parentage arises in UIFSA cases, depending on the specific circumstances present in a case: MCL 552.2102(g), (*l*), (m), (n), (p)(*i*), (p)(*iii*), (u), (v), (w), (aa)(*iii*), (cc); MCL 552.2201(1)(g); MCL 552.2305(2)(a); MCL 552.2311(1); MCL 552.2315; and MCL 552.2316(1), (4), (10).

An individual may initiate an action to determine parentage under the UIFSA by filing a petition[89] in an initiating tribunal[90] for forwarding to a

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[86]A detailed discussion of the Uniform Interstate Family Support Act is beyond the scope of this benchbook.

[87]A *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).

[88]A *responding tribunal* is "the authorized tribunal in a responding state or foreign country." MCL 552.2102(x).

[89]The required contents and form of a petition filed under the UIFSA "to determine parentage of a child" are set forth in MCL 552.2311.

responding tribunal, or an individual may initiate an action to determine parentage by filing a petition directly in another state or country that can exercise personal jurisdiction over the respondent. MCL 552.2301(2). In an action under the UIFSA to determine parentage, a state tribunal "may exercise personal jurisdiction over a nonresident individual" under any of the circumstances listed in MCL 552.2201(1). MCL 552.2201. When Michigan acts as a responding tribunal and receives a petition by transfer from an initiating tribunal or a petition filed directly with the Michigan tribunal, the Michigan tribunal, if not prohibited by other law, may "determine parentage of a child." MCL 552.2305(2)(a). See also MCL 552.2402.

MCL 552.2316 governs the type and use of evidence that may be involved in a proceeding to determine parentage. A nonresident party is not required to be physically present in a tribunal that will determine a child's parentage. MCL 552.2316(1). "A voluntary acknowledgment of paternity, certified as a true copy, is admissible to establish parentage of the child." MCL 552.2316(10). "A party whose parentage of a child has been previously determined by or according to law may not plead nonparentage as a defense to a proceeding under [the UIFSA]." MCL 552.2315.

[90] An *initiating tribunal* is a tribunal of a state or foreign country from which a petition is forwarded or a tribunal in which a petition is filed to be forwarded to another state or country. MCL 552.2102(k).

# Chapter 7: Preliminary Steps and Mediation


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## *In this chapter. . .*

This chapter discusses how to initiate child protective proceedings and the requirements for filing a proper petition. It also discusses the required procedures for conducting a preliminary inquiry, which is an informal proceeding that may be used when a child has not been taken into protective custody and the petitioner does not request that the child be placed.

If a child is in protective custody or the petitioner requests placement of the child, a preliminary hearing must be conducted. The court must make two major decisions at a preliminary hearing: whether to authorize the filing of the petition and, if so, whether to order pretrial placement of the child. This chapter deals only with the procedures leading up to the

decision to authorize the filing of the petition. The procedures governing the determination of whether the child should be placed pending trial are covered in Chapter 8. In addition to, or as an alternative to, placing the child outside his or her home, the court may order an alleged abuser to leave the child's home, and the court may also enter orders affecting nonparent adults.

This chapter also discusses child protection mediation, the appointment of attorneys for respondents, and the appointment of lawyer-guardians ad litem (L-GAL), attorneys, guardians ad litem (GAL), and court-appointed special advocates (CASAs) for children.

In an effort to provide trial courts with a quick practical guide through the process of preliminary hearings, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys: Preliminary Hearing (MCR 3.965/MCL 712A.11)*. The SCAO also developed professional training videos to illustrate mock court hearings that "identify the statutory timelines, procedural requirements, legal findings, and other information relevant to" preliminary hearings.

## 7.1 Initiating Child Protective Proceedings

Absent exigent circumstances, a request for court action to protect a child must be by petition.[1] MCR 3.961(A). MCR 3.903(A)(20) provides that a *petition* is "a complaint or other written allegation, verified in the manner provided in MCR 1.109(D)(3), that a parent, guardian, nonparent adult, or legal custodian has harmed or failed to properly care for a child[.]"

> **Note:** See Section 3.1 for a detailed discussion of exigent circumstances warranting removal of a child before a petition is filed.

The purposes of a petition are to frame the issues for the court and to provide notice of the allegations to a respondent. See generally MCL 712A.11(2)-(3); MCR 3.914(B)(1); MCR 3.931(A); MCR 3.931(B)(3)-(5).

## 7.2 Adding Nonrespondent Parent to Child Protective Proceedings

Although child protective proceedings may be initiated against one parent, the nonrespondent parent must receive an adjudication hearing before the court can interfere with his or her parental rights. See *In re Sanders*, 495 Mich 394, 407, 412-413 n 8, 415, 422 (2014) (finding unconstitutional the one-parent doctrine, which permitted the court to "enter dispositional orders affecting parental rights of *both* parents" once "jurisdiction [was] established by adjudication of only *one* parent" and holding that procedural "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights[]").[2] For purposes of child protective proceedings, a *nonrespondent parent* is "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)." MCR 3.903(C)(8).

MCR 3.961(C)(1)-(2) sets out the procedures for initiating child protective proceedings against a nonrespondent parent:

- "If a nonrespondent parent is being added as an additional respondent to a petition that has been authorized by the court under MCR 3.962 or MCR 3.965 against the first respondent

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[1] See SCAO form *Petition (Child Protective Proceedings)*.

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

parent, and the first respondent parent has not made a plea under MCR 3.971 or a trial has not been conducted under MCR 3.972, the allegations against the second respondent shall be filed in an amended petition."[3] MCR 3.961(C)(1).

> **Note:** For purposes of child protective proceedings, an *amended petition* is "a petition filed to correct or add information to an original petition, as defined in [MCR 3.903](A)(20)[4] before it is adjudicated." MCR 3.903(C)(2).

- "If a nonrespondent parent is being added as an additional respondent in a case in which a petition has been authorized under MCR 3.962 or MCR 3.965, and adjudicated by plea under MCR 3.971 or by trial under MCR 3.972, the allegations against the second respondent shall be filed in a supplemental petition." MCR 3.961(C)(2).

  > **Note:** For purposes of child protective proceedings, a *supplemental petition* is:
  >
  > > "(a) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that a parent, for whom a petition was authorized, has committed an additional offense since the adjudication of the petition, or
  > >
  > > (b) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that a nonrespondent parent is being added as an additional respondent in a case in which an original petition has been authorized and adjudicated against the other parent under MCR 3.971 or MCR 3.972, or
  > >
  > > (c) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that requests the court terminate parental rights of a parent or parents under MCR 3.977(F) or MCR 3.977(H)." MCR 3.903(C)(13).

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

[4] MCR 3.903(A)(20) defines *petition* as "a complaint or other written allegation, verified in the manner provided in MCR 1.109(D)(3), that a parent, guardian, nonparent adult, or legal custodian has harmed or failed to properly care for a child, or that a juvenile has committed an offense."

## 7.3 Who May Submit a Petition

Any person who suspects child abuse or child neglect may report the matter to the Department of Health and Human Services (DHHS), a law enforcement agency, or the court. MCL 712A.11(1); MCL 722.624. Once reported to the DHHS, the DHHS has 24 hours to either commence its own investigation or refer the case to the prosecuting attorney and the local law enforcement agency.[5] MCL 722.628(1). Following the investigation, either a Children's Protective Services (CPS) worker or a prosecuting attorney acting on behalf of the DHHS drafts and files a petition seeking court jurisdiction over a child suspected of being abused or neglected. See MCL 712A.11(1); MCL 712A.17(5); MCR 3.914(C).

**Note:** See Section 2.2(A) for a list of mandatory reporters.

"[*A*]*nyone* who complies with MCR 3.961(B)'s petition requirements has standing to initiate child protective proceedings, thereby allowing the trial court to consider the merits of the petition at a preliminary inquiry." *In re F Nikooyi*, 341 Mich App 490, 497 (2022). Specifically, a minor child's adult sibling may file a petition to initiate child protective proceedings related to the minor child. *Id*. at 498-499.

In addition, school officials may file a petition alleging educational neglect under MCL 712A.2(b)(1). See MCL 712A.11(1). The child advocate may also file a petition requesting the court to assume jurisdiction under MCL 712A.2(b) if the child advocate is satisfied that a complainant has contacted the DHHS, the prosecuting attorney, the child's attorney, and the child's guardian ad litem, if any, and that none of those persons intend to file a petition.[6] MCL 722.927(4).

However, where a person or agency other than a prosecuting attorney or the DHHS files a petition, the court may refer the matter to the DHHS for investigation. MCL 712A.11(1); MCR 3.962(A).

**Note:** The DHHS will not investigate a report alleging only a child's failure to attend school. See Section 2.2.

### A. When DHHS Must Submit a Petition

"[I]f [the statutory requirements of MCL 722.638] [are] satisfied, [the DHHS] must file a petition" and "the child [must] be brought within the jurisdiction of the court, [where] further determinations

[5] See Section 2.3 for a detailed discussion of investigation and referral requirements.

[6] See MCL 722.922(l) for a definition of *complainant* for purposes of MCL 722.925, and see MCL 722.925 for a list of persons who may make a complaint to the child advocate "alleging that an administrative act is contrary to law, rule, or policy, imposed without an adequate statement of reason, or based on irrelevant, immaterial, or erroneous grounds[,]" and see MCL 722.923 for a description of the child advocate.

regarding the child's well-being and placement are made by the court, not [the DHHS][;]"[7] the DHHS "ha[s] no discretion to refrain from filing the petition." *Jasinski v Tyler*, 729 F3d 531, 543-544 (CA 6, 2013) (because this Court "cannot say that a reasonable [DHHS] official would understand that the failure to file a petition under [MCL 722.638] would constitute a denial of procedural due process[,]" DHHS officials "are [now put] on notice that if a petition is mandated [under MCL 722.638], the failure to file a petition when [the statutory requirements of MCL 722.628] [are] met may constitute a denial of procedural due process").

MCL 722.638(1)(a)-(b) require the DHHS to submit a petition seeking the court's jurisdiction if it determines that one or more of the following apply:

- A parent, guardian, custodian, or a person 18 years of age or older residing with the child has abused the child or the child's sibling, and the abuse included one or more of the following:
  - abandonment of a young child;
  - criminal sexual conduct that involved penetration, attempted penetration, or assault with intent to penetrate;
  - battering, torture, or other serious physical harm;
  - loss or serious impairment of an organ or limb;
  - life-threatening injury; or
  - murder or attempted murder.
- There is a risk of harm, child abuse, or child neglect to the child at issue and the parent's parental rights to another child were terminated under MCL 712A.2(b) (or a similar law of another state) and the parent has failed to rectify the conditions that led to the prior termination of parental rights.
- There is a risk of harm, child abuse, or child neglect to the child at issue and the parent voluntarily terminated his or her parental rights to another child following initiation of proceedings under MCL 712A.2(b) (or a similar law of another state), the parent has failed to rectify the conditions that led to the prior termination of parental rights, and the

[7] For a detailed discussion of the court's placement options, see Chapter 8.

proceeding involved abuse that included one or more of the following:

- abandonment of a young child;
- criminal sexual conduct that involved penetration, attempted penetration, or assault with intent to penetrate;
- battering, torture, or other serious physical harm;
- loss or serious impairment of an organ or limb;
- life-threatening injury;
- murder or attempted murder;
- voluntary manslaughter; or
- aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter.

The requirement that the DHHS file a petition under MCL 722.638 to obtain jurisdiction over the sibling(s) of a child who has been abused "and that abuse included life-threatening injury" does not affect the existing jurisdictional requirements in MCL 712A.2. *In re Christie*, 339 Mich App 1, 6 (2021). In fact, MCL 722.638(1) requires the DHHS to file the petition in a court having jurisdiction under MCL 712A.2(b). *Christie*, 339 Mich App at 6. "[W]hile MCL 722.638 may satisfy the parental-conduct component of MCL 712A.2, it does not indicate that the location of the life-threatening injury to one sibling[] overcomes the geographic component of the jurisdictional statute as it relates to other siblings." *Christie*, 339 Mich App at 7. That is, without satisfaction of the relevant jurisdictional factors in MCL 712A.2, an injury that occurs to one sibling in one county does not give the court in that county jurisdiction over siblings living in a different county. *Christie*, 339 Mich App at 6, 7.

If the DHHS suspects a parent as the perpetrator of the abuse or suspects that a parent is placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate the risk, the DHHS must include with the mandatory petition filed under MCL 722.638(1) a request for termination of parental rights at the initial dispositional hearing.[8] MCL 722.638(2). See also DHHS's Children Protective Services Manual (PSM), *Family Court: Petitions, Hearings and Court Orders PSM 715-3*, p 4.[9] For example, where "the DHHS sought

[8] See Chapter 17 for a detailed discussion of hearings to terminate parental rights.

[9] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

termination at the initial dispositional hearing under MCL 722.638 because it believed that [the minor child] suffered severe physical abuse[10] at the hands of respondent," and "[t]he DHHS alleged that respondent excessively consumed alcohol while pregnant with [the minor child], causing [the minor child] to be born prematurely with extreme and ongoing medical conditions," "the trial court found grounds to assume jurisdiction over [the minor child]." *In re Rippy*, 330 Mich App 350, 357 (2019).[11]

"Under MCL 712A.19a(2)(a), in order to conclude that aggravated circumstances exist that excuse the requirement of reasonable efforts toward reunification, a trial court must make findings consistent with both MCL 722.638(1) and MCL 722.638(2)."[12] *In re Barber/Espinoza* (*Barber/Espinoza II*), ___ Mich ___, ___ (2025) (reversing *In re Barber/Espinoza* (*Barber/Espinoza I*), ___ Mich App ___ (2024) and reinstating the trial court's order terminating respondent's parental rights). "MCL 722.638(1) tells DHHS when it must file a jurisdictional petition, and MCL 722.638(2) tells DHHS when said mandatory petition triggers a requirement to request termination at the initial disposition." *Barber/Espinoza II*, ___ Mich at ___ n 5. In *Barber/Espinoza,* the DHHS petitioned to terminate respondent's parental rights for prostituting her child to some male friends in exchange for drugs. *Id*. at ___. The DHHS sought removal and termination at the initial disposition due to aggravated circumstances under MCL 722.638(1)(b), (2) and (3).[13] *Barber/Espinoza II*, ___ Mich at ___. The trial court assumed jurisdiction pursuant to MCL 712A.2(b)(1) and MCL 712A.2(b)(2); agreed that termination at initial disposition was justified "due to the parent being a suspected perpetrator . . . ,"; found grounds to terminate under MCL 712A.19b(3)(b)(*i*), MCL 712A.19b(3)(b)(*ii*), and MCL 712A.19b(3)(j); and concluded that termination was in the child's best interests. *Barber/Espinoza II*, ___ Mich at ___.[14]

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[10]"Severe physical abuse" is an "aggravated circumstance" under MCL 722.638(1)(a) that requires the DHHS to file a petition authorizing the court to take jurisdiction over the child involved. *In re Rippy*, 330 Mich App 350 (2019), was decided before November 1, 2022, the effective date of 2022 PA 66, which changed "severe physical abuse" to "serious physical harm." See MCL 722.638(1)(a)(*iii*) and MCL 722.638(1)(b)(*ii*)(C).

[11]But see *In re Simonetta*, 340 Mich App 700, 703 (2022) (mother's prenatal drug abuse did not amount to severe physical abuse, conduct that constituted an aggravating circumstance under MCL 722.638(1)) in light of *In re Rippy*, 330 Mich App 350 (2019) (assumption that mother's prenatal alcohol abuse constituted an aggravated circumstance). In *Simonetta*, the Court acknowledged that in *Rippy* it "upheld a termination of parental rights at the initial disposition based on an assumption that a mother's prenatal drug use was an aggravated circumstance" under MCL 722.638(1). *Simonetta*, 340 Mich App at 712 n 4. Although the cases appear to conflict, the Court's analysis in each case concentrated on aspects not considered by the other case. The *Simonetta* Court concluded that the mother's prenatal conduct was not an aggravating circumstance because a fetus is not a child, as "child" is contemplated in MCL 722.638(1). *Simonetta*, 340 Mich App at 712 n 4. The *Rippy* Court majority "declined to consider whether a 'fetus' [fell] within the definition of a 'child' as contemplated in MCL 722.638(1), and therefore reached no binding opinion on that question." *Id*.

The Court of Appeals reversed, holding that the trial court committed clear legal error that prejudiced respondent's rights when it determined that the requirements of MCL 722.638(1)(a) for an "aggravated circumstance" had been met because "the perpetrators were neither a parent, guardian, or custodian of [the child], and never resided with the [child] . . . ." *Barber/Espinoza I*, ___ Mich App at ___. Because the requirements for an aggravated circumstance had not been met, a petition for termination at the initial disposition hearing was not mandated, and MCL 722.638(2) did not apply. *Barber/Espinoza I*, ___ Mich App at ___.

The Michigan Supreme Court disagreed with the Court of Appeals' interpretation that MCL 722.638(1)(a) required respondent to be the perpetrator of the sexual abuse to the child in order to conclude that the respondent abused the child. *Barber/Espinoza II*, ___ Mich at ___. "The Legislature has pertinently defined 'child abuse' to include 'harm or threatened harm to a child's health or welfare that occurs through . . . sexual exploitation . . . by a parent[.]'" *Id*. at ___, quoting MCL 722.622(g)(alteration in original). "Sexual exploitation" means "'allowing, permitting, or encouraging a child to engage in prostitution[.]'" *Barber/Espinoza II*, ___ Mich at ___, quoting MCL 722.622(r) (alteration in original). Although not defined by statute, "prostitution" is defined in the dictionary as "the act or practice of engaging in sex acts and especially sexual intercourse in exchange for pay," or, otherwise stated, "commercialized sex." *Barber/Espinoza II*, ___ Mich at ___ (quotation marks and citations omitted). At trial, the child "testified that respondent allowed a man to sexually abuse [the child] in exchange for drugs," which amounted to engaging the child in prostitution. *Id*. at ___. "Because respondent engaged [the child] in prostitution, she sexually exploited [the child] and, thus, abused her." *Id*. at ___.

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[12] "[R]eliance on MCL 722.638 to terminate at the initial disposition necessarily invokes MCL 712A.19a(2)(a)." *In re C Walters*, ___ Mich App ___, ___ (2025). "MCL 712A.19a(2)(a) allows termination at the initial disposition if 'the parent has subjected the child to aggravated circumstances as provided in . . . MCL 722.638.'" *Walters*, ___ Mich App at ___ n 6. While MCL 722.638 is a "procedural statute" that dictates when the DHHS must take action, MCL 712A.19a(2) "substantively incorporates MCL 722.638, setting the parameters for when trial court may excuse reasonable efforts aimed at reunification if the aggravated circumstances outlined in MCL 722.638(1) and (2) exist." *Barber/Espinoza*, ___ Mich at ___ n 5. For more information on the aggravating circumstances exception to DHHS's obligation to make reasonable efforts at family reunification, see Section 8.4.

[13] MCL 722.638(3) requires the DHHS to "hold a conference among the appropriate agency personnel to agree upon the course of action" if the DHHS is considering petitioning for termination at the initial disposition even if the facts do not require it under MCL 722.638(1). See MCL 722.638(3); see also *Barber/Espinoza II*, ___ Mich at ___ n 3.

[14] Respondent's rights to her other child were also terminated at the same time due to the child being a sibling of the abused child. See *Barber/Espinoza II*, ___ Mich at ___ n 10.

To satisfy MCL 722.638(1)(a)(*ii*), the abuse must *include* criminal sexual conduct involving penetration; "however, that does not mean that the parent must have committed the act of criminal sexual conduct involving penetration." *Barber/Espinoza II*, ___ Mich at ___. MCL 722.638(2) was also satisfied because "[w]hen respondent sexually exploited [the child], respondent unquestionably placed [the child] at an unreasonable risk of harm, not only by failing to take reasonable steps to intervene to eliminate the risk, but by actively creating the risk of harm." *Barber/Espinoza II*, ___ Mich at ___. As MCL 722.638(1) and MCL 722.638(2) were satisfied, the trial court properly terminated respondent's parental rights without requiring the DHHS to make reasonable efforts at reunification under MCL 712A.19a(2)(a). *Barber/Espinoza II*, ___ Mich at ___ (reversing Court of Appeals judgment and reinstating trial court order terminating respondent's parental rights).

But see *In re Boshell/Shelton*, ___ Mich App ___, ___ (2025) ("The trial court plainly erred by finding that [respondent's] boys were subjected to aggravating circumstances [under MCL 722.638] because . . . the abusers . . . were not a parent, guardian, or custodian of the boys, and nothing in the record suggests that they ever resided with the boys.") (reversed and remanded).

> **Note:** MCL 722.638 does not violate a parent's procedural due process rights in mandating that a petitioner file a request for termination of parental rights after a parent voluntarily terminated their parental rights to another child, because the request for termination of parental rights does not necessarily mean a court will grant the request, and the petitioner is still required to show a risk of harm to the child at issue and that the child's parent is a suspected perpetrator or suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene or eliminate the risk.[15] *In re AH*, 245 Mich App 77, 85 (2001).
>
> Further, although MCL 722.638 creates a separate class of parents by requiring a petitioner to file a request for termination of parental rights of parents who have had their parental rights to another child terminated (voluntarily or otherwise), it does not violate a parent's fundamental right to the interest in the custody of their

[15] Although the prior version of MCL 722.638 was in effect at the time the petition was filed, the respondent-mother chose to challenge the amended version of the statute. *In re AH*, 245 Mich App 77, 80-81 (2001). The Court of Appeals found that the respondent-mother had standing to challenge the amended statute because she was attacking language present in both the prior and amended versions of the statute. *In re AH*, *supra* at 81.

> child and in the parent-child relationship, because MCL 722.638 is precisely tailored to serve a compelling state interest in protecting children from an unreasonable risk of harm. *In re AH*, 245 Mich App at 82-84.

In *In re Berryman/Hurd/Morgan/Morgan-Hurd*, ___ Mich App ___, ___ (2026), the DHHS did not satisfy the requirements of MCL 722.638(1)(a) to terminate respondents' parental rights at the initial disposition without making reasonable efforts at reunification when the petition was "based entirely on [a] shooting incident" and the circumstances that allowed for it. The DHHS failed to allege "that the incident was included within any 'abuse,' as defined by MCL 722.622(g), of [the child] or his siblings by respondents or anyone else." *Berryman*, ___ Mich App at ___. The 21-month-old child survived the shooting by his six-year-old cousin while in respondents' care, but "required reconstructive surgery to the left side of his nose, cheek, and shoulder due to the injuries he sustained." *Berryman*, ___ Mich App at ___. These injuries may have satisfied the requirement in MCL 722.638(1)(a)(*iii*) for serious physical harm but they "would not constitute an aggravated circumstance under MCL 722.638(1)(a) unless [they were] *included* in abuse of [the child] or one of his siblings by respondents or another listed individual." *Berryman*, ___ Mich App at ___. The trial court made no such finding, "and the record before it did not support one." *Id*. at ___. Thus, the trial court committed plain error warranting reversal by "excusing DHHS from its obligation to provide reasonable efforts toward reunification and instead terminating respondents' parental rights at initial disposition." *Id*. at ___.

If the DHHS determines that a child was severely physically injured, sexually abused, or allowed to be exposed to, or have contact with, methamphetamine production, it must file a petition under MCL 712A.2(b) within 24 hours. MCL 722.637(1). However, the DHHS is not required to file a petition if it determines that the child's parent or legal guardian is not a suspected perpetrator of the abuse and all of the following apply:

> (1) the child's parent or legal guardian did not neglect or fail to protect the child;
>
> (2) the child's parent or legal guardian does not have a history that shows a documented pattern of neglect or failing to protect the child; and
>
> (3) the child is safe under the parent's or legal guardian's care. MCL 722.637(2).

## B. Prosecutor's Role

A prosecutor has standing to appear in child protective proceedings when:

> (1) the DHHS requests it to do so;
>
> (2) the court requests it to do so; or
>
> (3) it files a petition for termination of parental rights after a child has remained in foster care or the custody of a guardian for a specified duration. *In re Hill*, 206 Mich App 689, 691 (1994).

In the context of child protective proceedings, a *prosecutor* or *prosecuting attorney* is defined as the "prosecuting attorney of the county in which the court has its principal office or an assistant to the prosecuting attorney." MCR 3.903(C)(11).

### 1. Filing Petition on Behalf of DHHS

Upon request of the DHHS (or an agent of the DHHS under contract with the DHHS), the prosecutor must serve as a legal consultant to the DHHS or its agent at all stages of the child protective proceeding. MCL 712A.17(5); MCR 3.914(C)(1). If the prosecutor does not appear on behalf of the DHHS or its agent, the DHHS may contract with an attorney of its choice for legal representation. MCL 712A.17(5); MCR 3.914(C)(2).

### 2. Court's Request

Upon the court's request, a prosecutor must review a petition for legal sufficiency and appear at any proceeding. MCL 712A.17(4); MCR 3.914(A).

> **Note:** A court's compliance with a prosecuting attorney's request for notice of hearings does not constitute a court request to make a formal appearance in a proceeding. *In re Hill*, 206 Mich App at 692-693.

### 3. Filing Petition Independent of DHHS

A prosecutor may file a petition independent of the DHHS. *In re Jagers*, 224 Mich App 359, 362 (1997). In *In re Jagers*, *supra* at 362, although the DHHS had retained independent legal counsel, the prosecutor filed a petition alleging abuse and neglect. The Court of Appeals held that a prosecutor has

standing, independent of the DHHS, to file a petition in child protective proceedings. *Id*. Specifically, the Court stated:

> "Under the plain language of MCL 712A.11, a petition may be filed by 'a person' requesting the court to take action on behalf of a child because of parental abuse or neglect. A prosecutor or an assistant prosecutor assuredly qualifies as 'a person.'
>
> * * *
>
> Moreover, [the Court] believe[s] that public policy favors allowing prosecutors to act independently of the [DHHS] . . . . [T]he prosecutor and the [DHHS] do not always agree on how a particular case should be handled. When . . . the prosecutor believes that a petition should be filed and the [DHHS], for whatever reason, is not persuaded, the prosecutor should not be precluded from taking any action. The state, and every county within it, has an interest in protecting children from abuse and neglect." *In re Jagers*, 224 Mich App at 362, 365.

A prosecutor may also file a petition for termination of parental rights if the child remains in foster care regardless of whether the prosecuting attorney is representing or acting as a legal consultant to the DHHS or any other party. MCL 712A.19b(1); MCR 3.977(A)(2)(f).

A prosecutor may not amend or supplement a petition filed by another party. *In re Hill*, *supra* at 692 (prosecutor was prevented from amending and supplementing petitions that were originally submitted by the DHHS, which had obtained legal representation by the attorney general's office).

## C. Petition Requesting Termination of Parental Rights[16]

### 1. Standing to File Petition Requesting Parental Termination

Only persons granted standing under a statute, court rule, or case law may participate in proceedings to terminate parental rights. *In re Foster (Catherine)*, 226 Mich App 348, 358-359

[16] For more information on termination of parental rights, see Chapter 17.

(1997). As such, a request for termination of parental rights may be made by any one of the following:

(1) the agency;[17]

(2) the child;

(3) a guardian, legal custodian, or representative of the child;

(4) a concerned person;

**Note:** A concerned person is a foster parent who:

(a) a child is living with or has lived with;

(b) has specific knowledge of the parent's behavior which constitutes grounds for termination under MCL 712A.19b(3)(b) or MCL 712A.19b(3)(g);[18]

(c) has contacted the DHHS, prosecuting attorney, child's attorney, and child's guardian ad litem (if any); and

(d) is satisfied that the DHHS, prosecuting attorney, child's attorney, and child's guardian ad litem (if any) does not intend to file a petition for termination of parental rights. MCL 712A.19b(6); MCR 3.977(A)(2)(d).

(5) the state child advocate; or

(6) the prosecuting attorney (without regard to whether the prosecuting attorney is representing or acting as a legal consultant to the agency or any other party). MCL 712A.19b(1); MCR 3.977(A)(2).

Additionally, a custodial parent has standing to file a petition requesting termination of a noncustodial parent's parental rights. *In re Huisman*, 230 Mich App 372, 380-381, 378-383 (1998), overruled in part on other grounds by *In re Trejo*, 462

[17] "'Agency' means a public or private organization, institution, or facility that is performing the functions under part D of title IV of the social security act, 42 USC 651 to [42 USC] 669b, or that is responsible under court order or contractual arrangement for a juvenile's care and supervision." MCL 712A.13a(1)(a).

[18] MCL 712A.19b(3)(b) allows for termination of parental rights due to physical injury or physical or sexual abuse, and MCL 712A.19b(3)(g) allows for termination due to a failure to provide proper care or custody (neglect). See Section 17.7 for a detailed discussion of MCL 712A.19b(3)(b) and MCL 712A.19b(3)(g).

Mich 341 (2000)[19] (interpreting "custodian" as used in MCL 712A.19b(1) to include a custodial parent). Although "'the comprehensive list of parties authorized to file a termination petition under [MCL 712A.19b(1)] does not include the term "parent[,]" . . . given the Legislature's use of the apparently broad term "custodian" in [MCL 712A.19b(1)], [there is] no statutory basis for excluding a *custodial* parent from filing a termination petition under the Juvenile Code to terminate the rights of the other natural parent[;] [t]he plain and ordinary meaning of "custodian" certainly encompasses a custodial parent.'" *In re Medina*, 317 Mich App 219, 235-236 (2016) (quoting *In re Huisman*, 230 Mich App at 380, and further concluding that "[a]lthough *Huisman* was partially overruled by *Trejo*, a close reading of *Trejo* indicates that the standing analysis from *Huisman* remains intact").

However, in *In re Swope*, 190 Mich App 478, 480-481 (1991), the Court of Appeals held that adoptive parents did not have standing to petition the court under MCL 712A.19b to terminate their own parental rights to their adopted daughter. The Court concluded that parents cannot petition to terminate their own parental rights "because the statute was clearly enacted for the protection of children, rather than for the convenience of parents." *In re Swope*, 190 Mich App at 481.

## 2. Requirements for Filing Petition Requesting Parental Termination

A request for termination of parental rights must be made in an original, amended,[20] or supplemental petition.[21, 22] MCR 3.977(A)(2). For termination of parental rights at the initial dispositional hearing, a request for termination of parental

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

[20] For purposes of child protective proceedings, "'[a]mended petition' means a petition filed to correct or add information to an original petition, as defined in [MCR 3.903](A)(20) before it is adjudicated." MCR 3.903(C)(2).

[21] For purposes of child protective proceedings, "'[s]upplemental petition' means: (a) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that a parent, for whom a petition was authorized, has committed an additional offense since the adjudication of the petition, or (b) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that a nonrespondent parent is being added as an additional respondent in a case in which an original petition has been authorized and adjudicated against the other parent under MCR 3.971 or MCR 3.972, or (c) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that requests the court terminate parental rights of a parent or parents under MCR 3.977(F) or MCR 3.977(H)." MCR 3.903(C)(13). MCR 3.903(C)(8) defines a *nonrespondent parent* as "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)."

[22] If the child is an Indian child or is believed to be an Indian child, the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA) must be followed. See Chapter 19 for information on the ICWA and the MIFPA.

rights must be made in an original or amended petition. MCR 3.977(E)(1). "[E]stablishing an exception [under MCL 712A.19a(2)] to the duty to provide reunification services is a mandatory prerequisite to termination at the initial disposition." *In re C Walters*, ___ Mich App ___, ___ (2025).[23] For termination of parental rights on the basis of changed circumstances, or after the child has been placed in foster care, the request may be made in a supplemental petition. MCL 712A.19b(4); MCR 3.977(F).

> **Note:** In some cases, MCL 722.638(2) requires the DHHS to file a petition seeking court jurisdiction and termination of parental rights at the initial dispositional hearing. See Section 7.3(A); *In re Barber/Espinoza*, ___ Mich ___, ___ (2025) ("[O]nly in rare circumstances provided by statute may the trial court hold a combined adjudicative and dispositional hearing in which parental rights may be terminated at the initial dispositional hearing.").

If a petition or an amended petition fails to request the termination of parental rights, a subsequent order terminating parental rights must be set aside. *In re SLH*, 277 Mich App 662, 674 (2008).

Res judicata will not bar a second petition requesting termination of parental rights where the petitioner is not seeking termination on the same grounds in both petitions and new evidence and changed circumstances are presented in the second petition. *In re Pardee*, 190 Mich App 243, 249-250 (1991). "[W]hen the facts have changed or new facts develop, the dismissal of a prior termination proceeding will not operate as a bar to a subsequent termination proceeding." *In re Pardee*, *supra* at 248.

## 7.4 Petition Requirements

### A. Form and Filing of Petition

"Absent exigent circumstances, a request for court action to protect a child must be in the form of a petition. The form, captioning,

[23] "Nothing in [MCR 3.977(E)] suggests that termination may be granted at the initial disposition without the presence of an aggravating circumstance." *Walters*, ___ Mich App at ___. For more information on the aggravating circumstances exception under MCL 712A.19a(2)(a) to DHHS's obligation to make reasonable efforts at family reunification, see Section 8.4.

signing, and verifying of documents are prescribed in MCR 1.109(D) and (E)." MCR 3.961(A).

Among other information listed in MCR 1.109(D), the first part of every document must include a caption containing "the case number, including a prefix of the year filed and a two-letter suffix for the case-type code from a list provided by the State Court Administrator pursuant to MCR 8.117, according to the principal subject matter of the proceeding," and for "a case filed under the juvenile code, . . . a petition number, where appropriate." MCR 1.109(D)(1)(b)(*iii*); MCR 1.109(D)(1)(d). "[A] separate petition number shall be assigned to each petition filed under the juvenile code, MCL 712A.1 *et seq*., as required under MCR 1.109(D)(1)(d)." MCR 8.119(D)(1).[24] The case-type code for child protective proceedings is "NA." See the Circuit Court Case-Type Code List, *Family Division—Proceedings under Juvenile Code, (7)(d)*, referred to by Standard 3.3.1.1 of the Michigan Trial Court Records Management Standards. "The case number (and petition number if applicable) shall be recorded in the court's automated case management system and on the case file." MCR 8.119(D)(1).

## B. Required Petition Content

In addition to specified case information,[25] "[a] petition must contain the following information, if known:

(1) The child's name, address, and date of birth.

(2) The names and addresses of:

(a) the child's mother and father,

(b) the parent, guardian, legal custodian, or person who has custody of the child, if other than a mother or father, and

(c) the nearest known relative of the child, if no parent, guardian, or legal custodian can be found.

(3) The essential facts that constitute an offense against the child under the Juvenile Code.[26]

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[24] "MCR 8.119(D)(1) specifically requires that all petitions *filed* under the juvenile code contain a separate petition number, not just those petitions that are *authorized*." *In re Diehl*, 329 Mich App 671, 702 (2019).

[25] "At a minimum, specified case information shall include the name, an address for service, an e-mail address, and a telephone number of every party[.]" MCR 1.109(D)(2).

[26] See Section 17.7 for a detailed discussion of the MCL 712A.19b(3) statutory standards for termination of parental rights.

> (4) A citation to the section of the Juvenile Code relied on for jurisdiction.
>
> (5) The child's membership or eligibility for membership in an Indian tribe, if any, and the identity of the tribe.[27]
>
> (6) The type of relief requested. A request for removal of the child or a parent or for termination of parental rights at the initial disposition must be specifically stated. If the petition requests removal of an Indian child or if an Indian child was taken into protective custody pursuant to MCR 3.963 as a result of an emergency, the petition must specifically describe:
>
> > (a) the active efforts, as defined in MCR 3.002,[28] that have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; and
> >
> > (b) documentation, including attempts, to identify the child's tribe. MCR 3.961(B).

The petition must include a statement indicating whether a family division matter involving members of the same family is or was pending. MCR 1.109(D)(2)(b). "When any pending or resolved family division or tribal court case exists that involves family members of the person(s) named in the petition filed under [MCR 3.961(B)], the petitioner must complete and file a case inventory [on a form approved by the State Court Administrative Office] listing those cases, if known. The case inventory is confidential, not subject to service requirements, and is available only to the party that filed it, the filing party's attorney, the court, and the friend of the court." MCR 3.961(A). See also MCR 3.920(B)(3)(d). See Section 7.4(C) for more information.

A petition need not enumerate every theory or argument in support of Family Division jurisdiction. *In re Arntz,* 125 Mich App 634, 639 (1983), rev'd on other grounds 418 Mich 941 (1984).[29] Nor must the petition disprove every possible innocent explanation for an alleged injury. *In re Martin (Ashley Lynn),* 167 Mich App 715, 723-724 (1988).

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[27] If the child is of Indian heritage, the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA) must be followed. See Chapter 19 for information on the ICWA and the MIFPA.

[28] For a detailed discussion of active efforts, including the definition, see Section 19.12(F).

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

"A petition . . . may be amended at any stage of the proceedings as the ends of justice require." MCL 712A.11(6). See *In re Slis*, 144 Mich App 678, 684 (1985) (requirements of due process were satisfied where petition was amended on the record to include respondent-parent's name).

However, if a petition or an amended petition fails to request the termination of parental rights, a subsequent order terminating parental rights must be set aside. *In re SLH*, 277 Mich App 662, 674 (2008).

## C. Other Court Cases Involving Same Family Members

MCR 1.109(D)(2)(b) requires the petition to contain one of the following statements, if known:

> "(*i*) There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition, or
>
> (*ii*) There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition. I have filed a completed case inventory listing those cases." MCR 1.109(D)(2)(b). See also MCR 3.961(A).
>
> > **Note:** If the DHHS is investigating a suspected abused or neglected child and determines that there is an open Friend of the Court (FOC) case regarding the child, the DHHS must "notify the office of the [FOC] in the county in which the [FOC] case is open that there is an investigation conducted under [the Child Protection Law] regarding that child." MCL 722.628(21). See Section 2.4(E) for additional information.

"The case inventory must be on a form approved by the State Court Administrative Office." MCR 3.961(A). It must not be served on any party. MCR 3.920(B)(3)(d).

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

### D. Verification Requirement

Information provided in the petition must be verified and may be upon information and belief. MCL 712A.11(3). However, if any of the facts required to be contained in the petition are unknown to the petitioner, the petition must state that the facts are unknown. MCL 712A.11(4).

A petition may be verified by oath or affirmation of the person having knowledge of the facts stated, or by a signed and dated declaration. MCR 1.109(D)(3). With the exception of an affidavit, the declaration may be verified by "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)(b). See also *In re Jagers*, 224 Mich App 359, 364-365 (1997).

A person who knowingly makes a false declaration under MCR 1.109(D)(3)(b) may be found in contempt of court. MCR 1.109(D)(3).

### E. Court Fees

A party is not required to pay a filing fee for filing a child protective petition. See MCL 600.2529(8).

## 7.5 Preliminary Inquiries

If a person gives information to the court that a child is within MCL 712A.2(b) or MCL 712A.2(c), a preliminary inquiry may be made to determine whether the interests of the public or the child require that further action be taken. MCL 712A.11(1).

A preliminary inquiry may also be held to determine the appropriate course of action when a petition does not request placement and the child is not in custody. MCR 3.962(A). However, if the child is in protective custody or placement[30] is requested, the court must commence a preliminary hearing[31] within 24 hours after the child is taken into protective custody.[32] MCR 3.965(A)(1). The court must also "conduct a preliminary inquiry to determine the appropriate action to be taken on a petition[]" "[i]f either an amended[33] or supplemental petition[34] [filed

[30] MCR 3.903(C)(10) defines *placement* as "court-approved transfer of physical custody of a child to foster care, a shelter home, a hospital, or a private treatment agency."

[31] See Section 7.6 for a more detailed discussion of preliminary hearings.

[32] The 24-hour time period does not include Sundays or holidays. MCR 3.965(A)(1). See also MCR 8.110(D)(2).

under MCR 3.961(C)(1) or MCR 3.961(C)(2)] is not accompanied by a request for placement of the child or the child is not in protective or temporary custody[.]" MCR 3.961(C)(3).

A *preliminary inquiry* is defined as "informal review by the court to determine appropriate action on a petition." MCR 3.903(A)(23). "A preliminary inquiry need not be conducted on the record or in the presence of the parties." MCR 3.962(B).

> "At the preliminary inquiry, the court may:
>
> (1) Deny authorization of the petition.
>
> (2) Refer the matter to alternative services.
>
> (3) Authorize the filing of the petition if it contains the information required by MCR 3.961(B), and there is probable cause to believe that one or more of the allegations is true. For the purpose of this subrule, probable cause may be established with such information and in such a manner as the court deems sufficient." MCR 3.962(B).

Because "[a] respondent [is] not entitled to be present at the . . . preliminary inquiry[ under MCR 3.903(A)(23) and MCR 3.962], [the respondent is] not entitled to the assistance of counsel at [the preliminary inquiry,] . . . there is nothing in the court rule governing preliminary inquiries, MCR 3.962, that entitled [the] respondent to any advanced notice of the [Indian] Tribe's intent to intervene and present testimony[ at the preliminary inquiry,] . . . [the] respondent ha[s] no right to cross-examine [a witness] at the preliminary inquiry or present his [or her] own expert witnesses[,] . . . [and the respondent] ha[s] no right to seek a transfer of jurisdiction at the preliminary inquiry." *In re England*, 314 Mich App 245, 263 (2016).

See also *In re Kyle*, 480 Mich 1151 (2008) ("[t]he permissible actions following a preliminary inquiry are limited to granting or denying

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[33] For purposes of child protective proceedings, "'[a]mended petition' means a petition filed to correct or add information to an original petition, as defined in [MCR 3.903](A)(20) before it is adjudicated." MCR 3.903(C)(2).

[34] For purposes of child protective proceedings, "'[s]upplemental petition' means: (a) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that a parent, for whom a petition was authorized, has committed an additional offense since the adjudication of the petition, or (b) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that a nonrespondent parent is being added as an additional respondent in a case in which an original petition has been authorized and adjudicated against the other parent under MCR 3.971 or MCR 3.972, or (c) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that requests the court terminate parental rights of a parent or parents under MCR 3.977(F) or MCR 3.977(H)." MCR 3.903(C)(13). MCR 3.903(C)(8) defines a *nonrespondent parent* as "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)."

authorization to file the petition, or referring the matter to 'alternative services[]'").

## A. Referring Case to Alternative Services

"Referring the matter to 'alternative services' [MCR 3.962(B)(2)] does not include granting the only relief sought by the petition." *In re Kyle*, 480 Mich at 1151. In *In re Kyle*, 480 Mich at 1151, the Court of Appeals erred in concluding that the preliminary inquiry procedure provided the circuit court with authority to grant the relief sought under the petition without a trial pursuant to MCR 3.972 and MCL 712A.17, when the sole focus of the demand for relief was for the minor child to receive a medical examination. The preliminary inquiry procedure only permits a court to grant or deny authorization to file the petition or to refer the matter to alternative services. *In re Kyle*, 480 Mich at 1151.

## B. Authorizing Petition

A "'[p]etition authorized to be filed' refers to written permission given by the court to file the petition among the court's public records as permitted by MCR 3.925." MCR 3.903(A)(21). "An authorized petition is deemed 'filed' when it is delivered to, and accepted by, the clerk of the court." MCR 3.903(A)(9). "Until a petition is authorized, it must be filed with the clerk and maintained as a nonpublic record, accessible only by the court and parties. After authorization, a petition and any associated records may be made nonpublic only as permitted by court rule or statute." MCR 3.903(A)(21).

Where a juvenile is alleged to be within the provisions of MCL 712A.2(b), the court may authorize the filing of a petition at the conclusion of a preliminary inquiry. MCL 712A.13a(2). The court may authorize the filing of the petition if it contains the information required by MCR 3.961(B),[35] and there is probable cause to believe that one or more of the allegations is true. MCL 712A.13a(2); MCR 3.962(B)(3). "The Legislature's use of the word 'may' [in MCL 712A.13a(2)] signifies that it intended to permit, but not require, a trial court to authorize a petition upon a finding of probable cause that the allegations are true and fall within the statutory provisions for jurisdiction." *In re KNK*, ___ Mich App ___, ___ (2024).

"[P]robable cause may be established with such information and in such a manner as the court deems sufficient." MCR 3.962(B)(3).

[35] See Section 7.4(A) for a list of requirements under MCR 3.961(B).

Unless a parent enters a plea of admission or no contest, a trial will be held upon the court's authorization to file the petition to determine whether the court will take personal jurisdiction over the child. See MCR 3.903(A)(27). See also Section 4.3 for a detailed discussion of personal jurisdiction, and Section 17.8 for a detailed discussion of voluntary termination.

If the court authorizes the petition and the child is not in custody, a trial must be held within six months after the filing of the petition, unless adjourned for good cause under MCR 3.923(G). MCR 3.972(A).

## 7.6 Preliminary Hearings

If a petition is accompanied by a request for placement[36] and the child is in temporary custody, the court must hold a preliminary hearing to decide whether to authorize the filing of the petition and whether to place the child outside his or her home. MCR 3.965(A)(1).[37] However, if the petition does not request placement and the child is not in custody, the court may conduct a preliminary inquiry to determine an appropriate course of action. MCR 3.962(A). See Section 7.5 for a more detailed discussion of preliminary inquiries.

"If either the amended[38] or supplemental petition[39] [filed under MCR 3.961(C)(1) or MCR 3.961(C)] contains a request for removal, the court shall conduct a preliminary hearing to determine the appropriate action to be taken on the petition consistent with MCR 3.965(B)[, and i]f either the amended or supplemental petition is authorized, the court shall proceed against each respondent parent in accordance with MCR 3.971 or

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[36] MCR 3.903(C)(10) defines *placement* as "court-approved transfer of physical custody of a child to foster care, a shelter home, a hospital, or a private treatment agency."

[37] See, e.g., *In re Shimmons/Hare*, ___ Mich App ___, ___ (2026) ("The trial court's order to remove [the children] from respondent's custody and its failure to hold a procedurally valid emergency removal hearing were erroneous" when the trial court ordered removal without authorizing the amended petition requesting removal or providing respondent with proper notice of either an emergency hearing under MCR 3.974(C)(3) or an ordinary preliminary hearing under MCR 3.965.).

[38] For purposes of child protective proceedings, "'[a]mended petition' means a petition filed to correct or add information to an original petition, as defined in [MCR 3.903](A)(20) before it is adjudicated." MCR 3.903(C)(2).

[39] For purposes of child protective proceedings, "'[s]upplemental petition' means: (a) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that a parent, for whom a petition was authorized, has committed an additional offense since the adjudication of the petition, or (b) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that a nonrespondent parent is being added as an additional respondent in a case in which an original petition has been authorized and adjudicated against the other parent under MCR 3.971 or MCR 3.972, or (c) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that requests the court terminate parental rights of a parent or parents under MCR 3.977(F) or MCR 3.977(H)." MCR 3.903(C)(13). MCR 3.903(C)(8) defines a *nonrespondent parent* as "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)."

MCR 3.972."[40] MCR 3.961(C)(3). However, "[i]f either an amended or supplemental petition [filed under MCR 3.961(C)(1) or MCR 3.961(C)(2)] is not accompanied by a request for placement of the child or the child is not in protective or temporary custody, the court shall conduct a preliminary inquiry to determine the appropriate action to be taken on a petition." MCR 3.961(C)(3). See Section 7.5 for a more detailed discussion of preliminary inquiries.

A preliminary hearing must commence within 24 hours of a child being taken into protective custody unless the preliminary hearing is adjourned for good cause, or the child must be released.[41] MCR 3.965(A)(1); MCL 712A.14(2). A preliminary hearing must also commence within 24 hours of the DHHS submitting a petition or by the next business day following submission of the petition where the child was severely physically harmed or sexually abused. MCR 3.965(A)(2).

The use of videoconferencing technology to conduct preliminary hearings is governed by MCR 3.904(B). See Section 1.7.

## A. Required Procedures at Preliminary Hearings

### 1. Notification

"The notice requirements for child protective proceedings must be strictly construed." *In re Shimmons/Hare*, ___ Mich App ___, ___ (2026) (quotation marks and citation omitted). In general, the summons must be personally served on respondent at least three days before the first preliminary hearing. *Id.* at ___. Once a party has appeared before the court, notice "'shall be served on that party or, if the party has an attorney, on the attorney for the party as provided in [MCR 3.920(D)].'" *Id.* at ___, quoting MCR 3.920(G). "For a preliminary hearing in which the children have not been taken into protective custody, notice 'must be given in writing or on the record at least 7 days before the hearing . . . .'" *Shimmons*, ___ Mich App at ___, quoting MCR 3.920(D)(1).

> **Note:** "'When a child is placed outside the home, notice of the preliminary hearing or an emergency removal hearing under MCR 3.974(C)(3) must be given to the parent of the child as soon as the hearing is scheduled.'" *Shimmons*, ___ Mich App at

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

[41] The 24-hour time period does not include Sundays or holidays. MCR 3.965(A)(1).

___, quoting MCR 3.920(D)(2)(b). See Section 5.2 for a detailed discussion of notice of hearings.

The court must determine whether the child's parent, guardian, or legal custodian received notification of the preliminary hearing and if the child's lawyer-guardian ad litem is present at the hearing. MCR 3.965(B)(1). The failure of an attorney, parent, guardian, or legal custodian to appear may result in adjournment of the preliminary hearing.[42] MCR 3.965(B)(1). The court may, however, continue with the preliminary hearing in the absence of the child's parent, guardian, or legal custodian if notice was given or if the court finds that a reasonable attempt to give notice was made. *Id.*

When a notice is returned unclaimed, "'the adequacy of the [DHHS]'s efforts will be evaluated in light of the actions it takes after it learns that its attempt at notice has failed.'" *In re Rood*, 483 Mich 73, 110 (2009), quoting *Sidun v Wayne Co Treas*, 481 Mich 503, 511 (2008).

## 2. Inquiring About Indian Children

The court must inquire whether a child or either of the child's parents is a member of an Indian tribe. MCR 3.965(B)(2). "If the court knows or has reason to know the child is an Indian child, the court must determine the identity of the child's tribe[.]"[43] *Id.*

Where an Indian child was taken into protective custody without a court order[44] or the petition requests removal of the Indian child, the court must follow the procedures set out in MCR 3.967. MCR 3.965(B)(2). See Section 19.12(B) for information on MCR 3.967.

**Note:** The court may hold the preliminary hearing in conjunction with the removal hearing if all necessary parties are notified,[45] there are no objections by the parties to do so, and at least one

[42] See Section 7.6(D) for a detailed discussion of preliminary hearing adjournments.

[43] "State courts must ask each participant in an emergency or voluntary or involuntary proceeding whether the participant knows or has reason to know that the child is an Indian child." 25 CFR 23.107(a). "Even if a party fails to assert that [the] ICWA may apply, the court has a duty to inquire as to [the] 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). *Note*: The previous link to this resource was created using Perma.cc and directs the reader to an archived record of the page. For additional information on determining an Indian child's status, including a discussion on determining an Indian child's Tribe, see Section 19.4(A).

[44] See Section 3.1(A) for a detailed discussion of protective custody of a child without court order.

> qualified expert witness is present to provide testimony. MCR 3.965(B)(2). However, the court may adjourn the preliminary hearing pending the conclusion of the removal hearing if necessary.[46] *Id.*

### 3. Temporary Orders

"The court may make temporary orders for the protection of the child pending the appearance of an attorney or pending the completion of the preliminary hearing." MCR 3.965(B)(3).

### 4. Lawyer-Guardian Ad Litem (L-GAL) for Child

The court must appoint a lawyer-guardian ad litem to represent a child in a child protective proceeding.[47] MCL 712A.17c(7). "The child's lawyer-guardian ad litem must be present to represent the child at the preliminary hearing." MCR 3.965(B)(3).

The court must determine whether the child's lawyer-guardian ad litem is present at the preliminary hearing. MCR 3.965(B)(1). The court must also direct that the child's lawyer-guardian ad litem receive a copy of the petition. MCR 3.965(B)(3).

### 5. Reading Allegations

Unless waived, the court must read the allegations in the petition in open court. MCR 3.965(B)(4).

### 6. Required Procedures Toward Respondent

If a respondent is present at the preliminary hearing, the court must assure that he or she has a copy of the petition. MCR 3.965(B)(4).

The court is also required to advise the respondent of his or her right:

> (1) pursuant to MCR 3.915(B)(1)(a), to the assistance of an attorney at the preliminary hearing

[45] See Section 19.5 for a detailed discussion of notification requirements under the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA).

[46] See Section 7.6(D) for information on adjournments of preliminary hearings.

[47] See Section 7.10 for a detailed discussion of lawyer-guardian ad litem (L-GAL) appointments.

> and any subsequent hearing. MCR 3.965(B)(6). See Section 7.9 for a detailed discussion of a respondent's right to counsel.
>
> (2) to a trial on the allegations in the petition, and that the trial may be held in front of a referee unless a demand for a jury or judge is filed under MCR 3.911 or MCR 3.912. MCR 3.965(B)(7). See Section 9.6 for a detailed discussion on demands for a jury or bench trial.

Additionally, the court must provide the respondent with an opportunity to deny or admit the allegations contained in the petition and give an explanatory statement. MCR 3.965(B)(9).

## 7. Decision to Dismiss, Refer, or Continue

The court must determine whether a petition should be dismissed or referred to alternative services. MCR 3.965(B)(5). If the case is dismissed or referred, the court must release the child. *Id.* However, if the court does not dismiss or refer the case, the court must continue the preliminary hearing. *Id.*

## 8. Nonrespondent Parent's Right to Seek Placement of Child in Home

"The court must advise a nonrespondent parent of his or her right to seek placement of his or her children in his or her home." MCR 3.965(B)(8).

For purposes of child protective proceedings, a *nonrespondent parent* is "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)." MCR 3.903(C)(8).

## 9. Child Subject to Another Court's Jurisdiction

The court must inquire whether the child is subject to the continuing jurisdiction of another court and, if so, which court. MCR 3.965(B)(10). See Section 4.4 for a detailed discussion of concurrent jurisdiction.

## 10. Inquiring About the Child's Family

Where a child's father has not been identified, the court must ask the child's mother about the father's identity and whereabouts. MCR 3.965(B)(14).

The court must also ask a child's parent, guardian, or legal custodian if the child has any relatives who might be available to provide care. MCR 3.965(B)(14).

> **Note:** A *relative* is "an individual who is at least 18 years of age and is either of the following:
>
> > (*i*) Related to the child within the fifth degree by blood, marriage, or adoption, including the spouse of an individual related to the child within the fifth degree, even after the marriage has ended by death or divorce, the parent who shares custody of a half-sibling,[48] and 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.
> >
> > (*ii*) Not related to a child within the fifth degree by blood, marriage, or adoption but who has a strong positive emotional tie or role in the child's life or the child's parent's life if the child is an infant, as determined by the [DHHS] or, if the child is an Indian child, as determined solely by the Indian child's tribe."[49] MCL 712A.13a(1)(j).[50]

A child's father may propose that his child be placed with relatives when the father is incarcerated, has not been adjudicated, and is unable to provide placement in his own home. *In re Dixon (On Reconsideration)*, 347 Mich App 337, 352-353 (2023). When an incarcerated father's relatives are unwilling to take custody of the child, the father may propose placement with a nonrelative. *Dixon*, 347 Mich App at 360, 361.

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[48] "'Sibling' means a child who is related through birth or adoption by at least 1 common parent. Sibling includes that term as defined by an American Indian or Alaskan native child's tribal code or custom." MCL 712A.13a(1)(*l*); MCL 722.952(*l*).

[49] For purposes of MCL 712A.13a, *Indian child* and *Indian child's tribe* "mean those terms as defined in [MCL 712B.3]." MCL 712A.13a(1)(j)(*ii*).

[50] The definition of *relative* under MCL 712A.13a(1)(j) includes "fictive kin." See *In re CJM*, ___ Mich App ___, ___ (2024) (2022 PA 200, effective October 7, 2022, "expanded the definition of 'relative' to include certain 'fictive kin'" as defined in MCL 712A.13a(1)(j)(*ii*)). "'[R]elative' under MCL 712A.13a(1)(j) now includes a biological parent." *In re Boshell/Shelton*, ___ Mich App ___, ___ (2025). For more information on relative placements, see Section 8.2(B).

## 11. Right to Appeal Removal of Child

"MCR 3.965(B)(15) provides that if the court orders removal of the child from a parent's care or custody, the court shall advise the parent of the right to appeal that action."*In re Barber/Espinoza*, ___ Mich ___, ___ (2025) (cleaned up). In *Barber/Espinoza*, the DHHS petitioned to terminate respondent's parental rights at the initial disposition due to aggravated circumstances under MCL 722.638, alleging in part that respondent prostituted one of her children in exchange for drugs. *Barber/Espinoza*, ___ Mich at ___. When the DHHS brought its petition, the children were residing with their father and respondent had limited parenting time. *Id*. at ___. At the preliminary hearing, the trial court authorized the petition, ordered the children to remain with their father, and suspended respondent's parenting time. *Id*. at ___. The trial court did not order a case service plan because the DHHS sought termination, and the court did not advise respondent of her right to appeal the removal decision. *Id*. at___. The order suspending respondent's parenting time was a "removal" from respondent's care and custody because it "eliminated her ability to participate in decisions about [the children's] care or exercise parenting time," which affected her joint legal custody right even though it did not affect the children's physical custody. *Id*. at ___. "[T]he trial court committed clear and obvious error by failing to advise respondent of her right to appeal the removal decision under MCR 3.965(B)(15)." *Id*. at ___.

However, given that "the trial court properly determined [at the initial disposition hearing[51]] that MCL 712A.19a(2)(a) excused the reasonable-efforts requirement, respondent [could not] show that, had she been advised of her appellate rights after the preliminary hearing, the outcome of [the] proceedings would have been different." *Barber/Espinoza*, ___ Mich at ___ (holding that "the Court of Appeals erred by concluding that respondent demonstrated outcome-determinative error," and reinstating the trial court's order terminating respondent's parental rights).

[51] "At the preliminary hearing, the trial court must determine whether reasonable efforts have been made to prevent *removal,* MCR 3.965(C)(4), not whether reasonable reunification efforts between removal and termination may be excused, MCL 712A.19a(2)." *Barber/Espinoza*, ___ Mich at ___. The standard of proof at the preliminary hearing is probable cause. *Id*. at ___. The standard of proof for the aggravated circumstances determination that excuses the DHHS from the reasonable-efforts requirement under MCL 712A.19a(2) is clear and convincing evidence. *Id*. at ___.

## B. Petition Authorization

Unless the preliminary hearing is adjourned, the court must decide whether to authorize the filing of a petition. MCR 3.965(B)(12). The court's authorizing of the filing of the petition refers to the court's written permission to "file the petition containing the formal allegations against the . . . respondent with the clerk of the court." MCR 3.903(A)(21).

The judge or referee must authorize the filing of a petition during the preliminary hearing, or the child must be released to his or her parent or parents, guardian, or custodian. MCL 712A.14(2). The court may authorize the filing of the petition upon a showing of probable cause, unless waived, that one or more of the allegations contained in the petition are true and fall within MCL 712A.2(b).[52] MCL 712A.13a(2); MCR 3.965(B)(12). Whether to authorize the filing of a petition is within the trial court's discretion even in some circumstances where probable cause is found. *In re KNK*, ___ Mich App ___, ___ (2024) ("The [use of the word 'may' in MCL 712A.13a(2)] indicates the Legislature contemplated that there would be circumstances in which a trial court could find probable cause to believe that the allegations in the petition are true and fall within the statutory provisions for jurisdiction but nonetheless decline to authorize the petition.").

> **Note:** "The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent that such privileges are abrogated by MCL 722.631."[53] MCR 3.965(B)(12).

A petition may be amended at any stage of the proceedings as the ends of justice require. MCL 712A.11(6).

### 1. Finding of Probable Cause

At a preliminary hearing, the court must make "a finding of probable cause that one or more of the allegations [in the petition] are true and could support the trial court's exercise of jurisdiction under MCL 712A.2(b)." *In re Ferranti*, 504 Mich 1, 15 (2019).

The probable-cause phase of a preliminary hearing may proceed in the following ways:

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[52] See Section 4.3(A) for information on MCL 712A.2(b).

[53] See Chapter 8 for a detailed discussion of child placements and Section 11.3 for information on abrogation of privileges.

- **Respondent waives probable-cause determination:** if the respondent waives the probable-cause determination, the verified petition allows the court to authorize the filing of the petition. See MCR 3.965(B)(12); MCR 3.965(C)(1). This is similar to the probable-cause showing at a preliminary inquiry. See MCL 712A.13a(2); MCR 3.962(B)(3).

- **Respondent does not waive probable-cause determination and witnesses are present:** if the respondent does not waive the probable-cause determination, the petitioner presents witnesses, and the respondent is given an opportunity to cross-examine witnesses, to subpoena witnesses, and to offer proofs to counter the admitted evidence. MCR 3.965(C)(1). If the court finds probable cause that one or more of the allegations in the petition are true, the court may authorize the filing of the petition. MCR 3.965(B)(12).

- **Respondent does not waive probable-cause determination and no witnesses are present:** if the respondent does not waive the probable-cause determination and no witnesses are present, the court may adjourn the hearing for up to 14 days to secure the attendance of witnesses. MCR 3.965(B)(11). If the court finds probable cause that one or more of the allegations in the petition are true, the court may authorize the filing of the petition. MCR 3.965(B)(12).

## 2. Authorizing the Filing of Petition

If the court authorizes the filing of the petition, it must decide whether the child should remain in the home, be returned home, or be placed in foster care pending trial. MCR 3.965(B)(12).[54] See also MCL 712A.14(3).

"If the court authorizes the filing of the petition, the court:

> (a) may release the child to a parent, guardian, or legal custodian and may order such reasonable terms and conditions believed necessary to protect the physical health or mental well-being of the child; or
>
> (b) may order placement of the child after making the determinations specified in [MCR 3.965](C), if those determinations have not previously been

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

made.[55] If the child is an Indian child, the child must be placed in descending order of preference with:

> (i) a member of the child's extended family,
>
> (ii) a foster home licensed, approved, or specified by the child's tribe,
>
> (iii) an Indian foster family licensed or approved by the department,
>
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

The court may order another placement for good cause shown in accordance with MCL 712B.23(3)-(5). If the Indian child's tribe has established a different order of preference than the order prescribed above, placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in MCL 712B.23(6).[56] 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."[57] MCR 3.965(B)(13).

If the court authorizes the petition, it may release the child to his or her parents, guardian, or custodian under reasonable terms and conditions necessary for the child's physical health or mental well-being. MCL 712A.13a(3). However,

- if the petition alleges that the child's parent, guardian, custodian, nonparent adult[58], or other person

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

[56] MCL 712A.13a contains information regarding a child's placement with relatives. However, "[n]othing in [MCL 712A.13a] is intended to supersede the placement preferences for an Indian child under [the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*.]." MCL 712A.13a(20).

[57] The Michigan Indian Family Preservation Act (MIFPA) also sets out a standard order of preference for the placement of Indian children in MCL 712B.23(1), which mirrors the orders set out in 25 USC 1915(b) and 25 CFR 23.131(b). For a detailed discussion of 25 USC 1915(b), MCL 712B.23(1), and 25 CFR 23.131(b) see Section 19.13.

[58] See Section 7.6(E) for the definition of nonparent adult.

residing in the child's home abused the child, the court must not "leave the child in or return the child to the child's home or place the child [in an unlicensed foster care], unless the court finds that the conditions of custody at the placement and with the individual with whom the child is placed are adequate to safeguard the child from the risk of harm to the child's life, physical health, or mental well-being." MCL 712A.13a(5).

- "[i]f [the] court finds [that] a parent is required by court order to register under the [S]ex [O]ffenders [R]egistration [A]ct,[59] the [DHHS] may, but is not required to, make reasonable efforts to reunify the child with the parent. The court may order reasonable efforts to be made by the [DHHS]." MCL 712A.13a(6).

Under MCL 712A.13a(2), if severe physical injury or sexual abused is alleged,[60] the court must consider:

(1) Ordering the alleged abuser to leave the child's home. MCL 712A.13a(4). See Section 7.6(C).

(2) Not leaving the child in or returning the child home unless the court finds that the child is adequately safeguarded from the risk of harm to his or her life, physical health, or mental well-being. MCL 712A.13a(5).

## C. Order Alleged Abuser From Child's Home

If the court authorizes the filing of the petition and releases the child to a parent, guardian, or legal custodian, the court may order such reasonable terms and conditions believed necessary to protect the child's physical health or mental well-being. MCR 3.965(B)(13)(a). One of the terms and conditions available to the court is to order the child's parent, guardian, custodian, nonparent adult,[61] or other person residing in the child's home to leave and not return except as the court orders. See MCL 712A.13a(4).

[59] "'Sex [O]ffenders [R]egistration [A]ct' means the [S]ex [O]ffenders [R]egistration [A]ct, . . . MCL 28.721 to [MCL] 28.730." MCL 712A.13a(1)(k).

[60] See Section 7.3(A).

[61] See Section 7.6(E) for the definition of *nonparent adult*.

## 1. Procedure to Order Alleged Abuser From Child's Home

When a court orders a child's parent, guardian, custodian, nonparent adult, or other person residing in the child's home to leave and to not subsequently return to the home, except as the court orders, the court must:

> (1) authorize the filing of the petition that contains allegations of child abuse;[62]
>
> (2) find, during the preliminary hearing, probable cause to believe the child's parent, guardian, custodian, nonparent adult, or other person residing in the child's home committed the abuse; and
>
> (3) find on the record that the presence of the alleged abuser in the child's home presents a substantial risk of harm to the child's life, physical health, or mental well-being.[63] MCL 712A.13a(4).

The court may also consider whether the parent remaining in the home is married to the removed person or has a legal right to retain possession of the home. MCL 712A.13a(7).

*Abuse*, for purposes of MCL 712A.13a, is any of the following:

> "(a) Harm or threatened harm by a person to a juvenile's health or welfare that occurs through nonaccidental physical or mental injury.
>
> (b) Engaging in sexual contact or sexual penetration as those terms are defined in . . . MCL 750.520a, with a juvenile.
>
> (c) Sexual exploitation of a juvenile, which includes, but is not limited to, allowing, permitting, or encouraging a juvenile to engage in prostitution or allowing, permitting, encouraging, or engaging in photographing, filming, or

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[62] But see *In re KNK*, ___ Mich App ___ (2024), where the Court held that the trial court did not abuse its discretion under MCL 712A.13a(2) when it declined to authorize a petition against respondent who had been removed from the home and was subject to a no-contact order with the minor, KK, due to a pending second-degree criminal sexual conduct case against him involving KK as the victim. The trial court found that the no-contact order in the criminal case adequately protected the child, and the Court affirmed, stating "[T]he mere fact that a parent is charged with criminal conduct against a child does not require a finding that the child is at a substantial risk of harm within the meaning of MCL 712A.2b(1)." *KNK*, ___ Mich App at ___.

[63] See SCAO form JC 65, *Order Removing Alleged Abuser From Child's Home (Child Protective Proceedings)*.

> depicting a juvenile engaged in a listed sexual act as that term is defined in . . . MCL 750.145c.
>
> (d) Maltreatment of a juvenile." MCL 712A.13a(21).

## 2. Additional Conditions Added to Order

The order removing a parent, guardian, custodian, nonparent adult, or other person from the home may contain one or more of the following terms or conditions:

> "(a) The court may require the alleged abusive parent to pay appropriate support to maintain a suitable home environment for the juvenile during the duration of the order.
>
> (b) The court may order the alleged abusive person, according to terms the court may set, to surrender to a local law enforcement agency any firearms or other potentially dangerous weapons the alleged abusive person owns, possesses, or uses.
>
> (c) The court may include any reasonable term or condition necessary for the juvenile's physical or mental well-being or necessary to protect the juvenile." MCL 712A.13a(8).

## 3. Violation of Court Order

A law enforcement officer has the authority to arrest a person without a warrant if the officer has reasonable cause to believe that:

> (1) the court has issued an order under MCL 712A.13a(4) that removes the person from the child's home and indicates the period of time when the order is valid;
>
> (2) a true copy of the order and proof of service has been filed with the law enforcement agency having jurisdiction of the area in which the person having custody of the child under MCL 712A.13a(4) resides;
>
> > **Note:** Orders and proofs of service must be entered into the Law Enforcement Information Network (LEIN). MCL 764.15f(6). If an order is rescinded, the court must

immediately order the removal of the protective order from LEIN. MCL 764.15f(7).

(3) the person removed from the home has received notice of the order;

(4) the removed person is acting in violation of the court's order; and

(5) the order indicates that a violation of its terms subjects the person to criminal contempt of court and may result in imprisonment of not more than 90 days and a fine of not more than $500. MCL 764.15f(1)(a)-(e).

"'Reasonable cause' means having enough information to lead an ordinarily careful person to believe that the defendant committed a crime." *People v Freeman*, 240 Mich App 235, 236 (2000) (reliance on LEIN information provided police officer with reasonable cause to believe that defendant named on the personal protection order (PPO) had notice of the PPO and had violated its provision, thereby subjecting him to an immediate arrest).

When a person is arrested for violating a court's order under MCL 712A.13a(4), he or she must go before the Family Division having jurisdiction of the cause within 24 hours of the arrest to answer to a charge of contempt for violation of the order. MCL 764.15f(3). Once the arrested person is brought before the court, the court must:

(1) schedule a hearing on the alleged violation of the order within 72 hours of the arrest (unless the court grants an extension of time upon the motion of the arrested person);

(2) set a reasonable bond pending the scheduled hearing; and

(3) notify the person having custody of the child under MCL 712A.13a(4) to appear at the scheduled hearing to give evidence on the charge of contempt. MCL 764.15f(3)(a)-(c).

**Note:** A Family Division judge may arraign, take a plea, or sentence a person for criminal contempt in the same manner as a circuit court judge could in other criminal cases. MCL 764.15f(4).

If a person is arrested for violating the court's order and a Family Division judge is not available within 24 hours of the arrest, he or she must go before a district court judge. MCL 764.15f(5). The district court judge must set a hearing before the Family Division that entered the violated order or that has jurisdiction over the order, and set bond. *Id.*

> **Note:** The requirements for enforcing orders issued under MCL 712A.13a(4) are similar to the requirements for enforcing a PPO. For a detailed discussion of PPOs, see the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 5. For a detailed discussion of contempt proceedings, see the Michigan Judicial Institute's *Contempt of Court Benchbook* and *Contempt Quick Reference Materials*.

## D. Adjournments of Preliminary Hearings

Adjourning a preliminary hearing should only be granted for good cause after the court takes the child's best interests into consideration and where the adjournment is for as short of a period of time as possible. MCR 3.923(G). For a more detailed discussion of adjournments, see Section 5.8.

The court may find good cause to adjourn a preliminary hearing for any of the following reasons:

(1) An attorney, parent, guardian, or legal custodian fails to appear at the preliminary hearing. MCR 3.965(B)(1). The court may, however, continue with the preliminary hearing in the absence of the child's parent, guardian, or legal custodian if notice was given or if the court finds that a reasonable attempt to give notice was made.[64] *Id.*

> **Note:** The child's lawyer-guardian ad litem must be present to represent the child at the preliminary hearing. MCR 3.965(B)(3). See Section 7.6(A) for additional information.

[64] See Section 7.6(A) for additional information on notification requirements. But see *Shimmons*, ___ Mich App at ___: The trial court erred when "no reasonable attempt to give notice was made[ and] the trial court [failed] to adjourn the preliminary hearing to secure respondent's appearance under MCR 3.965(B)(1)," but instead took testimony and entered an "Order After Preliminary Hearing" for the children's removal the same day that the DHHS filed the amended petition requesting removal. *Shimmons*, ___ Mich App at ___.

(2) A petition requests the removal of an Indian child. MCR 3.965(B)(2). The court may adjourn the preliminary hearing pending the conclusion of the removal hearing or continue with the preliminary hearing in conjunction with the removal hearing if the necessary parties are notified,[65] there are no objections by the parties to do so, and at least qualified one expert witness is present to provide testimony. *Id.*

(3) A witness's attendance needs to be secured. MCR 3.965(B)(11). The court may adjourn the preliminary hearing for up to 14 days to secure a witness's attendance or for good cause shown. *Id.*

(4) "[T]he court knows or has reason to know the child is an Indian[.]" MCR 3.965(B)(11). "[T]he court may adjourn the [preliminary] hearing for up to 21 days to ensure proper notice to the tribe or Secretary of the Interior as required by MCR 3.920(C)(1)."[66] MCR 3.965(B)(11).

> **Note:** If a preliminary hearing is adjourned, the court may enter temporary orders for placement of a child when necessary for the child's immediate safety, pending completion of the preliminary hearing, and subject to MCR 3.965(C), and as applicable, MCR 3.967.[67] MCR 3.965(B)(11).

## E. Impact of Preliminary Hearing on Nonparent Adult

At a preliminary hearing, the court may issue an order that does one or more of the following:

"(a) Requires the nonparent adult to participate in the development of a case service plan.[68]

(b) Requires the nonparent adult to comply with a case service plan.

(c) Permanently removes the nonparent adult from the home of the child as provided in [MCL 712A.13a].[69]

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[65] See Section 19.5 for a detailed discussion of notification requirements under the ICWA and the MIFPA.

[66] See Section 19.5 for a detailed discussion of notification requirements under the ICWA and the MIFPA.

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

[68] See Section 13.6 for a detailed discussion of case service plans.

[69] See Section 7.6(C).

> (d) Permanently restrains the nonparent adult from coming into contact with or within close proximity of the child." MCL 712A.6b(1)(a)-(d). See Section 4.10 for a discussion on the court's jurisdiction and authority over adults.

A *nonparent adult* is "a person who is 18 years of age or older and who, regardless of the person's domicile, meets all of the following criteria in relation to a child over whom the court takes jurisdiction under [MCL 712A.2(b)]:

> (*i*) Has substantial and regular contact with the child.
>
> (*ii*) Has a close personal relationship with the child's parent or with a person responsible for the child's health or welfare.
>
> (*iii*) Is not the child's parent or a person otherwise related to the child by blood or affinity to the third degree." MCL 712A.13a(1)(h).

A nonparent adult who violates a court order issued under MCL 712A.6b is guilty of a misdemeanor.[70] MCL 712A.6b(2). For subsequent violations, a nonparent adult is guilty of a felony.[71] MCL 712A.6b(3). A nonparent adult may also be charged with, convicted of, or punished for any other violations he or she commits while violating a court order issued under MCL 712A.6b. MCL 712A.6b(4).

The court may also exercise its criminal or civil contempt powers for a nonparent's violation of an order issued under MCL 712A.6b. MCL 712A.6b(5).

## 7.7 Family Treatment Court

In addition to the other state certified treatment courts authorized under the Revised Judicature Act of 1961, MCL 600.101 *et seq.*,[72] "[t]he circuit court in any judicial circuit court may adopt or institute a family treatment court, pursuant to statute or court rules." MCL 600.1099bb(1).

A "family treatment court" is defined as either of the following:

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[70] Punishable by not more than one year of imprisonment, a maximum fine of $1,000, or both.

[71] Punishable by not more than two years of imprisonment, a maximum fine of $2,000, or both.

[72] See the Michigan Judicial Institute's *Controlled Substances Benchbook*, Section 10.3, and the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Section 1.8 for more information on the other treatment courts.

"(*i*) A court-supervised treatment program for individuals with a civil child abuse or neglect case and who are diagnosed with a substance use disorder.

(*ii*) A program designed to adhere to the family treatment court best practice standards promulgated by a national organization representing the interest of drug and specialty court treatment programs and the Center for Children and Family Futures, which include all of the following:

(A) Early identification, screening, and assessment of eligible participants, with prompt placement in the program.

(B) Integration of timely, high-quality, and appropriate substance use disorder treatment services with justice system case processing.

(C) Access to comprehensive case management, services, and supports for families.

(D) Valid, reliable, random, and frequent drug testing.

(E) Therapeutic responses to improve parent, child, and family functioning, ensure children's safety, permanency, and well-being, support participant behavior change, and promote participant accountability.

(F) Ongoing close judicial interaction with each participant.

(G) Collecting and reviewing data to monitor participant progress, engage in a process of continuous quality improvement, monitor adherence to best practice standards, and evaluate outcomes using scientifically reliable and valid procedures.

(H) Continued interdisciplinary education in order to promote effective family treatment court planning, implementation, and operation.

(I) The forging of partnerships among other family treatment courts, public agencies, and community-based organizations to generate local support.

(J) A family-centered, culturally relevant, and trauma-informed approach.

(K) Ensuring equity and inclusion." MCL 600.1099aa(c).

## A. Adopting or Instituting a Family Treatment Court

"The circuit court shall not adopt or institute the family treatment court unless the circuit court enters into a memorandum of understanding with the prosecuting attorney, a representative of the bar specializing in family or juvenile law, a lawyer-guardian ad litem, a representative or representatives of the department, and a representative or representatives of community treatment providers." MCL 600.1099bb(1).

Other parties that are considered necessary may be included in the memorandum of understanding, "such as a court appointed special advocate, local law enforcement, the local substance abuse coordinating agency for that circuit court, a mental health treatment provider, a domestic violence services provider, an Indian child's tribe, or child and adolescent services providers." *Id*. The memorandum of understanding must describe each party's role. *Id*.

## B. State Certification

"A family treatment court operating in this state, or a circuit court in any judicial circuit seeking to adopt or institute a family treatment court, must be certified by the state court administrative office [SCAO]" according to procedures that SCAO must establish. MCL 600.1099bb(3). "[U]nder the direction and supervision of the supreme court," SCAO must "include a family treatment court certified under this subsection on the statewide official list of family treatment courts." *Id*.

"A family treatment court that is not certified under this subsection shall not perform any of the functions of a family treatment court, including, but not limited to, receiving funding under [MCL 600.1099*ll*]." MCL 600.1099bb(3). The state drug treatment court advisory committee shall monitor the effectiveness of family treatment courts. MCL 600.1082(10).

"A court that is adopting a family treatment court shall participate in training as required by [SCAO]." MCL 600.1099bb(2).

Each family treatment court must "collect and provide data on each individual applicant and participant in the program as required by [SCAO]" and must provide SCAO with all requested information. MCL 600.1099kk(1), (5).

Further, "[e]ach family treatment court shall report quarterly to [SCAO] on the funds received and expended by that family treatment court, in a manner prescribed by [SCAO]." MCL 600.1099*ll*(3).

## C. Individual Eligibility

"A family treatment court shall determine whether an individual may be admitted to the family treatment court. An individual does not have a right to be admitted into a family treatment court." MCL 600.1099dd(1). "

"[A]dmission must be indicated as appropriate as a result of a preadmission screening, evaluation, or assessment with an evidence-based screening and assessment tool." MCL 600.1099dd(2). An individual who seeks admission into a family treatment court "shall cooperate with and complete a preadmission screening, evaluation, or assessment, and shall agree to cooperate with any future evaluation or assessment as directed by the family treatment court." *Id*.

"The court may request that the [DHHS] provide to the court information about an individual applicant's child protective services history to determine an individual's admission into the family treatment court." MCL 600.1099dd(5). The DHHS must provide the information requested under MCL 600.1099dd(5) and the information required by MCL 722.627(1)(g). MCL 600.1099dd(5).

"Unless the family treatment court judge and the prosecuting attorney, in consultation with any known victim in the instant case, consent, a violent offender must not be admitted into a family treatment court." MCL 600.1099dd(1). A "violent offender" is "an individual who is currently charged with or has pled guilty to an offense involving the death of or serious bodily injury to any individual, whether or not death or serious bodily injury is an element of the offense, or an offense that is criminal sexual conduct of any degree." MCL 600.1099aa(i).

"An individual must not be admitted to a family treatment court if either of the following applies:

> (a) The individual is currently charged with first degree murder . . . , or criminal sexual conduct in the first, second, or third degree . . . .
>
> (b) The individual has been convicted of first degree murder . . . , criminal sexual conduct in the first degree . . . , or child sexually abusive activity . . . " MCL 600.1099dd(1).

## D. Preadmission Screening, Evaluation, or Assessment

"A family treatment court may hire or contract with licensed or accredited treatment providers in consultation and cooperation

with the local substance abuse coordinating agency, the local community mental health service provider, and other such appropriate persons to assist the family treatment court in fulfilling its requirements under [MCL 600.1099aa to MCL 600.1099*ll*], including, but not limited to, the investigation of an individual's background or circumstances, the clinical evaluation of an individual for the individual's admission into or participation in a family treatment court, providing a recommended treatment modality and level of care, and providing evidence-based, family-centered treatment using an integrated, comprehensive continuum of care." MCL 600.1099cc.

The preadmission screening, evaluation or assessment must include the seven elements identified in MCL 600.1099dd(2):

> "(a) A complete review of the individual's criminal history, and a review of whether or not the individual has been admitted to, has participated in, or is currently participating in a problem-solving court. The court may accept verifiable and reliable information from the prosecutor or the individual's attorney to complete its review and may require the individual to submit a statement as to whether or not the individual has previously been admitted to a problem-solving court and the results of the individual's participation in the prior program or programs.
>
> (b) A complete review of the individual's child protective services history.
>
> (c) As much as practicable, a complete review of the individual's civil record, including any records pertaining to divorce, custody, personal protection order, and extreme risk protection order proceedings.
>
> (d) An assessment of the family situation, including any nonrespondent parent and family support.
>
> (e) An assessment of the risk of danger or harm to the individual, the individual's children, or the community.
>
> (f) As much as practicable, a complete review of the individual's history regarding the use or abuse of any controlled substance or alcohol and an assessment of whether the individual abuses controlled substances or alcohol or is drug or alcohol dependent. As much as practicable, the assessment must be a clinical assessment.

> (g) A review of any special needs or circumstances of the individual that may potentially affect the individual's ability to receive substance abuse treatment and follow the court's orders." MCL 600.1099dd(2).

## E. Confidentiality

"The information received for an assessment under [MCL 600.1099dd(2)] is confidential and must not be used for any purpose other than treatment and case planning." MCL 600.1099dd(3).

Additionally, "[e]xcept as otherwise permitted in this act, any statement or other information obtained as a result of participating in a preadmission screening, evaluation, or assessment under [MCL 600.1099dd(2)] is confidential and is exempt from disclosure under the freedom of information act, [MCL 15.231 to MCL 15.246], and must not be used in a criminal prosecution, unless it reveals criminal acts other than, or inconsistent with, personal drug use." MCL 600.1099dd(4).

## F. Conditions of Admission

### 1. All Potential Participants

"Before an individual is admitted into a family treatment court, the court shall find on the record, or place a statement in the court file all of the following:

> (a) That the individual has a substance use disorder and is an appropriate candidate for participation in the family treatment court as determined by the preadmission screening, evaluation, or assessment.
>
> (b) That the individual understands the consequences of entering the family treatment court and agrees to comply with all court orders and requirements of the family treatment court and treatment providers.
>
> (c) That either the individual is not a violent offender or, subject to subdivisions (d) and (e), the family treatment court judge, the lawyer-guardian ad litem, and the prosecuting attorney, in consultation with any known victim in the instant case, consent to the violent offender being admitted to the family treatment court.

> (d) The individual is not currently charged with first degree murder or criminal sexual conduct in the first, second, or third degree.
>
> (e) The individual has never been convicted of first degree murder, criminal sexual conduct in the first degree, or child sexually abusive activity.
>
> (f) That an individual has completed a preadmission screening, evaluation, or assessment under [MCL 600.1099dd] and has agreed to cooperate with any future evaluation or assessment as directed by the family treatment court.
>
> (g) The terms and conditions of the agreement between the parties." MCL 600.1099ee.

### 2. Potential Participants Who Have Been Adjudicated

"If the individual being considered for admission to a family treatment court is adjudicated in a civil child neglect and abuse case, the individual's admission is subject to all of the following conditions:

> (a) The allegations contained in the petition must be related to the abuse, illegal use, or possession of a controlled substance or alcohol.
>
> (b) The individual must make an admission of responsibility to the allegations on the record.
>
> (c) The individual must sign a written agreement to participate in the family treatment court." MCL 600.1099ff.

"For an individual who is admitted to a family treatment court based on having an adjudicated child neglect or abuse case, the court shall accept the admission of responsibility to the allegations described in [MCL 600.1099ff]." MCL 600.1099gg(1)(a).

### 3. Jurisdiction Over Family Treatment Court Participants

"The court may place the [admitted] individual under court jurisdiction in the family treatment court program with terms and conditions as considered necessary by the court." MCL 600.1099gg(1)(b).

## G. Components of Family Treatment Court

Family treatment courts must provide participants with all of the following:

- **Monitoring**—"[c]onsistent, continual, and close monitoring of the participant and interaction among the court, treatment providers, department, and participant." MCL 600.1099hh(1)(a).
- **Drug testing**—"[m]andatory periodic and random testing for the presence of any controlled substance, alcohol, or other abused substance in a participant's blood, urine, saliva, or breath, using to the extent practicable the best available, accepted, and scientifically valid methods." MCL 600.1099hh(1)(b).
- **Progress evaluations**—"[p]eriodic evaluation assessments of the participant's circumstances and progress in the program." MCL 600.1099hh(1)(c).
- **Sanctions and rewards**—"[a] regimen or strategy of appropriate and graduated but immediate rewards for compliance and sanctions for noncompliance, including, but not limited to, the possibility of incarceration or confinement." MCL 600.1099hh(1)(d).
- **Treatment services**—"[s]ubstance abuse treatment services, including, but not limited to, family-centered treatment, relapse prevention services, mental health treatment services, education, and vocational opportunities as appropriate and practicable." MCL 600.1099hh(1)(e).

"Any statement or other information obtained as a result of participating in an assessment, evaluation, treatment, or testing while in a family treatment court is confidential and is exempt from disclosure under the freedom of information act, [MCL 15.231 to MCL 15.246], and must not be used in a criminal prosecution, unless it reveals criminal acts other than, or inconsistent with, personal drug use." MCL 600.1099hh(2).

## H. Post-Admission Procedures

"The family treatment court shall cooperate with, and act in a collaborative manner with, the prosecutor, representative of the bar specializing in family or juvenile law, treatment providers, lawyer-guardian ad litem, local substance abuse coordinating agency, department, and, to the extent possible, court appointed special

advocate, local law enforcement, child and adolescent services providers, domestic violence services providers, Indian child's tribe, and community corrections agencies." MCL 600.1099gg(2).

"The family treatment court may require an individual admitted into the court to pay a reasonable family treatment court fee that is reasonably related to the cost to the court of administering the family treatment court program as provided in the memorandum of understanding under [MCL 600.1099bb]." MCL 600.1099gg(3).

"The family treatment court may request that the [DHHS] provide the court with information about an admitted individual's child protective services history and updates on the individual's compliance with child protective services for the purpose of determining an individual's progress in and compliance with the family treatment court." MCL 600.1099gg(4). The DHHS must provide the family treatment court with the information it requests under MCL 600.1099gg and with the information required under MCL 722.627(1)(g)." MCL 600.1099gg(4).

To continue participation in a family treatment court and to successfully complete a family treatment court program, an individual must pay any applicable family treatment court fee[73] and "[c]omply with all court orders and case service plans[.]" MCL 600.1099ii(1)(a)-(b). The family treatment court may sanction violations of any court orders or case service plans "according to national and state recognized family treatment court best practices and standards." *Id*.

Further, "[t]he family treatment court must be notified of any new neglect and abuse allegations against the participant or if the participant is accused of a crime." MCL 600.1099ii(2). "The judge shall consider whether to terminate the participant's participation in the family treatment court in conformity with the memorandum of understanding under [MCL 600.1099bb]." MCL 600.1099ii(2).

## I. Successful Completion or Termination

"On completion of or termination from a family treatment court program, the court shall find on the record or place a written statement in the court file as to whether the participant completed the program successfully or whether the individual's participation in the program was terminated and, if it was terminated, the reason for the termination." MCL 600.1099jj(1). "All court proceedings

[73]The court may waive all or part of the fee if it determines that the fee would be a substantial hardship or would interfere with the participant's substance abuse treatment. MCL 600.1099ii(3).

under [MCL 600.1099jj] must be open to the public." MCL 600.1099jj(4).

If a participant successfully completes family treatment court, the court must send notice to the DHHS of the completion and final disposition. MCL 600.1099jj(2). If a participant is terminated from the family treatment court program, the court must send notice to the DHHS of the termination. MCL 600.1099jj(3). The DHHS must record a participant's successful completion or termination. MCL 600.1099jj(2)-(3).

"As directed by [SCAO], after an individual is discharged either on completion of or termination from the program, the family treatment court should conduct, as much as practicable, follow-up contacts with and reviews of participants for key outcome indicators, such as substance use, custody status of children, recidivism, and employment, as frequently and for a period of time determined by the state court administrative office based on the nature of the family treatment court and the nature of the participant. The follow-up contact and review of former participants is not an extension of the court's jurisdiction over the individual." MCL 600.1099kk(4).

### J. Collection and Provision of Information

"Each family treatment court shall collect and provide data on each individual applicant and participant in the program as required by [SCAO]." MCL 600.1099kk(1). See MCL 600.1099kk(2)-(3).

Information collected under MCL 600.1099kk concerning individual applicants to family treatment court and participants who successfully completed a family treatment court program is exempt from disclosure under the freedom of information act." MCL 600.1099kk(7).

## 7.8 Child Protection Mediation

"MCR 3.970 governs mediation in child protective proceedings." MCR 2.411(A)(1). See also MCR 3.970(A)(1), which provides that MCR 3.970 "applies to the mediation of child protective proceedings." "'Mediation' includes dispute resolution processes in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator or facilitator has no authoritative decision-making power." MCR 3.970(A)(2).

"Each trial court that submits child protective proceedings to mediation processes under this rule shall either incorporate the process into its current ADR plan, or if the court does not have an approved ADR plan, adopt an ADR plan by local administrative order under MCR 2.410(B)." MCR 3.970(B).

## A. Order for Mediation

"At any stage in the [child protective] proceedings, after consultation with the parties, the court may order that a case be submitted to mediation." MCR 3.970(C)(1). "Unless a court first conducts a hearing to determine whether mediation is appropriate, the court shall not refer a case to mediation if the parties are subject to a personal protection order or other protective order. The court may order mediation without a hearing if a protected party requests mediation." MCR 3.970(C)(2).

"In addition to other provisions the court considers appropriate, the order shall:

> (a) specify, or make provision for selection of, the mediation provider;[74]
>
> (b) provide time limits for initiation and completion of the mediation process." MCR 3.970(C)(3).

"The order referring the case for mediation shall specify the time within which the mediation is to be completed. A copy of the order shall be sent to each party, the CDRP center or the mediator selected." MCR 3.970(G)(1).

"The court shall not order a party to pay a fee for mediation services." MCR 3.970(C)(3).

"The order may require attendance at mediation proceedings as provided in [MCR 3.970(E)[75]]." MCR 3.970(C)(4).

## B. Objections to Mediation

"A party may orally object to an order to mediate or in writing. Cases may be exempt from mediation on the basis of the following:

> (1) Domestic abuse, unless attorneys for both parties will be present at the mediation session;

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[74] See Section 7.8(D) for a discussion on selecting a mediator.

[75] Although MCR 3.970(C)(4) refers to subrule (D), attendance at mediation proceedings is discussed under subrule (E).

> (2) Inability of one or both parties to negotiate for themselves at the mediation, unless attorneys for both parties will be present at the mediation session;
>
> (3) Reason to believe that one or both parties' health or safety would be endangered by mediation;
>
> (4) A showing that the parties have made significant efforts to resolve the issues such that mediation is likely to be unsuccessful; or
>
> (5) For other good cause shown." MCR 3.970(D).

## C. Attendance at Mediation Proceedings

"The court may direct that the attorneys representing the parties attend mediation proceedings. If the attorney representing a party is unable to attend, another attorney associated with the representing attorney may attend, but must be familiar with the case." MCR 3.970(E)(1).

"The court may direct that the parties to the action and other persons:

> (a) be present at the mediation proceeding or be immediately available by some other means at the time of the proceeding; and
>
> (b) have information and authority adequate for responsible and effective participation in the proceeding for all purposes.
>
> The court's order may specify whether the availability is to be in person or by other means." MCR 3.970(E)(2).

"Except for legal counsel, the parties may not bring other persons to the mediation session unless permission is first obtained from the mediator, after notice to opposing counsel." MCR 3.970(E)(3).

"The failure of a party to appear in accordance with this rule may be considered a contempt of court." MCR 3.970(E)(4).

"Following their attendance at a mediation session, a party may withdraw from mediation without penalty at any time." MCR 3.970(G)(4).

## D. Selection of Mediator

"The parties may stipulate to the selection of a mediator. A mediator selected by agreement of the parties need not meet the qualifications

set forth in [MCR 3.970(H) (setting out certain minimum qualifications a person must meet to be eligible for service as a mediator in child protection cases)]." MCR 3.970(F)(1).

"The court must appoint a mediator stipulated to by the parties, provided the mediator is willing to serve within a period that would not interfere with the court's scheduling of the case. If the parties do not stipulate to a particular mediator, the court may select a Community Dispute Resolution Program (CDRP) center or other mediator who meets the requirements of [MCR 3.970(H)]." MCR 3.970(F)(1).

"The rule for disqualification of a mediator is the same as that provided in MCR 2.003 for the disqualification of a judge. The mediator must promptly disclose any potential basis for disqualification." MCR 3.970(F)(2).

## E. Scheduling Mediation

"The order referring the case for mediation shall specify the time within which the mediation is to be completed. A copy of the order shall be sent to each party, the CDRP center or the mediator selected. Upon receipt of the court's order, the CDRP center or mediator shall promptly confer with the parties to schedule mediation in accordance with the order. The mediator may direct the parties to submit in advance, or bring to the mediation, documents or summaries providing information about the case." MCR 3.970(G)(1).

## F. Screen for Coercion or Violence

"The mediator must make reasonable inquiry as to whether either party has a history of a coercive or violent relationship with the other party. Throughout the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues. A reasonable inquiry includes the use of the domestic violence screening protocol for mediators provided by the State Court Administrative Office as directed by the Supreme Court."[76] MCR 3.970(G)(2).

[76] See the Domestic Violence Screening Protocol for Mediators of Domestic Relations Conflicts.

### G. Mediation Process

"The mediator shall discuss with the parties and counsel, if any, the facts and issues involved. Mediation participants may ask to meet separately with the mediator throughout the mediation process. The mediation will continue until: an agreement is reached, the mediator determines that an agreement is not likely to be reached, the end of the first mediation session, or until a time agreed to by the parties. Additional sessions may be held as long as it appears to the mediator that the process may result in an agreement." MCR 3.970(G)(3).

"Following their attendance at a mediation session, a party may withdraw from mediation without penalty at any time." MCR 3.970(G)(4).

"Within two days after the completion of the mediation process, the CDRP center or the mediator shall so advise the court, stating only: the date of completion of the process, who appeared at the mediation, whether an agreement was reached, and whether further mediation proceedings are contemplated. If an agreement was reached, the CDRP center or the mediator shall submit the agreement to the court within 14 days of the completion of mediation." MCR 3.970(G)(5).

"Agreements reached in mediation are not binding unless the terms are incorporated in an order of the court or placed on the record and the court complies with MCR 3.971." MCR 3.970(G)(6).

### H. Confidentiality

"Confidentiality in the mediation process is governed by MCR 2.412. However, previously uninvestigated allegations of abuse or neglect identified during the mediation process are not confidential and may be disclosed. The mediator shall advise the parties, orally and in writing, of the rules regarding confidentiality under MCR 2.412 and MCL 722.631." MCR 3.970(G)(7).

## 7.9 Respondent's Right to Counsel

An indigent respondent in a child protective proceeding has the right to appointed counsel at any hearing (including the preliminary hearing). MCL 712A.17c(5); MCR 3.915(B)(1)(b). However, a person does not enjoy the right to court-appointed counsel until he or she is named as a respondent. *In re Williams*, 286 Mich App 253, 276-277 (2009). In *In re Williams*, supra at 276, a child's father did not qualify as a respondent, and thus was not entitled to court-appointed counsel, when child

protective proceedings were initiated against the child's mother and the petition did not accuse him of any wrongdoing or allege that he was incapable of parenting his child. However, the father's status changed, raising his right to court-appointed counsel, when the DHHS filed a supplemental petition four months later that directly named the father as a respondent. *Id*. at 276-277.

A *respondent* is "the parent, guardian, legal custodian, or nonparent adult who is alleged to have committed an offense against a child[,]" (except as provided in MCR 3.977(B)). MCR 3.903(C)(12). MCR 3.977(B) limits the definition of respondent for termination of parental rights hearings to only include the child's natural or adoptive mother and the child's father as defined by MCR 3.903(A)(7).[77] It does not include "other persons to whom legal custody has been given by court order, persons who are acting in the place of the mother or father, or other persons responsible for the control, care, and welfare of the child." MCR 3.977(B).

MCR 3.903 defines *parent*, *guardian*, *legal custodian*, and *nonparent adult* as follows:

- "'Parent' means the mother, the father as defined in MCR 3.903(A)(7),[78] or both, of the minor. It also includes the term 'parent' as defined in MCR 3.002(20)."[79] MCR 3.903(A)(18).

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

- "'Juvenile Guardian' means a person appointed guardian of a child by a Michigan court pursuant to MCL 712A.19a or MCL 712A.19c. A juvenile guardianship is distinct from a guardianship authorized under the Estates and Protected Individuals Code." MCR 3.903(A)(13).

- "'Legal Custodian' means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid

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[77] See Chapter 6 for the definition of *father* under MCR 3.903(A)(7).

[78] See Chapter 6 for the definition of *father* under MCR 3.903(A)(7).

[79] MCR 3.002(20) defines an Indian child's *parent* as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the putative father if paternity has not been acknowledged or established." MCR 3.002(20) was formerly MCR 3.002(10).

power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. It also includes the term 'Indian custodian' as defined in MCR 3.002(15)."[80] MCR 3.903(A)(14).

- "'Nonparent adult' means a person who is 18 years of age or older and who, regardless of the person's domicile, meets all the following criteria in relation to a child over whom the court takes jurisdiction under this chapter:

  (a) has substantial and regular contact with the child,

  (b) has a close personal relationship with the child's parent or with a person responsible for the child's health or welfare, and

  (c) is not the child's parent or a person otherwise related to the child by blood or affinity to the third degree." MCR 3.903(C)(7).

The court has discretionary authority to appoint counsel to assist an indigent noncustodial parent in contesting termination of parental rights under the Adoption Code.[81] *In re Sanchez*, 422 Mich 758, 760-761 (1985). In *In re Sanchez*, *supra* at 770-771, the Michigan Supreme Court noted that when exercising its discretion,

> "the trial court will be guided by the principle of assuring the nonconsenting parent the ability to present a case properly, measured in the particular case by factors such as the relative strength of the adversaries and the presence or absence of legal, factual, procedural, or evidentiary complexity."

A parent is not entitled to court-appointed counsel for a voluntary release of parental rights. See *In re Blankenship*, 165 Mich App 706, 713 (1988) ("[i]t is well established that there is no right to appointed counsel in a voluntary adoption matter"); *In re Koroly*, 145 Mich App 79, 88 (1985) ("the right to counsel does not extend to releases for adoption, which are voluntary in nature"); *In re Jackson (Kenneth)*, 115 Mich App 40, 50-52 (1982) ("[t]here is no parallel statutory right to counsel provision under the Michigan Adoption Code, nor have the courts held that due process requires the right to counsel at such proceedings").

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

[81] For additional information on involuntary termination of parental rights pursuant to the Adoption Code, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 2.

## A. Appointment of Counsel at Trial Court Level[82]

Once a person is named as a respondent during a child protective proceeding, the court must inform the respondent of his or her right to court-appointed counsel. *In re Williams*, 286 Mich App at 276. Specifically, the Court of Appeals found:

> "Both MCL 712A.17c(4) and MCR 3.915(B)(1)(b) specifically extend the right of appointed counsel only to indigent 'respondent[s]' in child protective proceedings. The initial petition contained no allegations of wrongdoing against respondent father, and expressed no concerns about his ability to parent [his child]. Consequently, at the preliminary hearing, the adjudication, and the dispositional hearing, respondent father did not qualify as a 'respondent.' Although the foster care workers voiced some concerns involving respondent father's medical condition, at no point until petitioner filed the supplemental petition did it directly identify an act or omission that converted respondent father's status from that of a nonoffending parent into that of a respondent. Under the applicable statute and court rule, respondent father thus enjoyed no right to appointed counsel during the first four months of the proceedings. However, when the circuit court authorized the supplemental petition . . . , it was required to advise respondent father of his right to appointed counsel." *In re Williams*, 286 Mich App at 276.

At a respondent's first court appearance, the court must advise the respondent that he or she has:

> (1) the right to an attorney at each stage of the proceeding (including the preliminary hearing);
>
> (2) the right to a court-appointed attorney if he or she financially unable to retain one; and
>
> (3) the right to request and receive a court-appointed attorney at a later proceeding if he or she is not represented by an attorney. MCL 712A.17c(4); MCR 3.915(B)(1)(a).
>
> > **Note:** An attorney's appearance in a child protective proceeding is governed by MCR 2.117(B). MCR 3.915(C).

[82] See Chapter 20 for information about the appointment of appellate counsel.

A respondent must make some type of affirmative action in order for the court to appoint an attorney. *In re Hall (Sharnetta)*, 188 Mich App 217, 222 (1991).[83] After a respondent requests court-appointed counsel, the court must appoint an attorney if "it appears to the court, following an examination of the record, through written financial statements, or otherwise, that the respondent is financially unable to retain an attorney."[84] MCR 3.915(B)(1)(b)(ii). See also MCL 712A.17c(5).

> **Note:** When determining indigency, the trial court erred when it imputed all household income to the respondent, including income earned by those not legally obligated to contribute to the respondent's attorney fees. *In re Williams*, 286 Mich App at 277. Specifically, the Court of Appeals found:
>
> > "[The Court] reject[s] the idea that a [trial] court may deny a respondent appointed counsel by imputing to the respondent income earned by people who bear no legal responsibility to contribute to the respondent's legal expenses. Mere cohabitants, even if parents of an adult respondent, possess no obligation to pay the respondent's attorney fees, and a [trial] court may not prohibit a respondent from exercising the right to appointed counsel on the basis of a calculation that imputes income from sources unavailable to the respondent . . . . Furthermore, [the DHHS] contended at the termination hearing that respondent father's lack of 'independent housing' and his insufficient income supplied grounds for terminating his rights. We find it fundamentally unfair to deny appointed counsel because a respondent does not qualify as indigent, while at the same time invoking the respondent's indigence as a ground for terminating parental rights." *In re Williams*, 286 Mich App at 277.

If an attorney is appointed to represent a party in a child protective proceeding, the court may enter an order assessing costs of the representation to the party or against a person responsible for

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[83] The *Hall* case referred to former MCR 5.915(B), which required a court to appoint counsel "if the respondent desire[d] an attorney . . . ." Current MCR 3.915(B)(1)(i) requires a court to appoint counsel if "the respondent requests appointment of an attorney . . . ." The appointment of counsel was premature when no hearings had occurred in the child protective proceedings, "[r]espondent-mother was never on record requesting an attorney, and the trial court had not determined her ability to pay." *In re Alexander*, ___ Mich App ___, ___ (2026).

[84] See SCAO form *Request and Order For Court-Appointed Attorney*.

support of that party[85] "after a determination of ability to pay, which order may be enforced as provided by law."[86] MCR 3.915(E).

A respondent may waive his or her right to an attorney.[87] MCL 712A.17c(6); MCR 3.915(B)(1)(c). See *In re Hall*, 188 Mich App at 222, where the respondent waived her right to representation after effectively terminating her attorney-client relationship by failing to contact her court-appointed attorney for sixteen months, failing to appear at any review hearings, and residing at an unknown address where her attorney was unable to locate her. But see *In re Collier*, 314 Mich App 558, 576 (2016) (finding that the respondent did not "effectively terminate[] the attorney-client relationship or otherwise waive[] his right to be represented by counsel[] . . . [where the] respondent's lack of communication with counsel spanned only one month, and it came on the heels of [the] respondent's specific request for counsel").

Similarly, the respondent's absence from her termination hearing was not evidence of an intent to waive her right to counsel when the record showed that she "intended to contest the termination of her parental rights with the assistance of her trial counsel," that she "attended and participated in the overwhelming majority of the court hearings," and that she "was not properly served with the summons and supplemental petition indicating that the termination hearing would go forward." *In re Lovitt*, ___ Mich App ___, ___ (2024). When a trial court permits a respondent's attorney to withdraw, "the trial court must still ensure that a client's rights and interests are protected[.]" *Id*. at ___. "An attorney who represents a client cannot withdraw from a case in a manner which leaves his client without notice and without an adequate opportunity to seek other representation." *Id*. at ___ (quotation marks and citation omitted). In *Lovitt*, the trial court permitted respondent's attorney to withdraw from the termination hearing and allowed the DHHS "to present its case against respondent completely unchallenged." *Id*. at ___. "The trial court's actions in proceeding with the termination hearing without informing respondent that she no longer had the assistance of her appointed counsel plainly violated respondent's

[85] The trial court committed "a legal error [that] was outside the range of reasonable and principled outcomes" when it ordered petitioners, who were the child's legal guardians, to reimburse the court for the lawyer-guardian ad litem fees and respondent-mother's court-appointed attorney fees. *Alexander,* ___ Mich App at ___. "There is nothing in the law requiring or supporting assessing costs against the party petitioning the court. Rather, MCL 712A.17c(8), MCR 3.915(E), and MCR 3.916(D) require the trial court to determine a party's ability to pay for an attorney, appoint an attorney, and then assess costs against that same party or someone responsible for supporting the party. Petitioners [were] not responsible for respondent-mother." *Alexander*, ___ Mich App at ___.

[86] SCAO guidelines for court-ordered reimbursement can be found at https://www.courts.michigan.gov/siteassets/court-administration/standardsguidelines/childprotectionjuvdel/cor.pdf.

[87] See SCAO form JC 06, *Waiver of Attorney or Request For Appointment of Attorney*.

right to due process and seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id*. at ___.

> **Note:** The court must not accept a minor respondent's waiver of counsel over the objection of his or her parent, guardian, legal custodian, or guardian ad litem. MCL 712A.17c(6); MCR 3.915(B)(1)(c).

A court must permit a respondent who has initially waived counsel to withdraw from self-representation "if the [respondent] shows a legitimate reason for the change and if substitution would 'not result in unwarranted disruption prejudicial to the orderly progress of the case'." *In re Cobb*, 130 Mich App 598, 600-601 (1983), quoting *People v Eddington*, 77 Mich App 177, 188 (1977).

A court-appointed attorney must represent the respondent until discharged by the court. MCL 712A.17c(9); MCR 3.915(D)(2). A retained attorney may only withdraw from representation by court order. MCR 3.915(D)(1).

## B. Appointment of Counsel in Proceedings Involving an Indian Child

The court must appoint counsel in any removal, placement, or termination proceeding where it determines the parent[88] or Indian custodian is indigent.[89] 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.[90]

"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."[91] MCL 712B.21(2). Michigan statutory law requires the court to appoint a lawyer-

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[88] A "'parent' means any biological parent or parents of an Indian child or any person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. *Parent does not include the putative father if paternity has not been acknowledged or established*." MCL 712B.3(s) (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. See Chapter 6 on establishing paternity.

[89] An "'Indian custodian' means any Indian person who has custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control have been transferred by the Indian child's parent." MCL 712B.3(n). See also 25 USC 1903(6) and MCR 3.002(15), which contain substantially similar definitions of *Indian custodian*; 25 CR 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."

[90] For additional information on the ICWA and the MIFPA requirements as they pertain to an Indian child, see Chapter 19.

guardian ad litem to represent a child during child protective proceedings. MCL 712A.17c(7). See Section 7.10.

25 USC 1912(b) mandates that "[w]here State law makes no provision for appointment of counsel in [involuntary Indian child custody] proceedings, the court shall promptly notify the Secretary [of the Interior][92] upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to [25 USC 1913]." See also MCL 712B.21(1), which contains substantially similar language.

When the court notifies the Secretary of the Interior of the appointment of counsel, the court must also notify the Bureau of Indian Affairs (BIA) Regional Director in the Midwest Region Office. 25 CFR 23.11(b)(2);[93] 25 CFR 23.13(a).[94]

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).[95]

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[91] MCL 712B.3(q) defines *lawyer-guardian ad litem* as "an attorney appointed under [MCL 712B.21]. A lawyer-guardian ad litem represents the child, and has the powers and duties, as set forth in [MCL 712A.17d]. The provisions of [MCL 712A.17d] also apply to a lawyer-guardian ad litem appointed for the purposes of [the MIFPA] under each of the following: (*i*) [MCL 700.5213] or [MCL 700.5219][;] (*ii*) [MCL 722.24][;] and (*iii*) [MCL 722.630]." See also MCR 3.002(18), which contains substantially similar language.

[92] See 25 USC 1903(11), which defines *secretary* as the "[S]ecretary of the [I]nterior."

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## C. Effective Assistance of Counsel

"It is axiomatic that the right to counsel includes the right to competent counsel." *In re Trowbridge*, 155 Mich App 785, 786 (1986). In other words, "[t]he right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to effective assistance of counsel." *In re EP*, 234 Mich App 582, 597 (1999), overruled on other grounds by *In re Trejo*, 462 Mich 341 (2000).[96]

"[O]nce the right to counsel exists, there is a correlative right to effective representation that is free from actual conflicts of interest." *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 606 (1999) (order terminating parental rights should not be reversed on the basis of a conflict of interest arising from the fact that the prosecutor that represented the Department of Health and Human Services (DHHS) at the termination hearing had represented the respondent parent at an earlier hearing in the same matter absent a showing of actual prejudice).

For a respondent to prevail on a claim of ineffective assistance of counsel, the respondent must show that "her trial counsel's performance was deficient, i.e., she must 'show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced' her that it denied her a fair trial. This necessarily entails proving prejudice to [the respondent], which means that there is 'a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.'" *In re CR*, 250 Mich App 185, 198 (2002), overruled on other grounds by *In re Sanders*, 495 Mich 394 (2014),[97] quoting *People v Johnson*, 451 Mich 115, 124 (1996).

The effective assistance of counsel requires that counsel base his or her assistance on "'professional decisions and informed legal choices,'" which requires counsel to conduct a reasonable investigation into the matter. *In re Ross*, 506 Mich 993 (2020) (determining that trial counsel should have pursued leads available in phone records that would have bolstered respondent's credibility and revealed inconsistencies in complainant's testimony), quoting *Strickland v Washington*, 466 US 668, 680 (1984). In *Ross*, 506 Mich at 993, trial counsel's failure to investigate a matter that would have strengthened the respondent's credibility and shown that the complainant's narrative was inconsistent was "a fundamental

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

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

abdication of [trial counsel's] duty to conduct a complete investigation." Had counsel investigated the matter further and presented at trial the evidence discovered during the investigation, a different result was probable. *Id*.

A respondent who has been appointed an attorney is "entitled to reasonably assume that she would be represented at any further proceedings despite her absence." *In re Lovitt*, ___ Mich App ___, ___ (2024). An appointed attorney who seeks to withdraw from representing a respondent "without first engaging in the minimal effort to locate his client to notify them [has engaged in] conduct that falls below an objective standard of reasonableness." *Id*. at ___.

Trial counsel may be ineffective for failing to engage an expert witness in support of counsel's trial strategy or to challenge opposing counsel's expert witness. *In re Casto*, ___ Mich App ___, ___ (2022). In *Casto*, "trial counsel testified at the *Ginther*[98] hearing that her strategy was to attempt to show that [the minor's] disclosures were not credible and were instead the product of coaching by mother." *Id*. at ___. However, in spite of trial counsel's strategy, she "did not investigate—or even consider investigating—an expert who could have provided valuable information on child memory, suggestibility, source misattribution, and forensic-interview protocols, all of which would have been materially useful to supporting the defense's theory and assisting a fact-finder's assessment of [the minor's] disclosures." *Id*. at ___. In addition, trial counsel not only failed to object to the admission of the report submitted by one of petitioner's expert witnesses, "trial counsel stipulated to the admission of the report in its entirety and offered no specific objection with respect to [the expert's] opining on the credibility of [the minor]." *Id*. at ___. The Court of Appeals agreed with the Supreme Court's conclusion in a similar context and stated, "'While we cannot say that a battle of the experts would have ensured' a different outcome, 'counsel's failure to prepare or show up for the battle sufficiently undermines our confidence in the outcome of this case to entitle the [respondent] to relief.'" *Id*. at ___, quoting *People v Ackley*, 497 Mich 381, 397 (2015) (alteration in original).

A respondent cannot assert a claim of ineffective assistance of counsel on behalf of another person. *In re EP*, 234 Mich App at 598 (holding that the respondent could not assert a claim of ineffective assistance of counsel on behalf of her child because constitutional protections are personal and cannot be asserted vicariously).

[98] *People v Ginther*, 390 Mich 436 (1973).

## 7.10 Lawyer-Guardian Ad Litem (L-GAL)

During child protective proceedings, the court must appoint a lawyer-guardian ad litem[99] to represent the child at every hearing (including preliminary hearings), and the child may not waive the lawyer-guardian ad litem's assistance.[100] MCL 712A.17c(7); MCL 722.630; MCR 3.915(B)(2)(a).[101]

A lawyer-guardian ad litem is appointed to represent the interests of a child. MCL 712A.13a(1)(g); MCL 712A.17d(1); MCL 722.630. The lawyer-guardian ad litem's powers and duties include:

(1) Respecting the attorney-client privilege.

(2) Serving as independent representation for the child's best interests.

(3) Entitlement to fully and actively participate in the litigation.

(4) Access to all relevant information regarding the child.

(5) Conducting his or her own independent investigation, including interviewing the child, social workers, family members, and anyone else who may be necessary.

(6) Reviewing relevant reports and any other relevant information.

(7) Mandatory review of the agency case file[102] before disposition and before the parental termination hearing.

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[99] The Child Protection Law, MCL 722.621 *et seq.*, defines a *lawyer-guardian ad litem* as "an attorney appointed under [MCL 722.630] who has the powers and duties referenced by [MCL 722.630]." MCL 722.622(x). The Juvenile Code, MCL 712A.1 *et seq.*, defines a *lawyer-guardian ad litem* as "an attorney appointed under [MCL 712A.17c]." MCL 712A.13a(1)(g).

[100] See SCAO form JC 03, *Order Appointing Attorney/Guardian Ad Litem/Lawyer-Guardian Ad Litem*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc03.pdf.

[101] Where state law does not require the appointment of a lawyer-guardian ad litem, the ICWA and the MIFPA provide the court with the authority to appoint a lawyer-guardian ad litem for an Indian child on a finding that the appointment is in the child's best interests. 25 USC 1912(b) and MCL 712B.21(2). For a detailed discussion of the ICWA and the MIFPA, see Chapter 19. For purposes of the MIFPA, MCL 712B.3(q) defines *lawyer-guardian ad litem* as "an attorney appointed under [MCL 712B.21]. A lawyer-guardian ad litem represents the child, and has the powers and duties, as set forth in [MCL 712A.17d]. The provisions of [MCL 712A.17d] also apply to a lawyer-guardian ad litem appointed for the purposes of [the MIFPA] under each of the following: (*i*) [MCL 700.5213] or [MCL 700.5219][;] (*ii*) [MCL 722.24][;] and (*iii*) [MCL 722.630]." See also MCR 3.002(18), which contains a substantially similar definition of *lawyer-guardian ad litem*.

[102] An *agency case file* means "the current file from the agency providing direct services to the child, that may include the child protective services file if the child has not been removed from the home or the [DHHS] or contract agency foster care file as provided under . . . MCL 722.111 to [MCL] 722.128." MCL 712A.13a(1)(b).

(8) Mandatory review of all updated material as it is provided to the court and parties.[103]

(9) Meeting with or observing the child[104] 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.

(10) Explaining to the child, considering the child's level of understanding, the role of a child's lawyer-guardian ad litem.

(11) Filing all necessary pleadings and papers.

(12) Independently calling witnesses on the child's behalf.

(13) Attending all hearings or substituting representation on the child's behalf with court approval.

(14) 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.

(15) Informing the court of the child's wishes and preferences in a manner consistent with the attorney-client privilege.

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[103] The supervising agency is required to provide the documentation described in MCL 712A.17d(1)(c).

[104] 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).

(16) 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.

(17) 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.

(18) Requesting the court's authorization to pursue any additional issues on the child's behalf that do not arise specifically from the court appointment.

(19) Participating in early childhood, child, and adolescent development.

(20) Participating in trauma-informed training if the State Court Administrative Office offers it. MCL 712A.17d(1).[105]

> **Note:** An attorney's appearance in a child protective proceeding is governed by MCR 2.117(B). MCR 3.915(C). See SCAO *Appearance of Attorney/Guardian Ad Litem/Lawyer-Guardian Ad Litem*.

The court must inquire at each hearing whether the lawyer-guardian ad litem has met or had contact with the child. MCR 3.915(B)(2)(a). If the lawyer-guardian has not met or had contact with the child, the lawyer-guardian ad litem must state on the record the reasons for failing to do so. *Id.*

Where a conflict exists between a lawyer-guardian ad litem's determination of a child's best interests and what the child identifies as his or her interests, the lawyer-guardian ad litem court must communicate the child's position to the court. MCL 712A.17d(2). The court may appoint an attorney to represent the child if it deems the attorney appointment appropriate given the child's age and maturity, and nature of the discrepancy between the child's stated interests and the guardian ad litem's determination of the child's best interests. *Id.*; MCR

[105] The provisions of MCL 712A.17d apply to a lawyer-guardian ad litem appointed under MCL 700.5213, MCL 700.5219, MCL 712A.17c, MCL 722.24, and MCL 722.630. MCL 712A.13a(1)(g).

3.915(B)(2)(b). See Section 7.11 for additional information on a child's attorney appointment.

> **Note:** An attorney appointed to represent the child's identified interests serves in addition to the child's appointed lawyer-guardian ad litem. MCL 712A.17d(2).

A court-appointed lawyer-guardian ad litem must serve until he or she is discharged by the court. MCL 712A.17c(9); MCR 3.915(D)(2). The court may permit another attorney to temporarily substitute for the child's lawyer-guardian ad litem if it prevents adjournment of a hearing or for other good cause. MCR 3.915(D)(2). However, a substitute attorney must be familiar with the case and, for hearings other than a preliminary hearing or emergency removal hearing, must review the agency case file[106] and consult with the foster parents and caseworker before the hearing (unless the child's lawyer-guardian ad litem has already done so and communicated the information to the substitute attorney). *Id.* The court must inquire on the record whether the attorneys have followed these requirements. *Id.*

When a child has been committed to the Michigan Children's Institute (MCI), the child's attorney and/or lawyer-guardian ad litem and the MCI superintendent must consult with one another if the child's attorney and /or lawyer-guardian ad litem has an objection or concern regarding the child's placement or permanency plan. MCL 400.204(2).

> **Note:** If a lawyer-guardian ad litem was appointed in a child protective proceeding, the court may not discharge the lawyer-guardian ad litem while the child is "subject to the jurisdiction, control, or supervision of the court, or of the [MCI] or other agency, unless the court discharges the lawyer-guardian ad litem for good cause shown on the record." MCL 712A.17c(9). Once the court discharges a lawyer-guardian ad litem for good cause, the court must immediately appoint another lawyer-guardian ad litem to represent the child if the child remains under the court's or MCI's or another agency's jurisdiction, control, or supervision. *Id*.

[106] An *agency case file* means "the current file from the agency providing direct services to the child, that may include the child protective services file if the child has not been removed from the home or the [DHHS] or contract agency foster care file as provided under . . . MCL 722.111 to [MCL] 722.128." MCL 712A.13a(1)(b).

## A. Appointment of Lawyer-Guardian Ad Litem Under the Safe Delivery of Newborns Law

The court may appoint a lawyer-guardian ad litem to represent a newborn under the Safe Delivery of Newborns Law, MCL 712.1 *et seq*. A *lawyer-guardian ad litem* appointed under the Safe Delivery of Newborns Law is "an attorney appointed under [MCL 712.2]. . . . [who] represents the newborn, and has the powers and duties, as set forth in [MCL 712A.17d]." MCL 712.1(2)(j). See Section 3.1(D) for information on the custody of a child under the Safe Delivery of Newborns Law, Section 4.2(D) for the court's jurisdiction over a newborn child surrendered to an emergency service provider, and Section 8.14 for information on the placement of a child under the Safe Delivery of Newborns Law.

> **Note:** According to MCL 712.1(2)(k), a *newborn* is "a child who a physician reasonably believes to be not more than 72 hours old."

## B. Effective Assistance of Counsel

A child is entitled to the effective assistance of counsel. To constitute effective assistance of counsel, a child's attorney's conduct must comply with "applicable statutes, court rules, rules of professional conduct, and any logically relevant case law." *In re AMB*, 248 Mich App 144, 226 (2001). A party may "rais[e] concerns with the trial court over an LGAL's conduct or compliance with statutory requirements; a party is simply prohibited from asserting on behalf of the child that the LGAL provided constitutionally-defective representation that resulted in prejudice to the child." *In re L S Knipp*, ___ Mich App ___, ___ (2024).

## C. Lawyer-Guardian Ad Litem as Witness

A lawyer-guardian ad litem cannot be called as a witness to testify in matters that relate to a case to which he or she is appointed. MCL 712A.17d(3). In addition, a lawyer-guardian ad litem's case files are not discoverable. *Id*.

## D. Governmental Immunity

"LGALs are entitled to immunity under MCL 691.1407(6)." *Farris v McKaig*, 324 Mich App 349, 352 (2018) (concluding that "the Legislature intended for LGALs to be immune from civil liability under MCL 691.1407(6)," "which grants a guardian ad litem (GAL) immunity from civil liability when acting within the scope of the GAL's authority," "when acting in their role as an LGAL.").

### E. Assessment of Costs

If a lawyer-guardian ad litem is appointed in a child protective proceeding, the court may enter an order assessing costs of the representation to "the party or the person responsible for the support of the party after a determination of the ability to pay, and may enforce the order of reimbursement as provided by law."[107] MCL 712A.17c(8); see also MCR 3.916(D).

The trial court committed "a legal error [that] was outside the range of reasonable and principled outcomes" when it ordered petitioners, who were the child's legal guardians, to reimburse the court for the lawyer-guardian ad litem fees and respondent-mother's court-appointed attorney fees. *In re Alexander*, ___ Mich App ___, ___ (2026). "There is nothing in the law requiring or supporting assessing costs against the party petitioning the court. Rather, MCL 712A.17c(8), MCR 3.915(E), and MCR 3.916(D) require the trial court to determine a party's ability to pay for an attorney, appoint an attorney, and then assess costs against that same party or someone responsible for supporting the party. Petitioners [were] not responsible for respondent-mother." *Alexander*, ___ Mich App at ___.

A court's order assessing costs may be enforced through contempt proceedings. MCL 712A.17c(8).

## 7.11 Appointment of Attorney for the Child

Where a conflict exists between a lawyer-guardian ad litem's determination of a child's best interests and what the child identifies as his or her interests, the lawyer-guardian ad litem must communicate the child's position to the court. MCL 712A.17d(2). The court may appoint an attorney to represent the child if it deems the attorney appointment appropriate given the child's age and maturity, and nature of the discrepancy between the child's stated interests and the guardian ad litem's determination of the child's best interests.[108] *Id.*; MCR 3.915(B)(2)(b). See Section 7.10 for additional information on a child's lawyer-guardian ad litem appointment.

> **Note:** An attorney's appearance in a child protective proceeding is governed by MCR 2.117(B). MCR 3.915(C). See SCAO form *Appearance of Attorney/Guardian Ad Litem/Lawyer-Guardian Ad Litem*.

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[107] See SCAO guidelines for court-ordered reimbursement.

[108] See SCAO form JC 03, *Order Appointing Attorney/Guardian Ad Litem/Lawyer-Guardian Ad Litem*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc03.pdf.

An attorney appointed to represent a child under MCL 712A.2(b) means:

> "an attorney serving as the child's legal advocate in a traditional attorney-client relationship with the child, as governed by the Michigan Rules of Professional Conduct. An attorney defined under this subdivision owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client. For the purpose of a notice required under these sections, attorney includes a child's lawyer-guardian ad litem." MCL 712A.13a(1)(c).

An attorney appointed to represent the child's expressed wishes is in addition to the child's appointed lawyer-guardian ad litem. MCL 712A.17d(2). The court-appointed attorney must serve until he or she is discharged by the court. MCL 712A.17c(9); MCR 3.915(D)(2).

If an attorney is appointed to represent a party in a child protective proceeding, and after a determination of the ability to pay, the court may enter an order assessing costs of the representation to "the party or the person responsible for that party's support, or against the money allocated from marriage license fees for family counseling services under . . . MCL 551.103."[109] MCL 712A.17c(8); see also MCR 3.915(E). A court's order assessing costs may be enforced through contempt proceedings. MCL 712A.17c(8). Appointment of Guardians Ad Litem (GAL)

If the court finds that the welfare of the child requires it, the court may appoint a guardian ad litem to assist the court in determining the child's best interests.[110] MCL 712A.17c(10); MCR 3.916(A). A guardian ad litem does not need to be an attorney. MCL 712A.13a(1)(f).

> **Note:** Similar to a volunteer Court-Appointed Special Advocate (CASA), a guardian ad litem may be appointed to investigate a child's circumstances and make recommendations to the court regarding the child's best interests. See Section 7.12 for additional information on CASAs.

Upon appointment, the guardian ad litem must file a written appearance with the court. MCR 3.916(B). The appearance must include "a statement regarding the existence of any interest that the guardian ad litem holds in relation to the [child], the [child's] family, or any other person in the proceeding before the court or in other matters." MCR 3.916(B). See

[109] See SCAO guidelines for court-ordered reimbursement.

[110] See SCAO form *Order Appointing Attorney/Guardian Ad Litem/Lawyer-Guardian Ad Litem*.

SCAO form JC 07, *Appearance of Attorney/Guardian Ad Litem/Lawyer-Guardian Ad Litem*.

After an appearance is filed, the guardian ad litem is entitled to "copies of all petitions, motions, and orders filed or entered," and to consult with the child's attorney and/or lawyer-guardian ad litem. MCR 3.916(C).

### A. Governmental Immunity

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

### B. Assessment of Costs

"In a child protective proceeding, the court may assess the cost of providing a guardian ad litem against the party or a person responsible for the support of the party after a determination of ability to pay, and may enforce the order of reimbursement as provided by law."[111] MCR 3.916(D). Where the child is a ward of the state and a guardian ad litem is required in order for the case to proceed, the DHHS "is the responsible party for payment of [the guardian ad litem's] fees and expenses." *Doe v Boyle*, 312 Mich App 333, 348 (2015) (noting that "[a]lthough[, in this case, the guardian ad litem] was appointed in a civil case, rather than a child-protective or delinquency proceeding, . . . [since the child] was a ward of the state and required a guardian ad litem in order for the case to proceed[,] . . . [i]n this case, the person responsible for [the child] was the state[]"). See also *In re Alexander*, ___ Mich App ___, ___ (2026) ("Generally speaking, for court-appointed counsels, 'expenses incurred in carrying out this chapter shall be paid upon the court's order by the county treasurer from the county's general fund.'") (quoting MCL 712A.25(1)).

## 7.12 Appointment of Court-Appointed Special Advocates (CASAs)

"Each court in this state may establish a court-appointed special advocate [CASA] program. The court-appointed special advocate program must be administered under [MCL 722.2001 *et seq*]. MCL 722.2003. See also MCR 3.917(A) ("The court may, upon entry of an appropriate order, appoint a volunteer special advocate to assess and make recommendations to the court concerning the best interests of the child in any matter pending in the family division.").

[111] See SCAO guidelines for court-ordered reimbursement.

"A [CASA] program must do all of the following:

> (a) Screen, train, and supervise [CASA] volunteers to advocate for the best interests of a child when appointed by a court as provided in [MCL 722.2007]. Each court may be served by a CASA program. One CASA program may serve more than 1 court.
>
> (b) Hold regular case conferences with volunteers to review case progress and conduct annual performance reviews for all volunteers.
>
> (c) Provide CASA program staff and volunteers with written program policies, practices, and procedures.
>
> (d) Provide the training required under [MCL 722.2005]." MCL 722.2003(2).

A CASA must meet the minimum qualifications set forth in MCL 722.2006(1):

> "(a) Be at least 21 years of age.
>
> (b) Complete an application.
>
> (c) Sign a release of information form or submit the required information necessary for the background check under [MCL 722.2006(2)].
>
> (d) Participate in required screening interviews.
>
> (e) Be willing to commit to the court for the duration of the CASA case until permanency has been established for the CASA child.
>
> (f) Participate in the training required under [MCL 722.2005]."

"All CASA volunteers must be screened, trained, and supervised in accordance with National CASA/GAL Association standards" and "must participate in observing court proceedings before appointment as allowed by the court." MCL 722.2005(1); see also MCR 3.917(B). "Each court-appointed special advocate program must provide a minimum of 12 hours of in-service training per year to its volunteers." MCL 722.2005(2).

"The [CASA] program director must conduct a background check on each prospective CASA volunteer before the prospective CASA volunteer is assigned an initial CASA case and every 2 years after the initial background check under this subsection." MCL 722.2006(2). "A

background check conducted under [MCL 722.2006(2)] includes all of the following:

> (a) A criminal history background check using the department of state police's internet criminal history access tool (ICHAT) or an equivalent check on that individual from the state or province of residence.
>
> (b) Criminal background check through the Federal Bureau of Investigation or other national crime database.
>
> (c) A national and state offender registry check.
>
> (d) A child abuse and neglect central registry check in this state and each state of residence for the previous 5 years, where permissible by law.
>
> (e) A Social Security number trace that shows aliases, additional names, and former addresses." MCL 722.2006(2).

A prospective CASA volunteer who refuses to sign a release of information form or submit the required information necessary to complete the background check will be ineligible to volunteer. MCL 722.2006(3).

"If a background check conducted under [MCL 722.2006(2)] shows that a CASA volunteer or prospective CASA volunteer has been convicted of or has charges pending for a misdemeanor or felony involving a sex offense, child abuse or neglect, or related crimes that pose or would pose a risk to a child or affect the credibility of the CASA program, any of the following apply:

> (a) The CASA volunteer will be dismissed.
>
> (b) The application of the prospective CASA volunteer will not be accepted, and the CASA volunteer will be considered ineligible to participate in the program." MCL 722.2006(4).

"A court may appoint a CASA volunteer in a proceeding brought under [MCL 712A.2 and MCL 712A.19b], when, in the court's opinion, a child who may be affected by the proceeding requires services that a CASA volunteer can provide and the court finds that appointing a CASA volunteer is in the best interests of the child." MCL 722.2007(1).

A CASA volunteer must be appointed by court order that specifies the CASA volunteer "as a friend of the court acting on the court's authority." MCL 722.2007(2). Once a CASA is appointed and upon a court's order, the special advocate may have access to "all information, confidential or otherwise, contained in the court file if the court so orders." MCR 3.917(E). See MCL 722.2010(1).

A memorandum of understanding is required between a court and a CASA program which sets forth the CASA's roles and responsibilities. MCL 722.2007(3). A CASA's required duties are to:

> (1) maintain regular contact with the child;[112]
>
> (2) investigate the background of the case;
>
> (3) gather information regarding the child's status;[113]
>
> (4) provide written reports[114] to the court and all parties before each hearing; and
>
> (5) appear at all hearings when required by the court. MCR 3.917(C).[115]

"The CASA volunteer must be notified in a timely manner of all hearings, meetings, and other proceedings concerning the case to which the CASA volunteer has been appointed." MCL 722.2010(2). "The CASA volunteer may be called as a witness in a proceeding by a party or the court." MCL 722.2009(5).

"A CASA volunteer must cooperate with all government agencies, service providers, professionals, school districts, school personnel, parents, families, and other involved individuals and entities." MCL 722.2010(1).

The CASA must serve until he or she is discharged by the court. MCR 3.917(D); see also MCL 722.2006(1)(e). "The CASA volunteer's appointment ends when 1 of the following occurs:

> (a) When the court's jurisdiction over the CASA child ends.

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[112]See MCL 722.2010(1), which requires a CASA volunteer to "engage in regular visits with the CASA child."

[113]The CASA volunteer must monitor the case "to ensure that the CASA child's essential needs are being met." MCL 722.2009(3).

[114]"The CASA volunteer acting as a friend of the court shall offer as evidence a written report with recommendations consistent with the best interests of the child, subject to all pertinent objections." MCL 722.2007(2). See also MCL 722.2009(2), which states: The CASA volunteer, with the support and supervision of CASA program staff, shall make recommendations consistent with the best interests of the CASA child regarding placement, visitation, and appropriate services for the CASA child and the CASA child's family. The CASA volunteer with CASA program staff must prepare a written report to be distributed to the court and the parties to the proceeding."

[115]See MCL 722.2009(1), which states a CASA must do both of the following: "(a) Conduct an independent investigation regarding the best interests of the CASA child that will provide factual information to the court regarding the CASA child and the CASA child's family. The investigation may include interviews with and observations of the CASA child and the CASA child's family, interviews with other appropriate individuals, and review of relevant records and reports," and "(b) Make recommendations to the court for services for the CASA child and the CASA child's family and report to the court on the participation in, benefits of, and outcomes of the services." See also MCL 722.2009(4).

(b) Upon discharge by the court on its own or another party's motion.

(c) With the approval of the court, at the request of the program director." MCL 722.2007(4).

A CASA may not do any of the following:

"(a) Accept compensation for the duties and responsibilities of the volunteer's appointment.

(b) Have an association that creates a conflict of interest with the volunteer's duties.

(c) Be related to a party or attorney involved in the case.

(d) Be employed in a position that may result in a conflict of interest or give rise to the appearance of a conflict.

(e) Use the CASA volunteer position to seek or accept gifts or special privileges." MCL 722.2008.

"A CASA volunteer is immune from civil liability as provided in the volunteer protection act of 1997, 42 USC 14501 to 14505." MCL 722.2012.

## 7.13 Court-Appointed Foreign Language Interpreter[116]

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).[117] A person financially able to pay for the interpretation costs may be ordered to reimburse the court for those costs. MCR 1.111(F)(5). See also MCR 1.111(A)(4).

- "'Case or Court Proceeding' means any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer." MCR 1.111(A)(1).

- "'Party' means a person named as a party or a person with legal decision-making authority in the case or court proceeding." MCR 1.111(A)(2).

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[116] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 1, for more information on foreign language interpreters.

[117] In addition, "[t]he court may appoint a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding." MCR 1.111(B)(2).

# Chapter 8: Placement of a Child


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## *In this chapter. . .*

This chapter discusses the court's requirements in determining whether to order a child out of his or her home or to return the child to his or her parent(s), guardian, or legal custodian pending a trial on the allegations in a petition. It also discusses the court's placement options, placement of the child, placement of newborns falling under the Safe Delivery of Newborns Law, and a review or change in a child's placement.

This chapter also includes discussions on the procedures for releasing information concerning the child to the child's care provider, and the requirements for a child's medical treatment. It also discusses initial service plans, parenting time or visitation, and ordering an examination or evaluation for a parent, guardian, legal custodian, or a child.

## 8.1 Requirements to Release or Place a Child Pending Trial

If the court authorizes the filing of a petition,[1] it must then determine "whether the child should remain in the home, be returned home, or be placed in foster care pending trial."[2] MCR 3.965(B)(12). See also MCL 712A.14(3).

If the court authorizes the filing of the petition, the court may

- release the child to a parent, guardian, or legal custodian (with or without conditions); or
- order placement of the child after finding on the record that it would be contrary to the child's welfare to remain at home and that reasonable efforts have been made to prevent the child's removal from the home.[3] MCR 3.965(B)(13).

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[1] See Section 7.6(B) for information on petition authorization.

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

**Note:** See MCR 3.965(B)(13)(b) and Section 19.13 for preferred placements of Indian children.

## A. Requirements to Release a Child to a Parent, Guardian, or Legal Custodian

If the court authorizes the filing of a petition, it may release a child to his or her parent(s), guardian, or legal custodian. MCL 712A.13a(3); MCR 3.965(B)(13)(a). The court may also order reasonable terms and conditions necessary for the child's physical health or mental well-being. MCL 712A.13a(3); MCR 3.965(B)(13)(a). However,

- if a petition alleges that a child's parent, guardian, custodian, nonparent adult,[4] or other person residing in a child's home has abused the child, the court must not leave the child in or return the child to the home unless it "finds that the conditions of custody . . . are adequate to safeguard the child from the risk of harm to the child's life, physical health, or mental well-being." MCL 712A.13a(5).

  **Note:** "As used in [MCL 712A.13a], 'abuse' means 1 or more of the following:

  (a) Harm or threatened harm by a person to a juvenile's health or welfare that occurs through nonaccidental physical or mental injury.

  (b) Engaging in sexual contact or sexual penetration as those terms are defined in . . . MCL 750.520a, with a juvenile.

  (c) Sexual exploitation of a juvenile, which includes, but is not limited to, allowing, permitting, or encouraging a juvenile to engage in prostitution or allowing, permitting, encouraging, or engaging in photographing, filming, or depicting a juvenile engaged in a listed sexual act as that term is defined in . . . MCL 750.145c.

  (d) Maltreatment of a juvenile." MCL 712A.13a(21).

- "[i]f [the] court finds [that] a parent is required by court order to register under the [S]ex [O]ffenders [R]egistration [A]ct,[5] the [DHHS] may, but is not required to, make reasonable efforts to reunify the child with the parent. The

[3] See Section 8.1(B) and Section 8.4 for more information on making these findings.

[4] See Section 7.6(E) for the definition of nonparent adult.

> court may order reasonable efforts to be made by the [DHHS]." MCL 712A.13a(6).

Additionally, "[n]o one has the right to post bail in a protective proceeding for the release of a child in the custody of the court."MCR 3.965(C)(6).

## B. Requirements to Place a Child Outside His or Her Home

If the court authorizes the filing of a petition, "[t]he court may order placement of the child in foster care[6] if the court finds all of the following conditions:

> (a) Custody of the child with the parent presents a substantial risk of harm to the child's life, physical health, or mental well-being.
>
> (b) No provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from risk as described in subdivision (a).
>
> (c) Continuing the child's residence in the home is contrary to the child's welfare.[7]
>
> (d) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.[8]
>
> (e) Conditions of child custody away from the parent are adequate to safeguard the child's health and welfare."[9] MCL 712A.13a(9). See also MCR 3.965(C)(2), which contains substantially similar language.

"[W]hen a statute or court rule requires factual findings as to an enumerated list of factors, the trial court must make a record of its findings as to each and every factor sufficient for [the Court of Appeals] to conduct a meaningful review." *In re Williams*, 333 Mich App 172, 183-185 (2020) (reversing and remanding a case in which the trial court removed the minor child from the respondent's

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[5] "'Sex [O]ffenders [R]egistration [A]ct' means the [S]ex [O]ffenders [R]egistration [A]ct, . . . MCL 28.721 to [MCL] 28.730." MCL 712A.13a(1)(k).

[6] For purposes of MCL 712A.13a, *foster care* is "care provided to a juvenile in a foster family home, foster family group home, or child caring institution licensed or approved under . . . MCL 722.111 to [MCL] 722.128, or care provided to a juvenile in a relative's home under a court order." MCL 712A.13a(1)(e).

[7] For additional information on contrary to the welfare findings, see Section 8.3.

[8] For additional information on reasonable efforts findings, see Section 8.4.

[9] If the child is of Indian heritage, see Section 19.13 for preferred placements of Indian children.

custody without making a record of all the findings listed in MCR 3.965(C)(2) and MCL 712A.13a(9); see also *In re White*, ___ Mich App ___, ___ (2026) ("The court must make a sufficient record of its findings regarding all these conditions to enable meaningful appellate review."). "MCR 3.965(C)(2) and MCL 712A.13a(9) explicitly require that the trial court find *all* the factors prior to removing a child from a parent's care." *In re Williams*, 333 Mich App at 184. Cf. *In re Benavides*, 334 Mich App 162, 169-170 (2020) (concluding that the children's placement outside of the home was proper because all provisions of MCL 712A.13a(9) were satisfied and addressed by the referee's findings, which were subsequently adopted by the trial court; ultimately, the children were not placed outside of the home where they lived at the time because respondent no longer lived in the home and a safety plan was in place with the children's uncle, who did live in the home). But see *White*, ___ Mich App at ___: "[T]he trial court erred in finding that no provision of service or other arrangement except removal of the child was reasonably available to adequately safeguard the child," under MCL 712A.13a(9)(b). (Cleaned up.) "[R]espondent had voluntarily placed the child with the child's adult sister as part of a safety plan and had given the sister power of attorney regarding the child's custody and care." *White*, ___ Mich App at ___. "[T]here was an allegation . . . that the child's *mother* tried to take the child back from the sister while intoxicated. But, . . . it was clear error for the trial court to find that *respondent* [the child's father] did so, and petitioner points to no evidence in the record to support such a finding." *Id*. at ___. "Just as a court may not adjudicate only one parent as unfit and then enter dispositional orders affecting the parental rights of both parents, a trial court may not make removal findings on the basis of one parent's behavior and then rely solely on such findings to remove a child from both parents." *Id*. at ___ (citation omitted).

"If the court orders removal of the child from a parent's care or custody, the court shall advise the parent, guardian, or legal custodian of the right to appeal that action." MCR 3.965(B)(15).

"If the child was not released under [MCR 3.965(B)], the court shall receive evidence, unless waived, to establish that the criteria for placement set forth in [MCR 3.965(C)(2)] are present." MCR 3.965(C)(1). In addition, the respondent must be given the opportunity to cross-examine and subpoena witnesses, and to offer proofs to counter the admitted evidence. MCR 3.965(C)(1).[10]

# 8.2 Placement Options

MCR 3.903(C)(10) defines *placement* as a "court-approved transfer of physical custody of a child to foster care, a shelter home, a hospital, or a private treatment agency."

If the court authorizes the filing of the petition, the child may be placed in any of the following:

> (1) The home of the child's parent(s), guardian, or legal custodian;
>
> (2) A licensed county child care home or facility; or
>
> (3) A licensed child care institution or child placing agency. MCL 712A.14(3); MCL 712A.16(2).

**Note:** Placement often occurs through an agency, either a local DHHS office or a private agency under contract with DHHS. MCL 712A.13a(1)(a) defines *agency* as "a public or private organization, institution, or facility that is performing the functions under part D of title IV of the social security act, 42 USC 651 to [42 USC] 669b, or that is responsible under court order or contractual arrangement for a juvenile's care and supervision."

A *child placing agency* is "a governmental organization or an agency organized . . . for the purpose of receiving children for placement in private family homes for foster care or for adoption. The function of a child 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).

## A. After a Child's Removal

"If continuing the child's residence in the home is contrary to the welfare of the child,"[11] the court must not release the child to his or her parent(s), guardian, or legal custodian, but instead must order

[10] See, e.g., *In re Shimmons/Hare*, ___ Mich App ___, ___ (2026): "By deferring to its factual findings from the procedurally defective, pseudo-emergency removal hearing . . . , the trial court offered respondent no 'opportunity to be heard' at a hearing held 'at a meaningful time and in a meaningful manner,'" as required under MCR 3.965(C)(1). In *Shimmons*, ___ Mich App at ___, the trial court erred when it ordered respondent's children removed from her care without "hold[ing] a procedurally valid emergency removal hearing." Further, the trial court failed to "follow[] the notice requirements for an ordinary preliminary hearing." *Id*. at ___.

[11] For additional information on contrary to the welfare findings, see Section 8.3.

that the child be "placed in the most family-like setting available consistent with the juvenile's needs." MCL 712A.13a(12); MCR 3.965(C)(3). Accordingly, a child removed from his or her parent's control must be placed in care "as nearly as possible equivalent to the care that should have been given to the [child] by his or her parents." MCL 712A.1(3). However, if an Indian child is involved in the proceedings, the court must follow the placement preferences as outlined in MCR 3.965(B)(13)(b).[12]

## 1. Preferred Placement of a Child After the Child's Removal From Parental Custody

Upon the child's removal from parental custody, as part of the initial service plan,[13] "the supervising agency must, within 30 days, identify, locate, notify, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs." MCL 722.954a(2).

"Preference shall be given to an adult related to the child within the fifth degree by blood, marriage, or adoption provided the relative meets all relevant state child protection standards." MCL 722.954a(2). "The [DHHS] may make an exception to this preference only if good cause is shown." *Id*. "As used in [MCL 722.954a], 'good cause' means any of the following:

> (a) A request by 1 or both of the child's parents to deviate from this preference.
>
> (b) The child's request, if the child is of sufficient age and capacity to understand the decision that is being made.
>
> (c) The presence of a sibling attachment that can be maintained through a particular placement.
>
> (d) The child's physical, mental, or emotional needs, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.
>
> (e) The distance between the child's home and the proposed family placement would frustrate the

[12] MCR 3.965(B)(13)(b) mirrors the placement preferences for Indian children under the ICWA as outlined in 25 USC 1915(b), and the MIFPA as outlined in MCL 712B.23(1). See Section 19.13.

[13] See Section 8.7 for more information on Initial Service Plans.

> reunification goal or otherwise impede permanency." MCL 722.954a(2).

The DHHS "completely disregarded its obligation under MCL 722.954a(2) to investigate relative placements" for the child after the trial court removed the child from temporary placement with the maternal grandmother due to coaching concerns but did not investigate the suitability of a number of the child's other relatives who had expressed interest in having the child placed with them. *In re D M A N*, ___ Mich App ___, ___ (2025). The DHHS asserted that it did not investigate other potential relative placements due to concerns that the child's grandmother had coached the child, and its claim that the trial court had ordered that the child not be placed with relatives. *Id*. at ___ (no such order was found in the record). "Neither explanation allows DHHS to exempt itself from its statutory duty under MCL 722.954a(2)." *D M A N*, ___ Mich App at ___. "[T]he failure to even attempt to keep [the child] from being separated from her biological family seriously affects the fairness, integrity, and public reputation of judicial proceedings." *Id*. at ___. If a suitable relative placement was available, it would have weighed against a finding that termination was in the child's best interests, and protected the child's interest in maintaining a familial relationship with her suitable relatives. *Id*. at ___. Resultantly, the Court conditionally reversed the trial court's finding that termination was in the child's best-interests and remanded for a determination as to whether a suitable relative placement was available, and if so, to conduct the appropriate procedural steps indicated in MCL 722.954a. *Id*. at ___.

In notifying the child's relatives, the supervising agency must:

> "(a) Specify that the child has been removed from the custody of the child's parent.
>
> (b) Explain the options the relative has to participate in the child's care and placement, including any option that may be lost by failing to respond to the notification.
>
> (c) Describe the requirements and benefits, including the amount of monetary benefits, of becoming a licensed foster family home.
>
> (d) Describe how the relative may subsequently enter into an agreement with the department for guardianship assistance." MCL 722.954a(3).

### 2. Placement of a Child's Siblings

Reasonable efforts must be made to place siblings together. MCL 712A.13a(14); MCL 722.954a(6). If siblings are not placed together or not all of the siblings were removed, reasonable efforts must be made to provide "at least monthly visitation or other ongoing contact between the siblings," unless statutory requirements dictate otherwise. MCL 722.954a(6). See also MCL 712A.13a(14); MCL 722.954a(7). See Section 8.2(C) for a discussion on sibling placement and maintenance of sibling relationship.

## B. Relative Placements[14]

### 1. Definition of *Relative*

A *relative* is "an individual who is at least 18 years of age and is either of the following:

> (*i*) Related to the child within the fifth degree by blood, marriage, or adoption, including the spouse of an individual related to the child within the fifth degree, even after the marriage has ended by death or divorce, the parent who shares custody of a half-sibling, and 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.
>
> (*ii*) Not related to a child within the fifth degree by blood, marriage, or adoption but who has a strong positive emotional tie or role in the child's life or the child's parent's life if the child is an infant, as determined by the department or, if the child is an Indian child, as determined solely by the Indian child's tribe. As used in this section, 'Indian child' and 'Indian child's tribe' mean those terms as defined [MCL 712B.3]." MCL 712A.13a(1)(j).[15]

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[14]Relative placements are also known as kinship care, i.e., "the provision of full time nurturing and protection of children by adults other than parents who have a family relationship bond with the children." Child Welfare League of American, 1994. For additional information on Kinship Care, see the Michigan State University Kinship Care Resource Center.

[15]The definition of *relative* under MCL 712A.13a(1)(j) includes "fictive kin." See *In re CJM*, ___ Mich App ___, ___ (2024) (2022 PA 200, effective October 7, 2022, "expanded the definition of 'relative' to include certain 'fictive kin'" as defined in MCL 712A.13a(1)(j)(*ii*)). "'[R]elative' under MCL 712A.13a(1)(j) now includes a biological parent." *In re Boshell/Shelton*, ___ Mich App ___, ___ (2025).

## 2. Placement Preferences

Before a supervising agency[16] determines where to place a child in its care, it must give special consideration and preference to the child's relatives who are willing and fit to care for the child and can meet the child's developmental, emotional, and physical needs. MCL 722.954a(5).[17]

The supervising agency's decision on where to place the child must be in the child's best interests. MCL 722.954a(5).

## 3. Requirements For Placement in a Relative's Home

Before or within seven days of a child being placed in a relative's home, the DHHS must perform a central registry clearance and criminal record check on all relative caregivers and adult household members.[18] MCL 712A.13a(11); MCR 3.965(C)(5)(a). See also DHHS's Children's Foster Care Manual (FOM), *Relative Engagement and Placement FOM 722-03B*, pp 8-9 (**Note:** the DHHS information indicates that the checks should be completed *before* placement). The court may order the DHHS to report to the court before or within seven days the results of the central registry clearance and criminal record check. MCR 3.965(C)(5)(a). When a child is placed in a relative's home, the court must order a home study to be conducted and a copy of the results submitted to the court within 30 days of placement. MCL 712A.13a(11); MCR 3.965(C)(5)(b).

> **Note:** The DHHS may not place a child in a home where a member of the home is listed as a perpetrator on the central registry[19] or has a felony conviction for:
>
> (1) Child abuse or neglect.

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[16] MCL 722.952(m) defines *supervising agency* as "the [DHHS] if a child is placed in the [DHHS's] care for foster care, or a child placing agency in whose care a child is placed for foster care."

[17] **Note:** MCL 722.954a does not provide a specific definition of *relative* nor does it indicate that any persons other than those related to the child within the fifth degree by blood, marriage, or adoption may be considered *relatives* for purposes of placement under MCL 722.954a.

[18] See Section 2.4(F) for a discussion on accessing information from the Law Enforcement Information Network (LEIN), and Section 2.6(J) for a discussion on accessing information from the DHHS Registry.

[19] "A relative caregiver or adult household member identified as a perpetrator on Central Registry is not disqualified from placement consideration. Children may be placed with the relative listed on Central Registry after director approval of the DHS-3130A **and** the expunction of the caregiver/adult household member's Central Registry history." DHHS's Children's Foster Care Manual (FOM), *Relative Engagement and Placement FOM 722-03B*, p 10. DHS-3130A is the *Relative Placement Home Study* form and is available here.

(2) Spousal abuse.

(3) Crime against a child (including pornography).

(4) Crime that involves violence (including rape, sexual assault, or homicide, but not including other physical assault or battery).

(5) Physical assault, battery, or drug related offense within the last five years. DHHS's Children's Foster Care Manual (FOM), *Placement Selection and Standards FOM 722-03* pp 10-11.

Also, the DHHS may not place a child in a home where an adjudicated juvenile sex offender resides. *Placement Selection and Standards FOM 722-03*, p 18.

## C. Placement of a Child's Siblings

### 1. Sibling Defined

A *sibling* is "a child who is related through birth or adoption by at least 1 common parent. Sibling includes that term as defined by an American Indian or Alaskan native child's tribal code or custom." MCL 712A.13a(1)(*l*); MCL 722.952(*l*).

### 2. Reasonable Efforts and Placement of Siblings

"Reasonable efforts must be made to do the following:

(a) Place siblings removed from their home in the same foster care,[20] kinship guardianship, or adoptive placement, unless the supervising agency documents that a joint placement would be contrary to the safety or well-being of any of the siblings.

(b) In the case of siblings removed from their home who are not jointly placed, provide for visitation,

[20] *Foster care* is "24-hour a day substitute care for children placed away from their parents, guardians, or legal custodians, and for whom the court has given the Department of Health and Human Services [DHHS] placement and care responsibility, including, but not limited to,

(a) care provided to a child in a foster family home, foster family group home, or child caring institution licensed or approved under MCL 722.111 et seq.,[] or

(b) care provided to a child in a relative's home pursuant to an order of the court." MCR 3.903(C)(5). See also MCL 712A.13a(1)(e).

> at least monthly, or other ongoing interaction between the siblings, unless the supervising agency documents that visitation, at least monthly, or other ongoing interaction would be contrary to the safety or well-being of any of the siblings." MCL 712A.13a(14); see also MCL 722.954a(6), containing substantially similar language.

See also the DHHS's Children's Protective Services Manual (PSM), *Court Intervention and Placement of Children PSM 715-2,* pp 8-9, which provides:

"All siblings who enter foster care at or near the same time must be placed together, unless:

> • One of the siblings has exceptional needs that can be met only in a specialized program or facility.
>
> • Such placement is harmful to one or more of the siblings.
>
> • The size of the sibling group makes a joint placement impractical, notwithstanding diligent efforts to make a joint placement."

### 3. Maintenance of Sibling Relationship If Siblings Are Separated

"If siblings cannot be placed together or not all the siblings are being placed in foster care, the supervising agency must make reasonable efforts to facilitate at least monthly visitation or other ongoing contact with siblings unless a court has determined that at least monthly visitation or other ongoing contact with siblings would not be beneficial under [MCL 712A.13a(16)]." MCL 722.954a(7).

#### a. Suspension of Sibling Contact

> "If the supervising agency documents that visitation or other contact is contrary to the safety or well-being of any of the siblings and temporarily suspends visitation or contact, the supervising agency shall report its determination to the court for consideration at the next review hearing." MCL 712A.13a(15).
>
> "If the supervising agency temporarily suspends visitation or contact, the court shall review the decision and determine whether sibling visitation or contact will

be beneficial to the siblings. If so, the court shall order sibling visitation or contact to the extent reasonable." MCL 712A.13a(16).

### b. Discontinuation of Sibling Contact

"If the supervising agency discontinues visitation or other ongoing contact with siblings because the supervising agency determines that visitation or other ongoing contact is contrary to the safety or well-being of any of the siblings, the supervising agency must report its determination to the court for consideration at the next review hearing." MCL 722.954a(8).

## D. Relative Licensing Requirement

"Every relative with placement of a child in foster care must be referred for licensure. Every effort must be made to ensure relative caregivers who are referred for licensure complete licensure within 180 calendar days of placement. Within 45 calendar days of placement, the relative **must** be referred to a certification worker[.]" *Relative Licensing FOM 923*, p 1.

## E. Exception to Licensing Requirements

Upon the recommendation of a local Foster Care Review Board or a child placing agency, the department may grant a variance to one or more licensing rules or statutes that regulate foster family homes or foster family group homes for 1 or more of the following reasons:

> "(a) To allow the child and 1 or more siblings to remain or be placed together.
>
> (b) To allow a child with an established meaningful relationship with the family to remain with the family.
>
> (c) To allow a family with special training or skills to provide care to a child who has a severe disability." MCL 722.118b(1).

The department may grant the variance, if it determines that:

> (1) the child's placement will be in the child's best interests; and
>
> (2) the variance will not jeopardize the child's health or safety or the health or safety of another child residing in the foster family home or foster family group home.[21] MCL 722.118b(2). See also MCL 722.137a.

For purposes of licensing and regulating foster family homes or foster family group homes under the Child Care Licensing Act, MCL 722.111 *et seq.*, *department* refers to DHHS. MCL 722.111(m).

## F. Placement in Setting Providing Certain Services for Human Trafficking Victims

"Before determining placement of a child in its care, a supervising agency shall give special consideration to information that a child may be the victim of human trafficking. If a supervising agency finds that a child is or may be a victim of human trafficking, the supervising agency shall place the child in a setting that provides mental health services, counseling, or other specialized services that are necessary or appropriate for a victim of human trafficking." MCL 722.954e.

## G. Children Absent Without Leave From Placement (AWOLP)

"Foster parents, relative/unrelated caregivers, parents, and/or residential facility staff must **immediately** notify law enforcement agencies (state police, local police, or the sheriff's department) **and** the supervising agency when a youth under their care fails to return at the expected time or leaves a home without permission." *Absent Without Legal Permission (AWOLP) FOM 722-03A*, p 1. The supervising agency must, immediately after being notified of the child's absence, file a missing person report with the local law enforcement agency; the child must be classified as "missing and endangered." *Id*. Within 24 hours of a child's absence from a court-ordered placement, a supervising agency must notify the following:

(1) The court having jurisdiction over the child;

(2) The child's parent(s), if appropriate; and

(3) The child's lawyer-guardian ad litem;

(4) The National Center for Missing and Exploited Children (NCMEC). *Id*. at pp 1-2.

Each circuit court must have "a plan for reviewing cases involving children who are absent from court-ordered placements without permission from the court." Michigan Supreme Court Administrative Order No. 2002-4. See also the State Court Administrative Office (SCAO) *AWOLP Resources*.[22]

[21] If the department grants a variance, a private home's licensure status does not change. MCL 722.118b(3).

## H. Qualified Residential Treatment Program

Once in foster care,[23] the DHHS may place the child in a qualified residential treatment program (QRTP). See MCL 722.123a. Once placed, the court or its designated administrative body must approve or disapprove of a child's placement in a qualified residential treatment program. See MCL 722.111(m); MCL 722.123a(3); MCR 3.966(D). A QRTP is a program within a child caring institution that provides specialized services to the minor children placed there. See MCL 722.111(w). A QRTP has a trauma-informed treatment model in which an awareness and knowledge of trauma and skills in dealing with trauma are included in the program's culture, practices, and policies. MCL 722.111(w)(*i*); see also MCR 3.903(C)(14)(a). Registered or licensed nursing and clinical staff are on-site or are available 24/7 to provide care in the scope of their practices. MCL 722.111(w)(*ii*); see also MCR 3.903(C)(14)(b). In addition, a QRTP "integrates families into treatment, including maintaining sibling connections," provides services for at least six months after discharge, is accredited as indicated in 42 USC 672(k)(4)(G) by an independent not-for-profit organization, and "does not include a detention facility, forestry camp, training school, or other facility operated primarily for detaining minor children who are determined to be delinquent." MCL 722.111(w)(*iii*)-(*vi*); see also MCR 3.903(C)(14)(c)-(f).

Within 30 days of placing a child in a QRTP, the Department of Health and Human Services (DHHS) must have a qualified individual[24] conduct an assessment of the child's strengths and needs, determine which placement most aligns with the child's needs, and develop a list of mental and behavioral health goals for the child. See MCL 722.123a(1) for more information.

DHHS must file an ex parte petition requesting the court approve or disapprove the juvenile's placement in a QRTP within 45 days of the initial placement. MCR 3.966(D)(1). See also MCL 722.123a(3). The petition must "be accompanied by the assessment, determination,

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[22] "The AWOLP system is managed by the State Court Administrative Office and is available through the Michigan Court Application Portal. Each circuit court has an administrator who may request access to the AWOLP system for court staff, as well as local Department of Health and Human Services (DHHS) and private agency workers." *AWOLP Resources, AWOLP Case Reporting*.

[23] *Foster care* is "24-hour substitute care for a child placed away from his or her parent or guardian and for whom the title IV-E agency has placement and care responsibility." MCL 722.123a(9)(a).

[24] A "qualified individual" is "a trained professional or licensed clinician who is not an employee of the department and who is not connected to, or affiliated with, any placement setting in which children are placed by the department. The department may seek a waiver from the [United States Secretary of the Department of Health and Human Services] to approve a qualified individual who does not meet the criteria in this subdivision to conduct the assessment. The individual must maintain objectivity with respect to determining the most effective and appropriate placement for the child." MCL 722.123a(9)(b)-(c).

and documentation made by the qualified individual," and the DHHS must serve all parties with the ex parte petition and all accompanying documentation. MCR 3.966(D)(1)(a)-(b). See also MCL 722.123a(1)-(2). The court, or an administrative body authorized or appointed by the court independently, must review the motion within 14 days of its filing. MCR 3.966(D)(2). The court or administrative body must also review any documentation in support of the motion. *Id.*; see also MCL 722.123a(3)(a). Following the review of the motion and documentation, the court or administrative body must issue an order approving or disapproving of the placement. MCR 3.966(D)(2); MCL 722.123a(3)(c). The order issued must include the court's or administrative body's individualized findings concerning the following:

> "(a) whether the needs of the child can be met in a foster family home, or if not,
>
> (b) whether the placement of the child provides the most effective and appropriate level of care for the child in the least restrictive environment, and
>
> (c) whether the placement is consistent with the goals in the permanency plan for the child." MCR 3.966(D)(2). See also MCL 722.123a(3)(b).

The court's or administrative body's written documentation of the determination and QRTP approval or disapproval must be made part of the child's case plan. MCL 722.123a(4). "The court shall serve the order on parties." MCR 3.966(D).

> "As long as a child remains placed in a qualified residential treatment program, the department must submit evidence at each dispositional review hearing and each permanency planning hearing held with respect to the child that does the following:
>
> > (a) Demonstrates that ongoing assessment of the strengths and needs of the child cannot be met through placement in a foster family home, that the placement in a qualified residential treatment program provides the most effective and appropriate level of care for the child in the least restrictive environment, and that the placement is consistent with the short-term and long-term goals for the child, as specified in the permanency plan for the child.
> >
> > (b) Documenting the specific treatment or service needs that will be met for the child in the

> placement and the length of time the child is expected to need the treatment or services.
>
> (c) Documents the reasonable efforts made by the department to prepare the child to return home or to be placed with a fit and willing relative, a legal guardian, or an adoptive parent, or in a foster family home." MCL 722.123a(5).

The court must approve or disapprove of a child's placement in a QRTP when the matter is raised in a review hearing or a permanency planning hearing. MCL 712A.19(10); MCL 712A.19a(14); MCL 722.123a(6).

Detailed information about the treatment and services provided to a child placed in a QRTP, and the assessment and monitoring of a child's progress in the program by a qualified professional is found in MCL 722.123a.

## 8.3 Keeping Child at Home is Contrary to the Welfare Findings

If the court orders foster care placement, it must find, among other factors, that "[c]ontinuing the child's residence in the home is contrary to the child's welfare." MCR 3.965(C)(2)(c). See also MCR 3.965(C)(3). "If [the court finds that] continuing the child's residence in the home is contrary to the welfare of the child, the court shall not return the child to the home, but shall order the child placed in the most family-like setting available consistent with the child's needs." MCR 3.965(C)(3).

> **Note:** MCR 3.903(C)(4) defines *contrary to the welfare of the child* as "includ[ing], but [] not [being] limited to, situations in which the child's life, physical health, or mental well-being is unreasonably placed at risk."

The court may base its findings on "hearsay evidence that possesses adequate indicia of trustworthiness." MCR 3.965(C)(3).

If the court orders placement, it must make a statement of findings in writing or on the record that explicitly includes "the finding that it is contrary to the welfare of the child to remain at home and the reasons supporting that finding." MCR 3.965(C)(3). If the court elects to place its findings on the record, the finding "must be capable of being transcribed." MCR 3.965(C)(3).

> **Note:** To establish eligibility for federal funding of a child's foster care placement, a court must make a finding in its first order that sanctions a child's removal from his or her home

> that "continuation of residence in the home would be contrary to the welfare . . . of the child."[25] 45 CFR 1356.21(c). This finding must be detailed "explicitly documented and must be made on a case-by-case basis and so stated in the court order." 45 CFR 1356.21(d). Affidavits, nunc pro tunc orders, or orders simply referencing a Michigan statute or court rule are insufficient. 45 CFR 1356.21(d)(2)-(3).[26]

Additionally, if a petition alleges that a parent, guardian, custodian, nonparent adult, or other person residing in a child's home has abused the child, the court may not place the child in unlicensed foster care, i.e., with a relative, unless it "finds that the conditions of custody at the placement and with the individual with whom the child is placed are adequate to safeguard the child from the risk of harm to the child's life, physical health, or mental well-being." MCL 712A.13a(5).[27]

## 8.4 Reasonable Efforts to Prevent or Eliminate Removal of Child Findings

The DHHS is obligated to make reasonable efforts to reunify a child and the child's family in *all* cases except those cases involving an aggravated circumstance listed in MCL 712A.19a(2). *In re Simonetta*, 340 Mich App 700, 707 (2022); see also *In re Barber/Espinoza*, ___ Mich ___, ___ (2025), and *In re C Walters*, ___ Mich App ___, ___ (2025) ("In general, when a child is removed from the parents' custody, [the DHHS] is required to make reasonable efforts to rectify the conditions that caused the child's removal.") (cleaned up). There must be a judicial determination that a child has been subjected to aggravating circumstances before the DHHS is excused from its duty to make reasonable efforts to prevent a child's removal. *In re Smith-Taylor*, 339 Mich 189, 200 (2022); see also *In re Boshell/Shelton*, ___ Mich App ___, ___ (2025) ("Reasonable efforts toward reunification are not necessary if there is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in [MCL 722.638(1) and (2)].") (cleaned up). A trial court's failure to

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[25] "[T]he requirement that the state obtain a judicial determination that it was contrary to the welfare of the child to remain in the home for purposes of Title IV-E foster-care funding eligibility [is] not triggered" until a child is "removed from the home and placed into foster care[.]" *Ayotte v Department of Health and Human Services*, 326 Mich App 483, 485, 495 (2018) ("because the temporary detention order [to serve three days in a juvenile detention center] issued against [then 16-year-old] plaintiff [for committing domestic violence against his mother] was not an order removing him from his home and *into foster care*, the fact that this order did not include a 'contrary to the welfare' finding, see 42 USC 672(a)(2)(A)(ii), does not preclude plaintiff's eligibility for Title IV-E foster-care funding"; "[i]t was the [subsequent] order that indicated that plaintiff's removal from the home and into care was justified based on adverse family circumstances," which contained the requisite language making the plaintiff eligible for Title IV-E foster-care funding).

[26] See Section 3.1(A) and Section 14.1 for further discussion of these requirements.

[27] See Section 7.6(C) for information on ordering an alleged abuser from a child's home.

properly determine that aggravated circumstances exist in a case before terminating parental rights at the initial disposition without requiring the DHHS to make reasonable efforts at reunification constitutes plain error warranting reversal. See *In re Berryman/Hurd/Morgan/Morgan-Hurd*, ___ Mich App ___, ___ (2026) ("[T]he trial court indicated in its written order following the preliminary hearing that it found aggravated circumstances under MCL 722.638(1) and (2) existed such that DHHS was not required to make reasonable efforts toward reunification. But the court never articulated the factual basis for that apparent conclusion or how any such factual basis met the clear-and-convincing-evidence standard.").

"The mere fact of imprisonment is not one of [those aggravating circumstances]." *In re Dixon (On Reconsideration)*, 347 Mich App 337, 362 (2023). In *Dixon*, the Court held that the DHHS was obligated to make reasonable efforts at reunification with the child's father after the mother's parental rights were terminated, even though the father was incarcerated. *Id*. at 362. A trial court is required "to permit 'regular and frequent parenting time' when a child is removed from a parent's care," despite that the parent is incarcerated. *Id*. at 361, quoting MCL 712A.13a(13) and MCL 712A.18f(3)(e). In *Dixon*, the DHHS failed to arrange for the father to have video visits with his child as the trial court had ordered. *Dixon*, 347 Mich App at 361. Further, the DHHS did little to provide the incarcerated father with services "even after he was named as a respondent." *Id*. at 362. "At the very least, the caseworker must provide available workbooks for father to complete, as has been done in many other cases involving incarcerated parents." *Id*. at 362. See also *In re G Matamoros*, ___ Mich App ___, ___ (2025), where the Court reversed the order terminating respondent's parental rights because the DHHS did not prepare a case service plan for respondent, who was incarcerated and had a disability, and did not investigate what services were available to respondent in prison. "[The DHHS's] failure to fulfill its statutory duty to prepare a case service plan as part of its reasonable reunification efforts constituted clear error requiring reversal." *Id*. at ___ (remanded for the DHHS "to create and implement a case service plan for respondent that reasonably accommodates respondent's disabilities as required under the ADA").

If the court orders foster care placement, it must find, among other factors, that "[c]onsistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child." MCR 3.965(C)(2)(d). See also MCR 3.965(C)(4). A court is also required to make a finding that reasonable efforts have been made to avoid non-emergency removal of a child from his or her home and placement of the child in foster care to establish a child's eligibility for federal foster care maintenance payments under Title IV-E of the Social Security Act. 42 USC 672(a)(1).[28]

Accordingly, the court must find that reasonable efforts were made "to maintain the family unit and prevent the unnecessary removal of a child from his/her home, as long as the child's safety is assured[.]" 45 CFR 1356.21(b). The court must make a child's health and safety its paramount concern when making reasonable efforts determinations. 45 CFR 1356.21(b); MCR 3.965(C)(4).

"When the court has placed a child with someone other than the custodial parent, guardian, or legal custodian, the court must determine whether reasonable efforts to prevent the removal of the child have been made or that reasonable efforts to prevent removal are not required." MCR 3.965(C)(4). The court must make a reasonable efforts determination at the earliest possible time, but no later than 60 days of the child's removal from the home. MCR 3.965(C)(4); 45 CFR 1356.21(b)(1)(*i*). The court "must state the factual basis for the determination in the court order." MCR 3.965(C)(4). "Nunc pro tunc orders or affidavits are not acceptable." *Id.*

> **Note:** The court's failure to make a reasonable efforts determination within 60 days of the child's removal will result in the child's ineligibility for federal foster care maintenance payments under Title IV-E during the child's stay in foster care. 45 CFR 1356.21(b)(1)(*ii*).

The court's 60-day period for making a reasonable efforts determination begins on the date the child was actually removed from his or her home. 45 CFR 1356.21(b)(1)(*i*). If the child was living with a relative before the court proceedings and the court places the child with that relative, the date of the court order for removal from the constructive custody of a parent is the date of actual removal. 45 CFR 1356.21(k)(1)(*ii*).

## A. Reasonable Efforts Not Required for Child's Removal

Reasonable efforts to prevent a child's removal from his or her home are not required if the court has determined any of the following:

> "(a) the parent has subjected the child to aggravated circumstances as listed in . . . MCL 722.638(1) and [MCL 722.638](2);[29] or
>
> (b) the parent has been convicted of 1 or more of the following:

[28] See the Department of Health & Human Services, Children's Bureau Letter to Child Welfare and Judicial Leaders, which details the judicial determinations and proceedings that must be held in order to satisfy Title IV-E requirements as well as suggestions for ensuring courts continue "to practice in a manner consistent with constitutional principles and to serve the best interest of children[.]"

[29] See Section 7.3(A) for the list of aggravated circumstances set out in MCL 722.638(1)-(2).

> > > (*i*) murder of another child of the parent,
> > >
> > > (*ii*) voluntary manslaughter of another child of the parent,
> > >
> > > (*iii*) aiding or abetting, attempting, conspiring, or soliciting to commit such a murder or such a voluntary manslaughter, or
> > >
> > > (*iv*) a felony assault that results in serious bodily injury to the child or another child of the parent; or
> >
> > (c) parental rights of the parent with respect to a sibling have been terminated involuntarily; or
> >
> > (d) the parent is required to register under the Sex Offender[s] Registration Act [(SORA), MCL 28.721 *et seq.*]"[30] MCR 3.965(C)(4). See also 45 CFR 1356.21(b)(3).
> >
> > > **Note:** If the court determines that reasonable efforts to reunite the family or prevent removal are not required, an initial permanency planning hearing must be held within 28 days of that determination. MCR 3.976(B)(1). See Section 16.3(A).

For example, where the trial court's stated findings indicated that it "determined that [the minor child] suffered severe physical abuse (respondent's excessive consumption of alcohol while pregnant) that resulted in a life-threatening injury ([the minor child's fetal alcohol syndrome] symptoms and the accompanying medical issues), and that respondent was the perpetrator of this abuse," "[t]hese findings amount[ed] to a judicial determination that respondent subjected [the minor child] to aggravated circumstances as provided in MCL 722.638(1) and [MCL 722.638(2)]"; "[t]herefore, under MCL 712A.19b(2)(a), reasonable efforts were not required[.]" *In re Rippy*, 330 Mich App 350, 358-359 (2019).

But see *In re Simonetta*, 340 Mich App 700, 703 (2022), where the Court held that "[m]aternal drug use during pregnancy does not give rise to an aggravated circumstance permitting the termination of parental rights under any circumstances because a fetus is not a 'child' under the Probate Code." The Court acknowledged that in *Rippy*, 330 Mich App at 357-359, "th[e] Court upheld a termination of parental rights at the initial disposition based on an assumption that a mother's prenatal drug use was an aggravated circumstance." *Simonetta*, 340 Mich App at 712 n 4. However, the Court in *Simonetta*

[30] For information on the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, including a list of who must register under SORA, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 9.

distinguished its disposition in the instant case from its disposition in *Rippy*. *Id*.

*Simonetta* first noted that MCL 722.638(1) did not apply—and so reasonable efforts *were* required—because the record in the instant case "d[id] not support that [the infant] sustained *any* consequences of respondent's prenatal use of controlled substances." *Simonetta*, 340 Mich App at 708. The Court then stated that the absence of evidence in the case was "not the only reason" that MCL 722.638(1) was not applicable. *Simonetta*, 340 Mich App at 708. The Court determined that "MCL 722.638(1)(a)(*iii*) does not apply to the 'abuse' of a fetus because a fetus is not a 'child' as that term is defined in the criminal law or the juvenile code."[31] *Simonetta*, 340 Mich App at 708. The Court explained the distinction between its dispositions in *Rippy* and *Simonetta*: "[T]he majority in *Rippy*, *id*. at 359 n 2, declined to consider whether a 'fetus' falls within the definition of a 'child' as contemplated in MCL 722.638(1), and therefore reached no binding opinion on that question." *Simonetta*, 340 Mich App at 712 n 4.

The Court elaborated: "[T]he aggravating circumstances identified in MCL 722.638(1)(a)(*iii*)—'battering, torture, or other severe physical abuse'—apply to children living outside the womb." *Simonetta*, 340 Mich App at 710. The Court noted also that the other aggravating circumstances described in MCL 722.638(1)(a) "pertain to children who have been born, and not fetuses[.]" *Simonetta*, 340 Mich App at 710. According to the Court, "[b]y excluding fetuses from the definition of a 'child,' our Legislature has recognized that drug use during pregnancy does not automatically mean that a mother will abuse her child after birth." *Id*. at 711.

MCL 722.638(1)(a) does not require respondent to be the actual perpetrator of the child's sexual abuse in order to conclude that respondent abused the child. See *In re Barber/Espinoza*, ___ Mich ___, ___ (2025). "The Legislature has pertinently defined 'child abuse' to include 'harm or threatened harm to a child's health or welfare that occurs through . . . sexual exploitation . . . by a parent[.]'" *Id*. at ___, quoting MCL 722.622(g) (alteration in original). "Sexual exploitation" means "'allowing, permitting, or encouraging a child to engage in prostitution.'" *Barber/Espinoza*, ___ Mich at ___, quoting MCL 722.622(r). Although not defined by statute, "prostitution" means "the act or practice of engaging in sex acts and especially sexual intercourse in exchange for pay," or, alternatively, "commercialized sex." *Barber/Espinoza*, ___ Mich at ___ (quotation

[31] MCL 722.622(f), part of the Child Protection Law, defines 'child' as "an individual under 18 years of age." See also *Simonetta*, 340 Mich App at 709. "Similarly, the Michigan adoption code under the Probate Code defines 'child' as 'an individual less than 18 years of age.'" *Id*. at 709, citing MCL 710.22(j).

marks and citations omitted). At trial, the child "testified that respondent allowed a man to sexually abuse [the child] in exchange for drugs," which amounts to engaging the child in prostitution. *Id*. at ___. "Because respondent engaged [the child] in prostitution, she sexually exploited [the child] and, thus, abused her." *Id*. at ___.

The respondent need not be the perpetrator of the abuse in order for the aggravating circumstances in MCL 722.638(1)-(2) to apply. *In re Smith-Taylor*, 339 Mich App 189, 202 (2021), rev'd on other grounds 509 Mich 935 (2022). "The plain language of MCL 722.638(2) [does] not limit its application to the suspected perpetrator of the abuse." *In re Smith-Taylor*, 339 Mich App at 202. A respondent who does not perpetrate the abuse but who "plac[es] the child at an unreasonable risk of harm due to a failure to take steps to eliminate a risk of harm," may have his or her parental rights terminated at the initial dispositional hearing. *Id*. at 202. When aggravating circumstances are present, reasonable efforts to reunify a child and a parent are not required. *Id*. at 202.

But see *In re Boshell/Shelton*, ___ Mich App ___, ___ (2025): "The trial court plainly erred by finding that [respondent's] boys were subjected to aggravating circumstances [under MCL 722.638] because . . . the abusers . . . were not a parent, guardian, or custodian of the boys, and nothing in the record suggests that they ever resided with the boys." Because the requirements of MCL 722.638(1) were not met, MCL 722.638(2) did not apply to the petition, and therefore, the DHHS was not obligated to make reasonable efforts to reunify respondent and her sons before seeking termination. *Boshell/Shelton*, ___ Mich App at ___ (reversed and remanded).

## B. Required Documentation for Reasonable Efforts Finding

The court's determination "regarding . . . reasonable efforts to prevent removal . . . including judicial determinations that reasonable efforts are not required, must be explicitly documented and must be made on a case-by-case basis and so stated in the court order." 45 CFR 1356.21(d). See also MCR 3.965(C)(4).

Additionally, 45 CFR 1356.21(d) states:

> "(1) If the reasonable efforts . . . judicial determination[ is] not included as required in the court orders identified in . . . [45 CFR 1356.21(b)], a transcript of the court proceedings is the only other documentation that will be accepted to verify that th[is] required determination[ has] been made.

> (2) Neither affidavits nor nunc pro tunc orders will be accepted as verification documentation in support of reasonable efforts . . . judicial determinations.
>
> (3) Court orders that reference State law to substantiate judicial determinations are not acceptable, even if State law provides that a removal must be based on a judicial determination . . . that removal can only be ordered after reasonable efforts have been made."

For a description of services that may be offered to families to prevent a child's removal from his or her home, see the Department of Health and Human Services's (DHHS's) Children's Protective Services Manual (PSM), *CPS Supportive Services PSM 714-2*, and the DHHS's Children's Foster Care Manual (FOM), *Case Planning FOM 722-06*.

## 8.5 Release of Information Pertaining to Child

If the child is placed in foster care,[32] the court must order that, within 10 days after receiving a written request, the agency must provide the person who is providing the foster care with copies of the following:

> (1) All initial, updated, and revised case service plans and court orders relating to the child; and
>
> (2) All of the child's medical, mental health, and education reports (including reports compiled before the child was placed with that person). MCL 712A.13a(18); MCL 712A.18f(5).

The court must include in its placement order an order that "the child's parent, guardian, or custodian provide the supervising agency[33] with the name and address of each of the child's medical providers." MCL 712A.13a(19)(a); MCR 3.965(C)(8)(a). The court must also include an order that "each of the child's medical providers release the child's medical records."[34] MCL 712A.13a(19)(b); MCR 3.965(C)(8)(b).

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[32] MCR 3.903(C)(5) defines *foster care* as "24-hour a day substitute care for children placed away from their parents, guardians, or legal custodians, and for whom the court has given the Department of Health and Human Services placement and care responsibility, including, but not limited to, (a) care provided to a child in a foster family home, foster family group home, or child caring institution licensed or approved under MCL 722.111 *et seq.*, or (b) care provided to a child in a relative's home pursuant to an order of the court." See also MCL 712A.13a(1)(e).

[33] MCL 722.952(m) defines *supervising agency* as "the [Department of Health and Human Services (DHHS)] if a child is placed in the [DHHS's] care for foster care, or a child placing agency in whose care a child is placed for foster care."

[34] The placement order may specify providers by profession or type of institution. MCL 712A.13a(19)(b).

# 8.6 Child's Medical Treatment

## A. Medical Examination

The child's supervising agency must ensure that "the child receives a medical examination when the child is first placed in foster care." MCL 722.954c(5). "One objective of this examination is to provide a record of the child's medical and physical status upon entry into foster care." *Id.*

"If a child under the care of a supervising agency has suffered sexual abuse, serious physical abuse, mental illness, or is alleged to be the victim of human trafficking, the supervising agency shall have an experienced and licensed mental health professional as defined under [MCL 330.1100b(19)(a), MCL 330.1100b(19)(b), or MCL 330.1100b(19)(d)],[35] who is trained in children's psychological assessments perform an assessment or psychological evaluation of the child." MCL 722.954c(4).[36] The supervising agency must bear the costs of the assessment or evaluation. *Id*. "If an assessment or psychological evaluation required under [MCL 722.954c(4)] indicates that a child may have been a victim of human trafficking, the supervising agency shall provide, in addition to any reunification, adoption, or other services provided to a child under the supervising agency's care, counseling services appropriate for minor victims of human trafficking." MCL 722.954c(6).

The supervising agency must obtain the name and address of the child's medical provider and a signed release of the child's medical records from the parent, guardian, or custodian. MCL 722.954c(1). The child's medical provider must remain constant while the child is in foster care, unless the child's current primary medical provider is a managed care health plan, or unless requiring the medical provider to remain constant would create an unreasonable burden for the child's relative, foster parent, or other custodian. *Id.*

> **Note:** The court must include in its placement order an order that "the child's parent, guardian, or custodian provide the supervising agency with the name and address of each of the child's medical providers." MCL 712A.13a(19)(a); MCR 3.965(C)(8)(a). The placement order must also include an order that "each of the

[35]The specific definitions of *mental health professional* to which MCL 722.954a(4) refers now appear in MCL 330.1100b(19)(a)-(b) and MCL 330.1100b(19)(d). See 2020 PA 285 and 2020 PA 402, effective March 24, 2021.

[36] See MCL 712A.12 and MCR 3.923(B), which also permit the court to order an assessment or psychological evaluation of a child.

child's medical providers release the child's medical records."[37] MCL 712A.13a(19)(b); MCR 3.965(C)(8)(b).

## B. Medical Passports

The supervising agency must develop a medical passport for each child coming within its care. MCL 722.954c(2). The medical passport must contain all of the following:

> "(a) All medical information required by policy or law to be provided to foster parents.
>
> (b) Basic medical history.
>
> (c) A record of all immunizations.
>
> (d) Any other information concerning the child's physical and mental health, including information that the child may be a victim of human trafficking." MCL 722.954c(2).

The DHHS requires the supervising agency to provide a copy of all medical passports and updates for maintenance in a central location. MCL 722.954c(3).

A foster care worker who transfers a child's medical passport to another foster care worker must sign and date it, verifying that the worker has sought and obtained the required information and any additional information required by the DHHS policy. MCL 722.954c(3).

## C. Authority to Consent to Medical Treatment

If a child is placed outside the home, the child placing agency, the department,[38] or a court may consent to "routine, nonsurgical medical care, or emergency medical and surgical treatment" of a child. MCL 722.124a(1). See Section 3.3 for a detailed discussion of ordering medical treatment for a child.

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[37] The placement order may specify providers by profession or type of institution. MCL 712A.13a(19)(b).

[38] For purposes of the Child Care Licensing Act, MCL 722.111 *et seq.*, "[d]epartment means 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).

**Note:** If the child is placed in a child care organization,[39] the child placing agency, the department, or the court must execute a written instrument that grants the organization authority to consent to the child's emergency medical and surgical treatment. MCL 722.124a(1). The department may also execute a written instrument granting the child care organization the authority to consent to the child's routine, nonsurgical medical care. *Id.*

If the child is placed in a child care institution,[40] the child placing agency, the department, or the court must, in addition to emergency medical and surgical treatment, execute a written instrument that grants the institution authority to consent to the child's routine, nonsurgical medical care. MCL 722.124a(1).

Only the child's parent or guardian may consent to nonemergency, elective surgery for a child in foster care. MCL 722.124a(3). However, if a court terminated the parent's parental rights, the court or the agency with jurisdiction over the child may consent to nonemergency, elective surgery. *Id.*

**Note:** "[R]outine, nonsurgical medical care" does not include "contraceptive treatment, services, medication or devices." MCL 722.124a(4). The DHHS does not consider the prescription or use of psychotropic medications as routine, nonsurgical medical care. DHHS's Children's Foster Care Manual (FOM), *Prudent Parent Standard and Delegation of Parental Consent FOM 722-11*.

## 8.7 Initial Service Plans

An individual involved in a child protective proceeding may be eligible for admission to a family treatment court program if, among other requirements, "the individual has a substance use disorder," MCL 600.1099ee(a), and "[t]he allegations contained in the petition [are]

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

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

related to the abuse, illegal use, or possession of a controlled substance or alcohol," MCL 600.1099ff(a). See Section 7.7 for information about family treatment courts.

If placement is ordered, the court must inform the parties, either orally or in writing, of all of the following:

> "(1) that the agency designated to care and supervise the child will prepare an initial service plan no later than 30 days after the placement;
>
> (2) that participation in the initial service plan is voluntary unless otherwise ordered by the court;
>
> (3) that the general elements of an initial service plan include:
>
> > (a) the background of the child and the family,
> >
> > (b) an evaluation of the experiences and problems of the child,
> >
> > (c) a projection of the expected length of stay in foster care, and
> >
> > (d) an identification of specific goals and projected time frames for meeting the goals;
>
> (4) that, on motion of a party, the court will review the initial service plan and may modify the plan if it is in the best interests of the child; and
>
> (5) that the case may be reviewed for concurrent planning." MCR 3.965(D). See also MCL 712A.13a(10).

"A trial court's failure to inform a respondent of the information required by [MCL 712A.13a(10)] does not affect the validity of the trial court's order." *In re Benavides*, 334 Mich App 162, 171 (2020). In addition, the notice requirement in MCL 712A.13a(10) applies only when a child was removed from, and placed outside of, his or her home; notice is not required when the child was removed only from the respondent's custody but the child's placement remained in the residence where he or she was living at the time the petition was authorized. *In re Benavides*, 334 Mich App at 171. In *In re Benavides*, the court concluded that the children could remain in the home where they were living at the time of the preliminary hearing because respondent no longer lived in the home and a safety plan was in place with the children's uncle, who also lived in the home. *Id*. at 172. "Thus, the precipitating event, the placement of the juvenile outside the home, did not occur, and therefore, the trial court was not required to advise of the preparation of an initial services plan." *Id*.

In addition, the court must direct the agency to identify, locate, notify, and consult with a child's relatives to determine if placement with a relative would be in the child's best interests.[41] MCR 3.965(D). As part of the initial service plan, the child's supervising agency must, within 30 days of removing the child from parental custody, "identify, locate, notify, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs." MCL 722.954a(2). "Preference shall be given to an adult related to the child within the fifth degree by blood, marriage, or adoption provided the relative meets all relevant state child protection standards. The [DHHS] may make an exception to this preference only if good cause is shown. As used in this section, 'good cause' means any of the following:

> (a) A request by 1 or both of the child's parents to deviate from this preference.
>
> (b) The child's request, if the child is of sufficient age and capacity to understand the decision that is being made.
>
> (c) The presence of a sibling attachment that can be maintained through a particular placement.
>
> (d) The child's physical, mental, or emotional needs, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.
>
> (e) The distance between the child's home and the proposed family placement would frustrate the reunification goal or otherwise impede permanency." MCL 722.954a(2).[42]

The court must also require the agency to provide the name and address of the child's attending physician of record or primary care physician where a physician has diagnosed the child's abuse or neglect as involving one or more of the following:

> (1) failure to thrive;
>
> (2) Munchausen syndrome by proxy;
>
> (3) shaken baby syndrome;
>
> (4) a bone fracture diagnosed as being the result of abuse or neglect; or

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[41] See Section 8.2 for a detailed discussion of relative placements.

[42] The placement preferences in MCL 722.954a "do[] not supersede the placement preferences in the Michigan Indian family preservation act [MIFPA]." MCL 722.954a(10). MIFPA, as used in MCL 722.954a, appears in MCL 712B.1 to MCL 712B.41. MCL 722.954a(11).

(5) drug exposure.[43] MCL 712A.18f(6); MCR 3.965(D).

The development of a case plan for a child is governed by a federal regulation implementing the Adoption and Safe Families Act (ASFA). Specifically, 45 CFR 1356.21(g) states:

> "(g) *Case plan requirements.* In order to satisfy the case plan requirements of [42 USC 671(a)(16), 42 USC 675(1), and 42 USC 675(5)(A) and (D)], the State agency must promulgate policy materials and instructions for use by State and local staff to determine the appropriateness of and necessity for the foster care placement of the child. The case plan for each child must:
>
> (1) Be a written document, which is a discrete part of the case record, in a format determined by the State, which is developed jointly with the parent(s) or guardian of the child in foster care; and
>
> (2) Be developed within a reasonable period, to be established by the State, but in no event later than 60 days from the child's removal from the home pursuant to [45 CFR 1356.21(k)];[44]
>
> (3) Include a discussion of how the case plan is designed to achieve a safe placement for the child in the least restrictive (most family-like) setting available and in close proximity to the home of the parent(s) when the case plan goal is reunification and a discussion of how the placement is consistent with the best interests and special needs of the child. ([Federal financial participation] is not available when a court orders a placement with a specific foster care provider);
>
> (4) Include a description of the services offered and provided to prevent removal of the child from the home and to reunify the family; and
>
> (5) Document the steps to finalize a placement when the case plan goal is or becomes adoption or placement in another permanent home in accordance with [42 USC 675(1)(E), 42 USC 675(5)(E)]. When the case plan goal is adoption, at a minimum, such documentation shall include child-specific recruitment efforts such as the use

[43] See Section 13.5.

[44] The 60-day period is calculated from the child's actual or constructive removal from his or her home. 45 CFR 1356.21(k).

> of State, regional, and national adoption exchanges including electronic exchange systems."

## 8.8 Parenting Time or Visitation

If a child is removed from the parent's custody at any time, the court must permit the child's parent to have regular and frequent parenting time with his or her child of "not less than 1 time every 7 days[,]" MCL 712A.13a(13), unless:

> (1) the court determines that "exigent circumstances require less frequent parenting time[,]" MCL 712A.13a(13); or
>
> (2) the court determines that "parenting time, even if supervised, may be harmful to the [child's] life, physical health, or mental well-being[,] . . . [in which case] the court may suspend parenting time until the risk of harm no longer exists[,]" MCL 712A.13a(13); or
>
> (3) a petition requesting termination of the parent's parental rights was filed, and the court suspends the subject parent's parenting time,[45] MCL 712A.19b(4), MCR 3.965(C)(7)(a), MCR 3.977(D); or
>
> (4) the child has a guardian or legal custodian, MCR 3.965(C)(7)(a).
>
> > **Note:** If a child was living with a guardian or legal custodian, the court must determine what, if any, visitation it will permit the guardian or legal custodian to have with the child. MCR 3.965(C)(7)(b).

A parent's right to parenting time with his or her child at any time after the child is removed from the parent's care applies even after adjudication, except under the circumstances stated in MCL 712A.13a(13). *In re L Ott*, 344 Mich App 723, 739 (2022). "An automatic suspension of parenting time for a positive drug screen for THC absent any examination of and determination under [relevant] statutory provisions[46] is invalid." *Ott*, 344 Mich App at 742. In *Ott*, the "[r]espondent's use of marijuana did not justify the denial of her parenting time with [her child] unless the court determined that as a result of her marijuana use, parenting time, even if supervised, may have been harmful to [the child's] life, physical health, or mental well-being." *Id.* at 742-743. Under the circumstances in *Ott*, the trial court was

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[45] See Section 8.9(C) for more information on suspension of parenting time under MCL 712A.19b(4) and MCR 3.977(D).

[46] MCL 712A.13a(13), MCL 712A.18(1)(p), MCL 333.26424(d), and MCL 333.27955(3).

obligated to make a determination as to the respondent's parenting time and the child's life, physical health, and mental well-being. *Id*. at 742.

"The court may order the [child] to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time." MCL 712A.13a(13).

The supervising agency must institute a flexible schedule to allow for the occurrence of supervised in-home visitation outside of the traditional workday to accommodate the schedules of the individuals involved. MCL 722.954b(3).

"In a proceeding under [MCL 712A.2(b)] or [MCL 712A.2(c)], if a juvenile is removed from the parent's custody at any time, the court shall permit the juvenile's parent to have regular and frequent parenting time with the juvenile. Parenting time between the juvenile and the juvenile's parent must not be less than 1 time every 7 days unless the court determines either that exigent circumstances require less frequent parenting time or that parenting time, even if supervised, may be harmful to the juvenile's life, physical health, or mental well-being. If the court determines that parenting time, even if supervised, may be harmful to the [child's] life, physical health, or mental well-being, the court may suspend parenting time until the risk of harm no longer exists. The court may order the juvenile to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time." MCL 712A.18(1)(p).

A trial court is required "to permit 'regular and frequent parenting time' when a child is removed from a parent's care," even when the parent is incarcerated. *In re Dixon (On Reconsideration)*, 347 Mich App 337, 361 (2023), quoting MCL 712A.13a(13) and MCL 712A.18f(3)(e). Under the circumstances in *Dixon*, the Court "reluctantly" affirmed the trial court's initial refusal to transfer the child from the custody of the child's foster parents to the custody of the person named by the father for placement of his child. *Dixon*, 347 Mich App at 362. However, the Court noted that "[g]oing forward, the [trial] court and the DHHS must tread carefully to avoid repeating their mistakes." *Id*. at 361. The DHHS's investigation of the placement the incarcerated father proposed was inadequate, and the Court ordered a reevaluation of the study and ordered that more details of the study be placed on the record. *Id*. at 361, 362. Additionally, the DHHS had failed to arrange for the father to have video visits with his child as the trial court had ordered, and the Court ordered that this failure "be rectified immediately." *Id*. at 362. Further, the DHHS had done little to provide the incarcerated father with services "even after he was named as a respondent." *Id*. at 362. "At the very least, the caseworker [was required to] provide available workbooks for father to complete, as [had] been done in many other cases involving incarcerated parents." *Id*. at 362.

## 8.9 Order for Examination or Evaluation of Child, Parent, Guardian, or Legal Custodian

The court may order an evaluation or examination of a child or a parent, guardian, or legal custodian by a physician, dentist, psychologist, or psychiatrist. MCL 712A.12; MCR 3.923(B).

The privilege against self-incrimination in the Fifth Amendment to the United States Constitution may not be raised by a parent to prevent him or her from undergoing a psychological examination in child protective proceedings to determine if parental rights should be terminated. *In re Johnson*, 142 Mich App 764, 765-766 (1985).

## 8.10 Placement of Child

Not more than 90 days after the child's removal, the supervising agency must make a placement decision and document the reason for the decision in writing.[47] MCL 722.954a(4)(a). The supervising agency must give written notice of the placement decision and supporting reasons to the following persons:

(1) the child's attorney;

(2) the child's guardian;

(3) the child's guardian ad litem;

(4) the child's mother;

(5) the child's father;

(6) the attorneys for the mother and father;

(7) each relative who expresses an interest in caring for the child;

(8) the child, if he or she is old enough to express an opinion regarding placement; and

(9) the prosecuting attorney. MCL 722.954a(4)(b).

*Placement* is the "court-approved transfer of physical custody of a child to foster care,[48] a shelter home, a hospital, or a private treatment agency." MCR 3.903(C)(10).

The goal of a foster care placement is "not to create a new 'family' unit or encourage permanent emotional ties between the child and foster

[47] See Section 8.2 for a detailed discussion of placement options.

parents[, but rather] [f]oster care is designed to provide a stable, nurturing, noninstitutionalized environment for the child while the natural parent or caretaker attempts to remedy the problems which precipitated the child's removal or, if parental rights have been terminated, until suitable adoptive parents are found." *Mayberry v Pryor*, 422 Mich 579, 586-587 (1985).

Reasonable efforts must be made to place siblings together. MCL 712A.13a(14); MCL 722.954a(6). If siblings are not placed together or not all of the siblings were removed, reasonable efforts must be made to provide "at least monthly visitation or other ongoing contact" between the siblings, unless statutory requirements dictate otherwise. MCL 712A.13a(14); MCL 722.954a(6); MCL 722.954a(7). See Section 8.2(D) for a discussion on sibling placement and maintenance of sibling relationship.

## A. Change in Child's Foster Care Placement

Where a child who is under the court's or the Michigan Children's Institute's (MCI's) jurisdiction, control, or supervision is placed in foster care, the agency must not change the child's placement "before complying with the requirements of [MCL 712A.13b]," unless:

> "(a) The person providing the foster care requests or agrees to the change.
>
> (b) A contracted social services agency of a federally recognized tribal[49] government is providing primary case management.
>
> (c) Even if the person providing the foster care placement objects to a proposed change in placement, when 1 of the following applies:
>
> (*i*) The court orders the child returned home.
>
> (*ii*) The change in placement is less than 30 days after the child's initial removal from the child's home.
>
> (*iii*) The court orders the child to be moved.

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[48] MCR 3.903(C)(5) defines *foster care* as "24-hour a day substitute care for children placed away from their parents, guardians, or legal custodians, and for whom the court has given the Department of Health and Human Services placement and care responsibility, including, but not limited to, (a) care provided to a child in a foster family home, foster family group home, or child caring institution licensed or approved under MCL 722.111 *et seq.*, or (b) care provided to a child in a relative's home pursuant to an order of the court." MCL 712A.13a(1)(e) contains a substantially similar definition of *foster care*."

[49] See the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Section 11.20, for a detailed discussion on changing an Indian child's foster care placement.

> (iv) The child is an MCI ward and the move is a result of the MCI superintendent's denial of consent to adoption by the caregiver.
>
> (*v*) The child is an Indian child and the foster care placement or the proposed placement is within or to the placement preferences listed in [MCL 712B.23].
>
> (*vi*) The change in placement is in accordance with other provisions in this section." MCL 712A.13b(1).

Unless the provisions of MCL 712A.13b(1) are met, or there is an emergency change in a child's foster care placement under MCL 712A.13b(7), the agency must comply with all of the following requirements before changing the child's foster care placement:

> (a) Notify the foster care review board (FCRB), under SCAO, of any proposed change in placement;[50]
>
> (b) Notify the foster parents of the intended placement change, inform them that if they disagree with the change, they may appeal within three days to a FCRB, and provide the foster parents with the address and telephone number of a FCRB with jurisdiction over the child;
>
> (c) Maintain the current placement for not less than the three-day appeal period, and if the foster parents do appeal, then maintain the placement until the FCRB makes its determination;
>
> (d) Notify the court with jurisdiction over the child, notify the child's tribe, as applicable, and notify the child's lawyer guardian ad litem of the proposed change in placement.[51] MCL 712A.13b(2).

The agency's notification under MCL 712A.13b(2)(d), which does not affect the DHHS's placement discretion, must include all of the following information:

> (*i*) The reason for the change in placement.
>
> (*ii*) The number of times the child's placement has been changed.

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[50] Notice may be sent by ordinary mail or electronically as agreed on by the Department of Health and Human Services (DHHS) and SCAO. MCL 712A.13b(2)(a).

[51] Notice may be sent by ordinary mail or electronically as agreed on by the DHHS and the court. MCL 712A.13b(2)(d).

(*iii*) Whether the child will be required to change schools.

(*iv*) Whether the change will separate or reunite siblings or affect sibling visitation.

(*v*) If the child is an Indian child, the notice must also include:

(A) A statement that the child is an Indian child, and

(B) A list of active efforts the agency took to place the child in compliance with MCL 712B.23, including how the placement meets the standards appearing in MCL 712B.23(8). MCL 712A.13b(2)(d).[52]

**Indian children.** If an Indian child not already removed from consideration of the FCRB under MCL 712A.13b(1)(b) or MCL 712A.13b(1)(c)(*v*), under the court's jurisdiction pursuant to MCL 712A.2(b), or under MCI's jurisdiction, control, or supervision, is placed in foster care, "the agency or MCI must not change the child's placement or make a recommendation for placement change before notifying the Indian child's tribe, and before a change in an Indian child's foster care placement takes effect, the agency, or MCI, where applicable, must do all the following:

(a) Except as provided by [MCL 712A.13b(1)(c)(*i*), MCL 712A.13b(1)(c)(*iii*), or MCL 712A.13b(7)], the agency or MCI, where applicable, must notify an Indian child's tribe at least 3 days before any proposed placement change of an Indian child. Notification under this subdivision may be given by ordinary mail and email to the designated Indian child welfare act agent with receipt 3 days before the beginning of the foster care review board investigation.

(b) At the time of or immediately following an Indian child's removal under [MCL 712A.13b(7)[53]], the agency or MCI must inform the Indian child's tribe of the child's placement.

(c) The agency, foster care review board, and MCI must comply with [MCL 712B.23] for any placement change,

[52]See the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Section 11.20 for more information on the requirements for changing an Indian child's foster care placement

[53]See also 25 USC 1922 regarding the emergency removal of an Indian child.

including a placement following a removal under [MCL 712A.13b(7)]." MCL 712A.13b(9).

### B. Emergency Change in Foster Care Placement

The agency may change a child's foster care placement without adhering to the requirements in MCL 712A.13b(1) or MCL 712A.13b(2)(b)-(c), where the agency responsible for the child's care and supervision has reasonable cause to believe that:

- the child has suffered sexual abuse or nonaccidental physical injury while in a foster care placement; or
- there is substantial risk of harm to the child's physical or emotional well-being in the foster care placement. MCL 712A.13b(7).[54]

The agency must document in the child's file its justification for the emergency placement change. *Id.*

The agency must inform the foster parent(s) at the time of removal or immediately thereafter of their option to appeal the change in placement. MCL 712A.13b(8). The agency must also provide the foster parent(s) with the address and telephone number of a foster care review board (FCRB) with jurisdiction over the child. *Id.* The foster parent may appeal the change in placement to the FCRB within three days after the child's removal. MCL 712A.13b(7). Although the foster parent may appeal orally, a written appeal must be filed immediately thereafter. *Id.*

A child removed from a placement under MCL 712A.13b(7) shall not be returned to that foster care placement unless the court restores the placement after a hearing on an appeal under MCL 712A.13b(6), or the MCI Superintendent approves the placement restoration. MCL 712A.13b(5).

## 8.11 Appeals of Foster Care Placement Changes

### A. Appeals to Foster Care Review Board

Before a change in a child's foster care placement takes effect, a child placing agency must notify the foster parent(s) of the proposed change and of their option to appeal the proposed change to a foster care review board (FCRB) within three days.[55] MCL 712A.13b(2)(b).

[54] See Section 2.3.

[55] See Section 8.10(A) for more information on changing a child's foster care placement.

Except for emergency placement changes under MCL 712A.13b(7), the agency must not make any placement changes until after the three-day appeal period expires, and, if there is an appeal, until after the FCRB makes its determination. MCL 712A.13b(2)(c).

A foster parent may appeal orally but must submit a written appeal immediately thereafter. MCL 712A.13b(2)(b); MCL 712A.13b(7).

### 1. Investigation by Foster Care Review Board (FCRB)

The FCRB must investigate a proposed change in placement within seven days of an appeal under MCL 712A.13b(2) or MCL 712A.13b(7). MCL 712A.13b(3). The tribe of an Indian child must be invited to participate in the investigation, and the FCRB must comply with the best interests of the child standards and procedures that appear in MCL 712B.5.[56] MCL 712A.13b(4). The FCRB must report its findings and recommendations about the change, including whether the FCRB decides that the placement change is in the child's best interests, within three days of completing the investigation. If the child is an Indian child, the report must include a statement that the child is an Indian child and a list of active efforts taken by the agency to place the child according to MCL 712B.23. MCL 712A.13b(3)(a)-(b). The FCRB must report its findings and recommendations to the court or the Michigan Children's Institute (MCI) Superintendent (if the child is under the jurisdiction, supervision, or control of the MCI), foster care parent(s), parents, the tribe of an Indian child, and the agency. MCL 712A.13b(3). If the FCRB decides after its investigation that the move is in the child's best interests, the agency may move the child. MCL 712A.13b(4).

### 2. Change in Child's Placement Pending Appeal to Family Division

If, after investigation, the FCRB determines that the change in the child's foster care placement is not in the child's best interest, the child placing agency must maintain the child's current placement until a finding and order by the court or a decision by the MCI Superintendent (if the child is under the jurisdiction, supervision, or control of the MCI). MCL 712A.13b(5). If the child placing agency removed a child under MCL 712A.13b(7), the child placing agency must not return the child to the foster care placement from which the child was

[56] See the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Section 11.20 for more information on changing an Indian child's foster care placement.

removed unless the court orders a placement restoration or the MCI Superintendent approves a placement restoration. MCL 712A.13b(5).

The FCRB must notify the court or the MCI Superintendent (if the child is under the jurisdiction, supervision, or control of the MCI) about the disagreement between the FCRB and the child placing agency. *Id.*

## B. Appeals to Family Division or Michigan Children's Institute (MCI) Superintendent

### 1. Court's Review

Upon receipt of notice from the FCRB of its disagreement with the child placing agency's proposed change, the court must set a hearing date and provide notice of the scheduled hearing to:

- The child's foster parent(s);
- Each interested party; and
- The prosecuting attorney (if the prosecuting attorney has appeared in the case). MCL 712A.13b(5); MCR 3.966(C)(1)-(2).

"The court shall set a hearing no sooner than 7 and no later than 14 days after receipt of the notice from the [FCRB]." MCL 712A.13b(5). See also MCR 3.966(C)(2)(a). The Rules of Evidence do not apply, and the court may hear testimony from the child placing agency and any other interested party, including an Indian child's tribe. MCL 712A.13b(5)-(6); MCR 3.966(C)(2)(c). The court may also consider any other evidence relevant to the proposed change in the child's foster care placement. MCL 712A.13b(6); MCR 3.966(C)(2)(c).

The court must order the child's foster care placement continued or restored unless it finds that the proposed change in placement is in the child's best interests. MCL 712A.13b(6); MCR 3.966(C)(2)(d).

### 2. MCI Superintendent's Review

If the child is subject to MCI jurisdiction, control, or supervision, the MCI Superintendent must make a decision regarding a child's placement within 14 days of receiving notice from the FCRB of its disagreement with the child placing agency's proposed change. MCL 712A.13b(5). The MCI

Superintendent must also inform all interested parties of its decision. *Id.*

## 8.12 Review of Placement and Initial Service Plan

On any party's motion, the court must review custody orders, placement orders, and Initial Service Plans and may modify these orders and plans if it is in the child's best interests. MCL 712A.13a(17); MCR 3.966(A)(1). If the court receives a request for a child's removal from his or her parent(s), guardian, or legal custodian, "at the hearing on the motion, the court shall follow the placement procedures in MCR 3.965(B) and [MCR 3.965](C)."[57] MCR 3.966(A)(1).

> **Note:** In child protective proceedings, MCR 3.903(A)(19)(b) defines *party* to include "the petitioner, child, and respondent" and "the parent, guardian, or legal custodian."

If a child is removed from the home before the dispositional phase is complete, "the court shall conduct a dispositional hearing in accordance with MCR 3.973."[58] MCR 3.966(A)(2).

### A. Petition for Review of Placement Decision

Not more than 90 days after the child's removal, the supervising agency must make a placement decision, document the reasons for the decision in writing, and provide notice of the placement decision.[59] MCL 722.954a(4).

A person receiving the supervising agency's notice of the placement decision "may request in writing, within 5 days, documentation of the reasons for the decision[.]" MCL 722.954a(9). If the person disagrees with the supervising agency's placement decision, he or she may request the child's attorney to review the supervising agency's decision to determine whether the placement decision is in the child's best interest. *Id.* If the child's attorney determines that the supervising agency's placement decision is not in the child's best interest, the attorney must, within 14 days following the date of the decision, petition the court that ordered the out-of-home placement for a review hearing. *Id.*; MCR 3.966(B)(1)(e), (2).

Within seven days of the date of the petition, the court must begin a review hearing; the hearing must be on the record. MCR 3.966(B)(3).

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[57] See Section 7.6 for a discussion of MCR 3.965 (preliminary hearings).

[58] See Chapter 13 for information on dispositional hearings.

[59] See Section 8.10 for a detailed discussion of placing a child.

The court may review the supervising agency's placement decision once all of the following have been met:

> "(a) a child has been removed from the home;
>
> (b) the supervising agency has made a placement decision after identifying, locating, and consulting with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs as an alternative to nonrelative foster care;
>
> (c) the supervising agency has provided written notice of the placement decision;
>
> (d) a person receiving notice has disagreed with the placement decision and has given the child's lawyer-guardian ad litem written notice of the disagreement within 5 days of the date on which the person receives notice; and
>
> (e) the child's lawyer-guardian ad litem determines the decision is not in the child's best interest." MCR 3.966(B)(1).

## B. Review of Placement in a Qualified Residential Treatment Program

"Within 45 days of the child's initial placement in a qualified residential treatment program, the Agency shall file an ex parte motion requesting the court to approve or disapprove of the placement." MCR 3.966(D)(1). The motion must contain the qualified individual's assessment, determination, and documentation made by the qualified individual. MCR 3.966(D)(1)(a). "The Agency shall serve the ex parte motion and accompanying documentation on all parties." MCR 3.966(D)(1)(b). See also MCL 722.123a(3) (requiring court or its appointed administrative body to approve or disapprove the placement)."The court is not required to hold a hearing on the ex parte motion under [MCR 3.966(D)]." MCR 3.966(D).

The court, or an administrative body authorized or appointed by the court independently, must review the motion within 14 days of its filing. MCR 3.966(D)(2). The court or administrative body must also review any documentation in support of the motion. *Id*.; see also MCL 722.123a(3)(a). Following the review of the motion and documentation, the court or administrative body must issue an order approving or disapproving of the placement. *Id*.; MCL 722.123a(3)(c). The order issued must include a court's or an

administrative body's individualized findings concerning the following:

> "(a) whether the needs of the child can be met in a foster family home, or if not,
>
> (b) whether the placement of the child provides the most effective and appropriate level of care for the child in the least restrictive environment, and
>
> (c) whether the placement is consistent with the goals in the permanency plan for the child." MCR 3.966(D)(2). See also MCL 722.123a(3)(b).

The court's or administrative body's written documentation of the determination and QRTP approval or disapproval must be made part of the child's case plan. MCL 722.123a(4). The court must serve all parties with the order. MCR 3.966(D).

### C. Usage of Videoconferencing Technology

The use of videoconferencing technology to conduct review hearings in child protective proceedings is governed by MCR 3.904(B). See Section 1.7.

## 8.13 Interstate Compact on the Placement of Children (ICPC)

The Interstate Compact on the Placement of Children (ICPC), MCL 3.711 *et seq.*, "ensures protection and services to children placed across state lines for parental, foster care, adoption and residential placements by establishing procedures that verify placements are safe, suitable and able to provide proper care given the needs of the child." DHHS's Interstate Compact Manual (ICM), *Interstate Compact on the Placement of Children (ICPC) Overview ICM 100*, p 1.[60] The ICPC became effective in Michigan on May 29, 1984. MCL 3.711.

> **Note:** MCL 3.711, Article II(a) defines *child* as "a person who, by reason of minority, is legally subject to parental, guardianship, or similar control."
>
> MCL 3.711, Article II(d) defines *placement* as "the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill,

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> mentally defective, or epileptic or any institution primarily educational in character, and any hospital or other medical facility."

The purpose of the ICPC is to provide a legal framework and protections for children being placed across state lines. See MCL 3.711, Article I(a)-Article I(d). Limitations on the ICPC include:

> "(a) The sending or bringing of a child into a receiving state by the child's parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or the child's guardian and leaving the child with any such relative or nonagency guardian in the receiving state.
>
> (b) Any placement, sending, or bringing of a child into a receiving state pursuant to any other interstate compact to which both the state from which the child is sent or brought and the receiving state are party, or to any other agreement between said states which has the force of law." MCL 3.711, Article VIII.

## A. Placement Conditions

A sending agency must not place a child in foster care or preadoptive placement unless the sending agency complies with the ICPC placement conditions and the receiving state's governing laws. MCL 3.711, Article III(1).

> **Note:** MCL 3.711, Article II(b) defines a *sending agency* as "a party state, or officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency, or other entity which sends, brings, or causes to be sent or brought any child to another party state."
>
> MCL 3.711, Article II(c) defines a *receiving state* as "the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local public authorities or for placement with private agencies or persons."

Before a child is placed in a foster care or a preadoptive placement, the sending agency must provide written notice of the intent to place the child in the receiving state. MCL 3.711, Article III(2). The notice must contain:

> (1) The child's name, date, and place of birth.

> (2) The identity and address(es) of the parents or legal guardian.
>
> (3) The individual's, agency's, or institution's name and address where the child is being placed.
>
> (4) A statement indicating the reasons for the placement.
>
> (5) Evidence supporting the authority for placement.
>
> (6) Any additional evidence the receiving state requests. MCL 3.711, Article III(2)-(3).

The sending agency must not place the child in the receiving state until it receives written notice that the proposed placement is not contrary to the child's interests. MCL 3.711, Article III(4). When Michigan is the receiving state, the Department of Health and Human Services (DHHS) must send written approval for placement of a child in a home of an unrelated person. MCL 3.716; MCL 400.115c. If the intent of the placement is for adoption, the court's approval is also required. MCL 400.115c.

## B. Penalty for Illegal Placement

Violating any of the ICPC conditions will result in a violation of the ICPC in both the receiving state and the sending agency's state. MCL 3.711, Article IV. Either the receiving state or the sending agency's state may exercise jurisdiction over the violation in accordance with its laws. *Id.*

Any violation of the ICPC constitutes full and sufficient grounds for the suspension or revocation of the sending agency's license, permit, or other legal authority under which the agency places or cares for children. MCL 3.711, Article IV.

## C. Retention of Jurisdiction

### 1. Sending Agency Located in Michigan

A sending agency located in Michigan must retain jurisdiction over a child:

> (1) Sufficient to determine all matters relating to the custody, supervision, care, treatment, and disposition of the child, which it would have had if the child had remained in Michigan, until the child is adopted, reaches majority, becomes self-

> supporting, or is discharged with the concurrence of the appropriate authority in the receiving state.
>
> (2) Including the power to effect or cause a child's return or transfer to another placement.
>
> (3) Including financial responsibility for support and maintenance of the child during the period of placement. MCL 3.711, Article V(1).

However, a receiving state exercising jurisdiction over a delinquent child or a criminal matter takes precedence over a sending agency's retained jurisdiction. MCL 3.711, Article V(1).

### 2. Placement Made in Michigan

The sending agency must send its requests for home study and placement through the Michigan Interstate Compact Office.[61] See Michigan Interstate Compact Office for contact information.[62] The home study:

> "• Must be conducted and completed within 60 days of receipt of the request by the interstate compact office
>
> • Must include an assessment of the safety and suitability of the home and address the extent to which placement in the home would meet the needs of the child." DHHS's Interstate Compact Manual (ICM), *Interstate Compact on the Placement of Children (ICPC) Overview ICM 100*, p 1.[63]

Actual placement of the child is not made until after the training requirements are met and the ICPC Office gives its approval. DHHS's Interstate Compact Manual (ICM), *Interstate Compact on the Placement of Children (ICPC) Overview ICM 100*, pp 1-2.[64]

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[61] See DHHS form DHS-4332, *Interstate Compact Placement Request*.

[62] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

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## 8.14 Placement of Child Pursuant to Safe Delivery of Newborns Law

The Safe Delivery of Newborns Law (SDNL) permits a parent to leave a newborn with an emergency provider[65] without expressing an intent to return for the newborn. See MCL 712.1(2)(n) (defining *surrender*). The SDNL, MCL 712.1 *et seq.*, governs the procedures for surrendering a newborn. According to MCL 712.1(2)(k), a *newborn* is "a child who a physician reasonably believes to be not more than 72 hours old." The SDNL does not define the terms *parent*, *surrendering parent*, or *nonsurrendering parent*. *In re Miller*, 322 Mich App 497, 503 (2018).

If a parent surrenders a child who may be a newborn to an emergency service provider, the emergency service provider must assume the child is a newborn and immediately take the newborn into temporary protective custody. MCL 712.3(1). An emergency service provider that is not a hospital that takes a newborn into temporary protective custody must transfer the newborn to a hospital. MCL 712.5(1).

> **Note:** Although MCL 722.623 requires that suspected child abuse or child neglect be reported,[66] the reporting requirement does not apply to a newborn surrendered to an emergency service provider. MCL 712.2(2).

A hospital must accept an emergency service provider's transfer of a newborn. MCL 712.5(1). A hospital that takes a newborn into temporary protective custody must have the newborn examined by a physician. MCL 712.5(2). If the examining physician determines that there is reason to suspect the newborn experienced neglect or abuse (other than the parent surrendering the child to an emergency service provider), or if the examining physician believes the child is not a newborn, the physician must immediately report the suspected child abuse to the DHHS. MCL 712.5(2). However, if the examining physician does not suspect child abuse, the hospital must notify a child placing agency that it has taken a newborn into temporary protective custody. MCL 712.5(3). If the newborn is surrendered[67] under the SDNL, 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 must be listed as 'unknown' and the newborn must be listed as 'Baby Doe'." MCL 333.2822(1)(c). See also

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[65] See Section 3.1(D) for the definition and responsibilities of an emergency service provider. See also Section 4.2(D) for information on the court's jurisdiction over a newborn child surrendered to an emergency service provider, and Section 7.10(A) for information on the appointment of a Lawyer-Guardian Ad Litem under the Safe Delivery of Newborns Law (SDNL).

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

[67] MCL 333.2822(2) defines *surrender* as "that term as defined in . . . the Safe Delivery of Newborns Law, . . . MCL 712.1."

*In re Miller*, 322 Mich App 497, 501 n 1 (2018) (noting that "a birth certificate for a newborn surrendered under the SDNL must list the parents as '"unknown"' and the newborn as '"Baby Doe"'").

Once the hospital informs a child placing agency that it has taken a newborn into temporary protective custody, MCL 712.7 requires a child placing agency to do all of the following:

> (1) Immediately assume the care, control, and temporary protective custody of the newborn.
>
> (2) Immediately meet with a parent, if the parent's identity is known and he or she is willing.
>
> (3) Temporarily place the newborn with a prospective adoptive parent who has an approved preplacement assessment or a licensed foster parent if a petition for custody has been filed. See Section 8.14(B) for a detailed discussion of a petition for custody.
>
> (4) Unless the emergency service provider witnessed the birth, immediately request law enforcement assistance to investigate and determine whether the newborn is a missing child.
>
> (5) Within 48 hours of transferring physical custody to a prospective adoptive parent, petition the court in the county in which the prospective adoptive parent resides to provide authority to place the newborn and provide care for the newborn.[68] The petition must include all of the following:
>
> > (a) The transfer date of physical custody.
> >
> > (b) The emergency service provider's name and address.
> >
> > (c) Any written or oral information the surrendering parent provided by and to the emergency service provider.
> >
> > > **Note:** The emergency service provider that originally accepted the newborn must provide this information to the child placing agency. MCL 712.7(e)(*iii*).
>
> (6) Make reasonable efforts to identify, locate, and provide notice of the newborn's surrender to the nonsurrendering parent within 28 days of receiving notice from the hospital

[68] See SCAO form CCFD 01, *Petition for Placement Order of Surrendered Newborn Child*.

that it had taken temporary protective custody of the newborn.

(7) File a written report with the court that issued the order placing the newborn, indicating the efforts made to identify and locate the nonsurrendering parent and the result of those efforts.[69]

> **Note:** If the identity and address of the nonsurrendering parent are unknown, the child placing agency must provide notice of the newborn's surrender by publication in a newspaper of general circulation in the county where the newborn was surrendered. MCL 712.7(f).

## A. Immunity From Civil Damages

Except for an act or omission constituting gross negligence[70] or willful or wanton misconduct, a hospital and a child placing agency, and their agents or employees, are immune in a civil action for damages for an act or omission in accepting or transferring a newborn. MCL 712.2(4).

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

## B. Petition for Custody

### 1. Petition Requirements

A parent who surrenders custody of a newborn to an emergency service provider may file a petition with the court for custody of the newborn within 28 days after the newborn was surrendered. MCL 712.10(1).

A nonsurrendering parent, claiming to be the newborn's parent and wanting custody of the newborn, must file a petition for custody not more than 28 days after notice of surrender is published. MCL 712.10(1). See Section 8.14(C).

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[69] See SCAO form CCFD 02, *Order Placing Surrendered Newborn With Prospective Adoptive Parents*.

[70] *Gross negligence* is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 712.1(2)(h).

> **Note:** A nonsurrendering parent whose petition for custody was included in a complaint for divorce filed before the child was born has not timely filed a petition for custody of the surrendered newborn as is required by MCL 712.10(1). *In re Baby Boy Doe*, 509 Mich 1056, 1059 (2022). The statutory language used in MCL 712.10 demonstrates the Legislature's intent that a petition for custody of a newborn surrendered under the SDNL be made *after* the child is born; a petition for custody filed *before* a child is born does not constitute the petition for custody contemplated by MCL 712.10(1). *Baby Boy Doe*, 509 Mich at 1058.

A parent's petition for custody[71] must be filed in one of the following counties:

> (1) The county where the newborn is located.
>
> (2) If the newborn's location is unknown, the county where the emergency service provider to whom the newborn was surrendered is located, if known.
>
> (3) If the newborn or the emergency service provider to whom the newborn was surrendered cannot be located, the county where the parent is located. MCL 712.10(1).

If the petition for custody is filed in a court that did not issue the order placing the newborn, it must transfer the proceedings to that court. MCL 712.10(2).

## 2. Hearing to Determine Maternity or Paternity

Within seven days of a surrendering or nonsurrendering parent's petition for custody and before holding a custody hearing on the petition, the court must conduct a hearing to determine the newborn's biological parents. MCL 712.10(3).

If a petition for custody is filed, the court must order the newborn and each party claiming paternity or maternity to submit to "blood or tissue typing determinations or DNA identification profiling[.]"[72] MCL 712.11(1)-(2).

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[71] See SCAO form CCFD 03, *Petition of Parent for Custody of Surrendered Newborn Child*.

[72] See SCAO form CCFD 04, *Order for Blood or Tissue Typing or DNA Profile (Safe Delivery of Newborn Act)*.

> **Note:** A party claiming maternity need not submit to a DNA identification profiling or blood or tissue typing when an emergency service provider witnesses the birth and "sufficient documentation exists to support maternity[.]" MCL 712.11(2).

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

Maternity or paternity is presumed when the test results show a probability of 99 percent or higher and the DNA identification profile and summary report are admissible. MCL 712.11(3). A petitioner may move for summary disposition on the issue of maternity or paternity.[73] *Id.*

If the DNA identification profile and summary report are admissible and establish that the petitioner is not the newborn's parent, the court must dismiss the petition for custody. MCL 712.11(5).

### 3. Hearing to Determine Custody

After a petition for custody is filed and the court enters an order determining the newborn's biological parents, the court must hold a hearing to determine custody. See MCL 712.10(3).

The court must determine custody based on the newborn's best interests. MCL 712.14(1). With the goal of achieving permanence for the newborn at the earliest possible date, the court must consider, evaluate, and make a finding on each of the following factors:

> "(a) The love, affection, and other emotional ties existing between the newborn and the parent.
>
> (b) The parent's capacity to give the newborn love, affection, and guidance.
>
> (c) The parent's capacity and disposition to provide the newborn with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The permanence, as a family unit, of the existing or proposed custodial home.

[73] See SCAO form CCFD 04a, *Order Determining Maternity/Paternity of Surrendered Newborn Child*.

(e) The parent's moral fitness.

(f) The parent's mental and physical health.

(g) Whether the parent has a history of domestic violence [as defined in MCL 400.1501(d)(*i*)-(*iv*)].

[**Note:** MCL 400.1501(d) defines *domestic violence* as "the occurrence of any of the following acts by an individual 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 individual to feel terrorized, frightened, intimidated, threatened, harassed, or molested."]

(h) If the parent is not the parent who surrendered the newborn, the opportunity the parent had to provide appropriate care and custody of the newborn before the newborn's birth or surrender.

(i) Any other factor considered by the court to be relevant to the determination of the newborn's best interest." MCL 712.14(2).

After a review of the newborn's best interest factors, the court may issue an order[74] that does one of the following:

(1) Grants the parent legal or physical custody, or both, and:

(a) The court retains jurisdiction; or

(b) The court relinquishes jurisdiction.

[74] See SCAO form CCFD 06, *Order Determining Custody of Surrendered Newborn Child*.

(2) Orders the child placing agency to petition the court for jurisdiction under MCL 712A.2(b) if the court determines that granting custody to the petitioning parent is not in the newborn's best interest.

(3) Dismisses the petition. MCL 712.15.

## C. No Parental Request for Custody

A parent who surrenders a newborn and does not file a petition for custody within 28 days of the surrender is presumed to have knowingly released his or her parental rights to the newborn. MCL 712.10(1); MCL 712.17(1). Once the 28 days have expired, the child placing agency with authority to place the newborn must immediately file a petition with the court to determine whether the release must be accepted and whether the court must enter an order terminating the surrendering parent's parental rights.[75] MCL 712.17(2).

If a nonsurrendering parent fails to file a petition for custody of the newborn within 28 days of notice of the surrender was published, the child placing agency with authority to place the newborn must immediately petition the court to determine whether the court must enter an order terminating the nonsurrendering parent's parental rights. MCL 712.17(3).

The court must schedule a hearing on the petition from the child placing agency within 14 days of receiving the child placing agency's petition. MCL 712.17(4). At the hearing, the child placing agency must present evidence that demonstrates that the surrendering parent released the newborn and that demonstrates the efforts made by the child placing agency to identify, locate, and provide notice to the nonsurrendering parent. *Id.* The court must terminate the surrendering and nonsurrendering parents' parental rights[76] if it finds by a preponderance of the evidence that the child placing agency demonstrated all of the following:

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

(2) Reasonable efforts were made to locate the nonsurrendering parent.

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[75] See SCAO form CCFD 07, *Petition to Accept Release and Terminate Rights to Surrendered Newborn Child*.

[76] See SCAO form CCFD 08, *Order After Hearing on Petition to Accept Release and Terminate Rights to Surrendered Newborn Child*.

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

The SDNL 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 SDNL 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 the SDNL] 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).

## D. Closed Hearings and Confidentiality of Records

All hearings held under the SDNL are closed to the public. MCL 712.2a(1).

Records of the proceedings and all of the child placing agency's records created under the SDNL are confidential. MCL 712.2a(1)-(2).

> **Note:** Records of the proceedings are available to parties to the proceedings. MCL 712.2a(1).

Any individual who discloses information made confidential under MCL 712.2a(1) or MCL 712.2a(2) without a court order or specific authorization under federal or state law is civilly liable for damages proximately caused by the disclosure and is guilty of a misdemeanor. MCL 712.2a(3).

## E. Applicability of Other Law

The Child Custody Act or a provision found in another chapter of the Probate Code does not apply to SDNL proceedings unless the SDNL expressly provides otherwise. MCL 712.2(3).

### F. Safe Delivery of Newborns Program

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

## 8.15 Unregulated Custody Transfer

"Except as provided in [MCL 750.136c(4) and MCL 750.136c(5)], 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).

"[MCL 750.136c(3)] does not apply to services provided by an adoption attorney relating to a court supervised adoption proceeding under . . . MCL 710.21 to [MCL] 710.70, or to an adoption attorney providing services under any of the circumstances described under [MCL 750.136c(5)]." MCL 750.136c(4).

In addition, "[MCL 750.136c(3)] does 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 [DHHS].
>
> (b) By a child placing agency or the [DHHS].
>
> (c) In accordance with the interstate compact on placement of children [ICPC], . . . MCL 3.711 to [MCL] 3.717.[77]
>
> (d) In which the child will be returned in less than 180 days.

[77] For additional information on the ICPC, see Section 8.13.

(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.

(f) In accordance with . . . MCL 710.21 to [MCL] 710.70." MCL 750.136c(5).

**Note:** 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, 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 adoption of a minor ward or to release of a minor ward for adoption."[78] But see MCL 700.5103(2), which 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)][;]" MCL 700.5103(3), which provides an exception to the 180-day period for parents or guardians serving in the United States armed forces and on deployment to a foreign nation. MCL 750.136c(4).

"A person who violates [MCL 750.136c] 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(6).

[78] 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).

# Chapter 9: Pretrial Proceedings


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## *In this chapter. . .*

This chapter discusses several issues that arise following a preliminary inquiry or preliminary hearing, including which proceedings a judge must conduct and which proceedings a referee may conduct. The chapter discusses the court's ability to schedule a pretrial conference to isolate contested issues in a case and to set discovery, motion, and plea deadlines. The chapter also discusses issues that arise when a trial is held.

In an effort to provide trial courts with a quick practical guide through the process of pretrial hearings, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys: Pretrial Hearing*. This toolkit is accessible at https://www.courts.michigan.gov/administration/offices/child-welfare-services/cws-toolkit/.

# 9.1 Conducting Pretrial Proceedings

## A. Judges

A judge must conduct a jury trial. MCR 3.912(A)(1). A judge may also conduct a nonjury trial if a proper demand has been made. MCR 3.912(B).

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

A judge may be disqualified as provided in MCR 2.003. MCR 3.912(D). See *In re Schmeltzer,* 175 Mich App 666, 673-674 (1989) (disqualification of trial judge was not warranted, where the judge had presided over termination proceedings involving a younger sibling).

## B. Referees

MCR 3.913(A)(1) states that "the court may assign a referee to conduct a preliminary inquiry or to preside at a hearing other than those specified in MCR 3.912(A) and to make recommended findings and conclusions."[1]

In a child protective proceeding, "[o]nly a person licensed to practice law in Michigan may serve as a referee at a child protective proceeding other than a preliminary inquiry, preliminary hearing, a progress review under MCR 3.974(A) or [MCR 3.974(B)], or an emergency removal hearing under MCR 3.974(C). In addition, either an attorney or a nonattorney referee may issue an ex parte placement order under MCR 3.963(B)."[2] MCR 3.913(A)(2)(b).

An attorney referee may conduct a contempt hearing but may not issue an order holding a person in contempt of court. *In re Contempt of Steingold (In re Smith),* 244 Mich App 153, 157 (2000); MCL 712A.10(1).

A judge's communication with a referee concerning a matter before the court and about which the referee makes recommendations and prepares orders for the court is not "ex parte communication" under

[1] For purposes of a child protective proceeding, the only applicable listed exception is a jury trial. MCR 3.912(A)(1).

[2] For information on ex parte placement orders under MCR 3.963(B), see Section 3.2(A).

Canon 3 of the Michigan Code of Judicial Conduct. See Michigan Ethics Opinion JI-159 (2025) at 1:

> "Referees are employees of the court and, as such, are considered part of the judicial system. They are subject to the same ethical obligations that govern judges, including compliance with the Judicial Canons. These Canons impose strict requirements regarding impartiality, confidentiality, and the proper administration of justice. Because referees are hired and compensated by the court, they do not act as advocates or representatives for any party but instead serve as neutral officers tasked with assisting the court in resolving matters efficiently and fairly. Their obligation to confidentiality extends to all aspects of their role, including communications with judges, parties, and counsel."

## 1. Length of Authority

Unless a party has demanded a trial by judge or jury, a referee may conduct the trial and further proceedings through the dispositional phase. MCR 3.913(B).

## 2. Scope of Authority

MCL 712A.10(1) sets out the scope of a referee's authority. *In re AMB*, 248 Mich App 144, 216 (2001). Specifically, MCL 712A.10(1) provides:

> "Except as otherwise provided in [MCL 712A.10(2)[3]] and [MCL 712A.14], [MCL 712A.14a], and [MCL 712A.14b],[4] the judge may designate a probation officer or county agent to act as referee in taking the testimony of witnesses and hearing the statements of parties upon the hearing of petitions alleging that a child is within the provisions of [the Juvenile Code], if there is no objection by parties in interest. The probation officer or county agent designed to act as referee shall do all of the following:

[3] MCL 712A.10(2) pertains to juvenile proceedings, which exceeds the scope of this benchbook. For additional information on MCL 712A.10(2), see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 2.

[4] MCL 712A.14(2), MCL 712A.14a(3), and MCL 712A.14b(1) specifically provide a referee with the authority to issue an order under certain circumstances.

> (a) Take and subscribe the oath of office provided by the constitution.
>
> (b) Administer oaths and examine witnesses.
>
> (c) If a case requires a hearing and the taking of testimony, make a written signed report to the judge containing a summary of the testimony taken and a recommendation for the court's findings and disposition." MCL 712A.10(1).

"[A] hearing referee's recommendations and proposed order *cannot* be accepted without judicial examination[;] '[t]hey are a helpful time-saving crutch and no more[, and] [t]he responsibility for the ultimate decision and the exercise of judicial discretion in reaching it still rests squarely upon the trial judge' and may not be delegated." *In re AMB*, 248 Mich App at 217-218, quoting *Campbell v Evans*, 358 Mich 128, 131 (1959). Consequently, when it is apparent that someone other than a judge made the substantive legal decision in a case [where the referee's authority extends only to making a recommendation and proposed order], the only appropriate appellate response is to reverse." *In re AMB*, 248 Mich App at 217-218, quoting *Campbell v Evans*, 358 Mich 128, 131 (1959) (referee acted outside his authority when he entered an order permitting the withdrawal of a critically-ill premature infant's life support).

Referees are bound by the rules governing the Judicial Tenure Commission and the Michigan Code of Judicial Conduct. MCR 9.201(B)(2) (defining *judge* to include referees); MCR 9.202 (providing the standards of judicial conduct).

### 3. Required Summary of Testimony and Recommended Findings and Conclusions

MCL 712A.10(1)(c) provides that if a case requires a hearing and the taking of testimony, the referee must make a written signed report to the judge containing a summary of the testimony taken and a recommendation for the court's findings and disposition. Similarly, MCR 3.913(A)(1) requires a referee to "make recommended findings and conclusions."

### 4. Advice of Right to Appeal Referee's Recommended Findings and Conclusions

A referee must advise the parties of their right to request that a judge review the referee's recommended findings and

conclusions. MCR 3.913(C)(1). See Section 20.1 for a detailed discussion on reviewing a referee's recommendation.

### C. Table Summarizing Who May Conduct What Proceeding

| | Judge | Attorney Referee | Non-Attorney Referee |
|---|---|---|---|
| Preliminary inquiries | ✓ | ✓ | ✓ |
| Preliminary hearings | ✓ | ✓ | ✓ |
| Hearings to review a child's placement | ✓ | ✓ | |
| Bench trials | ✓ | ✓ | |
| Jury Trials | ✓ | | |
| Initial disposition hearings | ✓ | ✓ | |
| Progress reviews | ✓ | ✓ | ✓ |
| Review hearings | ✓ | ✓ | |
| Emergency removal hearings | ✓ | ✓ | ✓ |
| Ex parte placement orders | ✓ | ✓ | ✓ |
| Permanency planning hearings | ✓ | ✓ | |
| Termination of parental rights hearings | ✓ | ✓ | |
| Post-termination review hearings | ✓ | ✓ | |

## 9.2 Pretrial Conferences

The court may direct the parties to appear at a pretrial conference. MCR 3.922(E). "The scope and effect of a pretrial conference are governed by MCR 2.401, except as otherwise provided in or inconsistent with [subchapter 3.900 of the court rules]." MCR 3.922(E).

A pretrial conference may be held at any time after the commencement of the action. MCR 2.401(A). The court must give reasonable notice of the scheduling of a conference. *Id.*

## 9.3 Discovery

### A. Materials Discoverable As of Right

"The following materials are discoverable as of right in all proceedings and shall be produced no less than 21 days before trial, even without a discovery request:

> (a) all written or recorded statements and notes of statements made by the juvenile or respondent that are in possession or control of petitioner or a law enforcement agency, including oral statements if they have been reduced to writing;
>
> (b) all written or recorded statements made by any person with knowledge of the events in possession or control of petitioner or a law enforcement agency, including, but not limited to, police reports, allegations of neglect and/or abuse included on a complaint submitted to Child Protective Services, and Child Protective Services investigation reports, except that the identity of the reporting person shall be protected in accordance with MCL 722.625;
>
> (c) the names of all prospective witnesses;
>
> (d) a list of all prospective exhibits;
>
> (e) a list of all physical or tangible objects that are prospective evidence that are in the possession or control of petitioner or a law enforcement agency;
>
> (f) the results of all scientific, medical, psychiatric, psychological, or other expert tests, experiments, or evaluations, including the reports or findings of all experts, that are relevant to the subject matter of the petition;
>
> (g) the results of any lineups or showups, including written reports or lineup sheets;
>
> (h) all search warrants issued in connection with the matter, including applications for such warrants, affidavits, and returns or inventories;

(i) any written, video, or recorded statement that pertains to the case and made by a witness whom the party may call at trial;

(j) the curriculum vitae of an expert the party may call at trial and either a report prepared by the expert containing, or a written description of, the substance of the proposed testimony of the expert, the expert's opinion, and the underlying bases of that opinion; and

(k) any criminal record that the party may use at trial to impeach a witness." MCR 3.922(A)(1).

**Note:** A lawyer-guardian ad litem's case file is not discoverable. MCL 712A.17d(3).

### B. Materials Discoverable by Motion

Upon a party's motion, the court may permit discovery of any other materials and evidence (including untimely requested materials and evidence that would have been discoverable as of right[5] if timely requested during the 21-day period). MCR 3.922(A)(2). "Absent manifest injustice, no motion for discovery will be granted unless the moving party has requested and has not been provided the materials or evidence sought through an order of discovery." *Id.*

### C. Court's Authority

"Depositions may only be taken as authorized by the court." MCR 3.922(A)(3).

The court may also serve process on additional witnesses and order production of other evidence. MCR 3.923(A)(3).

### D. Sanctions

Failure to comply with MCR 3.922(A)(1) and MCR 3.922(A)(2) may result in sanctions in keeping with those assessable under MCR 2.313. MCR 3.922(A)(4).

## 9.4 Motion Practice

A brief discussion on motion practice requirements is contained in this section. For a more comprehensive discussion, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 9.

[5] See Section 9.3(A) for a list of materials discoverable as of right.

Motion practice is governed by MCR 2.119. MCR 3.922(D).

> **Note:** In civil cases, MCR 2.116(C)(10) allows a court to grant a motion for summary disposition when "there is no genuine issue as to any material fact . . . ." This rule does not apply to child protective proceedings. *In re PAP*, 247 Mich App 148, 154-155 (2001). In *In re PAP*, *supra* at 155, the Court of Appeals rejected the Department of Health and Human Services's (DHHS's) argument on appeal that because MCR 2.116(G) provides that MCR 2.119 applies to summary disposition motions, and MCR 2.119 applies to child protective proceedings, MCR 2.116 applies to child protective proceedings. The Court of Appeals termed the DHHS's logic "specious" and concluded that the argument was "simply without merit." *Id.*

## A. Time Requirements

Unless the court rules or the trial court (for good cause) state otherwise, a written motion (excluding ex parte motions), notice of hearing, and any supporting brief or affidavit must be served:

> (1) at least nine days before the time set for hearing if by first-class mail.[6]
>
> (2) at least seven days before the time set for hearing if delivered to the attorney under MCR 2.107(C)(1), delivered to the party under MCR 2.107(C)(2), or delivered electronically under MCR 1.109(G)(6)(a). MCR 2.119(C)(1).

Unless the court rules or the trial court (for good cause) state otherwise, any response to a motion (including a brief or affidavits) must be served:

> (1) at least five days before the hearing if by first-class mail.
>
> (2) at least three days before the hearing if delivered to the attorney under MCR 2.107(C)(1), delivered to the party under MCR 2.107(C)(2), or delivered electronically under MCR 1.109(G)(6)(a).[7] MCR 2.119(C)(2).

[6] MCR 2.107(C)(3) defines mailing a copy as "enclosing it in a sealed envelope with first class postage fully prepaid, addressed to the person to be served, and depositing the envelope and its contents in the United States mail. Service by mail is complete at the time of mailing."

The court may set a different time for serving a motion or a response. MCR 2.119(C)(3). "[The court's] authorization must be endorsed in writing on the face of the notice of hearing or made by separate order." *Id.*

Unless the court sets a different time, a motion must be filed at least seven days before the hearing, and any response to a motion required or permitted must be filed at least three days before the hearing. MCR 2.119(C)(4).

## B. Required Form of Written Motions

Unless a motion is made during a hearing or trial, it must be in writing, state with particularity the grounds and authority on which it is based, state the relief or order sought, and be signed by the party or attorney as provided in MCR 1.109(D)(3) and [MCR 1.109](E)." MCR 2.119(A)(1).

A motion or response to a motion that presents an issue of law must be accompanied by a brief citing authority for its proposition.[8] MCR 2.119(A)(2). A trial court should not deny a motion if it is filed without a brief, and the motion itself contains citations to legal authority supporting its proposition. *Woods v SLB Property Mgmt, LLC*, 277 Mich App 622, 625-626 (2008).

Unless the court permits otherwise, the combined length of a motion and brief may not exceed 20 pages double spaced.[9] MCR 2.119(A)(2)(a). Permission to file a motion and brief in excess of the 20-page limit should be requested sufficiently in advance of the hearing on the motion to allow the opposing party adequate opportunity for analysis and response. See *People v Leonard*, 224 Mich App 569, 578-579 (1997).

The motion and notice of hearing may be combined into one document. MCR 2.119(A)(3).

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[7] "Notwithstanding any other provision of [MCR 2.107], until further order of the Court, all service of process except for case initiation 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) but should otherwise comply as much as possible with the provisions of [MCR 2.107(C)(4)]." MCR 2.107(G).

[8] Citations of unpublished Court of Appeals opinions "must comply with the provisions of MCR 7.215(C)[.]" MCR 2.119(A)(2).

[9] Many jurisdictions have local court rules governing the form of motions.

## C. Affidavits

Unless specifically required by rule or statute, a pretrial motion need not be verified or accompanied by an affidavit. See MCR 1.109(D)(3).

Although an affidavit is not required, if one is included with a motion, MCR 2.119(B) sets out its required form. *Porter v Porter*, 285 Mich App 450, 461 (2009). Under MCR 2.119(B)(1), an affidavit filed in support of or in opposition to a motion must:

> "(a) be made on personal knowledge;
>
> (b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and
>
> (c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit."

In addition, an affidavit must:

> (1) be verified by oath or affirmation, MCR 1.109(D)(1)(f);
>
> (2) include sworn or certified copies of any documents it refers to, unless the documents
>
> > (a) have already been filed;
> >
> > (b) are matters of public record in the county in which the action is pending;
> >
> > (c) are in the adverse party's possession, and the affidavit or motion states this fact; or
> >
> > (d) are of such nature that it would be unreasonable or impracticable to attach them, and the affidavit or motion states this fact, MCR 2.119(B)(2); and
>
> (3) be served on the opposing party within the same time frame as written motions, MCR 2.119(C)(1).[10]

[10] See Section 9.4(A) on time requirements for written motions.

## D. Evidentiary Hearings

Generally, a trial court has discretion to determine whether an evidentiary hearing is necessary. *IGCFCO III, LLC v One Way Loans, LLC*, ___ Mich App ___, ___ (2024) ("The trial court need not hold an evidentiary hearing if it can sufficiently decide an issue on the basis of evidence already presented."). See also *MacIntyre v MacIntyre*, 472 Mich 882 (2005) ("[A]s long as the circuit court is able to determine independently what custodial placement is in the best interests of the children, an evidentiary hearing is not required in all cases.") (cleaned up); MCR 3.210(C)(8) ("In deciding whether an evidentiary hearing is necessary with regard to a postjudgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion.").

An evidentiary hearing must be conducted whenever a defendant challenges the admissibility of evidence on constitutional grounds. *People v Reynolds*, 93 Mich App 516, 519 (1979). Where a defendant fails to substantiate a claim that evidence is inadmissible on constitutional grounds or it is apparent that the defendant's allegations do not rise to the level of a constitutional violation, no evidentiary hearing is required. *People v Johnson*, 202 Mich App 281, 285 (1993).

The parties have the right to a judge at an evidentiary hearing. See MCR 3.912(B) (parties have the right to a judge at a hearing on the formal calendar,[11] which includes evidentiary hearings).

The use of videoconferencing technology to conduct evidentiary hearings is governed by MCR 3.904(B). See Section 1.7.

## E. Motions for Rehearing or Reconsideration

### 1. Requirements

A motion for reconsideration or rehearing must be filed and served 21 days after entry of an order deciding the motion, unless another rule provides a different procedure for reconsideration of a decision. MCR 2.119(F)(1).

Responses and oral arguments are not permitted unless ordered by the court. MCR 2.119(F)(2).

[11] MCR 3.903(A)(10) defines *formal calendar* as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

"The moving party must demonstrate a palpable error by which the court and the parties have been misled" and show that correcting the error will result in a different disposition in order for a court to grant a motion for rehearing or reconsideration. MCR 2.119(F)(3).

"'[R]ehearing [or reconsideration] will not be ordered on the ground merely that a change of members of the bench has either taken place, or is about to occur.'" *People v White (Kadeem) (White (Kadeem) II)*, 493 Mich 962, 962 (2013) (quoting *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883), and applying MCR 2.119(F)(3) to a motion for rehearing of the Michigan Supreme Court's decision[12] affirming the judgment of the Court of Appeals).[13]

## 2. Decision

MCR 2.119(F) does not restrict the court's discretion to hear or consider motions it has already denied. *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 722-723 (1986). The rule merely provides guidance to the court on when it may deny motions for reconsideration or rehearing. *Smith, supra* at 723.

Generally, a motion for rehearing or reconsideration that presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. MCR 2.119(F)(3). However, MCR 2.119(F)(3) "does not categorically prevent a trial court from revisiting an issue even when the motion for reconsideration presents the same issue already ruled upon; in fact, it allows considerable discretion to correct mistakes." *Macomb Co Dep't of Human Servs v Anderson*, 304 Mich App 750, 754 (2014), citing *In re Moukalled Estate*, 269 Mich App 708, 714 (2006).

"The purpose of MCR 2.119(F) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal, but at a much greater expense to the parties. The time requirement for filing a motion for reconsideration or rehearing insures that the motion will be brought expeditiously." *Bers v Bers*, 161 Mich App 457, 462 (1987) (citation omitted).

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[12] *People v White (Kadeem) (White (Kadeem) I)*, 493 Mich 187 (2013).

[13] On April 12, 2013, the Michigan Supreme Court issued similar orders applying MCR 2.119(F)(3) to motions for reconsideration in several civil cases. See, e.g., *Boertmann v Cincinnati Ins Co*, 493 Mich 963 (2013).

A court's decision to grant or deny a motion for reconsideration is an exercise of discretion. *Kokx v Bylenga*, 241 Mich App 655, 658-659 (2000). "[MCR 2.119(F)] allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx, supra* at 659. The court also has discretion to limit its reconsideration to the issues it believes warrant further consideration. *Id.*

A motion for reconsideration or rehearing may not be entertained by a court after entry of an order changing venue to another court, unless the order specifies an effective date. *Frankfurth v Detroit Med Ctr,* 297 Mich App 654, 656, 658-661 (2012) (holding that "once a transfer of venue is made, the transferee court has full jurisdiction over the action [under MCL 600.1651] and, therefore, the transferor court has none[; a]ny motion for rehearing or reconsideration would have to be heard by whichever court has jurisdiction over the action at the time the motion is brought, which, after entry of an order changing venue, would be the transferee court[]").[14]

## 9.5 Closing Child Protective Proceedings to the Public

Generally, all juvenile court proceedings on the formal calendar[15] and all preliminary hearings must be open to the public. MCR 3.925(A)(1).[16] However, upon motion of a party or a victim, the court may close proceedings to the general public during the testimony of a child witness or a victim to protect the welfare of either.[17] MCL 712A.17(7); MCR 3.925(A)(2). In making such a decision, the court must consider:

(1) the age and maturity of the witness or victim;

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[14] The *Frankfurth* Court noted that "the better practice might be to make orders changing venue effective as of some reasonable time [after entry of that order]." *Frankfurth*, 297 Mich App at 662.

[15] MCR 3.903(A)(10) defines *formal calendar* as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

[16] "[R]ecords of these juvenile delinquency cases . . . 'are not open to the general public and are open only to persons having a legitimate interest[.]'" *In re CWC*, ___ Mich ___, ___ (2026), quoting MCL 712A.28(3). "[B]y statute, the public cannot access personally identifying information about juvenile delinquency cases, including the minor child's name, in the circuit court's records." *CWC*, ___ Mich at ___. In *CWC*, "the juvenile sought to ensure the case caption referred to him by his initials rather than his full name and filed a stipulated motion with the court," which was denied. *Id*. at ___; see also *In re CWC*, unpublished order of the Court of Appeals, entered June 23, 2026 (Docket Nos. 377693; 378462). "The public policy interest codified by the Legislature does not lessen when a juvenile exercises their right to an appeal." *CWC*, ___ Mich at ___. Therefore, "[c]onsistent with the legislative purpose of MCL 712A.28(3) to protect the juvenile's identity," the Michigan Supreme Court reversed and remanded the case to the Court of Appeals "with instructions to grant the stipulated motion to amend the case caption." *CWC*, ___ Mich at___.

[17] A court may also limit access to court proceedings under MCR 8.116(D).

(2) the nature of the proceedings; and

(3) the witness's or victim's preference, and if the witness or victim is a child, the preference of his or her parent, guardian, or legal custodian. MCL 712A.17(7); MCR 3.925(A)(2).

Except where the victim requests a copy of the adjudication order under MCL 780.799, the records from a hearing that is closed under MCL 712A.17(7) must only be opened by court order to persons having a legitimate interest. MCL 712A.28(2)-(3).

## 9.6 Demand for Jury Trial or Trial by Judge

### A. Right to Jury Trial

MCR 3.911(A) states that "[t]he right to a jury in a juvenile proceeding exists only at the trial."[18] Once a child protective petition[19] is filed against a parent, "[t]he respondent[-]parent can either admit the allegations in the petition or plead no contest to them[,] MCR 3.971[,] . . . [or] the respondent[-parent] may demand a trial (i.e., an adjudication) and contest the merits of the petition[,] MCR 3.972. If a trial is held, the respondent[-parent] is entitled to a jury, MCR 3.911(A)[.]"[20] *In re Sanders*, 495 Mich 394, 405 (2014) (finding unconstitutional the one-parent doctrine, which permitted the court to "enter dispositional orders affecting parental rights of *both* parents" once "jurisdiction [was] established by adjudication of only *one* parent").[21]

Further, "MCL 712A.17(2) affords the [unadjudicated parent] the *statutory* right to demand a jury because a parental-fitness hearing qualifies as a noncriminal hearing under the juvenile code." *In re Sanders*, 495 Mich 394, 418 n 15, 422 (2014).

"Once a court assumes jurisdiction over a child [after adjudication], the parties enter the dispositional phase[, and u]nlike the adjudicative phase, . . . the respondent[-parent] is not entitled to a jury determination of facts[ under] MCR 3.911(A)."[22] *In re Sanders*, 495 Mich at 406.

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[18] However, this is not a constitutional right. *McKeiver v Pennsylvania*, 403 US 528, 545 (1971). But see *In re Sanders*, 495 Mich 394, 418 n 15, where the Michigan Supreme Court "express[ed] no opinion about whether the jury guarantee in MCL 712A.17(2) is constitutionally required."

[19] See Chapter 7 for a detailed discussion of child protective petitions.

[20] See Chapter 10 for additional information on pleading to allegations in the child protective petition, and Chapter 12 for additional information on trials.

[21] For additional information on the procedural due process rights of the unadjudicated parent, see Section 4.3(C)(2). For a discussion on the dispositional phase of child protective proceedings, see Chapter 13.

## B. Demand or Waiver of Jury Trial

A party who is entitled to a trial by jury may demand a jury trial by filing a written demand with the court. MCR 3.911(B). The demand must be filed within "(1) 14 days after the court gives notice of the right to jury trial, or (2) 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later, but no later than 21 days before trial. The court may excuse a late filing in the interest of justice." *Id.*

MCL 712A.17(2) allows an interested person to demand a jury trial, or the court, on its own motion, to order a jury trial in noncriminal trials.

## C. Demand for Judge to Preside at Hearing

Parties have the right to a judge at a hearing on the formal calendar.[23] MCR 3.912(B). A judge must preside at a jury trial. MCR 3.912(A)(1).

> **Note:** The right to have a judge sit as factfinder is not absolute. A party who fails to make a timely demand for a judge to serve as factfinder at a bench trial may find that a referee will conduct all further proceedings, and that the right to demand a judge has been waived. See Section 9.6(D) for information on referees.

In a bench trial, a party may demand that a judge preside rather than a referee by filing a written demand with the court. MCR 3.912(B). The demand must be filed within "(1) 14 days after the court gives notice of the right to a judge, or (2) 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later, but no later than 21 days before trial. The court may excuse a late filing in the interest of justice." *Id.*

## D. Referees

Unless a party has demanded a trial by judge or jury, a referee may conduct the trial and further proceedings through the dispositional phase.[24] MCR 3.913(B).

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[22] See Section 4.3 for a discussion on taking jurisdiction of a child, and Chapter 13 for a discussion on the dispositional phase of child protective proceedings.

[23] MCR 3.903(A)(10) defines *formal calendar* as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

[24] See Section 9.1(B) for a more detailed discussion of referees.

# Chapter 10: Pleas of Admission or No Contest


10.1 When Respondent May Make a Plea of Admission or No Contest ..... 10-2
10.2 Requirements Before Court Can Accept Plea ..... 10-4
10.3 Records of Plea Proceedings ..... 10-8
10.4 Withdrawal of Pleas ..... 10-9
10.5 Combined Adjudicative and Dispositional Hearings ..... 10-9


## *In this chapter. . .*

A respondent may enter a plea of admission or no contest to allegations contained in a petition. If the court accepts a respondent's plea, the court takes jurisdiction over the child or children involved in the case. This chapter sets out the rules governing the taking of pleas of admission or no contest. It discusses when a plea may be entered, required advice of rights, and establishing a factual basis for a plea. The effect of a plea by one respondent, but not the other, is also noted.

A parent may consent to the termination of his or her parental rights. See Section 17.8.

# 10.1 When Respondent May Make a Plea of Admission or No Contest

An individual involved in a child protective proceeding may be eligible for admission to a family treatment court program if, among other requirements, "the individual has a substance use disorder," MCL 600.1099ee(a), and "[t]he allegations contained in the petition [are] related to the abuse, illegal use, or possession of a controlled substance or alcohol," MCL 600.1099ff(a). See Section 7.7 for information about family treatment courts.

"A respondent may make a plea of admission or of no contest to the original allegations in the petition." MCR 3.971(A).

With an amended petition,[1] however, the court has the discretion whether to permit a respondent to enter a plea of admission or no contest. MCR 3.971(A). The plea may be taken at any time after the authorization of a petition if:

> (1) the petitioner and the child's attorney are notified of the plea offer to the amended petition; and
>
> (2) the petitioner and the child's attorney are given an opportunity to object before the plea is accepted. MCR 3.971(A).

## A. Plea Must Be By Respondent

The plea of admission or no contest to the allegations in the petition must be made by the respondent. *In re SLH*, 277 Mich App 662, 670 (2008). A *respondent* is "the parent, guardian, legal custodian, or nonparent adult who is alleged to have committed an offense against a child." MCR 3.903(C)(12). An *offense against a child* is "an act or omission by a parent, guardian, nonparent adult, or legal custodian asserted as grounds for bringing the child within the jurisdiction of the court" under the Juvenile Code. MCR 3.903(C)(9).

In *In re SLH*, 277 Mich App at 670, the trial court erred in finding jurisdiction over the children based on the mother's plea to a petition that alleged only that she found the respondent having sex with their child and that the respondent admitted as much. Reversing the trial court, the Court of Appeals concluded:

> "The petition does not allege that the mother permitted, or failed to prevent, the alleged sexual abuse from

[1] "'Amended petition' means a petition filed to correct or add information to an original petition, as defined in [MCR 3.903](A)(20) before it is adjudicated." MCR 3.903(C)(2).

> occurring. Therefore, although the mother was a 'party' to the proceeding, by definition, she was not a respondent. Because only a respondent may enter a plea and the mother was not a respondent, she could not enter a plea.
>
> * * *
>
> At trial, the mother certainly could testify regarding what she witnessed and the alleged admission by respondent, but these could not be the basis for a plea, because they involve no wrongdoing by her. Although the failure of one parent to protect a child from abuse or neglect by the other parent can be grounds for taking jurisdiction over the child, in this case the petition did not allege that the mother failed to protect her daughters, and the court's belief that 'there's a suggestion there was a failure to protect this child from inappropriate behavior from her father' is insufficient to serve as an allegation against the mother if it is not contained in the petition. Only allegations contained in the original, or amended, petition can be the basis for jurisdiction." *In re SLH*, 277 Mich App at 670-671.

## B. Plea by One Respondent-Parent Does Not Extend Court's Jurisdiction to Unadjudicated Second Parent

Although "courts may assume jurisdiction over a child on the basis of the adjudication of one parent[,]" procedural "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights." *In re Sanders*, 495 Mich 394, 412 n 8, 415 (2014) In *In re Sanders*, the Court of Appeals found the one-parent doctrine[2] unconstitutional and vacated the trial court's order that limited the unadjudicated parent's contact with his children and required that he comply with a service plan following the trial court's assumption of jurisdiction over the children based on the respondent-mother's no contest plea to allegations of child neglect and abuse and remanded the case to the trial court. *Id.* at 402-403, 422-423. For additional information on the procedural due process rights of the unadjudicated parent, see Section 4.3(C)(2). For a discussion on the dispositional phase of child protective proceedings, see Chapter 13.

[2] "In cases in which jurisdiction has been established by adjudication of only *one* parent, the one-parent doctrine allow[ed] the court to then enter dispositional orders affecting the parental rights of *both* parents." *In re Sanders*, 495 Mich 394, 407 (2014).

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

"[N]either the admissions made by [the adjudicated parent] nor [the unadjudicated parent's] failure to object to those admissions constituted an adjudication of [the unadjudicated parent's] fitness[.]" *In re SJ Temples*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2015 (Docket No. 323246)[3] (finding that the trial court violated the unadjudicated parent's "due process rights by subjecting him to dispositional orders without first adjudicating him as unfit[]").

## 10.2 Requirements Before Court Can Accept Plea

"[R]espondents have a fundamental right to direct the care, custody, and control of [their child]. And the Due Process Clause of the Fourteenth Amendment requires that, for a plea to constitute an effective waiver of a fundamental right, the plea must be voluntary and knowing. . . . [MCR 3.971] reflect[s] this due-process guarantee." *In re Ferranti*, 504 Mich 1, 21 (2019).

### A. Advice of Rights and Possible Disposition

"Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing that is made a part of the file:

> (1) of the allegations in the petition;
>
> (2) of the right to an attorney, if respondent is without an attorney;
>
> (3) that, if the court accepts the plea, the respondent will give up the rights to
>
> > (a) trial by a judge or trial by a jury,
> >
> > (b) have the petitioner prove the allegations in the petition by a preponderance of the evidence,
> >
> > (c) have witnesses against the respondent appear and testify under oath at the trial,

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

(d) cross-examine witnesses, and

(e) have the court subpoena any witnesses the respondent believes could give testimony in the respondent's favor;

(4) of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent.

(5) if parental rights are subsequently terminated, 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. Failure to provide required notice under this subsection does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent;

(6) that appellate review is available to challenge any errors in the adjudicatory process, which may be challenged in an appeal from the court's initial order of disposition;

(7) that an indigent respondent is entitled to appointment of an attorney to represent the respondent on any appeal as of right and to preparation of transcripts; and

(8) the respondent may be barred from challenging the assumption of jurisdiction in an appeal from an order terminating parental rights if they do not timely file an appeal of the initial dispositional order under MCR 7.204 or a delayed appeal under MCR 3.993(C)."[4] MCR 3.971(B).

**Note**: The procedural requirements in MCR 3.971(B) only apply to pleas of admission or no contest given in the *adjudication* phase of the proceeding when a respondent pleads to statutory grounds for termination; MCR 3.971(B) does not apply to a voluntary release of parental rights, which may be given in the *dispositional* phase of proceedings *after* the court has already assumed

[4] For additional information on filing an appeal of the initial disposition under MCR 3.993(A)(1)-(2), a delayed appeal under MCR 3.993(C), or a motion to restore appellate rights under MCR 3.993(F), see Section 20.3.

jurisdiction. *In re Pawloski*, ___ Mich App ___, ___ (2025).

A respondent's plea of admission or no contest is defective if the court fails to provide him or her with the advice of rights and possible disposition as provided in MCR 3.971(B) before accepting the respondent's plea. *In re SLH*, 277 Mich App 662, 672-673 (2008).

"The respondent may challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the court fails to properly advise the respondent of their right to appeal pursuant to [MCR 3.971](B)(6)-(8)." MCR 3.971(C).

See *In re Ferranti*, 504 Mich 1, 21 (2019) (vacating the trial court's order of adjudication where the respondent-parents' due process rights were violated when "[i]n taking the respondents' pleas, the court did not advise them that they were waiving any rights[, n]or did the court advise them of the consequences of their pleas, as required by our court rules[, MCR 3.971(C)-(D)[5]].") (citations omitted). But see *In re Pederson*, 331 Mich App 445, 466 (2020), where the trial court advised respondents of *most* of the rights waived by entry of a plea unlike the court in *Ferranti*. In *Pederson*, the trial court only failed to advise respondents that their pleas could be used against them during subsequent termination proceedings, MCR 3.971(B)(4). *In re Pederson*, 331 Mich App at 466. Importantly, respondents in *In re Pederson* were advised of the rights listed in MCR 3.971(B)(3), which concern the adjudicative phase of the proceedings. *Pederson*, 331 Mich App at 467-468. Therefore, respondents were aware that their pleas waived their right to have a trial to determine whether jurisdiction over their children was proper—that is, the court's failure to advise respondents that their pleas could be used during later termination hearings did not taint the adjudicative phase of the proceedings. *Id*. at 468-469. The trial court did err by failing to advise respondents of the consequence of their pleas as provided in MCR 3.971(B)(4), but the error was unpreserved and subject to review for plain error affecting substantial rights. *Pederson*, 331 Mich App at 470. Respondents failed to show that they were prejudiced by the error, that the error was outcome-determinative, or that the error seriously affected the fairness, integrity or public reputation of the proceedings, and therefore, respondents were not entitled to relief. *Id*. at 470-471.

## B. Knowing, Understanding, Voluntary, and Accurate Plea

Before accepting a plea, the court must satisfy itself that the plea is knowingly, understandingly, and voluntarily made. MCR

[5] Formerly MCR 3.971(B)-(C).

3.971(D)(1). The court must also establish the accuracy of the plea. MCR 3.971(D)(2). See *In re Wangler/Paschke*, 498 Mich 911, 911 (2015) ("the manner in which the trial court assumed jurisdiction violated the respondent-mother's due process rights" where "the trial court violated [MCR 3.971(D)(1)[6]] by failing to satisfy itself that the respondent-mother's plea was knowingly, understandingly, and voluntarily made, and violated [MCR 3.971(D)(2)[7]] by failing to establish support for a finding that one or more of the statutory grounds alleged in the petition were true").

### 1. Knowing and Understanding Plea

The court need not ask respondent directly if his or her plea is knowingly made. *In re King*, 186 Mich App 458, 466-467 (1990) (trial court's lengthy discussion with respondent regarding a plea agreement clearly showed that the plea was knowingly made).

### 2. Voluntary Plea

In a child protective proceeding, "[t]he court shall not accept a plea of admission or of no contest without satisfying itself that the plea is knowingly, understandingly, and voluntarily made." MCR 3.971(D)(1).

### 3. Accurate Plea

The court must establish support for a finding that one or more of the statutory grounds alleged in the petition are true before accepting a plea of admission or no contest. MCR 3.971(D)(2). Jurisdiction cannot be conferred by consent of the parties. *In re Youmans*, 156 Mich App 679, 684-685 (1986) ("Although the respondents are free to admit the truth of the allegations and relieve the prosecutor of the need to put forth proofs, the admissions do not establish the court's jurisdiction. The court must make an independent determination of whether the allegations are sufficient to permit the court to assume jurisdiction over the matter.")

If the respondent is entering a plea of admission, the accuracy of the plea should be established by questioning the respondent. MCR 3.971(D)(2). See *In re SLH*, 277 Mich App 662, 673 (2008) (inadequate factual basis established where, during the only dialogue exchanged, the mother admitted to an

[6] Formerly MCR 3.971(C)(1).

[7] Formerly MCR 3.971(C)(2).

allegation after the court simply read the petition's first paragraph and asked the mother whether she admitted it); *In re Waite*, 188 Mich App 189, 195 (1991) (inadequate factual basis established at plea proceeding where the mother admitted negligence only upon the court's questioning, and the mother's testimony "did not indicate that, at the time [she] entrusted her son to her friend's temporary care, she had any basis to believe that her friend either would not or could not provide proper care").

If the respondent pleads no contest, the court must not question him or her, but, by some other means, must establish support for a finding that one or more of the statutory grounds alleged in the petition are true. MCR 3.971(D)(2). The court must also state why a plea of no contest is appropriate. *Id*. See *In re Guilty Plea Cases*, 395 Mich 96, 134 (1975), for examples of appropriate reasons to accept a plea of no contest.

### C. Plea Does Not Waive Respondent's Right To Contest Adequacy of Reunification Efforts

A respondent's no contest plea to statutory grounds alleged in support of terminating the respondent's parental rights is not a waiver of the respondent's right to challenge the adequacy of the DHHS's efforts at reunification. *In re MJC*, 349 Mich App 42, 54 (2023). "DHHS's duty to make reasonable efforts toward reunification is distinct from its duty to prove at least one statutory ground for termination by clear and convincing evidence[.]" *Id*. at 50 (holding that although the DHHS's failure to make reasonable efforts at reunification would require reversal, respondent did not preserve the issue and could not demonstrate plain error affecting respondent's substantial rights; in fact, the DHHS regularly offered services to respondent aimed to assist respondent in remedying respondent's drug addiction, but respondent "was chronically noncompliant and wholly failed to benefit from the services offered").

## 10.3 Records of Plea Proceedings

"A record of all hearings must be made. All proceedings on the formal calendar[8] must be recorded by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108. A plea of

[8] MCR 3.903(A)(10) defines *formal calendar* as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

admission or no contest, including any agreement with or objection to the plea, must be recorded." MCR 3.925(B).

## 10.4 Withdrawal of Pleas

A respondent must raise issues concerning the court's noncompliance with the court rule governing pleas in the trial court in order to preserve the issue for appeal. *In re Campbell*, 170 Mich App 243, 249-250 (1988).

The trial court did not err in refusing to allow respondent-father to withdraw his plea where he failed to meet a condition of the plea agreement (failing to comply with the service agreement), and the Department of Health and Human Services (DHHS) moved to terminate his parental rights). See *In re Zelzack*, 180 Mich App 117, 124-126 (1989).

## 10.5 Combined Adjudicative and Dispositional Hearings

MCR 3.973(B), which governs notice of dispositional hearings, contemplates a combined adjudicative and dispositional hearing: "[u]nless the dispositional hearing is held immediately after the trial, notice of hearing may be given by scheduling it on the record in the presence of the parties or in accordance with MCR 3.920." MCR 3.973(C) assigns to the court's discretion the interval between the trial and the dispositional hearing (not to exceed 28 days when a child is in placement). Accordingly, the two hearings may be combined if necessary preparations are made before the hearing, including preparation of a case service plan.[9] MCR 3.973(E)(2).

> **Note:** Combined hearings are often conducted when the allegations in the petition are uncontested.

[9] See Section 13.6 for a detailed discussion of case service plans.

# Chapter 11: Common Evidentiary Issues in Child Protective Proceedings


11.1 Applicability of Michigan Rules of Evidence in Child Protective Proceedings ..... 11-2
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## *In this chapter. . .*

This chapter discusses rules of evidence that apply specifically to child protective proceedings, such as the abrogation of privileges, the admissibility of hearsay statements by children under 10 years old, and the admissibility of evidence of maltreatment of a sibling. It also discusses generally applicable rules of evidence that are frequently at issue in child protective proceedings, such as hearsay exceptions, witness

competence, expert witness testimony, and the admissibility of photographic evidence.

## 11.1 Applicability of Michigan Rules of Evidence in Child Protective Proceedings

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

See Appendix C for the applicability of the Michigan Rules of Evidence during Child Protective Proceedings.

## 11.2 Constitutional Issues

### A. Clear and Convincing Evidence Standard

Because US Const, Am XIV, provides natural parents with a fundamental liberty interest in the care, custody, and management of their children, the state must provide fundamentally fair procedures when it seeks to permanently terminate parental rights. *Santosky v Kramer,* 455 US 745, 752-754 (1982). Consequently, at a termination proceeding, the state must prove parental unfitness by clear and convincing evidence. *Santosky*, *supra* at 769.[1] See also MCL 712A.19b(3).[2]

Evidence is clear and convincing when it

> "'produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to

[1] The United States Supreme Court granted the states with discretion to implement a higher standard of proof. *Santosky*, 455 US at 769-770. However, Michigan uses the clear and convincing standard. See *In re Utrera*, 281 Mich App 1, 15 (2008).

[2] The standard of proof at trial is by a preponderance of the evidence, regardless of whether the petition contains a request to terminate parental rights. MCR 3.972(C).

> be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'" *Hunter v Hunter*, 484 Mich 247, 265 (2009), quoting *In re Martin (Michael)*, 450 Mich 204, 227 (1995).

## B. Privilege Against Self-Incrimination[3]

Both the state and federal constitutions prohibit compelled self-incrimination in a criminal case. US Const, Am V (no person "shall be compelled in any criminal case to be a witness against himself"); Const 1963, art 1, §17 ("[n]o person shall be compelled in any criminal case to be a witness against himself"). "The constitutional protection is worded as one applicable to criminal cases, and thus it applies in any situation in which a criminal prosecution might follow, regardless of how likely or unlikely that outcome may seem. Accordingly, '[t]he privilege can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory.' . . . The privilege may be invoked even when criminal proceedings have not been instituted or even planned." *In re Blakeman*, 326 Mich App 318, 332-333 (2018) (even though respondent had not been charged with a crime, the privilege applied throughout the child protection proceeding because "an inculpatory statement by respondent could be used in the future by the . . . prosecutor") (citations omitted; alteration in original).

"The privilege against self-incrimination permits a [witness] to refuse to answer official questions in any other proceeding, no matter how formal or informal, if the answer may incriminate him in future criminal proceedings." *In re Blakeman*, 326 Mich App at 333. However, a witness "'has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate.'" *People v Ferency*, 133 Mich App 526, 533-534 (1984), quoting *Brown v United States*, 356 US 148, 155 (1958). The trial judge must determine that the witness's answer does not have a tendency to incriminate him or her before ordering the witness to respond. *Ferency*, 133 Mich App at 534. This inquiry should be conducted outside a jury's presence. See *In re Stricklin*, 148 Mich App 659, 666 (1986).

To protect a person's privilege against self-incrimination, courts may stay civil proceedings pending the outcome of criminal proceedings. *Landis v North American Co*, 299 US 248, 254-255 (1936).

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[3] See also Section 8.9 (privilege against self-incrimination does not allow a parent to refuse to undergo a psychological examination) and Section 16.6 (privilege does not allow parent to refuse to produce a child subject to a court order).

A court has inherent authority to stay a proceeding pending the outcome of a separate action even though the parties to both proceedings are not the same. *Id*. at 254-255.

"In [*Stricklin*], [the Court of Appeals] recognized two interrelated requirements for a Fifth Amendment violation:

- "compulsion, i.e., evidence that 'a person is unable "to remain silent unless he chooses to speak in the unfettered exercise of his own will,"' that is grounded on a penalty exacted for appellants' refusal to testify."
- "there must be a penalty exacted on respondent for refusing to admit to the crime sufficient to compel self-incrimination." *In re Blakeman*, 326 Mich App at 333-334, 336.

"The compulsion of nonincriminating testimony is not the sort of compulsion contemplated by the Fifth Amendment." *In re Stricklin*, 148 Mich App at 666. Where the respondent-parents' testimony was presumed to be nonincriminating, the penalty exacted for respondent-parents' refusal to testify at termination proceedings was insufficient to amount to a breach of the parents' rights of self-incrimination. *Id.* at 664-666 (holding that the purported penalty—the increased risk of loss of parental rights by refusing to testify during the protective proceeding—did not amount to compulsion prohibited by the state and federal constitutions. The parents' asserted increased risk of loss of their parental rights implied that they would present nonincriminating testimony during the civil proceedings, making their choice not to give nonincriminating testimony a matter of trial strategy, not a matter of protecting their constitutional rights). But see *In re Blakeman*, 326 Mich App at 334-336 (even though "respondent waived his Fifth Amendment right against self-incrimination at the adjudicative bench trial[, and h]e provided 'nonincriminating' testimony, . . . there was a sufficient showing of compulsion at the dispositional review hearing" when the trial court "conditioned reunification [with his children] on an admission of guilt to [an act of criminal] child abuse"; his "right to remain silent was no longer unfettered, and there was sufficient compulsion 'to be a witness against himself'" when the trial court required the respondent "to choose between his liberty interests or his children.").

"The preservation of one's parental rights . . . may not be used to condition the waiver of one's right against self-incrimination[.] *In re Blakeman*, 326 Mich App at 339. Conditioning unsupervised visitation and possible reunification on a respondent's admission to a crime that he or she denies committing offends due process and violates the respondent's Fifth Amendment right against self-

incrimination. *Id*. at 339. In *Blakeman*, the respondent refused to admit to committing severe child abuse that the trial court determined he had committed. *Id*. at 336. The trial court then ordered him "to remain outside the family home, was granted only supervised visiting time [with his children], and was informed by the government that he most likely face[d] the future termination of his parental rights to his four children." *Id*. at 336. This ultimatum constituted "an extreme and detrimental choice–admit to the child abuse at therapy, which could be used in future criminal proceedings [as well as subject him to perjury charges]–or continue to be separated from his children and eventually lose his parental rights." *Id*. at 336. But see *In re K D Simpson*, ___ Mich App ___, ___ (2024), where the Court rejected respondent's claim based on *Blakeman* that his parental rights were terminated because he refused to confess his substance abuse. "Regardless of whether a hypothetical admission by respondent-father that he used drugs would tend to incriminate him, respondent-father has not shown he was compelled to provide any such admission in a way that would violate the Fifth Amendment." *Id*. at ___. "Rather, the issue in the present case was whether respondent-father was able to overcome his substance-abuse issues in order to be reunified with [the child], and the trial court's overriding concern was not with respondent-father admitting to drug use but with him addressing the substance-abuse problem that the evidence overwhelmingly showed." *Id*. at ___.

## 11.3 Abrogation of Privileges in Child Protective Proceedings

"MCL 722.631 governs privileges in child protective proceedings." MCR 3.901(A)(3). MCL 722.631 states:

> "Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy[4] in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to [the Child Protection Law]. This section does not relieve a member of the clergy from reporting suspected child abuse or child neglect under [MCL 722.623] if that member of the clergy receives information

[4] A *member of the clergy* is "a priest, minister, rabbi, Christian science practitioner, spiritual leader, or other religious practitioner, or similar functionary of a church, temple, spiritual community, or recognized religious body, denomination, or organization." MCL 722.622(z).

> concerning suspected child abuse or child neglect while acting in any other capacity listed under [MCL 722.623]."

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

Abrogation of privileges under MCL 722.631 does not depend on whether the person initiating the child protective proceeding was required to report the suspected abuse, or whether the proffered testimony directly addresses the abuse or neglect that gave rise to the protective proceeding. *In re Brock*, 442 Mich 101, 116-120 (1993) (physician and psychologist were permitted to testify concerning a parent's past history of mental illness despite the fact that a neighbor reported the suspected neglect that gave rise to the proceeding). See also MCR 3.973(E)(1), which states in relevant part that, "as provided by MCL 722.631, no assertion of an evidentiary privilege, other than the privilege between attorney and client, shall prevent the receipt and use, at the dispositional phase, of materials prepared pursuant to a court-ordered examination, interview, or course of treatment."

## 11.4 Admissibility of Child's Statement

MCR 3.972(C)(2) governs the admissibility of a child's statement:

> "Any statement made by a child under 10 years of age or an incapacitated individual under 18 years of age with a developmental disability as defined in [MCL 330.1100a(27)][5] regarding an act of child abuse,[6] child neglect,[7] confirmed sexual abuse,[8] or confirmed sexual exploitation,[9] as defined in MCL 722.622(g), (k), (q), or (r), performed with or on the child by another person may be admitted into evidence through the testimony of a person

[5] See Section 11.8(A) for a definition of *developmental disability*.

[6] *Child abuse* is defined in MCL 722.622(g). See 2022 PA 67, effective 11/1/2022.

[7] *Child neglect* is defined in MCL 722.622(k).See 2022 PA 67, effective 11/1/2022.

> who heard the child make the statement as provided in this subrule.[10]
>
> > (a) A statement describing such conduct may be admitted regardless of whether the child is available to testify or not, and is substantive evidence of the act or omission if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. This statement may be received by the court in lieu of or in addition to the child's testimony.
> >
> > (b) If the child has testified, a statement denying such conduct may be used for impeachment purposes as permitted by the rules of evidence.
> >
> > (c) If the child has not testified, a statement denying such conduct may be admitted to impeach a statement admitted under subrule (2)(a) if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement denying the conduct provide adequate indicia of trustworthiness."

The totality of the circumstances surrounding the making of the statement determine its reliability. *In re D M A N*, ___ Mich App ___, ___(2025). "Circumstances indicating the reliability of a hearsay statement may include spontaneity, consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of a similar age, and lack of motive to fabricate." *Id*. at ___ (quotation marks and citation omitted).

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[8]The definition of *sexual abuse* that appeared in MCL 722.622(z) was deleted. The definition of *confirmed sexual abuse* was added to MCL 722.622. MCL 722.622(q). A *confirmed case* for purposes of the Child Protection Law "means the [DHHS] has determined, by a preponderance of the evidence, that child abuse or child neglect occurred by a person responsible for the child's health, welfare, or care." MCL 722.622(n). *Confirmed sexual abuse* for purposes of the Child Protection Law was added to MCL 722.622 and "means a confirmed case that involves sexual penetration, sexual contact, attempted sexual penetration, or assault with intent to penetrate as those terms are defined in . . . MCL 750.520a." MCL 722.622(q). See 2022 PA 67, effective 11/1/2022.

[9]The definition of *sexual exploitation* that appeared in MCL 722.622(aa) was deleted. *Confirmed sexual exploitation* for purposes of the Child Protection Law was added to MCL 722.622 and "means a confirmed case that involves allowing, permitting, or encouraging a child to engage in prostitution, or allowing, permitting, encouraging, or engaging in the photographing, filming, or depicting of a child engaged in a listed sexual act as that term is defined in . . . MCL 750.145c." MCL 722.622(r). See 2022 PA 67, effective 11/1/2022.

[10]The definition of *confirmed serious abuse or neglect* was added to MCL 722.622; it "means a confirmed case of mental injury or physical injury or neglect to a child that involves any of the following: (*i*) Battering, torture, or other serious physical harm[;] (*ii*) Loss or serious impairment of an organ or limb[;] (*iii*) Life-threatening injury[;] (*iv*) Murder or attempted murder[;] (*v*) Serious mental harm." MCL 722.622(p). *Serious mental harm and serious physical harm* were also added; those terms are defined in . . . MCL 750.136b." MCL 722.622(ee). See 2022 PA 67, effective 11/1/2022.

## A. Notice of Intent

A proponent of a statement under MCR 3.972(C) must notify all parties of the intent to introduce the statement at trial. MCR 3.922(F).

Within 21 days after the parties received notice of a trial date (but no later than seven days before trial), the proponent must file with the court and serve all parties the written notice of intent. MCR 3.922(F)(1). The written notice of intent must indicate that the proponent intends to "admit out-of-court hearsay statements under MCR 3.972(C)(2), including the identity of the persons to whom a statement was made, the circumstances leading to the statement, and the statement to be admitted." MCR 3.922(F)(1)(d).

Within seven days of being notified of the proponent's intent (but no later than two days before trial) to use a child's statement, the nonproponent parties must provide written notice to the court of the intent to offer rebuttal testimony or evidence opposing the request. The notice must include the identity of any witnesses to be called. MCR 3.922(F)(2).

"The court may shorten the time periods provided in [MCR 3.922](F) if good cause is shown." MCR 3.922(F)(3).

## B. Testifying to Child's Statement

"For purposes of a trial with respect to adjudication, a statement by a child under the age of 10 concerning and describing an act of sexual abuse[, child abuse, child neglect, or sexual exploitation] performed on the child by another person may be admitted into evidence 'through the testimony of a person who heard the child make the statement,' regardless of the child's availability, but *only if* the court finds at a hearing before trial 'that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness.'" *In re Martin*, 316 Mich App 73, 80 (2016), quoting MCR 3.972(A)(2) (emphasis added).

"[A] videorecorded statement taken in compliance with MCL 712A.17b [(listing statutory requirements for videorecording a child's statement)[11]] must be admitted at a [pretrial] tender-years hearing and can be used by the trial court to assess whether a proposed witness who took the videorecorded statement should be permitted to testify at trial about the statement, i.e., to assess whether 'the circumstances surrounding the giving of the statement provide[d] adequate indicia of trustworthiness,' MCR

[11] For additional information on MCL 712A.17b, see Section 2.3(B)(3).

3.972(C)(2)(a)." *In re Martin*, 316 Mich App at 83. In *In re Martin*, 316 Mich App at 83-84, the Court of Appeals reversed the trial court's order of adjudication with respect to the respondent-father and the order terminating his parental rights, and "remand[ed] for new adjudication proceedings in compliance with MCR 3.972(C)(2)(a) and other applicable law" where "the forensic interviewer [whose recorded questioning of the child raised claims by the child of sexual abuse by the respondent-father] did not testify at trial with respect to the child's statements made in the interview[, and t]he trial court did not employ the [videorecorded statement] to determine whether the forensic interviewer should be allowed to testify under MCR 3.972(C)(2)(a)[, but the trial court instead erroneously] . . . used the [videorecorded statement], in and of itself, to adjudicate [the] respondent-father."

However, "the tender-years hearsay exception does not require that the child's statements be made in a recorded interview or as a result of a forensic interview." *In re D M A N*, ___ Mich App ___, ___ (2025). In *D M A N*, the child's hearsay statements that her father sexually abused her were appropriately admitted through her teacher's testimony under the tender years exception to MCR 3.972(C)(2). *D M A N*, ___ Mich App at ___. Although the statements were not made during a forensic interview or a recorded interview, they were found to be reliable, in part because they were spontaneous. *Id*. at ___. The teacher initiated the interview to address the child's inappropriate behavior in the classroom, not to ascertain "whether she was being sexually abused," and the child volunteered details of her father's conduct. *Id*. at ___.

## C. Totality of Circumstances Surrounding Child's Statement

The court must examine the totality of the circumstances surrounding the making of a child's statement to determine whether there are adequate indicia of trustworthiness. *In re Archer*, 277 Mich App 71, 82 (2007). Such circumstances include:

- spontaneity of the statement,
- consistent repetition of the statement,
- the child's mental state,
- the child's use of terminology unexpected by a child of similar age, and
- lack of a motive to fabricate. *In re Archer*, 277 Mich App at 82.

In *In re Archer*, 277 Mich App at 82-83, the minor children's out-of-court video statements were properly admitted at trial through the testimony of a forensic interviewer under MCR 3.972(C)(2)(a) because the totality of the circumstances provided adequate indicia of trustworthiness when the forensic interviewer was trained to conduct interviews of abused children, the forensic interviewer followed the state's forensic interviewing protocol when interviewing the children, the children used age-appropriate language in describing the abuse, there was no evidence of the children fabricating the stories or having a motive to lie, and there was photographic evidence to corroborate one of the children's description of the abuse.

The child's hearsay statements that her father sexually abused her were appropriately admitted through her teacher's testimony under the tender years exception to MCR 3.972(C)(2) where the circumstances surrounding the statements supported their reliability. *In re D M A N*, ___ Mich App___, ___ (2025). The Court concluded that the child's statements were spontaneous because she volunteered them during an interview with the teacher about the child's inappropriate behavior in the classroom. *Id*. at ___. The child's inappropriate classroom behavior also indicated that her statements were reliable, as the child mimicked actions that respondent-mother testified that the child and respondent-father engaged in at home. *Id*. at ___. Further supporting the reliability of the child's initial disclosure was the question she asked after being removed from her maternal grandmother's care—the child "asked if she could return home if her 'daddy' stopped 'doing stuff.'" *Id*. at ___.

In *In re L A LeDee*, ___ Mich App ___, ___ (2026), the forensic interviewer's testimony at a tender-years hearing about her use of the forensic interview protocol, her qualifications for interviewing the minor, the minor's substantive claims of abuse, the videorecording of the forensic interview, and the cross-examination by respondent's counsel established "'circumstances surrounding the giving of the statement [to] provide adequate indicia of trustworthiness' under MCR 3.972." The interviewer's tender-years hearing testimony was later admitted at respondent's trial as substantive evidence of abuse to support termination under MCL 712A.19b(3)(b)(*i*). *LeDee*, ___ Mich App at ___.

## 11.5 Exclusions From and Exceptions to Hearsay Rule

This section discusses hearsay issues that may arise in child protective proceedings. For a more detailed discussion of hearsay issues, including evidence excluded from the definition of hearsay, as well as exceptions to

the rule against the admission of hearsay, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 5.

MRE 801(c) defines *hearsay* as "a statement that:

> (1) the declarant does not make while testifying at the current trial or hearing; and
>
> (2) a party offers in evidence to prove the truth of the matter asserted in the statement."

"'Statement' means a person's oral assertion, written assertion, or nonverbal conduct if the person intended it as an assertion." MRE 801(a).

"Hearsay is not admissible unless [the Michigan Rules of Evidence] provide otherwise." MRE 802 ("the hearsay rule").[12] Exclusions from, and exceptions to, the hearsay rule include:

- admissions by party opponents, see MRE 801(d)(2);
- present sense impressions, see MRE 803(1);
- excited utterances, see MRE 803(2);
- statements of then-existing mental, emotional, or physical condition, see MRE 803(3);
- statements made for purposes of medical treatment or diagnosis in connection with treatment, see MRE 803(4);
- records of regularly conducted activity, see MRE 803(6);
- public records, see MRE 803(8);
- judgment of a previous conviction, see MRE 803(22);
- certain former testimony or statements of an unavailable witness, see MRE 804(b)(1); MRE 804(b)(3); MRE 804(b)(6); and
- residual exception to the hearsay rule, see MRE 807.[13]

[12] A child's statement may be admissible under MCR 3.972(C). See Section 11.4.

[13] The *residual hearsay exception* was previously referred to as the "catch-all" exception and found in MRE 803(24) and MRE 804(b)(7). This exception to the hearsay rule now appears in MRE 807. See ADM File No. 2021-10, effective January 1, 2024.

## A. Admissions by a Party-Opponent

A respondent's statements may be offered against him or her in child protective proceedings. See MRE 801(d)(2). A party's own statement is not hearsay if it is offered against the party. MRE 801(d)(2). A statement by a party-opponent need not be against that party's interest to be admitted, as is required for admissibility of statements under MRE 804(b)(3).[14] *Shields v Reddo,* 432 Mich 761, 774 n 19 (1989).

## B. Present Sense Impressions

A present sense impression is defined as "[a] statement describing or explaining an event or condition made while or immediately after the declarant perceived it." MRE 803(1). A present sense impression is admissible even though the declarant is available as a witness. MRE 803.

The following three conditions must be met for evidence to be admissible under the present sense impression exception to the hearsay rule:

> "(1) [T]he statement must provide an explanation or description of the perceived event[.]
>
> (2) [T]he declarant must personally perceive the event[.][]
>
> (3) [T]he explanation or description must be 'substantially contemporaneous' with the event." *People v Hendrickson*, 459 Mich 229, 236 (1998).

## C. Excited Utterances

An *excited utterance* is defined as "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." MRE 803(2). An excited utterance is admissible even though the declarant is available as a witness. MRE 803.

Before a statement may be admitted as an excited utterance, the following requirements must be met:

> (1) The statement must arise out of a startling event.

[14] Now MRE 804(b)(4). See ADM File No. 2021-10, effective January 1, 2024. Under MRE 804(b)(4), a statement against interest is not excluded by the hearsay rule if the declarant is unavailable as a witness. See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 5, for a detailed discussion.

(2) The statement must relate to the circumstances of the startling event.

(3) The statement must be made before there has been time for contrivance or misrepresentation by the declarant. *People v Kowalak (On Remand)*, 215 Mich App 554, 557 (1996).

"[I]t is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection." *People v Smith (Larry)*, 456 Mich 543, 551 (1998).

In the following cases, the statements were found admissible as excited utterances:

- *People v Houghteling*, 183 Mich App 805, 806-808 (1990) (statements of five-year-old made 20 hours after sexual assault in response to mother's questions were admissible);
- *People v Garland,* 152 Mich App 301, 307 (1986) (statements by seven-year-old victim of sexual abuse made one day after event were admissible where child had limited mental ability and was threatened);
- *People v Soles,* 143 Mich App 433, 438 (1985) (statements made five days after particularly heinous sexual assault were admissible);
- *People v Slaton*, 135 Mich App 328, 334-335 (1984) (tape recording of 911 call was admissible under MRE 803(2) where statements made by both a caller and 911 operator related to a startling event and made under stress of that event); and
- *People v Lovett,* 85 Mich App 534, 543-545 (1978) (statements by three-year-old witness to rape-murder made one week later were admissible; child stayed with grandparents during the interval between event and statements, and statements were spontaneous).

In the following cases, the statements were found inadmissible as excited utterances:

- *People v Straight,* 430 Mich 418, 425-428 (1988) (statements regarding sexual abuse made one month after event, during examination, and in response to repeated questioning were inadmissible);
- *People v Scobey,* 153 Mich App 82, 85 (1986) (statements by 13-year-old two and five days after event were inadmissible); and

- *People v Sommerville*, 100 Mich App 470, 489-490 (1980) (statements to police made 24 hours after assault were inadmissible).

## D. Statements of Then-Existing Mental, Emotional, or Physical Condition

MRE 803(3) allows admission of statements "of the declarant's then-existing state of mind, or emotional, sensory, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of declarant's will." Such statements are admissible even though the declarant is available as a witness. MRE 803.

Before a statement may be admitted under MRE 803(3), the court must conclude that the declarant's state of mind is relevant to the case. *Int'l Union UAW v Dorsey* (*On Remand*), 273 Mich App 26, 36 (2006).

Where the declarant states that he or she is afraid, the statement may be admissible to show the declarant's state of mind. *In re Utrera*, 281 Mich App 1, 18-19 (2008). In *In re Utrera*, *supra* at 18-19, the Michigan Court of Appeals affirmed the trial court's decision to admit statements the declarant (a child) made to her therapist regarding the fear the child felt towards her mother. The Court of Appeals concluded that these hearsay statements were admissible because they pertained to the declarant's then-existing mental or emotional condition. *Id.* at 18.

## E. Statements Made for Purposes of Medical Treatment or Diagnosis in Connection With Treatment

MRE 803(4) provides an exception to the hearsay rule, regardless of the declarant's availability as a witness, for a statement that:

> "(A) is made for — and is reasonably necessary to — medical treatment or diagnosis in connection [with] treatment; and
>
> (B) describes medical history, past or present symptoms or sensations, their inception, or their general cause."

"'Particularly in cases of sexual assault, in which the injuries might be latent . . . a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment.'" *People v Johnson (Jordan)*, 315 Mich App 163, 193 (2016), quoting *People v Mahone*, 294 Mich App 208, 215 (2011).

The rationales for admitting statements under MRE 803(4) are "'(1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient.'" *Merrow v Bofferding*, 458 Mich 617, 629 (1998), quoting *Solomon v Shuell*, 435 Mich 104, 119 (1992).

Before a hearsay statement can be found inherently trustworthy and necessary for obtaining adequate medical diagnosis and medical treatment under MRE 803(4), the following must be found:

- The statement was made for purposes of medical treatment or diagnosis in connection with treatment.
- The statement describes medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the injury.
- The statement is supported by the "self-interested motivation to speak the truth to treating physicians in order to receive proper medical care[.]"[15]
- The statement is reasonably necessary to the diagnosis and treatment of the patient. *People v Meeboer (After Remand)*, 439 Mich 310, 322 (1992).

This exception is frequently used in child abuse or neglect cases. Typically, a child suspected of being neglected or abused is examined by a physician and makes statements concerning injuries and their cause. Note, however, that the exception is not limited to statements made to physicians. See *People v Jones*, ___ Mich App ___, ___ (2025) (three-year old's prior statement to Emergency Room nurse about abuse by defendant admitted under MRE 803(4)[16] was not an abuse of discretion); *People v Johnson (Jordan)*, 315 Mich App 163, 192-195 (2016) (statements made to sexual assault nurse examiner (SANE) were admissible); *People v McElhaney*, 215 Mich App 269, 280-282 (1996) (statements made to physician's assistant were admissible); *People v James*, 182 Mich App 295, 297 (1990) (statements made to child sexual abuse expert were admissible); *People v Skinner*, 153 Mich App 815, 821 (1986) (statements made to

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[15] See Section 11.5(E) for a list of ten factors to assist in determining the trustworthiness of statements of patients age ten and under. See also *Meeboer*, 439 Mich at 324-325.

[16] MRE 803(4) was amended effective January 1, 2024. *Jones*, ___ Mich App at ___ n 3. At the time of the *Jones* trial, the medical treatment exception in the former version of MRE 803(4) read:

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment. [*Jones*, ___ Mich App at ___, quoting former MRE 803(4).]

child psychologist were admissible); *In re Freiburger*, 153 Mich App 251, 256-258 (1986) (statements made to psychiatric social worker were admissible).

### 1. Trustworthiness: Age of Declarant

In assessing the trustworthiness of a declarant's statements, Michigan appellate courts have drawn a distinction based upon the declarant's age. For declarants over the age of ten, a rebuttable presumption arises that they understand the need to speak truthfully to medical personnel. *People v Van Tassel (On Remand)*, 197 Mich App 653, 662 (1992).[17] For declarants ten years of age and younger, a trial court must inquire into the declarant's understanding of the need to be truthful with medical personnel. *Meeboer (After Remand)*, 439 Mich at 326. "'While the inquiry into the trustworthiness of the declarant's statement is just one prong of the analysis under MRE 803(4), it is very important that the understanding to tell the truth to the physician be established.'" *People v Jones*, ___ Mich App ___, ___ (2025), quoting *Meeboer*, 439 Mich at 324. The *Jones* Court held that the admissibility of a deceased four-year-old's prior statement to an ER nurse about abuse by defendant under MRE 803(4)[18] was a close evidentiary question when the trial court did not consider whether the child understood the importance of being truthful with the nurse, but that "the trial court's decision regarding a close evidentiary question generally does not constitute an abuse of discretion." *Jones*, ___ Mich App at ___.

The inquiry into trustworthiness requires a trial court to "consider the totality of circumstances surrounding the declaration of the out-of-court statement." *Meeboer*, *supra* at 324. The Michigan Supreme Court established ten factors to address when considering the totality of the circumstances:

- The age and maturity of the declarant.
- The manner in which the statement was elicited.

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[17] The *Van Tassel* Court discussed the declarant's age with respect to MRE 803A (applicable only to criminal and delinquency proceedings). Presumably, the Court's decision would also apply to a child protective proceeding. See MCR 3.972(C), which contains language similar to MRE 803A.

[18] MRE 803(4) was amended effective January 1, 2024. *Jones*, ___ Mich App at ___ n 3. At the time of the *Jones* trial, the medical treatment exception in the former version of MRE 803(4) read:

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment. [*Jones*, ___ Mich App at ___, quoting the former MRE 803(4).]

- The manner in which the statement was phrased.
- The use of terminology unexpected of a child of similar age.
- The circumstances surrounding initiation of the examination.
- The timing of the examination in relation to the assault or trial.
- The type of examination.
- The relation of the declarant to the person identified as the assailant.
- The existence of or lack of motive to fabricate.
- The corroborative evidence relating to the truth of the child's statement. *Meeboer*, 439 Mich at 324-325.

"In addition to the [*Meeboer*] ten-factor test, the reliability of the hearsay is strengthened when it is supported by other evidence, including the resulting diagnosis and treatment." *People v McElhaney*, 215 Mich App 269, 282 (1996) (finding results from a physical examination that showed "numerous abrasions and the complainant[-victim]'s vaginal and rectal areas [being] red, swollen, and tender[, ]corroborated the complainant[-victim]'s account of [her sexual abuse]"), citing *Meeboer (After Remand)*, 439 Mich at 325-326.

## 2. Trustworthiness: Statements to Psychologists

Regardless of the declarant's age, statements made to psychologists may be less reliable and thus less trustworthy than statements made to medical doctors. *Meeboer* (*After Remand*), 439 Mich at 327; *People v LaLone*, 432 Mich 103, 109-110 (1989).

In *LaLone*, *supra* at 116, a first-degree criminal sexual conduct case, the Michigan Supreme Court overturned the trial court's decision to admit the testimony of a psychologist based on statements made by her 14-year-old patient who was the complainant. The decision was based in part on the difficulty in determining the trustworthiness of statements to a psychologist. *Id*. at 109-110. The Michigan Supreme Court revisited this question in *Meeboer* (*After Remand*), 439 Mich at 329, reiterating that statements to psychologists may be less reliable than those to physicians. However, the *Meeboer* Court also noted that "the psychological trauma experienced by a

child who is sexually abused must be recognized as an area that requires diagnosis and treatment." *Meeboer*, *supra* at 329. Accordingly, the Court stated that its decision in *LaLone* should not preclude from evidence statements made during "psychological treatment resulting from a medical diagnosis." *Meeboer*, *supra* at 329.

### 3. Statements Identifying Assailant

When a victim seeks medical treatment for an injury, it is possible that the victim's statements to the treating medical professional may identify the assailant as the "general cause" of "past or present symptoms or sensations, [or] their inception[.]" MRE 803(4). If this occurs, trial courts may be called upon to determine whether the assailant's identity is reasonably necessary to medical diagnosis or treatment.

The following cases set forth some general principles for determining whether an assailant's identity is medically relevant.

- ***People v Meeboer (After Remand)*, 439 Mich 310 (1992):**

In three consolidated cases, all involving criminal sexual conduct against children aged seven and under, the Michigan Supreme Court found that statements identifying an assailant may be necessary for the declarant's diagnosis and treatment—and thus admissible under MRE 803(4)—as long as the totality of the circumstances surrounding the statements indicates trustworthiness. The Court listed the following circumstances under which identification of an assailant may be necessary to obtain adequate medical care:

> "Identification of the assailant may be necessary where the child has contracted a sexually transmitted disease. It may also be reasonably necessary to the assessment by the medical health care provider of the potential for pregnancy and the potential for pregnancy problems related to genetic characteristics, as well as to the treatment and spreading of other sexually transmitted diseases . . . .
>
> Disclosure of the assailant's identity also refers to the injury itself; it is part of the pain experienced by the victim. The identity of the assailant should be considered part of the physician's choice for diagnosis and treatment, allowing the physician to

> structure the examination and questions to the exact type of trauma the child recently experienced.
>
> In addition to the medical aspect . . . , the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment. A physician must know the identity of the assailant in order to prescribe the manner of treatment, especially where the abuser is a member of the child's household. . . . [S]exual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment. . . .
>
> A physician should also be aware of whether a child will be returning to an abusive home. This information is not needed merely for 'social disposition' of the child, but rather to indicate whether the child will have the opportunity to heal once released from the hospital.
>
> Statements by sexual assault victims to medical health care providers identifying their assailants can, therefore, be admissible under the medical treatment exception to the hearsay rule if the court finds the statement sufficiently reliable to support that exception's rationale." *Meeboer (After Remand)*, 439 Mich at 328-330.

- ***People v Van Tassel (On Remand)*, 197 Mich App 653 (1992):**

In this first-degree criminal sexual conduct case, the 13-year-old complainant identified her father as her assailant during a health interview that preceded a medical examination ordered by the probate court in a separate abuse and neglect proceeding. *Van Tassel* (*On Remand*), 197 Mich App at 656. The Court of Appeals found that the *Meeboer* factors had no application in a criminal sexual conduct case involving a complainant over age ten. *Van Tassel*, *supra* at 662. Nonetheless, the Court applied the *Meeboer* factors and concluded that the complainant's hearsay statements were trustworthy and properly admitted by the trial court.[19] *Van Tassel*, *supra* at 663-664. The Court also held that identification of the assailant was

[19] The *Van Tassel* Court evaluated the *Meeboer* factors "[i]n an effort to comply fully with the dictates of the [Michigan Supreme Court's] remand order." *Van Tassel*, 197 Mich App at 663.

reasonably necessary to the complainant's medical diagnosis and treatment: "[T]reatment and removal from an abusive home environment was medically necessary for the child victim of incest." *Id.* at 661.

- ***People v Creith*, 151 Mich App 217 (1986):**

The defendant appealed from his conviction of manslaughter. The victim, who suffered from kidney failure, died after an alleged beating by the defendant. *Creith*, 151 Mich App at 220. At trial, the court permitted the jury to hear the testimony of a nurse from the victim's dialysis center and another nurse from a hospital emergency room. *Creith, supra* at 220-222. These nurses testified that the victim had described abdominal pain resulting from being punched in the abdomen by the defendant. *Id.* The Court of Appeals held that the trial court properly admitted the testimony of these witnesses under MRE 803(4). *Creith, supra* at 226-227. The Court found that the victim's statements were made for the sole purpose of seeking medical treatment and were reasonably necessary for that purpose. *Id.*

## F. Records of Regularly Conducted Activity

MRE 803(6) allows for the admission of records of regularly conducted activity. In child protective proceedings, MRE 803(6) allows for the admission of records such as the Department of Health and Human Services (DHHS) records, medical records concerning the child, and police reports.[20] MRE 803(6) specifically indicates that the following records are not excluded by the hearsay rule, even though the declarant is available as a witness:

> "A record of an act, transaction, occurrence, event, condition, opinion, or diagnosis if:
>
> > (A) the record was made at or near the time by – or from information transmitted by – someone with knowledge;
> >
> > (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> >
> > (C) making the record was a regular practice of that activity;

[20] Police reports may be admissible under this rule, or under MRE 803(8), as public records. See Section 11.5(G).

> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with a rule prescribed by the Supreme Court or with a statute permitting certification; and
>
> (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."

See *Merrow v Bofferding*, 458 Mich 617, 626-628 (1998) (part of plaintiff's "History and Physical" hospital record was admissible under MRE 803(6) because it was compiled and kept by the hospital in the regular course of business); *People v Jobson*, 205 Mich App 708, 713 (1994) (police activity log sheet was properly admitted into evidence under MRE 803(6)).

Although it otherwise meets the foundational requirements of MRE 803(6), a business record may be excluded from evidence if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. *People v Huyser*, 221 Mich App 293, 296-299 (1997) (expert's report lacked trustworthiness of a report generated exclusively for business purposes when the expert prepared the report in contemplation of trial).

A business record may itself contain hearsay statements, each of which is admissible only if it conforms independently with an exception to the hearsay rule. MRE 805.

Under MRE 803(6), properly authenticated records that constitute records of regularly conducted activity may be introduced into evidence without requiring the records' custodian to appear and testify. See MRE 902, governing the authentication of a business record by the written certification of the custodian or other qualified person, which provides in part:

> "The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
>
> * * *
>
> (11) Certified Domestic or Foreign Record of a Regularly Conducted Activity. The original or a copy of a domestic or foreign record that meets the requirements of [MRE 803(6)(A)-MRE 803(6)(C)], as shown by a certification of the custodian or another qualified person that complies with a

> Michigan statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them." MRE 902.

## G. Public Records

MRE 803(8) allows the admission of public records.

> "A record or statement of a public office [is not excluded by the rule against hearsay] if it sets out:
>
> (A) the office's activities; or
>
> (B) a matter observed while under a legal duty to report, but not including:
>
> (i) in a criminal case, a matter observed by law-enforcement personnel; and
>
> (ii) information to which the limitations in MCL 257.624 apply."[21] MRE 803(8).

MRE 803(8)(B) does not allow the introduction of evaluative or investigative reports. *Bradbury v Ford Motor Co*, 419 Mich 550, 553-554 (1984). The exception extends only to "reports of objective data observed and reported by [public agency] officials." *Bradbury*, *supra* at 554. See *People v Shipp*, 175 Mich App 332, 334-335, 339-340 (1989) (portions of an autopsy report containing the medical examiner's conclusion and opinion that death ensued after attempted strangulation and blunt instrument trauma were improperly admitted into evidence under MRE 803(8); however, the medical examiner's recorded observations about the decedent's body were admissible).

A public record may itself contain hearsay statements, each of which is admissible only if it conforms independently with an exception to the hearsay rule. MRE 805.

## H. Previous Judgment or Conviction

Child protective proceedings often arise from the same circumstances as a criminal prosecution. Furthermore, a prior order

[21] MCL 257.624 prohibits the use of an accident report required by Chapter VI of the Michigan Vehicle Code, MCL 257.601–MCL 257.624b, in a court action.

terminating a parent's parental rights may serve as a basis to assume jurisdiction over a current child or to terminate a parent's parental rights to a current child.[22] Thus, the issue of the admissibility of a prior order or judgment may arise in child protective proceedings.

"A copy of any order, judgment or decree, of any court of record in this state, duly authenticated by the certificate of the judge, clerk or register of such court, under the seal thereof, *shall be admissible in evidence in any court in this state, and shall be prima facie evidence of the jurisdiction of said court over the parties to such proceedings and of all facts recited therein*, and of the regularity of all proceedings prior to, and including the making of such order, judgment or decree." MCL 600.2106 (emphasis added).

With regard to the orders, judgments, or decrees of a court of another state, MCL 600.2103 provides:

> "The records and judicial proceedings of any court in the several states and territories of the United States and of any foreign country shall be admitted in evidence in the courts of this state upon being authenticated by the attestation of the clerk of such court with the seal of such court annexed, or of the officer in whose custody such records are legally kept with the seal of his office annexed."

A judgment of conviction of a felony or two-year misdemeanor may be admissible as substantive evidence of conduct at issue in a subsequent civil case. See MRE 803(22), which specifically provides that evidence of a final judgment of conviction is not excluded by the rule against hearsay if:

> "(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea unless allowed by MRE 410;
>
> (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
>
> (C) the evidence is admitted to prove any fact essential to the judgment; and
>
> (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant."

[22] See Section 4.3(B) and Section 17.7.

> **Note:** By its terms, MRE 803(22) is limited to convictions and does not extend the hearsay exception to judgments of acquittal.

MRE 803(22) must be read in conjunction with MRE 410, which limits the use of pleas and plea-related statements. MRE 410 states, in part:

> "(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:
>
> (1) a guilty plea that was later withdrawn or vacated;
>
> (2) a nolo contendere plea – except that, to the extent that evidence of a guilty plea would be admissible, evidence of a nolo contendere plea to a criminal charge may be admitted in a civil proceeding to defend against a claim asserted by the person who entered the plea;
>
> (3) a statement made during a proceeding on either of those pleas under MCR 6.302[23] or MCR 6.310,[24] a comparable state procedure, or [FRCP] 11; or
>
> (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn or vacated guilty plea."[25]

Some exceptions to the rule against the admission of statements arising in plea discussions or plea proceedings exist:

> "(b) Exceptions. The court may admit a statement described in [MRE 410(a)(3) or MRE 410(a)(4)]:
>
> (1) in any proceeding in which another statement made during the same plea or plea discussions has

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[23] MCR 6.302 addresses the requirements for guilty and nolo contendere pleas in felony cases.

[24] MCR 6.310 addresses pleas that have been withdrawn or vacated.

[25] "MRE 410(4) does not require that a statement made during plea discussions be made in the presence of an attorney for the prosecuting authority. It only requires that the defendant's statement be made 'in the course of plea discussions' with the prosecuting attorney." *People v Smart*, 497 Mich 950, 950 (2015), overruling *People v Hannold*, 217 Mich App 382 (1996), to the extent that it conflicts with the holding in *Smart*. See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 2.

> been introduced, if in fairness the statements ought to be considered together; or
>
> (2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present." MRE 410.

## I. Residual Exceptions to the Hearsay Rule[26]

A brief discussion on the residual exceptions is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 5.

Except as provided in the Michigan Rules of Evidence, hearsay is not admissible. MRE 802. Exceptions to the rule against the admission of hearsay are found in MRE 803, MRE 803A, MRE 804, and MRE 807.

A party may seek admission under MRE 807 of hearsay statements not covered under one of the firmly established exceptions in MRE 803 or MRE 804.

MRE 807 provides:

> "(a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in [MRE 803 or MRE 804]:
>
> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
>
> (2) it is offered as evidence of a material fact;
>
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
>
> (4) admitting it will serve the purposes of these rules and the interests of justice.

See *People v Katt (Katt II)*, 468 Mich 272, 279, 290, 297 (2003) (child victim's statements to her social worker that the defendant sexually abused her were not admissible under MRE 803A, but were under MRE 803(24)[27]). See also *People v Geno*, 261 Mich App 624, 625, 631-

[26]The *residual hearsay exception* was previously referred to as the "catch-all" exception and found in MRE 803(24) and MRE 804(b)(7). This exception to the hearsay rule now appears in MRE 807. See ADM File No. 2021-10, effective January 1, 2024.

635 (2004) (child's statement to an interviewer conducting an assessment of the child that the defendant hurts her "here" and pointed to her vaginal area was properly admitted under MRE 803(24)[28]).

The party offering the evidence must provide advance notice of its intent to produce the evidence. *Katt II*, 468 Mich at 279. According to MRE 807:

> "(b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement — including its substance and the declarant's name and address — so that the party has a fair opportunity to meet it."

## 11.6 Child Witness

A brief discussion on child witnesses is contained in this section. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3.

"Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in [the Michigan Rules of Evidence]." MRE 601.

Competency to testify is a matter within the discretion of a trial court. See *Surman v Surman*, 277 Mich App 287, 303-304 (2007) (12-year-old child diagnosed with bipolar disorder, oppositional defiant disorder, taking medication, and receiving psychological care competent to testify); *People v Breck*, 230 Mich App 450, 457-458 (1998) (developmentally disabled complainant competent to testify); *People v Jehnsen*, 183 Mich App 305, 307-308 (1990) (four-year-old victim competent to testify); *People v Norfleet*, 142 Mich App 745, 748-749 (1985) (reversible error in finding seven-year-old witness incompetent to testify).

## 11.7 In-Camera Conferences

In-camera conferences should not be held in child protective proceedings for any reason whatsoever. *In re HRC*, 286 Mich App 444, 453 (2009).

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[27]Provisions previously found in MRE 803(24) appear in MRE 807. See ADM File No. 2021-10, effective January 1, 2024.

[28]Provisions previously found in MRE 803(24) appear in MRE 807. See ADM File No. 2021-10, effective January 1, 2024.

Although child custody cases permit the use of in-camera reviews for the limited purpose of determining a child's best interests, child protective proceedings are governed by the Juvenile Code. *In re HRC*, 286 Mich App at 454. "[N]othing in the [J]uvenile [C]ode, the caselaw, the court rules, or otherwise permits a trial court presiding over a termination of parental rights case to conduct in camera interviews of the children for purposes of determining their best interests." *Id*. Accordingly, "a trial court presiding over a juvenile proceeding has no authority to conduct in camera interviews of the children involved." *Id.*

"The use of unrecorded, in camera interviews in termination proceedings violates parents' due process rights" because they "might unduly influence the trial court's factual findings and termination decision, and because the process provides no opportunity for cross-examination by respondents or their counsel, the practice also prejudices a respondent's ability to impeach the witness and forecloses meaningful appellate review." *In re Ferranti*, 504 Mich 1, 31-32 (2019), quoting *HRC*, 286 Mich App at 455-456 (quotation marks omitted). Nothing "permits a trial court presiding over a termination of parental rights case to conduct in camera interviews of the children for purposes of determining their best interests," and although "testifying on the record and in the presence of parties and counsel [may cause] discomfort to [the children], that interest does not outweigh the respondents' interest in having any testimony on the record, given the fundamental parental rights involved in termination proceedings, the risk of an erroneous deprivation of those rights given the in camera procedure, and the fact that the information is otherwise easily obtained[.]" *Ferranti*, 504 Mich at 35, quoting *HRC*, 286 Mich App at 454, 456 (quotation marks omitted). Accordingly, "because the trial court violated the respondents' due-process rights by conducting an unrecorded, *in camera* interview of the subject child before the court's resolution of the termination petition, a different judge must preside on remand." *Ferranti*, 504 Mich at 8.

## 11.8 Alternative Procedures to Obtain Testimony of Child or Developmentally Disabled Witness

In general, a trial court is given broad authority to employ special procedures to protect any victim or witness while testifying. MRE 611(a). Specifically, MRE 611 provides:

> "(a) Control by the Court; Purposes. The court must exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
>
> (1) make those procedures effective for determining the truth;

> (2) avoid wasting time; and
>
> (3) protect witnesses from harassment or undue embarrassment." See also MCL 768.29.

> **Note:** MRE 611(a) contains no age or developmental disability restrictions and thus may be applied to all victims and witnesses. Moreover, MRE 611(a) contains no restrictions as to the specific type of procedures or protections that may be employed to protect victims and witnesses. Some of these procedures may include permitting the use of dolls or mannequins, providing a support person, rearranging the courtroom, shielding or screening the witness from the defendant, and allowing closed-circuit television or videotaped depositions in lieu of live, in-court testimony. See Section 11.8(B).

During child protective proceedings, the court may appoint an impartial person to address questions to a child witness. MCR 3.923(F).

MCL 712A.17b provides specific protections or procedures to a witness in addition to those afforded to a witness by law or court rule. MCL 712A.17b(18). The special statutory protections in MCL 712A.17b apply to witnesses who are either:

- under 16 years of age, or
- 16 years of age or older and developmentally disabled. MCL 712A.17b(1)(e).

## A. Developmental Disability

A developmental disability is defined in MCL 330.1100a(27). MCL 712A.17b(1)(b). However, the Juvenile Code limits this definition to "include[] only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments, and . . . not include a condition attributable to a physical impairment unaccompanied by a mental impairment." *Id.* Keeping these limitations in mind, MCL 330.1100a(27) defines *developmental disability* to mean one of the following:

> "(a) If applied to an individual older than 5 years of age, a severe, chronic condition that meets all of the following requirements:
>
> (*i*) Is attributable to a mental or physical impairment or a combination of mental and physical impairments.

(*ii*) Is manifested before the individual is 22 years old.

(*iii*) Is likely to continue indefinitely.

(*iv*) Results in substantial functional limitations in 3 or more of the following areas of major life activity:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

(*v*) Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

(b) If applied to a minor from birth to 5 years of age, a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in developmental disability as defined in subdivision (a) if services are not provided."

## B. Alternative Procedures

If the age or disability requirements of MCL 712A.17b are met, the court may allow one or more of the following measures to protect a witness or a party:

(1) use of dolls or mannequins.

(2) provide support person.

(3) use of videotaped depositions.

(4) use of videorecorded statements.

(5) use of videoconferencing technology. MCR 3.923(E). See also MCL 712A.17b(3)-(5).

### 1. Dolls or Mannequins

"If pertinent, the [child or developmentally disabled] witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination." MCL 712A.17b(3). See MCR 3.923(E).

### 2. Support Person

"A [child or developmentally disabled] witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony." MCL 712A.17b(4). See MCR 3.923(E). See also *People v Rockey*, 237 Mich App 74, 78 (1999) (trial court did not err in allowing a seven-year-old sexual assault victim to sit on her father's lap while testifying where there was no evidence of nonverbal communication between the victim and her father); *People v Jehnsen*, 183 Mich App 305, 308-311 (1990) (trial court did not err in allowing four-year-old victim's mother to remain in courtroom following the mother's testimony despite engaging in "nonverbal behavior which could have communicated the mother's judgment of the appropriate answers to questions on cross-examination[,]" where the trial court found no correlation between the mother's conduct and the victim's answers).[29]

A notice of intent to use a support person must be filed with the court and served on all the parties. MCL 712A.17b(4). The notice of intent must:

> (1) name the support person;
>
> (2) identify the relationship the support person has with the child or developmentally disabled witness; and
>
> (3) give notice that the child or developmentally disabled witness may request that the support person sit with him or her during any stage of the proceeding. MCL 712A.17b(4).

A party may file a motion objecting to the use of a named support person. See MCL 712A.17b(4). If a party objects, the

[29] These cases were decided under the authority of a similar statute, MCL 600.2163a, which only applies to criminal cases. Although MCL 712A.17b(4) and MCL 600.2163a(4) both permit the use of a support person, MCL 600.2163a also permits a courtroom support dog and extends these protections to certain vulnerable adult victim-witnesses.

court must rule on the motion "before the date at which the [child or developmentally disabled] witness desires to use the support person." *Id.*

### 3. Videotaped Depositions

"The court may allow the use of videotaped . . . depositions . . . to protect the child witness as authorized by MCL 712A.17b." MCR 3.923(E). The court may order a videorecorded deposition of a child or developmentally disabled victim witness on motion of a party or in the court's discretion. MCL 712A.17b(13).

"[I]f, upon the motion of a party or in the court's discretion, the court finds on the record that psychological harm to the witness would occur if the witness were to testify at the adjudication stage, the court shall order to be taken a videorecorded deposition of a [child or developmentally disabled] witness that shall be admitted into evidence at the adjudication stage instead of the live testimony of the witness." MCL 712A.17b(13).

If the court permits the use of a videorecorded deposition, "[t]he examination and cross-examination of the witness in the videorecorded deposition shall proceed in the same manner as permitted at the adjudication stage." MCL 712A.17b(13).

Use of a child's videotaped deposition did not deprive the respondent-parents of their due process rights to confrontation where an expert testified to the child's inability to communicate if attorneys questioned her and that she may suffer trauma if forced to participate in cross-examination, and during the deposition, the respondent-parents' counsel observed the child through a one-way window and submitted questions before and during the deposition. *In re Brock*, 442 Mich 101, 105-115 (1993).[30] The Court found that although parents "have an important liberty interest in the management of their children that is protected by due process[,] . . . the child's welfare is primary in child protective proceedings." *In re Brock, supra* at 114-115. Thus, where "the spirit of confrontation and cross-examination [can] only be achieved by alternative, nontraditional procedures, deviation from traditional practices should be allowed." *Id.* at 115.

[30] The Michigan Supreme Court also concluded that the Sixth Amendment right to confrontation was inapplicable to child protective proceedings because that right only applies to criminal proceedings. *In re Brock,* 442 Mich at 108. For information on an individual's Sixth Amendment right to confrontation in a criminal case, see the Michigan Judicial Institute's *Evidence Benchbook,* Chapter 3.

### 4. Videorecorded Statements

"The court may allow the use of videotaped statements . . . to protect the child witness as authorized by MCL 712A.17b." MCR 3.923(E). A videorecorded statement is "a witness's statement taken by a custodian of the videorecorded statement[31] as provided in [MCL 712A.17b(5)]." MCL 712A.17b(1)(d). See Section 2.3(B) for additional information on the taking of a child's videorecorded statement.

A videotaped statement must be admitted, in lieu of live testimony, for all stages of the proceeding except for trial. MCL 712A.17b(5). See *In re Martin*, 316 Mich App 73, 83-84 (2016) (reversing the trial court's order of adjudication with respect to the respondent-father and the order terminating his parental rights where the trial court erroneously relied on the child's videorecorded statement contained in a DVD instead of live testimony to adjudicate the respondent-father).[32]

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

"Each respondent and, if represented, his or her attorney has the right to view and hear the videorecorded statement at a reasonable time before it is offered into evidence." MCL 712A.17b(7). The court may also order that the defense receive a copy of the videorecorded statement "[i]n preparation for a court proceeding and under protective conditions, including, but not limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement[.]" *Id.*

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

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

[32] For additional information on the admissibility of a child's statement through a third-party witness, see Section 11.4(B).

"A videorecorded statement that becomes part of the court record is subject to a protective order of the court for the purpose of protecting the privacy of the witness." MCL 712A.17b(10).

### 5. Videoconferencing Technology or Other Electronic Equipment

"The court may allow the use of videoconferencing technology, speaker telephone, or other similar electronic equipment to facilitate hearings or to protect the parties." MCR 3.923(E).

In order to preserve a respondent's due process rights, including the right to confront witnesses against him or her face-to-face, the court must hear evidence and make particularized, case-specific findings that the procedure is necessary to protect the welfare of a child witness who seeks to testify. *Maryland v Craig*, 497 US 836, 855-856 (1990). See also *In re Brock*, 442 Mich at 110.[33] However, *Craig* is limited "to the specific facts it decided":

> "[A] child victim may testify against the accused by means of one-way video (or a similar *Craig*-type process) when the trial court finds, consistently with statutory authorization and through a case-specific showing of necessity, that the child needs special protection." *People v Jemison*, 505 Mich 352, 365 (2020).

The United States Supreme Court, in *Craig*, provided more detail:

> "The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than

[33]The Michigan Supreme Court concluded that the Sixth Amendment right of confrontation was inapplicable to child protective proceedings because that right only applies to criminal proceedings. *In re Brock*, 442 Mich at 108.

> 'mere nervousness or excitement or some reluctance to testify'. . . ." (Internal citations omitted).

### C. Notice of Intent to Use Special Procedure

A party must give notice of his or her intent to use certain alternative procedures. MCR 3.922(F)(1).

Within 21 days after the parties have been notified of a trial date (but no later than seven days before trial), the proponent must file with the court and serve all parties the written notice of intent. MCR 3.922(F)(1). The written notice of intent must indicate that the proponent intends to:

> "(a) use a support person, including the identity of the support person, the relationship to the witness, and the anticipated location of the support person during the hearing.
>
> (b) request special arrangements for a closed courtroom or for restricting the view of the respondent/defendant from the witness or other special arrangements allowed under law and ordered by the court.
>
> (c) use a videotaped deposition as permitted by law." MCR 3.922(F)(1).

A nonproponent party must provide written notice to the court of the intent to offer rebuttal testimony or evidence opposing the request, including the identity of any witnesses to be called, within seven days of receiving notice of the proponent's intent (but no later than two days before trial). MCR 3.922(F)(2).

"The court may shorten the time periods provided in [MCR 3.922(F)] if good cause is shown." MCR 3.922(F)(3).

## 11.9 Evidence of Prior Conduct

### A. Doctrine of Anticipatory Neglect

A party may seek to admit evidence of a respondent's prior maltreatment of the same child at issue in the current child protective proceeding or a respondent's prior maltreatment of another person not involved in the current proceeding. *In re LaFlure*, 48 Mich App 377, 392 (1973). See also M Civ JI 97.39 and the following cases:

- *In re L A LeDee*, ___ Mich App ___, ___ (2026) (concluding that the forensic interviewer's tender-years hearing testimony that was admitted as substantive evidence of respondent's physical abuse of one sibling at respondent's termination hearing supported "the trial court's finding, by clear and convincing evidence, that there was a reasonable likelihood that [the other sibling would] suffer from injury or abuse in respondent's care").

- *In re Sluiter*, ___ Mich App ___, ___ (2024) (evidence that the respondent-father abused the child's older half-siblings who were unrelated to respondent-father—including one half-sibling's disclosure during his CPS interview that he had witnessed respondent-father strangling respondent-mother in front of the child—was sufficient to invoke the doctrine of anticipatory neglect).

- *In re Foster (Tommy)*, 285 Mich App 630, 631-632 (2009) (where the conditions that led to the temporary wardship of the respondents' other children also led to the adjudication of the child in question when the conditions still existed at the time of and after the respondents' parental rights to the child in question were terminated);

- *In re Powers (Kayla)*, 208 Mich App 582, 592-593 (1995) (where respondent-custodian was found to have physically abused respondent-mother's first child, evidence of that abuse was relevant to respondent-custodian's ability to provide proper care and custody for a sibling subsequently born to respondent-custodian and respondent-mother);

- *In re Emmons*, 165 Mich App 701, 705 (1988) (evidence of respondent-father's prior guilty plea to charge of sexually assaulting child's siblings was admissible to provide basis for jurisdiction over child);

- *In re Smebak*, 160 Mich App 122, 128-129 (1987) (evidence that respondent-mother's mental illness prevented her from providing proper care of sibling was probative of her ability to care for another child);

- *In re Andeson*, 155 Mich App 615, 622 (1986) (where evidence suggested that respondent's physical abuse of a sibling led to the sibling's death, the probate court properly considered that evidence in terminating respondent's parental rights to another child);

- *In re Futch*, 144 Mich App 163, 166-168 (1984) (evidence that respondents were convicted of manslaughter in the beating death of respondent-mother's first child supported termination of respondents' parental rights to a subsequent child);

- *In re Kantola,* 139 Mich App 23, 28-29 (1984) (where evidence showed that respondents treated their son well but sexually, physically, and verbally abused their daughters, respondents' treatment of their son was not conclusive of their ability to provide a fit home for their daughters); and

- *In re Dittrick,* 80 Mich App 219, 222 (1977) (where respondents' parental rights were terminated to respondent-mother's first child on grounds of continuing physical and sexual abuse, allegations of the neglect of the first child were relevant to a finding of neglect sufficient to allow the court to take jurisdiction over respondents' second child).

## B. Evidence of Other Crimes, Wrongs, or Acts

A brief discussion on evidence of other crimes, wrongs, or acts, is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 2.

A party may seek to admit evidence of a respondent's past maltreatment of the same child or a non-sibling. See MRE 404(b), which provides:

> "(1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted Uses. If it is material, the evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, absence of mistake, or lack of accident."

The admissibility of other acts evidence under MRE 404(b), except for modus operandi evidence used to prove identity,[34] is generally governed by the test established in *People v VanderVliet*, 444 Mich 52 (1993), which is as follows:

- The evidence must be offered for a purpose other than to show the propensity to commit a crime or other bad act.

[34] Modus operandi evidence is not discussed in this benchbook.

- The evidence must be relevant under MRE 402 to an issue or fact of consequence at trial.

- The trial court should determine under MRE 403 whether the danger of undue prejudice substantially outweighs the probative value of the evidence, in view of the availability of other means of proof and other appropriate facts.

- Upon request, the trial court may provide a limiting instruction[35] under MRE 105, cautioning the jury to use the evidence for its proper purpose and not to infer a bad or criminal character that caused the respondent to commit the charged offense. V*anderVliet*, 444 Mich at 74-75.

  **Note:** MRE 404(b) codifies the requirements set forth in *People v VanderVliet*, 444 Mich 52 (1993).

The *VanderVliet* case underscores the following principles of MRE 404(b) as a rule of inclusion, not exclusion:

- There is no presumption that other acts evidence should be excluded.

- The rule's list of "other purposes" for which evidence may be admitted is not exclusive. Evidence may be presented to show any fact relevant under MRE 402, except a respondent's propensity to commit criminal or other bad acts.

- A respondent's general denial of the charges does not automatically prevent the prosecutor from introducing other acts evidence at trial.

- MRE 404(b) imposes no heightened standard for determining logical relevance or for weighing the prejudicial effect versus the probative value of the evidence. *VanderVliet*, 444 Mich at 65.

Accordingly, "MRE 404(b) . . . permits the admission of any logically relevant evidence, '*even if* it also reflects on a defendant's character,' so long as the evidence is not 'relevant *solely* to the defendant's character or criminal propensity.'" *People v Spaulding*, 332 Mich App 638, 649 (2020), quoting *People v Mardlin*, 487 Mich 609, 615-616 (2010).

## C. Notice Requirement

MRE 404(b)(3) requires the prosecution to

[35] See, e.g., M Crim JI 4.11.

> "(A) provide notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
>
> (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
>
> (C) do so in writing at least 14 days before trial, unless the court, for good cause, excuses pretrial notice, in which case the notice may be submitted in any form."

## 11.10 Admitted Evidence Considered at Subsequent Hearings

Evidence admitted at one hearing in a child protective proceeding may be considered as evidence at all subsequent hearings. *In re LaFlure*, 48 Mich App 377, 391 (1973) (due to the nature of the decision to terminate parental rights, the court must be apprised of all relevant circumstances). Hearings in protective proceedings are to be considered "as a single continuous proceeding." *In re LaFlure*, *supra* at 387.

A trial court may also take judicial notice of its court file. See MRE 201. See also *In re DMK*, 289 Mich App 246, 253 (2010).

## 11.11 Postpetition Evidence

"Ultimately, the question presented to an adjudication jury is whether a respondent's actions or inactions created an unfit environment for the children. If relevant[36] to a fact of consequence flowing from that question and otherwise admissible, a fact-finder may consider evidence gathered after the events cited in the petition." *In re Dearmon/Harverson-Dearmon*, 303 Mich App 684, 698 (2014). Accordingly, "evidence relevant to prove or defend a statutory ground for termination is potentially admissible at an adjudication trial despite that the evidence involves postpetition facts. The evidence must conform to the rules of evidence and the parties must have notice of the evidence." *Id.* at 687-88. (postpetition evidence of "[the r]espondent's recorded [jailhouse telephone] conversations with [her boyfriend]" were admissible at trial where the recorded jailhouse telephone conversations "related to [the respondent's] credibility and to whether she had [voluntarily] severed her relationship with [her boyfriend after the first assault and] before the third assault" and where "[the] respondent had notice of the existence of

[36] For a discussion of relevant evidence, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 2.

the [recorded] tapes"). "Fundamentally, evidence gathered postpetition should be shared with the opposing party to avoid unfair prejudice[, and a]dherence to the rules governing discovery embodied in MCR 3.922 should avoid prejudice to either party's due process rights." *In re Dearmon/Harverson-Dearmon*, 303 Mich App at 699.

> **Note:** In *In re Dearmon/Harverson-Dearmon*, 303 Mich App at 698-699, the Court highlighted "the important distinction between evidence of an event supporting jurisdiction that was not alleged in a petition, and evidence obtained after the petition was filed" and emphasized that "due process safeguards apply during the adjudicative phase of a child protective proceeding."

## 11.12 Expert Testimony in Child Protective Proceedings

A brief discussion on expert testimony is contained in this section. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

Qualified expert testimony is required when a child is an Indian child who is being placed outside the home or whose parent's parental rights are being terminated.[37] 25 USC 1912(e)-(f); MCL 712B.15(2); MCL 712B.15(4); MCR 3.977(G)(2); 25 CFR 23.121(a)-(b).

In addition, when preparing a case service plan, the Department of Health and Human Services (DHHS) must consult the child's attending physician during a hospitalization or the child's primary care physician if a child is placed outside the home and a physician has diagnosed the child's abuse or neglect as involving:

(a) a failure to thrive;

(b) Munchausen syndrome by proxy;

(c) Shaken baby syndrome;

(d) a bone fracture diagnosed as a result of abuse or neglect; or

(e) drug exposure.[38] MCL 712A.18f(6).

If this consultation is made and a subsequent judicial proceeding is held to determine whether to return the child home, "the court must allow the

[37] See Section 19.14 for a discussion of qualified expert testimony under the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA).

[38] See Section 13.5 for a discussion of required physician testimony.

child's attending physician of record during a hospitalization or the child's primary care physician to testify regarding the case service plan." MCL 712A.18f(7).

Doubts regarding an expert's credibility or qualifications, and disagreements with an expert's opinion or interpretation of facts, go to the weight of an expert's testimony, not its admissibility. *Surman v Surman*, 277 Mich App 287, 309 (2007). Such issues should be addressed during cross-examination and left for the jury to decide. *Surman, supra* at 309-310.

## A. Admissibility

MRE 702 provides the standard for admissibility of expert testimony:

> "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case."

After a court determines "that expert testimony will assist the trier of fact and that a witness is qualified to give the expert testimony," and if all the parties consent, the court may allow a qualified expert witness "to be sworn and testify at trial by video communication equipment that permits all the individuals appearing or participating to hear and speak to each other in the court, chambers, or other suitable place." MCL 600.2164a(1). The party wishing to present expert testimony by video communication equipment must file a motion at least seven days before the date set for trial, unless good cause is shown to waive that requirement. MCL 600.2164a(2). The party "initiat[ing] the use of video communication equipment shall pay the cost for its use unless the court otherwise directs."

MCL 600.2164a(3). "A verbatim record of the testimony shall be taken in the same manner as for other testimony." MCL 600.2164a(1).

## B. Factual Basis for Opinion

MRE 703 governs the bases of an expert's opinion testimony:

> "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. The facts or data must be in evidence — or, in the court's discretion, be admitted in evidence later."

Opinions and diagnoses may be admissible under MRE 803(6).[39]

A party may examine an expert witness using hypothetical situations based on facts already in evidence. *In re Rinesmith*, 144 Mich App 475, 482-483 (1985) (experts "opinion was based on a general knowledge of the development and sexual awareness of 4-year-olds and was not an evaluation of [the victim's] credibility").

## C. Court-Appointed Expert

MRE 706 authorizes a court to appoint expert witnesses in any case. MRE 706. The purpose of MRE 706 is to assist the court, and "is . . . inapplicable[ where] an expert witness [ is sought to] . . . consult with and assist [a party.]" *In re Yarbrough*, 314 Mich App 111, 121 (2016).

"On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations.The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act." MRE 706(a).

"The court must inform the expert of the expert's duties. The court may do so orally at a conference in which the parties have an opportunity to participate." MRE 706(b). "The expert:

> (1) must advise the parties of any findings the expert makes;
>
> (2) may be deposed by any party;

[39] See Section 11.5(F) for additional information on MRE 803(6).

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert." MRE 706(b).

## D. Expert Testimony by Physician or Psychologist

Like other expert testimony, an examining physician's testimony will be admissible if the expert possesses specialized knowledge that will assist the trier of fact in understanding the evidence or determining a fact in issue under MRE 702. *People v Smith,* 425 Mich 98, 112 (1986).

In cases involving child sexual abuse, a psychologist's opinion as to whether abuse actually occurred "is a legal question outside the scope of the psychologist's expertise and therefore not a proper subject of expert testimony." *In re Brimer,* 191 Mich App 401, 407 (1991), citing *People v Beckley,* 434 Mich 691, 726-729 (1990).[40] It is also improper for the psychologist to evaluate the child's credibility. *Brimer, supra,* citing *Beckley,* 434 Mich at 737.

"[A]n examining physician, if qualified by experience and training relative to treatment of sexual assault complainants, can opine with respect to whether a complainant had been sexually assaulted when the opinion is based on physical findings *and* the complainant's medical history." *People v Thorpe*, 504 Mich 230, 255 (2019). However, "examining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury." *Id.* at 235 ("an examining physician cannot give an opinion on whether a complainant had been sexually assaulted if the 'conclusion [is] nothing more than the doctor's opinion that the victim had told the truth'"; "[s]uch testimony is not permissible because a 'jury [is] in just as good a position to evaluate the victim's testimony as' the doctor"), quoting *Smith (Joseph)*, 425 Mich at 109 (alteration in the original).

"[A]n examining physician's testimony diagnosing a child-complainant with 'possible sexual abuse' is inadmissible without corroborating physical evidence[.]" *People v Del Cid (On Remand)*, 331 Mich App 532, 542, 550-551 (2020) (concluding, on remand, that admission of the examining physician's uncorroborated testimony

[40] See also *People v Harris* (*Johnny*), 491 Mich 906, 906 (2012) ("trial court impermissibly allowed [the expert witness] to testify that the complainant was the victim of child sexual abuse").

that there was "possible sexual abuse" was plainly erroneous and required reversal).

## E. Expert Testimony About Child Sexual Abuse Victim Behavior

A brief discussion on expert testimony about the behavior of child sexual abuse victims is contained in this subsection. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3.

"'[C]ourts should be particularly insistent in protecting innocent defendants in child sexual abuse cases' given 'the concerns of suggestibility and the prejudicial effect an expert's testimony may have on a jury.'" *People v Musser*, 494 Mich 337, 362-363 (2013) (holding that a detective who was not qualified as an expert witness was still subject to the same limitations as an expert because he "'gave . . . the same aura of superior knowledge that accompanies expert witnesses in other trials'" and because, as a police officer, jurors may have been inclined to place undue weight on his testimony), quoting *People v Peterson (Peterson I)*, 450 Mich 349, 371 (1995), modified *People v Peterson (Peterson II)*, 450 Mich 1212. Accordingly, an expert witness's testimony is limited. *Peterson (Peterson I)*, 450 Mich at 352. The expert witness may not (1) testify that the sexual abuse occurred, (2) vouch for the veracity of the victim,[41] or (3) testify to the defendant's guilt. *Id.* at 352.

Despite these limitations, "(1) an expert may testify in the prosecution's case in chief [(rather than only in rebuttal)] regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Peterson (Peterson I)*, 450 Mich at 352-353. See *id.* at 379-380 (expert's testimony was properly admitted where it helped to dispel common misperceptions held by jurors regarding reporting

[41] See *People v Thorpe*, 504 Mich 230, 235 (2019) ("expert witnesses may not testify that children overwhelmingly do not lie when reporting sexual abuse because such testimony improperly vouches for the complainant's veracity"; "examining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury").

See also *People v Sattler-VanWagoner*, ___ Mich App ___, ___ (2024) (an expert's statement "that false reports are 'statistically very rare,' though lacking a numeric value, was essentially the statistical vouching described in *Thorpe*, 504 Mich at 252"; nonetheless, "[t]he isolated nature of the statement and substantial other evidence of [defendant's] guilt indicates that this error did not affect the outcome").

of child sexual abuse, rebutted an inference that the victim's delay was inconsistent with the behavior of a child sexual abuse victim, and did not improperly bolster the victim's credibility); *People v Draper* (*On Remand*), 188 Mich App 77, 78-79 (1991) (expert testimony by two psychologists who gave opinions that the victim had been sexually abused was improper because their opinions went "beyond merely relating whether the victim's behavior [was] consistent with that found in other child sexual abuse victims [but rather] [were] opinions on an ultimate issue of fact, which is for the jury's determination alone[]").

A defendant must raise certain issues before expert testimony is admissible in the prosecutor's case-in-chief to show that the victim's behavior was generally consistent with sexually abused victims:

> "Unless a defendant raises the issue of the particular child victim's postincident behavior or attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child. Such testimony would be improper because it comes too close to testifying that the particular child is a victim of sexual abuse." *Peterson*, 450 Mich at 373-374.

See *People v Lukity*, 460 Mich 484, 501-502 (1999) (where the defense theory raised the issue of the complainant's postincident behavior [attempting suicide], it was not an abuse of discretion to admit expert testimony comparing the child-victim's postincident behavior with that of sexually abused children).

## F. Expert Assistance Funding

"[W]hen considering a request for expert witness funding[]" in a parental termination proceeding, "the proper inquiry weighs the interests at stake under the due process framework established in *Mathews v Eldridge*, [424 US 319, 335 (1976),]" which "examine[s] the private and governmental interests at stake, the extent to which the procedures otherwise available to [the parent] serve[] [his or her] interests, and the burden on the state of providing expert funding[.]" *In re Yarbrough*, 314 Mich App 111, 137 (2016) ("highlight[ing] the inherently fact-specific inquiry required by the *Eldridge* due process framework: 'due process is flexible and calls for such procedural protections as the particular situation demands[]'").

Where the respondent-parents in parental termination proceedings "plainly demonstrated that [the] petitioner's case rested exclusively on expert medical testimony involving complex, controversial

medical issues, and that respondent[-parents'] counsel lacked the tools necessary to challenge [the] petitioner's experts[,]" the chief judge[42] "abused his discretion by failing to employ the requisite due process analysis under [*Eldridge*, 424 US at 319], and by refusing to authorize reasonable expert witness funding[.]" Because one hospital's physicians determined that the child's scans "showed no evidence of trauma or . . . abnormality[,]" while another hospital's "medical experts determined that the same films [from MRI and CT scans] demonstrated powerful evidence of abuse[,]" there existed "no meaningful alternative evidentiary safeguards" that would have "afforded [the] respondents an opportunity to challenge [the] petitioner's child abuse theory[.]" *In re Yarbrough,* 314 Mich App at 131-132, 137-138. "[T]he private interests strongly favored funding for an expert witness or consultant[]" where "[t]he science swirling around cases involving 'shaken baby syndrome' and other forms of child abuse [was] 'highly contested[,]'" and "the nature of the child welfare proceedings [did not] adequately safeguard[] [the] respondents' interests, absent funding for an independent expert[,]" where "only one side possesse[d] the funds necessary to pay an expert witness, [and] the opposing side [was required to] rely on cross-examination to attack the experts' testimony." *Id*. at 135-136 (citation omitted). Finally, the burden of providing approximately $2,500 as requested by the respondents did not "outweigh[] the interests of [the] indigent [respondent-]parents, who otherwise lacked the financial resources to retain expert medical consultation." *Id*. at 137.

## 11.13 Photographic Evidence

A brief discussion on admissibility of photographic evidence is contained in this section. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 6.

The admissibility of photographic evidence, which includes digital and analog images, concerns two issues that commonly arise when such evidence is introduced at trial:

(A) Authentication (MRE 901).

(B) Relevancy questions (MRE 401 and MRE 403).

[42] This case was controlled by a local administrative order that only permitted the chief judge to authorize payment of expert witness funding. See *In re Yarbrough*, 314 Mich App at 119.

## A. Authentication

Authentication of photographic evidence is governed by MRE 901(a), which states:

> "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what its proponent claims it is."

"A photograph is admissible in evidence if someone familiar, from his own observation, with the scene photographed testifies that the photograph is an accurate representation of that photographed." *People v Heading*, 39 Mich App 126, 132 (1972). "The photographer need not be the one to so testify." *Id*.

"[C]hallenges to the authenticity of evidence involve two related, but distinct, questions. The first question is whether the evidence has been *authenticated*—whether there is sufficient reason to believe that the evidence is what its proponent claims for purposes of admission into evidence. The second question is whether the evidence is *actually authentic* or *genuine*—whether the evidence is, in fact, what its proponent claims for purposes of evidentiary weight and reliability." *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 154 (2017).

The first question, whether the evidence has been authenticated, "is reserved solely for the trial judge." *Mitchell*, 321 Mich App at 154. The proponent of the evidence bears the burden of presenting evidence "sufficient to support a finding that the matter in question is what its proponent claims." *Id.* at 155 (quotation marks and citation omitted). The proponent is not required "to sustain this burden in any particular fashion[,]" and "evidence supporting authentication may be direct or circumstantial and need not be free of all doubt." *Id.* at 155. The proponent is required "only to make a prima facie showing that a reasonable juror might conclude that the proffered evidence is what the proponent claims it to be." *Id.* at 155. "Once the proponent of the evidence has made the prima facie showing, the evidence is authenticated under MRE 901(a) and may be submitted to the jury. *Mitchell*, 321 Mich App at 155. Authentication may be opposed "by arguing that a reasonable juror could not conclude that the proffered evidence is what the proponent claims it to be[;]" however, "this argument must be made on the basis of the proponent's proffer; the opponent may not present evidence in denial of the genuineness or relevance of the evidence at the authentication stage." *Id.* at 155.

"[T]he second question—the weight or reliability (if any) given to the evidence—is reserved solely to the fact-finder[.]" *Mitchell*, 321 Mich App at 156. "When a bona fide dispute regarding the genuineness of evidence is presented, that issue is for the jury, not the trial court." *Id.* at 156. "Accordingly, the parties may submit evidence and argument, pro and con, to the jury regarding whether the authenticated evidence is, in fact, genuine and reliable." *Id.* at 156.

MRE 901(b)(1)-(10) provides a nonexhaustive list of examples of appropriate means of authentication.

## B. Relevance

"Evidence is relevant if:

> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action." MRE 401.

In general, "[r]elevant evidence is admissible[,]" and "[i]rrelevant evidence is not admissible." MRE 402. However, exceptions to the admissibility of relevant evidence may exist in the federal and state constitutions, the Michigan Rules of Evidence, and the Michigan Court Rules. See MRE 402. For example, MRE 403 sets out an exception to this general rule of admissibility:

> "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

As with all evidence, the trial court has discretion to admit or exclude photographs. *People v Mills*, 450 Mich 61, 76 (1995).

> "Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs. Photographs may also be used to corroborate a witness'[s] testimony. Gruesomeness alone need not cause exclusion. The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice." *Mills*, 450 Mich at 76 (internal citations omitted).

In *Mills*, the victim was intentionally set on fire by the defendants, and the prosecution sought to introduce color slides depicting the extent of the victim's injuries. *Mills*, 450 Mich at 63-64, 66. The Michigan Supreme Court found that the photographs were relevant under MRE 401 because they "affect[ed] two material facts: (1) elements of the crime, and (2) the credibility of witnesses." *Mills, supra* at 69. Additionally, the probative value of the slides was not substantially outweighed by unfair prejudice because, despite their graphic nature, they were an "accurate factual representation[] of the [victim's] injuries" and they "did not present an enhanced or altered representation of the injuries." *Id.* at 77-78.

## 11.14 Demonstrative Evidence

A brief discussion on admissibility of demonstrative evidence is contained in this section. For a detailed discussion, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 6.

"Demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case." *People v Bulmer*, 256 Mich App 33, 34-35 (2003) (trial court properly admitted a computer-animated slideshow simulation illustrating "what happens to [a] baby's brain during a shaken-baby episode[]").

"The demonstrative evidence must be relevant and probative[, and] . . . when evidence is offered not in an effort to recreate an event, but as an aid to illustrate an expert's testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event." *Bulmer*, 256 Mich App at 35. If the evidence bears a "substantial similarity" to an issue of fact in the case, it may be admissible. *Lopez v Gen Motors Corp*, 224 Mich App 618, 627-634 (1997). "The burden . . . is on the party presenting the evidence to satisfy the court that the necessary similar conditions exist." *Duke v American Olean Tile Co*, 155 Mich App 555, 561 (1986).

## 11.15 Safe Families for Children Act

The Safe Families for Children Act, MCL 722.1551 *et seq.*, permits "a parent or guardian of a minor child[43] [to] temporarily delegate to another person his or her powers regarding care, custody, or property of the minor child[.]" [44, 45] MCL 722.1555(1). The act of "[a] parent or guardian executing a power of attorney does not, by itself, constitute evidence of abandonment, child abuse, child neglect, delinquency, or

[43] For purposes of the Safe Families for Children Act, *minor child* is "an individual less than 18 years of age." MCL 722.1553(f).

other maltreatment of a minor child unless the parent or guardian fails to take custody of the minor child when a power of attorney expires." MCL 722.1565(1). The Safe Families for Children Act does not, however, "prevent or delay an investigation of child abuse, child neglect, abandonment, delinquency, or other mistreatment of a minor child." *Id*. For more information on investigating child abuse or child neglect, see Chapter 2. For information on the procedures and requirements under the Act, see the Safe Families for Children Act, MCL 722.1551 *et seq*.

## 11.16 Lawyer-Guardian Ad Litem Serving as Witness

Neither the court nor another party to the case may call a lawyer-guardian ad litem as a witness to testify regarding matters related to the case. MCL 712A.17d(3).

[44] "A parent or guardian cannot delegate, under this act, his or her power to consent to adoption of the minor child, consent to an abortion or inducement of an abortion to be performed on or for the minor child, or to terminate parental rights to the minor child." MCL 722.1555(1). "A parent is not authorized to consent to the marriage of a child who is under the legal age of marriage." *Id*.

[45] "The parent or guardian executing a power of attorney may revoke or withdraw the power of attorney at any time." MCL 722.1555(2).

# Chapter 12: Trials


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## *In this chapter. . .*

This chapter outlines the procedures for conducting a trial or adjudicative hearing in a child protective proceeding. It contains discussions on the purpose of a trial, time requirements, the standard of proof, and jury procedures.

This chapter also includes a discussion on the standards and procedures for granting or denying directed verdicts and motions for new trial or rehearing.

In an effort to provide trial courts with a quick practical guide through the process of adjudicatory hearings, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys:Adjudicatory Hearing (MCR 3.972)*. This toolkit is accessible at https://

www.courts.michigan.gov/administration/offices/child-welfare-services/cws-toolkit/.

## 12.1 Trials in Child Protective Proceedings

"[C]hild protective proceedings consist of two distinct phases: the adjudicative phase and the dispositional phase." *In re Barber/Espinoza*, ___ Mich ___, ___ (2025). In the context of a child protective proceeding, a *trial* is "the fact-finding adjudication of an authorized petition[1] to determine if the minor comes within the jurisdiction[2] of the court[, and also] . . . a specific adjudication of a parent's unfitness to determine whether the parent is subject to the dispositional authority of the court." MCR 3.903(A)(27). "If jurisdiction is exercised, the dispositional phase determines what action, if any, will be taken on behalf of the child to ensure the child's safety and well-being," including the potential termination of parental rights. *Barber/Espinoza*, ___ Mich at ___. In rare circumstances when certain statutory requirements are met, the trial court may "hold a combined adjudicative and dispositional hearing in which parental rights may be terminated at the initial dispositional hearing." *Id*. at ___.[3]

It is the trial or adjudication phase of a child protective proceeding that "'protects the parents' fundamental right to direct the care, custody, and control of their children, while also ensuring that the state can protect the health and safety of the children.'" *In re Ferranti*, 504 Mich 1, 28 (2019), quoting *In re Sanders*, 495 Mich 394, 422 (2014). "The question at adjudication is whether the trial court can exercise jurisdiction over the child (and the respondents-parents) under MCL 712A.2(b) so that it can enter dispositional orders, including an order terminating parental rights. . . . And '[w]hile the adjudicative phase is only the first step in child protective proceedings,[4] it is of critical importance because the procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights.' The adjudication divests the parent of her constitutional right to parent her child and gives the state that authority instead." *Ferranti*, 504 Mich at 15-16, quoting *Sanders*, 495 Mich at 405 (citations omitted).

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[1] See Section 7.1(B) for a discussion of authorization for filing petitions.

[2] See Chapter 4 for a discussion on jurisdiction.

[3] For a discussion on initial disposition hearings, see Chapter 13, and for a discussion on termination hearings, see Chapter 17.

[4] "A child protective proceeding is a single continuous proceeding that begins with a petition, proceeds to an adjudication, and—unless the family has been reunified—ends with a determination of whether a respondent's parental rights will be terminated." *Ferranti*, 504 Mich at 23 (citations and quotation marks omitted).

The court may conduct the trial in an informal manner, but it must read the allegations in the petition at the beginning of a trial (unless waived) and make a record of the proceeding. MCL 712A.17(1); MCR 3.972(B)(2).

> **Note:** Child protective proceedings are civil, not criminal, proceedings. MCL 712A.1(2). See also *People v Ali*, 328 Mich App 538, 548 (2019) (finding that child protective proceedings are fundamentally different than criminal proceedings).

If the factfinder concludes that the child is not within the jurisdiction of the court, the court must dismiss the petition. MCL 712A.18(1); *In re Waite,* 188 Mich App 189, 202 (1991).

If the factfinder concludes that the child is within the jurisdiction of the court, the court will generally hold a dispositional hearing. MCR 3.973(A). See Chapter 13 for information on dispositional hearings.

"[A] default cannot be entered in child protective proceedings" because "MCR 3.901(A)(1) sets forth the court rules that are applicable to child protective proceedings[, and] the rule pertaining to defaults, MCR 2.603, is not among the rules specifically incorporated into juvenile or child protective proceedings." *In re Collier,* 314 Mich App 558, 569 (2016). Furthermore, "a default is not an adjudication[5] of [the] respondent's fitness as a parent, and [the Michigan Court of Appeals] ha[s] not encountered any authority that a default can serve as a substitute for adjudication." *Id.* at 570.

Although "courts may assume jurisdiction over a child on the basis of the adjudication of one parent[,]" procedural "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights." *Sanders*, 495 Mich at 407, 412-413 n 8, 415, 422-23 (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").[6] See also *In re Dixon (On Reconsideration)*, 347 Mich App 337, 359, 360 (2023). In *Dixon*, the Court acknowledged the outcome in *Sanders* and discussed how "the court and the DHHS bypassed [the incarcerated] father's right to direct the

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[5] See *In re Sanders*, 495 Mich 394, 422 (2014).

[6] Where "a minor faces an *imminent* threat of harm, . . . the state may take the child into custody without prior court authorization or parental consent[;] . . . [s]imilarly, upon the authorization of a child protective petition, the trial court may order *temporary* placement of the child into foster care pending adjudication if the court finds that placement in the family home would be contrary to the welfare of the child." *In re Sanders*, 495 Mich at 416-417 n 12 (limiting the requirement for adjudication over each parent to "the court's exercise of its postadjudication dispositional authority"). See Chapter 3 for additional information on taking temporary protective custody over a child, and Chapter 8 for additional information on temporary placements pending adjudication.

placement of his child by delaying his legal ability to assert that right." *Dixon*, 347 Mich App at 352. According to the Court, "[t]here [was] no legitimate excuse for the DHHS's failure to timely declare father a respondent," and the delays caused by the DHHS's failure to timely make the child's father a respondent "impinged on father's constitutional right[]" to direct the care, custody, and control of his son before he himself was adjudicated.[7] *Id*. at 353.

The trial court erroneously assumed jurisdiction over respondent's three sons after trial based on its determination that respondent neglected her three daughters, two of whom lived with respondent and one of whom lived with the girls' father, because respondent failed to discover the unacceptable living conditions at the girls' father's home and the abuse of another child residing in the girls' father's household. *In re Boshell/Shelton*, ___ Mich App ___, ___ (2025). The girls' father resided with his partner, his partner's children, and one of respondent's daughters. *Id*. at ___. The other two girls occasionally visited their father's home, and the respondent's sons never visited the girls' father's home. *Id*. at ___. One of the partner's children was treated so badly that he died from his injuries. *Id*. at ___. The girls' father and his partner were arrested on torture and murder charges. *Id*. at___. The trial court assumed jurisdiction over all six of respondent's children under MCL 712A.2(b)(1), and found statutory grounds to terminate her parental rights under MCL 712A.19b(3)(a)(*ii*) and MCL 712A.19b(3)(b)(*ii*) due to her "'willful ignorance'" of the conditions in the girls' father's home. *Boshell/Shelton*, ___ Mich App at ___. The trial court later determined that termination of respondent's parental rights was in the best interests of all the children because respondent's "lack of a permanent home rendered her unable to provide the children with permanency, stability, and finality." *Id*. at ___. On appeal, the *Boshell/Shelton* Court held that the trial court erred in exercising jurisdiction over respondent's three sons based on the doctrine of anticipatory neglect because "the record [did] not support the trial court's determination that respondent neglected *any* of her children." *Id*. at ___. Rather, the record showed that respondent reported the girls' father to CPS at least twice in the four years after they separated, but it did not show whether or to what extent CPS investigated the reports. *Id*. at ___. Further, "[t]he trial court plainly erred by finding that [respondent's] boys were subjected to aggravating circumstances [under

[7] A parent's constitutional right to direct his or her child's care and custody before the parent is adjudicated is not without limit; "[w]hen a child has been placed into care by an unchallenged order of the court, the state has a legitimate and important interest in protecting the child's health and safety." *In re Dixon (On Reconsideration)*, 347 Mich App 337, 359 (2023) (court was permitted to continue the child's placement in foster care until the DHHS could properly investigate placement of the child with a nonrelative as proposed by the child's incarcerated father). If placing a child in the custody of an unadjudicated parent would require the court to order a change in the child's custody and would terminate the state's custody of the child, the state's interest in protecting the child's health and safety permits it to continue the child's temporary placement with foster parents while an investigation takes place to determine whether the new placement is appropriate. *Dixon*, 347 Mich App at 359, 360.

MCL 722.638] because . . . the abusers . . . were not a parent, guardian, or custodian of the boys, and nothing in the record suggests that they ever resided with the boys." *Boshell/Shelton*, ___ Mich App at ___. Thus, the DHHS was required to make reasonable efforts to reunify the boys with respondent. *Id*. at ___ (reversed and remanded).

"[N]either the admissions made by [the adjudicated parent] nor [the unadjudicated parent's] failure to object to those admissions constituted an adjudication of [the unadjudicated parent's] fitness[.]" *In re SJ Temples*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2015 (Docket No. 323246)[8] (finding that the trial court violated the unadjudicated parent's "due process rights by subjecting him to dispositional orders without first adjudicating him as unfit[]").

"Plowing forward with an adjudication hearing in the absence of both [the] respondent and an attorney who can represent [the] respondent offends due process." *In re Collier*, 314 Mich App at 569-571 (finding the respondent-father "was effectively denied the adjudication to which he was entitled" where, on the day scheduled for the respondent's adjudication bench trial, the hearing referee excused the respondent's counsel from the case, entered a default against the respondent for failure to appear, and continued to conduct the hearing and receive the testimony of the petitioner's witnesses; "the hearing referee denied [the] respondent his right to due process by entering a default against him for his failure to appear at the adjudication hearing and by infringing [on] his fundamental right to make decisions regarding the care and custody of his minor child").

## A. Judge or Referee as Factfinder

Unless a party has demanded a trial by judge or jury, a referee may conduct the trial. MCR 3.913(B). However, parties have the right to a judge at a hearing on the formal calendar, which includes a trial.[9] MCR 3.912(B). A judge must conduct a jury trial. MCR 3.912(A).

In a bench trial, a party may demand that a judge preside rather than a referee by filing a written demand with the court. MCR 3.912(B). The demand must be filed within "(1) 14 days after the court gives notice of the right to a judge, or (2) 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later, but no later than 21 days before trial. The court may excuse a late filing in the interest of justice." *Id.*[10]

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

[9] MCR 3.903(A)(10) defines *formal calendar* as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

### B. Lawyer-Guardian ad Litem Recommendation

"At the conclusion of the proofs, the lawyer-guardian ad litem for the child may make a recommendation to the finder of fact regarding whether one or more of the statutory grounds alleged in the petition have been proven." MCR 3.972(D).

### C. Findings of Fact and Conclusions of Law by Factfinder

Subchapter 3.900 of the Michigan Court Rules does not have a specific court rule addressing required findings of fact and conclusions of law by a judge or referee in a nonjury trial.[11] However, MCR 3.977(I), which sets out the requirements for findings and conclusions following hearings on the termination of parental rights, may be helpful:

> "(1) *General.* The court shall state on the record or in writing its findings of fact and conclusions of law. Brief, definite, and pertinent findings and conclusions on contested matters are sufficient. . . .
>
> (2) *Denial of Termination.* If the court finds that the parental rights of respondent should not be terminated, the court must make findings of fact and conclusions of law.
>
> (3) *Order of Termination.* An order terminating parental rights under the Juvenile Code may not be entered unless the court makes findings of fact, states its conclusions of law, and includes the statutory basis for the order." MCR 3.977(I).

After trial, a referee must "make a written signed report to the judge containing a summary of the testimony taken and a recommendation for the court's findings . . . ."[12] MCL 712A.10(1)(c).

## 12.2 Time Requirements

If a child is not in placement, a court must hold a trial within six months of the authorization of the petition unless it adjourns the trial for good cause under MCR 3.923(G). MCR 3.972(A).

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[10] See Section 9.1(B) for a discussion on a referee's scope of authority, and Section 20.1 for a discussion on reviewing a referee's recommendation.

[11] MCR 2.517, the rule governing civil bench trials, is not applicable to proceedings under Subchapter 3.900. See MCR 3.901(A)(2).

[12] See Section 9.1(B) for additional information on referees.

If a child is in placement, the court must hold a trial "as soon as possible, but not later than 63 days after the child is removed from the home unless the trial is postponed:

> (1) on stipulation of the parties for good cause;
>
> (2) because process cannot be completed; or
>
> (3) because the court finds that the testimony of a presently unavailable witness is needed." MCR 3.972(A).

If a trial is postponed because the process cannot be completed or because the testimony of an unavailable witness is necessary, the court must "release the child to the [child's] parent, guardian, or legal custodian unless the court finds that releasing the child to the custody of the parent, guardian, or legal custodian will likely result in physical harm or serious emotional damage to the child." MCR 3.972(A).

In child protective proceedings, adjourning a trial or hearing should only be granted for good cause after the court takes the child's best interests into consideration. MCR 3.923(G). The adjournment must be "for as short a period of time as possible."[13] *Id.* In order for a court to find good cause, "'a legally sufficient or substantial reason' must first be shown." *In re Utrera*, 281 Mich App 1, 10-12 (2008) (although the court erred by failing to find good cause or consider the child's best interests to support its multiple adjournments, reversal was not required when the respondent-mother contributed to the adjournments on several occasions and failed to show how she was prejudiced by them).

The court's refusal to adjourn a child protective proceeding pending the outcome of a related criminal proceeding that arose out of the same factual circumstances did not violate the appellant-parents' Fifth Amendment right against compelled self-incrimination. *In re Stricklin*, 148 Mich App 659, 664-665 (1986) (finding that an "accept[ance of the] appellant[-parents'] premise that the increased risk of loss of parental rights was the penalty imposed upon them for their refusal to testify [at the child protective proceeding], it must be concluded that the testimony sought through such compulsion would have been nonincriminating[, and t]he compulsion of nonincriminating testimony is not the sort of compulsion contemplated by the Fifth Amendment.").[14]

"If the child has been removed from the home, a review hearing must be held within 182 days of the date of the child's removal from the home, even if the trial has not been completed before the expiration of that 182-day period." MCR 3.972(A).

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[13] See Section 7.1(B) for a detailed discussion of adjourning preliminary hearings.

MCR 3.973(B), which governs notice of dispositional hearings, contemplates a combined adjudicative and dispositional hearing: "[u]nless the dispositional hearing is held immediately after the trial, notice of hearing may be given by scheduling it on the record in the presence of the parties or in accordance with MCR 3.920." MCR 3.973(C) assigns to the court's discretion the interval between the trial and the dispositional hearing (not to exceed 28 days except for good cause, when a child is in placement). Accordingly, the two hearings may be combined if necessary preparations are made before the hearing, including preparation of a case service plan.[15] MCL 712A.18f(2). See also MCR 3.973(E)(2).

## 12.3 Who May Be Present at Trial

Before proceeding with the trial, the court must determine that the proper parties are present. MCR 3.972(B)(1). "The respondent has the right to be present, but the court may proceed in the absence of the respondent provided notice has been served on the respondent." *Id.* "[The] respondent should not [be] defaulted for failing to appear." *In re Collier*, 314 Mich App 558, 569-570 (2016) (finding "no authority for the proposition that a respondent in a child protective proceedings can be defaulted[ for failing to appear for trial, and determining in this case that] . . . the hearing referee [who oversaw the respondent's adjudication hearing] denied [the] respondent his right to due process by entering a default against him for his failure to appear at the adjudication hearing . . .").[16]

In its discretion, a court may excuse a child "as [it] determines the child's interests require[,]" but may not restrict the child from attending trial. MCL 712A.12; MCR 3.972(B)(1).

A member of a local Foster Care Review Board must be admitted to a trial. MCL 712A.17(6).

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[14] In *In re Stricklin*, 148 Mich App at 664-665, the Court also found that "[b]ecause of the essential similarity of issues in the [child protective proceeding and the related criminal proceeding], any incriminating testimony offered at the criminal proceeding would have also been incriminating at the [child protective] proceeding[,]" and that "[a]ny adverse consequences resulting from [the] appellant[-parents'] failure to testify [during the child protective proceeding] cannot be said to have been created by the state[, but rather a]ny penalty resulting from [the] appellant[-parents'] failure to testify [during the child protective proceeding] was no more than the 'penalty' that any party suffers when he [or she] decides not to testify in his [or her] own defense."

[15] See Section 13.6 for a detailed discussion of case service plans.

[16] The Court also determined that the hearing referee denied the respondent his right to due process by "[p]lowing forward with an adjudication hearing in the absence of both the respondent and an attorney who can represent respondent" thereby "infringing [on the respondent's] fundamental right to make decisions regarding the care and custody of his minor child." *In re Collier,* 314 Mich App at 570-571.

## 12.4 Use of Videoconferencing Technology

The use of videoconferencing technology during trial is governed by MCR 3.904(B). See Section 1.7.

## 12.5 Rules of Evidence and Standard of Proof

"Except as otherwise provided in these rules, the rules of evidence for a civil proceeding and the standard of proof by a preponderance of evidence apply at the trial, notwithstanding that the petition contains a request to terminate parental rights."[17] MCR 3.972(C)(1). See also *In re Dearmon/Harverson-Dearmon*, 303 Mich App 684, 696 (2014) (citing MCR 3.972(C)(1) and stating that "the rules of evidence apply to adjudication hearings"); *In re Collier*, 314 Mich App 558, 573 (2016) ("[u]nlike at the dispositional phase of protective proceedings, the rules of evidence apply to adjudication trials[,]" and the petitioner is not "allowed to present inadmissible hearsay evidence"), citing MCR 3.972(C) and *In re Sanders*, 495 Mich 394, 405 (2014).

The standard of proof required to terminate parental rights at an initial disposition or on a supplemental petition is clear and convincing evidence, or, if an Indian child is the subject of the proceedings, beyond a reasonable doubt. MCR 3.977(E)(3); MCR 3.977(F)(1)(b); MCR 3.977(G)(2); 25 CFR 23.121(b). Statutory grounds under MCL 712A.19b(3) must be established by clear and convincing evidence. *In re D M A N*, ___ Mich App ___, ___ (2025). That termination of parental rights is in the child's best interests must be proved by a preponderance of the evidence. *Id*. at ___. [18]

## 12.6 Jury Procedures

A brief discussion of jury procedures is contained in this section. For a detailed discussion, see the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 7.

In child protective proceedings, parties have the right to demand a jury trial. MCL 712A.17(2); MCR 3.911(A). Juries in child protective proceedings consist of six jurors. MCL 712A.17(2). Alternate jurors may be impaneled and may deliberate under MCR 2.511(B) and MCR 2.514(A)(3).[19]

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[17] See Appendix C for a chart summarizing the applicability of the rules of evidence and applicable standards of proof at different stages throughout a child protective proceeding.

[18] For more information on the applicable standards of proof in termination hearings, see Chapter 17.

[19] MCR 3.911(C) states that "[j]ury procedure . . . is governed by MCR 2.508–[MCR] 2.516, except as provided in this subrule."

Prospective jurors must be summoned and impaneled in accordance with MCR 2.510.

Although MCR 2.508–MCR 2.516 govern most jury procedures in child protective proceedings, these types of cases have their own specific set of rules regarding peremptory challenges, multiple parties, and verdicts:

> "(2) In a child protective proceeding,
>
> > (a) each party is entitled to 5 peremptory challenges, with the child considered a separate party, and
> >
> > (b) a verdict in a case tried by 6 jurors will be received when 5 jurors agree."
>
> (3) Two or more parties on the same side, other than a child in a child protective proceeding, are considered a single party for the purpose of peremptory challenges.
>
> > (a) When two or more parties are aligned on the same side and have adverse interests, the court shall allow each such party represented by a different attorney 3 peremptory challenges.
> >
> > (b) When multiple parties are allowed more than 5 peremptory challenges under this subrule, the court may allow the opposite side a total number of peremptory challenges not to exceed the number allowed to the multiple parties." MCR 3.911(C).

## 12.7 Jury Instructions

A brief discussion of jury instructions is contained in this section. For a detailed discussion, see the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 6.

MCR 2.512(D) governs the creation, modification, and use of Model Civil Jury Instructions and Model Criminal Jury Instructions. MCR 2.512(D)(2) provides:

> "Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions[20] or its predecessor committee must be given in each action in which jury instructions are given if

[20] The Model Civil Jury Instructions for child protective proceedings is available at http://courts.mi.gov/courts/michigansupremecourt/resources/mcji/pages/child-protection-proceedings.aspx.

(a) they are applicable,

(b) they accurately state the applicable law, and

(c) they are requested by a party." MCR 2.512(D)(2).

A court may also "give additional instructions on applicable law not covered by the model instructions[, but the] [a]dditional instructions . . . must be patterned as nearly as practicable after the style of the model instructions, and must be concise, understandable, conversational, unslanted, and nonargumentative." MCR 2.512(D)(4).

In addition to providing a written copy, the court must orally provide the jury with pretrial instructions and final instructions. See MCR 2.513(A); MCR 2.513(N)(1); MCR 2.513(N)(3).

## 12.8 Verdict

"In a child protective proceeding, the verdict must be whether one or more of the statutory grounds alleged in the petition have been proven." MCR 3.972(E).

### A. Motions for Directed Verdict

A motion for directed verdict is permitted only at an adjudication trial before a jury; a motion for directed verdict is prohibited at an adjudication trial before the bench. *In re Miller*, 347 Mich App 420, 427 (2023) (holding that the trial court erred by granting the respondent's motion for directed verdict after petitioner presented its evidence at a *bench* trial because the court rule applicable to motions for directed verdict, MCR 2.516, is expressly made applicable to child protective proceedings by MCR 3.911(C), which governs procedure for *jury* trials in juvenile cases; trial court's decision affirmed because it reached the right result albeit for the wrong reason).

When a motion for directed verdict is permissible, "[a] party may [make the motion] at the close of the evidence offered by an opponent. The motion must state specific grounds in support of the motion. If the motion is not granted, the moving party may offer evidence without having reserved the right to do so, as if the motion had not been made. A motion for a directed verdict that is not granted is not a waiver of trial by jury, even though all parties to the action have moved for directed verdicts." MCR 2.516. See MCR 3.911(C), which indicates that MCR 2.516 applies to child protective proceedings.

The judge may grant a motion for directed verdict only "when the evidence does not establish a prima facie case and reasonable persons would agree that there is an essential failure of proof." *Auto Club Ins Assoc v Gen Motors Corp*, 217 Mich App 594, 601 (1996). The evidence and all legitimate inferences that may be drawn from it must be viewed in a light most favorable to the nonmoving party. *Caldwell v Fox*, 394 Mich 401, 407 (1975).

### B. Verdict in Jury Trial

A verdict in a child protective proceeding is reached when five of the six jurors agree.[21] MCR 3.911(C)(2)(b). A party may require the jury to be polled. MCR 2.514(B)(2). If the number of jurors agreeing is less than required, the jury must be sent out for further deliberation. MCR 2.514(B)(3). If the required number of jurors agrees to a verdict, it is deemed complete, and the court must discharge the jury. *Id.*

The court may also discharge and order a new jury:

> "(1) because of an accident or calamity requiring it;
>
> (2) by consent of all the parties;
>
> (3) whenever an adjournment or mistrial is declared;
>
> (4) whenever the jurors have deliberated and it appears that they cannot agree.
>
> The court may order another jury to be drawn, and the same proceedings may be had before the new jury as might have been had before the jury that was discharged." MCR 2.514(C).

## 12.9 Respondent's Rights Following Trial

"If the trial results in a verdict that one or more statutory grounds for jurisdiction has been proven, the court shall advise the respondent orally or in writing that:

> (1) appellate review is available to challenge any errors in the adjudicatory process, which may be challenged in an appeal from the court's initial order of disposition,

[21] See Section 12.1(C) on findings and conclusions in nonjury trials.

> (2) an indigent respondent is entitled to appointment of an attorney to represent the respondent on any appeal as of right and to preparation of transcripts, and
>
> (3) the respondent may be barred from challenging the assumption of jurisdiction if they do not timely file an appeal under MCR 7.204 or a delayed appeal under MCR 3.993(C)."[22] MCR 3.972(F).

"The respondent may challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the court fails to properly advise the respondent of their right to appeal pursuant to [MCR 3.972](F)(1)-(3)." MCR 3.972(G).

## 12.10 Court's Authority to Call Additional Witnesses or Order Production of Additional Evidence

"If at any time the court believes that the evidence has not been fully developed, it may:

> (1) examine a witness,
>
> (2) call a witness, or
>
> (3) adjourn the matter before the court, and
>
> > (a) cause service of process on additional witnesses, or
> >
> > (b) order production of other evidence." MCR 3.923(A).

See *In re Vandalen*, 293 Mich App 120, 137 (2011) (in a child protective proceeding, the court had authority to obtain, on its own accord, a previously entered custody order "in an attempt to resolve a conflict in the testimony, which bore on respondent-mother's ability to adequately protect the children from harm or abuse, an issue pertinent to the termination decision[]");[23] *In re Alton*, 203 Mich App 405, 407-408 (1994) (in a delinquency proceeding, the court properly allowed additional

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[22] A respondent may be eligible to file a motion to restore appellate rights under MCR 3.993(F) "[i]f [the] respondent was denied the right to appellate review or the appointment of appellate counsel due to errors by the respondent's prior attorney or the court, or other factors outside the respondent's control . . . ." For additional information on filing an appeal of the initial disposition under MCR 3.993(A)(1)-(2), a delayed appeal under MCR 3.993(C), or a motion to restore appellate rights under MCR 3.993(F), see Section 20.3.

[23] The Court of Appeals further found that the trial court did not deprive the respondent-parents' of their due process rights when it sought the previously entered custody order because "the court fully apprised the parties of its conduct in obtaining the additional evidence, allowed the parties to review the evidence, and gave the parties the opportunity to call additional witnesses and present additional evidence in light of the newly obtained evidence before rendering its decision[, and the] [r]espondent[-parents] did not object to the court's actions or the admission of the newly obtained evidence, despite having the opportunity to do so." *In re Vandalen*, 293 Mich App at 138.

testimony that directly addressed key conflicts between the testimony of the complainant and the juvenile).

## 12.11 Record of Proceedings at Trial

"A record of all hearings must be made. All proceedings on the formal calendar[24] must be recorded by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108." MCR 3.925(B). See also MCL 712A.17(1), which requires the court to record the proceedings via stenographic notes or another method of transcription.

## 12.12 Motions for Rehearings or New Trial

### A. Generally

In a child protective proceeding, "except for a case in which parental rights are terminated, a party may seek a rehearing or new trial by filing a written motion[25] stating the basis for the relief sought[.]" MCR 3.992(A). "In a case that involves termination of parental rights, [a party may file] a motion for new trial, rehearing, reconsideration, or other postjudgment relief[.]" *Id.*

A petition for rehearing may be filed by "an interested person[,]" which includes a member of a local foster care review board with whom the child's case has been assigned. MCL 712A.21.

"A motion will not be considered unless it presents a matter not previously presented to the court, or presented, but not previously considered by the court, which, if true, would cause the court to reconsider the case." MCR 3.992(A).

### B. Procedural Requirements

#### 1. Timing

The written motion stating the basis for the relief sought must be filed "within 21 days after the date of the order resulting from the hearing or trial." MCR 3.992(A). If the case involves "termination of parental rights, a motion for new trial,

[24] MCR 3.903(A)(10) defines *formal calendar* as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

[25] See SCAO form JC 15, *Motion re Transfer/Hearing/Placement*, at https://www.courts.michigan.gov/498068/siteassets/forms/scao-approved/jc15m_15a.pdf.

rehearing, reconsideration, or other postjudgment relief shall be filed within 14 days after the date of the order terminating parental rights." *Id.* But see MCL 712A.21, which requires a petition for rehearing to be filed within 20 days of entry of the order terminating parental rights where parental rights have been terminated and custody of a child has been removed from the parents, guardian, or other person.

However, "[t]he court may entertain an untimely motion for good cause shown." MCR 3.977(A).

Any response by parties to a motion for rehearing or new trial "must be in writing and filed with the court and served on the opposing parties within 7 days after notice of the motion." MCR 3.992(C).

#### 2. Notice

"All parties must be given notice of the motion in accordance with [MCR] 3.920."[26] MCR 3.992(B).

#### 3. No Hearing Required

The court does not need to hold a hearing before ruling on a motion for rehearing or new trial. MCR 3.992(E). "Any hearing conducted shall be in accordance with the rules for dispositional hearings and, at the discretion of the court, may be assigned to the person who conducted the hearing."[27] *Id.*

#### 4. Stay of Proceedings and Grant of Bail

The court may stay any order pending a ruling on a motion for rehearing or new trial. MCR 3.992(F).

#### 5. Findings by Court

The court must state the reasons for its decision on the record or in writing. MCR 3.992(E).

### C. Standards for Granting Relief

MCR 3.992(A) does not state the standard for granting relief following a court's consideration of a party's motion for rehearing or new trial. See *In re Alton*, 203 Mich App 405, 409 (1994). However,

[26] See Section 5.2

[27] See Section 13.4 for a discussion of the applicable evidentiary rules.

MCR 2.613(A), the "harmless error rule" for civil proceedings, applies to child protective proceedings. MCR 3.902(A). See also *In re Alton, supra* at 410. MCR 2.613(A) states:

> "An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice."

In *In re Alton*, 203 Mich App at 409-410, the Court of Appeals remanded the case to the juvenile court for a rehearing on the juvenile's motion for a new trial, adopting the following guidelines for ruling on such motions:

> "In ruling on the motion, the parties and the trial court applied the rules for granting a new trial embodied in MCR 2.611(A)(1). That court rule is not applicable in juvenile delinquency proceedings. See MCR [3].901(B). Therefore, we remand this case for the trial court to reconsider the juvenile's motion under the proper standard of review: whether, in light of the new evidence presented, it appears to the trial court that a failure to grant the juvenile a new trial would be inconsistent with substantial justice. MCR 2.613(A). In this case, that means the trial court must decide whether it appears that if the court refuses to grant the motion, it will be exercising jurisdiction over a juvenile who is not properly within its jurisdiction. The trial court must state the reasons for its decision on the record or in writing. MCR [3].992(E)."

## D. Remedies

"The judge may affirm, modify, or vacate the decision previously made in whole or in part, on the basis of the record, the memoranda prepared, or a hearing on the motion, whichever the court in its discretion finds appropriate for the case." MCR 3.992(D). See also MCL 712A.21(1).

The court may also enter an order for supplemental disposition while the child remains under the court's jurisdiction. MCL 712A.21(1).

# Chapter 13: Initial Dispositions


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## *In this chapter. . .*

This chapter discusses the requirements for initial dispositions. At an initial disposition hearing, the court may enter orders regarding the child's placement and the treatment and conduct of the respondents and other adults. The court may also consider a request for a termination of parental rights at an initial disposition hearing.[1]

Specifically, this chapter discusses procedural requirements for initial dispositional hearings, dispositional options, and case service plans. The chapter also addresses the procedures required when additional

[1] See Section 17.3 for a detailed discussion of terminating parental rights at an initial dispositional hearing.

allegations of child abuse or neglect are made during the dispositional phase of proceedings.

In an effort to provide trial courts with a quick practical guide through the process of initial dispositional hearings, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys: Initial Dispositional Hearing (MCR 3.973/MCL 712A.18)*. This toolkit is accessible at https://www.courts.michigan.gov/administration/offices/child-welfare-services/cws-toolkit/.

# 13.1 Overview of the Dispositional Phase of Child Protective Proceedings

An individual involved in a child protective proceeding may be eligible for admission to a family treatment court program if, among other requirements, "the individual has a substance use disorder," MCL 600.1099ee(a), and "[t]he allegations contained in the petition [are] related to the abuse, illegal use, or possession of a controlled substance or alcohol," MCL 600.1099ff(a). See Section 7.7 for information about family treatment courts.

"Child protective proceedings [are] divided into two phases: the adjudicative phase and the dispositional phase." *In re AMAC*, 269 Mich App 533, 536 (2006). "The adjudicative phase occurs first and involves a determination whether the trial court may exercise jurisdiction over the child, i.e., whether the child comes within the statutory requirements of MCL 712A.2(b)." *In re AMAC*, 269 Mich App at 536.

If a court finds that a child is not within the court's jurisdiction, the court must dismiss the petition. MCL 712A.18(1). See also *In re Waite*, 188 Mich App 189, 202 (1991).

If a court finds that a child is within the jurisdiction of the court, the dispositional phase follows. *In re AMAC*, 269 Mich App at 536. See also *In re Thompson*, 318 Mich App 375, 378 (2016) (noting that "[i]n order to have an initial disposition, there must *first* be an adjudication"). During the dispositional phase, the court must order return of the child if returning the child "would not cause a substantial risk of harm to the juvenile or society," and the court may also order one or more of the dispositional alternatives contained in MCL 712A.18(1) "that are appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained[.] . . ."[2] MCL 712A.18(1). See also MCR 3.973(F)(1).

> **Note:** "The court shall not enter an order of disposition until it has examined the case service plan as provided in MCL 712A.18f." MCR 3.973(F)(2). See Section 13.6 for a detailed discussion of case service plans.

The purpose of the dispositional phase is "to determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult, once the court has determined following trial, plea of admission, or plea of no contest that one or more of the statutory grounds alleged in the petition are true." MCR 3.973(A). See *In re Sanders*, 495 Mich 394, 414 n 10 (2014), where the Michigan Supreme Court noted that "the phrase 'when applicable' [contained in

[2] See Section 13.9(A) for a list of dispositional options available to the court.

MCR 3.973(A)] can reasonably—and constitutionally—be interpreted to mean that when the person meeting the definition of 'any adult' is a presumptively fit parent, the court's authority during the dispositional phase is limited by the fact that the state must overcome the presumption of parental fitness by proving the allegations in the [child protective] petition."

In child protective proceedings, the dispositional phase encompasses:

(1) initial dispositional hearings;

(2) dispositional review hearings;

(3) permanency planning hearings; and

(4) hearings on termination of parental rights.[3] See MCR 3.973–MCR 3.977.

No right to a jury trial exists during the dispositional phase of proceedings, even where a supplemental petition is subsequently filed containing new allegations of abuse or neglect. *In re Miller (Michelle)*, 178 Mich App 684, 686 (1989). See also MCR 3.911(A).

The court must hold a dispositional hearing "either immediately following the adjudicative hearing or after proper notice." *In re AMAC*, 269 Mich App at 538 (Court of Appeals reversed the trial court's order terminating respondent-mother's parental rights, finding the trial court's failure to afford respondent a dispositional hearing constituted error). See also MCR 3.973(B). See also *In re Thompson*, 318 Mich App at 376, 379 (where "the circuit court conducted only a termination hearing and considered jurisdiction as an afterthought[]" by "[taking] evidence in one sitting and reach[ing] a termination decision before considering whether jurisdiction was appropriate[,]" the Court of Appeals "vacate[d] the adjudicative and termination orders and remand[ed] to the circuit court to handle the[] proceedings in the manner and order dictated by law[]").

Four steps must be satisfied when the DHHS seeks termination at the initial disposition:

(1) The DHHS must establish jurisdiction over the child under MCL 712A.2(b) by a preponderance of the evidence;

(2) The DHHS must prove by clear and convincing evidence that its obligation under MCL 712A.19a(2)(a) to make

[3] See Chapter 16 for a discussion of dispositional review hearings and progress reviews, Chapter 17 for a discussion of permanency planning hearings, and Chapter 18 for a discussion of hearings on termination of parental rights.

reasonable efforts to reunify the parent and child is excused due to aggravated circumstances under MCL 722.638;

(3) The DHHS must demonstrate by clear and convincing evidence that one of the statutory grounds for termination under MCL 712A.19b(3) exists; and

(4) The court must determine if the termination is in the child's best interests by a preponderance of the evidence. See *In re KV*, ___ Mich App ___, ___ (2025).

## 13.2 Timing Requirements

"The interval, if any, between the trial and the dispositional hearing is within the discretion of the court. When the child is in placement, the interval may not be more than 28 days, except for good cause." MCR 3.973(C).

MCR 3.973(B), which governs notice of dispositional hearings, contemplates a combined adjudicative and dispositional hearing: "[u]nless the dispositional hearing is held immediately after the trial, notice of hearing may be given by scheduling it on the record in the presence of the parties or in accordance with MCR 3.920." MCR 3.973(C) assigns to the court's discretion the interval between the trial and the dispositional hearing (not to exceed 28 days when a child is in placement). Accordingly, the two hearings may be combined if necessary preparations are made before the trial, including preparation of a case service plan.[4] See MCR 3.973(E)(2).

## 13.3 Parties Who May Be Present at Initial Dispositional Hearings

In its discretion, a court may excuse a child "as the interests of the child require[,]" from attending the dispositional hearing. MCR 3.973(D)(1). See also MCL 712A.12.

"The respondent has the right to be present [at the dispositional hearing] or may appear through an attorney." MCR 3.973(D)(2).

If proper notice has been given, the court may proceed in the absence of a party. MCR 3.973(D)(3).

[4] See Section 13.6 for a detailed discussion of case service plans.

## 13.4 Rules of Evidence and Reports

MCR 3.973(E) sets out the rules of evidence applicable to an initial disposition hearing and requirements for examination of reports:

> "**(E) Evidence; Reports**
>
> (1) The Michigan Rules of Evidence do not apply at the initial dispositional hearing, other than those with respect to privileges. However, as provided by MCL 722.631, no assertion of an evidentiary privilege, other than the privilege between attorney and client,[5] shall prevent the receipt and use, at the dispositional phase, of materials prepared pursuant to a court-ordered examination, interview, or course of treatment.
>
> (2) All relevant and material evidence, including oral and written reports, may be received and may be relied on to the extent of its probative value. The court shall consider the case service plan and any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom the child is placed. If the agency responsible for the care and supervision of the child recommends not placing the child with the parent, guardian, or legal custodian, the agency shall report in writing what efforts were made to prevent removal, or to rectify conditions that caused removal, of the child from the home.[6]
>
> (3) The parties shall be given an opportunity to examine and controvert written reports so received and may be allowed to cross-examine individuals making the reports when those individuals are reasonably available.
>
> (4) Written reports, other than those portions made confidential by law, case service plans, and court orders, including all updates and revisions, shall be available to the foster parent, child caring institution, or relative with whom the child is placed. The foster parents, child caring institution, or relative with whom the child is placed shall not have the right to cross-examine individuals making such reports or the right to

[5] MCL 722.631 also preserves the priest-penitent privilege under certain circumstances. See Section 3..

[6] See also MCL 712A.18f(4), which requires the court to consider any relevant information about the child, including "the appropriateness of parenting time" from any of the individuals or entities listed in MCR 3.973(E)(2), or from the child's lawyer-guardian ad litem, attorney, or guardian ad litem. MCL 712A.18f(4).

> controvert such reports beyond the making of a written or oral statement concerning the child as provided in subrule (E)(2).
>
> (5) Reports in the Agency's case file, including but not limited to case services plans, substance abuse evaluations, psychological evaluations, therapists' reports, drug and alcohol screening results, contracted service provider reports, and parenting time logs shall be provided to the court and parties no less than seven (7) days before the hearing.
>
> (6) The court, upon receipt of a local foster care review board's report, shall include the report in the court's confidential social file. The court shall ensure that all parties have had the opportunity to review the report and file objections before a dispositional order, dispositional review order, or permanency planning order is entered. The court may at its discretion include recommendations from the report in its orders."

## 13.5 Required Case Review and Testimony by Child's Physician

To ensure that a case service plan[7] addresses a child's medical needs in relation to abuse and neglect, the Department of Health and Human Services (DHHS) must review the case with the child's attending or primary care physician if a physician has diagnosed the child's abuse or neglect as involving one or more of the following:

- Failure to thrive;
- Munchausen syndrome by proxy;
- Shaken baby syndrome;
- Bone fracture diagnosed as a result of abuse or neglect; or
- Drug exposure. MCL 712A.18f(6).

If a child is placed outside the home and the DHHS is required to review the child's case with a physician, the court must allow the child's attending or primary care physician to testify regarding the case service plan at a judicial proceeding to determine if the child is to be returned home. MCL 712A.18f(7). The court must notify each physician of the time and place of the hearing. *Id.*

[7] See Section 13.6 for a detailed discussion of case service plans.

## 13.6 Case Service Plans

The agency must prepare a case service plan and make it available to the court and all parties involved before the dispositional hearing. MCL 712A.18f(2). Before a court enters an order of disposition, it must consider the case service plan. MCL 712A.18f(4); MCR 3.973(F)(2).

> **Note:** The "agency" may be the Department of Health and Human Services (DHHS) or another agency supervising a child's placement. See MCL 712A.13a(1)(a).

A "'[c]ase service plan' [is] the plan developed by an agency and prepared under [MCL 712A.18f] that includes services to be provided by and responsibilities and obligations of the agency and activities, responsibilities, and obligations of the parent." MCL 712A.13a(1)(d). "[T]he required [case] service plan should be a forward-looking blueprint for facilitating the return of the child to the parent." *In re MJC*, 349 Mich App 42, 57 (2023). "This means petitioner must create a service plan outlining the steps that both it and the parent will take to rectify the issues that led to court involvement and to achieve reunification."*In re G Matamoros*, ___ Mich App ___, ___ (2025) (quotation marks and citation omitted). A case service plan may also be "referred to using different names than case service plan including, but not limited to, a parent/agency agreement or a parent/agency treatment plan and service agreement."[8] MCL 712A.13a(1)(d).

However, an "informal, unwritten 'safety plan'" implemented before the court had jurisdiction is nonbinding on a respondent and may not be the basis of a petition to terminate the respondent's parental rights. See *In re C Walters*, ___ Mich App ___, ___ (2025). "Pursuant to MCL 712A.18f(1) and (2), the case service plan must be in writing, and it must 'be available to the court and all the parties to the proceeding.'" *Walters*, ___ Mich App at ___, quoting MCL 712A.18f(2). In *Walters*, DHHS failed to petition the court for jurisdiction after CPS was notified that the child tested positive for illegal substances at birth. *Id*. at ___. Instead, CPS "purportedly established an oral safety plan" for respondent not to use substances in the child's presence and to leave the child with a sober caregiver if she did. *Id*. at ___. When respondent moved in with her mother, the case was transferred to a new county, which "purportedly updated the safety plan such that [the child] could not ever be left unsupervised with respondent[.]" *Id*. at ___. "No written plans were prepared until after DHHS filed a petition seeking termination of respondent's parental rights, . . . largely based on respondent's lack of compliance with the safety plans" and "despite a lack of evidence that [the child's] needs were

[8] See the DHHS's Children's Foster Care Manual (FOM), *Foster Care - Parent-Agency Treatment Plan & Service Agreement FOM 722-08C*. *Note*: The link to this resource was created using Perma.cc and directs the reader to an archived record of the page

not being met." *Id*. at ___. The trial court entered an ex parte order for the child's removal the same day the petition was filed and terminated respondent's parental rights at the initial disposition. *Id*. at___. The Court held that the trial court "erred by depriving respondent of her fundamental right to the care and custody of [the child] without adequate notice of what was expected of her in violation of her constitutional right to due process."

If placement was ordered following the preliminary hearing, services may have already been provided to the parent and child.[9] See MCL 712A.13a(10); MCR 3.965(D). On a party's motion, the court must review the initial service plan and may modify the plan if it is in the child's best interests. MCR 3.965(D)(4).

Because a putative father is not considered a parent under MCR 3.903(A), he is not entitled to an agency's services until he perfects paternity. *In re LE*, 278 Mich App 1, 18-19 (2008). However, an agency is not required to provide services to a putative father who perfected paternity 17 months after he was first ordered to do so. *In re LE, supra* at 19-21. In *In re LE, supra* at 21, the respondent was considered a putative father until he perfected paternity, and thus, the goal of reunification with the child never existed. The Court stated that "[s]ervices need not be provided where reunification is not intended." *Id.* at 21.

## A. Case Service Plan Requirements

If a child is removed from his or her home, the child must "be placed in care as nearly as possible equivalent to the care that should have been given to the [child] by his or her parents." MCL 712A.1(3). The case service plan must provide placement for the child "in the most family-like setting available and in as close proximity to the child's parents' home as is consistent with the child's best interests and special needs." MCL 712A.18f(3).

The case service plan must include, but not be limited to, the following:

> "(a) The type of home or institution in which the child is to be placed and the reasons for the selected placement.
>
> (b) Efforts to be made by the child's parent to enable the child to return to his or her home.
>
> (c) Efforts to be made by the agency to return the child to his or her home.

[9] See Chapter 7 for information on placements.

> (d) Schedule of services to be provided to the parent, child, and if the child is to be placed in foster care, the foster parent, to facilitate the child's return to his or her home or to facilitate the child's permanent placement.
>
> (e) Except as otherwise provided in this subdivision, unless parenting time, even if supervised, would be harmful to the child as determined by the court under [MCL 712A.13a] or otherwise, a schedule for regular and frequent parenting time between the child and his or her parent, which shall not be less than once every 7 days.
>
> (f) Efforts to be made by the supervising agency to provide frequent in-person visitation or other ongoing interaction between siblings unless the court determines under [MCL 712A.13a] that sibling visitation or contact will not be beneficial to 1 or more of the siblings.[10]
>
> (g) Conditions that would limit or preclude placement or parenting time with a parent who is required by court order to register under the [S]ex [O]ffenders [R]egistration [A]ct."[11] MCL 712A.18f(3).[12]

The court must consider the case service plan before entering an order of disposition. See MCL 712A.18f(4); see also *In re G Matamoros*, ___ Mich App ___, ___ (2025).

## B. Court-Ordered Participation in Case Service Plan

If a child is found to be within the court's jurisdiction, the court may order participation in all or part of the case service plan. MCL 712A.18f(4); MCR 3.973(F)(2). See *In re G Matamoros*, ___ Mich App ___, ___ (2025) (stating that the court "'may order compliance with all or any part of the case service plan as the court considers necessary,'"), quoting MCL 712A.18f(4).

"'While the [petitioner] has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to

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[10] Reasonable efforts must be made to place siblings together. MCL 712A.13a(14); MCL 722.954a(6). If siblings are not placed together or not all of the siblings were removed, reasonable efforts must be made to provide "at least monthly visitation or other ongoing contact" between the siblings, unless statutory requirements dictate otherwise. MCL 712A.13a(14); MCL 722.954a(6); MCL 722.954a(7). See Section 8.2(C) for a discussion on sibling placement and maintenance of sibling relationship.

[11] "'Sex [O]ffenders [R]egistration [A]ct' means the [S]ex [O]ffenders [R]egistration [A]ct, . . . MCL 28.721 to [MCL] 28.736." MCL 712A.13a(1)(k).

[12] See Section 8.8 for additional information on parenting time.

participate in the services that are offered.'" *In re A Atchley*, ___ Mich App ___, ___ (2022) (alteration in original), quoting *In re Frey*, 297 Mich App 242, 248 (2012).

Substantial failure to comply with a case service plan is evidence supporting a termination of parental rights. See MCR 3.976(E)(2).

A nonparent adult may also be required to participate in the development of and comply with a case service plan. MCL 712A.6b(1)(a)-(b).[13]

When determining whether termination is in a child's best interest, "a court may consider a parent's compliance with his or her case service plan[.]" *In re L L Gentry*, ___ Mich App ___, ___ (2026) (quotation marks and citation omitted). However, "a court is [not] mandated to consider a parent's ability to benefit from a service plan[.]" *Id*. at ___. No service plan was created for respondent in *Gentry* because "there was no chance of reunification" due to respondent's 40-year prison sentence for sexually exploiting his child's half-siblings. *Id*. at ___. Consequently, "the mere fact that respondent was willing to participate in services does not render the trial court's best-interest findings clearly erroneous." *Id*. at ___.

## C. Objection to the Adequacy of Case Service Plan

A respondent claiming that the petitioner failed to make reasonable efforts at reunifying the respondent with his or her child must object to the case service plan or otherwise indicate that the services available through the case service plan were inadequate.[14] *In re A Atchley*, 341 Mich App 332, 336 (2022). "[T]he constantly changing dynamic in a child protective case [means] a respondent has multiple opportunities to, as the circumstances change, object to the adequacy of the services being provided." *Id*. at 337-338. "[C]ommon sense dictates [that] services that are adequate at the beginning of the case may become inadequate as the case proceeds." *Id*. at 337.

The DHHS's failure to create and update a case service plan as part of the reasonable efforts toward reunification the DHHS is required to provide is reversible error, but reversal is not required if the respondent did not preserve the issue and cannot show how the

[13] See Section 7.6(E) for more information on nonparent adults as they relate to child protective proceedings.

[14] At the earliest, a respondent may object to the case services plan at the time the plan is adopted; "an objection or challenge [to the adequacy of services] may also be timely if raised later during the proceedings." *Atchley*, 341 Mich App at 337.

absence of a case service plan affected respondent's substantial rights. *In re MJC*, 349 Mich App 42, 47 (2023).

But see *In re G Matamoros*, ___ Mich App ___, ___ (2025), where the issue of whether respondent made reasonable efforts at reunification was preserved when respondent's attorney established at trial that respondent, who was incarcerated, was not given a case service plan and that respondent wanted the opportunity to benefit from services. The Court stated, "In this case, petitioner never created a case service plan for respondent, so respondent never had the opportunity to object." *Id*. at ___. Despite the lack of a case service plan, the trial court "check[ed] the box indicating that reasonable efforts were made to preserve and unify the family." *Id*. at ___. The Court held that the DHHS's "failure to fulfill its statutory duty to prepare a case service plan as part of its reasonable reunification efforts constituted clear error requiring reversal." *Id*. at ___.

### D. Revising Case Service Plans

If a child's placement continues outside the home, the case service plan must be updated and revised every 90 days. MCL 712A.18f(5). The updated and revised case service plan must be made available to the court and all parties involved. *Id*.

When revising and updating the case service plan, the DHHS must consult with the foster parent(s) and attach a summary of the information received from the foster parent(s) to the revised case service plan. MCL 712A.18f(5).

## 13.7 Required Reasonable Efforts Determination

DHHS is obligated to make reasonable efforts to reunify a child and the child's family in *all* cases except those cases involving an aggravated circumstance listed in MCL 712A.19a(2). *In re Simonetta*, 340 Mich App 700, 707 (2022); see also *In re Barber/Espinoza*, ___ Mich ___, ___ (2025) ("In most circumstances, . . . DHHS has an affirmative duty to make reasonable efforts to achieve reunification before a court may terminate parental rights."), and *In re Boshell/Shelton*, ___ Mich App ___, ___ (2025) ("Reasonable efforts toward reunification are not necessary if there is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in [MCL 722.638(1) and (2)]."[15]) (cleaned up).

[15]For more information on required aggravating-circumstances findings, see Section 7.3(A) and Section 8.4.

"The trial court plainly erred by finding that [respondent's] boys were subjected to aggravating circumstances [under MCL 722.638] because . . . the abusers . . . were not a parent, guardian, or custodian of the boys,[16] and nothing in the record suggests that they ever resided with the boys.") (reversed and remanded). Because the requirements of MCL 722.638(1) were not met, MCL 722.638(2) did not apply to the petition, and therefore, the DHHS was obligated to make reasonable efforts to reunify respondent and her sons before seeking termination. *Boshell/Shelton*, ___ Mich App at ___.

The trial court erroneously found that aggravated circumstances existed under MCL 722.638(1)(a) to excuse the DHHS's obligation to make reasonable efforts at reunification when it applied the doctrine of anticipatory neglect to abuse involving a respondent's stepchild. *In re KV*, ___ Mich App ___, ___ (2025). Respondent's stepdaughter testified that respondent had sexually abused her and that she had witnessed him sexually abuse his biological daughter, who was the subject of the case. *Id*. at ___. Respondent's stepdaughter also testified that respondent's stepsons sexually abused the girls by "walking in on them while they were dressing in the bathroom and groping them" and that respondent and her mother (respondent's estranged wife) ignored her complaints. *Id*. at ___. Respondent's biological daughter denied that respondent abused her but confirmed that her stepbrothers did. *Id*. at ___. "[A]ggravated circumstances exist when a parent 'has abused' a child or a child's sibling."[17] *Id*. at ___, quoting MCL 722.638(1)(a). The trial court only found that respondent had abused respondent's stepdaughter, and it was undisputed that she was not respondent's child's sibling. *KV*, ___ Mich App at ___. "Because the trial court did not find that respondent abused either [his biological daughter] or a sibling of [his biological daughter], DHHS was required to make reasonable efforts to reunify respondent with [his daughter] before seeking termination." *Id*. at ___.

In *In re Berryman/Hurd/Morgan/Morgan-Hurd*, ___ Mich App ___, ___ (2026), the DHHS did not satisfy the requirements of MCL 722.638(1)(a) to terminate respondents' parental rights at the initial disposition without making reasonable efforts at reunification when the petition was "based entirely on [a] shooting incident" and the circumstances that allowed for it. The DHHS failed to allege "that the incident was included within any 'abuse,' as defined by MCL 722.622(g), of [the child] or his siblings by respondents or anyone else." *Berryman*, ___ Mich App at ___. The 21-month-old child survived the shooting by his six-year-old cousin while in respondents' care, but "required reconstructive surgery to the

[16]The abusers were the father of respondent's three girls and his partner; they lived at a separate residence with his partner's children and one of the daughters he fathered with respondent. *Boshell/Shelton*, ___ Mich App at ___.

[17]"[I]n defining 'abused' in MCL 722.638, the Supreme Court has looked to the definition of 'child abuse' in MCL 722.622(g)." *KV*, ___ Mich App at ___, citing *In re Barber/Espinoza*, ___ Mich ___, ___ (2025).

left side of his nose, cheek, and shoulder due to the injuries he sustained." *Berryman*, ___ Mich App at ___. These injuries may have satisfied the requirement in MCL 722.638(1)(a)(*iii*) for serious physical harmbut they "would not constitute an aggravated circumstance under MCL 722.638(1)(a) unless [they were] *included* in abuse of [the child] or one of his siblings by respondents or another listed individual." *Berryman*, ___ Mich App at ___. The trial court made no such finding, "and the record before it did not support one." *Id*. at ___. Thus, the trial court committed plain error warranting reversal by "excusing DHHS from its obligation to provide reasonable efforts toward reunification and instead terminating respondents' parental rights at initial disposition." *Id*. at ___.

"[T]he trial court was allowed to consider termination of parental rights . . . at a 'combined adjudicative and disposition hearing,'" and the DHHS was not required to make reasonable efforts to achieve reunification before seeking to terminate respondent's parental rights to her youngest child when respondent was required to register under the Sex Offender Registration Act (SORA), MCL 28.721 *et seq*., due to her conviction for abusing the child's sibling. *In re Pacyga*, ___ Mich App ___, ___ (2026) (citation omitted). However, "[t]o terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been proved by clear and convincing evidence." *Pacyga*, ___ Mich App at ___ (quotation marks and citation omitted). Clear and convincing evidence "requires more than speculative opinions regarding what might happen in the future." *Id*. at ___ (quotation marks and citation omitted). When the trial court's findings were unsupported by the record, it "clearly err[ed] by finding that there were statutory grounds to terminate respondent's parental rights [on any of the grounds sought]." *Id*. at ___.

"The mere fact of imprisonment is not one of [those aggravating circumstances]." *In re Dixon (On Reconsideration)*, 347 Mich App 337, 362 (2023). In *Dixon*, the Court held that the DHHS was obligated to make reasonable efforts at reunification with the child's father after the mother's parental rights were terminated, even though the father was incarcerated. *Dixon*, 347 Mich App at 362. A trial court is required "to permit 'regular and frequent parenting time' when a child is removed from a parent's care," despite that the parent is incarcerated. *Id*. at 361, quoting MCL 712A.13a(13), and MCL 712A.18f(3)(e). In *Dixon*, the DHHS failed to arrange for the father to have video visits with his child as the trial court had ordered. *Dixon*, 347 Mich App at 361. Further, the DHHS did little to provide the incarcerated father with services "even after he was named as a respondent." *Id*. at 362. "At the very least, the caseworker must provide available workbooks for father to complete, as has been done in many other cases involving incarcerated parents." *Id*. at 362.

After determining that a respondent's lack of medical knowledge about the respondent's child's medical condition is an obstacle to reunification, the DHHS is obligated to provide the respondent with resources to overcome that obstacle. *In re OO Claudio-Perez*, ___ Mich ___, ___ (2024). Respondent's parental rights were terminated on the basis of respondent's inability "to properly care for her medically fragile son suffering from Ehlers-Danlos syndrome." *Id*. at ___. Having identified the deficiency, the DHHS failed to make "reasonable efforts to cure *that* deficiency." *Id*. at ___. "When DHHS fails to provide a respondent with any resources to overcome the obstacles to reunification, it necessarily fails to make reasonable efforts at reunification." *Id*. at ___.

"Offering services and visitation while termination is pending is not enough" to satisfy DHHS's duty to make reasonable efforts at reunification. *In re C Walters*, ___ Mich App ___, ___ (2025). "[MCL 712A.19a(2)] unambiguously provides that the efforts being made must be aimed at reunification, and this is impossible if the agency that is offering the services is actively working to terminate parental rights." *Walters*, ___ Mich App at ___. "The statutory framework mandates provision of services, preparation of a case service plan, and periodic dispositional reviews; this evidences the Legislature's position that reunification is the preferred outcome over termination." *Id*. at ___ (reversing the trial court's order terminating respondent's parental rights at the initial disposition hearing where DHHS failed to make reunification efforts before bringing the petition to terminate respondent's parental rights, and no aggravated circumstance exception to that obligation under MCL 712A.19a(2) was established).[18]

If an agency during a child protective proceeding advises a court not to place a child in the custody of the child's parent, guardian, or custodian, the agency must submit a written report to the court stating:

> "what efforts were made to prevent the child's removal from his or her home[;] or
>
> the efforts made to rectify the conditions that caused the child's removal from his or her home." MCL 712A.18f(1). See also MCR 3.973(E)(2).

The written report must include all of the following:

> "(a) If services were provided to the child and his or her parent, guardian, or custodian, the services, including in-home services, that were provided.

[18]For more information on the aggravating circumstances exception to DHHS's duty to make reasonable efforts at reunification, see Section 8.4. For more information on termination of parental rights at the initial disposition hearing, see Section 17.3.

> (b) If services were not provided to the child and his or her parent, guardian, or custodian, the reasons why services were not provided.
>
> (c) Likely harm to the child if the child were to be separated from his or her parent, guardian, or custodian.
>
> (d) Likely harm to the child if the child were to be returned to his or her parent, guardian, or custodian." MCL 712A.18f(1).

"The court, on consideration of the written report prepared by the agency responsible for the care and supervision of the child pursuant to MCL 712A.18f(1), shall, when appropriate, include a statement in the order of disposition as to whether reasonable efforts were made:

> (a) to prevent the child's removal from home, or
>
> (b) to rectify the conditions that caused the child to be removed from the child's home." MCR 3.973(F)(3). See also MCL 712A.18f(4), which contains substantially similar language.
>
> > **Note:** To establish a child's eligibility for federal foster care maintenance payments under Title IV-E of the Social Security Act, a court is required to make a finding that reasonable efforts have been made to avoid non-emergency removal of a child from his or her home and placement of the child in foster care. 42 USC 672(a)(1). See Section 8.4 for a detailed discussion of the reasonable efforts finding, and Section 14.1 for a detailed discussion of federal funding.[19]

"[E]fforts at reunification cannot be reasonable under the Probate Code unless the [DHHS] modifies its services as reasonably necessary to accommodate a parent's disability[, a]nd termination is improper without a finding of reasonable efforts." *In re Hicks (Hicks II)*, 500 Mich 79, 90 (2017), aff'g in part, vacating in part 315 Mich App 251 (2016) (finding that "[d]espite the recommendations of the [DHHS's] medical professionals that [the respondent-mother] could benefit from services tailored to her [intellectual] disability[,] . . . and despite the [DHHS's] failure to provide those court-ordered services, the circuit court nonetheless [improperly] concluded that the [DHHS] had made reasonable efforts at reunification and terminated [the respondent's] parental rights[;]" although the DHHS "cannot accommodate a disability

[19]See the Department of Health & Human Services, Children's Bureau Letter to Child Welfare and Judicial Leaders, which details the judicial determinations and proceedings that must be held in order to satisfy Title IV-E requirements as well as suggestions for ensuring courts continue "to practice in a manner consistent with constitutional principles and to serve the best interest of children[.]" *Note*: The link to the previous resource was created using Perma.cc and directs the reader to an archived record of the page.

of which it is unaware[,]" it was "clear that the [DHHS] knew of [the respondent's] disability[, and o]nce the [DHHS] knew of the disability, its affirmative duty to make reasonable efforts at reunification meant that it could not be 'passive in [its] approach . . . .as far as the provision of accommodations is concerned[]'"), quoting *Pierce v Dist of Columbia*, 128 F Supp 3d 250, 269 (D DC, 2015).

"Although DHHS has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of the respondent-parent to participate in the services and demonstrate having benefited from them." *In re MJC*, 349 Mich App 42, 61 (2023). Respondent did not fail to participate or benefit from services when the DHHS never prepared, and the trial court never adopted, a case service plan for respondent. *In re G Matamoros*, ___ Mich App ___, ___ (2025) (DHHS's allegation in its supplemental petition that respondent failed to benefit from court-ordered services was "clearly not true since there were no services ordered for respondent and as a result, respondent was never obligated to comply with or benefit from services").

For additional information on providing reasonable accommodations for disabled parents subject to child protective proceedings, see Section 13.8.

## 13.8 Reasonable Efforts Under the Americans With Disabilities Act (ADA)

### A. Reasonable Accommodations Requirement

"When a disabled parent is a party to child protective proceedings, Section 504 of the Rehabilitation Act of 1973, 29 USC 794, and Title II of the Americans with Disabilities Act of 1990 (ADA), 42 USC 12131 *et seq*., control the nature of the services that must be provided. Title II of the ADA provides that 'no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.' 42 USC 12132. Section 504 of the Rehabilitation Act similarly provides that qualified disabled persons shall not 'be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance' 'solely by reason of her or his disability.' 29 USC 794(a)." *In re Hicks (Hicks I)*, 315 Mich App 251, 266 (2016), aff'd in part, vacated in part on other grounds by *In re Hicks (Hicks II)*, 500 Mich 79 (2017).[20]

The Department of Health and Human Services (DHHS), as a public agency, must make reasonable accommodations for disabled

individuals when providing family reunification services and programs. *In re Terry*, 240 Mich App 14, 25 (2000). "[I]f the [DHHS] fails to take into account the parents' limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family." *Id*. at 26. "Absent reasonable modifications to the services or programs offered to a disabled parent, the [DHHS] has failed in its duty under the ADA to reasonably accommodate a disability[,] . . . has failed in its duty under the Probate Code to offer services designed to facilitate the child's return to his or her home, see MCL 712A.18f(3)(d), and has, therefore, failed in its duty to make reasonable efforts at reunification under MCL 712A.19a(2)[;] . . . efforts at reunification cannot be reasonable under the Probate Code if the [DHHS] has failed to modify its standard procedures in ways that are reasonably necessary to accommodate a disability under the ADA." *In re Hicks (Hicks II)*, 500 Mich 79, 86, 88 n 6 (2017) (aff'g in part and vacating in part on other grounds *In re Hicks* (*Hicks I)*, 315 Mich App 251 (2016), and noting that "[w]hile the Court of Appeals reasonably identified measures the [DHHS] should consider when determining how to reasonably accommodate a disabled individual, . . . these steps will [not] necessarily be implicated in every disability case"). See also *In re G Matamoros*, ___ Mich App ___, ___ (2025) (reversing the order terminating respondent's parental rights and remanding the case for DHHS to "provide respondent with a case service plan that reasonably accommodates respondent's disabilities as required under the ADA" after being informed that respondent had ADHD, anxiety, and bipolar disorder).

A respondent who claims that services offered "were not appropriate given [their] intellectual disability" must identify other "services that would have been appropriate in light of such disability," and how the respondent would have attained better results if the DHHS had offered the respondent other services. *In re Sanborn*, 337 Mich App 252, 266-267 (2021).

## B. Violation of ADA Not a Defense to Termination of Parental Rights Proceedings

Because termination of parental rights proceedings does not constitute "'services, programs or activities' within the meaning of 42 USC 12132[,] . . . a parent may not raise violations of the [Americans with Disabilities Act] (ADA)[, 42 USC 12101 *et seq*.,] as a

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

defense to termination of parental rights proceedings." *In re Terry*, 240 Mich App 14, 25 (2000).

### C. Must Timely Raise Violation of ADA

To be considered by the family court, claims that the DHHS violated the ADA must be raised in a timely manner:

> "[I]f a parent believes that the [DHHS] is unreasonably refusing to accommodate a disability, the parent should claim a violation of [his or] her rights under the ADA, either when a service plan is adopted or soon afterward. The court may then address the parent's claim under the ADA. Where a disabled person fails to make a timely claim that the services provided are inadequate to [his or] her particular needs, [he or] she may not argue that petitioner failed to comply with the ADA at a dispositional hearing regarding whether to terminate [his or] her parental rights. In such a case, [his or] her sole remedy is to commence a separate action for discrimination under the ADA. At the dispositional hearing, the family court's task is to determine, as a question of fact, whether petitioner made reasonable efforts to reunite the family, without reference to the ADA." *In re Terry*, 240 Mich App at 26.

The Michigan Supreme Court noted that it was "skeptical of [the] categorical rule[]" set out in *In re Terry*, 240 Mich App at 26, "that objections to a service plan are always untimely if not raised 'either when a service plan is adopted or soon afterward[;]'" however, the Court declined "to decide whether the [respondent-mother's] objection . . . was timely because neither the [DHHS] nor the children's lawyer-guardian ad litem raised a timeliness concern in the circuit court." *In re Hicks (Hicks II)*, 500 Mich 79, 88, 89 (2017) (holding that because "the [DHHS] and the circuit court operated as if [the respondent's] request [for accommodation] had been timely[,] the [DHHS could not] . . . complain otherwise[]" on appeal).

## 13.9 Dispositional Options and Requirements

A court must "enter an order of disposition as provided in the Juvenile Code and [the Michigan Court Rules]."[21] MCR 3.973(F)(1).

[21] See SCAO form JC 17, *Order of Disposition (Child Protective Proceedings)*, at https://www.courts.michigan.gov/494d1a/siteassets/forms/scao-approved/jc17.pdf.

## A. Dispositional Requirements

"[I]f the court finds that a juvenile is within [the Juvenile Code], the court shall order the juvenile returned to the juvenile's parent if the return of the juvenile to the juvenile's parent would not cause a substantial risk of harm to the juvenile or society." MCL 712A.18(1). The court may also enter any of the dispositional options listed in MCL 712A.18(1). *Id*.

## B. Dispositional Options Available to Court

If the court finds that a child is within its jurisdiction, "[t]he court may . . . enter any of the following orders of disposition that are appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained:"

> (1) Warn the juvenile's parents, guardian, or custodian and dismiss the petition, MCL 712A.18(1)(a).
>
> (2) Under supervision, return the juvenile home or place the juvenile with a relative,[22] MCL 712A.18(1)(b).
>
> (3) The court must not place the juvenile in a court-supervised foster care home,[23] MCL 712A.18(1)(c).
>
> (4) Place the juvenile in a private institution or agency, MCL 712A.18(1)(d).
>
> (5) Place the juvenile in a public institution or agency, MCL 712A.18(1)(e).
>
> (6) Provide health care, MCL 712A.18(1)(f).
>
> (7) Order the parents, guardian, custodian, or any other person to refrain from conduct harmful to the juvenile, MCL 712A.18(1)(g). See also MCR 3.973(A) and MCL 712A.6.[24]

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[22] For purposes of MCL 712A.18(1)(b), *related* "means a relative as that term is defined in [MCL 712A.13a]." MCL 712A.18(1)(b).

[23] Applies when a juvenile is within a court's jurisdiction under MCL 712A.2(b). A court may place a juvenile in a foster home under court supervision if the court has jurisdiction of the child under MCL 712A.2(a) or MCL 712A.2(h)

[24] But see *In re Sanders*, 495 Mich 394, 414, 414 n 10 (2014), "rejecting any interpretation of MCL 712A.6 and MCR 3.973(A) that fails to recognize the unique constitutional protections that must be afforded to unadjudicated parents, irrespective of the fact that they meet the definition of 'any adult[,]'" and noting that "the court's authority during the dispositional phase is limited by the fact that the state must overcome the presumption of parental fitness by proving the allegations in the [child protective] petition."

(8) Appoint a guardian for the juvenile, MCL 712A.18(1)(h).

(9) Include an order for juvenile support with disposition, MCR 3.973(F)(5).

### 1. Warning and Dismissal of Petition

Except as provided by MCL 712A.18(5), the court may warn a juvenile's parents, guardian, or custodian and dismiss the petition. MCL 712A.18(1)(a).

### 2. In-Home Placement With Supervision

#### a. Placement

The court may order supervision and return the juvenile to his or her home or place the child with a relative.[25] MCL 712A.18(1)(b). See *In re Brown (Abijah)*, 171 Mich App 674 (1988) (Court of Appeals affirmed the trial court's placement of the children with their father, where custody had previously been awarded to the respondent-mother in divorce proceedings, but where the respondent-mother pled no contest to physically abusing one of the children in the child protective proceeding).

If the court issues a dispositional order that removes the child from the parent's custody at any time, MCL 712A.18(1)(p) requires that the parent receive parenting time unless certain circumstances exists.

#### b. Terms of Supervision

The court must order terms and conditions of supervision, including reasonable rules governing the conduct of the parents, guardian, or custodian "as the court determines necessary for the physical, mental, or moral well-being and behavior of the juvenile." MCL 712A.18(1)(b). A trial court's authority to enter a disposition order under MCL 712A.18(1)(b) extends to any conduct the court might find harmful to the juvenile:

> "In analyzing [MCL 712A.18(1)(b) (allowing court to place juvenile under in-home

[25] See Section 8.13(A) for a discussion of required procedures before placing a child in a relative's home. For purposes of MCL 712A.18(1)(b), *related* "means a relative as that term is defined in [MCL 712A.13a]."MCL 712A.18(1)(b).

> supervision and may also include reasonable rules of conduct for parents, guardian, or custodian) and MCL 712A.18(1)(g) (allowing court to order any person to refrain from conduct considered harmful to child), it is significant to note that these dispositional orders are stated in broad, general terms. The court may provide 'reasonable rules for the conduct of the parents [or other persons or adults] [designed for the well-being of the child].' Also, the court may order parents [or other persons or adults] to discontinue conduct which, 'in the opinion of the court,' causes a child to come within the court's jurisdiction. Thus, we hold that the Legislature has conferred very broad authority to the . . . court. There are no limits to the 'conduct' which the court might find harmful to a child. The Legislature intended that the court be free to define 'conduct' as it chooses. Moreover, in light of the directive that these provisions are to be 'liberally construed' [under MCL 712A.1(3)] in favor of allowing a child to remain in the home, we find these sections supportive of the court's order prohibiting the father from living with his daughter." *In re Macomber*, 436 Mich 386, 393 (1990).

"An order directed to a parent or a person other than the juvenile is not effective and binding on the parent or other person unless opportunity for hearing is given by issuance of summons or notice as provided in [MCL 712A.12] and [MCL 712A.13] and until a copy of the order, bearing the seal of the court, is served on the parent or other person as provided in [MCL 712A.13]." MCL 712A.18(4).[26]

### 3. Placement in Foster Care Home

"If a juvenile is within the court's jurisdiction under [MCL 712A.2(b), the court shall not place a juvenile in a foster care home subject to the court's supervision." MCL 712A.18(1)(c).[27] See also *Wayne Co v State*, 202 Mich App 530, 535 (1993), which

[26] See Chapter 5 for a discussion of notice and service requirements.

[27] A court may place a child in a suitable foster home under court supervision if the court has jurisdiction of the child under MCL 712A.2(a) or MCL 712A.2(h).

states that although the court is prohibited from supervising such placement under MCL 712A.18(1)(c), it does have the authority to place a juvenile in private foster care under MCL 712A.18(1)(d) (foster care in a private institution or agency that is licensed and supervised by the DHHS's Division of Child Welfare Licensing). *Wayne Co*, 202 Mich App at 535.

If the court issues a dispositional order that removes the juvenile from the parent's custody at any time, MCL 712A.18(1)(p) requires that the parent receive parenting time unless certain circumstances exists.

## 4. Placement in Private Institution or Agency

The court may place the child in a private institution or agency "approved or licensed by the department's division of child welfare licensing for the care of juveniles of similar age, sex, and characteristics." MCL 712A.18(1)(d). However, if the juvenile is not a ward of the court, the child must be placed with the DHHS for commitment to an institution or agency the DHHS determines most appropriate and "subject to any initial level of placement the court designates."[28] *Id.*

If the court places a in a private institution or agency, it must "transmit with the order of disposition or supplemental order of disposition a summary of its information concerning such child, and such child may be placed in the care of a county agent, probation officer, juvenile matron or some other reliable person designated by the court to be conveyed to the institution[.]" MCL 712A.24.

> **Note:** If a child is placed in a private institution or agency, the court must require a progress report on the child "be made at least once every 6 months from the date of the order." MCL 712A.24.

If the court issues a dispositional order that removes the child from the parent's custody at any time, MCL 712A.18(1)(p) requires that the parent receive parenting time unless certain circumstances exists.

### a. Religious Affiliation

With the exception of a juvenile placed in a state institution, a juvenile's religious affiliations must be

[28] MCL 400.55(h) requires a county office of the DHHS to provide supervision of or foster care services to children under the Family Division's jurisdiction when ordered by the court.

protected by ordering placement in a private child-placing or child-caring agency or institution, if available. MCL 712A.18(1)(e).

### b. Child Placed Outside of Michigan

"If desirable or necessary, the court may place a ward of the court in or commit a ward of the court to a private institution or agency incorporated under the laws of another state and approved or licensed by that state's department of social welfare, or the equivalent approving or licensing agency, for the care of children of similar age, sex, and characteristics." MCL 712A.18a.

## 5. Placement in Public Institution or Agency

The court may place a juvenile in a public institution or agency "authorized by law to receive [children] of similar age, sex, and characteristics." MCL 712A.18(1)(e). However, if the juvenile is not a ward of the court, the juvenile must be placed with the department for placement in or commitment to an institution or agency the department determines most appropriate and "subject to any initial level of placement the court designates."[29] *Id.*

Unless placement is with a state institution, a juvenile's religious affiliations must be protected by placement in a private child placing or child caring agency or institution, if available. MCL 712A.18(1)(e).

If the court places a child in a public institution or agency, it must "transmit with the order of disposition or supplemental order of disposition a summary of its information concerning such child, and such child may be placed in the care of a county agent, probation officer, juvenile matron or some other reliable person designated by the court to be conveyed to the institution[.]" MCL 712A.24.

If the court issues a dispositional order that removes the juvenile from the parent's custody at any time, MCL 712A.18(1)(p) requires that the parent receive parenting time unless certain circumstances exists.

[29] MCL 400.55(h) requires a county office of the DHHS to provide supervision of or foster care services to children under the Family Division's jurisdiction when ordered by the court.

### 6. Order Health Care

The court may order a juvenile to be provided "with medical, dental, surgical, or other health care, in a local hospital if available, or elsewhere, maintaining as much as possible a local physician-patient relationship, and with clothing and other incidental items the court determines are necessary." MCL 712A.18(1)(f).

> **Note:** Under MCL 722.124a(1), when a child is placed outside the home under the Juvenile Code, a child placing agency, the department,[30] or the court may consent to "routine, nonsurgical medical care, or emergency medical and surgical treatment" of a child. See Section 3.3 for a detailed discussion of ordering medical treatment for a child, and Section 8.6(C) for a detailed discussion of the authority to consent to medical treatment.

A parent established as unfit during the adjudicative phase "must yield to the trial court's [dispositional] orders regarding the child's welfare." *In re Deng*, 314 Mich App 615, 625, 627 (2016) (finding "a parent who has been adjudicated as unfit [does not have] the right during the dispositional phase of the child protective proceedings to object to the inoculation of her children on religious grounds[;]" "following adjudication, which affords a parent due process for the protection of his or her liberty interests, the parent is no longer presumed fit to make decisions for the child and that power, including the power to make medical decisions involving immunization, rests instead with the court[31]"), citing MCL 712A.18(1)(f) and *In re Sanders*, 495 Mich 394, 409-410, 418 (2014).

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[30] For purposes of the Child Care Licensing Act, MCL 722.111 *et seq.*, "[d]epartment means 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(1)(m).

[31] "[T]he facts proved and ascertained [must] demonstrate that immunization is appropriate for the welfare of the juvenile and society." *In re Deng*, 314 Mich App at 625 (physician recommendations sufficed in this case), citing MCL 712A.18(1)(f).

### 7. Order Parents, Guardian, Custodian, or Other Person to Refrain From Conduct Harmful to the Child

The court may "[o]rder the parents, guardian, custodian, or any other person to refrain from continuing conduct that the court determines has caused or tended to cause the juvenile to come within or to remain under [the court's jurisdiction,] or that obstructs placement or commitment of the [juvenile under a dispositional order]." MCL 712A.18(1)(g). See also MCR 3.973(A) (purpose of dispositional hearing includes determining "what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult") and MCL 712A.6 (court has jurisdiction over adults and may make orders affecting adults where the court determines it is necessary for a child's physical, mental, or moral well-being).[32] But see *In re Sanders*, 495 Mich 394, 414 (2014), "rejecting any interpretation of MCL 712A.6 and MCR 3.973(A) that fails to recognize the unique constitutional protections that must be afforded to unadjudicated parents, irrespective of the fact that they meet the definition of 'any adult[,]'" and noting that "the court's authority during the dispositional phase is limited by the fact that the state must overcome the presumption of parental fitness by proving the allegations in the [child protective] petition."

A trial court's authority to enter a disposition order under MCL 712A.18(1)(g) extends to any conduct the court might find harmful to the child:

> "In analyzing [MCL 712A.18(1)(b) (allowing court to place child under in-home supervision and may also include reasonable rules of conduct for parents, guardian, or custodian) and MCL 712A.18(1)(g) (allowing court to order any person to refrain from conduct considered harmful to the child)], it is significant to note that these dispositional orders are stated in broad, general terms. The court may provide reasonable rules for the conduct of the parents [designed for the well-being of the child]. Also, the court may order parents to discontinue conduct which, in the opinion of the court, causes a child to come within the court's jurisdiction. Thus, we hold that the Legislature has conferred very broad authority to the . . . court. There are no limits to the conduct which the court might find harmful to a child. The

[32] See Section 4.10 for additional information on the court's jurisdiction and authority over adults.

> Legislature intended that the court be free to define conduct as it chooses. Moreover, in light of the directive that these provisions are to be liberally construed [according to MCL 712A.1(3)] in favor of allowing a child to remain in the home, [the Michigan Supreme Court found] these sections supportive of the court's order prohibiting the father from living with his daughter." *In re Macomber*, 436 Mich at 393 (quotation marks omitted; second alteration in original).

"An order directed to a parent or a person other than the juvenile is not effective and binding on the parent or other person unless opportunity for hearing is given by issuance of summons or notice as provided in [MCL 712A.12] and [MCL 712A.13] and until a copy of the order, bearing the seal of the court, is served on the parent or other person as provided in [MCL 712A.13]." MCL 712A.18(4).[33] Moreover, procedural "due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights."[34] *In re Sanders*, 495 Mich 394, 412-13 n 8, 407, 422 (2014) (finding unconstitutional the one-parent doctrine, which permitted the court to "enter dispositional orders affecting parental rights of *both* parents" once "jurisdiction [was] established by adjudication of only *one* parent").[35]

A parent's constitutional right to direct his or her child's care and custody before the parent is adjudicated is not without limit; "[w]hen a child has been placed into care by an unchallenged order of the court, the state has a legitimate and important interest in protecting the child's health and safety." *In re Dixon (On Reconsideration)*, 347 Mich App 337, 359 (2023) (court was permitted to continue the child's placement in foster care until the DHHS could properly investigate placement of

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[33] See Chapter 5 for a discussion of notice and service requirements.

[34] "[N]either the admissions made by [the adjudicated parent] nor [the unadjudicated parent's] failure to object to those admissions constituted an adjudication of [the unadjudicated parent's] fitness[.]" *In re SJ Temples*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2015 (Docket No. 323246) (finding that the trial court violated the unadjudicated parent's "due process rights by subjecting him to dispositional orders without first adjudicating him as unfit[]"). Note that unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

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

the child with a nonrelative as proposed by the child's incarcerated father).

### 8. Appointment of Guardian for Child

A court may appoint a guardian under MCL 700.5204, if it receives a petition requesting appointment of a guardianship over the child from a person interested in the juvenile's welfare. MCL 712A.18(1)(h).[36] If the court grants the request and appoints a guardian, it may enter an order dismissing the petition under the Juvenile Code. *Id.*

### 9. Order Child Support Payments

The court may order one or both of the child's parents to pay child support. MCR 3.973(F)(5). To order child support under MCR 3.973(F), the court must use the Michigan Child Support Formula, MCL 552.605, and the Uniform Support Order, MCR 3.211(D). MCR 3.973(F)(5).

## C. Supplemental Orders of Disposition

If a child remains under the jurisdiction of the court, an order of disposition may be amended or supplemented in accordance with MCL 712A.18 at any time the court considers necessary and proper. MCL 712A.19(1).[37] Such an amended or supplemented order "must be referred to as a 'supplemental order of disposition'." MCL 712A.19(1).

## D. Parenting Time

"In a proceeding under [MCL 712A.2(b)] or [MCL 712A.2(c)], if a juvenile is removed from the parent's custody at any time, the court shall permit the juvenile's parent to have regular and frequent parenting time with the [child]. Parenting time between the juvenile and his or her parent shall not be less than 1 time every 7 days unless the court determines either that exigent circumstances require less frequent parenting time or that parenting time, even if supervised, may be harmful to the juvenile's life, physical health, or mental well-being. If the court determines that parenting time, even if supervised, may be harmful to the juvenile's life, physical health, or mental well-being, the court may suspend parenting time until

[36] See Section 4.6 for a discussion on appointment of guardians.

[37] See SCAO form JC 19, *Order Following Dispositional Review/Permanency Planning Hearing (Child Protective Proceedings)*, at https://www.courts.michigan.gov/497a61/siteassets/forms/scao-approved/jc19.pdf.

the risk of harm no longer exists. The court may order the juvenile to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time." MCL 712A.18(1)(p).

An unadjudicated father who is incarcerated is entitled to parenting time with his minor child.[38] *In re Dixon (On Reconsideration)*, 347 Mich App 337, 361 (2023).

## 13.10 Respondent's Rights Upon Entry of Dispositional Order

"When the court enters an initial order of disposition following adjudication the court shall advise the respondent orally or in writing:

> (1) that at any time while the court retains jurisdiction over the minor, the respondent may challenge the continuing exercise of that jurisdiction by filing a motion for rehearing under MCL 712A.21 or by filing an application for leave to appeal with the Michigan Court of Appeals,[39]
>
> (2) that appellate review is available to challenge the court's initial order of disposition following adjudication,
>
> (3) that an indigent respondent is entitled to appointment of an attorney to represent the respondent on any appeal as of right and to preparation of transcripts, and
>
> (4) the respondent may be barred from challenging the assumption of jurisdiction or the removal of the minor from a parent's care and custody in an appeal from the order terminating parental rights if they do not timely file an appeal under MCR 7.204 or a delayed appeal under MCR 3.993(C)."[40] MCR 3.973(G).

"[T]he respondent may challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the

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[38] In this case, for at least 10 months, the DHHS had failed to arrange for virtual/video visits between the child and his incarcerated father. *In re Dixon (On Reconsideration)*, 347 Mich App 337, 361 (2023).

[39] See Section 12.12 for a discussion on rehearings, and Section 20.3 for a discussion on appeals to the Michigan Court of Appeals.

[40] A respondent may be eligible to file a motion to restore appellate rights under MCR 3.993(F) "[i]f [the] respondent was denied the right to appellate review or the appointment of appellate counsel due to errors by the respondent's prior attorney or the court, or other factors outside the respondent's control . . . ." MCR 3.993(F). For additional information on filing an appeal of the initial disposition under MCR 3.993(A)(1)-(2) a delayed appeal under MCR 3.993(C), or a motion to restore appellate rights under MCR 3.993(F),see Section 20.3.

court fails to properly advise the respondent of their right to appeal pursuant to [MCR 3.973](G)(2)-(4)." MCR 3.973(H).[41]

## 13.11 Ordering Release of Child's Medical Records

"Unless the court has previously ordered the release of medical information,[42] the order placing the child in foster care must include the following:

> (a) an order that the child's parent, guardian, or legal custodian provide the supervising agency with the name and address of each of the child's medical providers, and
>
> (b) an order that each of the child's medical providers release the child's medical records." MCR 3.973(F)(4).

If a child remains in foster care after the initial disposition, the agency must, within 10 days after receipt of a written request, provide the foster care provider with "all of the child's medical, mental health, and education reports, including reports compiled before the child was placed with that person." MCL 712A.13a(18); MCL 712A.18f(5).

## 13.12 Scheduling Review Hearings

"When the court does not terminate jurisdiction upon entering its dispositional order, it must:

> (1) follow the review procedures in MCR 3.975 [dispositional review hearings[43]] for a child in placement, or
>
> (2) review the progress of a child at home pursuant to the procedures of MCR 3.974(A)."[44] MCR 3.973(I).

### A. Accelerated Review Hearings

For children placed in foster care, the court must decide whether it will accelerate the date for the next review hearing at the initial

---

[41] MCR 3.973(H) also permits "[t]he respondent [to] challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the respondent's parental rights are terminated at the initial dispositional hearing pursuant to MCR 3.977(E)." See Section 17.3 for a discussion on terminating parental rights at an initial dispositional hearing.

[42] These requirements should have been met before the initial dispositional hearing under MCL 712A.13a(19), if the child was placed in foster care following the preliminary hearing. See Section 8.5.

[43] See Chapter 15 for a detailed discussion of dispositional review hearings.

[44] See Section 15.3(B) and Section 15.3(A) for a detailed discussion of review hearings for children at home.

dispositional review hearing and every review hearing. MCL 712A.19(9); MCR 3.975(D) (also applicable to children who were not placed in foster care at initial disposition but subsequently removed from home then later returned to home, MCR 3.974(A)(2)). See MCL 712A.19(2)-(4) for review hearing time requirements.[45]

### B. Videoconferencing Technology

The use of videoconferencing technology to conduct review hearings in child protective proceedings is governed by MCR 3.904(B). See Section 1.7.

## 13.13 Additional Allegations of Abuse or Neglect

"If the agency becomes aware of additional abuse or neglect of a child who is under the court's jurisdiction and if that abuse or neglect is substantiated as provided in the child protection law, . . . MCL 722.621 to [MCL] 722.638, the agency shall file a supplemental petition with the court." MCL 712A.19(1).

When allegations of additional abuse or neglect are made, the following procedures must be followed:

> "(1) Proceedings on a supplemental petition seeking termination of parental rights on the basis of allegations of additional abuse or neglect, as defined in MCL 722.622(g) and [MCL 722.622(k)], of a child who is under the jurisdiction of the court are governed by MCR 3.977.[46]
>
> (2) Where there is no request for termination of parental rights, proceedings regarding allegations of additional abuse or neglect, as defined in MCL 722.622(g) and [MCL 722.622(k)], of a child who is under the jurisdiction of the court, including those made under MCL 712A.19(1), are governed by MCR 3.974 for a child who is at home or MCR 3.975 for a child who is in foster care."[47] MCR 3.973(J).

Proceedings regarding additional allegations of abuse or neglect are dispositional in nature:

> "Once a case enters the dispositional phase, any subsequently filed petition which alleges new instances of

[45] See Section 15.3(C) for a detailed discussion of accelerated review hearings.

[46] See Section 17.4 for a detailed discussion of termination of parental rights based on new or different circumstances.

[47] See Chapter 15.

> abuse or neglect of the minor children does not create an entirely new case which requires the . . . court to redetermine jurisdiction and thus afford the respondent the right to a jury trial. The new charges fall within the continuation of the original proceeding. The hearing on such a petition is dispositional in nature, and no right to a jury trial exists." *In re Miller (Michelle)*, 178 Mich App 684, 686 (1989).

# Chapter 14: Funding


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## *In this chapter. . .*

This chapter contains an overview of sources used to pay the costs associated with child protective proceedings. The chapter discusses government sources used to pay the costs of care and service provided to a child and family, and federal reimbursement of foster care costs under Title IV-E of the Social Security Act. The chapter also discusses parental reimbursement of the costs of care, and attorney and lawyer-guardian ad litem fees.

The chapter contains an overview of guardianship assistance and a juvenile guardian's receipt of child support payments.

"Despite the public health crisis that exists, it is critical that child welfare agencies and courts work together to ensure that the requisite judicial proceedings continue during this time of uncertainty." See Department of Health & Human Services, Children's Bureau Letter to Child Welfare and Judicial Leaders, which details the judicial determinations and proceedings that must be held in order to satisfy Title IV-E requirements as well as suggestions for ensuring courts continue "to practice in a manner consistent with constitutional principles and to serve the best interest of children[.]"[1]

# 14.1 Federal, State, and County Sources of Funding[2]

Unless otherwise provided, expenses incurred in cases under the Juvenile Code must be paid "upon the court's order by the county treasurer from the county's general fund." MCL 712A.25(1). See e.g., MCL 400.117c(1)-(3), which either allows or requires the county to use its Child Care Fund to pay for placement costs (depending on type of placement and other factors), and provides for reimbursement by the Department of Health and Human Services (DHHS) for a portion of such expenses.

MCR 3.926(C)(1) provides that when a disposition is ordered by a court other than the court in the county where the child resides, the court ordering disposition is responsible for any costs incurred in connection with the order unless the court in the county where the child resides agrees to pay such dispositional costs.

## A. Generally

### 1. Funding

"Payments for out-of-home placement (hereafter called foster care payments) are made from legally defined fund sources for which specific eligibility must be determined. Funding comes from federal, state and county monies." DHHS's Children's Foster Care Manual (FOM), *Fund Sources FOM 901-8*, p 1.[3]

Specific funding sources available:

- Title IV-E Funding: This fund source is "established by title IV-E of the Social Security Act to provide federal financial participation in the administrative costs and foster care maintenance payments for [children.]" *Fund Sources FOM 901-8*, *supra* at 2.[4]

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[1]The link to the previous resource was created using Perma.cc and directs the reader to an archived record of the page.

[2]See the Department of Health & Human Services, Children's Bureau Letter to Child Welfare and Judicial Leaders, which details the judicial determinations and proceedings that must be held in order to satisfy Title IV-E requirements as well as suggestions for ensuring courts continue "to practice in a manner consistent with constitutional principles and to serve the best interest of children[.]" *Note*: The link to the previous resource was created using Perma.cc and directs the reader to an archived record of the page.

[3]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[4]See the Department of Health & Human Services, Children's Bureau Letter to Child Welfare and Judicial Leaders, which details the judicial determinations and proceedings that must be held in order to satisfy Title IV-E requirements as well as suggestions for ensuring courts continue "to practice in a manner consistent with constitutional principles and to serve the best interest of children[.]" *Note*: The link to the previous resource was created using Perma.cc and directs the reader to an archived record of the page.

- **County Child Care Funding (CCF):** "[This fund] is a state legislative appropriation to partially reimburse counties for the costs of foster care and other services provided for court wards." *Fund Sources FOM 901-8, supra* at 2.

- **State Ward Board and Care Funding (SWBC):** "[This fund] is the state legislative appropriation to provide payment of foster care costs for state wards who are not eligible for title IV-E or the placement is not title IV-E reimbursable[.]" *Fund Sources FOM 901-8, supra* at 3.

- **Limited Term/Emergency/General Funds:** "Limited term/emergency/general funds is a limited funding source to assist MDHHS staff in providing foster care payment and service under . . . specific circumstances[.]"[5] *Fund Sources FOM 901-8*, *supra* at 3.

"The fund source and payment procedures to be utilized in paying for the out-of-home care of [children] are determined by a combination of factors including legal status, living arrangement and federal regulations." DHHS's Children's Foster Care Manual (FOM), *Payment Source Guide FOM 901-9*, p 1.[6] For additional information on the payment systems used to execute foster care payments and a chart detailing which fund sources may be available, see the DHHS's Children's Foster Care Manual (FOM), *Payment Source Guide FOM 901-9*.

The DHHS must distribute money appropriated by the Legislature to counties for the cost of juvenile justice services[7] as provided in MCL 400.117a(4)(a)-(j). MCL 400.117a(4). Payment for expenditures for children placed with the DHHS for care, supervision, or placement (including children who are within the court's jurisdiction under MCL 712A.2(b)) must be paid by the DHHS and reimbursed by the county for all undisputed charges. MCL 400.117a(4)(a).[8] Payment for expenditures[9] for children not placed with the DHHS for care, supervision, or placement (including

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[5] See Section 14.1(E) for the list of circumstances.

[6] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[7] Juvenile justice service is a "service, exclusive of judicial functions, provided by a county for juveniles who are or likely to come within the court's jurisdiction under . . . MCL 712A.2," and includes, among other things, protective care services approved by the office. MCL 400.117a(1)(h).

[8] "Implementation of [MCL 400.117a(4)(a)] takes effect on October 1 of the fiscal year following the appropriation to support new payment processes and the implementation of technological changes to the statewide automated child welfare information system." MCL 400.117a(4)(a).

[9] See MCL 400.117a(4)(b)(*i*)-(*iv*) for an inclusive list of *expenditures*.

children who are within the court's jurisdiction under MCL 712A.2(b)) must be paid by a county and be reimbursed by the DHHS for all undisputed charges. MCL 400.117a(4)(b).

Distributions under MCL 400.117a(4) may be allowed unless otherwise accessible and available by other public assistance programs necessary to achieve the goals and outcomes for in-home care[10] or out-of-home care,[11] and reimbursement must not be made "for costs associated with an otherwise eligible child or family, or both, if the reason for the unavailability of public assistance is due to intentional program violations and disqualification of any public assistance." MCL 400.117a(5).

### 2. Assignment of Support to DHHS

If the DHHS is making state or federally funded foster care maintenance payments for a child that is either under the supervision of the DHHS or has been committed to the DHHS, all rights to current, past due, and future child support are assigned to the DHHS while the child is receiving or benefiting from those payments. MCL 400.115b(5). "When the [DHHS] ceases making foster care maintenance payments for the child, both of the following apply:

> (a) Past due support that accrued under the assignment remains assigned to the [DHHS].
>
> (b) The assignment of current and future support rights to the [DHHS] ceases." MCL 400.115b(5).

"The maximum amount of support the [DHHS] may retain to reimburse the state, the federal government, or both for the cost of care shall not exceed the amount of foster care maintenance payments made from state or federal money, or both." MCL 400.115b(6).

## B. Federal Foster Care Maintenance Payments Under Title IV-E Funding[12]

Title IV-E funding is a funding source "established by title IV-E of the Social Security Act[, 42 USC 670 *et seq.*,] to provide federal

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[10] "'In-home care' means expenditure of child care fund money for services and items listed in this section that are provided in the home or in the community to be an alternative to out-of-home care or to provide an early return home for a child placed out of the child's home." MCL 400.117a(1)(f).

[11] "'Out-of-home care' means placement outside of the residence of the child's parent, legal guardian, or, except as provided in this subdivision, relative where the child is found, from which the child was removed by the authority of the court, or in which the child will be placed on a permanent basis." MCL 400.117a(1)(i).

financial participation in the administrative costs and foster care maintenance payments for [children.]" DHHS's Children's Foster Care Manual (FOM), *Fund Sources FOM 901-8*, p 2.[13] 45 CFR 1355.20(a) defines *foster care maintenance payments* as "payments made on behalf of a child eligible for title IV-E foster care to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel for a child's visitation with family, or other caretakers. Local travel associated with providing the items listed above is also an allowable expense. In the case of child care institutions, such term must include the reasonable costs of administration and operation of such institutions as are necessarily required to provide the items described in the preceding sentences. 'Daily supervision' for which foster care maintenance payments may be made includes:

> **(1)** ***Foster family care*** **-** licensed child care, when work responsibilities preclude foster parents from being at home when the child for whom they have care and responsibility in foster care is not in school, licensed child care when the foster parent is required to participate, without the child, in activities associated with parenting a child in foster care that are beyond the scope of ordinary parental duties, such as attendance at administrative or judicial reviews, case conferences, or foster parent training. Payments to cover these costs may be: included in the basic foster care maintenance payment; a separate payment to the foster parent, or a separate payment to the child care provider; and
>
> **(2)** ***Child care institutions*** - routine day-to-day direction and arrangements to ensure the well-being and safety of the child."

"Title IV-E . . . requires all applicable federal regulations be followed for use of the fund." DHHS's Children's Foster Care Manual (FOM), *Funding Determinations and Title IV-E Eligibility FOM 902*, p 1.[14] "To be eligible for payment under title IV-E, children must, by Family Court or Tribal Court order, be under MDHHS

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[12]See the Department of Health & Human Services, Children's Bureau Letter to Child Welfare and Judicial Leaders, a letter that addresses the requirements of Title IV-E during COVID-19, but that outlines the process required *at all times*. The letter details the judicial determinations and proceedings that must be held in order to satisfy Title IV-E requirements as well as suggestions for ensuring courts continue "to practice in a manner consistent with constitutional principles and to serve the best interest of children[.]" *Note*: The link to the previous resource was created using Perma.cc and directs the reader to an archived record of the page.

[13]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

supervision for placement and care or committed to MDHHS." *Id.* at p 3. For more information on funding determinations and Title IV-E Eligibility, see the DHHS's Children's Foster Care Manual (FOM), *Funding Determinations and Title IV-E Eligibility FOM 902*.[15]

> **Note:** The Child Welfare Funding Specialist (CWFS) must determine "the appropriate fund source for out-of-home placements at the time the [child] is referred for care and supervision by MDHHS regardless of actual placement[.]"[16] *Funding Determinations and Title IV-E Eligibility FOM 902*, *supra* at p 1.

**Family First Prevention Services Act (FFPSA).** The 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. United States DHHS's Children's Bureau, *Information Memorandum-18-02*.[17] 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*.

## C. County Child Care Fund (CCF)

"The county [C]hild [C]are [F]und [(CCF)] is a county-state fiscal program whereby the State of Michigan reimburses counties which provide care and service for children and their families." DHHS's Children's Foster Care Manual (FOM), *Fund Sources FOM 901-8*,[18] p 2.

A county CCF consists of funds appropriated by a county for foster care. MCL 400.117c(1)-(2). The CCF *must* be used to pay the costs of

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[14]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[15]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[16] "A written court order from the Family Division of Circuit Court must exist that makes the Michigan Department of Health and Human Services (MDHHS) responsible for the child's placement, care, and supervision, unless the child is in a voluntary placement[.] . . . The department assumes legal, financial, and service responsibility at the point it accepts a child for placement and care." DHHS's Children's Foster Care Manual (FOM), *Foster Care - Entry into Foster Care FOM 722-01*, p 1. The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[17]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[18]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

providing foster care[19] for children "under the jurisdiction of the family division of circuit court or court of general criminal jurisdiction." MCL 400.117c(2). The CCF *may* be used for paying the county's share of the cost of placement in the Michigan Children's Institute (MCI). MCL 400.117c(3).

Except as provided in MCL 400.117a(4)(j), the DHHS must reimburse 50 percent of a county's eligible annual expenditures "for residential services of detention and long-term residential placements" from a county's CCF. MCL 400.117a(4)(c). Except as provided in MCL 400.117a(4)(j), the amount the county distributes shall equal 75 percent of the annual expenditures "for in-home expenses including community-based supervision, services, and related practices, and per diem rates for the use of respite care and shelter for less than 30 days." *Id.* The reimbursement of annual expenses does not include reimbursement for a county's capital expenditures. *Ottawa Co v Family Independence Agency*, 265 Mich App 496, 502-504 (2005). In *Ottawa Co,* eleven Michigan counties filed suit seeking reimbursement from the DHHS for 50 percent of the costs they incurred for capital expenditures that included building, equipping, and improving juvenile detention facilities. *Id*. at 498. The Court of Appeals concluded that reimbursement of a county's expenditure is conditional. *Id.* at 500. The DHHS "is obligated to establish standards for reimbursing the funds and may withhold reimbursement if certain expenditures violate its rules." *Id.* at 501. The Court further noted that MCL 400.117a(13)[20] and relevant administrative rules and policies limit the DHHS's ability to reimburse a county by requiring reimbursements be "'based on care given to a specific, individual child.'" *Ottawa Co,* 265 Mich App at 501-503, quoting MCL 400.117a(12). Thus, the counties were held financially "responsible for absorbing the large capital costs of building and equipping the facilities[.]" *Ottawa Co,* 265 Mich App at 503. The Court of Appeals also concluded that the DHHS's failure to reimburse the counties for their capital expenditures did not violate the Headlee Amendment, Const 1963, art 9, § 29. *Ottawa Co,* 265 Mich App at 503.

"Notwithstanding the provisions in [MCL 400.117a(4)(c)[21]] and subject to appropriations, the department shall implement a prospective payment system as part of a state-administered

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[19] MCR 3.903(C)(5) defines *foster care* as "24-hour a day substitute care for children placed away from their parents, guardians, or legal custodians, and for whom the court has given the Department of Health and Human Services placement and care responsibility, including, but not limited to, (a) care provided to a child in a foster family home, foster family group home, or child caring institution licensed or approved under MCL 722.111 *et seq.*, or (b) care provided to a child in a relative's home pursuant to an order of the court." MCL 712A.13a(1)(e) contains a substantially similar definition of *foster care.*

[20] Formerly MCL 400.117a(13). See 2023 PA 297, effective October 1, 2024.

performance-based child welfare system in a county with a population of not less than 575,000 or more than 750,000, for foster care case management in accordance with section 503 of article X of 2014 PA 252. The county is only required to contribute to foster care services payments in an amount that does not exceed the average of the annual net contribution made by the county for cases received under [MCL 712A.2(b)], in the 5 previous fiscal years before October 1, 2015. The prospective payment system as part of the state-administered performance-based child welfare system shall be implemented as described in this subdivision but shall not include in-home care service funding."[22] MCL 400.117a(4)(h). See also MCL 803.305(4), which contains substantially similar provisions under the Youth Rehabilitation Services Act.

If a child is committed to the MCI, the DHHS pays the entire cost of a child's care and supervision, but the county is charged back 50 percent of that cost. See MCL 400.207(1); MCL 803.305(1). The DHHS may, subject to a county's approval, offset the amount due by the DHHS to the county's CCF. MCL 400.117a(4)(c).[23]

## D. State Ward Board and Care Funds (SWBC)

The State Ward Board and Care Funds (SWBC) are available to support children in out-of-home placements when all of the following criteria are met:

- The child is a state ward committed to the DHHS.
- The child is in a DHHS supervised and approved out-of-home placement.
- The child or the placement is ineligible for Title IV-E funding.

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[21]Effective October 1, 2021, the distribution requirements outlined in MCL 400.117a(4)(c) apply unless the conditions in MCL 400.117a(4)(j) are applicable. MCL 400.117a(4)(c). Under MCL 400.117a(4)(j), the state's financial responsibility to "pay 100% of the cost to provide juvenile justice services when a court exercises jurisdiction over a juvenile who is 17 years of age, but under 18 years of age at the time of the offense" ended September 30, 2024. MCL 400.117a(4)(j). See 2023 PA 297, effective October 1, 2024.

[22] For purposes of MCL 400.117a, *in-home care* is "expenditure of child care fund money for services and items listed in this [MCL 400.117a] to be an alternative to out-of-home care or to provide an early return home for a child placed out of his or her home." MCL 400.117a(1)(f).

[23]Effective October 1, 2021, MCL 400.117a(4)(c) applies unless the circumstances require application of MCL 400.117a(4)(j), which requires "the state [to] pay 100% of the cost to provide juvenile justice services when a court exercises jurisdiction over a juvenile who is 17 years of age, but under the age of 18 at the time of the offense." MCL 400.117a(4)(j). See 2019 PA 114. Beginning October 1, 2025, "the rate of reimbursement paid by the state for all juveniles will be" the percentage resulting from the specific equation provided in MCL 400.117a(5), "using actual expenditures for the fiscal years ending September 30, 2022, September 30, 2023, and September 30, 2024[.]" MCL 400.117a(5). See 2019 PA 114, effective October 1, 2021.

- The child has not reached 19 years of age. DHHS's Children's Foster Care Manual (FOM), *Fund Sources FOM 901-8*, p 3.

"[SWBC] funds may be used to reimburse the foster family, placement agency foster care (PAFC) provider or residential facility for care provided, for certain intermittent or case service payments, and for independent living payments to the [child]" provided that specific criteria are met. *Funding Sources FOM 901-8*, *supra.*

### E. Limited Term, Emergency, and General Foster Care Funding

"Limited term/emergency/general funds is a limited funding source to assist MDHHS staff in providing foster care payment and service under the following specific circumstances:

> 1. The child is a court ward . . . and title IV-E eligible except for the receipt of [Social Security Income (SSI)]
>
> 2. Former MCI wards between age 19 and 20 who are in foster care or independent living.
>
> * * *
>
> 3. Emergency foster care for children in families receiving [Family Independence Program (FIP) assistance] and the caretaker is hospitalized or incarcerated and no other plan can be made through the FIP program. . . .
>
> * * *
>
> 4. Children may be placed in foster care prior to release to MDHHS under the Michigan Adoption Code." DHHS's Children's Foster Care Manual (FOM), *Fund Sources FOM 901-8*,[24] pp 3-4.

## 14.2 Monies Ordered and Collected

"The court shall not order a juvenile or a juvenile's parent, guardian, or legal custodian to pay for the costs of care, services, court-appointed attorney representation, or other costs or assessments related to the juvenile's court proceeding." MCL 712A.18(3).

[24]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

"An order directed to a parent or a person other than the juvenile is not effective and binding on the parent or other person unless opportunity for hearing is given by issuance of summons or notice as provided in [MCL 712A.12 and MCL 712A.13] and until a copy of the order, bearing the seal of the court, is served on the parent or other person as provided in [MCL 712A.13]." MCL 712A.18(4).

"Money collected for juveniles placed by the court with or committed to the [DHHS] or a county juvenile agency must be accounted for and reported on an individual juvenile basis." MCL 712A.18(2).

## 14.3 Orders for Reimbursement of Attorney and Lawyer-Guardian ad Litem Fees

"In a child protective proceeding, when an attorney is appointed for a party under [MCR 3.915], the court may enter an order assessing costs of the representation against the party or against a person responsible for the support of that party after a determination of ability to pay, which may be enforced as provided by law. MCR 3.915(E). See also MCL 712A.17c(8) (requiring the order to be made after the court determines the party's ability to pay).

"In a child protective proceeding, the court may assess the cost of providing a guardian ad litem against the party or a person responsible for the support of the party after a determination of ability to pay, and may enforce the order of reimbursement as provided by law." MCR 3.916(D)."An order assessing attorney costs may be enforced through contempt proceedings." MCL 712A.17c(8).

The trial court committed "a legal error [that] was outside the range of reasonable and principled outcomes" when it ordered petitioners, who were the child's legal guardians, to reimburse the court for the lawyer-guardian ad litem fees and respondent-mother's court-appointed attorney fees. *In re Alexander*, ___ Mich App ___, ___ (2026). "There is nothing in the law requiring or supporting assessing costs against the party petitioning the court. Rather, MCL 712A.17c(8), MCR 3.915(E), and MCR 3.916(D) require the trial court to . . . determine a party's ability to pay for an attorney, appoint an attorney, and then assess costs against that same party or someone responsible for supporting the party. Petitioners [were] not responsible for respondent-mother." *Alexander*, ___ Mich App at ___.

See SCAO guidelines for court-ordered reimbursement.

# 14.4 Guardianship Assistance

If the court appoints a guardian for a child under MCL 712A.19a(9)(c) or MCL 712A.19c(2), the Department of Health and Human Services (DHHS) is permitted to provide assistance payments to guardians of eligible children under the Guardianship Assistance Act, MCL 722.871 *et seq*. Guardianship assistance may make possible guardianships of children for whom "[r]eunification and placing the child for adoption are not appropriate permanency options." See MCL 722.873(1)(c).

"[T]he [DHHS] may pay guardianship assistance to an eligible guardian on behalf of an eligible child." MCL 722.875(1). The prospective guardian[25] must apply to the DHHS for the guardianship assistance. MCL 722.875(2). The DHHS must determine eligibility within 30 days after receiving a complete application for guardianship assistance. MCL 722.875(8).

> **Note:** "If guardianship assistance is requested, the determination of eligibility and a guardianship assistance agreement must be completed and signed by all parties before the court enters the order appointing the guardian(s)[.]" DHHS's Child Guardianship Manual (GDM), *Juvenile Guardianship GDM 600*, p 13.

The guardian or successor guardian must also apply for and maintain medical insurance for the child. MCL 722.877.

## A. Eligibility for Guardianship Assistance

The DHHS may pay guardianship assistance to an eligible guardian on behalf of an eligible child. MCL 722.875(1).

In order for a guardian to be eligible for guardianship assistance, he or she must meet the following conditions:

> "(a) The guardian is the eligible child's relative[26] or legal custodian.[27]
>
> (b) The guardian is a licensed foster parent and approved for guardianship assistance by the [DHHS]. The approval process must include criminal record checks and child abuse and neglect central registry

[25] "'Prospective guardian' means an individual seeking guardianship of a child if an order appointing that guardianship has not been finalized by the court." MCL 722.872(j).

[26] "'Relative' means that term as defined in . . . MCL 712A.13a." MCL 722.872(k).

[27] "'Legal custodian' means an individual who is at least 18 years of age in whose care a child remains or is placed after a court makes a finding under . . . MCL 712A.13a." MCL 722.872(h).

> checks on the guardian and all adults living in the guardian's home as well as fingerprint-based criminal record checks on the guardian. If the guardian's fingerprints are stored in the automated fingerprint identification system under . . . MCL 722.115k, the [DHHS] shall use those fingerprints for the criminal record check required in this subdivision.
>
> (c) The eligible child has resided with the prospective guardian in the prospective guardian's residence for a minimum of 6 months before the application for guardianship assistance is received by the [DHHS]." MCL 722.874(1).

A child is eligible for guardianship assistance if the DHHS determines that all of the following provisions are satisfied:

> "(a) The child has been removed from his or her home as a result of a judicial determination by a state court or tribal court within this state that allowing the child to remain in the home would be contrary to the child's welfare.
>
> (b) The child has resided in the home of the prospective guardian for, at a minimum, 6 consecutive months.
>
> (c) Reunification and placing the child for adoption are not appropriate permanency options.
>
> (d) The child demonstrates a strong attachment to the prospective guardian and the guardian has a strong commitment to caring permanently for the child until the child reaches 18 years of age.
>
> (e) If the child has reached 14 years of age, he or she has been consulted regarding the guardianship arrangement.
>
> (f) Certification has been made before the child's eighteenth birthday.
>
> (g) The guardianship assistance agreement has been signed by the prospective guardian and the [DHHS] before the guardianship is finalized by the court and before the child's eighteenth birthday." MCL 722.873.

"A determination by the [DHHS] on the eligibility of guardianship assistance does not affect a judicial finding that a guardianship should be ordered for the child." MCL 722.873(2).

For additional information on juvenile guardianship assistance eligibility, see the DHHS's Child Guardianship Manual (GDM), *Juvenile Guardianship Assistance Eligibility GDM 715*.

## B. Successor Guardian

"Subject to the provisions of [the Guardianship Assistance] Act, the [DHHS] may pay guardianship assistance to an eligible successor guardian[28] on behalf of an eligible child."[29] MCL 722.875c(1). The successor guardian must apply to the DHHS for the guardianship assistance. MCL 722.875c(2).

> **Note:** "Payment of guardian assistance shall not be made to a successor guardian until the court appoints a successor guardian. If the successor guardian began caring for the child before the court appoints the successor guardian, guardianship assistance payments can be made retroactively to either the date of death of the relative guardian, the date of incapacity of the relative guardian, or the date the successor guardian assumed care of the child, whichever is later." MCL 722.875c(4).

In order for a successor guardian to be eligible for guardianship assistance, the DHHS must determine that all of the following conditions have been met:

> "(a) A guardianship assistance agreement for the child was in effect before the appointment of the successor guardian.[30]
>
> (b) The successor guardian was appointed by the court as a result of the death or incapacitation of the preceding guardian.
>
> (c) The preceding guardian had an active guardianship assistance agreement for the child before his or her death or incapacitation.

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[28] "'Successor guardian' means a person appointed by the court to act as a legal guardian when the preceding guardian is no longer able to act as a result of his or her death or incapacitation under . . . MCL 712A.19a [or MCL] 712A.19c. Successor guardian does not include a person appointed as a guardian if that person's parental rights to the child have been terminated or suspended." MCL 722.872(*l*).

[29] MCL 722.874(4) permits a successor guardian to receive guardianship assistance payments if the child meets the eligibility requirements set out under MCL 722.873. For the eligibility requirements under MCL 722.873, see Section 14.4(A).

[30] For additional information on guardianship assistance agreements, see Section 14.4(C).

> (d) The successor guardian meets all of the conditions set forth in this act."[31] MCL 722.875c(5).

## C. Guardianship Assistance Agreement

If the DHHS finds that a child and a guardian are eligible for guardianship assistance, the DHHS must negotiate and enter into a written and binding guardianship assistance agreement with the child's prospective guardian.[32] MCL 722.875(3). A *guardianship assistance agreement* is "a negotiated binding agreement regarding financial support as described in [MCL 722.875] for children who meet the qualifications for guardianship assistance as specified in this act or in the [DHHS's] administrative rules." MCL 722.872(g). "[A] guardianship assistance agreement must remain in effect without regard to the state residency of the guardian." MCL 722.875(5).

> **Note:** The guardianship assistance agreement "may be transferred to a successor guardian who has been appointed by the court. This occurs when the successor guardian enters into a written, binding guardianship assistance agreement with the [DHHS]." MCL 722.875c(3).

"The guardianship assistance agreement must specify all of the following:

> (a) The additional services and assistance the child and the guardian are eligible for under the guardianship assistance agreement.
>
> (b) The procedure by which the guardian may apply for additional services, if needed.
>
> (c) That the [DHHS] will pay the total cost of nonrecurring expenses associated with obtaining legal guardianship of an eligible child, to the extent the total cost does not exceed $2,000.00." MCL 722.875(4).

A guardian's eligibility for guardianship assistance must be determined "without regard to the income of the prospective guardian." MCL 722.875(6).[33]

For additional information on juvenile guardianship assistance agreements, see the DHHS's Child Guardianship Manual (GDM),

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[31] For eligibility conditions set out under the Guardianship Assistance Act, see Section 14.4(A).

[32] "[The DHHS] must provide the prospective guardian [with] a signed copy of the guardianship assistance agreement." MCL 722.875(3).

*Juvenile Guardianship Assistance Agreements/Guardian Responsibilities GDM 740*.

## D. Annual Review

The DHHS must annually review the guardian's and child's eligibility to determine whether the guardianship assistance should continue. MCL 722.875(7).

MCL 722.875(7) requires the guardian to provide all eligibility information requested by the DHHS for purposes of the annual review.

> **Note:** It is the DHHS's responsibility to collect, assemble, and report all data and information required for reporting purposes. MCL 722.878(1). The guardian or successor guardian must provide all the information within his or her possession that the DHHS requests for reporting purposes. MCL 722.878(2).

## E. Case Service Plan

If a child's permanency plan includes placement with a guardian and the receipt of guardianship assistance, the DHHS, child-placing agency, or tribal child welfare agency must include all of the following in the child's case service plan:

> "(a) The steps that the [DHHS], child placing agency, or tribal child welfare agency has taken to determine that reunification and placing the child for adoption have been determined not to be in the child's best interest and ruled out as appropriate permanency options.
>
> (b) The reason for any separation of siblings during placement.
>
> (c) The reason a permanent placement through guardianship until the child reaches 18 years of age is in the child's best interest.
>
> (d) The reason why reunification and adoption have or have not been ruled out.

[33]The amount of a guardianship assistance payment includes determination of the rate of care for the child if the child were placed or remained in foster care plus any increase in payment due to an increase in the standard age-appropriate foster care rate paid by the DHHS. MCL 722.875(6). A guardianship assistance payment made on a child's behalf may not exceed the amount of a foster care maintenance payment that would have been paid on the child's behalf had the child remained in foster care. *Id*.

> (e) The efforts the [DHHS], child placing agency, or tribal child welfare agency has made to discuss adoption by the prospective guardian as a permanent alternative to legal guardianship and documentation of the reason the prospective guardian has chosen not to pursue adoption.
>
> (f) In cases where the parental rights have not been terminated, the efforts the [DHHS], the child placing agency, or the tribal child welfare agency has made to discuss with the child's birth parent or parents the guardianship assistance arrangement, or the reasons why the efforts were not made." MCL 722.875a.

## F. Duration of Guardianship Assistance

Except as otherwise provided in MCL 722.876(2), the DHHSmay not provide guardianship assistance after any one of the following occurs:

> "(a) The child reaches 18 years of age.
>
> (b) The [DHHS] determines that the guardian is no longer legally responsible for support of the child.
>
> (c) The [DHHS] determines that the child is no longer receiving any support from the relative guardian.
>
> (d) The death of the child.
>
> (e) The child is adopted by the guardian or another individual under the Michigan [A]doption [C]ode, . . . MCL 710.21 to [MCL] 710.70, or the adoption laws of any other state or tribal government.
>
> (f) The guardianship is terminated by order of the court having jurisdiction in the guardianship proceeding.
>
> (g) The death of the guardian unless a successor guardian has been appointed by the court." MCL 722.876(1).

MCL 722.876(2) permits the DHHS to provide "extended guardianship assistance until the youth reaches 21 years of age if the youth meets the requirements set forth in the [Y]oung [A]dult [V]oluntary [F]oster [C]are [A]ct, . . . MCL 400.641 to [MCL] 400.671." See Section 14.4(I).

If the DHHS terminates guardianship assistance, the DHHS must mail notice of the termination to the guardian's current or last

known address and to the court with jurisdiction over the guardianship. MCL 722.876(3). In its notice of termination the DHHS must inform the guardian and the court of its reason for terminating the guardianship assistance. *Id*.

"The guardianship assistance agreement must remain in effect without regard to the state residency of the guardian." MCL 722.875(5).

## G. Appealing the Department's Guardianship Assistance Determination

"An applicant for guardianship assistance under [the Guardianship Assistance Act] or a guardian, successor guardian, or child who has received guardianship assistance under a guardianship assistance agreement may appeal a decision of the [DHHS] denying the application, establishing or modifying the guardianship assistance, or terminating guardianship assistance according to the administrative procedures act of 1969, . . . MCL 24.201 to 24.328." MCL 722.879.

### 1. Petition for Review

A petition requesting review of the DHHS's determination must be within 60 days after the date of mailing notice of the department's final determination. MCL 24.304(1). Filing a petition for review does not automatically stay enforcement of the department's determination, but the department "may grant, or the court may order, a stay upon appropriate terms." *Id.*

"[A] petition for review shall be filed in the circuit court for the county where petitioner resides or has his or her principal place of business in this state, or in the circuit court for Ingham county." MCL 24.303(3).

"A petition for review shall contain a concise statement of:

> (a) The nature of the proceedings as to which review is sought.
>
> (b) The facts on which venue is based.
>
> (c) The grounds on which relief is sought.
>
> (d) The relief sought." MCL 24.303(3).

A copy of the department's determination must be attached as an exhibit to the petition. MCL 24.303(4).

### 2. Department's Responsibilities on Appeal

"Within 60 days after service of the petition, or within such further time as the court allows, the [DHHS] shall transmit to the court the original or certified copy of the entire record of the proceedings, unless parties to the proceedings for judicial review stipulate that the record be shortened. A party unreasonably refusing to so stipulate may be taxed by the court for the additional costs. The court may permit subsequent corrections to the record." MCL 24.304(2) MCL 24.304(2).

### 3. Application Requesting Leave to Present Additional Evidence

"If timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that an inadequate record was made at the hearing before the [DHHS] or that the additional evidence is material, and that there were good reasons for failing to record or present it in the proceeding before the [DHHS], the court shall order the taking of additional evidence before the [DHHS] on such conditions as the court deems proper. The [DHHS] may modify its findings, decision or order because of the additional evidence and shall file with the court the additional evidence and any new findings, decision or order, which shall become part of the record." MCL 24.305.

### 4. Court Determination

In reviewing an appeal, the court must do so without a jury and limit its review to what is provided in the record. MCL 24.304(3). However, the court may take evidence not shown on the record if the appeal involves an alleged irregularity in the department's procedures. *Id.* On a party's request, the court must also hear oral arguments and receive written briefs. *Id.*

The court must decide whether the department's determination was supported by "competent, material[,] and substantial evidence on the whole record." *Russo v Michigan Dep't of Licensing & Regulation*, 119 Mich App 624, 630-631 (1982). In *Russo*, the Court defined substantial evidence as: "The 'substantial evidence test' has been defined as evidence which a reasoning mind would accept as sufficient to support a conclusion. While it consists of more than a mere scintilla of evidence it may be substantially less than a preponderance of the evidence." *Id.* at 631 (internal citations omitted).

After the court's review, the court may do any of the following:

> (1) Remand for further proceedings.
>
> (2) Remand for the taking of additional evidence.
>
> (3) Affirm the DHHS's determination (in whole or in part).
>
> (4) Reverse the DHHS's determination (in whole or in part).
>
> (5) Modify the DHHS's determination. MCL 24.306(2).

"Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of [the DHHS's] if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

> (a) In violation of the constitution or a statute.
>
> (b) In excess of the statutory authority or jurisdiction of the [DHHS].
>
> (c) Made upon unlawful procedure resulting in material prejudice to a party.
>
> (d) Not supported by competent, material and substantial evidence on the whole record.
>
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
>
> (f) Affected by other substantial and material error of law. MCL 24.306(1).

## H. Court's Role

The court is authorized to appoint a guardian or juvenile guardian at a permanency planning hearing (rather than terminating parental rights or returning the child home) or after parental rights to the child have been terminated.[34] See MCL 712A.19a; MCL 712A.19c. The DHHS, not the court, determines whether a guardian will receive guardianship assistance. See the Guardianship Assistance Act, MCL 722.871 *et seq*.

[34] See Section 16.8(A) for a detailed discussion of juvenile guardianship appointments during permanency planning hearings, and Section 18.5(A) for a detailed discussion of post-termination guardianship appointments.

"The legal guardianship must be a judicially created relationship as provided for under . . . MCL 712A.19a and [MCL] 712A.19c, another state's law or code, or tribal law or code when the child is a ward of this state, between the child and the child's guardian that is intended to be permanent and self-sustaining as evidenced by the transfer to the guardian of the following parental rights with respect to the child:

(a) Protection.

(b) Education.

(c) Care and control of the individual.

(d) Custody of the individual.

(e) Decision making." MCL 722.875b.

Appointment of a guardian shifts the legal responsibility for the child to the guardian. MCL 712A.19c(7), (9). A guardian appointed under MCL 712A.19c has all the powers and duties described in MCL 700.5215. MCL 712A.19c(7).

> **Note:** "If guardianship assistance is requested, the determination of eligibility for guardianship assistance and a signed guardianship assistance agreement must be completed before the court enters the order appointing the guardian." DHHS's Child Guardianship Manual (GDM), *Juvenile Guardianship GDM 600*, p 13.

The court's jurisdiction over the child terminates after a guardian is appointed and a review hearing is held under MCL 712A.19. MCL 712A.19c(9). However, the court's jurisdiction over the guardianship continues until released by court order. MCL 712A.19c(10);MCR 3.979(C)(1)(a). "Unless terminated by court order, the court's jurisdiction over a juvenile guardianship ordered under MCL 712A.19a or MCL 712A.19c for a youth 16 years of age or older shall continue until 120 days after the youth's eighteenth birthday." MCR 3.979(C)(1)(b). If the DHHS provides the court with notice that it is extending guardianship assistance to a youth beyond the age of 18 under MCL 400.665 (Young Adult Voluntary Foster Care Act), the court must "retain jurisdiction over the guardianship until that youth no longer receives extended guardianship assistance."[35] MCR 3.979(C)(1)(b). "Upon receipt of notice from the [DHHS] that it will not continue extended guardianship assistance, the court shall

[35] For additional information on the extension of guardianship assistance under MCL 400.665, see Section 14.4(I).

immediately terminate the juvenile guardianship." MCR 3.979(D)(1)(c).

The court must "conduct an annual review of a juvenile guardianship as to the condition of the child until the child's eighteenth birthday." MCR 3.979(D)(1)(a). See also MCL 712A.19c(10). The court may conduct additional reviews as it deems necessary, or it may order the DHHS or a court employee to conduct an investigation and file a written report. MCL 712A.19c(10); MCR 3.979(D)(1)-(2). "If, under [MCR 3.979(C)(1)(b) (retention of court jurisdiction for extended juvenile guardianship assistance)], the [DHHS] has notified the court that extended guardianship assistance has been provided to a youth pursuant to MCL 400.665, the court shall conduct an annual review hearing . . . [until] the youth is no longer eligible for extended guardianship assistance." MCR 3.979(D)(1)(b).[36]

## I. Young Adult Guardianship Extension (YAGE)

MCL 722.876(2) permits the DHHS to provide "extended guardianship assistance until the youth reaches 21 years of age if the youth meets the requirements set forth in the [Y]oung [A]dult [V]oluntary [F]oster [C]are [A]ct[ (YAVFCA)], . . . MCL 400.641 to [MCL] 400.671."

Under the YAVFCA, the DHHS may provide extended guardianship assistance to a youth between the ages of 18-20 if the youth began receiving guardianship assistance at 16 years of age or older and the youth meets one of the eligibility conditions set out in MCL 400.667.[37] MCL 400.665; MCL 400.667. Under MCL 400.667, the youth must meet one of the following eligibility conditions:

> "(a) The youth is completing secondary education or a program leading to an equivalent credential.
>
> (b) The youth is enrolled in an institution that provides postsecondary or vocational education.
>
> (c) The youth is participating in a program or activity designed to promote employment or remove barriers to employment.
>
> (d) The youth is employed for at least 80 hours per month.

[36] For additional information on the extension of guardianship assistance under MCL 400.665, including the annual review requirements, see Section 14.4(I).

[37] "The [DHHS] shall determine a youth's initial and subsequent eligibility for extended guardianship assistance in accordance with the state's approved [T]itle IV-E plan." MCL 400.665(2).

> (e) The youth is incapable of doing any part of the activities in subdivisions (a) to (d) due to a medical condition. This assertion of incapacity must be supported by regularly updated information." MCL 400.667.

For additional information on extending guardianship assistance, see the DHHS's Child Guardianship Manual (GDM), *Extensions for Youth Entering Guardianship at Ages 16-17 GDM 716*.

## 1. Notice

The DHHS "will mail an application[38] and notice of eligibility or [the Young Adult Guardianship Extension (YAGE) program] to the guardian no later than 90 days before the youth's 18th birthday." SCAO Administrative Memorandum 2012-04, p 5. The DHHS will also send a notice to the court with jurisdiction over the juvenile guardianship to "inform the court that the youth may be eligible for an extension, and [to] request[] [that] the court [] keep the guardianship case open for 120 calendar days following the youth's 18th birthday to allow time to complete the application and eligibility determination process." SCAO Administrative Memorandum 2012-04, *supra* at p 5.

## 2. Approval

"[The DHHS] determines the youth's initial and subsequent eligibility for extended guardianship assistance." SCAO Administrative Memorandum 2012-04, *supra* at p 4. If the DHHS approves the extension, it will mail a voluntary agreement[39] to the guardian for the guardian and youth to sign. DHHS's Child Guardianship Manual (GDM), *Extensions for Youth Entering Guardianship at Ages 16-17 GDM 716*.

> **Note:** "Both the youth and the guardian must sign [the] voluntary agreement with [the DHHS] under which the youth and guardian pledge compliance with [MCL 400.667]." SCAO Administrative Memorandum 2012-04, *supra* at p 4.

"If [the DHHS] approves the application [and upon receipt of the signed voluntary agreement], it will send a copy of the signed voluntary agreement to the court, requesting the court to continue the guardianship."[40] SCAO Administrative

[38] See DHHS form DHS-1339-G, *Young Adult Guardianship Assistance Extension*.

[39] See DHHS form DHS-3313-YA, *Young Adult Guardianship Assistance Extension Agreement*.

Memorandum 2012-04, *supra* at p 5. "The court shall determine whether the juvenile guardianship remains in the youth's best interests and issue an order."[41] *Id.*

> **Note:** "[The] SCAO recommends that, upon receiving a voluntary agreement and request to keep the case open, the court schedule the required annual review hearing to ensure that a best interests determination is made within 365 days after the youth's 18th birthday and annually thereafter."

### 3. Court's Role

**Retain jurisdiction of the youth.** "If the court has appointed a [juvenile] guardian under [MCL 712A.19a] or [MCL 712A.19c][42] for a youth age 16 or older, the court shall retain *jurisdiction of the youth* until the [DHHS] determines the youth's[43] eligibility to receive extended guardianship assistance under the [YAVFCA], . . . MCL 400.641 to [MCL] 400.671, that shall be completed within 120 days of the youth's eighteenth birthday. If the [DHHS] determines the youth will receive extended guardianship assistance, the court shall retain *jurisdiction of the youth* until that youth no longer receives guardianship assistance."[44] MCL 712A.2a(4) (emphasis added). See also MCL 400.669(1), which requires the court to retain its jurisdiction "of a youth receiving, or a youth for whom the department is determining eligibility for receiving, extended guardianship assistance until that youth no longer receives guardianship assistance." But see MCL 712A.19a(12), MCL 712A.19c(9), and MCR 3.979(C)(1)(a), which require the

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[40] "Within 30 calendar days of the date the DHS-3313-YA, *Young Adult Guardianship Assistance Extension Agreement*, was signed by the [DHHS] Subsidy Office manager, the [DHHS] Subsidy Office will provide a copy of the agreement to the guardian and the court with jurisdiction over the guardianship." DHHS's Child Guardianship Manual (GDM), *Extensions for Youth Entering Guardianship at Ages 16-17 GDM 716*, p 5 (emphasis added).

[41] "Amendments to MCR 3.979(A)(1) are pending." SCAO Administrative Memorandum 2012-04, p 5 n 12. "The proposed court rules will require the court to serve the orders on the youth, the guardian[,] and [the DHHS]." SCAO Administrative Memorandum 2012-04, *supra* at p 5. The court order should be sent to the DHHS at the following address: DHHS Adoption Subsidy Office, P.O. Box 30037, Lansing, MI 48909. SCAO Administrative Memorandum 2012-04, *supra.*

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

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

[44] See Section 4.6 for a discussion of juvenile guardianship appointments, and Section 16.9 for a discussion of the Young Adult Voluntary Foster Care Act (YAVFC).

court's *jurisdiction over the child* pursuant to MCL 712A.2(b) to terminate once the juvenile guardian is appointed and a review hearing is conducted under MCL 712A.19.

**Retain jurisdiction of the guardianship.** If the DHHS provides the court with notice that it is extending guardianship assistance to a youth beyond the age of 18 under MCL 400.665 (YAVFCA), the court must also "retain *jurisdiction over the guardianship* until that youth no longer receives extended guardianship assistance." MCR 3.979(C)(1)(b) (emphasis added).

**Conduct Reviews.** MCR 3.979(D)(1)(b) sets forth the court's responsibilities for conducting reviews on extended guardianship assistance:

- "If, under [MCR 3.979(C)(1)(b) (retention of court *jurisdiction over juvenile guardianship* for extended juvenile guardianship assistance)], the [DHHS] has notified the court that extended guardianship assistance has been provided to a youth pursuant to MCL 400.665, the court shall conduct an annual review hearing at least once every 12 months thereafter to determine that the guardianship meets the criteria under MCL 400.667.[45] The duty to conduct an annual review hearing on extended guardianship assistance shall discontinue when the youth is no longer eligible for extended guardianship assistance. Notice of the hearing under this subrule shall be sent to the guardian and the youth as provided in MCR 3.920(D)(1).

  (*i*) The hearing conducted under this subrule may be adjourned up to 28 days for good cause shown.

  (*ii*) If requested by the court, the guardian must provide proof at the review hearing that the youth is in compliance with the criteria of MCL 400.667.

  (*iii*) Following a review hearing under this subrule, the court shall issue an order to support its determination and serve the order on the [DHHS], the guardian, and the youth."

[45] See also MCL 400.669(2), which requires "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance not less than 1 time every 12 months." "A hearing held under [MCL 400.669(2)] may be combined with a hearing held under [MCL 712A.19(2)] to [MCL 712A.19(4)], . . . [MCL 712A.19a(1)], . . . or [MCL 712A.19c(1)] . . . ." MCL 400.669(2).

> "Upon receipt of notice from the [DHHS] that it will not continue extended guardianship assistance, the court shall immediately terminate the juvenile guardianship." MCR 3.979(D)(1)(c).

For additional information on the court's jurisdiction following the appointment of a juvenile guardian, see Section 4.9.

## J. Title IV-E Eligibility[46]

MCL 722.874(2) and MCL 722.874(3) address Title IV-E[47] funding and its relationship to guardianship assistance:

> "(2) Only a relative who is a licensed foster parent caring for a child who is eligible to receive [T]itle IV-E-funded foster care payments for 6 consecutive months after licensure of the family is eligible for federal funding under [T]itle IV-E for guardianship assistance. A child who is not eligible for [T]itle IV-E funding who is placed with a licensed foster parent, related or unrelated, and who meets the requirements of [MCL 722.873(a)-(e)] may be eligible for state-funded guardianship assistance.
>
> (3) If a child is eligible for [T]itle IV-E-funded guardianship assistance under [MCL 722.873] but has a sibling who is not eligible under [MCL 722.873], both of the following apply:
>
> > (a) The child and any of the child's siblings may be placed in the same relative guardianship arrangement in accordance with . . . the probate code, [MCL 712A.1 *et seq.*,] another state's law or code, or tribal law or code, if the [DHHS] and the relative agree on the appropriateness of the arrangement for the sibling.
> >
> > (b) Title IV-E-funded relative guardianship assistance payments may be paid on behalf of each sibling placed in accordance with this subsection."

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[46] See the Department of Health & Human Services, Children's Bureau Letter to Child Welfare and Judicial Leaders, which details the judicial determinations and proceedings that must be held in order to satisfy Title IV-E requirements as well as suggestions for ensuring courts continue "to practice in a manner consistent with constitutional principles and to serve the best interest of children[.]"

[47] "'Title IV-E' refers to the federal assistance provided through the United States Department of Health and Human Services [(DHHS)] to reimburse states for foster care, adoption assistance payments, and guardianship assistance payments." MCL 722.872(m).

To maintain a child's Title IV-E funding eligibility when his or her juvenile guardianship is revoked and the child protective proceeding is reinstated, the court must make "contrary to the welfare of the child findings" and place the child with the DHHS. SCAO Memorandum, *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, p 5. The *contrary to the welfare of the child* findings are made against the juvenile guardian (not the child's parents). *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, *supra* at 5 n 10. However, if the child has not lived with the juvenile guardian for the last six consecutive months, the SCAO recommends that the court make *reasonable efforts* and *contrary to the welfare* findings regarding both the juvenile guardian and the child's parents. *Id.* If the court fails to make a *reasonable efforts* finding in its order revoking the juvenile guardianship, the finding needs to be made within 60 days of the revocation order. *Id.* at 6. See Section 16.8(E) for a detailed discussion of revoking a juvenile guardianship.

> **Note:** A new petition alleging abuse and neglect does not need to be filed against the guardian. *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, *supra* at 5.

## 14.5 Redirecting or Issuing Child Support Payment to Juvenile Guardian

To help support a child, a juvenile guardian may be eligible for child support payments. SCAO Memorandum, *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, p 3. Before issuing a child support order, the court must determine whether another state has issued a child support order or another court in Michigan has continuing jurisdiction over child support, custody, or parenting time. *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 5.

### A. Child Support Order Already Exists

Where the court finds that a child support order already exists, the court should not issue a new child support order against the same parent. SCAO Memorandum, *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, p 3. Rather, the juvenile guardian should make a written request for an administrative change of recipient to the Friend of the Court (FOC). *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 3. See also MCL 552.517(1)(f); MCL 552.605d.[48]

> **Note:** Because there has been a change in physical custody of the child, the FOC should initiate a review and modification of the child support order. See MCL 552.517; *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 3. If the FOC finds that both parents were not previously obligated to pay child support and the issuing court has continuing jurisdiction over the nonpaying parent, the FOC should recommend inclusion of the nonpaying parent when it is not inconsistent with the permanency plan. *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 3.

The Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq.*,[49] and the Full Faith and Credit of Child Support Orders Act (FFCCSOA), 28 USC 1738B, require recognition of interstate child support orders and a prohibition against modifying another state's child support order without certain criteria being met. *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues, supra* at 4. Where an FOC office already has an interstate case concerning the child, the juvenile guardian should request IV-D services through the Michigan Office of Child Support (OCS).[50] *Id.* However, if another state issued a child support order, but an FOC office does not have an interstate case concerning the child, the juvenile guardian should request IV-D services through an FOC office. *Id.*

## B. No Child Support Order Exists

A juvenile guardian may request entry of a child support order, or the court may enter one on its own motion. SCAO Memorandum, *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, p 5.

### 1. Pending Action

MCR 3.204 controls an action to establish a child support obligation where the circuit court has a pending action involving child support, custody, or parenting time, or the court has continuing jurisdiction over such matters due to a prior action involving the child's parents. *Juvenile Guardianship*

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[48] See SCAO recommended guidelines for redirection of child support.

[49] Effective January 1, 2016, the Michigan Legislature repealed the Uniform Interstate Family Support Act (UIFSA), MCL 552.1101 *et seq.*, and in its place created the Uniform Interstate Family Support Act (UIFSA), MCL 552.2101 *et seq*.

[50] See DHHS form DHS 1201, *IV-D Child Support Services Application/Referral*.

*Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, *supra* at 4. See MCR 3.973(F)(5).

To establish a child support obligation, the juvenile guardian should request IV-D services through the Michigan Office of Child Support (OCS).[51] *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, *supra* at 4. Once the OCS refers the IV-D case, the prosecutor's office will assist in establishing an order of support. *Id.* at 4 n 8.

### 2. No Pending Action

Where there is no other pending or prior action involving child support, custody, or parenting time, and the court has not terminated the parents' parental rights, the court may enter a support order requiring one or both parents to pay child support.[52] *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, *supra* at 4. See MCR 3.973(F)(5).[53] To order child support, the court must find that the proofs in the case satisfy the requirements for ordering child support under one of the following laws:

(1) Emancipation of Minors Act;

(2) Paternity Act;

(3) Family Support Act;

(4) Uniform Interstate Family Support Act; or

(5) Divorce Code. *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, *supra* at 4-5.

In entering a support order under MCR 3.973(F)(5), the court must use the Michigan Child Support Formula to determine the amount of support. MCL 552.605; MCR 3.973(F)(5); *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, *supra* at 5. See Section 4.01 and Section 4.02 of the Michigan Child Support Formula for guidance on determining child support for third party custodians and other special custody arrangements for children.

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[51] See DHHS form DHS 1201, *IV-D Child Support Services Application/Referral*

[52] See SCAO form FOC 10, *Uniform Child Support Order*.

[53] See SCAO recommended guidelines for ordering child support in child protective proceedings under MCR 3.973(F)(5).

The court should establish child support once the juvenile guardian is appointed and before the child protective proceeding is terminated. *Juvenile Guardianship Guidelines for Transfer of Jurisdiction, Child Support, and Funding Issues*, *supra* at 4. If the child protective proceeding is terminated before a child support order is entered, the juvenile guardian may file a separate support action to obtain the child support. *Id.* at 5. To establish the child support obligation, the juvenile guardian should request IV-D services through the OCS. *Id.* at 4. Once the OCS refers the IV-D case, the prosecutor's office will assist in establishing an order of support. *Id.* at 5.

# Chapter 15: Dispositional Review Hearings


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## *In this chapter. . .*

This chapter discusses the requirements for reviewing a court's initial dispositional order and a party's compliance with the case service plan. When a child has not been removed from his or her home, or when a child has been returned to his or her home following an initial removal, the court must conduct periodic review hearings to determine the family's progress toward rectifying conditions that brought the child within the court's jurisdiction.

This chapter also outlines procedures for removing a child from his or her home in an emergency that arises during the dispositional phase of proceedings.

In an effort to provide trial courts with a quick practical guide through the process of dispositional review hearings, the State Court

Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys: Dispositional Review Hearings*.

## 15.1 Overview

An individual involved in a child protective proceeding may be eligible for admission to a family treatment court program if, among other requirements, "the individual has a substance use disorder," MCL 600.1099ee(a), and "[t]he allegations contained in the petition [are] related to the abuse, illegal use, or possession of a controlled substance or alcohol," MCL 600.1099ff(a). See Section 7.7 for information about family treatment courts.

If the court does not terminate jurisdiction over a child after entering a dispositional order, and the child is placed outside the child's home, the court must "follow the review procedures in MCR 3.975 [dispositional review hearings.]" MCR 3.973(I)(1). "A dispositional review hearing is conducted to permit court review of the progress made to comply with any order of disposition and with the case service plan prepared pursuant to MCL 712A.18f and court evaluation of the continued need and appropriateness for the child to be in foster care[.] MCR 3.975(A). In addition, a dispositional review hearing permits the court to approve or disapprove of the child's initial or continued placement in a qualified residential treatment program."*Id.*

If the court does not terminate jurisdiction over a child after entering a dispositional order and the child remains in the home, the court must review the child's progress under MCR 3.974(A). MCR 3.973(I)(2). The court must "periodically review the progress of a child not in foster care over whom it has taken jurisdiction." MCR 3.974(A)(1).

## 15.2 Notice

The notice requirements in all dispositional review hearings (i.e. under MCR 3.974 or MCR 3.975) are governed by MCR 3.920 and MCR 3.921(B)(2). See also MCR 3.975(B) (requiring the court to ensure compliance with MCR 3.920 and MCR 3.921(B)(2)).[1] For purposes of MCR 3.975, "[t]he notice must inform the parties of their opportunity to participate in the hearing and that any information they wish to provide should be submitted in advance to the court, the agency, the lawyer-guardian ad litem for the child, or an attorney for one of the parties." MCR 3.975(B).

[1] See Section 5.2(A) for a list of persons entitled to written notice of dispositional review hearings.

# 15.3 Time Requirements

## A. Review Hearings for Children Currently or Previously in Foster Care

For children placed in foster care (even if subsequently returned home), the court must conduct a dispositional review hearing "not more than 182 days after the child's removal from his or her home and no later than every 91 days after that for the first year that the child is subject to the court's jurisdiction." MCL 712A.19(3);[2] MCR 3.974(A)(2) (requiring the court to follow procedures in MCR 3.975 in cases where the child was placed outside the home then subsequently returned home); MCR 3.975(C)(1). "After the first year that the child has been removed from his or her home and is subject to the court's jurisdiction, a review hearing must be held not more than 182 days from the immediately preceding review hearing before the end of that first year and no later than every 182 days from each preceding review hearing after that until the case is dismissed." MCL 712A.19(3). See also MCR 3.975(C)(1) (containing substantially similar language). For cases involving children who were in foster care and subsequently returned home, "[t]he review shall occur no later than 182 days after the child returns home[.]" MCR 3.974(A)(2).

> **Note:** Federal regulations implementing the Adoption & Safe Families Act require that reviews of a child's status by a court or administrative agency occur at least every six months. 45 CFR 1355.34(c)(2)(*ii*). The six-month period begins when the child enters foster care. See 45 CFR 1355.34(c)(1)-(2). A child enters foster care the earlier of the date that the court found the child to be abused or neglected or 60 days after the child's removal from his or her home, or an earlier date if the state chooses. 45 CFR 1355.20(a).

"If a child is under the care and supervision of the agency and is either placed with a relative and the placement is intended to be permanent or is in a permanent foster family agreement, the court shall hold a review hearing not more than 182 days after the child has been removed from his or her home and no later than 182 days after that so long as the child is subject to the jurisdiction of the court, the Michigan [C]hildren's [I]nstitute [(MCI)], or other agency

[2] A hearing held under MCL 400.669(2) (requiring "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance [under the Young Adult Voluntary Foster Care Act (YAVFCA)] not less than 1 time every 12 months[]") may be combined with a hearing held under MCL 712A.19(3). Section 14.4(I) for additional information on the extension of guardianship assistance under MCL 400.665.

[as provided in MCR 3.976(E)(3)]." MCL 712A.19(4).[3] See also MCR 3.975(C)(2) (containing substantially similar language).

The court must not cancel or delay a review hearing beyond the number of days required, "regardless of whether a petition to terminate parental rights or another matter is pending." MCL 712A.19(3); MCL 712A.19(4); MCR 3.975(C).

An error in the proceedings, such as a delay in conducting a hearing within the time allotted by statute or court rule, is not grounds for the Court of Appeals to reverse the trial court or amend any of the trial court's orders, unless the Court believes that its failure to take action "'would be inconsistent with substantial justice.'" *In re Sanborn*, 337 Mich App 252, 270 (2021), quoting *In re TC*, 251 Mich App 368, 371 (2002). In *In re Sanborn*, there was some delay between the respondents' preliminary hearing and the termination/disposition hearing,[4] and the respondent-mother claimed that the delay deprived her of an additional month of services toward achieving reunification. *In re Sanborn*, 337 Mich App at 269-271. The Court decided that any due process violation as a result of the delay was cured and there existed no fundamental unfairness because the respondent-mother continued to receive services after the trial court denied the petition to terminate her parental rights. *Id*. at 271. Similarly, the respondent-mother benefited from the DHHS's delay in petitioning for termination because services continued for the two months that passed before the DHHS filed the petition; the DHHS's delay "actually provided *more* opportunity" for the respondent-mother to engage in services and to continue supervised virtual visits with her child. *Id*. at 272.

At review hearings held under MCL 712A.19, the court must approve or disapprove placement in a qualified residential treatment program as provided in MCL 722.123a. MCL 712A.19(10).

## B. Review Hearings for Children Never Removed From Home

"[I]f a child subject to the court's jurisdiction remains in his or her home, a review hearing must be held not more than 182 days from the date a petition is filed to give the court jurisdiction over the child

[3] A hearing held under MCL 400.669(2) (requiring "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance [under the Young Adult Voluntary Foster Care Act (YAVFCA)] not less than 1 time every 12 months[]") may be combined with a hearing held under MCL 712A.19(4). Section 14.4(I) for additional information on the extension of guardianship assistance under MCL 400.665.

[4] Some delay in holding timely hearings during 2020-2021 in this and other cases throughout Michigan "can be attributed to the unprecedented COVID-19 pandemic." *In re Sanborn*, 337 Mich App 252, 270 (2021).

and no later than every 91 days after that for the first year that the child is subject to the court's jurisdiction." MCL 712A.19(2).[5] See also MCR 3.974(A)(2) (containing substantially similar language except that it contemplates the child having "never [been] removed from the home" and requires the review hearing to be held within 182 days from the date a petition was *authorized*). "After the first year that the child is subject to the court's jurisdiction, a review hearing shall be held no later than 182 days from the immediately preceding review hearing before the end of that first year and no later than every 182 days from each preceding review hearing after that until the case is dismissed." MCL 712A.19(2); MCR 3.974(A)(2).

> **Note:** "If the child was removed from the home and subsequently returned home, review hearings shall be held in accordance with MCR 3.975." MCR 3.974(A)(2).

The court must not cancel or delay a review hearing beyond the number of days required, "regardless of whether a petition to terminate parental rights or another matter is pending." MCL 712A.19(2).

At review hearings held under MCL 712A.19, the court must approve or disapprove placement in a qualified residential treatment program as provided in MCL 722.123a. MCL 712A.19(10).

## C. Accelerated Review Hearings

On a party's motion or in the court's discretion, a court may accelerate a review hearing to "review any element of the case service plan[.]" MCL 712A.19(2)-(4). See also MCR 3.975(D).

Where a child is placed in foster care, "the court shall determine at the dispositional hearing and each review hearing whether the cause should be reviewed before the next review hearing[.]" MCL 712A.19(9). See also MCR 3.975(D) (containing substantially similar language). "In making this determination, the court shall consider at least all of the following:

> (a) The parent's, [guardian's, or legal custodian's] ability and motivation to make necessary changes to provide a suitable environment for the child.

[5] A hearing held under MCL 400.669(2) (requiring "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance [under the Young Adult Voluntary Foster Care Act (YAVFCA)] not less than 1 time every 12 months[]") may be combined with a hearing held under MCL 712A.19(2). Section 14.4(I) for additional information on the extension of guardianship assistance under MCL 400.665.

> (b) Whether there is a reasonable likelihood that the child may be returned to his or her home before the next review hearing[.]" MCL 712A.19(9). See also MCR 3.975(D), which contains substantially similar language.

At review hearings held under MCL 712A.19, the court must approve or disapprove placement in a qualified residential treatment program as provided in MCL 722.123a. MCL 712A.19(10).

### D. Return of Child Without Dispositional Review Hearing

If all the parties involved receive notice at least seven days before a child is returned home, or if proper notice of hearing is waived,[6] and if no party requests a hearing within the seven days, the court may issue an order permitting the agency to return the child home without holding a review hearing. MCL 712A.19(11); MCR 3.975(H).

### E. Videoconferencing Technology

The use of videoconferencing technology to conduct review hearings in child protective proceedings is governed by MCR 3.904(B). See Section 1.7.

## 15.4 Procedures and Rules of Evidence

MCR 3.975(E) (applicable to children who have been placed in foster care) sets out the required procedures and rules of evidence for dispositional review hearings:

> "Dispositional review hearings must be conducted in accordance with the procedures and rules of evidence applicable to the initial dispositional hearing.[7] The Agency shall provide to all parties all reports in its case file, including but not limited to initial and updated case service plans, treatment plans, psychological evaluations, psychiatric evaluations, substance abuse evaluations, drug and alcohol screens, therapists' reports, contracted service provider reports, and parenting time logs. The reports shall be provided to the parties at least seven (7) days before the hearing. The reports that are filed with the court must be offered into evidence. The court shall consider any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring

[6] See Section 5.3 for requirements for waiver of notice of hearing.

[7] See Section 13.4 for a discussion of the rules of evidence applicable to an initial disposition hearing.

> institution, or relative with whom a child is placed, in addition to any other relevant and material evidence at the hearing.[8] The court, on request of a party or on its own motion, may accelerate the hearing to consider any element of a case service plan. The court, upon receipt of a local foster care review board's report, shall include the report in the court's confidential social file. The court shall ensure that all parties have had the opportunity to review the report and file objections before a dispositional order, dispositional review order, or permanency planning order is entered. The court may at its discretion include recommendations from the report in its orders."

For proceedings under MCR 3.974(A) (dispositional review hearings applicable to children placed at home), the rules of evidence do not apply except those with respect to privileges as governed by MCL 722.631. See MCR 3.901(A)(3), which states that the rules of evidence do not apply to child protective proceedings unless a court rule specifically provides otherwise.

For dispositional review hearings being conducted pursuant to MCR 3.974(D)(2) for a child in placement under MCR 3.974(B)(2) (postadjudication hearing on petition for out-of-home placement) or MCR 3.974(C)(3)(b) (postadjudication hearing following emergency removal of child from home), the rules of evidence applicable to a dispositional hearing apply. MCR 3.974(D)(2).

If an agency responsible for the care and supervision of the child advises the court not to place a child in the custody of the child's parent, guardian, or custodian, the agency must submit a written report to the court stating:

> "what efforts were made to prevent the child's removal from his or her home[;] or
>
> the efforts made to rectify the conditions that caused the child's removal from his or her home."[9] MCL 712A.18f(1). See also MCR 3.973(E)(2).

[8] See also MCL 712A.19(12), which requires the court to consider any relevant information about the child, including "the appropriateness of parenting time" from any of the individuals or entities listed in MCR 3.973(E)(2), or from the child's lawyer-guardian ad litem, attorney, or guardian ad litem.

[9] See Section 13.7 for a detailed discussion of required reasonable efforts determination.

## 15.5 Review of Progress Toward Compliance With Case Service Plan

"The court, in reviewing the progress toward compliance with the case service plan,[10] must consider:

> (a) the services provided or offered to the child and parent, guardian, or legal custodian of the child;
>
> (b) whether the parent, guardian, or legal custodian has benefited from the services provided or offered;
>
> (c) the extent of parenting time or visitation, including a determination regarding the reasons either was not frequent or never occurred;
>
> (d) the extent to which the parent, guardian, or legal custodian complied with each provision of the case service plan, prior court orders, and any agreement between the parent, guardian, or legal custodian and the agency;
>
> (e) any likely harm to the child if the child continues to be separated from his or her parent, guardian, or custodian;
>
> (f) any likely harm to the child if the child is returned to the parent, guardian, or legal custodian; and
>
> (g) if the child is an Indian child, whether the child's placement remains appropriate and complies with MCR 3.967(F) [(providing for preference in order of placement)]." MCR 3.975(F)(1). See also MCL 712A.19(6), which contains substantially similar language.

After review of the case service plan, "[t]he court must decide the extent of the progress made toward alleviating or mitigating conditions that caused the child to be, and to remain, in foster care." MCR 3.975(F)(2). See also MCL 712A.19(7), which contains substantially similar language.

## 15.6 Dispositional Review Orders

"At a review hearing . . ., the court shall determine the continuing necessity and appropriateness of the child's placement[.]" MCL 712A.19(8).

The court has several options following a dispositional review hearing involving a child who has been placed in foster care:

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[10] See Section 13.6 for a detailed discussion of case service plans.

> "(1) order the return of the child home,
>
> (2) change the placement of the child,
>
> (3) modify the dispositional order,
>
> (4) modify any part of the case service plan,
>
> (5) enter a new dispositional order, or
>
> (6) continue the prior dispositional order." MCR 3.975(G). See also MCL 712A.19(8), which contains substantially similar language.

"The court shall order the child returned to the custody of his or her parent if returning the child to his or her parent would not cause a substantial risk of harm to the child." MCL 712A.19(8).

Additionally, "[i]n a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court may [no longer] issue orders affecting a party as necessary[.]" See MCL 712A.2(i). For purposes of child protective proceedings, MCL 712A.2(i)(*ii*) defines *party* as "the petitioner, department, child, respondent, parent, guardian, or legal custodian, and any licensed child caring institution or child placing agency under contract with the department to provide for a juvenile's care and supervision."

## A. Review Placement in Qualified Residential Treatment Program

"Where a child remains placed in a qualified residential treatment program, the court shall review the evidence submitted by the Agency, approve or disapprove of the placement, and make individualized findings as to:

> (a) whether the needs of the child can be met through placement in a foster home; or if not,
>
> (b) whether the placement provides the most effective and appropriate level of care for the child in the least restrictive environment; and
>
> (c) whether the placement is consistent with the short- and long-term goals for the child, as specified in the permanency plan for the child." MCR 3.975(F)(3).

## B. Order Change in Placement When Child Is at Home

Generally, a court may not order a change in a child's placement without a hearing:

> "Except as provided in [MCR 3.974(C) (emergency removals)[11]], the court may not order a change in the placement of a child without a hearing. If the child for whom the court has authorized a petition remains at home or has otherwise returned home from foster care, and it comes to the court's attention at a review hearing held pursuant to [MCR 3.974(A)(2)], or as otherwise provided in this rule, that the child should be removed from the home, the court may order the placement of the child. If the court orders the child to be placed out of the home following a review hearing held pursuant to [MCR 3.974(A)(2)], the parent must be present and the court shall comply with the placement provisions in MCR 3.965(C). If the parent is not present, the court shall proceed under [MCR 3.974(C)] before it may order removal. If the child is an Indian child, in addition to a hearing held in accordance with this rule, the court must also conduct a removal hearing in accordance with MCR 3.967 [(providing for preference in order of placement)[12]] before it may order the placement of the Indian child." MCR 3.974(A)(3).
>
> **Note:** A person with custody of a child pursuant to court order may not invoke the constitutional privilege against self-incrimination to conceal the child's whereabouts or refuse to surrender the child. *Baltimore City DSS v Bouknight*, 493 US 549, 561 (1990).

The trial court did not err when it amended its dispositional order and terminated a respondent-mother's extended visitation of her child at an accelerated dispositional review hearing, basing its conclusion on the respondent-mother's noncompliance with the case service plan. *In re EP*, 234 Mich App 582 (1999), overruled on other grounds by *In re Trejo*, 462 Mich 341 (2000).[13] Specifically, the Court of Appeals held:

> "Although [the Court of Appeals] agree[s] with respondent[-mother] that the court rules require a hearing before the [trial] court may issue an order terminating the extended visit, [the Court of Appeals] conclude[s] that the court conducted such a hearing

[11] See Section 15.8 for a discussion of emergency removals under MCR 3.974(C).

[12] See Section 19.12 for a detailed discussion of removal hearings for Indian children under MCR 3.967.

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

> before it issued the order removing the child from respondent[-mother's] home.
>
> * * *
>
> In this case, the child was returned to respondent[-mother's] home for an extended visit after the initial disposition. It is reasonable that such an arrangement fits within the phrase 'or has otherwise returned home from foster care.' MCR [3.974(A)(3)].[14] Thus contrary to the [trial] court's opinion regarding this issue, a hearing was required before the child could be removed from respondent[-mother's] home. However, respondent[-mother's] argument that she was denied due process simply because the court reached this conclusion is without merit because a hearing resulting in the relevant supplemental dispositional order was held . . . . Although the hearing was initiated by respondent[-mother], who was seeking a [temporary restraining order] to prevent petitioner from removing the child from her home, it resulted in a dispositional review hearing in which both sides presented evidence, and the court did not order termination of the extended visitation until after the hearing was conducted. This hearing fully complied with the requirements of MCR [3.974(A)(3)].
>
> * * *
>
> Further, the [trial] court appropriately focused on respondent[-mother's] compliance, or lack thereof, with the case service plan when making its decision to terminate the child's extended home visit with respondent[-mother]. . . .
>
> Following the . . . dispositional review hearing, the court informed respondent[-mother] that the child would remain in her home only if she complied with the case service plan. The evidence reveals that respondent[-mother] failed to do so. . . . [U]pon respondent[-mother's] demonstrated failure to comply with the case service plan, which was the only means the court had to make sure the child was safe within respondent[-mother's] home, the [trial] court was permitted to amend the dispositional order to terminate the child's

[14] The *In re EP* Court refers to the former MCR 5.973(E)(1), which was replaced with MCR 3.974(A)(3).

> extended visit in respondent[-mother's] home." *In re EP*, 234 Mich App at 591-593, 595-596.

### C. Modify Dispositional Order

Subject to MCL 712A.20,[15] if a child is under the court's jurisdiction, the court may terminate the cause or amend or supplement a dispositional order under MCL 712A.18 at any time the court finds it necessary. MCL 712A.19(1).

### D. Modify Case Service Plan

After review of the case service plan, "[t]he court may modify any part of the part of the case service plan including, but not limited to, the following:

> (a) Prescribing additional services that are necessary to rectify the conditions that caused the child to be placed in foster care or to remain in foster care.
>
> (b) Prescribing additional actions to be taken by the parent, guardian, nonparent adult,[16] or custodian to rectify the conditions that caused the child to be placed in foster care or to remain in foster care." MCL 712A.19(7).

## 15.7 Hearing on Petition for Out-of-Home Placement

### A. Preadjudication

"If a child for whom a petition has been authorized under MCR 3.962 or MCR 3.965[17] is not yet under the jurisdiction of the court and an amended petition has been filed to remove the child from the home, the court shall conduct a hearing on the petition in accordance with MCR 3.965." MCR 3.974(B)(1).

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[15] MCL 712A.20 provides that "[i]f the child is placed in the temporary custody of the court, no supplemental order of disposition providing permanent custody, or containing any other order of disposition shall be made except at a hearing pursuant to issuance of summons or notice as provided in [MCL 712A.12] and [MCL 712A.13] or at a rehearing provided by [MCL 712A.19]."

[16] See Section 7.6(E) for more information on nonparent adults as they relate to child protective proceedings.

[17] See Section 7.5(B) for petition authorization under MCR 3.962 and Section 7.6(B) for petition authorization under MCR 3.965.

### B. Postadjudication

"If a child is under the jurisdiction of the court and a supplemental petition has been filed to remove the child from the home, the court shall conduct a hearing on the petition. The court shall ensure that the parties are given notice of the hearing as provided in MCR 3.920 and MCR 3.921.[18] Unless the child remains in the home, the court shall comply with the placement provisions in MCR 3.965(C) and must make a written determination that the criteria for placement listed in MCR 3.965(C)(2)[19] are satisfied. If the court orders that the child be placed out of the home, the court shall proceed under [MCR 3.974(D)]." MCR 3.974(B)(2).

"If the child is in placement under [MCR 3.974(B)(2) (postadjudication hearing on petition for out-of-home placement)] . . ., the court shall proceed as follows:

> "(1) If the court has not held a dispositional hearing under MCR 3.973,[20] the court shall conduct the dispositional hearing within 28 days after the child is placed by the court, except for good cause shown.
>
> (2) If the court has already held a dispositional hearing under MCR 3.973, a dispositional review hearing must commence no later than 14 days after the child is placed by the court, except for good cause shown. The dispositional review hearing may be combined with the removal hearing for an Indian child prescribed by MCR 3.967.[21] The dispositional review hearing must be conducted in accordance with the procedures and rules of evidence applicable to a dispositional hearing.[22]
>
> (3) The court shall advise the parent, guardian, or legal custodian of the right to appeal the order removing the child from a parent's care or custody." MCR 3.974(D).

## 15.8 Emergency Removal of a Child Placed at Home

"If a child for whom the court has authorized an original petition remains at home or is returned home following a hearing pursuant to the

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[18] See Chapter 5 for notice requirements under MCR 3.920 and MCR 3.921.

[19] See Section 8.1(B) for a detailed discussion of requirements on placing a child outside the home under MCR 3.965(C)(2).

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

[21] See Section 19.12 for a detailed discussion of removal hearings for Indian children under MCR 3.967.

[22] See Section 13.4 for a discussion on rules of evidence applicable in dispositional hearings.

rules in this subchapter, the court may order the child to be taken into protective custody pending an emergency removal hearing pursuant to the conditions listed in MCR 3.963(B)(1)[23] and upon receipt, electronically or otherwise, of a petition or affidavit of fact. The trial court may not order the emergency removal of children under MCR 3.974(C)(1) before authorizing the petition. See *In re Shimmons/Hare*, ___ Mich App ___, ___ (2026):

> Ordinarily, a trial court would make the appropriate findings under MCR 3.963(B)(1) on the basis of the petition or affidavit, enter an order providing for the child to be taken into protective custody, and *then* schedule an emergency removal hearing to occur within 24 hours and give the respondent notice. But in [*Shimmons*], the trial court did not enter an order providing for taking the children into protective custody before holding the purported emergency removal hearing—[the children] were still in respondent's custody at the time of the hearing. . . . Furthermore, neither the original petition nor the amended petition had been authorized, as was required to properly order the children's removal under MCR 3.974(C)(1).

If the child is an Indian child and the child resides or is domiciled within a reservation, but is temporarily located off the reservation, the court may order the child to be taken into protective custody only when necessary to prevent imminent physical damage or harm to the child." MCR 3.974(C)(1). See the Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, C.1 (2016), which extends emergency proceedings to non-reservation-resident Indian children.[24] See also 25 USC 1922, MCL 712B.7(2), and 25 CFR 23.113, which provide the court with limited emergency jurisdiction under the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA), where a reservation-resident Indian child is temporarily off the reservation and the state has removed the Indian child in an emergency situation to prevent imminent physical damage or harm to the Indian child.

"If the court orders the child to be taken into protective custody under MCR 3.963,[25] the court must conduct an emergency removal hearing no later than 24 hours after the child has been taken into custody, excluding Sundays and holidays as defined in MCR 8.110(D)(2)." MCR 3.974(C)(3). "The 24-hour window in which to hold an emergency removal hearing

[23] For the list of conditions set out in MCR 3.963(B)(1), see Section 3.1(A)(1).

[24] For additional information on emergency proceedings involving an Indian child, see Section 19.12(A).

[25] For additional information on taking custody of a child with a court order under MCR 3.963, see Section 3.1(A).

[is] not triggered until the trial court enter[s] the protective custody order . . . ." *Shimmons*, ___ Mich App at ___. "If the child is an Indian child, the court must also conduct a removal hearing in accordance with MCR 3.967[26] in order for the child to remain removed from a parent or Indian custodian."MCR 3.974(C)(3).

"If a child for whom a petition has been authorized under MCR 3.962 or MCR 3.965[27] is not yet under the jurisdiction of the court, the emergency removal hearing shall be conducted in the manner provided by MCR 3.965." MCR 3.974(C)(3)(a).

"If a child is under the jurisdiction of the court, unless the child is returned to the parent pending disposition or dispositional review, the court shall comply with the placement provisions in MCR 3.965(C) and must make a written determination that the criteria for placement listed in MCR 3.965(C)(2) are satisfied.[28] The parent, guardian, or legal custodian from whom the child was removed must be given an opportunity to state why the child should not be removed from, or should be returned to, the custody of the parent, guardian, or legal custodian." MCR 3.974(C)(3)(b).

"If the court orders removal of the child from a parent's care or custody, the court shall advise the parent, guardian, or legal custodian of the right to appeal that action." MCR 3.965(B)(15). See, e.g., *In re Barber/Espinoza*, ___ Mich ___, ___ (2025), where the trial court committed "clear and obvious error" under MCR 3.965(B)(15) by failing to advise respondent at the preliminary hearing of her right to appeal its decision to remove the children from her care. However, given that "the trial court properly determined [at the initial disposition hearing] that MCL 712A.19a(2)(a) excused the reasonable-efforts requirement, respondent [could not] show that, had she been advised of her appellate rights after the preliminary hearing, the outcome of [the] proceedings would have been different." *Barber/Espinoza*, ___ Mich at ___ (holding that "the Court of Appeals erred by concluding that respondent demonstrated outcome-determinative error," and reinstating the trial court's order terminating respondent's parental rights).

In an effort to provide trial courts with a quick practical guide through the process of emergency removal hearings, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys:Emergency Removal Hearing (MCR 3.974(C)[29]/MCL 712A.13a)*.

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[26] See Section 19.12 for a detailed discussion of removal hearings for Indian children under MCR 3.967.

[27] See Section 7.5(B) for petition authorization under MCR 3.962 and Section 7.6(B) for petition authorization under MCR 3.965.

[28] See Section 8.1(B) for a detailed discussion of requirements on placing a child outside the home under MCR 3.965(C)(2).

## A. Notice of Emergency Removal Hearing

"The notice requirements for child protective proceedings must be strictly construed." *In re Shimmons/Hare*, ___ Mich App ___, ___ (2026) (quotation marks and citation omitted). "The court shall ensure that the parties are given notice of the emergency removal hearing as provided in MCR 3.920 and MCR 3.921."[30] MCR 3.974(C)(2). "'When a child is placed outside the home, notice of the preliminary hearing or an emergency removal hearing under MCR 3.974(C)(3) must be given to the parent of the child as soon as the hearing is scheduled.'" *Shimmons*, ___ Mich App at ___, quoting MCR 3.920(D)(2)(b). "'The notice may be in person, in writing, on the record, or by telephone.'" *Shimmons*, ___ Mich App at ___, quoting MCR 3.920(D)(2)(b).

## B. Postadjudication Hearing Following Emergency Removal of Child From Home

"If the child is in placement under . . . [MCR 3.974(C)(3)(b) (postadjudication hearing following emergency removal of child from home)], the court shall proceed as follows:

> "(1) If the court has not held a dispositional hearing under MCR 3.973,[31] the court shall conduct the dispositional hearing within 28 days after the child is placed by the court, except for good cause shown.
>
> (2) If the court has already held a dispositional hearing under MCR 3.973, a dispositional review hearing must commence no later than 14 days after the child is placed by the court, except for good cause shown. The dispositional review hearing may be combined with the removal hearing for an Indian child prescribed by MCR 3.967.[32] The dispositional review hearing must be conducted in accordance with the procedures and rules of evidence applicable to a dispositional hearing.[33]
>
> (3) The court shall advise the parent, guardian, or legal custodian of the right to appeal the order removing the child from a parent's care or custody." MCR 3.974(D).

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[29] Formerly MCR 3.974(B).

[30] See Chapter 5 for notice requirements under MCR 3.920 and MCR 3.921.

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

[32] See Section 19.12 for a detailed discussion of removal hearings for Indian children under MCR 3.967.

[33] See Section 13.4 for a discussion on rules of evidence applicable in dispositional hearings.

> At the postadjudication hearing held under MCR 3.974(D), "[t]he respondent parent, guardian, or legal custodian from whom the child is removed must receive a written statement of the reasons for removal and be advised of the following rights . . . :
>
> (*i*) to be represented by an attorney at the hearing;
>
> (*ii*) to contest the continuing placement at the hearing within 14 days; and
>
> (*iii*) to use compulsory process to obtain witnesses for the hearing." MCR 3.974(C)(3)(b).

## 15.9 Combined Permanency Planning Hearing and Dispositional Review Hearing

If proper notice for a permanency planning hearing is provided, the permanency planning hearing may be combined with a dispositional review hearing if the combined hearings are held no later than the 12 months or 28 days from the child's removal from the home or 12 months from the preceding permanency planning hearing.[34] MCL 712A.19a(1); MCL 712A.19c(1); MCR 3.976(B)(3).

## 15.10 Records of Dispositional Review Hearings

MCR 3.925(B) provides in relevant part:

> "A record of all hearings must be made. All proceedings on the formal calendar[35] must be recorded by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108."

[34] See Chapter 16 for a detailed discussion of permanency planning hearings.

[35] MCR 3.903(A)(10) defines *formal calendar* as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

# Chapter 16: Permanency Planning Hearings


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## *In this chapter. . .*

This chapter discusses permanency planning hearings. The purpose of a permanency planning hearing is to review and finalize a permanency plan for a child in foster care.

Specifically, this chapter discusses the time requirements associated with permanency planning hearings, notice requirements, procedures required for permanency planning hearings, and the applicable rules of evidence. The chapter also discusses the court's placement options at a permanency planning hearing.

In an effort to provide trial courts with a quick practical guide through the process of permanency planning hearings, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys:Permanency Planning Hearings (MCR 3.976)*. The National Resource Center for Child Protective Services and the National Child Welfare Resource Center on Legal and Judicial Issues also developed the

*Child Safety: A Guide for Judges and Attorneys* to "offer[] a comprehensive approach to child safety decision-making, addressing the fundamentals of safety assessments and safety planning." This guide is available from the American Bar Association at https://www.americanbar.org/products/inv/book/215601/.

## 16.1 Overview

An individual involved in a child protective proceeding may be eligible for admission to a family treatment court program if, among other requirements, "the individual has a substance use disorder," MCL 600.1099ee(a), and "[t]he allegations contained in the petition [are] related to the abuse, illegal use, or possession of a controlled substance or alcohol," MCL 600.1099ff(a). See Section 7.7 for information about family treatment courts.

"[I]f a child remains in foster care and parental rights to the child have not been terminated, the court shall conduct a permanency planning hearing within 12 months after the child was removed from his or her home."[1] MCL 712A.19a(1). A permanency planning hearing is conducted to review the progress being made toward returning home a child in foster care, or to show why the child should not be made a permanent court ward. MCL 712A.19a(3).

During the permanency planning hearing, the court must:

- "review the permanency plan for a child in foster care [and] . . . determine whether and, if applicable, when:

  (1) the child may be returned to the parent, guardian, or legal custodian;

  (2) a petition to terminate parental rights should be filed;

  (3) the child may be placed in a legal guardianship;

  (4) the child may be permanently placed with a fit and willing relative; or

  (5) the child may be placed in another planned permanent living arrangement, but only in those cases where the agency has documented to the court a compelling reason for determining that it would not be in the best interests of the child to follow one of the options listed in subrules (1)-(4)."

[1] If the court determines that reasonable efforts to reunite the family or prevent removal are not required, an initial permanency planning hearing must be held within 28 days of that determination. MCR 3.976(B)(1). See Section 16.3(A).

MCR 3.976(A). See also 45 CFR 1355.20(a) and MCL 712A.19a(4), which contain substantially similar language. For additional information on the court's options during the permanency planning hearing, see Section 16.7.

- obtain the child's views regarding his or her permanency plan in an age appropriate manner.[2] MCL 712A.19a(3); MCR 3.976(D)(2).

- consider both in-state and out-of-state placement options when a child will not be returned home. MCL 712A.19a(3); MCR 3.976(E)(1).

- determine whether the out-of-state placement continues to be appropriate and in the child's best interests if the child is already in an out-of-state placement. MCL 712A.19a(3); MCR 3.976(E)(1).

- make sure the agency[3] provides appropriate services to assist a child transitioning from foster care to independent living. MCL 712A.19a(3); MCR 3.976(E)(1).

"At or before each permanency planning hearing, the court shall determine whether the agency has made reasonable efforts to finalize the permanency plan." MCL 712A.19a(4). See also MCR 3.976(A). MCL 712A.19(13) permits reasonable efforts to finalize an alternate permanency plan and reasonable efforts at reunification to be made concurrently. See also 45 CFR 1356.21(b)(4), which contains substantially similar language.

## 16.2 Reasonable Efforts Findings

To maintain a child's eligibility for continued federal foster care maintenance payments under Title IV-E of the Social Security Act, "[t]he [T]itle IV-E agency must make reasonable efforts . . . to effect the safe reunification of the child and family (if temporary out-of-home placement is necessary to ensure the immediate safety of the child); and to make and finalize alternate permanency plans in a timely manner when reunification is not appropriate or possible."[4] 45 CFR 1356.21(b). See also 42 USC 672(a)(1).

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[2] SCAO published recommended guidelines to help courts implement this requirement. See SCAO memorandum, *Obtaining the Child's Opinion at Permanency Planning Hearings*.

[3] MCR 3.903(C)(1) defines *agency* as "a public or private organization, institution, or facility responsible pursuant to court order or contractual arrangement for the care and supervision of a child."

DHHS is obligated to make reasonable efforts to reunify a child and the child's family in *all* cases except those cases involving an aggravated circumstance listed in MCL 712A.19a(2). *In re Simonetta*, 340 Mich App 700, 707 (2022). See also *In re Barber/Espinoza*, ___ Mich ___, ___ (2025) ("MCL 712A.19a(2) provides a narrow exception for when DHHS may forgo reasonable reunification efforts," if the court determines "that the parent has subjected the child to aggravated circumstances as provided in [MCL 722.638(1)-(2)]."). [5]

"The mere fact of imprisonment is not one of [those aggravating circumstances]" that excuses the DHHS from its obligation to make reasonable efforts at reunification with a child's parent, even when the child's parent is incarcerated. *In re Dixon (On Reconsideration)*, 347 Mich App 337, 362 (2023). In *Dixon*, the Court held that the DHHS was obligated to make reasonable efforts at reunification with the child's father after the mother's parental rights were terminated, even though the father was incarcerated. *Id*. at 362.

"At or before each permanency planning hearing, the court shall determine whether the agency has made reasonable efforts to finalize the permanency plan." MCL 712A.19a(4). See also MCR 3.976(A). The court must also determine "whether or not the agency, foster home, or institutional placement has followed the reasonable and prudent parenting standard[6] that the child has had regular opportunities to engage in age or developmentally appropriate activities." MCL 712A.19a(5).

> **Note:** To maintain Title IV-E eligibility, "[t]he [T]itle IV-E agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect (whether the plan is reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement) within twelve months of the date the child is considered to have entered foster care[7] . . . , and at least once every twelve months thereafter while the child is in

[4] Reasonable efforts are not the sole means of establishing eligibility under Title IV-E; an agency must also comply with other federal requirements. See Chapter 14 for a detailed discussion of federal funding. See also the Department of Health & Human Services, Children's Bureau Letter to Child Welfare and Judicial Leaders, which details the judicial determinations and proceedings that must be held in order to satisfy Title IV-E requirements as well as suggestions for ensuring courts continue "to practice in a manner consistent with constitutional principles and to serve the best interest of children[.]"

[5] For more information on required aggravating-circumstances findings, see Section 7.3(A).

[6] For purposes of the Juvenile Code, MCL 712A.1(1)(r) defines *reasonable and prudent parenting standard* as "decisions characterized by careful and sensible parental decisions that maintain a child's health, safety, and best interest while encouraging the emotional and developmental growth of the child when determining whether to allow a child in foster care to participate in extracurricular, enrichment, cultural, and social activities."

> foster care." 45 CFR 1356.21(b)(2)(i). "If such a judicial determination regarding reasonable efforts to finalize a permanency plan is not made in accordance with the schedule prescribed in [45 CFR 1356.21(b)(2)(i)], the child becomes ineligible under [T]itle IV-E at the end of the month in which the judicial determination was required to have been made, and remains ineligible until such a determination is made." 45 CFR 1356.21(b)(2)(ii).[8]
>
> However, reasonable efforts to reunify the child with his or her family is not required under certain circumstances. See Section 16.3(A).

## 16.3 Time Requirements[9]

### A. Initial Permanency Planning Hearing

If a child is in foster care and the child's parents' parental rights have not been terminated, generally the court must hold an initial permanency planning hearing within 12 months of the child's removal from the home. MCL 712A.19a(1); MCR 3.976(B)(2). See also 45 CFR 1355.20(a) and 45 CFR 1355.34(c)(2)(iii), which contain substantially similar language. During this time, DHHS is obligated to make reasonable efforts to reunify a child and the child's family in *all* cases except those cases involving an aggravated circumstance listed in MCL 712A.19a(2). *In re Simonetta*, 340 Mich App 700, 707 (2022). Accordingly, an initial permanency planning hearing must be held within 28 days of a child's removal if one or more of the following circumstances apply:

> "(a) There is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in [MCL 722.638](1) and [MCL 722.638](2).
>
> (b) The parent has been convicted of 1 or more of the following:

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[7] A child enters foster care on the date that the court found a child to be abused or neglected or the date that is 60 calendar days after the child's actual removal from his or her home, whichever is earlier. 45 CFR 1355.20(a). "A [T]itle IV-E agency may use a date earlier than required in this definition, such as the date the child is physically removed from the home." *Id*.

[8] See the Department of Health & Human Services, Children's Bureau Letter to Child Welfare and Judicial Leaders, which details the judicial determinations and proceedings that must be held in order to satisfy Title IV-E requirements as well as suggestions for ensuring courts continue "to practice in a manner consistent with constitutional principles and to serve the best interest of children[.]"

[9] Many court hearings in Michigan were delayed beginning in March 2020 as a result of "the unprecedented COVID-19 pandemic"; those delays are not attributable to the trial courts. See *I n re Sanborn*, 337 Mich App 252, 270 (2021).

(*i*) Murder of another child of the parent.

(*ii*) Voluntary manslaughter of another child of the parent.

(*iii*) Aiding or abetting in the murder of another child of the parent or voluntary manslaughter of another child of the parent, the attempted murder of the child or another child of the parent, or the conspiracy or solicitation to commit the murder of the child or another child of the parent.

(*iv*) A felony assault that results in serious bodily injury to the child or another child of the parent.

(c) The parent has had rights to the child's siblings involuntarily terminated and the parent has failed to rectify the conditions that led to the termination of parental rights.

(d) The parent is required by court order to register under the sex offenders registration act."[10] MCL 712A.19a(2). See also 45 CFR 1355.20(a), 45 CFR 1356.21(b)(3), 45 CFR 1356.21(h)(2), MCR 3.976(B)(1), which contain substantially similar language.

42 USC 675(5)(E) requires the State agency to file or join in filing a petition requesting termination of parental rights when the court determines that a child has been abandoned or the parent has "committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent[.]" If the State agency files or joins a petition to terminate parental rights, "it must concurrently begin to identify, recruit, process, and approve a qualified adoptive family for the child." 45 CFR 1356.21(i)(3). See also 42 USC 675(5)(E).

**Note:** "The petition to terminate parental rights must be filed within 60 days of the judicial determination that the child is an abandoned infant[.]" 45 CFR 1356.21(i)(1)(ii). For a parent "[w]ho has been convicted of one of the felonies listed [in 45 CFR 1356.21(b)(3)(ii),] . . . the petition to terminate parental rights must be filed within 60 days of a judicial determination that

[10] See MCL 28.721 to [MCL] 28.736.

reasonable efforts to reunify the child and parent are not required."[11] 45 CFR 1356.21(i)(1)(iii).

"Incarceration alone is not a sufficient reason for termination of parental rights." *In re Mason*, 486 Mich 142, 146 (2010).[12] Where a respondent-parent is incarcerated for a crime not listed in MCL 712A.19a(2), "[t]he state is not relieved of its duties to engage an absent parent merely because that parent is incarcerated." *In re Mason*, 486 Mich at 152. Thus, a trial court prematurely terminates an incarcerated parent's parental rights when it fails to provide a "meaningful and adequate opportunity to participate." *Id.* Cf. *In re Smith*, 291 Mich App 621, 623 (2011) (failure of the DHHS to facilitate reunification between an incarcerated parent and his child did not require reversal of the trial court's termination of his parental rights because his parental rights to the child's sibling were previously involuntarily terminated and "the prior involuntary termination of parental rights to a child's sibling [under MCL 712A.19a(2)(c)] is a circumstance under which reasonable efforts to reunite the child and family need not be made").

The court must not cancel or delay an initial permanency planning hearing beyond the 12-month or 28-day period, regardless of whether there is a petition for termination of parental rights or any other matters pending. MCL 712A.19a(1). See also MCR 3.976(B)(2), which states that if the 28-day rule does not apply (i.e. reasonable efforts are required), "the court must conduct an initial permanency planning hearing no later than 12 months after the child's removal from the home, regardless of whether any supplemental petitions are pending in the case."

## B. Annual Permanency Planning Hearing

As long as a child is in foster care, subsequent permanency planning hearings must be held no later than 12 months after each preceding permanency planning hearing. MCL 712A.19a(1); MCR 3.976(B)(3).[13] See also 45 CFR 1355.20(a) and 45 CFR 1355.34(c)(2)(iii), which contain substantially similar language.

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[11] "The judicial determinations regarding . . . reasonable efforts to finalize the permanency plan in effect, including judicial determinations that reasonable efforts are not required, must be explicitly documented and must be made on a case-by-case basis and so stated in the court order." 45 CFR 1356.21(d).

[12] Incarceration alone is not an aggravated circumstance excusing the DHHS from making reasonable efforts at reunification with a child's incarcerated parent. *In re Dixon (On Reconsideration)*, 347 Mich App 337, 362 (2023).

[13] A hearing held under MCL 400.669(2) (requiring "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance [under the Young Adult Voluntary Foster Care Act (YAVFCA) not less than 1 time every 12 months[]") may be combined with a hearing held under MCL 712A.19a(1). Section 14.4(I) for additional information on the extension of guardianship assistance under MCL 400.665.

"The interval between permanency planning hearings is within the discretion of the court as appropriate to the circumstances of the case[.]" MCR 3.976(B)(3). However, the court must not cancel or delay a subsequent permanency planning hearing beyond the 12 month period, regardless of whether there is a petition for termination of parental rights or any other matters pending. MCL 712A.19a(1); MCR 3.976(B)(3).

### C. Combined Permanency Planning Hearing and Dispositional Review Hearing

If proper notice for a permanency planning hearing is provided, a permanency planning hearing may be combined with a dispositional review hearing if the combined hearings are held no later than the 12 months (where reasonable efforts are required) or 28 days (where reasonable efforts are not required) from the child's removal from the home or 12 months from the preceding permanency planning hearing.[14] MCL 712A.19a(1); MCL 712A.19c(1); MCR 3.976(B)(3).

The court must not cancel or delay a permanency planning hearing beyond the 12-month or 28-day period, regardless of whether there are any other pending matters. MCL 712A.19a(1); MCL 712A.19c(1).

### D. Finalizing Court-Approved Permanency Plan

"The judicial determination to finalize the court-approved permanency plan must be made within the time limits prescribed in [MCR 3.976(B)(1)-(3)]." MCR 3.976(B)(4).

## 16.4 Notice

### A. Generally

"Written notice of a permanency planning hearing must be given as provided in MCR 3.920 and MCR 3.921(B)(2)."[15] MCR 3.976(C).

The notice must state the purpose of the hearing and must indicate that further proceedings to terminate parental rights may result from the hearing. MCL 712A.19a(6); MCR 3.976(C). "The notice must inform the parties of their opportunity to participate in the hearing and that any information they wish to provide should be submitted in advance to the court, the agency, the lawyer-guardian

[14] See Chapter 15 for a detailed discussion of dispositional review hearings.

[15] See Section 5.2 for additional information on notices of hearings in child protective proceedings.

ad litem for the child, or an attorney for one of the parties." MCR 3.976(C).

Written notice must be served on all individuals and entities entitled to notice at least 14 days before a permanency planning hearing. MCL 712A.19a(6); MCR 3.920(B)(5)(a)(i).

## B. Parties Entitled to Notice

Written notice of the hearing must be served on all of the following:

(1) the agency,[16]

(2) the child's parents (if parental rights have not been terminated),

(3) the child (if the child is 11 years of age or older),

(4) the child's guardian,[17]

(5) the child's foster parents or legal custodian,

(6) the child's preadoptive parents,

(7) the child's guardian ad litem,

(8) relative caregivers,

(9) "if the court knows or has reason to know the child is an Indian child, the child's tribe,"[18]

(10) "if the court knows or has reason to know the child is an Indian child and the parents, guardian, legal custodian, or tribe are unknown, to the Secretary of Interior,"[19]

(11) the attorney for the child, for each party (including a respondent-parent if parental rights have not been terminated, MCR 3.921(B)(2)(c)), and the prosecuting attorney (if the prosecuting attorney has appeared in the case),

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[16] The agency must advise the child of the permanency planning hearing if the child is 11 years old or older. MCL 712A.19a(6)(a).

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

[18] See Section 19.5 for additional information on notice requirements for cases involving an Indian child.

[19] See Section 19.5 for additional information on notice requirements for cases involving an Indian child.

(12) the noncustodial parent if he or she has requested notice at a hearing or in writing, and

(13) any other person the court may direct. MCL 712A.19a(6); MCR 3.921(B)(2); MCR 3.976(C).[20]

### C. Parties Entitled to Participate in Permanency Planning Hearing

The following parties are entitled to participate in a permanency planning hearing:

(1) the child's parents, if parental rights have not been terminated,

(2) the child who is of an appropriate age,

(3) the child's guardian,[21]

(4) the child's legal custodian,

(5) the child's foster parents,

(6), the child's preadoptive parents,

(7) the child's relative caregivers, and

(8) if the child is an Indian child, the Indian child's tribe. MCR 3.976(C).

## 16.5 Permanency Planning Hearing Procedures

MCR 3.976(D)(1) sets out the required procedures for permanency planning hearings:

> "Each permanency planning hearing must be conducted by a judge or a referee. Paper reviews, ex parte hearings, stipulated orders, or other actions that are not open to the participation of (a) the parents of the child, unless parental rights have been terminated; (b) the child, if of appropriate age; and (c) foster parents or preadoptive parents, if any, are

[20] MCR 3.976(C) lists only the individuals who are permitted to participate in the hearing. Express reference to "notice" in MCR 3.976(C) refers to MCR 3.920 and MCR 3.921(B)(2).

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

> not permanency planning hearings." See also 45 CFR 1355.20(a), which contains substantially similar language.

If the court receives a local foster care review board's report, it must include the report in the court's confidential social file. MCR 3.976(D)(3). The court must also make sure that all of the parties involved in the proceedings have an opportunity to review the report and file any objections before the court enters a dispositional order, dispositional review order, or permanency planning order. *Id.* "The court may at its discretion include recommendations from the report in its orders." *Id.*

Written reports in the Agency's case file must be provided to the court and the parties no less than seven days before the hearing. MCR 3.976(D)(4). This includes, but is not limited to, case service plans, treatment plans, substance abuse evaluations, psychological evaluations, therapists' reports, drug and alcohol screens, contracted service provider reports, and parenting time logs. *Id*.

## 16.6 Rules of Evidence Applicable to Permanency Planning Hearings

MCR 3.976(D)(2) sets out the rules of evidence applicable to permanency planning hearings:

> "The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631.[22] At the permanency planning hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value. The court must consider any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent, child caring institution, or relative with whom the child is placed, in addition to any other evidence offered at the hearing.[23] The court shall obtain the child's views regarding the permanency plan in a

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[22] MCL 722.631 states "Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to this act. This section does not relieve a member of the clergy from reporting suspected child abuse or child neglect under [MCL 722.633] if that member of the clergy receives information concerning suspected child abuse or child neglect while acting in any other capacity listed under [MCL 722.633]." For a discussion of the abrogation of evidentiary privileges in child protective proceedings, see Section 11.3.

[23] See also MCL 712A.19a(14), which requires the court to consider any relevant information about the child, including "the appropriateness of parenting time."

> manner appropriate to the child's age. The parties must be afforded an opportunity to examine and controvert written reports received and may be allowed to cross-examine individuals who made the reports when those individuals are reasonably available."

## 16.7 Court's Options at Permanency Planning Hearings

"At or before each permanency planning hearing, the court shall determine whether the agency has made reasonable efforts to finalize the permanency plan." MCL 712A.19a(4). See also MCR 3.976(A). MCL 712A.19(12) permits reasonable efforts to finalize an alternate permanency plan and reasonable efforts at reunification to be made concurrently. See also 45 CFR 1356.21(b)(4).

"At the [permanency planning] hearing, the court must review the permanency plan for a child in foster care [and] . . . determine whether and, if applicable, when:

> (1) the child may be returned to the parent, guardian, or legal custodian;
>
> (2) a petition to terminate parental rights should be filed;
>
> (3) the child may be placed in a legal guardianship;[24]
>
> (4) the child may be permanently placed with a fit and willing relative;[25] or
>
> (5) the child may be placed in another planned permanent living arrangement, but only in those cases where the agency has documented to the court a compelling reason for determining that it would not be in the best interests of the child to follow one of the options listed in subrules (1)-(4)." MCR 3.976(A). See also 45 CFR 1355.20(a) and MCL 712A.19a(4), which contain substantially similar language.

The court must also determine "whether or not the agency, foster home, or institutional placement has followed the reasonable and prudent parenting standard[26] that the child has had regular opportunities to engage in age or developmentally appropriate activities." MCL 712A.19a(5). In addition, if the court is presented with a qualified residential treatment program as provided in MCL 722.123a, it must

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[24] See Section 4.6 for additional information on the court's jurisdiction following guardianship appointments.

[25] See Sections 8.2(A) and (B) for a discussion of required procedures before placing a child in a relative's home.

approve or disapprove the program. MCL 712A.19a(14). See also MCL 722.123a(3)(c); MCR 3.976(E)(2).

"In a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court may [no longer] issue orders affecting a party as necessary[.]" See MCL 712A.2(i). For purposes of child protective proceedings, MCL 712A.2(i)(*ii*) defines *party* as "the petitioner, department, child, respondent, parent, guardian, or legal custodian, and any licensed child caring institution or child placing agency under contract with the department to provide for a juvenile's care and supervision."

## A. Determining Whether Child Should Return to Parent, Guardian, or Legal Custodian

At a permanency planning hearing, the court must review the permanency plan for a child in foster care and decide whether the child should be returned to the parent, guardian, or legal custodian.[27] MCL 712A.19a(4)(a); MCR 3.976(A)(1).

"At the conclusion of a permanency planning hearing, the court must order the child returned home unless it determines that the return would cause a substantial risk of harm to the life, the physical health, or the mental well-being of the child." MCR 3.976(E)(2). See also MCL 712A.19a(7), which contains substantially similar language. In determining whether returning the child to the parent, guardian, or legal custodian would cause substantial risk of harm to the child, the court must:

- "view the failure of the parent to substantially comply with the terms and conditions of the case service plan prepared under [MCL 712A.18f] as evidence that returning the child to his or her parent would cause a substantial risk of harm to the child's life, physical health, or mental well-being." MCL 712A.19a(7). See also MCR 3.976(E)(2), which contains substantially similar language.

- "consider any condition or circumstance of the child that may be evidence that returning the child to the parent would cause a substantial risk of harm to the child's life,

[26] For purposes of the Juvenile Code, MCL 712A.1(1)(r) defines *reasonable and prudent parenting standard* as "decisions characterized by careful and sensible parental decisions that maintain a child's health, safety, and best interest while encouraging the emotional and developmental growth of the child when determining whether to allow a child in foster care to participate in extracurricular, enrichment, cultural, and social activities."

[27] If the court determines that the child should be returned to the parent, guardian, or legal custodian, it must also determine when this will occur. MCL 712A.19a(4); MCR 3.976(A).

physical health, or mental well-being." MCL 712A.19a(7); MCR 3.976(E)(2).

A parent's physical compliance with a permanency plan is not equivalent to a parent benefiting from the services to improve his or her parenting ability. *In re Gazella*, 264 Mich App 668, 676 (2005), superseded in part on other grounds by *In re Hansen*, 285 Mich App 158 (2009), vacated 486 Mich 1037 (2010).[28] The Court of Appeals discussed "compliance" as it related to an *Adrianson* order[29] issued by the trial court "to give [the respondent-mother] one last chance to avoid termination." Although not directly related to the compliance required by MCL 712A.19a, the Court's discussion provides some insight into what may be required under the statute:

> "'Compliance' could be interpreted as merely going through the motions physically; showing up for and sitting through counseling sessions, for example. However, it is not enough to merely go through the motions; a parent must benefit from the services offered so that he or she can improve parenting skills to the point where the children would no longer be at risk in the parent's custody. In other words, it is necessary, but not sufficient, to physically comply with the terms of a parent[-]agency agreement or case service plan. For example, attending parenting classes, but learning nothing from them and, therefore, not changing one's harmful parenting behaviors is of no benefit to the parent or child.
>
> It could be argued that a parent complied with a case service plan that merely required attending parenting classes but was silent concerning the need for the parent to benefit from them. It is our opinion that such an interpretation would violate common sense and the spirit of the juvenile code, which is to protect children and rehabilitate parents whenever possible so that the parents will be able to provide a home for their children that is free of neglect or abuse." *In re Gazella,* 264 Mich App at 676.

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

[29] *In re Adrianson*, 105 Mich App 300 (1981). The Court found that *Adrianson* orders are no longer statutorily permissible because both MCL 712A.19b and MCR 3.977 require termination of parental rights once a court determines there are statutory grounds for termination. *In re Gazella*, 264 Mich at 673-674. For additional information, see Section 17.6.

"If the court does not order the child returned home, and the child remains in a qualified residential treatment program, the court shall:

> (a) review the evidence submitted by the Agency, approve or disapprove of the placement, and make individualized findings as to:
>
> > (*i*) whether the needs of the child can be met through placement in a family foster home; or if not,
> >
> > (*ii*) whether the placement provides the most effective and appropriate level of care for the child in the least restrictive environment; and
> >
> > (*iii*) whether the placement is consistent with the short- and long-term goals for the child, as specified in the permanency plan of the child." MCR 3.976(E)(2).

## B. Order Agency to Initiate Termination Proceedings

At a permanency planning hearing, the court must review the permanency plan for a child in foster care and may determine whether a petition to initiate termination of a parent's parental rights should be filed. MCL 712A.19a(4)(b); MCR 3.976(A)(2).

"If the court determines at a permanency planning hearing that a child should not be returned to his or her parent, the court may order the agency to initiate proceedings to terminate parental rights." MCL 712A.19a(8). See also MCR 3.976(E)(3), which contains substantially similar language. Except as otherwise provided by statute or court rule, the court must order the agency to initiate termination of parental rights proceedings if a child has been in foster care for 15 of the last 22 months.[30] MCL 712A.19a(8); MCR 3.976(E)(3).

"If the court does not require the agency to initiate proceedings to terminate parental rights under [MCR 3.976(E)(3)], the court shall state on the record the reason or reasons for its decision." MCR 3.976(E)(3). "The court is not required to order the agency to initiate proceedings to terminate parental rights if 1 or more of the following apply:

[30] SCAO recommends the court set time guidelines for the DHHS to file the termination petition. See SCAO memorandum, *New Foster Care / Permanency Planning Laws* (2008 Public Acts 199-203), pp 3-4. See also 45 CFR 1356.21(i)(1)(i), which provides methods for calculating when to file the petition.

> (a) The child is being cared for by relatives.
>
> (b) The case service plan documents a compelling reason for determining that filing a petition to terminate parental rights would not be in the best interest of the child. Compelling reasons for not filing a petition to terminate parental rights include, but are not limited to, all of the following:
>
> > (*i*) Adoption is not the appropriate permanency goal for the child.
> >
> > (*ii*) No grounds to file a petition to terminate parental rights exist.
> >
> > (*iii*) The child is an unaccompanied refugee minor as defined in 45 CFR 400.111.
> >
> > (*iv*) There are international legal obligations or compelling foreign policy reasons that preclude terminating parental rights.
>
> (c) The state has not provided the child's family, consistent with the time period in the case service plan, with the services the state considers necessary for the child's safe return to his or her home, if reasonable efforts are required." MCL 712A.19a(8). See also MCR 3.976(E)(3), 42 USC 675(5)(E) and 45 CFR 1356.21(i)(2), which contain substantially similar language.

See *In re Mason*, 486 Mich 142, 159-160 (2010), where the trial court committed clear error when it failed to consider the fact that a respondent-father had never been evaluated as a future placement or provided with services as required by MCL 712A.19a(8)(c):[31]

> "Although the initial conditions of [MCL 712A.19a(8)] were met—the children could not yet be returned to respondent and they had been placed out of their home for more than 15 months—the court and the [DHHS] failed to consider that respondent had *never* been evaluated as a future placement or provided with services. . . . [The DHHS] disregarded respondent's statutory right to be provided services and, as a result, extended the time it would take him to comply with the service plan upon his release from prison—which was potentially imminent at the time of the termination hearing. The state failed to involve or evaluate

[31] Formerly MCL 712A.19a(6).

> respondent, but then terminated his rights, in part because of his failure to comply with the service plan, while giving him no opportunity to comply in the future. This constituted clear error. As [this Court] observed in *In re Rood*, [483 Mich 73, 119 (2009),] a court may not terminate parental rights on the basis of 'circumstances and missing information directly attributable to respondent's lack of meaningful prior participation.'" *In re Mason*, 486 Mich at 159-160.

If the Title IV-E agency files or joins a petition to terminate parental rights, "it must concurrently begin to identify, recruit, process, and approve a qualified adoptive family for the child." 45 CFR 1356.21(i)(3).

If the court orders the agency to initiate termination of parental rights proceedings, "the order must specify the date, or the time within which the petition must be filed." MCR 3.976(E)(3). "In either case, the petition must be filed no later than 28 days after the date the permanency planning hearing is concluded." *Id.*

An error in the proceedings, such as a delay in conducting a hearing within the time allotted by statute or court rule, is not grounds for the Court of Appeals to reverse the trial court or amend any of the trial court's orders, unless the Court believes that its failure to take action "'would be inconsistent with substantial justice.'" *In re Sanborn*, 337 Mich App 252, 270 (2021), quoting *In re TC*, 251 Mich App 368, 371 (2002). In *In re Sanborn*, 337 Mich App at 271-272, the Court concluded that any due process violation that resulted from the DHHS's two-month delay in filing a termination petition was harmless, and that it "actually provided *more* opportunity for [respondent-]mother to engage in services, benefit from services, and continue supervised parenting visits (albeit virtual) that she would have otherwise lost out on had the petition been timely filed because services and supervised parenting time continued during the time between the May 2020 hearing and the filing of the July 2020 termination petition."

## C. Order Another Planned Permanent Living Arrangement (APPLA)

As an alternative to returning a child home, terminating parental rights, establishing a legal guardianship, or permanently placing a child with a fit and willing relative, the court may order "another planned permanent living arrangement[.]" MCL 712A.19a(4)(e); MCR 3.976(A)(5). The agency must "document[] to the court a compelling reason for determining that it would not be in the best interests of the child to follow one of the options listed in [MCR

3.976(A)(1)-(4)]." MCR 3.976(A)(5). See also MCL 712A.19a(4)(e), which contains substantially language; 45 CFR 1356.21(h)(3), which contains substantially similar language except that it also provides:

> "Examples of a compelling reason for establishing such a permanency plan may include:
>
> > (i) The case of an older teen who specifically requests that emancipation be established as his/her permanency plan;
> >
> > (ii) The case of a parent and child who have a significant bond but the parent is unable to care for the child because of an emotional or physical disability and the child's foster parents have committed to raising him/her to the age of majority and to facilitate visitation with the disabled parent; or,
> >
> > (iii) the Tribe has identified another planned permanent living arrangement for the child."

"If the court does not return the child to the parent, guardian, or legal custodian and if the agency demonstrates that termination of parental rights is not in the best interests of the child, the court may[:]

> (a) continue the placement of the child in foster care for a limited period to be set by the court while the agency continues to make reasonable efforts to finalize the court-approved permanency plan for the child,
>
> (b) place the child with a fit and willing relative,[32]
>
> (c) upon a showing of compelling reasons, place the child in [another] planned permanent living arrangement, or
>
> (d) appoint a juvenile guardian for the child pursuant to MCL 712A.19a and MCR 3.979.[33]

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[32] See Section 8.2(A) for a discussion of required procedures before placing a child in a relative's home.

[33] See Section 16.8 for a detailed discussion of juvenile guardianship placements. Note: "[a]bsent contrary statutory language . . . a generalized policy [against recommending guardianship for children under a specific age] is inappropriate." *In re Affleck*, 505 Mich 858 (2019) (remanding for the trial court to "address whether guardianship is appropriate for [the minor children] as part of its best-interest determinations without regard to a generalized policy disfavoring guardianship for children under the age of 10"); see also *In re L J Lombard*, ___ Mich App ___, ___ (2024) (remanding "for the trial court to make an individualized determination regarding [the child's] best interests without regard to a generalized policy disfavoring guardianship").

> The court must articulate the factual basis for its determination in the court order adopting the permanency plan." MCR 3.976(E)(4).

See also MCL 712A.19a(9), which requires the court to order one of the following alternative placements if the agency demonstrates that termination is not in the child's best interests, or the court does not order the agency to initiate termination proceedings under MCL 712A.19a(8):

> "(a) If the court determines that other permanent placement is not possible, the child's placement in foster care must continue for a limited period to be stated by the court.
>
> (b) If the court determines that it is in the child's best interests based on compelling reasons, the child's placement in foster care may continue on a long-term basis.
>
> (c) Subject to [MCL 712A.19a(11)], if the court determines that it is in the child's best interests, appoint a guardian for the child, which guardianship may continue until the child is emancipated."

## 16.8 Juvenile Guardianship Placement

"[T]he appointment of a guardian is done in an effort to avoid termination of parental rights." *In re Burns*, ___ Mich App ___, ___ (2025) (quotation marks and citation omitted). A court may consider a juvenile guardianship before termination if "one of two conditions [are] met: either the DHHS must demonstrate under MCL 712A.19a(8) that initiating the termination of parental rights to the child is clearly not in the child's best interests, or the court must not order the agency to initiate termination proceedings under MCL 712A.19a(8)." *Burns*, ___ Mich App at ___ (cleaned up). However, "[e]ven if one of these two conditions is met, a court may order a guardianship only if it determines that doing so is in the child's best interests." *Id.* at ___; MCL 712A.19a(9)(c); MCR 3.979(A).[34] See also *In re K D Simpson*, ___ Mich App ___, ___ (2024), which states that "a trial court can order a guardianship only if it determines that doing so is in the child's best interests." (Cleaned up.) The trial court must place its best interest findings on the record. See *Burns*, ___ Mich App at ___.

[34] MCL 712A.19c governs the procedure for appointmenting a juvenile guardian *after* termination of parental rights. See Section 18.5(A) for additional information.

> **Note:** SCAO recommends that the court exercise the appointment of a juvenile guardian placement option *only* when adoption is not an appropriate goal.[35] However, "[a]bsent contrary statutory language . . . a generalized policy [against recommending guardianship for children under a specific age] is inappropriate." *In re Affleck*, 505 Mich 858 (2019) (remanding for the trial court to "address whether guardianship is appropriate for [the minor children] as part of its best-interest determinations without regard to a generalized policy disfavoring guardianship for children under the age of 10"). See also *In re LJ Lombard*, ___ Mich App ___, ___ (2024) (remanding "for the trial court to make an individualized determination regarding [the child's] best interests without regard to a generalized policy disfavoring guardianship"). Reasonable efforts to reunify a child and family may be made concurrently with reasonable efforts to place a child for adoption or with a legal guardian. MCL 712A.19(14).

During the process of appointing a juvenile guardian, the court must order the DHHS to:

> (1) Perform an investigation and file a written report for a review hearing under MCL 712A.19a(12);
>
> (2) Submit to the court within seven days a criminal record check and a central registry clearance of the residents in the home; and
>
> (3) Perform a home study and submit it to the court within 30 days[36] or submit a copy of a home study conducted within the last 365 days.[37] MCL 712A.19a(11); MCR 3.979(A)(1).
>
> > **Note:** If the child is in foster care, the court must continue the foster care placement and order the information required by MCR 3.979(A)(1) about the proposed juvenile guardian. MCR 3.979(A)(2).

In an effort to provide trial courts with a quick practical guide through the process of ordering juvenile guardianships, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys: Ordering a Juvenile Guardianship* (MCR 3.979; MCL 712A.19a(7)(c);[38] and MCL 712A.19c(2).

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[35] See SCAO memorandum, *New Foster Care / Permanency Planning Laws* (2008 Public Acts 199-203), p 6.

[36] MCR 3.979(A)(1) states that the home study must be submitted to the court within 28 days.

[37] "If a home study has been performed within the immediately preceding 365 days, a copy of that home study must be submitted to the court." MCL 712A.19a(11)(c).

## A. Appointing Juvenile Guardian

MCR 3.979(B) describes the process by which a juvenile guardian is appointed:

> "After receiving the information ordered by the court under [MCR 3.979(A)(1)], and after finding that appointment of a juvenile guardian is in the child's best interests, the court may enter an order appointing a juvenile guardian. The order appointing a juvenile guardian shall be on a form approved by the state court administrator.[39] Within 7 days of receiving the information, the court shall enter an order appointing a juvenile guardian or schedule the matter for a hearing. A separate order shall be entered for each child.
>
> (1) *Acceptance of Appointment.* A juvenile guardian appointed by the court shall file an acceptance of appointment with the court on a form approved by the state court administrator.[40] The acceptance shall state, at a minimum, that the juvenile guardian accepts the appointment, submits to personal jurisdiction of the court, will not delegate the juvenile guardian's authority, and will perform required duties.
>
> (2) *Letters of Authority.* On the filing of the acceptance of appointment, the court shall issue letters of authority on a form approved by the state court administrator.[41] Any restriction or limitation of the powers of the juvenile guardian must be set forth in the letters of authority, including but not limited to, not moving the domicile of the child from the state of Michigan without court approval.
>
> (3) *Certification.* Certification of the letters of authority and a statement that on a given date the letters are in full force and effect may appear on the face of copies furnished to the juvenile guardian or interested persons.

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[38] Now renumbered to MCL 712A.19a(9) by 2016 PA 497, effective April 6, 2017.

[39] See SCAO form JC 91, *Order Appointing Juvenile Guardian*.

[40] See SCAO form JC 92, *Acceptance of Appointment (Juvenile Guardian)*.

[41] See SCAO form JC 93, *Letters of Juvenile Guardianship*.

> (4) *Notice.* Notice of a proceeding relating to the juvenile guardianship shall be delivered or mailed to the juvenile guardian by first-class mail at the juvenile guardian's address as listed in the court records and to his or her address as then known to the petitioner. Any notice mailed first class by the court to the juvenile guardian's last address on file shall be considered notice to the juvenile guardian."

## B. Due Process

"It is axiomatic that a parent has a fundamental liberty interest in the care, custody, and management of his or her child[.]" *In re TK*, 306 Mich App 698, 706 (2014), citing *In re Rood*, 483 Mich 73, 91 (2009). As such, the court must comply with procedural and substantive due process when appointing a juvenile guardian. See *In re TK*, 306 Mich App at 706. However, because "the appointment of a guardian for a juvenile [under MCL 712A.19a(9)(c)[42]] is not tantamount to a de facto termination of parental rights[,]" due process does not require DHHS "to prove statutory grounds for termination of parental rights [under MCL 712A.19b(3)] by clear and convincing evidence." *In re TK* 306 Mich App at 705-706.

"There are two types of due process: procedural and substantive." *Id*. at 706. "Procedural due process requires notice and a meaningful opportunity to be heard before an impartial decision-maker[,]" while "[t]he essence of a substantive due process claim is the arbitrary deprivation of liberty or property interests." *Id.* at 706, citing *AFT Mich v State*, 297 Mich App 597, 622 (2012). "Ultimately, due process requires fundamental fairness." *In re TK*, 306 Mich App at 706.

### 1. Procedural Due Process

"[T]he statutory provisions governing juvenile guardianship [do not] violate procedural due process principles." *In re TK*, 306 Mich App at 708. A court should consider three factors to determine what is required by procedural due process:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;

[42] Formerly MCL 712A.19a(7)(c).

> and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *In re TK*, 306 Mich App at 706-707, quoting *In re Brock*, 442 Mich 101, 111 (1993), in turn quoting *Mathews v Eldridge*, 424 US 319, 332, 334 (1976) (quotation marks omitted).

For purposes of juvenile guardianships, "the private interest involved is a parent's fundamental liberty interest in the care, custody, and management of [his or] her child[;]" . . . the applicable statutes and corresponding court rules indicate[] that the procedures employed in the appointment of a juvenile guardianship ensure that there will not be an erroneous deprivation of those interests[;]" and though each case may present other governmental interests, "the primary governmental interest is the welfare of the minor child." *In re TK*, 306 Mich App at 707-708 (finding no procedural due process violation because "[a] parent is given notice and an opportunity to be heard before the appointment of a [juvenile] guardian[,]" and "[t]he statutory scheme employs multiple safeguards to ensure that there is not an erroneous deprivation of a parent's liberty interest in caring for his or her child").

"[T]he trial court erred when it granted [a juvenile] guardianship without conducting a hearing pursuant to MCR 3.979(B)." *In re Burns*, ___ Mich App ___, ___ (2025). In *Burns*, the respondent, the child's lawyer-guardian ad litem, and the DHHS stipulated to change the child's permanency goal from termination to guardianship after the trial court removed the child from respondent's care and ruled that reasonable efforts at reunification were not required. *Id*. at ___. Respondent later "attempt[ed] to withdraw her plea, discontinue the court's jurisdiction, and prevent the appointment of [the] guardians." *Id*. at ___. At the permanency planning hearing, the trial court indicated it would hold a separate hearing where respondent could challenge the guardianship; "[h]owever, the trial court *did not* conduct another hearing before it entered [an] ex parte guardianship order." *Id*. at ___. By doing so, "the trial court erroneously implemented the guardianship without giving respondent-mother the opportunity to protect her fundamental interests." *Id*. at ___. "[T]he stipulation addressed a change in DHHS's *goal*, it did not extinguish respondent-mother's right to challenge a guardianship." *Id*. at ___.

### 2. Substantive Due Process

Substantive due process in a juvenile guardianship proceeding requires that the appointment not arbitrarily deprive the respondent of liberty or property interests. *In re TK*, 306 Mich App at 708-709, (holding that the appointment did not arbitrarily deprive the respondent-mother of her interest in the minor child where the minor child suffered from post-traumatic stress syndrome related to sexual abuse by her father, was in therapy to address anger issues related to the respondent-mother's failure to protect her from the sexual abuse, flourished in her foster home, and the respondent-mother did not respond well to the minor child's needs).

## C. Juvenile Guardian's Duties and Authority

MCR 3.979(E) describes a juvenile guardian's duties and authority:

> "A juvenile guardianship approved under these rules is authorized by the Juvenile Code and is distinct from a guardianship authorized under the Estates and Protected Individuals Code.[43] A juvenile guardian has all the powers and duties of a guardian set forth under [MCL 700.5215].[44]
>
> > (1) *Report of Juvenile Guardian.* A juvenile guardian shall file a written report annually within 56 days after the anniversary of appointment and at other times as the court may order. Reports must be on a form approved by the state court administrator.[45] The juvenile guardian must serve the report on the persons listed in MCR 3.921.
> >
> > (2) *Petition for Conservator.* At the time of appointing a juvenile guardian or during the period of the juvenile guardianship, the court shall determine whether there would be sufficient assets under the control of the juvenile guardian to require a conservatorship. If so, the court shall

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[43] Although a juvenile guardian has all the same powers and duties of a guardian appointed under MCL 700.5215, the two guardianships differ in that a juvenile guardian is "intended to be the permanent placement for a child who cannot be returned home[,]" and a guardian appointed under MCL 700.5215 is typically intended to be "short term, due to a temporary inability of a parent to care for a child." SCAO memorandum, *New Foster Care / Permanency Planning Laws* (2008 Public Acts 199-203), p 4, at https://www.courts.michigan.gov/48d5de/siteassets/court-administration/administrative-memoranda/2008/2008-05.pdf. See Section 4.6 for additional information on guardianship appointments under MCL 700.5215.

[44] See also MCL 712A.19a(10), which contains substantially similar language.

[45] See SCAO form JC 94, *Annual Report of Juvenile Guardian on Condition of Child*.

order the juvenile guardian to petition the probate court for a conservator pursuant to MCL 700.5401 *et seq*.

(3) *Address of Juvenile Guardian.* The juvenile guardian must keep the court informed in writing within 7 days of any change in the juvenile guardian's address.

(4) The juvenile guardian shall provide the court and interested persons with written notice within 14 days of the child's death."

## D. Jurisdiction and Court's Responsibilities

**Jurisdiction over juvenile guardianship.** Once a juvenile guardian is appointed, the court's *jurisdiction over the juvenile guardianship* continues until 120 days after the youth's 18th birthday or sooner if released by court order. MCR 3.979(C)(1)(b). See also MCL 712A.19a(13). If the DHHS provides the court with notice that it is extending guardianship assistance to a youth beyond the age of 18 under MCL 400.665 (Young Adult Voluntary Foster Care Act (YAVFCA)), the court must "retain jurisdiction over the guardianship until that youth no longer receives extended guardianship assistance."[46] MCR 3.979(C)(1)(b). "Upon receipt of notice from the [DHHS] that it will not continue extended guardianship assistance, the court shall immediately terminate the juvenile guardianship." MCR 3.979(D)(1)(c).

The court may order parenting time for a parent during the course of a juvenile guardianship or after a juvenile guardianship has been established. *In re Ballard*, 323 Mich App 233, 237 (2018). ("Because MCL 712A.19a(14) plainly envisions a trial court having an authoritative role with respect to parenting time *during* the course of a guardianship, . . . MCL 712A.19a(14) . . . provide[s] a court with authority to order parenting time for a parent *after* a juvenile guardianship has been established, even though parenting time was not initially ordered when the guardianship commenced or at the time of the permanency planning hearing.") (emphasis added). In addition, a court may approve or disapprove of placement in a qualified residential treatment program (QRTP) if placement in a QRTP is presented in a hearing under MCL 712A.19a. MCL 712A.19a(14).

[46] See Section 4.9 for a detailed discussion of a court's jurisdiction following juvenile guardianship appointments, and Section 14.4(I) for additional information on extension of guardianship assistance under MCL 400.665.

The court must "conduct an annual review of a juvenile guardianship as to the condition of the child until the child's eighteenth birthday." MCR 3.979(D)(1)(a).[47] See also MCL 712A.19a(13). The court may conduct additional reviews as it deems necessary, or it may order the DHHS or a court employee to conduct an investigation and file a written report. MCL 712A.19a(13); MCR 3.979(D)(1)-(2). "If, under [MCR 3.979(C)(1)(b) (retention of court jurisdiction over the juvenile guardianship for extended juvenile guardianship assistance)], the [DHHS] has notified the court that extended guardianship assistance has been provided to a youth pursuant to MCL 400.665, the court shall conduct an annual review hearing . . . [until] the youth is on longer eligible for extended guardianship assistance."[48]

**Jurisdiction over child/youth.** The court's *jurisdiction over the child* pursuant to MCL 712A.2(b) terminates once the juvenile guardian is appointed and a review hearing is conducted under MCR 3.975 (when parental rights to the child have not been terminated) or MCR 3.978 (when parental rights to the child have been terminated). MCL 712A.19a(12); MCR 3.979(C)(1)(a). But see MCL 712A.2a(4), which requires the court to retain its jurisdiction over a youth 16 years of age or older who was appointed a juvenile guardian under MCL 712A.19a until the DHHS determines whether the youth[49] is eligible to receive extended guardianship assistance under MCL 400.641 (YAVFCA).[50] If the DHHS determined the youth was eligible for extended guardianship assistance under the YAVFCA, the court must retain jurisdiction until the youth no longer receives the guardianship assistance.[51] See also MCL 400.669(1), which requires the court to retain its jurisdiction "of a youth receiving, or a youth for whom the [DHHS] is determining eligibility for receiving, extended guardianship assistance until that youth no longer receives guardianship assistance."

Unless the court releases the child sooner, the appointment of a lawyer-guardian ad litem terminates once the court's jurisdiction

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[47] See Section 4.9(D) for a detailed discussion of review hearings following juvenile guardianship appointments, and Section 4.9(E) for a detailed discussion of ordering an investigation of juvenile guardianships.

[48] For additional information on the extension of guardianship assistance under MCL 400.665, including the annual review requirements, see Section 14.4(I).

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

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

[51] See Section 4.6 for a discussion of juvenile guardianship appointments, and Section 16.9 for a discussion of the Young Adult Voluntary Foster Care Act (YAVFCA).

over the child under MCL 712A.2(b) terminates. MCR 3.979(C)(3). However, if warranted, the court may reappoint the lawyer-guardian ad litem or appoint a new lawyer-guardian ad litem once a juvenile guardian is appointed.[52] *Id.*

## E. Revocation of Juvenile Guardianship

On its own motion or upon petition from the DHHS or the child's lawyer guardian ad litem, the court may[53] hold a hearing to determine whether to revoke a juvenile guardianship.[54] MCL 712A.19a(15); MCR 3.979(F)(1)(a).

After notice and a hearing on a petition to revoke a juvenile guardianship, the court must enter an order to revoke or terminate a juvenile guardianship if it finds:

> (1) by a preponderance of the evidence the continuation of the juvenile guardianship is not in the child's best interests;
>
> (2) it is contrary to the child's welfare to be placed in or remain in the juvenile guardian's home; and
>
> (3) reasonable efforts were made to prevent removal. MCR 3.979(F)(5). See also MCL 712A.19a(17).

Upon entry of the revocation or termination order, the child must be placed under the care and supervision of the DHHS.[55] MCR 3.979(F)(5). See also MCL 712A.19a(17), which requires the court to either "appoint a successor [juvenile] guardian or restore temporary legal custody to the [DHHS]." Additionally, the court's jurisdiction over the child under MCL 712A.2(b) is reinstated under the previous child protective proceeding. MCR 3.979(F)(5).

A child may be eligible for voluntary foster care after the court has terminated the child's juvenile guardianship; in those cases where the court has terminated a child's juvenile guardianship and there is no successor guardian, the DHHS is given temporary legal custody of the child under MCL 712A.2(b), and subject to any eligibility requirements, the child may apply for voluntary foster care under the Young Adult Voluntary Foster Care Act (YAVFCA), MCL 400.641 *et seq*. *In re Hull*, 345 Mich App 562, 568, 569 (2023).

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[52] See Section 7.10 for a detailed discussion of a lawyer-guardian ad litem's powers and duties.

[53] MCR 3.979(F)(1)(a) *requires* the court to hold this hearing; MCL 712A.19a(15) states that the court *may* hold this hearing.

[54] See Section 4.9(H) for a detailed discussion of revoking a juvenile guardianship.

[55] See SCAO form JC 101, *Order Regarding Revocation of Juvenile Guardianship*.

### F. Petition to Terminate Juvenile Guardianship

On petition from the juvenile guardian or other interested person, the court may hold a hearing to determine whether to terminate the juvenile guardianship.[56] MCL 712A.19a(16); MCR 3.979(F)(1)(b).

> **Note:** A request to terminate a guardianship may include a request for appointment of a successor guardian. MCL 712A.19a(16); MCR 3.979(F)(1)(b).

If, after notice and a hearing on the petition to terminate a juvenile guardianship, the court finds by a preponderance of the evidence that termination is in the child's best interests, the court must either:

> (1) proceed under MCR 3.979(F)(5) if there is no successor,[57] or
>
> (2) terminate the appointment if there is a successor and proceed with an investigation and the appointment of a successor juvenile guardian in accordance with MCR 3.979(B).[58] MCR 3.979(F)(6). See also MCL 712A.19a(17).

The court's jurisdiction over a juvenile guardianship continues with the appointment of a successor juvenile guardian. MCR 3.979(F)(6)(b).

## 16.9 Young Adult Voluntary Foster Care Act (YAVFCA)

The Young Adult Voluntary Foster Care Act (YAVFCA) "authorize[s] the Department of [Health and] Human Services [(DHHS)] to provide foster care services, adoption subsidy support,[59] and guardianship assistance[60] for eligible youth until they reach age 21[.]" SCAO Administrative Memorandum 2012-04, p 1, available at https://www.courts.michigan.gov/48d93b/siteassets/court-administration/administrative-memoranda/2012/2012-04.pdf.

"[T]he [YAVFCA] . . . offers 18-, 19-[,] and 20-year-olds who were in state-supervised foster care at the age of 18 or older the option of living in a licensed foster family home, a child care institution[,] or an approved

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[56] See Section 4.9(H) for a detailed discussion of terminating a juvenile guardianship.

[57] The court's jurisdiction over the child under MCL 712A.2(b) is reinstated under the previous child protective proceeding. MCR 3.979(F)(5); MCR 3.979(F)(6)(a).

[58] See SCAO form JC 100, *Order Following Hearing on Petition to Terminate Appointment of Juvenile Guardian*.

[59] See the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 10, for a detailed discussion of extending adoption subsidy agreements and medical subsidy agreements under the YAVFCA.

[60] See Section 14.4(I) for a detailed discussion of extending guardianship assistance under the YAVFCA.

setting in which the individual is living independently, until age 21." DHHS's Children's Foster Care Manual (FOM), *Foster Care - Young Adult Voluntary Foster Care FOM 722-16*, p 1, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/722-16.pdf. See also MCL 722.111(z), which defines a *minor child* to mean "[a] person who is a resident in a child caring institution, foster family home, or foster family group home, who is at least 18 but less than 21 years of age, and who meets the requirements of the [YAVFCA], 2011 PA 225, MCL 400.641 to [MCL] 400.671," and under MCL 722.111*(z)(iv)* to mean "[a] person 18 years of age or older who is placed in an unlicensed residence under [MCL 722.115(4)[61]] or a foster family home under [MCL 722.115(7)]."

"[The] SCAO encourages courts to discuss the youth's options for voluntary foster care at review hearings beginning when the youth is 17 years old." SCAO Administrative Memorandum 2012-04, *supra* at p 2. "[The DHHS] policy recommends that the YAVFC[A] program be discussed with the youth and considered by the court as a potential component of the youth's transition plan **prior** to the court closing the [child abuse/neglect (NA)] case." *Id.* at p 3.

## A. Extension of Foster Care Services

The YAVFCA was enacted to extend foster care services to children who are no longer under the court's jurisdiction. See SCAO Administrative Memorandum 2012-04, *supra* at p 2. It "does not replace other existing law and policy allowing foster care to continue for foster youth until age 20." *Id.* Rather, "[a] youth may **not** participate in [the] YAVFC[A] until [the] family/juvenile court jurisdiction is dismissed." *Foster Care - Young Adult Voluntary Foster Care FOM 722-16*, *supra* at p 6.

> **Note:** MCL 712A.2a(1) permits a court that has exercised personal jurisdiction over a youth under MCL 712A.2(b) before the youth's 18th birthday, to continue its jurisdiction over the youth until the youth reaches 20 years of age unless the court terminates jurisdiction sooner. If the court terminates its jurisdiction over the

[61] MCL 722.115(4) permits the "department [to] authorize a child placing agency or governmental unit to place a child who is at least [18] but less than 21 years of age [and who meets the requirements of the YAVFCA] in his or her own unlicensed residence, or in the unlicensed residence of an adult who has no supervisory responsibility for the child, if a child placing agency or governmental unit retains supervisory responsibility for the child." For purposes of the Child Care Licensing Act, MCL 722.111 *et seq.*, "[d]epartment means 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).

youth[62] and "the [DHHS] files a report with the court under . . . MCL 400.655, the court shall determine whether it is in the youth's best interests to continue in voluntary foster care within 21 days of the filing of the report."[63] MCL 712A.2a(2).

MCL 400.203(1) allows a child who has been committed to the Michigan Children's Institute (MCI) to remain a state ward until his or her 19th birthday, "unless the superintendent or the [DHHS] discharges the child sooner as provided in [MCL 400.208] or [MCL 400.209] or if the child is at least 18 years of age but less than 21 years of age and is participating in extended foster care services as described in [MCL 400.651]. MCL 400.203(1).

MCL 722.111(z)(*iii*) (governing child care organizations) permits a child who was placed in a foster home or foster care facility before his or her 18th birthday to continue placement in the foster home or foster care facility after the child's 18th birthday.

If the court terminates its jurisdiction over the youth, the YAVFCA "allow[s] eligible youth between [the] ages [of] 18 and 21 (whose child abuse/neglect (NA) court file closed) to sign a voluntary agreement that will enable them to receive services until [the] age [of] 21." SCAO Administrative Memorandum 2012-04, *supra* at p 2.

## B. Eligibility for YAVFCA

Under the YAVFCA, the DHHS may provide extended foster care services to a youth who meets the eligibility conditions set out under MCL 400.649 after the youth signs a voluntary foster care agreement.[64] MCL 400.653.

"The voluntary agreement may not be signed until the youth reaches 18 years old **and** the court has terminated jurisdiction of the [child abuse/neglect (NA)] court case." SCAO Administrative Memorandum 2012-04, *supra* at p 2.

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[62] The YAVFCA defines a *youth* as "an individual who is at least 18 years of age but less than 21 years of age." MCL 400.643(c).

[63] "A hearing is not required under this subsection, but may be held on the court's own motion or at the request of the youth or the [DHHS]." MCL 712A.2a(2). See Section 16.9(E) for a detailed discussion of the court procedure.

[64] "The [DHHS] shall implement the [YAVFCA] in accordance with the state's approved [T]itle IV-E state plan." MCL 400.645.

## 1. Eligibility Conditions

Under MCL 400.649, the youth must meet one of the following eligibility conditions to be eligible for services under the YAVFCA:

> "(a) The youth is completing secondary education or a program leading to an equivalent credential.
>
> (b) The youth is enrolled in an institution that provides postsecondary or vocational education.
>
> (c) The youth is participating in a program or activity designed to promote employment or remove barriers to employment.
>
> (d) The youth is employed for at least 80 hours per month.
>
> (e) The youth is incapable of doing any part of the activities in subdivisions (a) to (d) due to a medical condition. This assertion of incapacity must be supported by regularly updated information in the youth's case plan."

## 2. Voluntary Foster Care Agreement

The DHHS and an eligible youth choosing to participate in the extended foster care services must sign a voluntary foster care agreement that includes, at a minimum, all of the following information:

> "(a) The obligation for the youth to continue to meet the conditions for eligibility described in [MCL 400.649] for the duration of the voluntary foster care agreement.
>
> (b) Any obligation considered necessary by the [DHHS] for the youth to continue to receive extended foster care services.
>
> (c) Any obligation considered necessary by the [DHHS] to facilitate the youth's continued success in the program.
>
> (d) Termination of a voluntary foster care agreement and program participation as described in [MCL 400.663].

> (e) The voluntary nature of the youth's participation in receiving extended foster care services."[65] MCL 400.651.

## C. YAVFCA Availability

"If the youth meets the eligibility requirements [set out in MCL 400.649] and maintains compliance, the youth may enter or reenter the YAVFCA program at any time between the dismissal of the original [child abuse/neglect (NA)] court case and the age of 21." SCAO Administrative Memorandum 2012-04, *supra* at p 2. See also MCL 400.647, which permits "[a] youth who exited foster care after reaching 18 years of age but before reaching 21 years of age [to] reenter foster care and receive extended foster care services."

A child may be eligible to enter voluntary foster care under YAVFCA after termination of the child's juvenile guardianship; termination of a child's juvenile guardianship temporarily reinstates the DHHS's legal custody of the child under MCL 712A.2(b), at which time the child could apply for voluntary foster care under YAVFCA, MCL 400.641 *et seq*. *In re Hull*, 345 Mich App 562, 568, 569 (2023).

## D. Ex Parte Petition

"Within 150 days after the signing of a voluntary foster care agreement, the [DHHS] shall file with the family division of the circuit court, in the county where the youth resides, an ex parte petition requesting the court's determination that continuing in voluntary foster care is in the youth's best interests." MCR 3.616(E). See also MCL 400.655, which contains substantially similar language; MCL 712A.2a, the Juvenile Code provision requiring a court to make the best interests determination.

### 1. Petition Contents

"The petition shall contain

> (a) the youth's name, date of birth, race, gender, and current address;
>
> (b) the name, date of birth, and residence address of the youth's parents or legal custodian (if parental rights have not been terminated);

[65] See DHHS form DHS 1297, *Young Adult Voluntary Foster Care Agreement*, at http://www.michigan.gov/documents/dhs/DHS-1297_381251_7.pdf.

> (c) the name and address of the youth's foster parent or parents;
>
> (d) a statement that the youth has been notified of the right to request a hearing regarding continuing in foster care;
>
> (e) a showing that jurisdiction of a court over the youth's child protective proceeding has been terminated, including the name of the court and the date jurisdiction was terminated; and
>
> (f) any other information the [DHHS], parent or legal custodian, youth, or foster parent wants the court to consider." MCR 3.616(E)(1).

The DHHS must prepare the ex parte petition on a form approved by the state court administrator. MCR 3.616(D). See SCAO Form CCFD 20, *Ex Parte Petition Regarding Voluntary Foster Care Agreement*.

## 2. Supporting Documentation

"The petition shall be accompanied by a written report prepared pursuant to MCL 400.655 and a copy of the signed voluntary foster care agreement." MCR 3.616(E)(2).

The written report prepared under MCL 400.655 must contain all of the following information:

> "(a) The youth's name, date of birth, race, gender, and current address.
>
> (b) A statement of facts that supports the voluntary foster care agreement and includes both of the following:
>
> > (*i*) The reasonable efforts made to achieve permanency for the youth.
> >
> > (*ii*) The reasons why it remains in the youth's best interests to continue in voluntary foster care.
>
> (c) A copy of the signed voluntary foster care agreement.
>
> (d) Any other information the [DHHS] or the youth wants the court to consider."

### 3. Service

"The [DHHS] shall serve the petition on

(a) the youth; and

(b) the foster parent or parents, if any." MCR 3.616(E)(3).

### 4. Court Fees

A party is not required to pay a fee for filing an ex parte petition requesting an extension of foster care services under the YAVFCA. See MCL 600.2529(8).

## E. Court Procedure

"Upon the filing of a petition under [MCR 3.616], the family division of the circuit court has jurisdiction to review an agreement for the voluntary extension of foster care services after age 18." MCR 3.616(B). See also MCL 400.657, which also extends jurisdiction to the court "to review the voluntary foster care agreement signed by the [DHHS] and the youth in [MCL 400.651]."

Once the DHHS files a report under MCL 400.655, "the court shall open a young adult voluntary foster care case for the purpose of determining whether continuing in voluntary foster care is in the youth's best interests."[66] MCL 400.657. See also MCR 3.616(C), which also requires the court to open a voluntary foster care case following the DHHS's filing of an ex parte petition under MCR 3.616(E).

### 1. Judicial Determination

"The court shall review the petition, report, and voluntary foster care agreement filed pursuant to [MCR 3.616](E), and then make a determination whether continuing in voluntary foster care is in the best interests of the youth."[67] MCR 3.616(F).

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[66] "Upon receipt of a[n ex parte] petition, the court will open a case using [the] case code 'VF.'" SCAO Administrative Memorandum 2012-04, *supra* at p 3.

[67] "Federal guidelines require that there be a judicial determination that remaining in foster care is in the youth's best interests if [T]itle IV-E foster care maintenance payments are to continue beyond the first 180 days of the voluntary placement." DHHS's Children's Foster Care Manual (FOM), *Young Adult Voluntary Foster Care (YAVFC) Funding and Payments FOM 902-21*, p 2, available at http://www.mfia.state.mi.us/olmweb/ex/FO/Public/FOM/902-21.pdf. "If the order is not signed by the judge or referee within 180 calendar days of the date the youth signed the DHS-1297, YAVFC Agreement, the youth is no longer eligible for the YAVFC program[.]" *Young Adult Voluntary Foster Care (YAVFC) Funding and Payments FOM 902-21*, *supra* at p 2.

See also MCL 712A.2a(2), which also requires the court, after receiving a written report from the DHHS, to determine whether "it is in the youth's best interests to continue in voluntary foster care[.]"

"Following the court's determination in [MCL 400.657], the court shall close the young adult voluntary foster care case and the [DHHS] shall provide extended foster care services to the youth[.]"[68] MCL 400.659. See also MCR 3.616(C), which also requires the court to close the young adult voluntary foster care case "following the issuance of the court's determination under [MCR 3.616](F)."

### a. Findings

"If the court finds that the voluntary foster care agreement is in the youth's best interests, the court shall issue an order containing individualized findings to support its determinations made under [MCL 712A.2a(2)] and close the case in accordance with . . . MCL 400.659." MCL 712A.2a(3).

The court's findings must be "based on the [DHHS's] written report and other information filed with the court." MCR 3.616(F)(1). See also MCL 712A.2a(3). The court must also submit its judicial determination on a form approved by the state court administrator. MCR 3.616(D). See SCAO Form CCFD 21, *Order Regarding Voluntary Foster Care Agreement*.

### b. Timing

Within 21 days of the DHHS filing the ex parte petition, the court must sign and date an order "that includes its determination and individualized findings that support its determination."[69] MCR 3.616(F)(1). See also MCL 400.657 and MCL 712A.2a(2), which contain the same 21-day requirement.

### c. Service of Court Order

"The court shall serve the order on

[68] "[The DHHS] retains full responsibility for the YAVFC case[.]" SCAO Administrative Memorandum 2012-04, *supra* at p 3.

[69] "If the best interests determination is not made within 21 days, the youth will not be eligible for Title IV-E funding[,] and [the DHHS] will cancel the agreement." SCAO Administrative Memorandum 2012-04, *supra* at p 3.

(a) the [DHHS];

(b) the youth; and

(c) the foster parent or parents, if any." MCR 3.616(F)(2).

### 2. Formal Hearing Not Required

"The court's review of the petition and the entry of the order **do not** need to be conducted at a formal hearing on the record. It is sufficient that a judicial officer completes the review and authorization administratively ('paper review')." SCAO Administrative Memorandum 2012-04, *supra* at p 3. See also MCL 712A.2a(2), which states, "A hearing is not required under [MCL 712A.2a(2)], but may be held on the court's own motion or at the request of the youth or the [DHHS]."

## F. Confidentiality of Records

"The [DHHS] and the youth are entitled to access to the records contained in the [youth's young adult voluntary foster care] file, but otherwise, the file is confidential." MCR 3.616(G).

## G. Termination of Extended Foster Care Services

"A youth may choose to terminate the voluntary foster care agreement and stop receiving extended foster care services at any time." MCL 400.663(1). "If, at any time, the [DHHS] determines that the youth is not in compliance with the voluntary foster care agreement or any program requirements,[70] the [DHHS] may terminate the voluntary foster care agreement with the youth and stop providing extended foster care services to the youth."[71] MCL 400.663(2).

[70] "The [DHHS] shall conduct periodic case reviews not less than once every 180 days to address the status of the youth's safety, continuing necessity and appropriateness of placement, extent of compliance with the case plan, and projected date by which the youth may no longer require extended foster care service." MCL 400.661.

[71] "The [DHHS] shall provide written or electronic notice to the youth regarding termination of the voluntary foster care agreement and the youth's participation in the program." MCL 400.663(2).

# Chapter 17: Hearings on Termination of Parental Rights


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## *In this chapter. . .*

This chapter sets out the applicable procedures, evidentiary standards, and statutory bases for terminating a parent's parental rights to a child. Termination of a parent's parental rights may be considered at an initial dispositional hearing or a hearing on a supplemental petition. In either situation, the petitioner must establish a statutory basis for terminating a parent's parental rights, and the court must determine whether terminating the parent's parental rights is in the child's best interests.

In an effort to provide trial courts with a quick practical guide through the process of terminating parental rights, the State Court Administrative

Office (SCAO) developed the *Toolkit for Judges and Attorneys: Termination of Parental Rights*.

## 17.1 Request for Termination of Parental Rights

A request for termination of parental rights must be made in an original, amended,[1] or supplemental petition.[2] MCR 3.977(A)(2).[3] If a petition or an amended petition fails to request the termination of parental rights, a subsequent order terminating parental rights must be set aside. *In re SLH*, 277 Mich App 662, 674 (2008). See Section 7.3(C) for a detailed discussion of petitions requesting termination of parental rights.

Only individuals or entities granted standing under a statute, court rule, or case law may participate in proceedings to terminate parental rights. *In re Foster (Catherine)*, 226 Mich App 348, 357-359 (1997). MCL 712A.19b(1) and MCR 3.977(A)(2) allow the following individuals or entities to petition the court to terminate parental rights:

- the agency, which means the "public or private organization, institution, or facility responsible pursuant to court order or contractual arrangement for the care and supervision of [the] child, MCR 3.903(C)(1);
- the child;
- the child's guardian, legal custodian, or representative;
- a concerned person;[4]
- the state child advocate; or

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[1] For purposes of child protective proceedings, "'[a]mended petition' means a petition filed to correct or add information to an original petition, as defined in [MCR 3.903[(A)(20) before it is adjudicated." MCR 3.903(C)(2).

[2] For purposes of child protective proceedings, "'[s]upplemental petition' means: (a) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that a parent, for whom a petition was authorized, has committed an additional offense since the adjudication of the petition, or (b) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that a nonrespondent parent is being added as an additional respondent in a case in which an original petition has been authorized and adjudicated against the other parent under MCR 3.971 or MCR 3.972, or (c) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that requests the court terminate parental rights of a parent or parents under MCR 3.977(F) or MCR 3.977(H)." MCR 3.903(C)(13). MCR 3.903(C)(8) defines a *nonrespondent parent* as "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)."

[3] "[MCR 3.977] applies to all proceedings in which termination of parental rights is sought. Proceedings for termination of parental rights involving an Indian child are governed by 25 USC 1912 in addition to this rule." MCR 3.977(A)(1). MCL 712B.9 and 25 CFR 23.112 also provides proceedings for termination of parental rights involving an Indian child. See Chapter 19 for special procedures applicable to cases involving Indian children.

- the prosecuting attorney regardless of whether he or she is representing or acting as a legal consultant to the agency or any other party.

The parties in a child protective proceeding include "the petitioner, child, and respondent,"[5] and "the parent, guardian, or legal custodian." MCR 3.903(A)(19)(b)(*i*)-(*ii*).

> **Note:** "'Parent' means the mother, the father as defined in MCR 3.903(A)(7),[6] or both, of the minor. It also includes the term 'parent' as defined in MCR 3.002(20)."[7] MCR 3.903(A)(18). MCR 3.002(20) defines an Indian child's *parent* as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the putative father if paternity has not been acknowledged or established."
>
> "'Guardian' means a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or [MCL] 700.5205, by a court of another state under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202, or a juvenile guardian appointed pursuant to MCL 712A.19a or MCL 712A.19c." MCR 3.903(A)(11).
>
> "'Legal Custodian' means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. It also includes the term 'Indian custodian' as defined in MCR 3.002(15)."[8] MCR 3.903(A)(14). An *Indian custodian* is "any Indian person who

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[4] MCL 712A.19b(6) defines a *concerned person* as "a foster parent with whom the child is living or has lived who has specific knowledge of behavior by the parent constituting grounds for termination under [MCL 712A.19b](3)(b) or [MCL 712A.19b(3)](g) and who has contacted the [DHHS], the prosecuting attorney, the child's attorney, and the child's guardian ad litem, if any, and is satisfied that none of these persons intend to file a petition [to terminate parental rights]."

[5] MCR 3.977(B) limits the definition of *respondent* for termination of parental rights hearings to only include the child's natural or adoptive mother and the child's father as defined by MCR 3.903(A)(7). It does not include "other persons to whom legal custody has been given by court order, persons who are acting in the place of the mother or father, or other persons responsible for the control, care, and welfare of the child." MCR 3.977(B).

[6] Under MCR 3.903(A)(7), "'a putative father does not qualify as a father or parent for the purpose of exercising jurisdiction in child protective proceedings.'" *In re C S Alexander*, ___ Mich App ___, ___ (2025), quoting *In re Long*, 326 Mich App 455, 464 (2018).

[7] Formerly MCR 3.002(10).

[8] Formerly MCR 3.002(7).

> has custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody, and control have been transferred by the child's parent." MCR 3.002(15).

The court must give "[h]earings on petitions seeking termination of parental rights . . . the highest possible priority consistent with the orderly conduct of the court's caseload." MCR 3.977(C)(2).

The court cannot consider terminating a respondent-parent's parental rights and placing the child in the permanent custody of the court unless it has first established jurisdiction over the child under MCL 712A.2(b).[9] *In re Taurus F*, 415 Mich 512, 526 (1982). See also MCR 3.977(E)(2) (requiring the court to assume jurisdiction over a child under MCL 712A.2(b) before ordering termination at an initial dispositional hearing); MCR 3.977(F) (allowing the court to take action on a supplemental petition seeking termination if the child is "already within the jurisdiction of the court" for another reason); MCR 3.977(H) (allowing the court to take action on a supplemental petition seeking termination if "the child is within the jurisdiction of the court[]").

An order terminating a respondent's parental rights based on improperly exercised jurisdiction is void ab initio. See *In re C S Alexander*, ___ Mich App ___, ___ (2025) ("all orders based on the wrongful assumption of jurisdiction are void ab initio") (quotation marks and citation omitted). In *Alexander*, *id*. at ___, respondent-father's parental rights were erroneously terminated after the trial court improperly exercised jurisdiction over the child under MCL 712A.2(b)(6)(A) and (B) (failing to substantially support or contact the child for at least two years despite having the ability to do so) when respondent-father's paternity was not established at the time the termination petition was filed. "'[R]espondent-father's status as a putative father on the date the petition was filed means that he [did] not qualify as a "parent" under MCL 712A.2(b)(6).'" *Alexander*, ___ Mich App at ___, quoting *In re Long*, 326 Mich App 455, 464 (2018). Resultantly, respondent-father's conduct before establishing paternity "may not be considered for the purposes of jurisdiction." *Alexander*, ___ Mich App at ___. "'[T]o rely on a putative father's action or inaction in the two years or more preceding the filing of a petition when considering whether to exercise jurisdiction under MCL 712A.2(b)(6) is violative of due process.'" *Alexander*, ___ Mich App at ___, quoting *Long*, 326 Mich App at 464-465.[10]

In addition, "due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship." *In re Sanders*, 495 Mich 394, 422 (2014).[11] Accordingly, "all parents 'are constitutionally entitled to a hearing on

[9] See Section 4.3 for a summary of the statutory bases for personal jurisdiction.

their fitness before their children are removed from their custody.'" *Id.* at 412, quoting *Stanley v Illinois*, 405 US 645, 658 (1972) (concluding that the one-parent doctrine[12] violated the nonadjudicated parent's constitutional due process rights "[b]ecause [it] allow[ed] the court to deprive a parent of th[e] fundamental right [to the care, custody and control of his or her children] without any finding that he or she [was] unfit"). "[N]either the admissions made by [the adjudicated parent] nor [the unadjudicated parent's] failure to object to those admissions constituted an adjudication of [the unadjudicated parent's] fitness[.]" *In re SJ Temples*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 2015 (Docket No. 323246)[13] (finding that the trial court violated the unadjudicated parent's "due process rights by subjecting him to dispositional orders without first adjudicating him as unfit[]").

## A. No Right to Jury at Disposition

"The right to a jury in a [child protective] proceeding exists only at the trial." MCR 3.911(A). However, there is no right to have a jury determine whether to terminate parental rights. MCR 3.977(A)(3). See also *In re AMAC*, 269 Mich App 533, 537 (2006), where the Court of Appeals stated, "Unlike the adjudicative hearing, at the initial dispositional hearing the respondent is not entitled to a jury determination of the facts[.]"[14]

## B. Suspension of Parenting Time

"If a petition to terminate parental rights to a child is filed, the court may suspend parenting time for a parent who is a subject of the petition." MCL 712A.19b(4); MCR 3.977(D).

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[10] However, a putative father's conduct before establishing paternity may be considered for purposes of establishing statutory grounds for termination: "While *In re Knipp* [___ Mich App ___, ___ (2024)] recognizes a circumstance under which certain conduct of a putative father may be considered for the purposes of statutory grounds for termination, it does not stand for the proposition that the conduct of a putative father may be considered for the purposes of jurisdiction." *Alexander*, ___ Mich App at ___. The *Alexander* Court noted that jurisdiction was not challenged in *Knipp*. *Alexander*, ___ Mich App at ___ n 12.

[11] For additional information on the procedural due process rights of the nonrespondent parent, see Section 4.3(C)(2).

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

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

[14] See Section 17.3 for a detailed discussion of termination of parental rights at an initial disposition hearing.

## 17.2 Use of Videoconferencing Technology

The use of videoconferencing technology during termination of parental rights proceedings is governed by MCR 3.904(B). See Section 1.7.

## 17.3 Termination of Parental Rights at Initial Dispositional Hearing

"[MCL 712A.19a(2)] provides the circumstances under which termination may be granted at the initial disposition, and [MCR 3.977(E)] lays out the procedure that must be followed to grant termination at the initial disposition." *In re C Walters*, ___ Mich App ___, ___ (2025). The court may enter an order terminating parental rights at the initial dispositional hearing pursuant to a request in an original or amended petition.[15] MCR 3.977(E)(1). See also MCL 712A.19b(4). If an original or amended petition does not request termination, an order terminating parental rights must not be entered. See *In re SLH*, 277 Mich App 662, 674 (2008) ("[a]bsent . . . a written request [for termination in the petition or amended petition], the . . . order terminating respondent's parental rights . . . must be set aside.").[16]

> **Note:** Certain serious circumstances require the DHHS to file a petition requesting termination of parental rights at the initial disposition hearing. See MCL 722.638(1)-(2).[17]

### A. Procedural Requirements

MCR 3.973 addresses procedural and substantive aspects of dispositional hearings in general,[18] whereas MCR 3.977(E) sets out the procedural requirements for termination of parental rights at an initial dispositional hearing:

> "The court shall order termination of the parental rights of a respondent at the initial dispositional hearing held pursuant to MCR 3.973, and shall order that additional efforts for reunification of the child with the respondent shall not be made, if

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[15] For purposes of child protective proceedings, "'[a]mended petition' means a petition filed to correct or add information to an original petition, as defined in [MCR 3.903](A)(20) before it is adjudicated." MCR 3.903(C)(2). See SCAO form *Order Following Hearing to Terminate Parental Rights*.

[16] In *In re SLH*, 277 Mich App 662, the Court of Appeals also found other reasons that supported setting aside the order terminating the respondent-father's parental rights. Those other reasons are independent of and unrelated to the requirement that the petition contain a request for termination.

[17] See Section 7.3(A) for a detailed discussion of the circumstances that require the DHHS to file a petition for termination of parental rights at an initial dispositional hearing.

[18] See Chapter 13 for more information about initial dispositions.

> (1) the original, or amended, petition contains a request for termination;
>
> (2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;
>
> (3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:
>
> > (a) are true, and
> >
> > (b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a)[-](b), [or MCL 712A.19b(3)(d)-(m)];
>
> (4) termination of parental rights is in the child's best interests."[19]

"The dispositional hearing [can] be conducted 'immediately following the adjudicative hearing' but the two [cannot] be converged such that there [is] no distinction." *In re Thompson*, 318 Mich App 375, 376, 379 (2016), quoting *In re AMAC*, 269 Mich App 533, 538 (2006). "[T]he trial court must clearly bifurcate the proceedings by conducting the adjudicative hearing and determine whether there is sufficient evidence to take jurisdiction before proceeding to the dispositional phase." *In re Smith-Taylor*, 339 Mich App 189, 196 (2021), rev'd on other grounds 509 Mich 935 (2022).

When MCR 3.973(A)-(C) and MCR 3.977(E)(3) are read together, "the following described process honors the intent of the court rules promulgated by our Supreme Court and applies when an adjudication trial is conducted and the DHHS requests termination at the initial dispositional hearing under circumstances such as those posed in [*In re Mota*, 334 Mich App 300 (2020):]

> First, an adjudication trial is to be conducted with the court allowing the introduction of legally admissible evidence that is relevant to the exercise of jurisdiction

[19] See *In re Simonetta*, 340 Mich App 700, 712 (2022) (reiterating that "to justify termination of parental rights at initial disposition and without reasonable efforts at reunification, a court must find 'on the basis of clear and convincing legally admissible evidence' that the facts alleged are true, establish at least one statutory ground for termination, and that termination is in the child's best interests").

> under MCL 712A.2(b). At the conclusion of the adjudication trial, the court, in a bench trial, is to determine whether the DHHS established by a preponderance of the evidence a basis for jurisdiction under MCL 712A.2(b). If jurisdiction is not established, the proceeding is . . . concluded. If the trial court finds that it has jurisdiction, the dispositional hearing in which termination is sought may immediately be commenced. At the termination hearing, the trial court, in rendering its termination decision under MCL 712A.19b, may take into consideration any evidence that had been properly introduced and admitted at the adjudication trial, MCR 3.977(E), along with any additional relevant and material evidence that is received by the court at the termination hearing, MCR 3.977(H)(2)." *Mota*, 334 Mich App at 316.

In *In re Mota*, 334 Mich App at 317, "[t]he trial court . . . failed to proceed as required by the court rules" when "with respect to the presentation of evidence, the trial court did not separate the adjudication trial from the dispositional hearing, and it then issued rulings in regard to jurisdiction and termination after all the proofs were submitted." However, in *Mota*, the Court could not conclude that "respondent's substantial rights were affected or that the integrity, fairness, or public reputation of the proceedings were seriously affected by the court's procedural errors." *Id*.

"[DHHS] must make reasonable efforts toward family reunification before seeking termination." *In re C Walters*, ___ Mich App ___, ___ (2025). "MCL 712A.19a(2) contains an exclusive list of the exceptions to DHHS's duty to make reasonable efforts toward reunification." *Id*. at ___. MCR 3.977(E) does not limit MCL 712A.19a(2)'s applicability to "the interim period after the petition is filed and before parental rights are terminated." *Id*. at ___. "Under no circumstances may a trial court terminate a parent's rights without first finding that one of these exceptions applies." *Id*. at ___. See also *In re Berryman/Hurd/Morgan/Morgan-Hurd*, ___ Mich App ___, ___ (2026) ("The trial court plainly erred by terminating respondents' parental rights at initial disposition instead of ordering that reasonable efforts toward reunification be made, as none of the statutory exceptions excusing such efforts were properly found to exist.").[20]

[20]For more information on the aggravating circumstances exception to DHHS's duty to make reasonable efforts at reunification), see Section 8.4.

### B. Right to Appellate Review

"The respondent may challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the respondent's parental rights are terminated at the initial dispositional hearing pursuant to MCR 3.977(E)." MCR 3.971(C) (pleas of admission or no contest); MCR 3.973(H) (dispositional hearing).

> **Note:** MCR 3.971(C), MCR 3.972(G), and MCR 3.973(H) also permit the "respondent [to] challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the court fails to properly advise the respondent of their right to appeal pursuant to [MCR 3.971(B)(6)-(8), MCR 3.972(F)(1)-(3), and MCR 3.973(G)(2)-(4), respectively]." See Chapter 10 for additional discussion on MCR 3.971 (pleas of admission or no contest), Chapter 12 for additional discussion on MCR 3.972 (trials), and Chapter 13 for additional discussion on MCR 3.973 (dispositional hearings).

## 17.4 Termination of Parental Rights on Basis of New or Different Circumstances

"The court may take action on a supplemental petition[21] that seeks to terminate the parental rights of a respondent[22] over a child already within the jurisdiction of the court on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction." MCR 3.977(F).

"The court must order termination of the parental rights of a respondent, and must order that additional efforts for reunification of the child with the respondent must not be made,[23] if

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[21] For purposes of child protective proceedings, "'[s]upplemental petition' means: (a) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that a parent, for whom a petition was authorized, has committed an additional offense since the adjudication of the petition, or (b) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that a nonrespondent parent is being added as an additional respondent in a case in which an original petition has been authorized and adjudicated against the other parent under MCR 3.971 or MCR 3.972, or (c) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that requests the court terminate parental rights of a parent or parents under MCR 3.977(F) or MCR 3.977(H)." MCR 3.903(C)(13). MCR 3.903(C)(8) defines a *nonrespondent parent* as "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)."

[22] MCR 3.977(B) limits the definition of respondent for termination of parental rights hearings to only include the child's natural or adoptive mother and the child's father as defined by MCR 3.903(A)(7). It does not include "other persons to whom legal custody has been given by court order, persons who are acting in the place of the mother or father, or other persons responsible for the control, care, and welfare of the child." MCR 3.977(B).

> (a) the supplemental petition for termination of parental rights contains a request for termination;
>
> (b) at the hearing on the supplemental petition, the court finds on the basis of clear and convincing legally admissible evidence[24] that one or more of the facts alleged in the supplemental petition:
>
> > (*i*) are true; and
> >
> > (*ii*) come within MCL 712A.19b(3)(a)[-](b), [MCL 712A.19b(3)(c)(*ii*)], [MCL 712A.19b(3)(d)-(g)], [or MCL 712A.19b(i)-(m)]; and
>
> (c) termination of parental rights is in the child's best interests." MCR 3.977(F)(1).

Parties must make the disclosures detailed in MCR 3.922(A) at least 21 days prior to the termination hearing. MCR 3.977(F)(2). Parties have rights to discovery consistent with MCR 3.922(A). The court must hold a hearing on a supplemental petition for termination of parental rights within 42 days after the supplemental petition is filed. MCR 3.977(F)(2). The court may extend the hearing for an additional 21 days on a showing of good cause. *Id.* Upon a showing of good cause, a court may extend the hearing beyond the additional 21 days allowed under the court rule. *In re King*, 186 Mich App 458, 462 (1990) (an additional continuance that was requested and agreed upon by the parties constituted good cause). See also *In re Jackson (Shereathea Rebecca)*, 199 Mich App 22, 28-29 (1993) (citing to *King*, but finding that good cause was not shown where the respondent-mother failed to show she was prejudiced by the delay).

## 17.5 Termination of Parental Rights in Other Cases

Following a dispositional review hearing under MCR 3.975, a progress review hearing under MCR 3.974, or a permanency planning hearing under MCR 3.976, the court:

> (1) *must* hold a hearing to decide whether to terminate parental rights after a supplemental petition[25] is filed based on one of more grounds listed in MCL 712A.19b(3) if:

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[23] See SCAO form JC 63, *Order Following Hearing to Terminate Parental Rights*, at https://www.courts.michigan.gov/49c114/siteassets/forms/scao-approved/jc63.pdf.

[24] Where "the basis for the court taking jurisdiction of a child is unrelated to the basis for seeking termination of parental rights, . . . the basis for terminating parental rights lacks th[e] background of legally admissible evidence from the adjudicative phase and, thus, such a foundation must be laid before probative evidence not admissible under the Michigan Rules of Evidence may be considered." *In re Snyder*, 223 Mich App 85, 89-90 (1997).

(a) the child is within the court's jurisdiction,

(b) parental rights over the child were not terminated at an initial dispositional hearing under MCR 3.977(E) or at a hearing on a supplemental petition on the basis of different circumstances under MCR 3.977(F), and

(c) the child is in foster care or in the custody of a guardian or limited guardian.[26]

(2) *may* hold a hearing to decide whether to terminate parental rights after a supplemental petition is filed based on one or more grounds listed in MCL 712A.19b(3) if:

(a) the child is within the court's jurisdiction,

(b) parental rights over the child were not terminated at an initial dispositional hearing under MCR 3.977(E) or at a hearing on a supplemental petition on the basis of different circumstances under MCR 3.977(F), and

(c) the child is not in foster care.[27] MCL 712A.19b(1); MCR 3.977(H).

## A. Time Requirements

"The supplemental petition for termination of parental rights may be filed at any time after the initial dispositional review hearing, progress review, or permanency planning hearing, whichever occurs first." MCR 3.977(H)(1)(a).

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[25] For purposes of child protective proceedings, "'[s]upplemental petition' means: (a) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that a parent, for whom a petition was authorized, has committed an additional offense since the adjudication of the petition, or (b) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that a nonrespondent parent is being added as an additional respondent in a case in which an original petition has been authorized and adjudicated against the other parent under MCR 3.971 or MCR 3.972, or (c) a written allegation, verified in the manner provided in MCR 1.109(D)(3), that requests the court terminate parental rights of a parent or parents under MCR 3.977(F) or MCR 3.977(H)." MCR 3.903(C)(13). MCR 3.903(C)(8) defines a *nonrespondent parent* as "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)."

[26] MCR 3.977(H) only requires a hearing "if the child is in foster care"; MCL 712A.19b(1) requires a hearing if the child is in foster care or under the custody of a guardian or limited guardian.

[27] A child need not be placed in foster care before a court may entertain a petition requesting the termination of a respondent-parent's parental rights. *In re Marin*, 198 Mich App 560, 568 (1993) (although the trial court is obligated under MCL 712A.19b(1) to conduct a hearing on termination when the child remains in foster care, that section does not otherwise limit the conditions under which a petition for termination may be entertained). See *In re Medina*, 317 Mich App 219, 232 (2016), declining to declare a conflict under MCR 7.215(J)(2) with the *In re Marin* Court's interpretation of MCL 712A.19b(1), and holding "that the interpretation of [MCL 712A.19b(1)] adopted in [*In re Marin*] is consistent with both the statutory language and the underlying legislative intent."

The court must hold a hearing on a supplemental petition for termination of parental rights within 42 days after the supplemental petition is filed. MCR 3.977(F)(2). The court may extend the hearing for an additional 21 days on a showing of good cause. *Id*. The court rule does not expressly prohibit a trial court from granting a 21-day continuance in addition to the initial 21 days. *In re King*, 186 Mich App 458, 462 (1990) ("the second continuance was granted at the request and with the express consent of the respondents, and constituted good cause"). See also *In re Jackson*, 199 Mich App 22, 28-29 (1993) (citing *King*, 186 Mich App at 461, and expressly holding that "[t]he trial court may extend the time for a hearing beyond the additional twenty-one days" and noting that the respondent was not prejudiced by the extensions and, in fact, could have benefited from the additional time to improve her compliance with the court's order).

## B. Evidence

"Parties shall make disclosures as detailed in MCR 3.922(A) at least 21 days prior to the termination hearing and have rights to discovery consistent with that rule. The Michigan Rules of Evidence do not apply at the hearing, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631. At the hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value. The parties must be afforded an opportunity to examine and controvert written reports received by the court and shall be allowed to cross-examine individuals who made the reports when those individuals are reasonably available." MCR 3.977(H)(2).

## C. Order

"The court must order termination of the parental rights of a respondent and must order that additional efforts for reunification of the child with the respondent must not be made,[28] if the court finds

> (a) on the basis of clear and convincing evidence admitted pursuant to subrule (H)(2) that one or more facts alleged in the petition:
>
> (i) are true; and
>
> (ii) come within MCL 712A.19b(3)[; and]

[28] See SCAO form JC 63, *Order Following Hearing to Terminate Parental Rights*, at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/juvenile/jc63.pdf.

(b) that termination of parental rights is in the child's best interests." MCR 3.977(H)(3).

## 17.6 Standard and Burden of Proof Required to Establish Statutory Basis for Termination

There must be clear and convincing evidence that one or more of the statutory bases allowing for termination of parental rights have been met. MCL 712A.19b(3); MCR 3.977(E)(3) (termination at initial disposition); MCR 3.977(F)(1)(b) (termination on the basis of different circumstances); MCR 3.977(H)(3)(a) (termination for "other" reason). The clear and convincing evidence standard is the minimum standard necessary to satisfy the requirements of due process under the Fourteenth Amendment to the United States Constitution. *Santosky v Kramer*, 455 US 745, 768-770 (1982). "Clear and convincing evidence is the most demanding standard applied in civil cases and requires evidence so clear, direct, and weighty that the fact finder can come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *In re D P Rozenboom*, ___ Mich App ___, ___ (2025) (cleaned up).

The petitioner has the burden of proving the statutory basis for terminating a respondent's parental rights under MCL 712A.19b.[29] MCR 3.977(A)(3); *In re AMAC*, 269 Mich App 533, 537 (2006). See *Rozenboom*, ___ Mich App at ___. There, petitioner failed to present clear and convincing evidence to support termination of respondent's parental rights under MCL 712A.19b(3)(f), citing respondent's failure to visit, contact, or communicate with the child for a period of two years or more before the petition was filed, where "[t]he record supports a finding that respondent spent years persistently attempting to contact and visit [the child]," *Rozenboom*, ___ Mich App at ___, and "petitioner persistently rebuffed these efforts . . . ." *Id.* at ___.

A court cannot agree to set aside an order that terminates a respondent-parent's parental rights if the respondent-parent complies with certain conditions set by the court.[30] *In re Gazella*, 264 Mich App 668, 673-674 (2005), superseded in part on other grounds by *In re Hansen*, 285 Mich

[29] See Section 17.7 for a detailed discussion of the statutory standards under MCL 712A.19b(3).

[30] These types of agreements are commonly referred to as *Adrianson* Agreements. See *In re Gazella*, 264 Mich App 673 (2005), superseded in part on other grounds by *In re Hansen*, 285 Mich App 158 (2009), vacated 486 Mich 1037 (2010). Specifically, "[i]n an *Adrianson* proceeding, the trial court would enter an order terminating the [respondent-]parents' rights following the necessary statutory findings. The court would then enter a further order suspending the order terminating the [respondent-]parents' rights on condition that the [respondent-]parents comply with certain requirements designed to assist their rehabilitation. If the [respondent-]parents were successful, the order terminating their rights would be set aside and never take effect. However, should the [respondent-]parents not be successful, the order terminating rights would be permitted to go into effect." *Gazella*, *supra* at 673.

App 158 (2009), vacated 486 Mich 1037 (2010).[31] Specifically, the Court of Appeals concluded:

> "[MCL 712A.19b(5) and MCR 3.977] are clear: once the court finds there are statutory grounds for termination of parental rights, the court must order termination of parental rights and must further order that 'additional efforts for reunification of the child with the parent not be made,' unless the court finds that termination of parental rights to the child is clearly not in the child's best interest . . . .Once the statutory grounds for termination have been proven (unless the court finds that termination of parental rights to the child is clearly not in the child's best interests), the court must terminate parental rights immediately. An *Adrianson* order cannot be entered." *Gazella, supra* at 673-674.

A party aggrieved by a trial court's decision "must overcome the clear error standard of review on appeal." *Rozenboom*, ___ Mich App at ___. "This means that prevailing on appeal requires [the aggrieved party] to show that the court made a clear error when it found that petitioner did not meet the highest burden of proof applicable in civil cases." *Id*. at ___. In *Rozenboom*, the trial court did not clearly err in dismissing petitioner's petition to terminate respondent's parental rights under MCL 712A.19b(3)(f) where "text messages exchanged between petitioner and respondent overwhelmingly support the trial court's finding that petitioner blocked respondent from visiting, contacting, and communicating with [the child]." *Rozenboom*, ___ Mich App at ___.

## 17.7 Statutory Standards for Termination of Parental Rights Under Juvenile Code–§19b(3) Factors

A court may terminate a parent's parental rights to his or her child if the court finds by clear and convincing evidence that one or more of the factors listed under MCL 712A.19b(3) exist. MCL 712A.19b(3); MCR 3.977(E)(3); MCR 3.977(F)(1)(b); MCR 3.977(H)(3)(a).

> **Note:** The court must also find that the termination of parental rights is in the child's best interests. See Section 17.8 for a detailed discussion of the requirements for the best interest step.

A court may terminate one parent's parental rights without terminating the other parent's parental rights. *In re Marin,* 198 Mich App 560, 566

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

(1993) (use of singular "parent" throughout MCL 712A.19b(3) indicates legislative intent to allow termination of one parent's parental rights).

A court may not terminate parental rights to a child unless at least one statutory ground is proven with regard to *that child*. *In re SLH*, 277 Mich App 662, 674 (2008) (where the trial court only made findings with respect to one child, the order terminating a respondent-father's parental rights to two other children "must be set aside").

It is a violation of a parent's due process rights for a state or state agency to "deliberately take[] action with the purpose of 'virtually assur[ing] the creation of a ground for termination of parental rights,' and then proceed[] to seek termination on that very ground. *In re B & J*, 279 Mich App 12, 19-20 (2008) (the DHHS violated respondent-parents' due process rights when it reported them as illegal immigrants to federal officials then sought termination on the ground that they were unable to care for their children because they had been deported).

## A. Termination on Grounds of Desertion–§19b(3)(a)

Under MCL 712A.19b(3)(a), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he child has been deserted under either of the following circumstances:

> (*i*) The child's parent is unidentifiable, has deserted the child for 28 or more days, and has not sought custody of the child during that period. For the purposes of this section, a parent is unidentifiable if the parent's identity cannot be ascertained after reasonable efforts have been made to locate and identify the parent.
>
> (*ii*) The child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period."

### 1. Evidence Supported Termination Under §19b(3)(a)

Termination under §19b(3)(a)(*ii*) was supported by clear and convincing evidence where the respondent-father had moved out-of-state, did not provide support for his children, failed to visit the children since they were removed from the mother's home (although he did have some phone-contact with them), and failed on two occasions to "make himself available for [a court-ordered] assessment of the suitability of his home," despite receiving ample notification of the visits. *In re Laster*, 303 Mich App 485, 492 (2013).

Termination under §19b(3)(a)(*ii*) was supported by clear and convincing evidence where the respondent-mother "failed to make any substantial effort to communicate with [the child] or obtain assistance in regaining custody of [the child] for a period well beyond the [91-day] statutory period." *In re TM (After Remand)*, 245 Mich App 181, 193-194 (2001), overruled on other grounds by *In re Morris (Morris III)*, 491 Mich 81 (2012)[32] (respondent-mother's efforts to obtain custody of her child years earlier was irrelevant).

Termination under §19b(3)(a)(*ii*) was supported by clear and convincing evidence where the respondent-noncustodial parent failed to appear at hearings, failed to provide support, and had not seen his son for over two years. *In re Mayfield*, 198 Mich App 226, 230, 235 (1993).

"The plain language of MCL 712A.19b(3)(a)(*ii*) does not require that the requisite 91-day period of abandonment occur after a judicial determination of paternity has been made." *In re L S Knipp*, ___ Mich App ___, ___ (2024) (the respondent-father contended that the 91-day period of desertion under §19b(3)(a)(*ii*) did not begin to run until paternity was established). The *Knipp* Court noted that, in the context of MCL 712A.19b(3)(g)—failure to provide proper care or custody for the child under certain circumstances—"this Court has stated that the actions of a putative father occurring before he perfects paternity may be considered for purposes of terminating parental rights." *Knipp*, ___ Mich App at ___ (quotation marks and citations omitted). According to *Knipp*, the same approach applies to termination of parental rights under §19b(3)(a)(*ii*). *Knipp*, ___ Mich App at ___. Termination under §19b(3)(a)(*ii*) was supported by clear and convincing evidence where respondent-father had not had any contact with his 17-month-old son since the child's birth even though he suspected he was the father. *Knipp*, ___ Mich App at ___. Further, even after respondent's paternity was established, he did nothing to seek custody of, or parenting time with, the child, and he provided no support to the child. *Id*. at ___. The *Knipp* Court concluded that "the trial court did not err by considering respondent's conduct after being ordered to determine paternity, but before a judicial determination of paternity was made, in determining whether 91 days had elapsed as required by MCL 712A.19b(3)(a)(*ii*)." *Knipp*, ___ Mich App at ___.

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

### 2. Evidence Did Not Support Termination Under §19b(3)(a)

Termination under §19b(3)(a)(*ii*) was not supported by clear and convincing evidence where "[a]lthough [the] respondent-mother had previously left [her] children with their maternal grandmother for an extended period of time, that occurred approximately one and a half years before the filing of the termination petition. And after that time, [the] respondent-mother did have contact with the children and did participate in some, although very few, of the court hearings and required services." *In re Laster*, 303 Mich App 485, 492 (2013).

The trial court clearly erred by finding a statutory ground for termination under MCL 712A.19b(3)(a)(*ii*) as to respondent's three sons when "[n]othing in the record suggest[ed] that respondent abandoned the boys." *In re Boshell/Shelton*, ___ Mich App ___, ___ (2025). "The boys lived with respondent before the trial court removed them from her care," and, thereafter, respondent attended every court hearing seeking to restore her custody of her sons throughout the case. *Id*. at ___.

## B. Termination on Grounds of Physical Injury or Sexual Abuse–§19b(3)(b)

Under MCL 712A.19b(3)(b), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he child or a sibling[33] of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

> (*i*) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.
>
> (*ii*) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

[33] For purposes of the Juvenile Code, *sibling* is defined as "a child who is related through birth or adoption by at least 1 common parent[; s]ibling includes that term as defined by an American Indian or Alaskan native child's tribal code or custom." MCL 712A.13a(1)(*l*).

> (*iii*) A nonparent adult's[34] act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home."

Sections 19b(3)(b)(*i*)-(*iii*) are interpreted in the context of each other; thus, the application of §19b(3)(b)(*ii*), is no broader than (b)(*i*) or (b)(*iii*). *In re LaFrance*, 306 Mich App 713, 725 (2014). "[U]nder these provisions[,] . . . for physical injury to fall within the MCL 712A.19b(3), it must be caused by a 'parent's act' or a 'nonparent adult's act' and not merely contributed to by a unintentional omission." *Id.* at 725.

Termination of a parent's parental rights under §19b(3)(b) is permissible "even in the absence of definitive evidence regarding the identity of the perpetrator when the evidence does show that the respondent or respondents must have either caused or failed to prevent the child's injuries." *In re Ellis*, 294 Mich App 30, 35-36 (2011) (trial court properly terminated both parents' parental rights under §19b(3)(b) and §19b(3)(k) where the trial court concluded that one parent must have abused the child while the other parent failed to prevent the child abuse when the child suffered "numerous non-accidental injuries that likely occurred on more than one occasion[,]" and the child's parents lived together and shared in the child care responsibilities as the child's sole caregivers).

## 1. Termination Under §19b(3)(b)(*i*)

> For purposes of terminating parental rights under §19b(3)(b)(*i*), "[i]t is [] appropriate for a trial court to evaluate a respondent's potential risk to the other siblings by analyzing how the respondent treated another one of his or her children, albeit a child the respondent gave up for adoption. Though no legal relationship exists in such a situation, the reality is that respondent is still the biological [parent] of the child who was given up for adoption and that child is the biological half-sibling of the respondent's other children." *In re Hudson (Sword-Pope)*, 294 Mich App 261, 266 (2011) (respondent-mother was convicted of first-degree criminal sexual conduct relating to sexual activity she had with her 14-year-old

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

biological son whom she had given up for adoption at birth, but reconnected with through MySpace).

### a. Evidence Supported Termination Under §19b(3)(b)(*i*)

Termination of the respondent-father's parental rights to his daughter under §19b(3)(b)(*i*) was supported by clear and convincing evidence where "[t]he evidence . . . established that [the father] had [committed] an act of [CSC] involving penetration[]" against her. *In re Schadler*, 315 Mich App 406, 409 (2016) (noting that "medical findings corroborated [the daughter's] statements, and [the father's] explanation of the circumstances was not consistent with the statements or the medical findings").

Termination under §19b(3)(b)(*i*) was supported by clear and convincing evidence where, in a separate proceeding, the respondent-father pled guilty to first-degree criminal sexual misconduct for sexually abusing his stepdaughter, who was the minor children's half-sister. *In re Jenks*, 281 Mich App 514, 517-518 (2008) (stating that the respondent-father's plea constituted sufficient evidence that "a reasonable likelihood [existed] that the minor children would suffer injury or abuse in the foreseeable future if placed in respondent's home").

Termination under §19b(3)(b)(*i*) was supported by clear and convincing evidence where the testimony at trial indicated that the respondent-father had sexually abused his oldest daughter from the age of three, fractured her arm, fractured his son's skull with a blunt object, and that he had locked his twin daughters in a closet for approximately 12 hours without food or water to conceal them from investigators. *In re Vasquez*, 199 Mich App 44, 51-52 (1993).

### b. Evidence Did Not Support Termination Under §19b(3)(b)(*i*)

The trial court clearly erred when it found grounds to terminate respondent's parental rights under MCL 712A.19b(3)(b)(*i*). *In re Pacyga*, ___ Mich App ___, ___ (2026). "[R]espondent was convicted in 2018 of child sexually abusive activity in violation of MCL 750.145c(2), was sentenced to six years in prison, was placed on the sex offender registry, and voluntarily released her

parental rights to [MP, her eldest child, the victim of the abuse, who was an infant at the time]." *Pacyga*, ___ Mich App at ___. In 2024, the DHHS petitioned "the trial court to exercise jurisdiction over [CP, respondent's two-day-old newborn], remove him from respondent's care, and terminate respondent's parental rights." *Id*. at ___. The trial court authorized the petition, placed CP in foster care, denied respondent's motion for supervised parenting time—a petition that was supported by individuals and programs that had been working with respondent, including respondent's mother, who had adopted MP—and ultimately conducted a combined trial on adjudication and termination. *Id*. at ___. In its written opinion terminating respondent's parental rights to CP, the trial court stated that respondent's past sexual abuse of MP "'*alone* [was] a compelling reason to find that another child placed in her care would be at a risk of harm . . . .'" *Id*. at ___. "Under the circumstances of [the] case, this was clear error." *Id*. at ___. "Although respondent's past abuse of MP is disturbing, the trial court was required to assess respondent's (and CP's) *current* situation to determine whether there [was] a *reasonable likelihood* that CP would be harmed in respondent's care." *Id*. at ___. Respondent's abuse of MP occurred eight years before the trial "when respondent was a 19-year-old victim of human trafficking and directed by her own abuser to commit the abusive acts." *Id*. at ___. At the time of the trial, respondent was "far removed from that world, ha[d] successfully engaged in therapy and other relevant programming, ha[d] a support structure, [was] gainfully employed, and by all accounts [was] emerging as something of a success story." *Id*. at ___. "[T]he probative value of respondent's abuse of MP is significantly decreased by the passage of time, change in circumstances, and respondent's rehabilitative progress." *Id*. at ___. Thus, "respondent's past conduct against MP is not, under the circumstances of this case, clear and convincing evidence that there is a reasonable likelihood that CP will be harmed in respondent's care." *Id*. at ___.

Termination under §19b(3)(b)(*i*) was not supported by clear and convincing evidence where although "[t]here was testimony that before the removal of the children, one of the children was sexually abused by the daughter of [the] respondent-mother's girlfriend[,] . . . [the] respondent-mother ended that relationship and moved out of the house before adjudication occurred, which was approximately 18 months before the termination hearing,

and there was no evidence that [the] respondent-mother associated with other known abusers." *In re Laster*, 303 Mich App 485, 492 (2013).

Termination under §19b(3)(b)(*i*) was not supported by clear and convincing evidence where "there was no evidence that the children incurred abuse while in the care of [the] respondent-father." *In re Laster*, 303 Mich App at 492.

## 2. Termination Under §19b(3)(b)(*ii*)

"[§19b(3)(b)(*ii*)] is intended to address the parent who, while not the abuser, failed to protect the child from the other parent or nonparent adult who is an abuser." *In re LaFrance*, 306 Mich App 713, 725 (2014). Thus, §19b(3)(b)(*ii*) is not grounds for termination where the child was injured by the respondent-parent's "negligent failure to respond to an accidental injury or naturally occurring medical condition" when the accidental injury or naturally occurring medical condition was "not caused by an 'act' of a parent or other adult." *In re LaFrance*, 306 Mich App at 724-725 (holding that §19b(3)(b)(*ii*) did not apply where the child's dehydration, resulting kidney failure, and other complications were the result of the respondent-father's "failure to respond" to the child's virus-related symptoms, which were not caused by an act of a parent or other adult).[35] See also *In re Boshell/Shelton*, ___ Mich App ___, ___ (2025), quoting *In re LaFrance*, 306 Mich App at 725: "The harm contemplated by MCL 712A.19b(3)(b)(*ii*) 'must be caused by a parent's act or a nonparent adult's act and not merely contributed to by an unintentional omission.'" Therefore, it was error to terminate respondent's parental rights in part under §19b(3)(b)(*ii*) for her failure to discover the living conditions and severe abuse of another child residing in the household where one of respondent's daughters lived with the girl's father along with her father's partner's children. *Boshell/Shelton*, ___ Mich App at ___ ("[T]here was no evidence that respondent deserted her children or failed to protect them[.]").

Where a case involves termination of a parent's parental rights under §19b(3)(b)(*ii*) to multiple children, the statute "d[oes] not require that there be clear and convincing evidence that the children [are] at risk from the same abuser[; r]ather, [§19b(3)(b)(*ii*)] addresses the harm occasioned by a parent who

[35] The Court also noted that "medical neglect may constitute statutory grounds for termination" under other provisions of MCL 712A.19b(3). *In re LaFrance*, 306 Mich App at 726.

is unwilling or unable to protect his or her children from abuse." *In re Gonzales/Martinez*, 310 Mich App 426, 432 (2015).

### a. Evidence Supported Termination Under §19b(3)(b)(*ii*)

Termination under §19b(3)(b)(*ii*) was supported by clear and convincing evidence where "[the] respondent[-mother] did not believe her children's revelations about [her boyfriend abusing them despite there being evidence supporting] the abuse, . . . [the] respondent[-mother] 'did nothing to stop' the abuse after [one of her] child[ren] told [her] about it[, and] . . . [the] respondent[-mother] had the opportunity to prevent the abuse, but failed to do so." *In re Gonzales/Martinez*, 310 Mich App 426, 431-432 (2015). "Th[is] evidence established that [the] respondent[-mother] placed her desire to be with her boyfriend–despite his abuse–over the needs of her children, and there was evidence that she would likely continue placing her personal desires over her children's welfare." *Id*. at 432.

Termination under §19b(3)(b)(*ii*) was supported by clear and convincing evidence where the respondent-mother failed to stop the respondent-father from physically harming their child, Andrew, when he hit Andrew's finger with a hammer and tied him to a chair in her presence; although the respondent-mother filed for a personal protection order and divorced the respondent-father, she continued to place her children in danger by associating with known sex offenders, leaving her children with them, and allowing one of the sex offenders to live with her. *In re Archer*, 277 Mich App 71, 74-75 (2007).

Termination under §19b(3)(b)(*ii*) was supported by clear and convincing evidence where the respondent-mother continued to allow her children to stay at the home of an adult acquaintance known as "Uncle Lenny" after her children reported that he was sexually abusing them. *In re Brown/Kindle/Muhammad*, 305 Mich App 623, 636-637 (2014). The respondent-mother confronted "Uncle Lenny," who was a friend of a friend and whose full name and address she did not know, about the alleged abuse; however, "Uncle Lenny" denied abusing the children, and the respondent-mother continued to allow the children to stay with him despite disclosures about the abuse from all three of her children. *Id.* at 636. The Court

noted that it was clear that the respondent-mother "was in a position to prevent the abuse and failed to do so and that the children would have been at risk of harm in her care, justifying termination under [§19b(3)(b)(*ii*)]."

### b. Evidence Did Not Support Termination Under §19b(3)(b)(*ii*)

Termination of the respondent-mother's parental rights under §19b(3)(b)(*ii*) was not supported by clear and convincing evidence where she ended her relationship with the abusive respondent-father approximately 18 months before the termination hearing, and although her new boyfriend was abusive, her children were not present when the boyfriend assaulted her, the boyfriend did not have a history of abusive behavior, and he was attending violence counseling.[36] *In re Sours,* 459 Mich 624, 634-636 (1999) (stating that these facts did not support a finding that it was reasonably likely the children would be harmed in the foreseeable future if placed in the respondent-mother's home, as required by §19b(3)(b)(*ii*)]).

The trial court clearly erred by finding that respondent's "willful ignorance" and "failure to follow up on" several "red flags" in the case supported terminating her parental rights to her six children under MCL 712A.19b(3)(b)(*ii*). *In re Boshell/Shelton*, ___ Mich App ___, ___ (2025). The trial court's finding that respondent failed to investigate the abusive conditions at her three daughter's father's home—where one daughter lived—was unsupported by the record, which reflected that respondent reported her suspicions "that [her girls' father] had hit [the daughter who lived with him] with a stroller, that [she] was not in school, and that [she] was underfed." *Id*. at ___. Additionally, the record did not support a finding that respondent's three sons—who had a different father than her daughters and never visited the girls' father's home—were reasonably likely to "'suffer injury or abuse in the foreseeable future if placed in the [respondent's] home.'" *Id*. at ___, quoting MCL 712A.19b(3)(b)(*ii*).

## 3. Termination Under §19b(3)(b)(*iii*)

Termination under §19b(3)(b)(*iii*) was supported by clear and convincing evidence where the respondent-mother continued

[36] The respondent-mother's parental rights were terminated, however, under §19b(3)(c)(*ii*) (failure to rectify conditions following court's assumption of jurisdiction). *In re Sours*, 459 Mich 624, 637-641 (1999).

to allow her children to stay at the home of an adult acquaintance known as "Uncle Lenny" after her children reported that he was sexually abusing them. *In re Brown/Kindle/Muhammad*, 305 Mich App 623, 636-637 (2014). The respondent-mother confronted "Uncle Lenny," who was a friend of a friend and whose full name and address she did not know, about the abuse. *Id.* at 636. However, "Uncle Lenny" denied abusing the children, and the respondent-mother continued to allow the children to stay with him despite disclosures about the abuse from all three of her children. *Id*. The Court noted that it was clear that the respondent-mother "was in a position to prevent the abuse and failed to do so." *Id*.

## C. Termination on Grounds of Failure to Rectify Conditions Following Court's Assumption of Jurisdiction–§19b(3)(c)

Under MCL 712A.19b(3)(c), the court may terminate a parent's parental rights if it finds that "[t]he parent was a respondent in a proceeding brought under [the Juvenile Code], 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
>
> (*ii*) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age."

### 1. Termination Under §19b(3)(c)(*i*)

#### a. Evidence Supported Termination Under §19b(3)(c)(*i*)

Termination under §19b(3)(c)(*i*) supported the Court of Appeals conclusion that "the trial court did not clearly err in finding that petitioner made reasonable efforts to reunify respondent-father with his child." *In re A Atchley*,

342 Mich App 332, 341 (2022). Respondent-father asserted that fixing his phone and transportation problems would have allowed him to "better participate in the services offered." *Id*. at 339. The evidence related to the respondent-father was contradictory—he "frequently complained about his telephone [but] never asked for assistance in obtaining a phone." *Id*. Despite the respondent-father's phone problems, the caseworker "nevertheless communicated frequently with him both in person and via text messages." *Id*. "Further, the record reflect[ed] that respondent-father's phone issues were not so significant as to prevent him from frequently participating in court proceedings using Zoom, a video conferencing app." *Id*. "Respondent-father missed multiple visits [with his child], seemingly without regard to whether they were in-person or over Zoom." *Id*. at 340. The petitioner made repeated accommodations in response to respondent-father's requests. *Id*. at 340-341. Respondent-father did not cooperate with the substance-abuse or domestic-violence providers—"he continued to miss drug screens and to test positive for amphetamines and methamphetamines, and THC." *Id*. In addition, respondent-father failed to engage with services or respond to referrals aimed at addressing domestic violence. *Id*. Respondent-father's parental rights were properly terminated under MCL 712A.19b(3)(c)(*i*), because no evidence indicated that he could, within a reasonable time given the child's age, be able to rectify the conditions that resulted in the child's removal. *Atchley*, 342 Mich App at 344. See also *In re K D Simpson*, ___ Mich App ___, ___ (2024), citing *In re Atchley*, 342 Mich App at 344: "Another major obstacle for respondent-father [that supported termination under MCL 712A.19b(3)(c)(*i*)] was the fact that his drug screens continuously tested positive for cocaine and other substances, although he continued to deny drug use." "Considering respondent-father's failure to rectify his substance-use issue and his housing situation throughout the duration of the proceedings, the trial court did not clearly err by finding that there was no reasonable likelihood that respondent-father would rectify these barriers [to reunification] within a reasonable time." *K D Simpson*, ___ Mich App at ___, citing MCL 712A.19b(3)(c)(*i*).

In *Atchley*, termination of parental rights was appropriate where respondent-mother argued that the COVID-19 pandemic required that reasonable efforts be "more extensive than what might normally be required" and

"that the 'standard amount of time' was inadequate to provide her with a 'true opportunity for reunification.'" *Id*. at 341. "However, she [did] not identify what additional services should have been provided or detail how the services provided throughout the case were inadequate." *Id*. Respondent-mother claimed she needed more time but did not produce "any evidence indicating that the trial court erred by finding that she would be unable to rectify the conditions leading to adjudication within a reasonable time considering the age of her child." *Id*. at 341-342. Further, respondent-mother "completed a substance-abuse assessment, but did not follow through with the recommendations." *Id*. at 342. "She did not follow through with referrals for mental-health counseling" and failed to attend any sessions when she did schedule them. *Id*. at ___. Respondent-mother failed to comply with the drug-screening, "tested positive, missed drug screens, or refused to submit to the screens." *Id*. According to the Court, "even in light of the pandemic, [it discerned] no clear error in the trial court's finding that petitioner made reasonable efforts to reunify respondent-mother with the child." *Id*. at 342-343. "[D]espite being provided with services that specifically accounted for the pandemic—including mobile drug screening and telehealth visits—respondent-mother had made virtually no progress toward reunification." *Id*. at 345. Evidence indicated that there was no reasonable likelihood that respondent-mother could rectify the conditions resulting in the child's removal. *Id*.

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence "that respondent could not provide proper supervision to the children and would not be able to do so within a reasonable time given the children's ages." *In re Jackisch*, 340 Mich App 326, 337 (2022).[37] In *Jackisch*, the Court detailed the respondent's "poor prognosis for ever becoming an independent parent." *Id*. at 337. The Court noted that respondent struggled (1) "to properly supervise the children during

[37]Petitioner cited MCL 712A.19b(3)(c)(*i*), (3)(g), and (3)(j) as factors supporting the termination of respondent's parental rights. *In re Jackisch*, 340 Mich App 326, 335 (2022). It is not entirely clear on which statutory factor the Court of Appeals relied to affirm the termination of respondent's parental rights. The last sentence of the opinion, immediately before the Court stated its decision, indicates that the Court affirmed the trial court on at least one ground and then explained that "[b]ecause termination of parental rights must be supported by at least one statutory ground, [the Court of Appeals] need not address the additional grounds for termination." *Id*. at 338. The circumstances and evidence the Court of Appeals recited in its opinion supported termination of respondent's parental rights MCL 712A.19b(3)(c)(*i*), and thus, the opinion was placed in this section of the benchbook.

parenting time," (2) "to handle multiple children at once," (3) "to engage with [her children] during visits," frequently ignoring one child when focused on another child, (4) to show that she benefited from more than three years of services, (5) to provide proper discipline and instead initiated inappropriate discipline that increased "the children's behavioral problems," (6) "to understand the children's emotional cues," (7) "to follow through with the direction of therapists regarding [one child's] care," and (8) to acknowledge the severity of one child's behavior. *Id*. at 336, 337. In addition, respondent supplied the children with inappropriate sweets, which was contrary to one child's dental problems, neglected one child's medical needs, initially failed to show up for mental health counseling, and sometimes failed to refill her mental health prescriptions. *Id*. at 330, 331. "Overall, respondent showed a consistent pattern of failing to understand, appreciate, and respond appropriately to the medical and mental health needs of herself and her children." *Id*. at 337-338.

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where "[r]espondent[-mother] had made little, if any, progress in addressing the main reasons the court took jurisdiction over the child"; "[t]here [were] numerous references to respondent's having been told multiple times by the court, the agency and the [Guardian Ad-Litem (GAL)] that neither she nor her child were to associate with [the minor child's alleged biological father]," and "[d]espite respondent's denials, substantial evidence was presented that respondent had continued to voluntarily associate with [the minor child's alleged biological father] and had allowed the child to be around him"; respondent's therapist "testified that [respondent] continued to lack insight, . . . was unable or unwilling to take responsibility for her actions, . . . show[ed] an increase in her rage and inability to control herself[, and] . . . opined that respondent's continued poor decisions in choosing relationships with abusive men presented a risk to the child's safety[; and r]espondent's caseworker expressed these same concerns, and noted that respondent had obtained a second psychological evaluation, which indicated that she was likely to have problems with anger management, impulsiveness, and acting out." I*n re Kaczkowski*, 325 Mich App 69, 76-79 (2018).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the respondent-mother "made minimal progress" toward rectifying the conditions that led to her child's removal when she failed to seek employment and instead "provided a number of excuses as to why she could not work, . . . did not provide petitioner with any documentation of her job search," "belie[ved] that she did not need to work," and had no intentions of working; she failed to seek suitable housing and instead moved into an apartment that did not have handicap-accessible ramps to accommodate her handicap child and refused petitioner's offer to help find suitable housing; she "failed to address the main barriers that her mental health posed to the child's care" when she "met with a number of therapists over the course of the case, but failed to provide the caseworker with a release for her most current mental-health provider so that petitioner could track her progress, . . . there [was] no indication that respondent benefited from any of these services, . . . [she] refused to address the issues that caused [her child's] removal, and continued to act with hostility toward the child's medical providers and foster parents" (hostility that resulted in an altercation in the hospital and a suspension of her parenting time); and she failed to show any "progress toward demonstrating her ability to care for the child's extensive medical needs" when she "missed 30 of the child's 62 scheduled doctor appointments, surgeries, or other procedures and [she] continued to be confrontational with medical personnel and their treatment recommendations," and admitted to having "inadequate training regarding the minor child's feeding tube." *In re Smith*, 324 Mich App 28, 47-49 (2018).[38]

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where although the respondent-mother "made significant progress with the parenting aspect of her service plan[,]" her psychological evaluation indicated that she was "emotionally immature and likely to engage in relationships with exploitive men who would put her children at a risk of harm[,]" to which her oldest daughter "was particularly vulnerable to abuse and harm because of her autism[,]" and "[d]uring the

[38] Noting that the respondent-mother's appeal of the trial court's order terminating her parental rights was not moot despite the death of the minor child "because the trial court's termination of respondent's parental rights may have collateral legal consequences for respondent." *In re Smith,* 324 Mich App 28, 42 (2018).

two-year pendency of this case, [she] continued to invite men into her home[, one of which] had a criminal background[, and] the other only left [her home] after the police were called." *In re White*, 303 Mich App 701, 712 (2014). See also *In re K D Simpson*, ___ Mich App at ___, quoting *In re White*, 303 Mich App at 710: "'[Statutory ground under MCL 712A.19b(3)(c)(*i*)] exists when the conditions that brought the child into foster care continue to exist despite time to make changes and the opportunity to take advantage of a variety of services[.]'" (Alteration in original.) The trial court did not clearly err when it terminated respondent-father's parental rights under MCL 712A.19b(3)(c)(*i*) where more than 182 days had passed between the initial disposition order and the termination order, respondent-father had declined DHHS resources to help him find appropriate housing, and "continuously tested positive for cocaine and other substances" although he denied drug use, which hindered his substance-abuse treatment. *In re K D Simpson*,___ Mich App at ___.

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where "[i]n the approximately two years that the children were in the court's temporary custody, [the] respondent-mother failed to obtain suitable housing[,] . . . she provided multiple false addresses to the agency[,] . . . there was evidence [during the termination hearing] that [she] was living in a shelter[, and a]lthough she testified that she would be obtaining a three-bedroom home once she received an income tax refund, given her inability to obtain suitable housing during the duration of the reunification plan, there [was] no indication that this would occur within a reasonable time." *In re Laster*, 303 Mich App 485, 493 (2013).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where "[the] respondent-father had not provided for the children and there was no evidence that he had obtained suitable housing, considering he twice failed to participate in [a court-ordered] assessment of the suitability of his home," despite receiving ample notification of the visits. *In re Laster*, 303 Mich App at 493.

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where "[the] respondent[-parents] failed to comply or benefit sufficiently from their participation in services in accordance with the court-ordered treatment plans" when the respondent-mother,

"[a]fter completing a 30-day inpatient substance abuse program, . . . experienced a relapse in her drug use[,]" she was "arrested three times on charges of retail fraud and home invasion[,]" and she "admitted that her participation in the home invasion was based on her intention to steal prescription drugs[;]" "[the] respondent[-]father was incarcerated for one-half of the time th[e] case remained open[;]" both respondent-parents "missed numerous drug screens," and "[a]t the time of the final hearing, neither [respondent-]parent was physically available to care for the child[;]" and "the trial court was legitimately concerned with the ability of [the] respondent[-parents] to remain clean, sober, and out of prison for sufficient blocks of time in order to be available to provide adequate care for their minor child." *In re Frey*, 297 Mich App 242, 244-245 (2012) ("[t]he primary condition leading to the adjudication in this matter was [the] respondent[-parents'] failure to resolve issues pertaining to [the] respondent[-father's] alcohol abuse and [the] respondent[-mother's] substance abuse[, and] . . . during the pendency of the proceedings, issues came to light pertaining to [the] respondent[-parents'] inability to provide adequate housing and financial support for the minor child, and that [the] respondent[-parents] were involved in criminal activity"). See also *In re K D Simpson*, ___ Mich App at ___ (the trial court did not clearly err when it found that respondent-father would not be able to "provide[ the child] with a safe, stable, and permanent home if returned to respondent-father's care," and consequently terminated respondent-father's parental rights under MCL 712A.19b(3)(c)(*i*)), citing *In re Frey*, 297 Mich App at 248-249.

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where despite the respondent-mother's efforts to treat her longstanding drug addictions, she continued to battle them, she was not able to complete a drug treatment program, she was unemployed and lacked housing, "she would require a lengthy period of assessment, counseling, and supervision before reunification with her child could be considered[, and] . . . the two years [the child] already had spent in foster care, her entire life, constituted too long a period to await the mere possibility of a radical change in respondent[-]mother's life."]" *In re Williams*, 286 Mich App 253, 272-273 (2009) (conditions leading to adjudication were respondent-mother's longstanding drug addiction, repeated failure to complete drug

treatment program, and failure to provide adequate housing or find employment).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the respondent-father failed to follow the parent-agency agreement of submitting to regular alcohol screens and continued to drink, the children's school attendance was still an issue, neither respondent-parent was able to adequately manage resources, and the respondent-parents only showed a slight benefit from ten years of services, including intensive services provided before this case began. *In re Foster (Tommy)*, 285 Mich App 630, 631-633 (2009) (conditions leading to adjudication were the underlying conditions "surrounding the temporary wardship over [the child's] older siblings[;]" "[t]he underlying conditions included respondent[-]father's drinking, the children's poor school attendance, and respondent[-parents'] inability to manage their household and finances despite receiving extensive services, which resulted in two evictions and a recurring lack of food).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the respondent-mother had not made progress toward finding adequate housing for the children and she was not likely to do so in the foreseeable future; she continued to miss drug screens despite the court's warnings, which had resulted in the suspension of her visitation with the children; and even if she had been afforded an extended period of time to rectify the conditions, as might be necessary with the older children, there was not a reasonable likelihood that she would have been able to do so within a reasonable time. *In re LE*, 278 Mich App 1, 27-28 (2008) (as related to §19b(3)(c)(*i*), conditions leading to adjudication were respondent-mother's failure to provide adequate housing or employment, and her longstanding substance abuse problem).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the respondent-mother did not demonstrate that she could provide adequate housing, missed roughly half of the scheduled visitations, continued an abusive relationship, and did not undergo counseling. *In re AH*, 245 Mich App 77, 87-88 (2001) (conditions leading to adjudication were previous child protection petitions filed with respect to respondent-mother's other children, respondent-mother's arrests for

domestic violence, respondent-mother's relationship with a man who had substance abuse issues and was listed as a perpetrator of child abuse or neglect, and respondent-mother's history of mental illness combined with her failure to take appropriate medication).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the respondent-mother failed to find and maintain suitable housing for her three children and failed to establish a custodial plan for the children before the "best interests phase" of the termination hearing. *In re Trejo*, 462 Mich 341, 357-360 (2000) (conditions leading to adjudication were respondent-mother's failure to provide adequate housing and care for her children).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the respondent-mother failed to find *adequate* housing for her children, failed to provide numerous drug screens, had a continuing pattern of missing drug treatment therapy sessions, and relapsed while her children were under the court's jurisdiction, and where two years elapsed between the filing of the supplemental petition and the termination hearing. *In re Powers*, 244 Mich App 111, 118-119 (2000) (conditions leading to adjudication were respondent-mother's failure to provide adequate housing for her children and her alcohol and drug abuse).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the respondent-mother's alcoholism left her unable to care for her two sons, one of whom suffered from fetal alcohol syndrome, and although she attended (but did not complete) inpatient treatment programs and participated in counseling, the respondent-mother continued to drink while her children were under the court's jurisdiction. *In re Conley*, 216 Mich App 41, 43-44 (1996) (condition leading to adjudication was respondent-mother's alcohol addiction).

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the respondent-mother's "incarceration[] continued to exist and there was no reasonable likelihood that the condition could be rectified within a reasonable time." *In re McIntyre*, 192 Mich App 47, 51 (1991) (condition leading to adjudication was respondent-mother's extended incarceration). The Court also found that the respondent-mother's planned placement of the child with a relative was inappropriate,

and termination was proper "because permanent custody was in the best interest of the children[.]" *In re McIntyre, supra* at 52.

Termination under §19b(3)(c)(*i*) was supported by clear and convincing evidence where the two-to-three-year time period necessary for the respondent-mother's rehabilitation was unreasonable given the ages and "pervasive behavior disorders" of the children: "two of the children would frequently act like wild dogs, barking incessantly and eating off their plates without using utensils[,] [t]he youngest child demonstrated signs of impaired socialization, indicating an impoverished home environment, and the oldest demonstrated behavior indicative of sexual abuse." *In re Dahms,* 187 Mich App 644, 646-648 (1991) (respondent-mother claimed she was denied "reasonable time" within which to rectify the conditions leading to adjudication, as required by §19b(3)(c)(*i*)).

Termination under §19b(3)(c)(*i*) of the respondent-father's parental rights to his youngest child was supported by clear and convincing evidence where the respondent-father admittedly failed to "notice something amiss with, or otherwise attend to, his youngest child as she went several hours without taking nourishment or fluid[,]" which resulted in a life-threatening condition due to dehydration, the respondent-father had persistent substance-abuse problems, and the respondent-father failed to "participate in, or benefit from, services relat[ed] to caring for a child with cerebral palsy, or to attend most of that child's medical appointments[,]" all of which heightened concerns that the medical neglect could recur. *In re LaFrance*, 306 Mich App 713, 728-729 (2014)

Termination under §19b(3)(c)(*i*) of the respondent-mother's parental rights to her youngest child was supported by clear and convincing evidence where she tested positive for methadone and THC during her pregnancy with that child, admitted using opiates for years, demonstrated behavior while in the hospital for the delivery that caused medical staff to question her ability to care for a newborn, and "even after the infant's cerebral palsy diagnosis, [the] respondent-mother failed to attend virtually all of the dozens of medical appointments for the baby, failed to attend programs intended to educate her about that condition, and refused to sign paperwork to facilitate the child[] receiving physical therapy." *In re LaFrance*, 306 Mich App at 729. "[T]he failure to

participate in services directly linked to the ability to care for a special needs, or medically fragile, child bears directly on issues of neglect." *Id.* at 729-730.

### b. Evidence Did Not Support Termination Under §19b(3)(c)(*i*)

The trial court erred by terminating respondent-mother's parental rights under MCL 712A.19b(3)(c)(*i*) when the evidence supported that respondent had made improvements in all the areas upon which the court's jurisdiction was based. *In re K M Brown*, ___ Mich App ___, ___ (2025). The DHHS petitioned to remove respondent-mother's child from her care after the child tested positive for THC at birth in 2020. *Id*. at ___.[39] A month after the child's birth, respondent-mother stabbed respondent-father[40] in the hand while they were both intoxicated. *Id*. at ___. Consequently, the court took jurisdiction over the infant and both respondents in 2020 based on substance use and mutual domestic violence. *Id*. at ___. However, by the termination hearing in 2024, respondent-mother was at least partially compliant with all aspects of the case service plan related to the court's initial bases for jurisdiction. *Id*. at ___. Regarding her substance use, respondent-mother had missed some drug screens due to her work schedule, and continued to test positive for THC, but the foster care worker testified the THC use did not negatively affect respondent-mother's parenting and there was no concern that she was using illegal substances. *Id*. at ___. As to the domestic violence, respondent-mother's counselor recommended ending counseling "because she was not concerned with respondent-mother relapsing or engaging in domestic violence." *Id*. at ___. "And as for any domestic abuse against respondent-mother, such incidents alone are not proper grounds for termination." *Id*. at ___. For these reasons, "the trial court clearly erred by finding that there were grounds to terminate respondent-mother's parental rights under MCL 712A.19b(3)(c)(*i*)." *Brown*. ___ Mich App at ___.

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[39]"[R]espondent-mother reported a history of heroin addiction, although she had been clean for over three years." *Brown*, ___ Mich App at ___.

[40]Respondent-mother was married to another man when the child was born. *Brown*, ___ Mich App at ___. Paternity for respondent-father was established, and the court assumed jurisdiction over him as well. *Id*. at __. Respondent-father's parental rights were terminated, and he did not appeal. *Id*. at ___ n 1.

Termination of the respondent-mother's parental rights under §19b(3)(c)(*i*) was not supported by clear and convincing evidence where "[t]he conditions that led to mother's adjudication was her use of marijuana during her pregnancy," but "by the termination hearing, there was no evidence that mother's use of medical marijuana was having any negative effect on her ability to parent or causing any risk of harm to [the child]."[41] *In re Richardson*, 329 Mich App 232, 252 (2019). "The concerns expressed in the proceedings . . . were based more on the referee's speculation that mother's use of medical marijuana *might* lead to creating a harmful environment for [the child] even though the overwhelming evidence related to mother's current medical marijuana use and parenting skills indicated just the opposite. . . . There must be facts within the record demonstrating that the parent's acts are actually harming or presenting an articulable risk of harm to the child, and the trial court cannot simply presume a risk of harm from its own prior experiences or personal disapproval of a parent's choices. . . . Rather, in this case, the record reveal[ed] that the referee essentially placed the burden on mother to demonstrate her fitness as a parent and her ability to provide proper care and custody, which is an unconstitutional means of deciding whether to terminate parental rights." *Richardson*, 329 Mich App at 254-255.

There was not clear and convincing evidence under §19b(3)(c)(*i*) "that father was harming or presenting an articulable risk of harm to [the child], either based on his own actions or based on his plan of relying on [the child's] mother to care for the child in their joint home while he worked." *Richardson*, 329 Mich App at 257. The father's parental rights were "terminated essentially because of mother's medical marijuana use[, but] . . . there was no evidence to suggest that [the child's] mother presented a current risk of harm to the child despite her use of medical marijuana." *Id*. at 256. In addition, "the referee appeared to fault father for the nature of his work schedule and how it interfered with his ability to

[41] "[I]t is not the mere undesirable acts (presuming, of course, that use of a prescribed medicine constituted an undesirable act) of the parents alone that justifies the state in terminating parental rights; there must be some showing of harm or actual risk of harm to the child that results from the parents' acts." *Richardson*, 329 Mich App at 253. See also, the Michigan Medical Marihuana Act (MMMA), MCL 333.26424(d), and the Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27955(3), which prohibit a person from being denied custody or visitation with a minor child for acting in accordance with the MMMA and MRTMA ***unless*** the person's behavior "creates an unreasonable danger to the minor that can be clearly articulated and substantiated."

participate in various services[, but] . . . [f]ather testified that he was concerned about keeping his job, which 'looked very good for [his] parole officer' and would allow him to remain out of prison, . . . [that] he would be laid off for a period of time in the winter, during which time he could participate in more services[, and] . . . there was evidence that father had shown improvement in his parenting skills during his parenting time visits . . . following his release [from incarceration]." *Id*. at 256. The referee supported his decision by referencing to drug tests for father that were positive for marijuana and cocaine[, b]ut father denied using these drugs, testified about the loose adherence to procedures at the drug-testing facility, and testified that he had [] to complete drug screens as part of his parole and did not have any parole violations." *Id.* at 257.

Termination of the respondent-father's parental rights under §19b(3)(c)(*i*) was not supported by clear and convincing evidence because his "incarceration alone [was] not a sufficient reason for termination of parental rights[]" where he provided proper care and custody through the child's placement with the child's grandmother (she having acted as the child's caregiver since birth) during his incarceration ("petitioner[-DHHS] improperly determined that the grandmother's criminal history barred her outright from [becoming a licensed foster care provider]");[42] and the respondent-father although "unable to make significant progress on his case service plan while incarcerated[,]" demonstrated that he "did participate in services meaningfully while he was not incarcerated." *In re Pops*, 315 Mich App, 590, 598, 599 (2016) (emphasis added).

Termination of the respondent-mother's parental rights under §19b(3)(c)(*i*) was not supported by clear and convincing evidence where the condition that led to adjudication—the father's abuse and the respondent-mother's failure to protect the children from it—did not exist 182 days or more after the initial dispositional hearing. *In re Sours,* 459 Mich 624, 636-637 (1999) (the respondent-mother took steps to protect her children from the abuse by ending her relationship with the

[42] See *In re Mason*, 486 Mich 142, 161 n 11 (2010) (permitting an incarcerated parent to achieve proper care and custody through placement with a relative). See also *In re Dixon (On Reconsideration)*, 347 Mich App 337, 362 (2023) (incarceration alone is not an aggravated circumstance excusing the DHHS from making reasonable efforts at reunification with a child's incarcerated parent).

abusive father approximately 18 months before the termination hearing).[43]

Termination under §19b(3)(c)(*i*) was not supported by clear and convincing evidence where the DHHS never gave the respondent-parents adequate instruction on how to maintain a clean home. *In re Newman,* 189 Mich App 61, 65-71 (1991) (as related to §19b[3][c][*i*], conditions leading to adjudication were heating the home with an inappropriate device, the home was unsanitary, and the children were dirty, hungry, and had lice).

Termination under §19b(3)(c)(*i*) of the respondent-parents' parental rights to their three older children was not supported by clear and convincing evidence where, although the respondent-parents failed to "gain control over their substance-abuse habits[,]" there was no evidence "that either respondent[-parent] had ever abused or neglected any of their three older children." *In re LaFrance*, 306 Mich App 713, 730 (2014). Although the court did not clearly err by terminating the respondent parents' respective parental rights to the older children's younger sibling, the doctrine of anticipatory neglect did not apply in relation to whether their parental rights to the older children should also be terminated because the older children did not require special medical care like their younger sibling, the respondent-parents cared for the older children from birth without incident, the only allegation of neglect and abuse related to the youngest child, and "drug use alone, in the absence of any connection to abuse or neglect, cannot justify termination solely through operation of the doctrine of anticipatory neglect." *Id*. at 730-731.

## 2. Termination Under §19b(3)(c)(*ii*)

### a. Evidence Supported Termination Under §19b(3)(c)(*ii*)

Clear and convincing evidence supported termination of respondent-mother's parental rights under §19b(3)(c)(*ii*) because "it became evident that [respondent-]mother lacked the requisite parenting skills and emotional stability to care for the child, who had several medical conditions that required particular care." *In re Sanborn*,

[43] The respondent-mother's parental rights were terminated, however, under §19b(3)(c)(*ii*) (failure to rectify conditions following court's assumption of jurisdiction). *In re Sours*, 459 Mich 624, 637-641 (1999).

337 Mich App 252, 273 (2021). The respondent-mother "admitted that she was homeless and that her homelessness affected her ability to care for the child[.]" *Id*. at 274. The respondent-mother had been offered services by the DHHS and had been given a reasonable opportunity to rectify the conditions, i.e., improve her parenting skills and emotional stability, and had failed to do so. *Id*. Although the respondent-mother consistently participated in the services, she was unable to demonstrate sufficient benefits as a result of her participation. *Id*. The trial court did not err when it concluded that the respondent-mother was unlikely to rectify the issues within a reasonable time given the child's age. *Id*. at 274-275.

Termination under §19b(3)(c)(*ii*) was appropriate because clear and convincing evidence showed that the minor children would suffer emotional harm if returned to respondents, and according to uncontroverted expert testimony, that any child in respondents' care would suffer "'a very high, long-term chronic risk for neglect[.]'" *In re Pederson*, 331 Mich App 445, 457-458, 474 (2020) (alteration in original). In addition, evidence established that respondents' prognoses were poor even with treatment, they were unable to work, they had tens of thousands of dollars in outstanding debts, they were frequently incarcerated and fined for a variety of petty crimes, and they were repeatedly unable to accept responsibility for their actions. *Id*. at 474. All of these issues were "conditions 'other' than those that led to adjudication because respondents made no admissions concerning those conditions in their jurisdictional plea." *Id*. at 475. While respondents were given an opportunity to rectify these conditions, they failed to do so. *Id*. This fact combined with the children's ages and the expert's testimony that "it would take respondents years to address their psychological issues under optimal circumstances," supported a conclusion "that there was no reasonable likelihood that respondents would be able to rectify these conditions within a reasonable time[.]" *Id*. at 473, 474.

Termination under §19b(3)(c)(*ii*) was supported by clear and convincing evidence where the respondent-mother "had been given notice, repeatedly, of the programs she would have to participate in and the changes that she would have to make in order to have her children returned[,]" but the respondent-mother instead after her

first five children were removed and a sixth child was born, neglected the sixth child by "fail[ing] to keep a medical appointment, utiliz[ing] the services of a home-care nurse, and properly medicat[ing] the [sixth] child or us[ing] the required apnea monitor[ when] [s]he hid the sickly child under a blanket for fifteen minutes without the apnea monitor attached[, and] [m]ost significantly, after the removal of her [sixth child], she admitted not making any contact with her children, the [DHHS], or the court [for approximately four months], and stated that she 'turned to alcohol' during this period."[44] *In re Sours,* 459 Mich 624, 637-640 (1999).

### b. Evidence Did Not Support Termination Under §19b(3)(c)(*ii*)

Termination was not supported by clear and convincing evidence where there was insufficient evidence to establish as the "other condition" under §19b(3)(c)(*ii*) a lack of bonding or attachment between the respondent-mother and the child following the child's placement in foster care. *In re JK,* 468 Mich 202, 211-212 (2003). The trial court erroneously relied on a single therapist's minimal observation of the respondent-mother's and the child's interaction over a "fully knowledgeable staff of persons[45] who had worked directly with the respondent[-mother] over an extended period[.]" *In re JK, supra* at 211-212. In addition, the respondent-mother was not given "'a reasonable opportunity' to rectify the alleged bonding and attachment issue" where "the trial court ignored the fact that, immediately after the [DHHS] filed the petition for termination of parental rights, visitation was automatically suspended for several

[44] The original and an amended petition alleged the respondent-father's physical abuse and the respondent-mother's failure to protect the children from the father's abuse, after which the mother and father separated. *In re Sours*, 459 Mich 624, 625-626 (1999) (the amended petition also sought removal of the children). After the respondent-mother's first five children were removed from her home, a second amended petition alleged that two children had severe diaper rash, one child was malnourished, and the mother had packed insufficient clothing and provided inappropriate snacks for the children upon their removal by the DHHS. *Id.* at 626-627. Upon the birth of a sixth child, the DHHS filed a petition alleging that the respondent-mother "failed to keep the [sixth] child on [an] apnea monitor [as instructed], that she missed a scheduled doctor's appointment for him, and that she failed to give the child proper medication or allow home visits from the nurse assigned to care for the child." *Id.* at 628-629.

[45] "The respondent[-mother's] therapist met with her weekly[, and] [a]fter ample opportunity to observe the respondent[-mother] and the child interact, she opined that they were adequately bonded[;] . . . [t]he respondent[-mother's] supervisor in the independent-living program also found the respondent[-mother's] interaction with the child to be appropriate[;] [t]he psychologist who conducted the respondent[-mother's] court-ordered evaluation found nothing in her psychological makeup that prevented her from appropriately parenting her child." *In re JK*, 468 Mich 202, 212 (2003).

> months pursuant to MCL 712A.19b(4)[, and t]he [respondent-mother's] counselor was then notified only two months before trial to address the bonding and attachment issue with the respondent[-mother]." *In re JK, supra* at 212-213.

## D. Termination on Grounds of Substantial Failure to Comply With Limited Guardianship Placement Plan–§19b(3)(d)

Under MCL 712A.19b(3)(d), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he child's parent has placed the child in a limited guardianship under . . . MCL 700.5205, and has substantially failed, without good cause, to comply with a limited guardianship placement plan described in . . . MCL 700.5205, regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship."[46]

A respondent meets the "good cause" requirement when he or she can show "'a legally sufficient or substantial reason'" for his or her noncompliance with the limited guardianship placement plan. *In re Utrera*, 281 Mich App 1, 10-11, 22 (2008). "Termination is therefore appropriate pursuant to MCL 712A.19b(3)(d) if a respondent fails to substantially comply with a limited guardianship plan without a 'legally sufficient or substantial reason,' and this noncompliance results in a disruption of the parent-child relationship." *In re Utrera, supra* at 22. In *In re Utrera*, *supra* at 22-24, the respondent-mother asserted that her mental illness constituted good cause for her failure to comply with the limited guardianship placement plan. The Court of Appeals held that "[b]ecause respondent[-mother's] asserted cause for noncompliance with the transition plan, i.e., her mental illness, is the very condition that impairs her ability to care for the child, it cannot constitute a legally sufficient or substantial reason[,]" and without a showing of good cause, clear and convincing evidence supported termination of the respondent-mother's parental rights under §19b(3)(d) where the respondent-mother's failure to comply with the limited guardianship plan resulted in an eight-month gap in visitation. *In re Utrera*, 281 Mich App at 22-24.

[46] See Section 4.6 for a detailed discussion of the court's ability to take jurisdiction when a parent fails to comply with a limited guardianship placement plan under MCL 712A.2(b)(4).

## E. Termination on Grounds of Substantial Failure to Comply With Court-Structured Guardianship Placement Plan–§19b(3)(e)

Under MCL 712A.19b(3)(e), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he child has a guardian under . . . MCL 700.1101 to [MCL] 700.8206, and the parent has substantially failed, without good cause, to comply with a court-structured plan described in . . . MCL 700.5207 and [MCL] 700.5209, regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship."[47]

## F. Termination on Grounds of Parent's Failure to Support, Visit, Contact, and Communicate With Child Who Has Guardian–§19b(3)(f)

Under MCL 712A.19b(3)(f), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he child has a guardian under . . . MCL 700.1101 to [MCL] 700.8206, and both of the following have occurred:

> (*i*) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.
>
> (*ii*) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition."[48]

MCL 712A.19b(3)(f)(*ii*) phrases "visit, contact, or communicate" in the disjunctive; therefore, petitioners must only establish that a respondent "had the ability to perform at least one of the acts and regularly and substantially failed or neglected to do so, without good cause, for two or more years preceding the filing of the petition." *In re C S Alexander*, ___ Mich App ___, ___ (2025)

[47] See Section 4.6 for a detailed discussion of the court's ability to take jurisdiction when a parent fails to comply with a court-structured guardianship plan under MCL 712A.2(b)(5).

[48] See Section 4.6 for a detailed discussion of the court's ability to take jurisdiction when a parent fails to support and contact a child who has a guardian under MCL 712A.2(b)(6).

(affirming the order terminating respondent-mother's parental rights in part because "[i]n a nutshell, the record show[ed] little effort by respondent-mother to maintain a relationship or interact with [the child]").

"[T]he trial court clearly erred by finding termination [was] warranted under MCL 712A.19b(3)(f)(*i*)" when "[t]here [were] fewer than twenty-four months between [the effective date of the child support order] and [the date the petition to terminate parental rights was filed]. *In re Ernsberger, Minors*, ___ Mich App ___, ___ (2024) (reversing termination and remanding for further proceedings). "[MCL 712A.19b(3)(f)(*i*)] uses the disjunctive 'or' when setting forth the two methods of determining financial abandonment." *Id*. at ___. Thus, "if a support order is in place, termination is proper if the respondent-parent fails to substantially comply with that order 'for a period of 2 years or more before the filing of the petition.'" *Id*. at ___, quoting MCL 712A.19b(3)(f)(*i*). The trial court erroneously concluded respondent's "three-year period of financial abandonment" during the guardianship was "sufficient to satisfy MCL 712A.19b(3)(f)(*i*)" when "the support order had [only] been in place for 22 or 23 months . . . ." *Ernsberger*, ___ Mich App at ___.

The trial court properly dismissed petitioner-guardian's petition to terminate respondent-mother's parental rights under MCL 712A.19b(3)(f) where "[t]he record support[ed] a finding that respondent spent years persistently attempting to contact and visit" the child. *In re D P Rozenboom*, ___ Mich App ___, ___ (2025). In *Rozenboom*, petitioner often met respondent's requests to see respondent's child with "hostility or shame." *Id*. at ___. Petitioner's persistent rebuffs directly violated the probate court's order that respondent would have two hours of supervised parenting time every week. *Id*. at ___. Petitioner also "violated the court order by demanding that respondent take a drug test prior to allowing respondent to have access to [the child]." *Id*. at ___. The Court of Appeals further noted that in "a traditional termination case in which proceedings were initiated by the state, the court would have been compelled to deny termination on the basis of the failure to make reasonable efforts toward reunification." *Id*. at ___. Thus, a finding in favor of petitioner would require the Court "to implicitly hold that parents who place their children in guardianships have fewer rights than those who have their children removed by the state[.]" *Id*. at ___.

## G. Termination on Grounds of Failure to Provide Proper Care or Custody–§19b(3)(g)

"Under this statutory subdivision, petitioner [is] required to prove two separate elements by clear and convincing evidence." *In re Pacyga*, ___ Mich App ___, ___ (2026). "First, petitioner [must] prove that the parent—although, in the court's discretion, financially able to do so—failed to provide proper care or custody for the child." *Id*. at ___. "[S]econd, petitioner [must] prove that there [is] no reasonable expectation that the parent would be able to provide such care and custody within a reasonable time considering the child's age." *Id*. at ___. "[A] parent's compliance with a service plan is evidence of their ability to provide proper care and custody." *Id*. at ___.

Under MCL 712A.19b(3)(g), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he parent, although, in the court's discretion, financially able to do so, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." "'A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child proper care and custody.'" *In re Kaczkowski*, 325 Mich App 69, 77 (2018), quoting *In re White*, 303 Mich App 701, 710 (2014).

Termination of both parents' parental rights under MCL 712A.19b(3)(g) "is permissible even in the absence of determinative evidence regarding the identity of the perpetrator when the evidence shows that respondents must have either caused the intentional injuries or failed to safeguard the children from injury." *In re Vandalen*, 293 Mich App 120, 141 (2011) (trial court properly terminated both respondent-parents' parental rights under §19b(3)(g) and §19b(3)(j) where the trial court concluded that one parent must have abused the children while the other parent failed to protect the children from the abuse when the respondent-parents' two infant children "suffered unexplained, serious, non-accidental injuries consistent with intentional abuse while in respondent[-parents'] sole care and custody[]" and "the extent and seriousness of the injuries to both children were consistent with prolonged abuse and clearly demonstrated a pattern of abuse in respondent[-parents'] home indicating a substantial risk of future harm[]").

It is harmless error for a trial court to terminate a respondent's parental rights under §19b(3)(h)[49] where those parental rights clearly could have been terminated under §19b(3)(g).[50] *In re Perry*,

[49] Formerly §19b(3)(e).

193 Mich App 648, 650-651 (1992) (despite the court's potential misinterpretation of the first element of §19b(3)(h), the two remaining elements of §19b(3)(h) were sufficient to warrant termination under §19b(3)(g)[51] and "[a]lthough the termination petition was brought solely under [§19b(3)(h)], respondent[-father] was given adequate notice of the proofs that he would have to present to overcome termination under [§19b(3)(g)][]").

## 1. Evidence Supported Termination Under §19b(3)(g)

MCL 712A.19b(3)(g) was amended by 2018 PA 58, effective June 12, 2018, to include an additional step in the analysis. The cases decided pre-amendment have been left in this book to assist a reader with the first part of the analysis. The pre-amended cases are included under a separate heading following the post-amended cases.

### a. Post-Amended §19b(3)(g) Cases

"Under this statutory subdivision, petitioner [is] required to prove two separate elements by clear and convincing evidence." *In re Pacyga*, ___ Mich App ___, ___ (2026). 'First, petitioner [must] prove that the parent—although, in the court's discretion, financially able to do so—failed to provide proper care or custody for the child." *Id*. at ___. "[S]econd, petitioner [must] prove that there [is] no reasonable expectation that the parent would be able to provide such care and custody within a reasonable time considering the child's age." *Id*. at ___. When respondent was living at a facility that did not house children at the time of her trial, "[t]he trial court properly found that the first element was satisfied." *Id*. at ___. "As to the second element, however, the record [did] not support a finding that there was no reasonable expectation that respondent would be able to provide such care and custody within a reasonable time considering the child's age." *Id*. at ___. Respondent was nearing the end of her two-year stay in a support and recovery program for sex trafficking victims, was paying rent, and "had stable employment, income, and even savings." *Id*. at ___. Respondent's unopposed testimony was "that although she was not in a position to 'immediately' obtain independent housing, she was prepared to seek and use the resources that were

[50] Formerly §19b(3)(d).

[51] "Both elements of [§19b(3)(g)] [are] contained in [§19b(3)(h)]." *In re Perry*, 193 Mich App 648, 651 (1992).

available to her and believed she could obtain housing and otherwise provide for [the child's] needs." *Id*. at ___. Additionally, contrary to the trial court's findings, the record supported that "respondent *was* engaged in therapy and NA," and neither of the DHHS's witnesses' testimony established that respondent would be unable to provide proper care or custody for the child within a reasonable time. *Id*. at___. "[A] parent's compliance with a service plan is evidence of their ability to provide proper care and custody." *Id*. at ___. "Therefore, it was clear error for the trial court to find grounds for termination under MCL 712A.19b(3)(g)." *Id*. at ___.

The respondent's parental rights were properly terminated under §19b(3)(g) because the court found by clear and convincing evidence that the "respondent could not provide proper care and custody for the children and would not be able to because of a continued failure to adequately address her mental health needs and the court had not seen any improvement." *In re Smith-Taylor*, 339 Mich App 189, 203 (2021), rev'd on other grounds 509 Mich 935 (2022). Evidence supporting the trial court's conclusion included the respondent's continued display of "unstable and erratic behavior throughout the proceedings." *Id*. at 203. Evidence showed that "respondent was taken to [the hospital] after threatening the children's father with a knife," fled the hospital when she arrived there, was found by police a few days later on the freeway, incoherent, and with one child in the car, was hospitalized but failed to take her medications after her discharge and did not participate in after-care services, was arrested several times, was involved in altercations with members of her family, and "was aggressive with providers during her parenting visits." *Id*. at 203, 204. In addition, the respondent and the children's father had a history of domestic abuse and one of their children was severely injured while in the father's care; nonetheless the "respondent made it clear to the court that she would separate from the father only until the completion of the proceedings and she would not divorce him." *Id*. at 204. Finally, evidence showed that the respondent did not fully understand the extent of the injuries sustained by the child while in the father's care, nor did she understand the long-term care the child would require as a result of the severe injuries. *Id*. at 205, 207.

### b. Pre-Amended §19b(3)(g) Cases

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother's "continued voluntary contact with [the minor child's alleged biological father] despite being [court] ordered to refrain from contact and after being made aware [that he was prohibited from having contact with minors for a prior conviction in Oklahoma for child molestation], support[ed] a finding that she ha[d] not benefited from her service plan," and "testimony [was given by respondent's therapist and caseworker] that respondent ha[d] continued mental health issues, including anger management issues, and that she refuse[d] to consider psychotropic medications as an option for achieving emotional stability." I*n re Kaczkowski*, 325 Mich App 69, 77-78 (2018).

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother "failed to comply with many of the terms of her treatment plan and made only minimal progress on other terms." Specifically, "the child had extensive medical needs and required constant care," and the respondent-mother did not adequately participate in the child's medical care where she "missed 30 of the child's 62 scheduled doctor appointments, surgeries, or other procedures, . . . continued to be confrontational with medical personnel and their treatment recommendations, . . . claimed to have inadequate training regarding the minor child's feeding tube," and moved into an apartment that did not have handicap-accessible ramps to accommodate her handicap child and refused petitioner's offer to help find suitable housing. Accordingly, "[g]iven the child's fragile medical condition, there existed a reasonable likelihood that the child would have suffered serious physical harm if returned to respondent's home." *In re Smith*, 324 Mich App 28, 47-50 (2018).[52]

Termination of the respondent-father's parental rights to his daughter under §19b(3)(g) was supported by clear and convincing evidence where "[t]he evidence . . . established that [the father] had . . . [committed] an act of

[52] Noting that the respondent-mother's appeal of the trial court's order terminating her parental rights was not moot despite the death of the minor child "because the trial court's termination of respondent's parental rights may have collateral legal consequences for respondent." *In re Smith,* 324 Mich App 28, 42 (2018).

[CSC] involving penetration[]" against her. *In re Schadler*, 315 Mich App 406, 409 (2016) (noting that "medical findings corroborated [the daughter's] statements, and [the father's] explanation of the circumstances was not consistent with the statements or the medical findings").

Termination under §19b(3)(g) was supported by clear and convincing evidence where "[the] respondent[-mother] failed to comply with the terms of her agency agreement[,] . . . tested positive for cocaine, had called [her child] a liar with respect to the allegations of sexual abuse, . . . had been charged with retail fraud[,] . . . was found passed out in the home of the 83-year-old man she was living with after consuming alcohol and pills[,] . . . [and] there was evidence that [the] respondent[-mother] was not consistent in attending counseling and treatment sessions, was unemployed and only received a small amount of monthly income in the form of social security disability, and failed to adequately address her mental health issues." *In re Gonzales/Martinez*, 310 Mich App 426, 332-333 (2015). Although "the time between the imposition of the parent-agency agreement and termination was only 13 weeks, [the] respondent[-mother's] actions demonstrated that she was unable to alter her behavior and provide a stable home." *Id.* at 433.

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother was living in a shelter at the time of the termination hearing and had a history of transient housing and rarely had hot water or heat. *In re Brown/Kindle/Muhammad,* 305 Mich App 623, 637 (2014). The respondent-mother also had an "extensive CPS history[,]" and three of six complaints were substantiated, including complaints for physical neglect and poor living conditions, a complaint due to one of her children testing positive for marijuana at birth, and one for unspecified physical neglect. *Id*. Further, the respondent-mother admitted that she smoked marijuana daily. *Id*. Accordingly, the Court concluded that "[c]onsidering [the] respondent's history of inadequate housing and reliance on other people to raise the minor children, the trial court did not clearly err when it found that respondent was not in a position to provide the children with proper care or custody[.]" *Id*.

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother "had a history of inviting men with criminal backgrounds into her home[,] [she] continued to invite men into her home

throughout the pendency of the case, demonstrating that she did not benefit from her service plan[,]" and her psychological evaluation indicated that she was "emotionally immature and likely to engage in relationships with exploitive men who would put her children at a risk of harm[,]" to which her oldest daughter "was particularly vulnerable to abuse and harm because of her autism." *In re White*, 303 Mich App 701, 712 (2014).

Termination under §19b(3)(g) was supported by clear and convincing evidence where "[the] respondent[-mother] [] unsuccessfully participated in several domestic violence classes[,] [] refused to extricate herself from [the mutually abusive] relationship with [her current boyfriend,]" and had a "long history of engaging in domestic violence and [] repetitive selection of violent, abusive partners." *In re Dearmon/Harverson-Dearmon*, 303 Mich App 684, 700 (2014).

Termination under §19b(3)(g) was supported by clear and convincing evidence where "[t]he court took jurisdiction of the children because [the] respondent-mother failed to provide a safe and suitable home for her children[; s]he left [her children for an extended period of time] with their maternal grandmother, whose parental rights had been previously terminated and whose home had no running water[;] . . . [she] had still failed to obtain suitable housing [by the termination hearing][;] . . . she was unable to provide legal documentation of her income, despite two requests made by the agency[; s]he [] failed to attend the majority of her court hearings, parenting classes, weekly therapy sessions, and parenting time visits[; s]he lived across the state from her children[;] . . . she had not had phone contact with her daughter [for over a year, though she had phone contact with her son every weekend; and] . . . [she] did not participate in weekly drug screens, and of the two drug screens she did participate in . . . , one tested positive for alcohol." *In re Laster*, 303 Mich App 485, 493-494 (2013).

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-father "did not provide support for [his] children, he failed to make himself available for a [court-ordered] home assessment [of the suitability of his home on two occasions despite ample notification of the visits], he did not participate in other voluntary services, such as therapy and parenting classes, and he had not visited [his] children while this case was pending." *In re Laster*, 303 Mich App at 494.

Termination under §19b(3)(g) was supported by clear and convincing evidence. *In re Moss*, 301 Mich App 76, 82 (2013). The respondent-mother's "substance abuse affect[ed] her ability to provide proper care and custody for [her] children" when "she used drugs in the presence of [her] children[,] . . . took them with her to purchase drugs on at least one occasion[, and]" was "living at a homeless shelter with [her] children, and there was no evidence that she would be able to provide suitable housing for the children in the reasonably foreseeable future." *Id.* at 81. Moreover, "there [was not] a reasonable expectation that [the] respondent[-mother] would be able to provide proper care and custody within a reasonable amount of time considering the children's ages[,] [the respondent-mother] ha[d] a long history of mental illness that [she struggled] to manage[,][53] [such as] . . . repeated[] [] psychotic episodes, including auditory hallucinations in which she was told to harm her children." *Id*.

Termination under §19b(3)(g) was supported by clear and convincing evidence where despite the respondent-mother's efforts to treat her longstanding drug addictions, she continued to battle them, she was not able to complete a drug treatment program, she was unemployed and lacked housing, "she would require a lengthy period of assessment, counseling, and supervision before reunification with her child could be considered[, and] . . . the two years [the child] already had spent in foster care, her entire life, constituted too long a period to await the mere possibility of a radical change in respondent[-]mother's life."]" *In re Williams*, 286 Mich App 253, 272-273 (2009).

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother had not made progress toward finding adequate housing for the children and that she was not likely to do so in the foreseeable future; she continued to miss drug screens despite the court's warnings, which had resulted in the suspension of her visitation with the children; and even if she had been afforded an extended period of time to rectify the conditions, as might be necessary with the

[53] "[The respondent-mother] had been admitted at least three times for psychiatric care at hospitals in Michigan, Illinois, and Florida, and [the] respondent[-mother admitted to having] difficulties [] when her medications ran out[, and] . . . to [having] numerous problems in adjusting her medications to successfully control her symptoms." *In re Moss*, 76 Mich App at 81.

older children, there was not a reasonable likelihood that she would have been able to do so within a reasonable time. *In re LE*, 278 Mich App 1, 27-28 (2008).

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother failed to find and maintain adequate housing for her three children and failed to progress in therapy. *In re Trejo,* 462 Mich 341, 360-363 (2000).

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother allowed known sex offenders to interact with her children, failed to take steps to ensure that sexual assaults would not occur, and had a history of failing to protect her children from physical abuse. *In re Archer*, 277 Mich App 71, 75-76 (2007).

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother "maintained suitable employment and separated from her abusive boyfriend" but only "minimally complied" with the provisions of a court-ordered "family plan" (guardianship plan), especially with respect to parenting time. *In re BZ,* 264 Mich App 286, 297-301 (2004).

Termination under §19b(3)(g) was supported by clear and convincing evidence where testimony established that the respondent-mother's emotional and cognitive problems would make her an ineffective parent no matter how well she was assisted by a third party. *In re IEM,* 233 Mich App 438, 451-453 (1999), overruled on other grounds by *In re Morris (Morris III)*, 491 Mich 81 (2012).[54]

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother attempted to murder her child to prevent visitation with the noncustodial parent, the respondent-mother was serving an 8-25 year sentence for this, and the evidence showed that the respondent-mother's serious emotional problems would continue to exist in the future. *In re Huisman,* 230 Mich App 372, 384-385 (1998), overruled in part on other grounds by *In re Trejo*, 462 Mich 341 (2000).[55]

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

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

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-father was incarcerated for most of his children's lives, resumed criminal behavior and drug use while not incarcerated, and expert witnesses testified to his poor parenting skills, his lack of cooperation in court-ordered counseling to improve those skills, and his inability to improve those skills within a reasonable time. *In re Hamlet (After Remand)*, 225 Mich App 505, 516-517 (1997), overruled in part on other grounds by *In re Trejo*, 462 Mich 341 (2000).[56]

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother was diagnosed as a paranoid schizophrenic, repeatedly left the children alone in the home, "would probably have more difficulty as the children grew older[,] and . . . could not cope with five young children, three of whom had health or behavioral problems requiring special attention." *In re Jackson (Shereathea Rebecca)*, 199 Mich App 22, 26-28 (1993).

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-father had not maintained contact with his child since he and the child's mother divorced, he had a drinking problem and an extensive criminal record, and where he was released from prison but reoffended within two weeks and would be incarcerated for at least another year. *In re Systma*, 197 Mich App 453, 457 (1992).

Termination under §19b(3)(g) was supported by clear and convincing evidence where the respondent-mother's apartment was littered with trash and feces, she was repeatedly evicted from other apartments, and she left the children unattended for extended periods and neglected their physical needs, and she failed to successfully complete parenting classes. *In re King*, 186 Mich App 458, 463-464 (1990).

Termination under §19b(3)(g) of the respondent-father's parental rights to his youngest child was supported by clear and convincing evidence where the respondent-father admittedly failed to "notice something amiss with, or otherwise attend to, his youngest child as she went several hours without taking nourishment or fluid[,]" which resulted in a life-threatening condition due to

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

dehydration, the respondent-father had persistent substance-abuse problems, and the respondent-father failed to "participate in, or benefit from, services relat[ed] to caring for a child with cerebral palsy, or to attend most of that child's medical appointments[,]" all of which heightened concerns that the medical neglect could recur. *In re LaFrance*, 306 Mich App 713, 728-729 (2014).

Termination under §19b(3)(g) of the respondent-mother's parental rights to her youngest child was supported by clear and convincing evidence where she tested positive for methadone and THC during her pregnancy with that child, admitted using opiates for years, demonstrated questionable behavior while in the hospital for the delivery that caused medical staff to question her ability to care for a newborn, and "even after the infant's cerebral palsy diagnosis, [the] respondent-mother failed to attend virtually all of the dozens of medical appointments for the baby, failed to attend programs intended to educate her about that condition, and refused to sign paperwork to facilitate the child[] receiving physical therapy." *In re LaFrance*, 306 Mich App at 729. "[T]he failure to participate in services directly linked to the ability to care for a special needs, or medically fragile, child bears directly on issues of neglect." *Id*. at 729-730.

## 2. Evidence Did Not Support Termination Under §19b(3)(g)

MCL 712A.19b(3)(g) was amended by 2018 PA 58, effective June 12, 2018, to include an additional step in the analysis. The cases decided pre-amendment have been left in this book to assist a reader with the first part of the analysis. The cases that follow are separated by bold post-amendment and pre-amendment headings.

### a. Post-Amended §19b(3)(g) Cases

Termination of the respondent-mother's parental rights under §19b(3)(g) was not supported by clear and convincing evidence where "there was no evidence that mother's use of medical marijuana was having any negative effect on her ability to parent or causing any risk of harm to [the child].[57] In fact, the evidence was overwhelming that there were no significant concerns about mother's parenting-time visits and that mother appropriately cared for [the child] during visits. There was no evidence that mother was impaired or 'high'

during her parenting-time visits, and mother indicated that she understood the importance of not being in an impaired state while caring for [the child]. Further, mother testified that using medical marijuana reduced the frequency of her seizures and that her parenting ability would be negatively affected if she were subject to the likelihood of having seizures more frequently. Mother testified that she was not using any illicit drugs." *In re Richardson*, 329 Mich App 232, 252 (2019). "The concerns expressed in the proceedings . . . were based more on the referee's speculation that mother's use of medical marijuana *might* lead to creating a harmful environment for [the child] even though the overwhelming evidence related to mother's current medical marijuana use and parenting skills indicated just the opposite. . . . There must be facts within the record demonstrating that the parent's acts are actually harming or presenting an articulable risk of harm to the child, and the trial court cannot simply presume a risk of harm from its own prior experiences or personal disapproval of a parent's choices. . . . Rather, in this case, the record reveal[ed] that the referee essentially placed the burden on mother to demonstrate her fitness as a parent and her ability to provide proper care and custody, which is an unconstitutional means of deciding whether to terminate parental rights." *Richardson*, 329 Mich App at 254-255.

There was not clear and convincing evidence under §19b(3)(g) "that the father was harming or presenting an articulable risk of harm to [the child], either based on is own actions or based on his plan of relying on [the child's] mother to care for the child in their joint home while he worked." *Richardson*, 329 Mich App at 257. The father's parental rights were "terminated essentially because of mother's medical marijuana use[, but] . . . there was no evidence to suggest that [the child's] mother presented a current risk of harm to the child despite her use of medical marijuana." *Id*. at 256. In addition, "the referee appeared to fault father for the nature of his work schedule and how it interfered with his ability to

[57] "[I]t is not the mere undesirable acts (presuming, of course, that use of a prescribed medicine constituted an undesirable act) of the parents alone that justifies the state in terminating parental rights; there must be some showing of harm or actual risk of harm to the child that results from the parents' acts." *Richardson*, 329 Mich App at 253. See also, the Michigan Medical Marihuana Act (MMMA), MCL 333.26424(d), and the Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27955(3), which prohibit a person from being denied custody or visitation with a minor child for acting in accordance with the MMMA and MRTMA ***unless*** the person's behavior "creates an unreasonable danger to the minor that can be clearly articulated and substantiated."

participate in various services[, but] . . . [f]ather testified that he was concerned about keeping his job, which 'looked very good for [his] parole officer' and would allow him to remain out of prison, . . . [that] he would be laid off for a period of time in the winter, during which time he could participate in more services[, and] . . . there was evidence that father had shown improvement in his parenting skills during his parenting-time visits . . . since his release [from incarceration]." *Id*. at 256. The referee also supported his decision by referencing to drug tests for father that were positive for marijuana and cocaine[, b]ut father denied using these drugs, testified about the loose adherence to procedures at the drug-testing facility, and he testified that he had [] to complete drug screens as part of his parole and did not have any parole violations." *Id.* at 256-257.

### b. Pre-Amended §19b(3)(g) Cases

Termination of the respondent-father's parental rights under §19b(3)(g) was not supported by clear and convincing evidence because his "incarceration alone [was] not a sufficient reason for termination of parental rights[]" where he provided proper care and custody through the child's placement with the child's grandmother (she having acted as the child's caregiver since birth) during his incarceration (the "petitioner[-DHHS] improperly determined that the grandmother's criminal history barred her outright from [becoming a licensed foster care provider]");[58] and the respondent-father although "unable to make significant progress on his case service plan while incarcerated[,]" demonstrated that he "did participate in services meaningfully while he was not incarcerated." *In re Pops*, 315 Mich App, 590, 598, 599 (2016) (emphasis added).

Termination under §19b(3)(g) was not supported by clear and convincing evidence where "several witnesses testified that [the child] was generally well-supervised, that he was clean, and that he had never before left the house unsupervised[;]" the Child Protective Services (CPS) worker testified that the isolated incident that led to "the filing of the petition, i.e., that [the child] had been found unsupervised with a heavily soiled diaper and accompanied by two pit bull puppies[,] . . . on its own,

[58] See *In re Mason*, 486 Mich 142, 161 n 11 (2010) (permitting an incarcerated parent to achieve proper care and custody through placement with a relative).

would have likely resulted in nothing more than an offering of services had it not been for [the respondent-mother's] earlier termination[ case]s[;]" there was no evidence "that the presence of multiple dogs in the [respondent-mother's] home represented either a danger to [the child] or neglect on the part of [the] respondent[-mother;] and "[a]lthough the trial court may have possessed a level of skepticism based on [the] respondent's decision in earlier termination cases to maintain a relationship with [the father of some of her children] after he showed himself to be abusive," "no evidence or testimony was presented at the termination hearing indicating that [the] respondent was currently in any sort of relationship with [him,]" and "[the] respondent not only denied any relationship with [him], but she also testified as to her awareness that a relationship with [him] would put her children at risk." *In re Gach*, 315 Mich App 83, 95, 96, 97 (2016).

Termination under §19b(3)(g) was not supported by clear and convincing evidence where "clear factual errors and errors of law . . . essentially resulted in the termination of respondent[-father's] parental rights solely because of his incarceration." *In re Mason*, 486 Mich 142, 160, 164-165 (2010) (as related to §19b[3][g], the trial court failed to evaluate "whether [the] respondent[-father] could care for his children in the future, either personally or with the help of relatives").

Termination under §19b(3)(g) was not supported by clear and convincing evidence where the DHHS failed to inform the respondent-father of the proceedings and its impact on his parental rights, and he was not evaluated to determine whether he was capable of providing proper care and custody of the child. *In re Rood*, 483 Mich 73, 111-114 (2009). Although the DHHS was able to show that the respondent-father was neglectful in failing to visit or provide support to his child during the proceedings, "a showing of neglect, alone, merely triggers a parent's right to participate in services. It does not automatically justify termination." *Id*. at 114. Specifically, the Michigan Supreme Court found:

> "As expressed in MCL 712A.19b(3)(g), when a parent fails 'to provide proper care or custody for the child,' termination is not appropriate unless 'there is [also] no reasonable expectation that the parent will be able to provide proper care and custody within a

> reasonable time considering the child's age.' Because [the] respondent[-father] was neither informed about nor properly offered the evaluation and services available to aid the court in making the latter determination, his rights could not be terminated merely because of his failure to provide care and custody." *In re Rood*, 483 Mich at 114.

Termination under §19b(3)(g) was not supported by clear and convincing evidence where "the [DHHS], itself, intentionally set out to create [the] very ground for termination[]" by reporting the respondents' illegal presence in the country, after which the respondents were involuntarily deported and forced to leave their children behind. *In re B & J*, 279 Mich App 12, 19-20 (2008).

Termination under §19b(3)(g) was not supported by clear and convincing evidence where the respondent-mother fulfilled every requirement of the parent-agency agreement.[59] *In re JK,* 468 Mich 202, 213-214 (2003).

Termination under §19b(3)(g) was not supported by clear and convincing evidence where the respondent-mother, who had a diagnosed personality disorder, demonstrated "proper motivation" by making significant strides toward meeting the goals the court established, the respondent-mother's psychologist testified that the respondent-mother, with proper motivation, could make progress in dealing with her personality disorder and begin addressing her parenting problems within four to six months, and "[t]he trial court's conclusion that there [was] a 'reasonable likelihood' that the child would be harmed if reunited with respondent[-mother] . . . [was] 'essentially conjecture. . . .'"[60] *In re Boursaw,* 239 Mich App 161, 169-172, 177 (1999), overruled in part on other grounds by *In re Trejo*, 462 Mich 341 (2000).[61]

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[59] "Th[e] [Michigan Supreme] Court has held that a parent's failure to comply with the parent-agency agreement is evidence of a parent's failure to provide proper care and custody for the child. [*In re*] *Trejo*, [462 Mich ] at 360-363. By the same token, the parent's *compliance* with the parent-agency agreement is evidence of [his or] her ability to provide proper care and custody." *In re JK*, 468 Mich at 214.

[60] The Court of Appeals distinguished this case from *In re Dahms,* 187 Mich App 644 (1991), because the child involved in the *In re Boursaw* matter did not suffer from similar problems as the children in the *In re Dahms* matter. *In re Boursaw*, 239 Mich App 161, 175-176 (1999). In *In re Dahms*, 187 Mich App at 647, the Court of Appeals found termination of the respondent-mother's parental rights proper under §19b(3)(c)(*i*) where there was clear and convincing evidence that the two-to-three-year period was unreasonable given the ages and "pervasive behavior disorders" of the children.

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

> Termination under §19b(3)(g) of the respondent-parents' parental rights to their three older children was not supported by clear and convincing evidence where, although the respondent-parents failed to "gain control over their substance-abuse habits[,]" there was no evidence "that either respondent[-parent] had ever abused or neglected any of their three older children." *In re LaFrance*, 306 Mich App 713, 730 (2014). Although the court did not clearly err by terminating the respondent-parents' respective parental rights to the older children's younger sibling, the doctrine of anticipatory neglect did not apply in relation to whether their parental rights to the older children should also be terminated because the older children did not require special medical care like the younger sibling, the respondent-parents cared for the older children from birth without incident, the only allegation of neglect and abuse related to the youngest child, and "drug use alone, in the absence of any connection to abuse or neglect, cannot justify termination solely through operation of the doctrine of anticipatory neglect." *Id*. at 730-731.

## H. Termination on Grounds of Imprisonment of Parent–§19b(3)(h)

Under MCL 712A.19b(3)(h), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age."

"The mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination." *In re Mason*, 486 Mich 142, 160 (2010).[62] MCL 712A.19b(3)(h) requires that all three conditions be met:

> "[t]he combination of the first two criteria—that a parent's imprisonment deprives a child of a normal home for more than two years *and* the parent has not provided for proper care and custody—permits a parent to provide for a child's care and custody *although*

[62]See also *In re Dixon (On Reconsideration)*, 347 Mich App 337, 362 (2023) (incarceration alone is not an aggravated circumstance excusing the DHHS from making reasonable efforts at reunification with a child's incarcerated parent).

> *the parent is in prison*; he [or she] need not *personally* care for the child. The third necessary condition is forward-looking; it asks whether a parent 'will be able to' provide proper care and custody within a reasonable time. Thus, a parent's past failure to provide care because of his [or her] incarceration also is not decisive." *In re Mason*, 486 Mich at161.

It is harmless error for a trial court to terminate a respondent's parental rights under §19b(3)(h)[63] where those parental rights clearly could have been terminated under §19b(3)(g).[64] *In re Perry*, 193 Mich App 648, 650-651 (1992) (despite the court's potential misinterpretation of the first element of §19b[3][h], the two remaining elements of §19b(3)(h) were sufficient to warrant termination under §19b(3)(g)[65] and "[a]lthough the termination petition was brought solely under [§19b(3)(h)], respondent[-father] was given adequate notice of the proofs that he would have to present to overcome termination under [§19b(3)(g)]").

### 1. Evidence Supported Termination Under §19b(3)(h)

Termination under §19b(3)(h) was supported by clear and convincing evidence where the respondent-mother was going to be imprisoned for nine years, and she would be unable to provide her children with proper care and custody when she "subject[ed] the children to emotional damage, breach[ed] their trust and confidence in her, plac[ed] them in a situation where they no longer reside together as a family unit and depriv[ed] them of her daily presence." *In re Hudson*, 294 Mich App 261, 267 (2011).

### 2. Evidence Did Not Support Termination Under §19b(3)(h)

Termination under §19b(3)(h) was not supported by clear and convincing evidence where the child was "placed in the care of respondent's brother, who . . . was providing exceptional care and custody for the child in respondent's absence," the record evidence did not support the conclusion that respondent would not be able to provide proper care and custody within a reasonable time where the caseworker's opinion "was 'based on the normal life span of a CPS case'" and not based on

[63] Formerly §19b(3)(e).

[64] Formerly §19b(3)(d).

[65] "Both elements of [§19b(3)(g)] [are] contained in [§19b(3)(h)]." *In re Perry*, 193 Mich App 648, 651 (1992).

"evidence specific to *respondent's circumstances*," and the evidence specific to respondent showed that she completed a parenting class, was pursuing her GED and a career in cosmetology, had family support, and intended to reside with her parents until she could support herself. *In re Baham*, 331 Mich App 737, 754 n 9, 755, 756 (2020) (opinion by KELLY, J.) (noting that placement with a relative is still evidence of a parent providing proper care and custody even if the placement occurs after jurisdiction is exercised and is accomplished with the aid of the DHHS and the court).

Termination under §19b(3)(h) was not supported by clear and convincing evidence where the trial court failed to consider (1) that termination was sought at a time when the respondent-father anticipated being paroled in less than two years, (2) that the DHHS never evaluated the respondent-father's parenting skills or facilitated access to services, and (3) "whether [the] respondent[-father] could provide proper care and custody in the future by voluntarily granting legal custody to his relatives during his remaining term of incarceration." *In re Mason*, 486 Mich at 160-163.

## I. Termination on Grounds of Prior Termination of Parental Rights to Siblings–§19b(3)(i)

Under MCL 712A.19b(3)(i), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[p]arental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and the parent has failed to rectify the conditions that led to the prior termination of parental rights."

## J. Termination on Grounds of Reasonable Likelihood of Harm to Child–§19b(3)(j)

Under MCL 712A.19b(3)(j), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if the child is returned to the home of the parent." "'[A] parent's failure to comply with the terms and conditions of his or her service plan is evidence that the child will be harmed if returned to the parent's home.'" *In re Kaczkowski*, 325 Mich App 69, 77 (2018), quoting *In re White*, 303 Mich App 701, 710 (2014).

For purposes of terminating parental rights under §19b(3)(j), it is proper for a court to evaluate the potential for *emotional* harm to the child(ren). *In re Hudson (Sword-Pope)*, 294 Mich App 261, 268 (2011)

(trial court properly terminated respondent-mother's parental rights under §19b(3)(j) where her "behavior [would] have life-long and profound effects on her children as they come to grips with the fact that she was guilty of first-degree criminal sexual conduct with her own 14-year-old biological child").

Termination of both parents' parental rights under §19b(3)(j) "is permissible even in the absence of determinative evidence regarding the identity of the perpetrator when the evidence shows that respondent-parents must have either caused the intentional injuries or failed to safeguard the children from injury." *In re Vandalen*, 293 Mich App 120, 139, 141 (2011) (trial court properly terminated both respondent-parents' parental rights under §19b(3)(g) and §19b(3)(j) where the trial court concluded that one parent must have abused the children while the other parent failed to protect the children from the abuse when the respondent-parents' two infant children "suffered unexplained, serious, nonaccidental injuries consistent with intentional abuse while in respondent[-parents'] sole care and custody[]" and "the extent and seriousness of the injuries to both children were consistent with prolonged abuse and clearly demonstrated a pattern of abuse in respondent[-parents'] home indicating a substantial risk of future harm[]").

"[A] criminal history alone does not justify termination [under §19b(3)(j)." *In re Mason*, 486 Mich 142, 165 (2010) (concluding that termination of a respondent-father's parental rights was not supported by clear and convincing evidence because there was "no evidence show[ing] that the children would be harmed if they lived with [the] respondent[-father] upon his release[]"). "[I]t is proper to scrutinize the likelihood of harm [under §19b(3)(j)] if the child were returned to the parent's home *after* the parent's release from prison." *In re Pops*, 315 Mich App 590, 600 (2016), citing *In re Mason*, 486 Mich at 165. The *Mason* Court noted:

> "[J]ust as incarceration alone does not constitute grounds for termination, a criminal history alone does not justify termination. Rather, termination solely because of a parent's past violence or crime is justified only under certain enumerated circumstances, including when the parent created an unreasonable risk of serious abuse or death of a child, if the parent was convicted of felony assault resulting in the injury of one of his own children, or if the parent committed murder, attempted murder, or voluntary manslaughter of one of his own children." *In re Mason*, 486 Mich at 165.

### 1. Evidence Supported Termination Under §19b(3)(j)

The respondent-father's parental rights were properly terminated under §19b(3)(j) because sufficient evidence supported a conclusion that there was "a reasonable likelihood that the child would be harmed if returned to [the respondent-]father's care." *In re Sanborn*, 337 Mich App 252, 280 (2021); MCL 712A.19b(3)(j). The respondent-father's "own testimony established that he was unable to recall anything that he had learned from the parenting classes and that he needed further assistance with respect to the child's medical needs." *In re Sanborn*, 337 Mich App at 279-280. Further, the respondent-father could not remember anything he learned throughout the case to help him care for the child. *Id*. at 280.

Termination under §19b(3)(j) was appropriate because clear and convincing evidence showed that the minor children would suffer emotional harm if returned to respondents, and according to uncontroverted expert testimony, that any child in respondents' care would suffer "'a very high, long-term chronic risk for neglect[.]'" *In re Pederson*, 331 Mich App 445, 457-458, 474 (2020) (alteration in original). In addition, evidence established that respondents' prognoses were poor even with treatment, they were unable to work, they had tens of thousands of dollars in outstanding debts, they were frequently incarcerated and fined for a variety of petty crimes, and they were repeatedly unable to accept responsibility for their actions. *Id*. at 474.

Termination under §19b(3)(j) was supported by clear and convincing evidence where the respondent-mother's "continued voluntary contact with [the minor child's alleged biological father] despite being [court] ordered to refrain from contact and after being made aware [that he was prohibited from having contact with minors for a prior conviction in Oklahoma for child molestation], support[ed] a finding that she ha[d] not benefited from her service plan . . . [and] fail[ed] to take adequate precautions to keep the child safe from [the biological father]" and "testimony [was given by respondent's therapist and caseworker] that respondent ha[d] continued mental health issues, including anger management issues, and that she refuse[d] to consider psychotropic medications as an option for achieving emotional stability." I*n re Kaczkowski*, 325 Mich App 69, 77-78 (2018).

Termination under §19b(3)(j) was supported by clear and convincing evidence where the respondent-mother "failed to comply with many of the terms of her treatment plan and made only minimal progress on other terms." Specifically, "the

child had extensive medical needs and required constant care," and the respondent-mother did not adequately participate in the child's medical care where she "missed 30 of the child's 62 scheduled doctor appointments, surgeries, or other procedures, . . . continued to be confrontational with medical personnel and their treatment recommendations, . . . claimed to have inadequate training regarding the minor child's feeding tube," and moved into an apartment that did not have handicap-accessible ramps to accommodate her handicap child and refused petitioner's offer to help find suitable housing. Accordingly, "[g]iven the child's fragile medical condition, there existed a reasonable likelihood that the child would have suffered serious physical harm if returned to respondent's home." *In re Smith*, 324 Mich App 28, 47-50 (2018).[66]

Termination under §19b(3)(j) was supported by clear and convincing evidence where "[the] respondent[-mother] had difficulty controlling her emotional stability and aggression, . . . evidence from two [police] officers suggested that [the] respondent[-mother] had committed a violent assault on an older woman[,] . . . [the] respondent[-mother] slapped [her child] when the child told [her about being] sexua[ly]l abuse[d,] . . . the children's current caretakers, their aunt and uncle, [did] not feel that [the] respondent[-mother] [was] safe[, and t]here was also testimony that [the respondent-mother's son] specifically thinks that [the] respondent[-mother would] kill him if he [was] returned to her." *In re Gonzales/Martinez*, 310 Mich App 426, 433-434 (2015).

Termination under §19b(3)(j) was supported by clear and convincing evidence where the respondent-mother continued to allow her children to stay at the home of an adult acquaintance known as "Uncle Lenny" after her children reported that he was sexually abusing them. *In re Brown/Kindle/Muhammad,* 305 Mich App 623, 636-637 (2014). The respondent-mother confronted "Uncle Lenny," who was a friend of a friend and whose full name and address she did not know, about the abuse. *Id.* at 636. However, "Uncle Lenny" denied abusing the children, and the respondent-mother continued to allow the children to stay with him despite disclosures about the abuse from all three of her children. *Id*. The Court noted that on the basis of this conduct, it was clear

[66] Noting that the respondent-mother's appeal of the trial court's order terminating her parental rights was not moot despite the death of the minor child "because the trial court's termination of respondent's parental rights may have collateral legal consequences for respondent." *In re Smith,* 324 Mich App 28, 42 (2018).

"that the children would have been at risk of harm in [the respondent-mother's] care[.]" *Id*.

Termination under §19b(3)(j) was supported by clear and convincing evidence where the respondent-mother "had a history of inviting men with criminal backgrounds into her home[, she] continued to invite men into her home throughout the pendency of the case, demonstrating that she did not benefit from her service plan," and her psychological evaluation indicated that she was "emotionally immature and likely to engage in relationships with exploitive men who would put her children at a risk of harm," to which her oldest daughter "was particularly vulnerable to abuse and harm because of her autism." *In re White*, 303 Mich App 701, 712 (2014).

Termination under §19b(3)(j) was supported by clear and convincing evidence where "[the] respondent[-mother] [] unsuccessfully participated in several domestic violence classes[,] [] refused to extricate herself from [the mutually abusive] relationship with [her current boyfriend,]" and had a "long history of engaging in domestic violence and [] repetitive selection of violent, abusive partners[.]" *In re Dearmon/ Harverson-Dearmon*, 303 Mich App 684, 700 (2014).

Termination under §19b(3)(j) was supported by clear and convincing evidence where "[the r]espondent-mother left [her] children [for an extended period of time] in the care of their maternal grandmother who previously had her parental rights terminated and whose home did not have running water[; d]uring the approximately two years that [her] children were in the court's temporary custody, she failed to maintain employment and obtain suitable housing, often living with others, and most recently, in a shelter[; and s]he [] neglected to contact the police after her daughter informed her that she had suffered sexual abuse." *In re Laster*, 303 Mich App 485, 494 (2013).

Termination under §19b(3)(j) was supported by clear and convincing evidence where the respondent-mother had "a long history of substance abuse and mental illness, and her [previous attempts at] treatment ha[d] been unsuccessful for both[;]" "it was undisputed that [the] respondent[-mother] had thoughts of harming her youngest daughter and that she acted on those thoughts by attempting to suffocate her[;]" "[the] respondent[-mother's] oldest daughter had previously been removed and placed in foster care [following] [the] respondent[-mother's] [] thoughts of harming her[,]" and after falsifying drug tests to regain custody of the oldest daughter,

"[the] respondent[-mother] continued to have thoughts of harming her daughter." *In re Moss*, 301 Mich App 76, 82 (2013).

Termination under §19b(3)(j) was supported by clear and convincing evidence where the respondent-mother "had been struggling with her anger-management problems for years[,]" "she was unable to control her anger" despite receiving treatment on and off over a span of four years, there were "several incidents of angry outbursts and at least one incident in which [the DHHS] personnel had to call the police to remove [the] respondent[-mother] from her anger-management class[, which resulted in her] . . . incarcerat[ion] for disturbing the peace[, and] . . . the children had begun to internalize and model [the respondent-mother's] aggressive behavior." *In re Olive/Metts*, 297 Mich App 35, 40-41 (2012).

Termination under §19b(3)(j) was supported by clear and convincing evidence where the respondent-mother's lengthy period of mental instability was relevant to her present ability to properly care for the child, she made poor decisions during the time the child lived with the guardian (e.g. living with two different abusive men after knowing each man for a very short period of time), and her own testimony evidenced her "lack of judgment, insight, and empathy for the child[.]" *In re Utrera*, 281 Mich App 1, 24-26 (2008).

Termination under §19b(3)(j) was supported by clear and convincing evidence where the respondent-mother allowed known sex offenders to interact with her children, failed to take steps to ensure that sexual assaults would not occur, and had a history of failing to protect her children from physical harm and abuse. *In re Archer*, 277 Mich App 71, 75-76 (2007).

Termination under §19b(3)(j) of the respondent-father's parental rights to his youngest child was supported by clear and convincing evidence where the respondent-father admittedly failed to "notice something amiss with, or otherwise attend to, his youngest child as she went several hours without taking nourishment or fluid[,]" which resulted in a life-threatening condition due to dehydration, the respondent-father had persistent substance-abuse problems, and the respondent-father failed to "participate in, or benefit from, services relating to caring for a child with cerebral palsy, or to attend most of that child's medical appointments[,]" which created a reasonable likelihood of harm if returned to the respondent-father's care. *In re LaFrance*, 306 Mich App 713, 728-729 (2014).

Termination under §19b(3)(j) of the respondent-mother's parental rights to her youngest child was supported by clear and convincing evidence where she tested positive for methadone and THC during her pregnancy with that child, admitted using opiates for years, demonstrated questionable behavior while in the hospital for the delivery that caused medical staff to question her ability to care for a newborn, and "even after the infant's cerebral palsy diagnosis, [she] failed to attend virtually all of the dozens of medical appointments for the baby, failed to attend programs intended to educate her about that condition, and refused to sign paperwork to facilitate the child[] receiving physical therapy." *In re LaFrance*, 306 Mich App at 729. "[T]he failure to participate in services directly linked to the ability to care for a special needs, or medically fragile, child bears directly on issues of neglect." *Id.* at 729-730.

### 2. Evidence Did Not Support Termination Under §19b(3)(j)

The trial court clearly erred when it found grounds to terminate respondent's parental rights under MCL 712A.19b(3)(j). *In re Pacyga*, ___ Mich App ___, ___ (2026). "[R]espondent was convicted in 2018 of child sexually abusive activity in violation of MCL 750.145c(2), was sentenced to six years in prison, was placed on the sex offender registry, and voluntarily released her parental rights to [MP, her eldest child, the victim of the abuse, who was an infant at the time]." *Pacyga*, ___ Mich App at ___. In 2024, the DHHS petitioned "the trial court to exercise jurisdiction over [CP, respondent's two-day-old newborn], remove him from respondent's care, and terminate respondent's parental rights." *Id*. at ___. The trial court authorized the petition, placed the child in foster care, denied respondent's motion for supervised parenting time—a petition that was supported by individuals and programs that had been working with respondent, including respondent's mother, who had adopted MP—and ultimately conducted a combined trial on adjudication and termination. *Id*. at ___. In its written opinion terminating respondent's parental rights, the trial court stated that respondent's past sexual abuse of MP "'*alone* [was] a compelling reason to find that another child placed in her care would be at a risk of harm . . . .'" *Id*. at ___. "Under the circumstances of [the] case, this was clear error." *Id*. at ___. "Although respondent's past abuse of MP is disturbing, the trial court was required to assess respondent's (and CP's) *current* situation to determine whether there [was] a *reasonable likelihood* that CP would be harmed in respondent's care." *Id*. at ___. Respondent's abuse of the MP occurred eight years before

the trial "when respondent was a 19-year-old victim of human trafficking and directed by her own abuser to commit the abusive acts." *Id*. at ___. At the time of the trial, respondent was "far removed from that world, ha[d] successfully engaged in therapy and other relevant programming, ha[d] a support structure, [was] gainfully employed, and by all accounts [was] emerging as something of a success story." *Id*. at ___. "[T]he probative value of respondent's abuse of MP is significantly decreased by the passage of time, change in circumstances, and respondent's rehabilitative progress." *Id*. at ___. Thus, "respondent's past conduct against MP is not, under the circumstances of this case, clear and convincing evidence that there is a reasonable likelihood that CP will be harmed in respondent's care." *Id*. at ___.

"[U]nder MCL 712A.19b(3)(j), a trial court may terminate parental rights if it finds by clear-and-convincing evidence that there is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." *In re K M Brown*, ___ Mich App ___, ___ (2025) (cleaned up). In *Brown*, the trial court erred by terminating respondent-mother's rights under §19b(3)(j) because she resided in an extended-stay motel room. *Id*. at ___. The DHHS admitted that the room was "safe and appropriate" for unsupervised visits, but asserted that the room was "too small for [the child—a toddler] to live there." *Id*. at ___. The trial court repeatedly identified housing as a barrier for reunification, however, "[t]he trial court's findings [were] not particularly clear on the reasonable likelihood of harm to [the child]," and the record did not explain why the room was "inadequate." *Id*. at ___. "[O]ther than a bare assertion, the DHHS did not actually demonstrate in the proceedings below or on appeal that the size of the motel room alone justified removal." *Id*. at ___. The room had space for a toddler bed, the child's toys and clothing, and a kitchenette to cook meals. *Id*. at ___. "Being 'too small'—without more—is not sufficient . . . ." *Brown*, ___ Mich App at ___. "Although [there is] little doubt that the housing was not ideal, ideal is not the standard." *Id*. at ___.

Termination under §19b(3)(j) was not supported by clear and convincing evidence where respondent was making "undisputed progress toward reunification"; specifically, "respondent was compliant with services and was seeking out additional services," "was demonstrating appropriate parenting during the parenting time visits," "was making plans for how to support herself and [the child] in the future," had a supportive family, and her "behavior in prison was

exemplary[.]" *In re Baham*, 331 Mich App 737, 758 (2020) (opinion by KELLY, J.).

Termination under §19b(3)(j) was not supported by clear and convincing evidence where the trial court terminated the respondent-father's parental rights on the sole ground that the respondent-father "was incarcerated, and [the child] would 'obviously' be harmed if returned to [the] respondent[-father][;[67]] . . . [the] petitioner[-DHHS] did not present any evidence that [the] respondent[-father] ever harmed his child or was likely to harm his child[;]" and although the respondent-father "undoubtedly created a risk of harm[]" by "fleeing from the police for 14 blocks while [the child] was in the vehicle[,]" this did "not create an 'unreasonable risk of serious abuse or death' that would justify termination[, and] . . . the trial court could not terminate parental rights based on [the] respondent[-father]'s criminal record alone because [the] respondent[-father] did not commit any of the enumerated crimes listed in MCL 712A.19a(2) or MCL 722.638(1) and [MCL 722.638(2)]." *In re Pops*, 315 Mich App 590, 600-601 (2016).

Termination under §19b(3)(j) was not supported by clear and convincing evidence where "several witnesses testified that [the child] was generally well-supervised, that he was clean, and that he had never before left the house unsupervised[;]" the Child Protective Services (CPS) worker testified that the isolated incident that led to "the filing of the petition, i.e., that [the child] had been found unsupervised in a park with a heavily soiled diaper and accompanied by two pit bull puppies[,] . . . on its own, would have likely resulted in nothing more than an offering of services had it not been for [the respondent-mother's] earlier termination[ case]s[;]" there was no evidence "that the presence of multiple dogs in the [respondent-mother's] home represented a danger to [the child] or neglect on the part of [the] respondent[-mother;] and "[a]lthough the trial court may have possessed a level of skepticism based on [the] respondent's decision in earlier termination cases to maintain a relationship with [the father of some of her children] after he showed himself to be abusive," "no evidence or testimony was presented at the termination hearing indicating that [the] respondent was currently in any sort of relationship with [him,]" and "[the] respondent not

[67] "[T]he [trial] court seemed to suggest that returning [the child] to [the] respondent[-father]'s care would mean sending the child to live with [the] respondent[-father] in prison. However, [the trial court should have] . . . scrutinize[d] the likelihood of harm if the child were returned to the [father's] home *after* [his] release from prison." *In re Pops*, 315 Mich App at 600.

only denied any relationship with [him], but testified as to her awareness that a relationship with [him] would put her children at risk." *In re Gach*, 315 Mich App 83, 95, 96, 97 (2016).

Termination under §19b(3)(j) was not supported by clear and convincing evidence where "[a]lthough [the] respondent-father was not involved in [his] children's lives and did not provide support for them, that [was] not, by itself, sufficient evidence that the children would be harmed if placed in his home." *In re Laster*, 303 Mich App 485, 495 (2013).

Termination under §19b(3)(j) was not supported by clear and convincing evidence where the respondent-father's criminal record consisted of "short jail stints for comparatively minor offenses[, t]he record show[ed] that he supported his family before his imprisonment[,] no evaluation was ever conducted to gauge whether he was likely to offend again." *In re Mason*, 486 Mich at 165. Thus, the DHHS failed to show any evidence that the children would be harmed if returned to the respondent-father upon his release from jail. *In re Mason*, 486 Mich at 165.

Termination under §19b(3)(j) was not supported by clear and convincing evidence where the respondent-mother, who had a diagnosed personality disorder, demonstrated "proper motivation" by making significant strides toward meeting the goals the court established, the respondent-mother's psychologist testified that the respondent-mother, with proper motivation, could make progress in dealing with her personality disorder and begin addressing her parenting problems within four to six months, and "[t]he trial court's conclusion that there [was] a 'reasonable likelihood' that the child would be harmed if reunited with respondent[-mother] . . . [was] 'essentially conjecture. . . .'"[68] *In re Boursaw,* 239 Mich App 161, 169-172, 177 (1999), overruled in part on other grounds by *In re Trejo*, 462 Mich 341 (2000).[69]

Termination under §19b(3)(j) of the respondent-parents' parental rights to their three older children was not supported by clear and convincing evidence where, although the

[68] The Court of Appeals distinguished this case from *In re Dahms,* 187 Mich App 644 (1991), because the child involved in the *In re Boursaw* matter did not suffer from similar problems as the children in the *In re Dahms* matter had. *In re Boursaw*, 239 Mich App at 175-176. In *In re Dahms*, *supra* at 647, the Court of Appeals found termination of the respondent-mother's parental rights proper under §19b(3)(c)(*i*) where there was clear and convincing evidence that the two-to-three-year period was unreasonable given the ages and "pervasive behavior disorders" of the children.

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

respondent-parents failed to "gain control over their respective substance-abuse habits[,]" there was no evidence "that either respondent[-parent] had ever abused or neglected any of their three older children." *In re LaFrance*, 306 Mich App 713, 730 (2014). Although the court did not clearly err by terminating the respondent parents' respective parental rights to the older children's younger sibling, the doctrine of anticipatory neglect did not apply because the older children did not require special medical care like the younger sibling, the respondent-parents cared for the older children from birth without incident, the only allegation of neglect and abuse related to the youngest child, and "drug use alone, in the absence of any connection to abuse or neglect, cannot justify termination solely through operation of the doctrine of anticipatory neglect." *Id*. at 731-732.

## K. Termination on Grounds of Serious Abuse of Child or Sibling–§19b(3)(k)

Under MCL 712A.19b(3)(k), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he parent abused the child or a sibling[70] of the child and the abuse included 1 or more of the following, and there is a reasonable likelihood that the child will be harmed if returned to the care of the parent:

(*i*) Abandonment of a young child.

(*ii*) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

(*iii*) Battering, torture, or other severe physical abuse.

(*iv*) Loss or serious impairment of an organ or limb.

(*v*) Life threatening injury.

(*vi*) Murder or attempted murder.

(*vii*) Voluntary manslaughter.

(*viii*) Aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter.

[70] For purposes of the Juvenile Code, *sibling* is defined as "a child who is related through birth or adoption by at least 1 common parent[; s]ibling includes that term as defined by an American Indian or Alaskan native child's tribal code or custom." MCL 712A.13a(1)(*l*).

(*ix*) Sexual abuse as that term is defined in . . . MCL 722.622."[71]

**Note:** MCL 712A.19b(3)(k) was amended by 2018 PA 58, effective June 12, 2018, to include an additional step in the analysis. The cases decided pre-amendment have been left in this subsection to assist a reader with the first part of the analysis. Please note that any future post-amendment cases will be included under a separate bold heading.

"[A] parent need not be criminally charged with or convicted of criminal sexual conduct (CSC) for MCL 712A.19b(3)(k)(*ii*) to apply." *In re Schadler*, 315 Mich App 406, 410 (2016).

Termination of a parent's parental rights under §19b(3)(k) is permissible "even in the absence of definitive evidence regarding the identity of the perpetrator when the evidence does show that the respondent or respondents must have either caused or failed to prevent the child's injuries." *In re Ellis*, 294 Mich App 30, 35-36 (2011).

For purposes of terminating parental rights under §19(3)(k)(*ii*), "[i]t is [] appropriate for a trial court to evaluate a respondent's potential risk to other siblings by analyzing how the respondent treated another one of his or her children, albeit a child the respondent gave up for adoption. Though no legal relationship exists in such a situation, the reality is that respondent is still the biological [parent] of the child who was given up for adoption and that child is the biological half-sibling of the respondent's other children." *In re Hudson (Sword-Pope)*, 294 Mich App 261, 266 (2011).

## 1. Evidence Supported Termination Under §19b(3)(k)

**Pre-amended §19b(3)(k) cases.**

Termination of the respondent-father's parental rights to his daughter was supported by clear and convincing evidence where "[t]he evidence . . . established that [the father] had . . . [committed] an act of [CSC] involving penetration[]" against her. *Schadler*, 315 Mich App at 409 (noting that "medical findings corroborated [the daughter's] statements, and [the

[71]The definition of *sexual abuse* that appeared in MCL 722.622(z) was deleted. The definition of *confirmed sexual abuse* was added to MCL 722.622. MCL 722.622(q). A *confirmed case* for purposes of the Child Protection Law "means the [DHHS] has determined, by a preponderance of the evidence, that child abuse or child neglect occurred by a person responsible for the child's health, welfare, or care." MCL 722.622(n). See 2022 PA 67, effective 11/1/2022. *Confirmed sexual abuse* for purposes of the Child Protection Law was added to MCL 722.622 and "means a confirmed case that involves sexual penetration, sexual contact, attempted sexual penetration, or assault with intent to penetrate as those terms are defined in . . . MCL 750.520a." MCL 722.622(q). See 2022 PA 67, effective 11/1/2022.

father's] explanation of the circumstances was not consistent with the statements or the medical findings[]"). "The trial court also did not clearly err in finding that" termination of the father's parental rights to his son was supported by clear and convincing evidence under §19b(3)(k)(*ii*), "because [the son was], indisputably, a sibling of [the abused daughter]." *Schadler*, 315 Mich App at 409.

Termination of both parents' parental rights under §19b(3)(k) was supported by clear and convincing evidence where the trial court concluded that one parent must have abused the child while the other parent failed to prevent the child abuse when the child suffered "numerous non-accidental injuries that likely occurred on more than one occasion," and the child's parents lived together and shared in the child care responsibilities as the child's sole caregivers. *Ellis*, 294 Mich App at 35-36.

Termination was supported under §19b(3)(k)*(ii)* by clear and convincing evidence where the respondent-mother was convicted of first-degree criminal sexual conduct relating to sexual activity she had with her 14-year-old biological son whom she had given up for adoption at birth, but reconnected with through MySpace. *Hudson (Sword-Pope)*, 294 Mich App at 266.

Termination under §19(3)(k)(*ii*) was supported by clear and convincing evidence where the respondent-father admitted that he sexually penetrated his stepdaughter, the minor children's half-sister. *In re Jenks*, 281 Mich App 514, 518 (2008).

## 2. Evidence Did Not Support Termination Under §19b(3)(k)

**Post-amended §19b(3)(k) cases.**

The trial court clearly erred when it found grounds to terminate respondent's parental rights under MCL 712A.19b(3)(k)(*ii*). *In re Pacyga*, ___ Mich App ___, ___ (2026). "[R]espondent was convicted in 2018 of child sexually abusive activity in violation of MCL 750.145c(2), was sentenced to six years in prison, was placed on the sex offender registry, and voluntarily released her parental rights to [MP, her eldest child, the victim of the abuse, who was an infant at the time]." *Pacyga*, ___ Mich App at ___. In 2024, the DHHS petitioned "the trial court to exercise jurisdiction over [CP, respondent's two-day-old newborn], remove him from respondent's care, and terminate respondent's parental rights." *Id*. at ___. The trial court authorized the petition, placed the child in foster care,

denied respondent's motion for supervised parenting time—a petition that was supported by individuals and programs that had been working with respondent, including respondent's mother, who had adopted MP—and ultimately conducted a combined trial on adjudication and termination. *Id*. at ___. In its written opinion terminating respondent's parental rights, the trial court stated that respondent's past sexual abuse of the MP "'*alone* [was] a compelling reason to find that another child placed in her care would be at a risk of harm . . . .'" *Id*. at ___. "Under the circumstances of [the] case, this was clear error." *Id*. at ___. "Although respondent's past abuse of MP is disturbing, the trial court was required to assess respondent's (and CP's) *current* situation to determine whether there [was] a *reasonable likelihood* that CP would be harmed in respondent's care." *Id*. at ___. Respondent's abuse of MP occurred eight years before the trial "when respondent was a 19-year-old victim of human trafficking and directed by her own abuser to commit the abusive acts." *Id*. at ___. At the time of the trial, respondent was "far removed from that world, ha[d] successfully engaged in therapy and other relevant programming, ha[d] a support structure, [was] gainfully employed, and by all accounts [was] emerging as something of a success story." *Id*. at ___. "[T]he probative value of respondent's abuse of MP is significantly decreased by the passage of time, change in circumstances, and respondent's rehabilitative progress." *Id*. at ___. Thus, "respondent's past conduct against MP is not, under the circumstances of this case, clear and convincing evidence that there is a reasonable likelihood that CP will be harmed in respondent's care." *Id*. at ___.

## L. Termination on Grounds of Prior Voluntary Termination of Parental Rights to Another Child–§19b(3)(*l*)

Under MCL 712A.19b(3)(*l*), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he parent's rights to another child were voluntarily terminated following the initiation of proceedings under [MCL 712A.2(b)] or a similar law of another state and the proceeding involved abuse that included 1 or more of the following, and the parent has failed to rectify the conditions that led to the prior termination of parental rights:

(*i*) Abandonment of a young child.

(*ii*) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

(*iii*) Battering, torture, or other severe physical abuse.

(*iv*) Loss or serious impairment of an organ or limb.

(*v*) Life-threatening injury.

(*vi*) Murder or attempted murder.

(*vii*) Voluntary manslaughter.

(*viii*) Aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter.

(*ix*) Sexual abuse as that term is defined in . . . MCL 722.622."[72]

## M. Termination on Grounds of Conviction of a Serious Offense–§19b(3)(m)

Under MCL 712A.19b(3)(m), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that "[t]he parent is convicted of 1 or more of the following, and the court determines that termination is in the child's best interests because continuing the parent-child relationship with the parent would be harmful to the child:

(*i*) A violation of . . . [female genital mutilation under] MCL 750.136, [transportation for purposes of female genital mutilation under MCL] 750.136a, [first-degree murder under MCL] 750.316, [second-degree murder under MCL] 750.317, [first-degree criminal sexual conduct under MCL] 750.520b, [second-degree criminal sexual conduct under MCL] 750.520c, [third-degree criminal sexual conduct under MCL] 750.520d, [fourth-degree criminal sexual conduct under MCL] 750.520e, [or assault with intent to commit criminal sexual conduct under MCL] 750.520g.

(*ii*) A violation of a criminal statute that includes as an element the use of force or the threat of force and that

[72]The definition of *sexual abuse* that appeared in MCL 722.622(z) was deleted. The definition of *confirmed sexual abuse* was added to MCL 722.622. MCL 722.622(q). A *confirmed case* for purposes of the Child Protection Law "means the [DHHS] has determined, by a preponderance of the evidence, that child abuse or child neglect occurred by a person responsible for the child's health, welfare, or care." MCL 722.622(n). See 2022 PA 67, effective 11/1/2022. *Confirmed sexual abuse* for purposes of the Child Protection Law was added to MCL 722.622 and "means a confirmed case that involves sexual penetration, sexual contact, attempted sexual penetration, or assault with intent to penetrate as those terms are defined in . . . MCL 750.520a." MCL 722.622(q). See 2022 PA 67, effective 11/1/2022.

> subjects the parent to sentencing [as a repeat offender] under . . . MCL 769.10, [MCL] 769.11, and [MCL] 769.12.
>
> (*iii*) A federal law or law of another state with provisions substantially similar to a crime or procedure listed or described in subparagraph (*i*) or (*ii*)."

## 17.8 Voluntary Termination of Parental Rights

Notwithstanding MCR 3.977(I)(3),[73] which states that "[a]n order terminating parental rights under the Juvenile Code may not be entered unless the court makes findings of fact, states its conclusions of law, and includes the statutory basis for the order," a parent may voluntarily consent to termination of his or her parental rights[74] without the court announcing a statutory basis for termination.[75] *In re Toler*, 193 Mich App 474, 477 (1992). In *Toler*, the trial court failed to expressly state a statutory basis for termination. *Id*. at 476-477. The Court of Appeals stated that the respondent-father, who consented to the termination of his parental rights, "conceded in effect that the court would be able to find statutory authorization for the termination and that termination would be in the best interest of the children." *Id*. at 478.

In voluntarily terminating parental rights during a child protective proceeding, a parent may do one of the following:

> (1) Execute a release and termination of parental rights under the Adoption Code.[76] Note that a release requires *both* parents' parental rights over a child to be terminated.[77, 78] See MCL 710.22(u); MCL 710.28(1)(a); MCL 710.29(8).

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[73] Former MCR 5.974(G), as indicated in *In re Toler*, 193 Mich App 474, 476-477 (1992).

[74] Note, however, that in child protective proceedings, *jurisdiction* cannot be conferred on the Family Division by consent of the parties. *In re Toler*, 193 Mich App 474, 476 (1992); *In re Youmans*, 156 Mich App 679, 684 (1986).

[75] See Chapter 19 for special procedures applicable to cases involving Indian children.

[76] See the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 2.

[77] 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*.

[78] "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*. "If all parental rights are not extinguished following the release, and the remaining parental rights are terminated in an NA 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). The SCAO-approved form JC 63 – *Order Following Hearing to Terminate Parental Rights (Child Protective Proceedings)* is available for use. A child committed to MCI pursuant to MCL 400.203(1)(a) is referred to as an Act 220 ward." SCAO Memorandum, *AU Case-Type Code and Release to Adopt*.

(2) Consent to the termination of parental rights under the Juvenile Code. *Toler*, 193 Mich App at 477. Although required to establish jurisdiction, the court is not required to state a statutory basis for the termination of parental rights. *Id*.

In *In re Pawloski*, ___ Mich App ___, ___ (2025), respondent executed a release of parental rights in a proceeding under the Juvenile Code, then challenged the validity of that release on appeal. Respondent alleged that the release was invalid because it was not knowingly or voluntarily executed. *Id*. at ___. Relying on *In re Burns*, 236 Mich App 291, 292 (1999), a termination case under the Adoption Code, the Court affirmed the trial court's acceptance of the release, stating "the record reflects that the release was the product of respondent's free, deliberate, and informed choice." *Pawloski*, ___ Mich App at ___. The Court noted that "in light of a parent's fundamental right to the care and custody of his or her children, [there appears to be] no principled distinction between proceedings under the adoption code and the juvenile code on this issue." *Id*. at ___ n 5.

In cases where a respondent consents to termination of parental rights, *Toler* held that a trial court's failure to explicitly state a statutory basis in an order terminating a respondent's parental rights did not invalidate the order. *Toler*, 193 Mich App at 476-477. *Toler* does not speak to whether the trial court there made findings of fact and conclusions of law as required by MCR 3.977(I)(3),[79] but *Toler* does note that even though the court failed to state a statutory basis for termination, the trial court relied on the parties' agreement calling for termination of the respondent-father's parental rights, a condition to which the respondent-father agreed. *Toler*, 193 Mich App at 476-477.

In cases that terminate parental rights under the Juvenile Code, the court must also determine that termination is in a child's best interests. MCR 3.977(E)(4); MCR 3.977(F)(1)(c); MCR 3.977(H)(3)(b). See also Section 17.9.

A voluntary release of parental rights for purposes of adoption must comply with the Adoption Code, and the court's failure to properly execute a release and termination of parental rights under the Adoption Code will invalidate a termination order. *In re Buckingham*, 141 Mich App 828, 836-837 (1985) ("[t]he absence of a duly executed release by respondent[-]mother, the failure of the [trial] court to find that the release would be in the best interests of the children, and the [trial] court's failure to distinguish the Adoption Code from the [J]uvenile [C]ode mandate[d] a finding that the release of respondent[-]mother was legally inadequate and therefore void[;] [t]hus, the order terminating respondent[-]mother's parental rights pursuant to the invalid release [was] reversed[]").

[79] Former MCR 5.974(G). See *Toler*, 193 Mich App at 476-477.

The advice of rights requirements in MCR 3.971(B) do not apply to a voluntary release of parental rights under the Adoption Code or a consent to terminate parental rights under the Juvenile Code, which are given in the dispositional phase of proceedings *after* the court has already assumed jurisdiction. *Pawloski*, ___ Mich App at ___. MCR 3.971(B) only applies to pleas given in the adjudicatory phase. *Id*. at ___.

Once the court properly executes a release and termination of parental rights under the Adoption Code, it cannot terminate those same parental rights under the Juvenile Code. *In re Jones*, 286 Mich App 126, 128 (2009). In *In re Jones, supra* at 127-128, the Department of Health and Human Services (DHHS) sought involuntary termination of the parents' parental rights to their daughter under the Juvenile Code after both parents, in lieu of child protective proceedings, had already voluntarily released their parental rights under the Adoption Code. The court terminated the parents' parental rights pursuant to the Adoption Code and released the daughter to the DHHS. *Id.* Following the termination, the court attempted to terminate the respondents' parental rights under the Juvenile Code. *Id.* at 128. On appeal, the Court of Appeals held that the court clearly erred when it attempted to terminate parental rights to the daughter under the Juvenile Code after it properly executed a release and termination of parental rights under the Adoption Code. *Id.* Specifically, the Court of Appeals found:

> "That attempted termination under the [J]uvenile [C]ode was without effect and was clearly improper, because the [respondent-]parents no longer possessed any parental rights that could be terminated. Their parental rights had previously been terminated under the Adoption Code, a completely separate statutory proceeding from a termination under the [J]uvenile [C]ode. Once a parent voluntarily releases his or her child to the [DHHS] or to a child placement agency under the Adoption Code, and the release is accepted by the court, and the court enters an order terminating that parent's rights to the child, that parent no longer has any parental rights subject to termination under the [J]uvenile [C]ode." *In re Jones*, 286 Mich App at 128.

The trial court need not advise a respondent of the rights set forth in MCR 3.971(B) prior to accepting a voluntary termination of parental rights. *In re Pawloski*, ___ Mich App ___, ___ (2025).

## 17.9 Requirements for "Best Interest" Step

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order

that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). See also MCR 3.977(E)(4), MCR 3.977(F)(1)(c), and MCR 3.977(H)(3)(b), which also require the court to expressly find that termination of parental rights *is* in the child's best interests.

"The trial court must order the parent's parental rights terminated if the Department [of Health and Human Services (DHHS)] has established a statutory ground for termination by clear and convincing evidence[80] and it finds from a preponderance of evidence on the whole record that termination is in the children's best interests." *In re White*, 303 Mich App 701, 713 (2014). See also *In re K D Simpson*, ___ Mich App ___, ___ (2024) ("The trial court should weigh all the evidence available to determine the child's best interests."), quoting *In re White*, 303 Mich App at 713, and *In re CJM*, ___ Mich App ___, ___ (2024) ("'[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence.'"), quoting *In re Moss*, 301 Mich App 76, 90 (2013) (alteration in original).[81]

The Michigan Court of Appeals reviews "for clear error the trial court's determination regarding the children's best interests." *In re White*, 303 Mich App at 713; see also *CJM*, ___ Mich App at ___, and *In re C S Alexander*, ___ Mich App ___, ___ (2025) (the trial court clearly was barred from determining that termination of respondent-father's parental rights was in the child's best interests when it lacked jurisdiction over the child as to respondent-father). In addition, the Michigan Court of Appeals reviews "for clear error whether the trial court failed to address a significant difference between each child's best interests." *White*, 303 Mich App at 716.

## A. Legal Standards for Best-Interest Determination

When making a best-interest determination for a child under MCL 712A.19b(5), the court should place its "focus on the child rather than the parent." *In re Schadler*, 315 Mich App 406, 411 (2016), citing *In re Moss*, 301 Mich App 76, 87 (2013). See also *In re Medina*, 317 Mich App 219, 239 (2016) ("[t]he 'primary beneficiary' of the best-interests analysis 'is intended to be the child'"), quoting *In re Trejo*, 462 Mich 341, 356 (2000).

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[80] "[T]he [United States Supreme] Court held [in *Santosky v Kramer*, 455 US 745 (1982),] that the clear and convincing evidence standard is the minimal constitutionally mandated standard that must be applied at the fact-finding stage of termination proceedings." *In re Moss*, 301 Mich App at 86, citing *Santosky*, 455 US at 769. Note that the standard of proof at the fact-finding stage of termination proceedings the *Santosky* Court refers to is similar to Michigan's "clear and convincing evidence standard to determine whether there are statutory grounds for termination." *In re Moss*, 301 Mich App *76,* 86 (2013).

[81] In *In re Moss*, 301 Mich App at 90 n 2, the Court noted that "the Legislature did not include a standard for the best-interest determination when it amended [MCL 712A.19b(5)], as it did for the establishment of a statutory ground for termination [under MCL 712A.19b(3);] [h]ad the Legislature intended for the standards to be the same, it could have included such language."

"To determine whether termination of a parent's parental rights is in a child's best interests, the court should consider a wide variety of factors that may include 'the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home.' The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App 701, 713-714 (2014), quoting *In re Olive/Metts*, 297 Mich App 35, 41-42 (2012). However, a parent's parental rights may not be terminated "solely because he or she was a victim of domestic violence." *In re Plump*, 294 Mich App 270, 273 (2011).[82] See also *In re Jackisch*, 340 Mich App 326, 334 (2022). In *Jackisch*, the trial court erred by relying "on respondent's involvement in domestic violence" as a basis for terminating respondent's parental rights because the record neither established respondent as a *perpetrator*, nor did it establish respondent as a *victim* of domestic violence. *Id*. at 334. However, without regard to whether respondent is a perpetrator or a victim, termination of respondent's parental rights may be based on "'the fact that [a] respondent's own behaviors were directly harming the children or exposing them to harm.'" *Id*. at 334, quoting *Plump*, 294 Mich App at 273 (alteration in original).

"'The court *may* utilize the [Child Custody F]actors provided in MCL 722.23[]'" when making a best-interest determination for a child under MCL 712A.19b(5). *In re Medina*, 317 Mich App at 238, quoting *In re McCarthy*, 497 Mich 1035 (2015). The court *must*, however, make an individualized best-interests determination "[i]f the trial court concludes there is clear and convincing evidence that there is a reasonable likelihood that [the children at issue] will suffer injury or abuse in the foreseeable future if placed in [respondent's] home." *In re JMG/JGG/JMG*, ___ Mich ___, ___(2025).[83] Importantly, "[c]onducting a best-interests analysis in the context of termination is not the same as deciding whether one parent should receive full custody or deciding a dispute over parenting time." *JMG/JGG/JMG*, ___ Mich ___, ___(2025). "Rather, the best-interests analysis in the

[82] The trial court did not err in terminating the respondent-mother's parental rights, however, after finding reasonable efforts to reunify were made where the respondent-mother's own behaviors–among other things, maintaining a relationship with the abuser of her and her children, and failing to benefit from services provided to her as a victim of domestic violence–were directly harming her children or exposing them to harm. *In re Plump*, 294 Mich App 270 (2011).

[83] *In re JMG/JGG/JMG* is an order issued by the Michigan Supreme Court. ___ Mich ___, ___ (2025). "Supreme Court orders that include a decision with an understandable rationale establish binding precedent." *People v Giovanni,* 271 Mich App 409, 414 (2006), citing *People v Crall*, 444 Mich 463, 464 n 8 (1993).

termination context must consider whether retaining the parent-child relationship, in some form, is in each child's best interests." *Id*.

No service plan was created for respondent in *Gentry* because "there was no chance of reunification" due to respondent's 40-year prison sentence for sexually exploiting his child's half-siblings. *Id*. at ___. Consequently, "the mere fact that respondent was willing to participate in services does not render the trial court's best-interest findings clearly erroneous." *Id*. at ___.

The court may consider a child's placement when making a best-interests determination. *In re Foster,* 285 Mich App 630, 635 (2009). Specifically, the Court of Appeals found:

> "[O]nce a statutory ground [for termination] is established, a parent's interest in the care and custody of his or her child yields to the state's interest in the protection of the child. Thus, while it is inappropriate for a court to consider the advantages of a foster home in deciding whether a statutory ground for termination has been established, such considerations are appropriate in a best-interests determination." *In re Foster*, 285 Mich App at 635 (internal citations omitted).

"'The trial court may also consider how long the child was in foster care or placed with relatives, along with the likelihood that the child could be returned to the parents' home within the foreseeable future, if at all.'" *In re CJM*, ___ Mich App ___, ___ (2024), quoting *In re Mota*, 334 Mich App 300, 321 (2020).

The doctrine of anticipatory neglect[84] may be relevant to a best-interest determination. See *Mota*, 334 Mich App at 323 (2020); see also *In re L A LeDee*, ___ Mich App ___, ___ (2026) ("The referee appropriately concluded that the evidence of respondent's abuse of [the child's sibling] weighed in favor of termination [of respondent's parental rights to the child].")

A trial court clearly errs when it "fail[s] to duly consider the role of relative placement [in] its best-interests assessment . . . , and remand is necessary for the court to properly account for that consideration and reassess if termination is in [a child's] best interests." *CJM*, ___ Mich App at ___ n 3. Because "a child's placement with relatives weighs against termination," *id*. at ___, "a trial court's failure to explicitly address whether termination is appropriate in light of the child's placement with relatives renders the factual record

[84] "The doctrine of anticipatory neglect provides that how a parent treats one child is probative of how that parent may treat other children." *In re Mota*, 334 Mich App 300, 323 (2020).

inadequate to make a best-interest determination and requires reversal." *Id*. at ___ (cleaned up).[85]

See *In re Mays*, 490 Mich 997, 997 (2012) (Michigan Supreme Court reversed "that part of the Court of Appeals judgment holding that the trial court did not clearly err in finding that termination was in the children's best interests [under] MCL 712A.19b(5)[] [because] [t]he factual record in th[e] case [was] inadequate to make a best interests determination[] . . . [when] there [was] no evidence in the record that the trial court considered whether termination of the respondent's parental rights was appropriate given the children's placement with their maternal grandmother[]").

"Although the trial court may terminate parental rights in lieu of placement with relatives if it finds that termination is in the child's best interests, the fact that the children are in the care of a relative at the time of the termination hearing is an 'explicit factor to consider in determining whether termination was in the children's best interests.'" *In re Olive/Metts*, 297 Mich App 35, 43 (2012), quoting *In re Mason*, 486 Mich 142, 164 (2010) ("trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal"). See also *In re L J Lombard*, ___ Mich App ___, ___ (2024) (finding that the trial court abused its discretion when, rather than make individualized findings on whether a guardianship with the child's maternal grandfather, with whom the child was placed, would be in the child's best interests, it instead relied on a general policy disfavoring guardianships for children under 10 years old); *In re Boshell/Shelton*, ___ Mich App ___, ___ (2025) (reversed and remanded after the trial court terminated respondent's parental rights to her three sons without articulating any findings as to their best interests and failed to consider their placement with their biological father).

The DHHS "completely disregarded its obligation under MCL 722.954a(2) to investigate relative placements" for the child after the trial court removed the child from temporary placement with the maternal grandmother due to coaching concerns but did not investigate the suitability of a number of the child's other relatives who had expressed interest in having the child placed with them.

[85]The definition of "relative" in MCL 712A.13a(1) was amended to include "fictive kin" under MCL 712A.13a(1)(j)(*ii*) during the proceedings in *CJM*. *Id. at* ___. Remand was necessary because the trial court did not consider whether the third-party caregiver with whom the child was placed qualified as a relative under the amended definition for purposes of the best-interest determination. *Id*. at ___. See also *In re Boshell/Shelton*, ___ Mich App ___, ___ (2025): "'[R]elative' under MCL 712A.13a(1)(j) now includes a biological parent." *Boshell/Shelton* was reversed and remanded because the trial court failed to consider respondent's sons' placement with their biological father in its best-interest analysis before terminating respondent's parental rights.

*In re D M A N*, ___ Mich App ___, ___ (2025). "[T]he failure to even attempt to keep [the child] from being separated from her biological family seriously affect[ed] the fairness, integrity, and public reputation of judicial proceedings." *Id*. at ___. If a suitable relative placement was available, it would have weighed against a finding that termination was in the child's best interests, and it would have protected the child's interest in maintaining a familial relationship with her other relatives. *Id*. at ___. Resultantly, the Court conditionally reversed the trial court's finding that termination was in the child's best interests and remanded for a determination as to whether a suitable relative placement was available, and if so, to conduct the appropriate procedural steps indicated in MCL 722.954a. *Id*. at ___.

The SCAO Memorandum, *Child's Best Interests in Termination of Parental Rights Proceedings* (August 22, 2013), p 3, addresses "[t]he child's placement with a relative [a]s one factor the court must consider," but also sets out the following additional factors the court should consider when determining whether termination of parental rights is in a child's best interests:

> "•The opinion of experts including psychologists and therapists, the caseworker, and the lawyer guardian ad litem.
>
> • The likelihood of the child being adopted.
>
> • The child's age.
>
> • The child's wishes, if of a sufficient age to express an opinion.
>
> • The child's relationships with extended relatives.
>
> • Whether the child has special needs.
>
> • Ethnic or cultural considerations.
>
> • The length of time the child has been in foster care.
>
> • The bond that exists between siblings."
>
> **Note:** It is important to note that the list set out in the *Child's Best Interests in Termination of Parental Rights Proceedings*, *supra* at p 3, "is not an exhaustive list of considerations, as each child protective proceeding includes facts and circumstances that may trigger other considerations in the best interests analysis." "[T]he [court] record regarding the best interests analysis should be supported by case-specific facts

> to illustrate that termination of parental rights is in the child's best interests, even if that child is placed with a relative." *Id.*

"'The trial court may also consider how long the child was in foster care or placed with relatives, along with the likelihood that the child could be returned to the parents' home within the foreseeable future, if at all.'" *In re CJM*, ___ Mich App ___, ___ (2024), quoting *In re Mota*, 334 Mich App 300, 321 (2020).

## B. Best Interests of Each Child Individually

### 1. Siblings

"[T]he trial court has a duty to decide the best interests of each child individually[, and] [a]lthough 'in most cases it will be in the best interests of each child to keep brothers and sisters together . . . , if keeping the children together is contrary to the best interests of an individual child, the best interests of that child will control.'" *In re Olive/Metts*, 297 Mich App 35, 42 (2012), quoting *Wiechmann v Wiechmann*, 212 Mich App 436, 439 (1995) (even though *Wiechmann*, 212 Mich App at 439, "[was a] child custody dispute[] in which the children's best interests were analyzed under the framework of the Child Custody Act, MCL 722.21 *et seq.*, the same principle—that each child be treated as an individual—applies with equal force in termination-of-parental-rights cases under the [J]uvenile [C]ode, [MCL 712A.19b][, and] [i]t is, therefore, incumbent on the trial court to view each child individually when determining whether termination of parental rights is in that child's best interests"). A trial court must, for *each* child, "articulate whether there is clear and convincing evidence that there is a reasonable likelihood that [the child] will suffer injury or abuse in the foreseeable future if placed in the parent's home." *In re JMG/JGG/JMG*, ___ Mich ___, ___ (2025) (quotation marks and citation omitted).[86] After finding there is clear and convincing evidence to terminate a parent's parental rights, "the trial court shall make an individualized best-interests determination as to each child . . . ." *Id.* at ___.

The holding in *In re Olive/Metts* "stands for the proposition that, if the best interests of the individual children *significantly* differ, the trial court should address those differences when

[86] *In re JMG/JGG/JMG* is an order issued by the Michigan Supreme Court. ___ Mich ___, ___ (2025). "Supreme Court orders that include a decision with an understandable rationale establish binding precedent." *People v Giovanni,* 271 Mich App 409, 414 (2006), citing *People v Crall*, 444 Mich 463, 464 n 8 (1993).

making its determination of the children's best interests[]" and "does not stand for the proposition that the trial court errs if it fails to explicitly make individual and—in many cases—redundant factual findings concerning each child's best interests." *In re White*, 303 Mich App 701, 715-16 (2014) ("trial court did not clearly err by failing to distinguish the individual best interests of the children" where "the trial court *did* distinguish between the children when [the children's individual and different special needs] differed in significant ways," and "[t]here [was] no indication that the trial court clearly erred by failing to find that the oldest daughter shared a particular, stronger bond with [the respondent-mother] than the younger children").[87]

## 2. Generalized Concerns

"[T]he trial court shall make an individualized determination as to whether terminating [a] respondent's parental rights is in the best interests of [the] respondent's . . . child without regard to a generalized policy disfavoring guardianship for children under the age of 14." *In re RJK*, 501 Mich 867, 867 (2017) (vacating "that part of the judgment of the Court of Appeals addressing the best interests determination[]" and remanding the case to the trial court "for reconsideration of whether terminating [the] respondent's parental rights is in the best interests of the child"; "[t]he trial court judge failed to articulate whether her generalized concerns regarding the lack of permanency and stability for younger children placed with a guardian are present for *this* child"). See also *In re Affleck*, 505

[87]Note that Chief Justice Clement warned against using *White* in a way that authorizes a trial court to limit its best-interests determinations to situations in which the best interests of the children involved *significantly* differ. *In re JMG/JGG/JMG*, ___ Mich at ___. According to Chief Justice Clement's concurrence/dissent:

> "Setting aside the facts of this case, I write further to question the Court of Appeals' current approach to determining when individualized best-interests analyses are required in multichild termination proceedings. Although *Olive/Metts* rightly requires trial courts to decide the best interests of each child individually, the Court of Appeals in *White* watered down this requirement by effectively holding that individualized best-interests inquiries are required only when the best interests of the individual children *significantly* differ. *White* reached this conclusion by observing that the needs of the children in *Olive/Metts* significantly differed, such that *Olive/Metts*' otherwise broad holding actually meant that individualized best-interests findings are not always required.
>
> . . . *Olive/Metts* did not cabin its holding to cases involving similar facts. Rather, *Olive/Metts* stated that the trial court has a duty to decide the best interests of each child *individually*, that it is incumbent on the trial court to view each child *individually* when determining whether termination of parental rights is in that child's best interests, and that the same principle—that each child be treated as an *individual*—applies with equal force in termination-of-parental-rights cases under the juvenile code. These clear statements of law are unqualified and unambiguous. As a result, I am concerned that the factual underpinnings of *Olive/Metts* have been used to artificially limit its broad and sensible holding." (quotation marks and citations omitted.)

Mich 858, 858-859 (2019), where the Michigan Supreme Court noted that "[p]etitioner did not consider recommending a guardianship for [the minor children] with respondent's mother because of a purported departmental policy against recommending guardianship for children under the age of 10," and vacated "that part of the judgment of the Court of Appeals addressing the trial court's best-interest determinations," then remanded the case to the trial court to "address whether guardianship is appropriate [for the minor children] as part of its best-interest determinations without regard to a generalized policy disfavoring guardianship for children under the age of 10." Accord, *In re L J Lombard*, ___ Mich App ___, ___ (2024).

## C. Termination in Child's Best Interests

Termination of respondent's parental rights under MCL 712A.19b(3)(b)(*i*) was in the child's best interest where the "[t]he record support[ed] the trial court's determination that there was a reasonable likelihood that [the child] would be harmed if returned to respondent's care." *In re L A LeDee*, ___ Mich App ___, ___ (2026). The record included the tender-years hearing testimony of the forensic interviewer about respondent's physical abuse of the child's sibling. *Id*. at ___. The interviewer testified that the sibling told her that respondent had hurt her on different occasions and said that respondent "would hit [the child] really hard" over the child's diaper. *Id*. at ___. This evidence, combined with corresponding medical records reflecting physical abuse, and evidence that respondent was emotionally unstable and provided the child with poor nutrition and dental care, outweighed the benefit of any bond between respondent and the child and supported termination. *Id*. at ___.

It was in the child's best interests to terminate respondent's parental rights when respondent had been convicted of sexually exploiting his other child and his stepchildren and was sentenced to 40 years of federal incarceration. *In re L L Gentry*, ___ Mich App ___, ___ (2026). The child was three years old when respondent was arrested and only had one or two weekly telephone contacts with respondent "for a four or five week period" in between orders suspending respondent's parenting time while incarcerated. *Id*. at ___. Some evidence "supported the existence of a bond between respondent and [the child]," *id*. at ___, but "the fact that there is a bond between a parent and a child is not dispositive of the child's best interests." *Id*. at ___. "The testimony established that [the child] was thriving in his mother's care, that he was getting ready to start kindergarten, that he was confused by the inconsistent phone contact with respondent, that the consistency of future contact was not guaranteed, that respondent posed a psychological risk to [the

child] given his conviction for sexually exploiting [the child's] half-siblings, that [the child] had only ever known one home, and that respondent's 40-year incarceration would preclude any reunification until long after [the child] reach[ed] 18 years of age." *Id*. at ___. Termination was in the child's best interests. *Id*. at ___.

Termination was in the child's best interests when "respondent-father's inability to make real progress toward finding suitable housing and addressing his drug addiction created serious barriers toward providing [the child] with the permanency, stability, and finality that [the child] needed." *In re K D Simpson*, ___ Mich App ___, ___ (2024). During the proceedings, respondent continued to test positive for cocaine and other substances although he denied any drug use and attributed his positive tests to the conditions in the apartment he shared with the child's mother and two other men. *Id*. at ___. Further, the trial court did not clearly err when it rejected respondent-father's argument that more parenting time with him was in the child's best interests. *Id*. at ___. "[Respondent's] argument confuses the focus during the best-interests stage, in which the focus is on the needs of the child, not the parent." *Id*. at ___. "The trial court did not conclude that it was in [the child's] best[] interests to terminate respondent-father's parental rights because he failed to bond with [the child]. Rather, the trial court found that despite the bond that [the child] had with respondent-father, [the child] would not be provided with a safe, stable, and permanent home if returned to respondent-father's care." *Id*. at ___.

Termination of parental rights is in a child's best interests when the respondent failed to remedy the respondent's drug addiction despite having been repeatedly offered, over the course of more than two years, opportunities for inpatient and outpatient substance-abuse treatment, during which time the respondent consistently missed drug screens or tested positive for drugs including cocaine, heroin, morphine, and fentanyl. *In re MJC*, 349 Mich App 42, 59, 60 (2023). At the time of the best-interests hearing, the respondent had been using drugs for 19 years, and although the respondent denied the circumstances of the incident, respondent's child, at 11 months, had been hospitalized for ingesting drugs the respondent tested positive for two days later. *Id*. at 63, 64.

In *In re Smith-Taylor*, 339 Mich App 189, 206 (2021), rev'd on other grounds 509 Mich 935 (2022), the "[r]espondent's failure to significantly address her mental health, her erratic behavior throughout the proceedings, her continued relationship with the [children's] father, and her failure to acknowledge the severity of [one child's] injuries demonstrated that she did not have the ability to properly care for the children and that it was in the best interests of the children to terminate respondent's parental rights."

Termination was properly ordered because it was supported by a preponderance of the evidence. *Id*. at 205, n 5. Also significant to the court's decision was the fact that all three children had been placed with relatives who agreed to adopt the children. *Id*. at 206-207.

A preponderance of the evidence supported the trial court's finding that termination of the respondent-mother's parental rights was in the child's best interests. *In re Sanborn*, 337 Mich App 252, 277 (2021). The respondent-mother had received services before parental rights to a previous child were terminated, and issues that had existed with the respondent-mother's other child had carried over into her care of the instant child. *Id*. These issues included the respondent-mother's "lack of insight or knowledge about child development, child care practices, and parenting techniques." *Id*. Termination was in the child's best interests because the respondent-mother remained "unable to successfully feed the child when in-person visits were offered despite repeated exposure to feeding therapy and a private lesson." *Id*. at 278. The child's need for permanency, coupled with how long the child had been in foster care and the potential length of time the child might have to wait for the respondent-mother to rectify continuing conditions, heavily favored termination. *Id*.

Termination of respondent-father's parental rights was in his children's best interests where the respondent abused a child who was not his biological child but was "a child who had looked to respondent for care and protection as a father figure" and who "respondent had been raising . . . for a number of years as if she were his daughter" because it "revealed a side of respondent that posed a serious danger to his minor [biological] children." *In re Mota*, 334 Mich App 300, 322-323 (2020). Under those circumstances, "the trial court did not clearly err by finding that termination of respondent's parental rights [to his biological children] was in the best interests of the children." *Id*. at 323.

Termination of respondents' parental rights was in the children's best interests because respondents' neglect had transformed the parent-child bond "into something that has traumatized the children." *In re Pederson*, 331 Mich App 445, 477 (2020). "[T]he parent-child bond is a blade that is capable of cutting both ways; whether it benefits or harms a child depends on how the parent wields it. In this case, respondents' neglect over the course of years turned the parent-child bond into something emotionally harmful, and further contact with respondents will likely only prevent the children's psychological wounds from healing." *Id*. (respondents' argument that focused on the parent-child bond to the exclusion of all else was "myopic"). Considering that the children flourished in foster care, the length of the proceedings, the children's ages and

special needs, and the respondents' "long track record of evictions, unpaid debts, mental illness, criminality and neglect," termination was in the children's best interests. *Id*. at 478.

Termination of the respondent-mother's parental rights was supported by a preponderance of the evidence that the termination was in the minor child's best interests where the minor child "came into care because he displayed symptoms and characteristics of [fetal alcohol syndrome] at birth" and the respondent reported suffering from alcoholism, "admitted to drinking six beers a day during her pregnancy," and stated on multiple occasions "that she wanted to voluntarily terminate her parental rights[.]" *In re Rippy*, 330 Mich App 350, 361 (2019) ("[a] parent's substance abuse history is . . . relevant to whether termination is in the child's best interests").[88] Additionally, the best interest determination was supported where the minor child was "medically fragile and [had] extensive medical issues that [would] require lifelong care, and it [was] unclear whether respondent would be able to care for him in light of her failure to address her . . . untreated alcoholism and mental health issues." *Id*. at 361-362.

Termination of the respondent-mother's parental rights was supported by a preponderance of the evidence that the termination was in the children's best interests where "testimony of the family therapist showed that the bond between respondent and the minor children was broken"; "[t]he minor children refused to visit with respondent, and the record established that the minor children were flourishing in their placement with other relatives, who were willing to adopt"; and "the record was replete with accusations of serious physical abuse by respondent." *In re Keillor*, 325 Mich App 80, 94 (2018) (RIORDAN, J.); *id*. at 95-96 (RONAYNE KRAUSE, P.J., concurring).

Termination of the respondent-mother's parental rights was supported by a preponderance of the evidence that the termination was in the child's best interests where "[a]t the time of the termination hearing, the child had been in foster care for

[88]But see *In re Simonetta*, 340 Mich App 700, 703 (2022) (mother's prenatal drug abuse did not amount to severe physical abuse, conduct that constituted an aggravating circumstance under MCL 722.638(1)) in light of *In re Rippy*, 330 Mich App 350 (2019) (assumption that mother's prenatal alcohol abuse constituted an aggravated circumstance). In *Simonetta*, the Court acknowledged that in *Rippy* it "upheld a termination of parental rights at the initial disposition based on an assumption that a mother's prenatal drug use was an aggravated circumstance" under MCL 722.638(1). *Simonetta*, 340 Mich App at 712 n 4. Although the cases appear to conflict, the Court's analysis in each case concentrated on aspects not considered by the other case. The *Simonetta* Court concluded that the mother's prenatal conduct was not an aggravating circumstance because a fetus is not a child, as "child" is contemplated in MCL 722.638(1). *Simonetta*, 340 Mich App at 712 n 4. The *Rippy* Court majority "declined to consider whether a 'fetus' [fell] within the definition of a 'child' as contemplated in MCL 722.638(1), and therefore reached no binding opinion on that question." *Id*.

approximately 2-1/2 years"; "respondent had made little, if any, progress in addressing the main reasons that the court took jurisdiction over the child"; "respondent's therapist opined that it was highly unlikely that respondent would ever be emotionally or psychologically stable enough to provide a safe environment for the child"; "the child was doing well in foster care and her foster parents were willing to adopt her"; "the caseworker testified that the child was fully adjusted to her foster home and had bonded with her foster siblings"; "the caseworker also stated that termination would provide the child with the permanency she needed, especially considering that respondent would not be able to improve her deficient parenting skills within a reasonable period of time"; and "the caseworker had explored alternatives to termination, such as guardianship, but no one else had come forward and the foster parents were not interested in that option." I*n re Kaczkowski*, 325 Mich App 69, 78-79 (2018).

Termination of the respondent-father's parental rights was supported by a preponderance of the evidence that the termination was in the child's best interests where the respondent-father was "a registered sex offender who pleaded guilty to CSC-I for forcibly raping and sodomizing his nine-year-old cousin"; "he [was] allegedly a member of . . . [a] street gang . . . ."; "he also continue[d] to associate with, and live with, others who [had] a substantial criminal record, including domestic violence convictions"; "[e]ven during his infrequent visits with [the child] when the child was an infant, respondent's conduct betrayed his indifference toward the child"; "[m]oreover, respondent had little or no contact with [the child] for nearly two and a half years—over half the child's life—immediately preceding termination[, and b]ecause of such lack of interaction, [the child] ha[d] not developed a bond with respondent but [was] instead closely bonded to [the child's] stepfather . . . who [sought] to adopt [the child]." *In re Medina*, 317 Mich App 219, 239-240 (2016).

Termination of the respondent-mother's parental rights was supported by a preponderance of the evidence that the termination was in the children's best interests where "[t]hough respondent shared a bond with the children, that bond was outweighed by the children's need for safety, permanency, and stability"; the "respondent never obtained suitable housing during the course of the proceedings, nor could she meet her own economic or financial needs, let alone the needs of the children"; "these issues were longstanding and numerous services had been provided to no avail[, and t]here was no indication that [the] respondent would be able to rectify the problems in such time that the children could be returned to her in the foreseeable future"; "there were also serious concerns with respondent's history of bringing inappropriate

individuals—including men with histories of criminal sexual conduct—around her children"; the "respondent failed to address this issue in counseling and minimized the matter throughout the proceedings"; and "finally, even though the minor children were not in preadoptive placements, any further delay in providing them permanency by allowing respondent additional time to improve her situation was not in children's best interests." *In re Jones*, 316 Mich App 110, 120-121 (2016).

Termination of the respondent-father's parental rights was supported by a preponderance of the evidence that the termination was in the child's best interests where the respondent-father sexually abused the child, the "respondent's behavior demonstrated that he was not committed to meeting [the child's] needs, which required providing a safe and secure environment in which to grow up[, and] . . . [although] there was some evidence of a bond between [the child] and respondent, . . . the abuse [the child suffered at the hands of the respondent-father] was 'heinous and resulted in physical injury, as well as emotional injury[,' and] . . . [the child] could not 'thrive and prosper and recover from the trauma she . . . sustained at the hands of her father if his parental rights remain[ed] intact'"; "there was [also] evidence that respondent imposed excessive physical discipline, and [the child] reported that there was a lot of fighting between her mother and respondent, which frightened her." *In re Schadler*, 315 Mich App 406, 411 (2016).

Termination of the respondent-father's parental rights was supported by a preponderance of the evidence that the termination was in the child's best interests where the child's therapist testified to the child being diagnosed with post-traumatic stress disorder (PTSD) as a result of trauma the child suffered from "violence and inappropriate parenting by his stepmother and respondent, [the child] indicated to the therapist that he did not want to be alone with respondent, who administered discipline with a belt and left marks[, and] . . . [although the child] loved respondent, . . .[he also] greatly feared his father[, he] . . . witnessed physical violence between his stepmother and respondent, and . . . [the child] had 'access to pornography, which contributed to his sexual curiosity with his sister'"; "the therapist opined that termination was in [the child's] best interests[, a]nd, the trial court found that the bond between respondent and [the child] was damaged and that respondent failed to provide a safe and loving environment." *Schadler*, 315 Mich App at 412.

Termination of the respondent-mother's parental rights was supported by a preponderance of the evidence that the termination was in the children's best interests where "[t]here was evidence that respondent had violently attacked an elderly women, had not

successfully addressed her substance abuse and mental health issues, . . . was not motivated to make the necessary changes to address those issues. Respondent also continued to have contact with the children's abuser, even going so far as to indicate her desire to start a family with him[, and t]he children's relatives were willing to adopt them, and both children were excelling in their new environment." *In re Gonzales/Martinez*, 310 Mich App 426, 435 (2015).

Termination of the respondent-mother's parental rights was supported by a preponderance of the evidence that the termination was in the children's best interests where the respondent "lacked the ability to keep her children safe or effectively parent them," despite the fact that the children were placed with relatives, the respondent did not miss any supervised visits, and the respondent and children were bonded. *In re Brown/Kindle/Muhammad*, 305 Mich App 623, 638 (2014). Specifically, the respondent repeatedly sent the minor children to a location where they were sexually abused because the children "begged" her to send them there. *Id*. Moreover, "the children's need for permanency, stability, and finality, militated against placing the minor children in respondent's care" because she "frequently changed housing, lived illegally in a series of abandoned houses without utilities or appliances, and left the minor children in the care of others." *Id*.

Termination of the respondent-mother's parental rights was supported by a preponderance of the evidence based on "the child's need for permanency and stability" where "[a]lthough there was evidence that respondent[-]mother had appropriate parenting skills, . . . [before the termination hearing,] respondent[-]mother was sentenced to . . . imprisonment for her participation in a bank robbery, . . . [and] the child was thriving in foster care and had developed a very strong attachment to the foster mother."[89] *In re Johnson*, 305 Mich App 328, 335-336 (2014).

Termination of the respondent-mother's parental rights was supported by a preponderance of the evidence that the termination was in the children's best interests where although "the trial court found that the children [and the respondent-mother] shared a bond," the court "strongly weighed the children's need for safety and stability" and found that the respondent-mother "had a history of failing to comply with her case service plan by inviting strange men into her home, . . . that the children were doing very well in

[89] Note, however, that the trial court's order terminating the respondent-mother's parental rights was conditionally reversed and remanded for purposes of ICWA compliance finding that the ICWA notice requirements were triggered and not followed during the preliminary hearing. *In re Johnson*, 305 Mich App at 332. For additional information on the ICWA's notice requirements under 25 USC 1912(a), see Section 19.5.

foster care, . . . that there was a possibility that the children would be adopted[, a]nd . . . that the children strongly needed permanence and stability." *In re White*, 303 Mich App 701, 714 (2014).

Termination of the respondent-father's parental rights was supported by a preponderance of the evidence that the termination was in the children's best interests where "[the] respondent-father had very minimal involvement in [his] children's lives[, h]e did not provide support for [his] children, . . . he had little or no contact with [his children] for several years[, and t]here was . . . no evidence that he was able to provide suitable housing for [his] children [when he failed to] comply with the required [court-ordered] home assessment [of the suitability of his home on two occasions, despite ample notification of the visits]." *In re Laster*, 303 Mich App 485, 496 (2013).

Termination of the respondent-mother's parental rights was supported by a preponderance of the evidence that the termination was in the children's best interests where "the [court] record show[ed] that respondent acted on her thoughts of harming her youngest daughter by attempting to suffocate her numerous times, . . . that she brought her children with her while purchasing drugs, that her son had seen her using crack cocaine before, . . . that she did not have stable housing[, and] . . . given her history, [the respondent-mother's] ultimate success regarding her substance abuse and mental health treatments [were] uncertain at best." *In re Moss*, 301 Mich App 76, 90 (2013).

Termination of the respondent-parents' parental rights were in the children's best interests where "[even though the] respondent[-parents] did make some progress in addressing their [alcohol and substance abuse], the evidence showed that it was unlikely that the child could be returned to [the child's] parents' home within the foreseeable future, if at all[, and] [t]he child required a permanent, safe, and stable home, which neither respondent was capable of providing." *In re Frey*, 297 Mich App 242, 248-249 (2012).

Termination of the respondent-parent's parental rights to three of her five children[90] was in the children's best interests where the evidence showed that "[the] respondent[-mother] struggled to cope with five children, was unable to control her temper to the detriment of the children, lacked a source of income, had lost her

[90] The Michigan Court of Appeals "vacate[d] the trial court's best-interest analysis with respect to the [two youngest children], and remand[ed] th[e] case to the trial court for further proceedings" because "the trial court was required to consider the best interests of each child individually and was required to explicitly address each child's placement with relatives at the time of the termination hearing if applicable," but the trial court failed to "expressly address the fact that the two youngest children were residing with a paternal relative." *In re Olive/Metts*, 297 Mich App at 43-44.

home, and was in jail"; "[r]espondent failed to derive any lasting benefit from services previously provided and there were no additional services that could be provided." *In re Olive/Metts*, 297 Mich App 35, 43 (2012).

Termination of the respondent-parents' parental rights were in the children's best interests where there was "[c]ompelling evidence indicat[ing] that the children would not be safe in respondent[-parents'] custody considering that both children suffered unexplained injuries consistent with serious abuse while in respondents' primary care," the children were young, "the ongoing uncertainty about the circumstances surrounding the serious abuse of the children while in respondents' care weighed heavily against additional reunification efforts[, and] [t]he children had been placed in a stable home where they were thriving and progressing and that could provide them continued stability and permanency given the foster parents' desire to adopt them." *In re Vandalen*, 293 Mich App 120, 141 (2011).

Despite evidence showing that the mother took positive steps to address her anger and emotional control issues, the trial court did not clearly err when it concluded that termination of her parental rights was in the child's best interests where a psychological evaluation revealed that the issues were unresolved, the mother did not show appropriate parenting techniques during parenting time, she continued to place herself in abusive situations, and she had yet to establish a parent-child relationship with her child. *In re Jones*, 286 Mich App 126, 129-130 (2009).

## D. In-Camera Interviews

The court does not have the authority to hold in camera interviews with a child when making best interests findings in child protective proceedings. *In re HRC*, 286 Mich App 444, 452-453 (2009). Specifically, the Court of Appeals found:

> "[N]othing in the [J]uvenile [C]ode, the case[]law, the court rules, or otherwise permits a trial court presiding over a termination of parental rights case to conduct in camera interviews of the children for purposes of determining their best interests. Accordingly, [the Court of Appeals] hold[s] that a trial court presiding over a juvenile proceeding has no authority to conduct in camera interviews of the children involved." *In re HRC*, 286 Mich App at 454.

## 17.10 Court's Required Findings

MCR 3.977(I) sets out the requirements for a court's findings following a hearing on termination of parental rights:

> "(1) *General.* The court shall state on the record or in writing its findings of fact and conclusions of law. Brief, definite, and pertinent findings and conclusions on contested matters are sufficient. If the court does not issue a decision on the record following hearing, it shall file its decision within 28 days after the taking of final proofs, but no later than 70 days after the commencement of the hearing to terminate parental rights.[91]
>
> (2) *Denial of Termination.* If the court finds that the parental rights of respondent should not be terminated, the court must make findings of fact and conclusions of law.
>
> (3) *Order of Termination.* An order terminating parental rights under the Juvenile Code may not be entered unless the court makes findings of fact, states its conclusions of law, and includes the statutory basis for the order."

"The court's failure to issue an opinion within 70 days does not dismiss the petition." MCL 712A.19b(1). See also *In re TC*, 251 Mich App 368, 370-371 (2002) (trial court's failure to issue an opinion within the 70-day requirement under MCR 3.977(I)(1) did not require the trial court to reverse its order terminating the respondent-mother's parental rights where "[t]he Court [of Appeals] has consistently interpreted MCR [3.977(I)(1)[92]] as not requiring dismissal where the time limits set forth in that section have been violated[,] [t]here is no reason to suppose that the [Michigan] Supreme Court intended that the penalty for delay would be more delay[, and] . . . the [Michigan] Supreme Court [] stated in the court rules [under MCR 2.613(A)[93]] that a trial court's error in issuing a ruling or order or an error in the proceedings is not grounds for th[e] Court [of Appeals] to reverse or otherwise disturb an order unless th[e] Court [of Appeals] believes that failure to do so would be inconsistent with substantial justice[]").

"A child's placement with relatives is a factor that the trial court is required to consider when making its best-interests determination , and a child's placement with relatives weighs against termination." *In re CJM*, ___ Mich App ___, ___ (2024) (cleaned up). A trial court's failure to do so constitutes clear error and requires reversal. See *id*. at ___.[94]

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[91] See also MCL 712A.19b(1), which states substantially similar language.

[92] Formerly MCR 5.974(G)(1).

[93] MCR 2.613(A) governs limitations on corrections of error. MCR 3.902(A).

Under MCR 3.977(G) additional findings must be made when terminating the parental rights of an Indian child's parent:[95]

> "In addition to the required findings in this rule, the parental rights of a parent of an Indian child must not be terminated unless:
>
> (1) the court is satisfied that active efforts as defined in MCR 3.002[96] have been made to provide remedial service and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful, and
>
> (2) the court finds evidence beyond a reasonable doubt, including testimony of at least one qualified expert witness, as described in MCL 712B.17, that parental rights should be terminated because continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child."

## 17.11 Required Advice of Rights

Immediately following entry of an order terminating a parent's parental rights, the court must advise the respondent-parent orally or in writing that:

> (1) he or she is entitled to appellate review of the termination order.
>
> (2) the court will appoint an attorney if the respondent-parent is financially unable to retain one, and the court will furnish the appointed attorney with the complete transcript and record of all proceedings.
>
> (3) he or she must request the assistance of an attorney within 21 days after:
>
> (a) notice of the termination order is given; or
>
> (b) entry of an order denying a timely filed postjudgment motion.

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[94] For more information on the best-interests determination requirements, see Section 17.9(C).

[95] See Chapter 19 for special procedures applicable to cases involving Indian children.

[96] For a detailed discussion of active efforts, including the definition, see Section 19.12(F).

(4) if he or she requests the assistance of an attorney, the instructions and time period for requesting the appointment of an attorney, which must be repeated in the form that the court must also provide to the respondent-parent.[97]

(5) he or she has the right to control the release of his or her identifying information.

(6) he or she remains obligated to support the child "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."[98] MCR 3.977(J)(1).

## 17.12 Effects of Termination of Parental Rights

Parental rights to a child include the rights to custody, control, services, and earnings. See MCL 722.2. See also *In re Beck*, 488 Mich 6, 14-16 (2010). "[I]f all parental rights to [a] child are terminated, the child [will be] placed in [the] permanent custody of the court." MCL 712A.19b(1).

If the court terminates parental rights, the court must order that additional efforts for the reunification of the child with the respondent-parent must not be made. MCL 712A.19b(5). The court may then commit the child to the Michigan Children's Institute (MCI)[99] for adoptive planning, supervision, care, and placement.[100] See MCL 400.203(1)(a).

**Note:** See SCAO form JC 63, *Order Following Hearing to Terminate Parental Rights*, at https://www.courts.michigan.gov/49c114/siteassets/forms/scao-approved/jc63.pdf.

### A. Reinstatement of Parental Rights Following Rehearing

Parental rights may be reinstated by a supplemental order of disposition entered after a rehearing under MCL 712A.21(1). MCL

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[97] See SCAO form JC 44, *Advice of Rights After Order Terminating Parental Rights (Juvenile Code)*, at https://www.courts.michigan.gov/4904c4/siteassets/forms/scao-approved/jc44.pdf.

[98] "Failure to provide required notice under [MCR 3.977(J)(1)(e)] does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent." MCR 3.977(J)(1)(e).

[99] "Wherever commitment to the Michigan [C]hildren's [I]nstitute [(MCI)] is mentioned in any law of this state, it shall be construed to mean commitment to the [DHHS]." MCL 400.204(1).

[100] "Within 30 days after an order is made committing a child to the superintendent of the Michigan [C]hildren's [I]nstitute [(MCI)], the court shall send to the superintendent a certified copy of the petition, the order of disposition in the case, and the report of the physician who examined the child. Upon receipt of the order the superintendent of the [MCI] shall notify the court of the child's placement[.]" MCL 400.204(1).

712A.21(1) requires the petition for rehearing to be filed within "20 days of the entry of the order terminating parental rights."[101]

## B. Child Support Obligations

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 3.971(B)(5) (requiring that the court advise a parent of this obligation before accepting a plea of admission or no contest); MCR 3.977(J)(1)(e) (requiring that the court advise a parent of this obligation after entry of an order terminating parental rights).

[101] See Section 12.12 for a detailed discussion of motions for rehearing.

# Chapter 18: Post-Termination Review Hearings


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## *In this chapter. . .*

If a child remains in placement following termination of parental rights, a court must conduct post-termination review hearings to determine the appropriateness of the child's placement, appropriateness of the permanency plan, and determine whether reasonable efforts are being made to permanently place the child. This chapter describes the procedures for those review hearings.

The chapter also discusses the court's options following a post-termination review hearing, and termination of a court's jurisdiction of a child protective proceeding.

In an effort to provide trial courts with a quick practical guide through the process of post-termination review hearings, the State Court Administrative Office (SCAO) developed the *Toolkit for Judges and Attorneys: Post-Termination Review Hearings*.

The SCAO also developed the *Conducting Effective Post-Termination Review Hearings* to guide trial courts through the procedures of conducting post-termination review hearings.

## 18.1 Overview

"[I]f a child remains in placement following the termination of parental rights to the child, the court shall conduct a [post-termination] review hearing not more than 91 days after the termination of parental rights and no later than 91 days after that hearing for the first year following termination of parental rights to the child."[1] MCL 712A.19c(1). See also MCR 3.978(A), which contains substantially similar language.

During any post-termination review hearing under MCL 712A.19c, the court must review:

> "(a) The appropriateness of the permanency planning goal for the child.[2]
>
> (b) The appropriateness of the child's placement.[3]
>
> (c) The reasonable efforts being made to place the child for adoption or in other permanent placement in a timely manner." MCL 712A.19c(1).

As long as a child is under the court's, Michigan Children's Institute's (MCI's), or an agency's jurisdiction, control, or supervision, the court must conduct a post-termination review hearing to review a child's placement in foster care and review the progress being made toward a child's adoption or other permanent placement. MCR 3.978(A). See also MCL 712A.19c(14).

However, post-termination review hearings under MCL 712A.19c apply "only to a child's case in which parental rights to the child were either terminated as the result of a proceeding under [MCL 712A.2(b)] or a similar law of another state or terminated voluntarily following the

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[1] If a child is placed in a permanent planned living arrangement or placed with a fit and willing relative with the intent the placement be permanent, the post-termination review hearing must be held within 182 days. MCR 3.978(A). See Section 18.3(A).

[2] "State and federal policies approve four types of permanency goals for children." SCAO Guideline, Conducting Effective Post-Termination Review Hearings, p 8. The four types in order of priority are: adoption, guardianship, placement with a fit and willing relative, and another planned living arrangement (APPLA). *Conducting Effective Post-Termination Review Hearings*, *supra* at pp 8-9.

[3] "If the child is a **permanent** court ward under MCL 712A.20, the court may order a change in placement if the court determines that a different placement is more appropriate and in the child's best interests." SCAO Guideline, Conducting Effective Post-Termination Review Hearings, p 10. However, "[i]t is important to note that courts may not order a change of placement for a state ward[;] [t]he MCI superintendent is responsible for decisions regarding state wards' placement and care." *Conducting Effective Post-Termination Review Hearings*, *supra*. "SCAO recommends that if the court believes that the child's placement is not appropriate, the court make that belief known and recommend that the child's [Lawyer Guardian Ad Litem] (LGAL) and the [Michigan Children's Institute] (MCI) superintendent consult regarding the court's concern." *Id.*

initiation of a proceeding under [MCL 712A.2(b)] or a similar law of another state." MCL 712A.19c(14).

## 18.2 Reasonable Efforts Findings

To establish a child's eligibility for federal foster care maintenance payments under Title IV-E of the Social Security Act, "[t]he State must make reasonable efforts . . . to make and finalize alternate permanency plans in a timely manner when reunification [of the child and family] is not appropriate or possible."[4] 45 CFR 1356.21(b). See also 42 USC 672(a)(1).

"The court must make findings on whether reasonable efforts have been made to establish permanent placement for the child[.]" MCR 3.978(C).

> **Note:** To maintain Title IV-E eligibility, "[t]he . . . agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect (whether the plan is reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement) within twelve months of the date the child is considered to have entered foster care[5] . . . , and at least once every twelve months thereafter while the child is in foster care." 45 CFR 1356.21(b)(2)(i). "If such a judicial determination regarding reasonable efforts to finalize a permanency plan is not made in accordance with the schedule prescribed in [45 CFR 1356.21(b)(2)(i)], the child becomes ineligible under [T]itle IV-E at the end of the month in which the judicial determination was required to have been made, and remains ineligible until such a determination is made." 45 CFR 1356.21(b)(2)(ii).

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[4] Reasonable efforts are not the sole means of establishing eligibility under Title IV-E; the state must also comply with other federal requirements. See Chapter 14 for a detailed discussion of federal funding. See also the Department of Health & Human Services, Children's Bureau Letter to Child Welfare and Judicial Leaders, which details the judicial determinations and proceedings that must be held in order to satisfy Title IV-E requirements as well as suggestions for ensuring courts continue "to practice in a manner consistent with constitutional principles and to serve the best interest of children[.]"

[5] A child enters foster care on the earlier of the date that the court found a child to be abused or neglected or the date of the child's actual removal from his or her home. 45 CFR 1355.20(a).

# 18.3 Time Requirements

## A. Initial Post-Termination Review Hearings

If a child remains in foster care following termination of his or her parent's parental rights, the court must hold an initial post-termination review hearing within 91 days of the termination of parental rights. MCL 712A.19c(1); MCR 3.978(A).

However, "[i]f a child is under the care and supervision of the agency and is either placed with a relative and the placement is intended to be permanent or is in a permanent foster family agreement, the court shall hold a review hearing not more than 182 days after the child has been removed from his or her home[.]" MCL 712A.19(4); MCL 712A.19c(1).

The court must not cancel or delay an initial post-termination review hearing beyond the required number of days, regardless of any other pending matters. MCL 712A.19c(1).

## B. Subsequent Post-Termination Review Hearings

The court must not cancel or delay a subsequent post-termination review hearing beyond the required number of days, regardless of any other pending matters. MCL 712A.19c(1).

### 1. Child is in Foster Care

For the first year following a termination of a child's parent's parental rights, the court must hold subsequent post-termination review hearings at least every 91 days. MCL 712A.19c(1); MCR 3.978(A).

"If a child remains in a placement for more than 1 year following termination of parental rights to the child, a review hearing shall be held no later than 182 days from the immediately preceding review hearing before the end of the first year and no later than every 182 days from each preceding review hearing thereafter until the case is dismissed." MCL 712A.19c(1).[6]

[6] A hearing held under MCL 400.669(2) (requiring "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance [under the Young Adult Voluntary Foster Care Act (YAVFCA)] not less than 1 time every 12 months[]") may be combined with a hearing held under MCL 712A.19c(1). Section 14.4(I) for additional information on the extension of guardianship assistance under MCL 400.665.

### 2. Child is Placed in Permanent Planned Living Arrangement or with Relative

If a child resides in a permanent planned living arrangement or with a fit and willing relative and the relative placement is intended to be permanent, the court must hold subsequent post-termination review hearings at least every 182 days. MCL 712A.19(4); MCL 712A.19c(1); MCR 3.978(A).[7]

### C. Accelerated Review Hearings

On a party's motion or in the court's discretion, a court may accelerate a post-termination review hearing to "review any element of the case." MCL 712A.19c(1).

## 18.4 Notice

"The foster parents (if any) of a child and any preadoptive parents[8] or relative providing care to the child must be provided with notice of and an opportunity to be heard at each [post-termination review] hearing." MCR 3.978(B).

## 18.5 Court's Options Following Post-Termination Review Hearings

"The court must make findings on whether reasonable efforts have been made to establish permanent placement for the child, and may enter such orders as it considers necessary in the best interests of the child, including appointment of a juvenile guardian pursuant to MCL 712A.19c and MCR 3.979." MCR 3.978(C).

Note: "After termination [of parental rights], the superintendent of the Michigan Children's Institute (MCI) becomes the child's legal guardian as soon as the court commits the child to the Department of [Health and] Human Services (DHHS)." SCAO Guideline, Conducting Effective Post-Termination Review Hearings, p 4. "The MCI then

[7] A hearing held under MCL 400.669(2) (requiring "[t]he court [to] hold a hearing regarding the youth's continued participation in extended guardianship assistance [under the Young Adult Voluntary Foster Care Act (YAVFCA)] not less than 1 time every 12 months[]") may be combined with a hearing held under MCL 712A.19(4) and MCL 712A.19c(1). Section 14.4(I) for additional information on the extension of guardianship assistance under MCL 400.665.

[8] "The term 'preadoptive parent' is not defined in Michigan law or court rule. The term appears in MCL 722.956, where it is used in conjunction with placement." SCAO Guideline, Conducting Effective Post-Termination Review Hearings, p 6 n 5.

> oversees the care, custody, and placement of the child[, and] . . . approves the permanency plan developed by the caseworker, resolves placement-change issues, consents to appropriate medical care, and consents to guardianships and adoptions." *Conducting Effective Post-Termination Review Hearings*, *supra.* "The court's continuing role is to ensure that the agency moves forward on the child's permanency plan." *Id.*

## A. Appointment of Juvenile Guardian

After parental rights have been terminated, MCL 712A.19c(2)[9] and MCR 3.979(A) permit the court to appoint a juvenile guardian for the child if the court finds it to be in the child's best interests.[10] See also MCR 3.978(C).

> **Note:** If the proposed guardian is seeking guardianship assistance payments, the assistance agreement must be approved and signed before the order of guardianship is entered. See Section 14.4 for a detailed discussion of guardianship assistance.

"[T]here is no preference for placement with relatives as part of a [juvenile] guardianship determination under MCL 712A.19c(2)." *In re COH, ERH, JRG, & KBH*, 495 Mich 184, 187 (2014). "[T]he preference for placement with relatives created by MCL 722.954a is [not] relevant to a court's consideration of a petition to appoint a [juvenile] guardian under MCL 712A.19c(2)."[11] *In re COH, ERH, JRG, & KBH*, 495 Mich at 187 (because MCL 712A.19c(2) and MCL 722.954a "apply at different and distinct stages of child protective proceedings, . . . there is no preference for placement with relatives as part of a [juvenile] guardianship determination under MCL 712A.19c(2)[;]" "the preference for placement with relatives created in MCL 722.954a does not apply outside the time period for determining a child's initial placement immediately after removal and, therefore, does not apply to a court's decision to appoint a [juvenile] guardian under MCL 712A.19c(2) after parental rights are terminated").

In order for the court to appoint a juvenile guardian, the court must first obtain written consent from the Michigan Children's Institute

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[9] "[T]he process for appointing a [juvenile] guardian under MCL 712A.19c(2) is only applicable at the posttermination stage of a child protective proceeding." *In re COH, ERH, JRG, & KBH,* 495 Mich 184, 197 (2014). MCL 712A.19a governs the procedures for appointments of juvenile guardians *before* termination of parental rights. See Section 16.8 for additional information.

[10] See Section 18.5(A)(1) for information on the best interests determination.

[11] For additional information on relative placements under MCL 722.954a, see Section 8.2(A).

(MCI) Superintendent or his or her designee.[12] MCL 712A.19c(3); MCR 3.979(A)(3). "The consent must be filed with the court no later than 28 days after the . . . post[-]termination review hearing, or such longer time as the court may allow for good cause shown." MCR 3.979(A)(3). However, the court may appoint a juvenile guardian without the MCI Superintendent's consent, if after a hearing, "the court finds by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious[.]"[13] MCL 712A.19c(6); MCR 3.979(A)(3)(c).

> **Note:** The court may order the Department of Health and Human Services (DHHS) to seek the MCI Superintendent's consent. MCR 3.979(A)(3).

If a child is placed in a juvenile guardian's or a proposed juvenile guardian's home, the court must order the DHHS to:

> (1) Perform an investigation and file a written report for a review hearing under MCL 712A.19c(10);
>
> (2) Submit to the court within seven days a criminal record check and a central registry clearance of the residents in the home; and
>
> (3) Perform a home study and submit it to the court within 28 days[14] or submit a copy of a home study conducted within the last 365 days.[15] MCL 712A.19c(8); MCR 3.979(A)(1).
>
> > **Note:** If the child is in foster care, the court must continue the foster care placement and order the information required by MCR 3.979(A)(1) about the proposed juvenile guardian. MCR 3.979(A)(2).

## 1. Best-Interests Determination

Under MCL 712A.19c(2), the trial court must determine whether a juvenile guardianship "is in the child's best interest[.]" "A trial court may use its discretion under MCL 712A.19c(2) to determine the best method for analyzing the child's best interests by considering the circumstances relevant

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[12] The MCI Superintendent or his or her designee must consult with the child's lawyer guardian ad litem before granting written consent. MCL 712A.19c(3).

[13] See Section 18.5(A) for more information on ordering a juvenile guardianship without the MCI Superintendent's consent.

[14] MCL 712A.19c(8) states that the home study must be submitted to the court within 30 days.

[15] "If a home study has been performed within the immediately preceding 365 days, a copy of that home study shall be submitted to the court." MCL 712A.19c(8).

to the particular case." *In re COH, ERH, JRG, & KBH*, 495 Mich 184, 202 (2014). "[D]epending on the circumstances, a case may more reasonably lend itself to application of the Child Custody Act factors [(comparing two placement options)], some combination of the Adoption Code [(when only one party petitions for guardianship)] and Child Custody Act factors, or a unique set of factors developed by the trial court for purposes of a particular case." *Id.* at 203. "A trial court's decision regarding what factors to consider in making the best-interest determination is reviewed for an abuse of discretion." *Id.* at 202 ("the trial court's decision to apply [the Child Custody Act factors] rather than the Adoption Code factors was not an abuse of discretion" because comparing "the two placement options [(between the biological grandmother and the foster parents)] in this case was a logical method for determining which option was in the children's best interests," and "the Child Custody Act factors incorporate a comparative analysis").

"[T]he trial court's findings of fact regarding the best-interest determination . . . are subject to the clear-error standard on appeal." *In re COH, ERH, JRG, & KBH*, 495 Mich 184, 203-204 (2014) ("trial court did not clearly err in concluding that a [juvenile] guardianship with [the children's biological grandmother] was not in the children's best interests under [MCL 712A.19c(2)]" where "the trial court provided an individualized analysis based on the relevant evidence for each of the applicable [Child Custody Act factors][,] . . . the trial court did not take a one-sided view of the evidence[, but] rather . . . weighed evidence that favored each placement option[, and] . . . the trial court correctly explained that[ although its decision might be unfair to the biological grandmother,] its focus remained on the *children's* best interests, as required by law"), quoting *In re Mason*, 486 Mich 142, 152 (2010).

### 2. Juvenile Guardianship Appointment Without MCI Superintendent's Consent

"If a person denied consent believes that the decision to withhold consent by the MCI [S]uperintendent is arbitrary or capricious, the person may file a motion with the court within 56 days of receipt of the decision to deny consent."[16] MCR 3.979(A)(3)(a). The motion must contain all of the following information:

[16] See also MCL 712A.19c(4), which contains substantially similar language.

> "(i) the specific steps taken by the person or agency to obtain the consent required and the results, if any, and
>
> (ii) the specific reasons why the person or agency believes that the decision to withhold consent was arbitrary or capricious." MCR 3.979(A)(3)(a). See also MCL 712A.19c(4), which contains substantially similar language.

Upon receipt of a motion alleging the MCI Superintendent's decision to withhold consent was arbitrary or capricious, the court must set a hearing date and ensure notice is provided to "the MCI [S]uperintendent and all parties entitled to notice under MCR 3.921."[17] MCR 3.979(A)(3)(b).[18]

The court may approve a juvenile guardianship appointment without the MCI Superintendent's consent if it finds by clear and convincing evidence that the MCI Superintendent's decision to withhold consent was arbitrary or capricious. MCL 712A.19c(6); MCR 3.979(A)(3)(c).

### 3. Procedure for Appointing Juvenile Guardian

MCR 3.979(B) describes the process by which a juvenile guardian is appointed:

> "After receiving the information ordered by the court under [MCR 3.979(A)(1)], and after finding that appointment of a juvenile guardian is in the child's best interests, the court may enter an order appointing a juvenile guardian. The order appointing a juvenile guardian shall be on a form approved by the state court administrator.[19] Within 7 days of receiving the information, the court shall enter an order appointing a juvenile guardian or schedule the matter for a hearing. A separate order shall be entered for each child.
>
> > (1) *Acceptance of Appointment.* A juvenile guardian appointed by the court shall file an acceptance of appointment with the court on

[17] See Section 5.2 for additional information on notices of hearings in child protective proceedings.

[18] See also MCL 712A.19c(5), which contains substantially similar language to MCR 3.979(A)(3)(b), but also specifies that the "MCI [S]uperintendent, the foster parents, the prospective guardian, the child, and the child's lawyer guardian ad litem" must receive notice of the hearing.

[19] See SCAO form JC 91, *Order Appointing Juvenile Guardian*, at https://www.courts.michigan.gov/4a2c0d/siteassets/forms/scao-approved/jc91.pdf.

> a form approved by the state court administrator.[20] The acceptance shall state, at a minimum, that the juvenile guardian accepts the appointment, submits to personal jurisdiction of the court, will not delegate the juvenile guardian's authority, and will perform required duties.
>
> (2) *Letters of Authority.* On the filing of the acceptance of appointment, the court shall issue letters of authority on a form approved by the state court administrator.[21] Any restriction or limitation of the powers of the juvenile guardian must be set forth in the letters of authority, including but not limited to, not moving the domicile of the child from the state of Michigan without court approval.
>
> (3) *Certification.* Certification of the letters of authority and a statement that on a given date the letters are in full force and effect may appear on the face of copies furnished to the juvenile guardian or interested persons.
>
> (4) *Notice.* Notice of a proceeding relating to the juvenile guardianship shall be delivered or mailed to the juvenile guardian by first-class mail at the juvenile guardian's address as listed in the court records and to his or her address as then known to the petitioner. Any notice mailed first class by the court to the juvenile guardian's last address on file shall be considered notice to the juvenile guardian."

## 4. Juvenile Guardian's Duties and Authority

MCR 3.979(E) describes a juvenile guardian's duties and authority:

> "A juvenile guardianship approved under these rules is authorized by the Juvenile Code and is distinct from a guardianship authorized under the Estates and Protected Individuals Code.[22] A

[20] See SCAO form JC 92, *Acceptance of Appointment (Juvenile Guardian)*, at https://www.courts.michigan.gov/4a2c3e/siteassets/forms/scao-approved/jc92.pdf.

[21] See SCAO form JC 93, *Letters of Juvenile Guardianship*, at https://www.courts.michigan.gov/4a2c20/siteassets/forms/scao-approved/jc93.pdf.

juvenile guardian has all the powers and duties of a guardian set forth under [MCL 700.5215].[23]

(1) *Report of Juvenile Guardian.* A juvenile guardian shall file a written report annually within 56 days after the anniversary of appointment and at other times as the court may order. Reports must be on a form approved by the state court administrator.[24] The juvenile guardian must serve the report on the persons listed in MCR 3.921.

(2) *Petition for Conservator.* At the time of appointing a juvenile guardian or during the period of the juvenile guardianship, the court shall determine whether there would be sufficient assets under the control of the juvenile guardian to require a conservatorship. If so, the court shall order the juvenile guardian to petition the probate court for a conservator pursuant to MCL 700.5401 *et seq*.

(3) *Address of Juvenile Guardian.* The juvenile guardian must keep the court informed in writing within 7 days of any change in the juvenile guardian's address.

(4) The juvenile guardian shall provide the court and interested persons with written notice within 14 days of the child's death."

## 5. Jurisdiction and Court's Responsibilities

**Jurisdiction over juvenile guardianship.** Once a juvenile guardian is appointed, the court's *jurisdiction over the juvenile guardianship* continues until 120 days after the youth's 18th birthday or sooner if released by court order. MCR

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[22] Although a juvenile guardian has all the same powers and duties of a guardian appointed under MCL 700.5215, the two guardianships differ in that a juvenile guardian is "intended to be the permanent placement for a child who cannot be returned home[,]" and a guardian appointed under MCL 700.5215 is typically intended to be "short term, due to a temporary inability of a parent to care for a child." SCAO memorandum, p 4, at https://www.courts.michigan.gov/48d5de/siteassets/court-administration/administrative-memoranda/2008/2008-05.pdf. See Section 4.6 for additional information on guardianship appointments under MCL 700.5215.

[23] See also MCL 712A.19c(7), which contains substantially similar language.

[24] See SCAO form JC 94, *Annual Report of Juvenile Guardian on Condition of Child*, at https://www.courts.michigan.gov/4a2c27/siteassets/forms/scao-approved/jc94.pdf.

3.979(C)(1)(b). See also MCL 712A.19c(10). If the DHHS provides the court with notice that it is extending guardianship assistance to a youth beyond the age of 18 under MCL 400.665 (Young Adult Voluntary Foster Care Act (YAVFCA)), the court must "retain jurisdiction over the guardianship until that youth no longer receives extended guardianship assistance."[25] MCR 3.979(C)(1)(b). "Upon receipt of notice from the [DHHS] that it will not continue extended guardianship assistance, the court shall immediately terminate the juvenile guardianship." MCR 3.979(D)(1)(c).

- The court must "conduct an annual review of a juvenile guardianship as to the condition of the child until the child's eighteenth birthday."[26] MCR 3.979(D)(1)(a). See also MCL 712A.19c(10). The court may conduct additional reviews as it deems necessary, or it may order the DHHS or a court employee to conduct an investigation and file a written report. MCL 712A.19c(10); MCR 3.979(D)(1)-(2). "If, under [MCR 3.979(C)(1)(b) (retention of court jurisdiction over the juvenile guardianship for extended juvenile guardianship assistance)], the [DHHS] has notified the court that extended guardianship assistance has been provided to a youth pursuant to MCL 400.665, the court shall conduct an annual review hearing . . . [until] the youth is on longer eligible for extended guardianship assistance."[27]

**Jurisdiction over child/youth.** The court's *jurisdiction over the child* under MCL 712A.2(b) terminates once the juvenile guardian is appointed and a post-termination review hearing is held. MCL 712A.19c(9); MCR 3.979(C)(1)(a). But see MCL 712A.2a(4), which requires the court to retain its jurisdiction over a youth 16 years of age or older who was appointed a juvenile guardian under MCL 712A.19c until the DHHS determines whether the youth[28] is eligible to receive extended

[25] See Section 4.9 for a detailed discussion of a court's jurisdiction following juvenile guardianship appointments, and Section 14.4(I) for additional information on extension of guardianship assistance under MCL 400.665.

[26] See Section 4.9(D) for a detailed discussion of review hearings following juvenile guardianship appointments, and Section 4.9(E) for a detailed discussion of ordering an investigation of juvenile guardianships.

[27] For additional information on the extension of guardianship assistance under MCL 400.665, including the annual review requirements, see Section 14.4(I).

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

guardianship assistance under MCL 400.641 (YAVFCA).[29] If the DHHS determines the youth is eligible for extended guardianship assistance under the YAVFCA, the court must retain jurisdiction until the youth no longer receives the guardianship assistance.[30] See also MCL 400.669(1), which requires the court to retain its jurisdiction "of a youth receiving, or a youth for whom the [DHHS] is determining eligibility for receiving, extended guardianship assistance until that youth no longer receives guardianship assistance."

The appointment of a lawyer-guardian ad litem terminates once the court's jurisdiction over the child under MCL 712A.2(b) terminates. MCR 3.979(C)(3). However, the court may reappoint the lawyer-guardian ad litem or appoint a new lawyer-guardian ad litem once a juvenile guardian is appointed.[31] *Id.*

### 6. Revocation of Juvenile Guardianship

The court must[32] hold a hearing to determine whether to revoke a juvenile guardianship, on its own motion or upon petition from the DHHS, the child's lawyer guardian ad litem, or the appointed guardian.[33] MCL 712A.19c(11); MCR 3.979(F)(1)(a).

After notice and a hearing on a petition to revoke a juvenile guardianship, the court must enter an order to revoke a juvenile guardianship if it finds that:

> (1) by a preponderance of the evidence the continuation of the juvenile guardianship is not in the child's best interests;
>
> (2) it is contrary to the child's welfare to be placed in or remain in the juvenile guardian's home; and
>
> (3) reasonable efforts were made to prevent removal. MCR 3.979(F)(5). See also MCL 712A.19c(13).

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

[30] See Section 4.6 for a discussion of juvenile guardianship appointments, and Section 16.9 for a discussion of the Young Adult Voluntary Foster Care Act (YAVFC).

[31] See Section 7.10 for a detailed discussion of a lawyer-guardian ad litem's powers and duties.

[32] MCR 3.979(F)(1)(a) *requires* the court to hold this hearing; MCL 712A.19c(11) states that the court *may* hold this hearing.

[33] See Section 4.9(H) for a detailed discussion of revoking a juvenile guardianship.

Upon entry of the revocation order, MCR 3.979(F)(5) requires the child to be placed under the care and supervision of the DHHS.[34] However, MCL 712A.19c(13) requires the court to appoint a successor juvenile guardian or commit the child to the MCI under MCL 400.203.

Additionally, upon revocation, the court's jurisdiction over the child under MCL 712A.2(b) is reinstated under the previous child protective proceeding. MCR 3.979(F)(5).

If a court revokes a juvenile guardianship, it must hold a dispositional review hearing under MCR 3.978

## 7. Petition to Terminate Juvenile Guardianship

On petition from the juvenile guardian or other interested person, the court may hold a hearing to determine whether to terminate the juvenile guardianship.[35] MCL 712A.19c(12); MCR 3.979(F)(1)(b).

> **Note:** A request to terminate a guardianship may include a request for appointment of a successor guardian. MCL 712A.19c(12); MCR 3.979(F)(1)(b).

Under MCR 3.979(F)(6), if, after notice and a hearing on the petition to terminate a juvenile guardianship, the court finds by a preponderance of the evidence that termination is in the child's best interests, the court must either:

> (1) proceed under MCR 3.979(F)(5) if there is no successor,[36] or
>
> (2) terminate the appointment if there is a successor and proceed with an investigation and the appointment of a successor juvenile guardian in accordance with MCR 3.979(B).[37]

But see MCL 712A.19c(13), which requires the court to terminate the guardianship and either appoint a successor guardian or commit the child to the MCI under MCL 400.203.

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[34] See SCAO form JC 101, *Order Regarding Revocation of Juvenile Guardianship*, at https://www.courts.michigan.gov/4a2bb5/siteassets/forms/scao-approved/jc101.pdf.

[35] See Section 4.9(H) for a detailed discussion of terminating a juvenile guardianship.

[36] The court's jurisdiction over the child under MCL 712A.2(b) is reinstated under the previous child protective proceeding. MCR 3.979(F)(5); MCR 3.979(F)(6)(a).

[37] See SCAO form JC 100, *Order Following Hearing on Petition to Terminate Appointment of Juvenile Guardian*, at https://www.courts.michigan.gov/4a2bc7/siteassets/forms/scao-approved/jc100.pdf.

The court's jurisdiction over a juvenile guardianship continues with the appointment of a successor juvenile guardian. MCR 3.979(F)(6)(b).

## B. Placing Child on Adoption Registry

If an adoptive family has not been identified within 90 days of entry of an order terminating parental rights, the supervising agency[38] must submit the child's information for inclusion in the registry of children available for adoption.[39] MCL 722.954b(2).

## C. Legal Risk Placement

Once a court enters an order terminating parental rights, it may place a child in an adoptive home before the time for a rehearing or appeal of the termination order has expired. MCL 710.41(2). The placement is often referred to as a legal risk placement or more commonly a legal risk adoption.[40]

> **Note:** The court must not grant an adoption petition while an appeal is pending with the Court of Appeals or the Supreme Court. *In re JK*, 468 Mich 202, 219 (2003). See also MCL 710.56(2). The Court noted that at each post-termination review hearing, "the court can monitor the progress of the parent's appeal and ensure that an adoption does not take place until the parent's right to appellate review has been exhausted." *In re JK*, 468 Mich at 210 n 28.
>
> "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

[38] For purposes of the Foster Care and Adoption Services Act *supervising agency* means "the department if a child is placed in the department's care, or a child placing agency in whose care a child is placed for foster care." MCL 722.952(m). MCL 722.952(g) defines *child placing agency* as "that term as defined in . . . MCL 722.111." MCL 722.952(h) defines *department* as "the department of health and human services."

[39] See MCL 722.958(2), which requires the department to maintain a directory of children who are under the department's jurisdiction and who are available for adoption.

[40] For a detailed discussion of legal risk adoptions, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 8.

> for rehearing or reconsideration is pending; and that the time for all appellate proceedings in this matter has expired." MCR 3.808.[41]

## 18.6 Termination of Jurisdiction

"[I]f the court has exercised jurisdiction over a [child] under [MCL 712A.2(b)], jurisdiction shall continue for a period of 2 years beyond the maximum age of jurisdiction conferred under [MCL 712A.2], unless the [child] is released sooner by court order." MCL 712A.2a(1). The maximum age of jurisdiction conferred under MCL 712A.2(b) is 18 years. See MCL 712A.2(b).

### A. Court Order Terminating Jurisdiction

> "The jurisdiction of the court in the child protective proceeding may terminate when a court of competent jurisdiction enters an order:
>
> > "(1) terminating the rights of the entity with legal custody and enters an order placing the child for adoption,[42] or
> >
> > (2) appointing a juvenile guardian under MCR 3.979 after conducting a review hearing under [MCR 3.979(A)]."[43] MCR 3.978(D).
>
> "While courts are authorized to terminate jurisdiction as soon as the child is placed for adoption, SCAO recommends that courts retain jurisdiction until the *final adoption order is entered*[;] [t]his will allow the court [to] continue its oversight of the case in the event that an adoption is disrupted within the [three or] six month waiting

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[41] "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").

[42] See also MCL 710.51, which permits the court to enter, under the Adoption Code, an order terminating the rights of a person or entity consenting to a child's adoption and to formally place a child for adoption. See the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 6, for a detailed discussion of formal placements.

[43] See Section 18.5(A) for a detailed discussion of juvenile guardianship appointments.

period."[44] SCAO Guideline, Conducting Effective Post-Termination Review Hearings, pp 13-14.

## B. Continuation of Child's Placement

If parental rights have been terminated, the court must continue to review the case while a child is in placement or under the jurisdiction, supervision, or control of the Michigan Children's Institute.[45] MCL 712A.19c(1); MCL 712A.19c(14). If a child has been committed to the Michigan Children's Institute (MCI), the child may remain a state ward until his or her 19th birthday.[46] MCL 400.203(1).

If a child is placed in a child caring institution, children's camp, or foster family or group home before his or her 18th birthday, that placement may continue after the child's 18th birthday.[47] MCL 722.111(z)(*iii*).

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[44] "MCL 710.56 requires a six month waiting period [for an adoptee who is one year of age or older] from the time the child is placed in the adoptive home until the final adoption is entered, unless [the 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 finds, after holding a hearing, that an extension of the six-month period is in the child's best interests]." SCAO Guideline, Conducting Effective Post-Termination Review Hearings, p 14 n 18. However, if the adoptee is less than one-year old at the time the adoption petition is filed, MCL 710.56(1) requires a three-month waiting period from the time the child is placed in the adoptive home until the final adoption order is entered, 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.

[45] "Wherever commitment to the Michigan Children's Institute is mentioned in any law of this state, it shall be construed to mean commitment to the [DHHS]." MCL 400.203(1).

[46] A child may be discharged as a state ward by the DHHS earlier than his or her 19th birthday under MCL 400.208 (unable to place or retain the child in a family home) or MCL 400.209 (child is adopted, married, emancipated, or appointed a juvenile guardian). MCL 400.203(1).

[47] Whether a child can continue placement depends on the number of total residents in relation to the number of residents already over the age of 18. See MCL 722.111(z)(*iii*)(A)-(D).

# Chapter 19: Child Custody Proceedings Involving Indian Children


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## *In this chapter . . .*

This chapter discusses the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq.*, as they apply to child protective proceedings. Through ICWA and the MIFPA, Congress and the Michigan Legislature have expressed a strong preference for keeping Indian children with their

families and deferring to tribes on matters of child custody and placement. This preference is expressed in the ICWA's and the MIFPA's notice, transfer, intervention, and heightened evidentiary requirements.

The ICWA and the MIFPA also apply to delinquency, guardianship, and adoption proceedings. For discussion of these types of proceedings, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, the Institute of Continuing Legal Education's *Michigan Probate Benchbook*, and the Michigan Judicial Institute's *Adoption Proceedings Benchbook*.

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.

In an effort to "help Michigan judges learn about the federal Indian Child Welfare Act of 1978, the need for states to comply with the Act, and discuss its implementation in Michigan[,]" the State Court Administrative Office (SCAO) developed the *Michigan Indian Family Preservation Act of 2013 and Indian Child Welfare Act of 1978: A Court Resource Guide*.

The SCAO also created the *Indian Child Welfare Act - Michigan Indian Family Preservation Act Reference Comparison Chart* to "provide[] a [reference chart for] comparison between key provisions of ICWA and MIFPA."

The SCAO also developed the *State of Michigan ICWA/MIFPA Field Guide* to provide trial courts with a quick practical guide through the process of applying the MIFPA and the ICWA standards and procedures for cases involving Indian children.

The Permanency Planning for Children Department of the National Council of Juvenile and Family Court Judges also created a series of checklists "to assist juvenile and family court judges in assuring that the necessary inquiries are being made to determine as early as possible in every case whether the [ICWA] applies."

# 19.1 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*.

## 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*.

## 19.2 General Requirements and Purpose of the Indian Child Welfare Act (ICWA)

### A. General Requirements of the ICWA

The Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., mandates that state courts adhere to certain minimum procedural requirements before removing Indian children[1] from their homes and placing them in foster or adoptive homes. 25 USC 1902. Because the ICWA is federal law, it preempts conflicting state law. See *In re L A LeDee*, ___ Mich App ___, ___ (2026) ("[W]hen an Indian child is involved in the adjudication of a custody proceeding, . . . ICWA governs from start to finish.") (quotation marks and citation omitted). It is important to remember that the ICWA provides additional requirements for the termination of parental rights, placements, and adoptions. The court must meet the requirements of the state law and, when the ICWA applies, it must also meet the additional requirements of the ICWA.

However, several of the procedural requirements of the ICWA are less stringent than statutory and court rule requirements in Michigan. When applicable state law contains higher standards than the ICWA, a court must apply those higher standards.[2] See 25

[1] See Section 19.4(A) for a discussion of Indian children, which includes the definition of an Indian child.

USC 1921. See also 25 CFR 23.106(a)-(b), which contain substantially similar language.

### B. Purpose of the ICWA

The ICWA was enacted in 1978 "to protect and preserve Indian families in response to growing concerns over abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster-care placement, usually in non-Indian homes." *In re L A LeDee*, ___ Mich App ___, ___ (2026) (quotation marks and citation omitted). The ICWA promotes this purpose by establishing minimum federal standards for the removal of Indian children from their families and for their placement in foster or adoptive homes that reflect the unique values of Indian culture. In short, "[the ICWA] aims to keep Indian children connected to Indian families." *Haaland v Brackeen*, 599 US 255, 265 (2023).[3] The ICWA's purpose also includes providing assistance to Indian Tribes in the operation of child and family services programs. 25 USC 1902.

The ICWA does not violate the Equal Protection rights of non-Indians. *In re Miller*, 182 Mich App 70, 74-76 (1990).

## 19.3 General Requirements and Purpose of the Michigan Indian Family Preservation Act (MIFPA)

"[Michigan's] Legislature adopted MIFPA in 2012 to establish state law standards for child welfare and adoption proceedings involving Indian children." *In re L A LeDee*, ___ Mich App ___, ___ (2026) (quotation marks and citation omitted). Some of MIFPA's standards "provide greater protections for Indian families than those provided by ICWA." *LeDee*, ___ Mich App at ___ (quotation marks and citation omitted). "In Indian child custody proceedings,[4] [the MIFPA requires] the best interests of the Indian child[5] [to] be determined, in consultation with the Indian child's tribe,[6] in accordance with the [ICWA], and the policy specified in this section. Court shall do both of the following:

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[2] These higher standards are noted in this chapter when relevant.

[3] The ICWA "requires a state court to place an Indian child with an Indian caretaker, if one is available," and the ICWA applies "even if the child is already living with a non-Indian family and the state court thinks it in the child's best interest to stay there." *Haaland v Brackeen*, 599 US 255, 264 (2023) (affirming that Congress acted within the legislative authority granted it by the Constitution when it enacted the ICWA).

[4] For a discussion of Indian child-custody proceedings, see Section 19.4(B).

[5] See Section 19.4(A) for a discussion of Indian children, which includes the definition of an Indian child.

[6] For a discussion on an Indian child's tribe, see Section 19.4(A)(2).

(a) Protect the best interests of Indian children and promote the stability and security of Indian tribes and families.

(b) Ensure that the department[7] uses practices, in accordance with the [ICWA], this chapter, and other applicable law, that are designed to prevent the voluntary or involuntary out-of-home care placement of Indian children and, when an out-of-home care placement, adoptive placement, or preadoptive placement is necessary, place an Indian child in a placement that reflects the unique values of the Indian child's tribal culture and that is best able to assist the Indian child in establishing, developing, and maintaining a political, cultural, and social relationship with the Indian child's tribe and tribal community." MCL 712B.5.

## 19.4 When the ICWA and the MIFPA Apply

The ICWA and the MIFPA "apply whenever an Indian child[8] is the subject of:

(1) A child-custody proceeding, including:[9]

(*i*) An involuntary proceeding;[10]

(*ii*) A voluntary proceeding[11] that could prohibit the parent[12] or Indian custodian[13] from regaining custody[14] of the child upon demand; and

[**Note:** A parent or Indian custodian is prohibited from regaining custody of the child *upon demand* if

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[7] For purposes of the MIFPA, "'[d]epartment' means the department of health and human services [(DHHS)] or a successor department or agency." MCL 712B.3(e). See also MCR 3.002(5), which contains a substantially similar definition of *department.*

[8] ICWA and MIFPA both apply when the *child* is an Indian child; accordingly, if the child meets the requirements of that definition, the protections apply to a proceeding involving a respondent-parent who has no Indian lineage. *In re Beers/Lebeau-Beers*, 325 Mich App 653, 668 (2018).

[9] The ICWA and the MIFPA uniquely define the term *child custody proceedings* as it specifically relates to an Indian child. See Section 19.4(B) for the ICWA's and the MIFPA's definition of *child custody proceeding*.

[10] "*Involuntary proceeding* means 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. For additional information on involuntary proceedings involving an Indian child, see Section 19.12.

[11] "*Voluntary proceeding* means 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. For additional information on involuntary proceedings involving an Indian child, see Section 19.12.

he or she has to do more than make a simple verbal request for the child's return.[15] 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."]

(*iii*) A proceeding involving status offenses[16] 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."[17] 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 (1996) (trial court erroneously made an independent determination as to whether the child was being removed from an existing Indian family in deciding whether the 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

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[12] "*Parent* or *parents* means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established." 25 CFR 23.2. See also 25 USC 1903(9) and MCR 3.002(20), which contain substantially similar definitions of *parent*; MCL 712B.3(s), which contains a substantially similar definition of *parent*, except that where the Indian child has been adopted, it does not require the adopter to be an Indian.

[13] "*Indian custodian* means any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law." 25 CFR 23.2. See also 25 USC 1903(6), MCL 712B.3(n), and MCR 3.002(15), which contain substantially similar definitions of *Indian custodian*.

[14] "*Custody* means 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.

[15] See, for example, a voluntary consent to 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). See also MCL 712B.13(3), which also requires the parent or Indian custodian (where applicable) to follow certain formalities in order to withdraw his or her consent.

[16] "*Status offenses* means 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.

sovereignty and the important public policy of improving tribal ties reflected in the ICWA").

The MIFPA 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 in a divorce proceeding. See MCL 712B.3(b)(*vi*); MCL 712B.7(1).

"[The] 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;[18] 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,[19] 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."[20] 25 CFR 23.103(b). See also 25 USC 1903(1).

> **Note:** MCL 712B.13 specifically extends the MIFPA's application to certain voluntary placements. For a

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[17] "*Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child." 25 CFR 23.2.

[18] The 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). "[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." *Id.* See Section 19.4(B) for a discussion of Indian child-custody proceedings.

[19] 25 CFR 23.102 defines *agency as "*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."

[20] 25 CFR 23.2 defines *upon demand to "*mean[] that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies."

discussion on MIFPA's application to voluntary placements, see Section 19.11.

"If [the] 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] parent cannot waive a child's status as an Indian child or any right of the tribe that is guaranteed by [the] ICWA." *In re Morris (Morris III)*, 491 Mich 81, 111 (2012).

The court must inquire whether the child or either of the child's parents is a member of an Indian tribe at the preliminary hearing.[21] MCR 3.965(B)(2).

- "If the court knows or has reason to know the child is an Indian child, the court must determine the identity of the child's tribe[.]" MCR 3.965(B)(2).

- "If the court knows or has reason to know the child is an Indian child, the court may adjourn the [preliminary] hearing for up to 21 days to ensure proper notice to the tribe or Secretary of the Interior as required by MCR 3.920(C)(1)."[22] MCR 3.965(B)(11). See also MCR 3.965(B)(2).

  **Note:** A petitioner must include in a petition for termination of parental rights a child's membership or eligibility for membership in an Indian tribe, if known.[23] MCR 3.961(B)(5).

For a checklist on when the ICWA applies, see http://www.ncjfcj.org/sites/default/files/ICWAChecklistFullDoc.pdf, p 15.

## A. Determining Indian Child Status

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 substantially similar language; 25 USC 1903(4), which contains substantially similar language except that it also

[21] See Section 7.6 for a detailed discussion of preliminary hearings.

[22] See Section 19.5 for a detailed discussion of notification requirements under the ICWA and the MIFPA.

[23] See Section 7.4 for a complete list of a petition's required content.

> 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."[24, 25] (Emphasis added).
>
> > **Note:** "ICWA does not apply simply based on a child['s] or parent's Indian ancestry. Instead there must be a political relationship to the Tribe." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, B.1 (2016).

The court must determine whether the child involved in the emergency proceeding[26] or child custody proceeding[27] 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); *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at B.7 (providing that "the court must ultimately determine whether the child is an Indian child for purposes of the child-custody proceeding[]").[28]

MCL 712B.9(3) requires the DHHS to "actively seek to determine whether a child at initial contact is an Indian child[, and] [i]f the [DHHS] is able to make an initial determination as to which Indian tribe or tribes a child brought to its attention may be a member, the [DHHS] shall exercise due diligence to contact the Indian tribe or tribes in writing so that the tribe may verify membership or eligibility for membership. If the [DHHS] is unable to make an initial determination as to which tribe or tribes a child may be a member, the [DHHS] shall, at a minimum, contact in writing the tribe or tribes located in the county where the child is located and the [S]ecretary [of the Interior]."[29] See *In re Jones*, 316 Mich App 110, 119 (2016) (conditionally reversing the trial court's order terminating the respondent-mother's parental rights due to ICWA

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[24] 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[]").

[25] See also 25 CFR 23.2, which contains substantially similar language as 25 USC 1903(4) except that it uses the term *citizen* and *citizenship* synonymously with *member* and *membership*.

[26] "*Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child." 25 CFR 23.2.

[27] For a discussion of Indian child-custody proceedings, see Section 19.4(B).

[28] See also 25 USC 1902 and MCL 712B.5, which mandate that state courts adhere to certain minimum procedural requirements under the ICWA and the MIFPA when an Indian child is involved.

[29] Note that MCL 712B.9(3) pertains to the DHHS "or a successor department or agency." See MCL 712B.3(e). See also MCL 712B.3(u), which defines *secretary* as the "Secretary of the Interior."

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).

> **Note:** In a child custody proceeding, MCL 712B.9(7) requires the "petitioner [to] document all efforts made to determine a child's membership or eligibility for membership in an Indian tribe and [to] provide them, upon request, to the court, Indian tribe, Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian."

"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.

**Exclusivity of Indian Tribal membership.** Generally, 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." See 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[, 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. 25 CFR 23.108(b).

**Court determines Indian child status for purposes of ICWA application.** "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." *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at B.7. See also *In re L A LeDee*, ___ Mich App ___, ___ (2026) ("While it is for the tribe to determine

whether a child is an 'Indian child,' it is for the court to determine whether the tribe is an 'Indian tribe.'") (quotation marks and citation omitted).

"[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*.

"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.

### 1. 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 [the] ICWA may apply, the court has a duty to inquire as to [the] 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).

"[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.

"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[30] 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);[31] 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."[32] 25 CFR 23.107(b).
>
> > **Note:** "The State court may rely on facts or documentation indicating a Tribal determination of membership or eligibility

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[30] 25 CFR 23.102 defines *agency as* "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."

[31] "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 19.4(A)(2).

> 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,[33] or agency[34] 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[35] or in an Alaska Native village;[36]

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[32] "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.*

[33] 25 CFR 23.102 defines *Indian organization* as "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."

[34] 25 CFR 23.102 defines *agency as "*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."

> (5) The court is informed that the child is or has been a ward of a Tribal court; or
>
> (6) The court is informed that either parent or the child possesses an identification card indicating 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.

"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.

## 2. Determining an Indian Child's Tribe

"*Indian child's Tribe* means:

> (1) The Indian Tribe in which an Indian child is a member or eligible for membership; or
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> (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]."[37] 25 CFR 23.2.[38]

Generally, 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

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[35] 25 CFR 23.2 defines *domicile* for a parent or Indian custodian as "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[;]" *domicile* for an Indian child as "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[;]" and *reservation* as "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."

[36] 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).

[37] See Section 19.4(A)(2)(b), for a discussion of 25 CFR 23.109.

[38] See also MCL 712B.3(*l*) and MCR 3.002(13), which contain substantially similar language except as otherwise noted and discussed in Section 19.4(A)(2)(b).

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).[39] "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 19.4(A)(2)(b).

"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) (trial court erroneously made an independent determination as to whether the child was being removed from an existing Indian family in deciding whether the 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[]").

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.' An example of documentation indicating membership is a document issued by the Tribe, such as Tribal enrollment documentation."[40] 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

[39] 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.

[40] "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).

438, 445-446 (1999), overruled on other grounds by *In re Morris (Morris III)*, 491 Mich 81 (2012)[41] (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 the ICWA); *In re NEGP*, 245 Mich App 126, 133 (2001), overruled on other grounds by *In re Morris (Morris III)*, 491 Mich 81 (2012)[42] ("The lack of enrollment in a Native American tribe is not . . . conclusive of the issue whether a child qualifies as an 'Indian child'").

### a. Determining Indian Tribal Status

An "'Indian tribe' or 'tribe' means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the [S]ecretary [of the Interior][43] 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.*

The court determines whether a tribe is an Indian tribe. *In re NEGP*, 245 Mich App 126, 133-134 (2001), overruled on other grounds by *In re Morris (Morris III)*, 491 Mich 81 (2012).[44]

> **Note:** The Bureau of Indian Affairs, *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 81 Federal Register 5019 (2016), contains a list of federally recognized Indian Tribes. However, the list is not all-inclusive because the Secretary may federally recognize an Indian Tribe after the list of federally recognized Tribes was last posted.

The ICWA does not apply to an Indian tribe that is not federally recognized. *In re Fried*, 266 Mich App 535, 540 (2005) (finding that "because the tribe to which [the]

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

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

[43] See MCL 712B.3(u), which defines *secretary* as the "Secretary of the Interior."

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

respondent[-father] belongs is not a tribe recognized as eligible for services provided to Indians by the Secretary of the Interior, it is not an 'Indian tribe' within the meaning of the ICWA[,] 25 USC 1903(8) and [25 USC 1903](11)"). See also *In re L A LeDee*, ___ Mich App ___, ___ (2026), and Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, B.4 (2016) (providing that the ICWA applies "only if the Tribe is a federally recognized Indian Tribe").

### b. 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).

**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).

**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."[45] 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 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[46] 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 [the] ICWA, the Indian Tribe with which the

[45] "[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).

[46] For additional information on involuntary child-custody proceedings, see Section 19.12.

> Indian child has the more significant contacts as the Indian child's Tribe, taking into consideration:
>
> (*i*) Preference of the parents[47] for membership of the child;
>
> (*ii*) Length of past domicile[48] or residence on or near the reservation[49] of each Tribe;
>
> (*iii*) Tribal membership of the child's custodial parent or Indian custodian;[50]
>
> (*iv*) Interest asserted by each Tribe in the child-custody proceeding;[51]
>
> (*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 [the] ICWA and the regulations in this subpart do not constitute a determination for any other purpose." 25 CFR 23.109(c)(3).

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[47] "*Parent* or *parents* means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established." 25 CFR 23.2.

[48] "For an Indian child, "[*domicile* is] 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. "For a parent or Indian custodian, [*domicile* is] 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." *Id*.

[49] "*Reservation* means 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.

[50] "*Indian custodian* means any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law." 25 CFR 23.2.

[51] For a discussion of Indian child-custody proceedings, see Section 19.4(B).

### 3. 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 other information sent to the [S]ecretary [of the Interior][52] and the tribal enrollment officer of the appropriate Indian tribe described in [MCL 712B.35(1)]." MCL 712B.35(2).

Moreover, "[i]n seeking verification of the child's status in a voluntary proceeding[53] 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."[54] 25 CFR 23.107(d). Note, however, that a parent's request for anonymity "does not relieve the court, agency,[55] or other party from any duty of compliance with [the] 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.[56]

## B. Child Custody Proceedings

The ICWA and the MIFPA apply whenever an Indian child is the subject of a *child custody proceeding*. See 25 USC 1903(1); MCL 712B.3(b); 25 CFR 23.2; 25 CFR 23.103(a). The child custody proceedings include actions involving foster care, guardianship, juvenile guardianship,[57] preadoptive placements, termination of

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[52] See 25 USC 1903(11) and MCL 712B.3(u), which define *secretary* as the "Secretary of the Interior."

[53] 25 CFR 23.2 defines *voluntary proceeding* as "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." See Section 19.11 for additional information on voluntary proceedings, and Section 19.4(B) for additional information on child-custody proceedings.

[54] "A Tribe receiving information related to this inquiry must keep documents and information confidential." 25 CFR 23.107(d).

[55] 25 CFR 23.102 defines *agency as "*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."

[56] For a discussion on placement preferences, see Section 19.13.

[57] See the SCAO memorandum, pp 6-7 at http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/JuvenileGuardianship.pdf.

parental rights, and adoptive placements. 25 USC 1903(1)(*i*)-(*iv*); MCL 712B.3(b)(*i*)-(*iv*); MCR 3.002(2)(a)-(d); 25 CFR 23.2.

Under MIFPA, "'[c]hild 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[58] or Indian custodian,[59] and where the parent or Indian custodian cannot have the Indian child returned upon demand[60] 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.[61]
> >
> > (B) The home of a guardian or limited guardian under . . . the [E]states and [P]rotected [I]ndividuals [C]ode, . . . MCL 700.5201 to [MCL] 700.5219.
> >
> > (C) A [J]uvenile [G]uardianship under [MCL 712A.19a or MCL 712A.19c].
>
> (*ii*) Termination of parental rights. Any action resulting in the termination of the parent-child relationship.[62]
>
> (*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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[58] For purposes of an Indian child, "'parent' means any biological parent or parents of an Indian child or any person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. *Parent does not include the putative father if paternity has not been acknowledged or established*." MCL 712B.3(s) (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. See Chapter 6 for information on establishing paternity.

[59] An "'Indian custodian' means any Indian person who has custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control have been transferred by the 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 CR 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."

[60] A parent or Indian custodian is prohibited from regaining custody of the child *upon demand* if he or she has to do more than make a simple verbal request for the child's return. 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."

[61] For purposes of the MIFPA, "'[f]oster home or institution' means a child caring institution as that term is defined in . . . MCL 722.111." MCL 712B.3(g). See also MCR 3.002(8), which contains a substantially similar definition of *foster home or institution.*

(*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[63] 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." See also 25 USC 1903(1) and MCR 3.002(2), which contain substantially similar definitions of *child custody proceedings*; 25 CFR 23.2, which contains a substantially similar definition of *child custody proceedings* except that it uses the phrase "may culminate in one of the following outcomes[,]" rather than the phrase "includes" and specifically excludes emergency proceedings[64] from the definition.[65]

**Note:** See Section 19.11 for voluntary proceedings, and Section 19.12 for involuntary proceedings.

## 19.5 Notice of Proceedings

Once the court knows or has reason to know that an Indian child is involved in a child custody proceeding, the child's parent[66] or Indian custodian[67] and the Indian child's tribe must be notified by the party seeking foster care placement or termination of parental rights.[68, 69] 25

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[62] "[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).

[63] "*Status offenses* means 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.

[64] "*Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child." 25 CFR 23.2.

[65] 25 CFR 23.2 also clarifies that "[a]n action that may culminate in one of these four outcomes [(foster-care placement, termination of parental rights, preadoptive placement, and 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 offense, that status offense proceeding is a child-custody proceeding." For purposes of 25 CFR 23.2, *hearing* means "a judicial session held for the purpose of deciding issues of fact, of law, or both[,]" and *status offense* means "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.

USC 1912(a); MCL 712B.9(1); 25 CFR 23.11(a). **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.

"Notice must include the requisite information identified in [25 CFR 23.111[70]], consistent with the confidentiality requirement in [25 CFR 23.111(d)(6)(*ix*)]." 25 CFR 23.11(a). Copies of the notice must also be sent to the appropriate Regional Director, which for Michigan is the Midwest Regional Director. 25 CFR 23.11(a); 25 CFR 23.11(b)(2). "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).

> 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.

25 CFR 23.111(a) requires the court, once it knows or has reason to know that an Indian child is involved in "an involuntary foster-care-placement or termination-of-parental rights proceeding[,]" to ensure that:

> "(1) The party seeking placement promptly sends notice 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."

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[66] A "'parent' means any biological parent or parents of an Indian child or any person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. *Parent does not include the putative father if paternity has not been acknowledged or established*." MCL 712B.3(s) (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. See Chapter 6 on establishing paternity.

[67] An "'Indian custodian' means any Indian person who has custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control have been transferred by the 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 CR 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."

[68] See the ICWA form, *Notice Form*, at http://www.narf.org/nill/documents/icwa/forms/index.html.

[69] For additional information on determining an Indian child's status, including a discussion on determining an Indian child's Tribe, see Section 19.4(A).

[70] For additional information on notice requirements under 25 CFR 23.111, see Section 19.5(B).

The Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at D.1, also recommends that "State agencies 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."

See Section 19.4 for a detailed discussion of an Indian child, how to determine an Indian child's Tribe, and what constitutes a child custody proceeding, an Indian child's parent, and an Indian custodian.

"[S]ufficiently reliable information of virtually any criteria on which membership might be based is adequate to trigger the notice requirement of 25 USC 1912(a)." *In re Morris (Morris III)*, 491 Mich 81, 108-109 (2012) (trial courts[71] properly determined "that there existed sufficient indicia of Indian heritage to require tribal notice[]" where the trial court found in *In re Morris* that the tribal-notice requirement under 25 USC 1912(a) was triggered when the child's parents informed the court during a preliminary hearing that they had Cherokee Indian heritage, and the trial court found in *In re Gordon* that the tribal-notice requirement under 25 USC 1912(a) was triggered when the child's parent indicated "her family was part of the Saginaw Chippewa Indian Tribe, and the referee indicated that the DHHS would be required to notify the Saginaw Chippewa [T]ribe to conclusively resolve the issue").

"A nonexhaustive list of indicia sufficient to trigger tribal notice includes situations in which (1) the trial court has information suggesting that the child, a parent of the child, or members of a parent's family are tribal members, (2) the trial court has information indicating that the child has Indian heritage, even though no particular Indian tribe can be identified, (3) the child's birth certificate or other official record indicates that the child or a parent of the child is of Indian descent, (4) the child, the child's

[71] 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 the ICWA.

parents, or the child's Indian custodian resides or is domiciled in a predominantly Indian community[,] and (5) the child or the child's family has received services or benefits from a tribe or the federal government that are available to Indians." *Morris III*, 491 Mich at 108 n 18. See also *In re Johnson*, 305 Mich App 328, 330, 332 (2014) (conditionally reversing the trial court's order terminating the respondent-mother's parental rights due to ICWA noncompliance and remanding to the trial court where the ICWA notice requirements were triggered following "the minor child's father['s] state[ment] [during the preliminary hearing] that his deceased grandmothers were both 'full-blooded' Native Americans, although he did not know to which tribe they belonged[,]" and "the [court] record contain[ed] no indication that notice was served under 25 USC 1912(a), nor [was] there any claim that such notice was ever served, apparently because there was a determination, or at least it was stated in court documents, that the minor child [was] not an Indian child[]"); *In re Jones*, 316 Mich App 110, 117-118 (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 "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[, and g]iven 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[]").

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).[72]

"'[T]he proper remedy for ICWA-notice violations is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue.'" *In re L A LeDee*, ___ Mich App ___, ___ (2026) (quoting *Morris III*, 491 Mich at 122). However, "'ICWA does not apply to a termination case when the minor child is claimed to be an Indian child from an Indian tribe that is not recognized as eligible for services provided to Indians by the Secretary of the Interior.'" *LeDee*, ___ Mich App at ___ (quoting *In re Fried*, 266 Mich App 535, 536 (2005). The *LeDee* Court determined that respondent-mother was not entitled to relief under ICWA because the Lumbee Tribe to which she belonged was not federally recognized as an

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

"Indian Tribe" under 25 USC 1903(8) or MCL 712B.3(o) until after her rights were terminated). *LeDee*, ___ Mich App at ___. The fact that the Lumbee Tribe received federal recognition while respondent's appeal was pending did not trigger ICWA and MIFPA notice requirements for respondent-mother because, by then, "no party [was] seeking foster care or termination of [respondent-mother's] parental rights" as her parental rights had already been terminated. *LeDee*, ___ Mich App at ___. Pursuant to MCL 712B.9(2), the trial court appropriately suspended "*all further proceedings*" involving the child's father, who was not a party in respondent-mother's case, until the Tribe receives notice. *LeDee*, ___ Mich App at ___.

A parent cannot waive a child's status as an Indian child or a tribe's right to notice under 25 USC 1912(a). *Morris III*, 491 Mich at 95-97, 110-111 (Court of Appeals erroneously held that a parent's "clarification [of the child's grandmother receiving direct notification from the tribe that indicated she and her son "'don't have enough heritage to get—to be part of the tribe'"] had relieved the trial court from making further tribal-notification efforts"). Specifically,

> "We do not think that the purported communication from the tribe to [the child's grandmother] about her eligibility for tribal benefits suffices for any purpose relevant to [the] ICWA. First, the purported letter to [the grandmother] had nothing to do with [the] ICWA or the child custody proceedings. Second, it is not clear that ineligibility for tribal benefits equates with ineligibility for tribal membership. Lastly, the trial court was correct to conclude that the tribe's response to the notice of the child custody proceedings needed to be sent from the tribe or the Secretary of the Interior directly to the DHHS or the trial court. A communication from a tribe to a relative of a respondent about eligibility for tribal benefits is insufficient to support any conclusion that [the] ICWA does not apply to the child custody proceedings." *Morris III*, 491 Mich at 111 n 20.

## A. Identity and Location of Parents, Indian Custodians, or Tribe

"The first step in the [ICWA and the 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 (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 the court 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 Custodians, or Tribe Can be Determined

In a child custody proceeding where the court knows or has reason to know that an Indian child is involved and where the identity and location of a child's Indian parent(s), Indian custodian(s), or tribe(s) can be determined, "the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending child custody proceeding and of the right to intervene."[73] MCL 712B.9(1). See also 25 USC 1912(a) and MCR 3.920(C)(1), which contain substantially similar language, and 25 CFR 23.11(a), 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).[74]

For purposes of providing notification to a Tribe,

- "[m]any Tribes designate an agent for receipt of ICWA notices."[75] 25 CFR 23.105(a). For a published list of current designated Tribal agents by region and alphabetically by Tribe within

[73] See Section 19.4 for the ICWA's and the MIFPA's definition of child custody proceeding, parent, custodian, and tribe. See also Section 19.9 for information on the tribe's or Indian custodian's right of intervention.

[74] 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).

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).

- "[f]or a Tribe without a designated Tribal agent for service of ICWA notice, contact the Tribe to be directed to the appropriate office or individual." 25 CFR 23.105(b).

- "[i]f 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[.]"[76] 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*, 81 Federal Register 96476, B.6 (2016). "State agencies should document their conversations with the 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).

## 2. Identity or Location of Parents, Indian Custodians, or Tribe Cannot be Determined

When the identity or location of the Indian parent(s), Indian custodian(s), or Indian tribe cannot be determined,[77] but there is reason to know the child is an Indian child, notice of the pending child-custody proceeding must be by registered mail with return receipt requested to the Secretary of the Interior's

[75] 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 the ICWA.

[76] Available at http://www.bia.gov/ContactUs/index.htm.

[77] "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*, 81 Federal Register 96476, D.2 (2016).

Regional Director,[78] which for Michigan is the Midwest Regional Director.[79] 25 USC 1912(a); MCL 712B.9(1); MCR 3.920(C)(1); 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[]'").

The contact information for the Midwest Region Office may be obtained at http://www.bia.gov/WhoWeAre/RegionalOffices/Midwest/index.htm.

> **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). The Secretary has 15 days after receiving the notice to notify the child's Tribe and parents or Indian custodians and to send a copy of the notice to the court. 25 USC 1912(a); MCL 712B.9(1); 25 CFR 23.11(c). 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). The Secretary must complete all research efforts, even if the research cannot be completed before the child-custody proceeding begins. *Id*.

## B. 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). 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).

Specifically, 25 CFR 23.111(d) requires "[n]otice to [be] in clear and understandable language and include the following:

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[78] See 25 CFR 23.2, which defines *secretary* as "the Secretary of the Interior or the Secretary's authorized representative acting under delegated authority." See also 25 USC 1903(11), MCL 712B.3(u), and MCR 3.002(22), which define *secretary* as the "Secretary of the Interior."

[79] 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).

"(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*, 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 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."[80] 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 [the] ICWA, the BIA's regulations, or Michigan caselaw that [requires the] petitioner [to] conduct independent research to obtain a parent's detailed genealogical information[;]" rather, "[t]he BIA adopted regulations [under 25 CFR 23.11(a) and 25 CFR 23.111(d)[81]] requir[e] notice to include ancestry information *if known*." *In re Morris (Morris IV) (After Remand)*, 300 Mich App 95, 105 (2013)[82] (where the petitioner receives a request for additional information from a tribe, whom the petitioner had notified of the proceedings, "it would be unreasonable to expect [the] petitioner to [locate the requested additional information regarding the respondent's family]" when "[the] respondent could not obtain any additional information regarding his [or her] relatives[;]" "[i]mposing this burden on [the] petitioner would also encourage parents, who can best research their own ancestry, to delay the proceedings by providing limited information[, and] [b]ecause it would often take a long time to uncover ancestry details, a requirement that [the] ICWA tribal notices include every detail of a child's ancestry would undermine [the] ICWA's 10-day provision [under 25 USC 1912(a)], which prevents unreasonable delays[, and] [i]t would also jeopardize concepts of permanency and finality.").

## C. Procedures After Providing Notice

The court must wait a minimum of 10 days after the parents or Indian custodians and the Indian tribe or the Secretary of the Interior have received notice before going forward with a foster-care-placement or termination-of-parental-rights proceeding. 25 USC 1912(a); MCL 712B.9(2); 25 CFR 23.112(a). On request, the court must grant parents, Indian custodians, or an Indian tribe an additional 20 days to prepare for the proceeding.[83] 25 USC 1912(a); MCL 712B.9(2); 25 CFR 23.112(a). "The parent, Indian custodian, and Indian child's Tribe are entitled to one extension of up to 20 days for each proceeding. Any extension beyond the initial extension up to 20 days is subject to the State court's rules and

[80] For a discussion of court-appointed foreign language interpreters, see Section 7.13.

[81] Formerly 25 CFR 23.11(d).

[82] The *Morris IV* case was filed before the MIFPA was enacted.

[83] See the ICWA form, *Motion for Extension of Time*, at http://www.narf.org/nill/documents/icwa/forms/index.html.

discretion." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, D.7 (2016).

> **Note:** "If the petitioner or court later discovers that the child may be an Indian child, all further proceedings shall be suspended until notice is received by the tribe or the [Secretary of the Interior[84]] as set forth in [MCL 712B.9(2)]. If the court determines after a hearing that the parent or tribe was prejudiced by lack of notice, the prior decisions made by the court shall be vacated and the case shall proceed from the first hearing. The petitioner has the burden of proving lack of prejudice." MCL 712B.9(2).

"Notice under [the] ICWA does not require the court or [the] petitioner to demand a response from the tribes notified." *In re Morris (Morris IV)* (*After Remand*), 300 Mich App 95, 108 (2013).

"If proper notice is provided and a tribe fails to either respond or intervene in the matter, the burden shifts to the parties (i.e., the parents) to show that the ICWA still applies. *In re TM* (*After Remand*), 245 Mich App 181, 187 (2001), overruled on other grounds by *In re Morris (Morris III)*, 491 Mich 81 (2012).[85] 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)[86] ("'[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 the ICWA still applied where "[t]here [was] nothing in the [trial court] record to indicate that the minor child [was] eligible for membership in an Indian tribe, [] both [the] petitioner and the trial court satisfied their obligations under [the notice requirements of 25 USC 1912(a)][,]" and the respondent-father did not "show[] that any new information [beyond what the petitioner provided to the tribes] [was] available or would result in a different tribal determination").

There was no due process violation where "[n]otice to the tribes was properly provided under [the] ICWA, no tribe sought a request for more time to prepare for the proceedings, and [the] respondent[-father] was given ample time to investigate, uncover, and provide

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[84] See MCL 712B.3(u), which defines *secretary* as the "Secretary of the Interior."

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

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

any family information that he could. *Morris IV*, 300 Mich App at 108.

"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*, 81 Federal Register 96476, D.10 (2016).

## D. Recordkeeping Requirements to Show Compliance

"While [the] ICWA is silent regarding the recordkeeping requirements of 25 USC 1912(a) notice compliance, . . . it [is] essential that certain documents be included in the record."[87] *Morris III*, 491 Mich at 113. Specifically, the Michigan Supreme Court held that the "trial courts have a duty to ensure that the record includes, at minimum[:]

- (1) the original or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a), and
- (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice[, and]
- [i]n addition, it would be helpful—especially for appellate purposes—for the record to include any additional correspondence between the petitioner, the court, and the Indian tribe or other person or entity entitled to notice under 25 USC 1912(a)." *Morris III*, 491 Mich at 114 (bullets added).

"Congress may impose ancillary recordkeeping requirements related to state-court proceedings without violating the Tenth Amendment [powers not delegated to the federal government by the Constitution and not prohibited by it to the States, are reserved to the States or to the people]." *Haaland v Brackeen*, 599 US 255, 291 (2023). "[25 USC 1951(a)] requires the state court to transmit to the Secretary a copy of a court order along with basic demographic

[87] The Michigan Supreme Court found in *Morris III,* 491 Mich at 112, that "[i]t [was] . . . impossible to discern from the [trial court's] record . . . whether notice was actually sent, to whom it was sent, and whether the notices were received by the appropriate recipients."

information. [25 USC 1915(e)] likewise requires the State to record a limited amount of information—the efforts made to comply with the placement preferences—and provide the information to the Secretary and to the child's tribe. These duties are 'ancillary' to the state court's obligation to conduct child custody proceedings in compliance with ICWA." See *Printz v United States*, 521 US 898, 908 n 2 (1997). "Thus, ICWA's recordkeeping requirements are consistent with the Tenth Amendment." *Haaland*, 599 US at 291.

## 19.6 Advice of Rights

"If a parent[88] or Indian custodian[89] 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 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."[90] 25 CFR 23.111(g).

For a discussion of appointment of counsel for an indigent parent or Indian custodian, see Section 19.8, transfer or objection to transfer of proceeding to Tribal court, see Section 19.7(B), request for additional time, see Section 19.5(C), and intervention in proceedings, see Section 19.9.

## 19.7 Jurisdiction

"The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and domicile[91] of the Indian child."[92] 25 CFR 23.110(a).

**State jurisdiction.** A State court has jurisdiction over a child custody proceeding involving an Indian child in three situations:

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[88] For purposes of 25 CFR Part 23, a *parent(s)* is "any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established." 25 CFR 23.2.

[89] For purposes of 25 CFR Part 23, an *Indian custodian* is "any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law." 25 CFR 23.2.

[90] "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*, 81 Federal Register 96476, D.9 (2016).

(1) Concurrent jurisdiction where the Indian child is domiciled or resides off an Indian reservation[93] and is not a ward of the Tribal court,[94] see 25 USC 1911(b), MCL 712B.7(3);

(2) A Tribal-State agreement where the Tribe allocates jurisdiction to the state, 25 USC 1919(a), MCL 712B.31(1); and

> **Note:** A Tribe or a State may revoke a Tribal-State agreement by providing a 180-day written notice to the other party. 25 USC 1919(b); MCL 712B.31(2)(a). Unless otherwise provided in the agreement, a revocation will not impact an action or proceeding over which the State court has already assumed jurisdiction. 25 USC 1919(b); MCL 712B.31(2)(b).

(3) Limited emergency jurisdiction where 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).[95] 25 USC 1922; MCL 712B.7(2);MCR 3.974(C)(1); Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 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 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).

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[91] "For an Indian child, [*domicile* is] 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. "For a parent or Indian custodian, [*domicile* is] 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." *Id*.

[92] For additional information on determining an Indian child's status, see Section 19.4(A), and child-custody proceedings, see Section 19.4(B).

[93] "'Reservation' means Indian country as defined in 18 USC 1151 and any lands, not covered under that section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation." MCL 712B.3(t). See also 25 USC 1903(10), MCR 3.002(21), and 25 CFR 23.2, which contain substantially similar definitions of *reservation.*

[94] Under MIFPA, MCL 712B.3(w) defines *ward of tribal court* as "a child over whom an Indian tribe exercises authority by official action in tribal court of by the governing body of the tribe." See also MCR 3.002(24), which contains a substantially similar definition of *ward of tribal court*.

[95] See Section 15.8 for a detailed discussion of emergency removals.

**Tribal court[96] jurisdiction.** A Tribe has jurisdiction over a child custody proceeding in three situations:

> (1) The Indian child is domiciled or resides on an Indian reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings (unless federal law provides otherwise), 25 USC 1911(a); MCL 712B.7(1); MCR 3.002(6); 25 CFR 23.110(a);
>
> (2) 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).

## A. Mandatory Transfer of Case to Tribal Court

If an Indian tribe has exclusive jurisdiction over an Indian child involved in a child protective proceeding and the State's involvement is not due to an emergency removal, the State court must notify the Tribe of the dismissal, dismiss the matter, and ensure that the Tribe is sent all information regarding the proceeding. MCR 3.905(A); 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 for Implementing the Indian Child Welfare Act*, 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[97] where the Tribe exercises exclusive jurisdiction over child-custody

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[96] "'Tribal court' means a court with jurisdiction over child custody proceedings that is either a court of Indian offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe that is vested with authority over child custody proceedings." MCL 712B.3(v). See also 25 USC 1903(12), MCR 3.002(23), and 25 CFR 23.2, which contain substantially similar definitions of *Tribal court.*

[97] "'Reservation' means Indian country as defined in 18 USC 1151 and any lands, not covered under that section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation." MCL 712B.3(t). See also 25 USC 1903(10), MCR 3.002(21), and 25 CFR 23.2 which contain substantially similar definitions of *reservation.*

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 3.905(A).

> 25 CFR 23.2 defines an *Indian child's domicile* as "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." A *parent's or Indian custodian's domicile* is "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." *Id.*

## 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.[98] 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,[99] 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).

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[98] For purposes of the MIFPA, MCL 712B.3(w) defines *ward of tribal court* as "a child over whom an Indian tribe exercises authority by official action in tribal court or by the governing body of the tribe." See also MCR 3.002(24), which contains a substantially similar definition of *ward of tribal court*.

[99] 25 CFR 23.2 defines *Tribal court* as a court with jurisdiction over child-custody proceedings and which 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 vested with authority over child-custody proceedings." For a discussion on child-custody proceedings, see Section 19.4(B).

## B. Non-Mandatory Transfer of Case to Tribal Court (Concurrent Jurisdiction)

When the Indian child is domiciled[100] or resides off the Indian reservation[101] 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 child custody proceeding, the court must ensure that the petitioner gave notice of the proceedings in accordance with MCR 3.920(C) to the interested parties listed in MCR 3.921.[102] MCR 3.905(C).

However, if either parent, the Indian custodian, or the Indian child's Tribe requests that the proceeding be transferred to the Tribal court,[103] 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 3.905(C)(1); 25 CFR 23.117.

> **Note:** The State court must not dismiss the case until the transfer has been accepted by the Tribal court. MCR 3.905(C)(2).

### 1. Request for Transfer of Case to Tribal Court Under MIFPA

A request to transfer the child protective proceeding to a tribal court may be made at any time in accordance with MCL 712B.7(3). MCR 3.905(C)(4).

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[100] "For an Indian child, [*domicile* is] 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. "For a parent or Indian custodian, [*domicile* is] 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." *Id*.

[101] "'Reservation' means Indian country as defined in 18 USC 1151 and any lands, not covered under that section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation." MCL 712B.3(t). See also 25 USC 1903(10), MCR 3.002(21), and 25 CFR 23.2 which contain substantially similar definitions of *reservation.*

[102] See Section 19.5 for information on notice requirements, and Section 5.2 for lists of interested parties under MCR 3.921.

[103] 25 CFR 23.2 defines *Tribal court* as "a court with jurisdiction over child-custody proceedings and which 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 vested with authority over child-custody proceedings." For a discussion on child-custody proceedings, see Section 19.4(B).

### a. Parental Objection to a Transfer

Either parent[104] may prevent the state from transferring a case to the tribal court by objecting to the request that the proceeding be transferred. MCL 712B.7(3); MCR 3.905(C)(1).

### b. Good Cause Not to Transfer

The trial court must not transfer the proceeding to the tribal court if the trial court finds good cause not to transfer it. MCL 712B.7(3); MCR 3.905(C)(1).

Under the MIFPA, good cause may exist "only if the person opposing the transfer shows by clear and convincing evidence that either of the following applies:

> (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."[105] MCL 712B.7(5). See also MCR 3.905(C)(1), which contains substantially similar requirements.

"By its plain language, good cause to not transfer an Indian child custody proceeding to a tribal court under MCL 712B.7(5)(b) has three components[: f]irst, there must be an undue hardship on the parties or witnesses that will be required to present evidence in the tribal court[;] . . . [s]econd, the undue hardship must stem from the requirement to present evidence in the tribal court[;] . . . [and t]hird, the Indian tribe must be unable to mitigate the undue hardships caused by the requirement of the parties or witnesses [to] present evidence in the

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[104] For purposes of an Indian child, a "'parent' *means* any biological parent or parents of an Indian child or any person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. *Parent does not include the putative father if paternity has not been acknowledged or established*." MCL 712B.3(s) (emphasis added). See also MCR 3.002(20), which contains a substantially similar definition of *parent*, except that, where the Indian child has been adopted, it requires the adopter to be an Indian. See Chapter 6 for information on establishing paternity.

[105] "[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)[]").

tribal court." *In re Spears*, 309 Mich App 658, 671-672 (2015) (trial court erred in finding good cause to not transfer the proceedings to the tribal court by "bas[ing] its decision on an undue hardship to the [Indian children] without determining whether the [Indian children] had any requirement to present evidence in the tribal court[,] . . . not identify[ing] any other parties or witnesses that would be required to present evidence in the tribal court[, a]nd . . . failing to explain why the tribal court would be unable to mitigate the anticipated undue hardships[]").

The court is prohibited from considering the "adequacy of the tribe, tribal court, or tribal social services" when making a good cause determination. MCL 712B.7(4); MCR 3.905(C)(1).

## 2. Declination of Transfer

The court must not transfer the proceeding to the tribal court if the tribal court declines the transfer of jurisdiction. MCL 712B.7(3); MCR 3.905(C)(2). On a declination of transfer, the court must continue to apply the MIFPA and applicable court rule provisions as they pertain to the Indian child. MCR 3.905(C)(3).

### c. Acceptance of Transfer

The state court must not dismiss the case until the transfer has been accepted by the tribal court. MCR 3.905(C)(2).

## 3. Request for Transfer of Case to Tribal Court Under ICWA

"Either parent,[106] the Indian custodian, or the Indian child's Tribe may 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." 25 CFR 23.115(a).

"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

[106] For purposes of an Indian child, "*[p]arent* or *parents* means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. *It does not include an unwed biological father where paternity has not been acknowledged or established*." 25 CFR 23.2 (emphasis added). See also 25 USC 1903(9), which contains a substantially similar definition of *parent*. See Chapter 6 for information on establishing paternity.

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."[107] Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, F.2 (2016).

Once the court receives a request to transfer the proceeding to a Tribal court, the court "must ensure that the Tribal court is promptly notified in writing of the [request for transfer]."[108] 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.*

### a. Parental Objection to a 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). "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*, 81 Federal Register 96476, F.4 (2016).

### b. 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).

"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).

In determining whether good cause exists, the court must *not* consider:

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[107] For a discussion of adoption proceedings involving an Indian child, see the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 11.

[108] "[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.

> "(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;
>
> (2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
>
> (3) Whether [the] transfer could affect the placement of the child;
>
> (4) The Indian child's cultural connections with the Tribe or its reservation;[109] 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)(5).

"[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*, 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).

The Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, *supra* at F.5, 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.

### c. 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).

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[109] "'Reservation' means 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), which contains a substantially similar definition of *reservation*.

> **Note:** Upon a declination of transfer, the court must apply the MIFPA and applicable court rule provisions as they pertain to the Indian child. MCR 3.905(C)(3).

"[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*, 81 Federal Register 96476, F.4 (2016).

### d. Acceptance of Transfer

"If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related 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 3.905(C)(2).

"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).

## 19.8 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[110] or Indian custodian[111] is indigent.[112] 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

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[110] A "'parent' means any biological parent or parents of an Indian child or any person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. *Parent does not include the putative father if paternity has not been acknowledged or established*." MCL 712B.3(s) (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. See Chapter 6 on establishing paternity.

[111] An "'Indian custodian' means any Indian person who has custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control have been transferred by the Indian child's parent." MCL 712B.3(n). See also 25 USC 1903(6) and MCR 3.002(15), which contain substantially similar definitions of *Indian custodian*; 25 CR 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."

best interests. 25 USC 1912(b); MCL 712B.21. See Section 7.9(B) for a detailed discussion of appointing counsel in proceedings involving an Indian child.

"If state law does not require the appointment of a lawyer-guardian ad litem for the child, the court may, in its discretion, appoint a lawyer-guardian ad litem for the child upon a finding that the appointment is in the best interest of the child." MCL 712B.21(2). Michigan statutory law requires the court to appoint a lawyer-guardian ad litem to represent a child during child protective proceedings. MCL 712A.17c(7). See Section 7.10.

> **Note:** MCL 712B.3(q) defines *lawyer-guardian ad litem* as "an attorney appointed under [MCL 712B.21]. A lawyer-guardian ad litem represents the child, and has the powers and duties, as set forth in [MCL 712A.17d]. The provisions of [MCL 712A.17d] also apply to a lawyer-guardian ad litem appointed for the purposes of [the MIFPA] under each of the following:
>
> (*i*) [MCL 700.5213] or [MCL 700.5219].
>
> (*ii*) [MCL 722.24].
>
> (*iii*) [MCL 722.630]."[113]

## 19.9 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."[114] MCL 712B.7(6). See also MCR 3.905(D), which contains substantially similar language; 25 USC 1911(c),which provides for a right of intervention, but limits it to a child's Indian tribe or Indian custodian and to a proceeding for foster care placement or termination of parental rights.[115]

"[An] [o]fficial tribal representative[] ha[s] the right to participate in any proceeding that is subject to the [ICWA] and [the MIFPA]." MCL

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[112] "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*, 81 Federal Register 96476, D.9 (2016).

[113] See also MCR 3.002(18), which contains a substantially similar definition of *lawyer-guardian ad litem*.

[114] See Section 19.4(A) for a discussion on determining an Indian child's status and an Indian child's Tribe, and Section 19.4(B) for a discussion on Indian child-custody proceedings and Indian custodians.

[115] See the ICWA form, *Motion to Intervene*, at http://www.narf.org/nill/documents/icwa/forms/index.html.

712B.7(7). MCL 712B.3(r) defines an *official tribal representative* as "an individual who is designated by the Indian child's tribe to represent the tribe in a court overseeing a child custody proceeding."[116]

## 19.10 Participation By Alternative Methods

"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 child protective proceedings, with the exception of MCR 3.904(B)(2), "courts may allow the use of videoconferencing technology by any participant, as defined in MCR 2.407(A)(1),[117] in any proceeding." MCR 3.904(B)(1). MCR 5.140(A) also permits "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[.]"[118, 119] "The court may use videoconferencing technology for the guardianship consent hearing required to be held under MCL 712B.13(1) and this subrule." MCR 5.404(B)(1).

For purposes of child protective and juvenile guardianship proceedings, MCR 3.904(B) governs the permissible use of videoconferencing technology. See Section 1.7.

For a discussion on Indian children, see Section 19.4(A), and Section 19.4(B) for a discussion on child-custody proceedings involving an Indian child.

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[116] "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.*

[117] MCR 2.407(A)(2) defines videoconferencing. In general, MCR 2.407 governs the criteria for, requests for, objections to, and the mechanics of videoconferencing.

[118] "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. Subject to this right to be present 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). MCR 2.407(B)(5) authorizes a court to decide "that a case is not suited for videoconferencing, and may require any hearing, even a proceeding categorized as presumptively subject to videoconferencing technology, to be conducted in person."

[119] "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(D).

## 19.11 Voluntary Proceedings

A brief discussion of the ICWA and the MIFPA in the context of child protective proceedings is included in this section. However, a detailed discussion of the ICWA and the MIFPA as it applies to the Indian child's parent voluntarily consenting to a release of parental rights or consent to adopt under the Adoption Code, or the Indian child's parent or Indian custodian consenting to a petition for guardianship is beyond the scope of this benchbook. See the Michigan Judicial Institute's *Adoption Proceedings Benchbook*, Chapter 11, for additional information on this topic.

"The [ICWA] applies to voluntary proceedings [as well as to involuntary proceedings]. Relinquishing a child temporarily (to foster care) or permanently (to adoption) is a grave act, and a state court must ensure that a consenting parent or custodian knows and understands 'the terms and consequences.'" *Haaland v Brackeen*, 599 US 255, 266-267 (2023), quoting 25 USC 1913(a). "Notably, a biological parent who voluntarily gives up an Indian child cannot necessarily choose the child's foster or adoptive parents." *Haaland*, 599 US at 267. "The child's tribe has 'a right to intervene at any point in [a] proceeding' to place a child in foster care or terminate parental rights, as well as a right to collaterally attack the state court's decree." *Id*. at 267, quoting 25 USC 1911(c) (alteration in original). See also 25 USC 1914 and MCL 712B.39. A collateral attack based on violations of ICWA's and MIFPA's notice requirements may be raised for the first time on appeal. See *In re L A LeDee*, ___ Mich App ___, ___ (2026) (finding "the caselaw determining that Section 1914 dispenses with traditional state law preservation requirements persuasive, [and applying] the standards of review applicable to preserved ICWA and MIFPA arguments"). "As a result, the tribe can sometimes enforce ICWA's placement preferences against the wishes of one or both biological parents, even after the child is living with a new family." *Haaland*, 599 US at 267. See *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 49-52 (1989).

Under the MIFPA, there are multiple types of voluntary proceedings:

- *both* parents or Indian custodian voluntarily consent 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).[120] See also MCR 5.404(B) (voluntary consent to guardianship).

> **Note:** 25 CFR 23.2 defines *voluntary proceeding* as "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,[121] 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."[122]

"An individual parent's consent is valid only as to [that parent]." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, I.6 (2016).

"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 a reason to believe the child is an Indian child, the State court must ensure that the party seeking placement has taken all 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 of determining an Indian child's status, including determining whether a child is an Indian child, finding an Indian child's Tribe, and addressing confidentiality concerns, see Section 19.4(A).

Once a parent[123] or Indian custodian[124] has voluntarily consented, the court must follow the ICWA's and the MIFPA's placement preferences (unless the child's Tribe has established a different order of preference or good cause is shown to the contrary). 25 USC 1915; MCL 712B.23; 25 CFR

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[120] For purposes of voluntary proceedings, the MIFPA provides for higher standards of protection under MCL 712B.13 by specifying certain circumstances that give rise to a voluntary proceeding than the ICWA provides under 25 USC 1913. See 25 USC 1921, which provides that applicable state law prevails if it contains higher standards than the ICWA.

[121] "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 [the] 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).

[122] For a discussion of Indian child-custody proceedings, see Section 19.4(B).

[123] A "'parent' means any biological parent or parents of an Indian child or any person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. *Parent does not include the putative father if paternity has not been acknowledged or established*." MCL 712B.3(s) (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. See Chapter 6 on establishing paternity.

23.124(c). See Section 19.13 for a detailed discussion of preferred placements of Indian children.

## A. Procedures

A voluntary custody proceeding must meet three requirements:

- Valid consent.
- Proper notice.
- Conform to certain court rule and statutory requirements. MCL 712B.13(1).

### 1. Valid Consent

To obtain a valid consent from the child's parent or Indian custodian, the following procedures must be followed:

> (1) The consent must be executed on a form approved by the State Court Administrative Office, in writing during a recorded proceeding before a judge of a court of competent jurisdiction;[125]
>
> (2) The presiding judge must certify that the terms and consequences of the consent were fully explained in detail and were fully understood by the child's parent or Indian custodian;
>
> (3) The court must certify either that the parent or Indian custodian fully understood the explanation in English or that it was translated into a language that the parent or Indian custodian understood; and
>
> (4) A consent is not valid if given prior to the birth of the Indian child, or within ten days after the birth of the Indian child.[126] 25 USC 1913(a); MCL

[124] An "'Indian custodian' means any Indian person who has custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control have been transferred by the Indian child's parent." MCL 712B.3(n). See also 25 USC 1903(6) and MCR 3.002(15), which contain substantially similar definitions of *Indian custodian*; 25 CR 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."

[125] See Section 19.7 for a detailed discussion of jurisdiction.

[126] "The court may use videoconferencing technology for the guardianship consent hearing required to be held under MCL 712B.13(1) and this subrule." MCR 5.404(B)(1). If a parent is consenting to the termination of his or her parental rights over an Indian child pursuant to MCL 712B.13, MCR 3.804(B)(3) prevents the court from using videoconferencing technology for the consent hearing.

712B.13(1)(a). See also MCR 5.404(B), 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:

- Before accepting the parent's or Indian custodian's consent to *foster-care placement*, 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*).

- 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*).

"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 19.4(A)(3) for additional information on confidentiality concerns.

### a. Required Content of Consent Document

The consent document[127] must contain the following information:

> (1) The name and birthdate of the Indian child;
>
> (2) The name of the Indian child's tribe;
>
> (3) Any identifying number or other indication of the child's membership in the tribe;

[127] See the ICWA form, *Consent to Temporary Custody and Certification*, at http://www.narf.org/nill/documents/icwa/forms/index.html, and the ICWA form, *Consent to Termination of Parental Rights*, at http://www.narf.org/nill/documents/icwa/forms/index.html.

> (4) The name and address of the consenting parent or Indian custodian; and
>
> (5) A sworn statement from the translator, if one was used, that attests to the accuracy of the translation.
>
> (6) The parent(s)' or Indian custodian's signature "recorded before the judge, verifying an oath of understanding of the significance of the voluntary placement and the parent's right to file a written demand to terminate the voluntary placement or consent at anytime."
>
> (7) "For consent for voluntary placement of the Indian child in foster care, the name and address of the person or entity who will arrange the foster care placement as well as the name and address of the prospective foster care parents if known at the time."
>
> (8) "For consent to termination of parental rights or adoption of an Indian child, in addition to the information [above], the name and address of the person or entity that will arrange the preadoptive or adoptive placement." MCL 712B.13(2). See also 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).

## 2. Notice

"Notice of the pending [voluntary] proceeding must be given as prescribed by [the Michigan Court Rules], the [ICWA], and [MCL 712B.9(1)]. MCL 712B.13(1)(b); MCL 712B.27(3). See Section 19.5 for a detailed discussion of notice proceedings.

## 3. Conforming to Court Rule and Statutory Requirements

"The voluntary custody proceeding shall be conducted in accordance with [the Michigan Court Rules] and the following statutes:

(*i*) In a guardianship proceeding under [MCL 700.5204] or [MCL 700.5205] also applies.

(*ii*) In an adoption proceeding, [MCL 712B.27] also applies." MCL 712B.13(1)(c).

## B. Consent to Voluntarily Terminate Parental Rights[128] During Child Protective Proceedings

When the court has taken jurisdiction over a child in a child protective proceeding, the court has the authority to conduct a hearing under MCL 712A.19b of the Juvenile Code to determine if parental rights should be involuntarily terminated. However, the parent may elect to voluntarily terminate his or her parental rights by either executing a release and termination of parental rights under the Adoption Code under MCL 710.28,[129] or admitting to a ground for termination or enter a no contest plea under the Juvenile Code. *In re Toler*, 193 Mich App 474, 477 (1992). See also *In re Pawloski*, ___ Mich App ___, ___ n 5 (2025) ("in light of a parent's fundamental right to the care and custody of his or her children, [there appears to be] no principled distinction between proceedings under the adoption code and the juvenile code" for purposes of determining that the respondent's release or consent to termination was knowing and voluntary).

"If 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, 336 (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 336 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."[130] *In re Williams*, 501 Mich at 336 (emphasis added).

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[128] *Termination of parental rights* means "[a]ny action resulting in the termination of the parent-child relationship." MCL 712B.3(b)(*ii*). See also 25 USC 1903(1)(*ii*) and MCR 3.002(2)(b), which both contain a substantially similar definition of *termination of parental rights*.

[129] "If a release . . . to adoption under [the Adoption Code, MCL 710.21 *et seq.*,] is executed, consent to voluntary placement of an Indian child must also be executed by both parents of the Indian child in accordance with [MCL 712B.13]." MCL 712B.27(1).

**Note:** MCL 712B.3(d) defines *culturally appropriates services* as:

> "[S]ervices that enhance an Indian child's and family's relationship to, identification, and connection with the Indian child's tribe.[131] 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 [DHHS] that are consistent with the tribe's beliefs about child rearing, child development, and family wellness. Culturally appropriate services may involve tribal representatives, extended family members,[132] 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." See also MCR 3.002(4), which contains a substantially similar definition of *culturally appropriate services.*

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, 334 (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

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[130] "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 336 (alteration in original).

[131] For a discussion on an Indian child's Tribe, see Section 19.4(A)(2).

[132] For purposes of the MIFPA, "[e]xtended family members' means that term as defined by the law or custom of the Indian child's tribe or, in the absence of that law or custom, means a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent and includes the term 'relative' as that term is defined in [MCL 712A.13a(1)(j)]." MCL 712B.3(f). "'[R]elative' under MCL 712A.13a(1)(j) now includes a biological parent." *In re Boshell/Shelton*, ___ Mich App ___, ___ (2025). See also 25 USC 1903(2), MCR 3.002(7), and 25 CFR 23.2, which contain substantially similar definitions of *extended family members*.

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 337. For a discussion on MCL 712B.15, see Section 19.12.

But see 25 CFR 23.125(b)(2)(*ii*)-(*iii*) and 25 CFR 23.128(a)-(b), which 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*.[133] 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*.[134] 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

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[133] 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).

[134] 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 MCL 712B.13(3) as amended by 2016 PA 26, effective May 30, 2016.

consented to the termination of parental rights." *In re Williams*, 510 Mich at 337.

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.[135]

## 19.12 Involuntary Proceedings

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."[136] 25 CFR 23.2.

Except for purposes of emergency proceedings[137] involving an Indian child,[138] the court must not hold a foster-care-placement or termination-of-parental-rights proceeding until ten days after the child's parent[139] or Indian custodian[140] (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[141] (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

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[135] Note that 25 USC 1913(c) and 25 CFR 23.128(d) require return of the child to the parent *or Indian custodian*. 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 MCL 712B.13(3) as amended by 2016 PA 26, effective May 30, 2016.

[136] "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 [the] 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).

[137] "*Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child." 25 CFR 23.2.

[138] 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. "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 Section 15.8 for more information on emergency removals.

providing proper notice to the parent, Indian custodian, or Indian child's Tribe, see Section 19.5.

The parent, Indian custodian, and the Indian child's Tribe each have a right, on request, to be given up to 20 additional days[142] from the date on which notice was received to prepare for participation in the proceedings.[143] 25 USC 1912(a); MCL 712B.9(2); 25 CFR 23.112(a)-(b).

> **Note:** "If the petitioner or court later discovers that the child may be an Indian child, all further proceedings shall be suspended until notice is received by the tribe or the [Secretary of the Interior[144]] 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).

"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 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 [MCL 712B.13], or a guardianship proceeding under [MCL

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[139] A "'parent' means any biological parent or parents of an Indian child or any person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. *Parent does not include the putative father if paternity has not been acknowledged or established*." MCL 712B.3(s) (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. See Chapter 19 on establishing paternity.

[140] An "'Indian custodian' means any Indian person who has custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control have been transferred by the Indian child's parent." MCL 712B.3(n). See also 25 USC 1903(6) and MCR 3.002(15), which contain substantially similar definitions of *Indian custodian*; 25 CR 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."

[141] For a discussion on an Indian child's Tribe, see Section 19.4(A)(2).

[142] 25 CFR 23.112(c) permits additional extensions beyond the 20 days if "available under State law or pursuant to extensions granted by the court."

[143] See the ICWA form, *Motion for Extension of Time*, at http://www.narf.org/nill/documents/icwa/forms/index.html.

[144] See MCL 712B.3(u), which defines *secretary* as the "Secretary of the Interior."

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].[145]
>
> (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, 337 (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 336. For a discussion on MCL 712B.13, see Section 19.11.

## A. Emergency Proceedings

An *emergency proceeding* is "any court action that involves an emergency removal or emergency placement of an Indian child."[146] 25 CFR 23.2.

> **Note:** Notice is not required "prior to an emergency removal because of the short timeframe in which emergency proceedings are conducted to secure the safety of the child[.]" Bureau of Indian Affairs,

[145] See Section 19.5 for a detailed discussion of notice requirements.

[146] "As a matter of general best practice in child welfare, State agencies should try to identify extended family or other individuals with whom the child is already familiar as possible emergency placements. If the child is an Indian child, agencies should strive to provide an initial placement for the child that meets [the] ICWA's (or the Tribe's) placement preferences." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, C.6 (2016). "If the Indian child is placed on an emergency basis in a non-preferred placement because a preferred placement is unavailable or has not yet met background check or licensing requirements, State agencies should have a concurrent plan for placement as soon as possible with a preferred placement." *Id.* See Section 19.13 for a discussion on preferred placements of Indian children.

*Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, C.9 (2016).

During an emergency proceeding, "[t]he State court must:

> (1) Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;
>
> (2) Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and
>
> (3) At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.
>
> (4) Immediately terminate (or ensure that the agency[147] immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child." 25 CFR 23.113(b).

## 1. Termination of Emergency Proceeding

"Any emergency removal or placement of an Indian child under State law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child." 25 CFR 23.113(a).

An emergency proceeding can also terminate by one or more of the following actions:

> (1) an Indian child-custody proceeding is initiated.[148]
>
> (2) the child is transfered "to the jurisdiction of the appropriate Indian Tribe.

[147] 25 CFR 23.102 defines *agency as* "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."

[148] For a discussion of Indian child-custody proceedings, see Section 19.4(B).

> (3) the child is returned to the child's parent[149] or Indian custodian.[150] 25 CFR 23.113(c).

"Termination of the emergency proceeding does not necessarily mean that the actual placement of the child must change. If an Indian child cannot be safely returned to the parents or custodian, the child must either be transferred to the jurisdiction of the appropriate Indian Tribe, or the Sate must initiate a child-custody proceeding to which the full set of ICWA protections would apply." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, C.3 (2016).

### 2. Petition for Emergency Removal or Continued Emergency Placement

"A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child. The petition or its accompanying documents should also contain the following information:

> (1) The name, age, and last known address of the Indian child;
>
> (2) The name and address of the child's parents and Indian custodians, if any;
>
> (3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;
>
> (4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them,

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[149] "*Parent* or *parents* means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established." 25 CFR 23.2. See also 25 USC 1903(9) and MCR 3.002(20), which contain substantially similar definitions of *parent*; MCL 712B.3(s), which contains a substantially similar definition of *parent*, except that where the Indian child has been adopted, it does not require the adopter to be an Indian.

[150] "*Indian custodian* means any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law." 25 CFR 23.2. See also 25 USC 1903(6), MCL 712B.3(n), and MCR 3.002(15), which contain substantially similar definitions of *Indian custodian*.

> including contact with the appropriate BIA Regional Director[, which for Michigan is the Midwest Regional Director,[151] 25 CFR 23.1(b)(2)];
>
> (5) The residence and the domicile of the Indian child;
>
> (6) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Tribe affiliated with that reservation or village;
>
> (7) The Tribal affiliation of the child and of the parents or Indian custodians;
>
> (8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;
>
> (9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and
>
> (10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody." 25 CFR 23.113(d).

"A failure to include any of the listed information [under 25 CFR 23.113(d)] should not result in denial of the petition if the child faces imminent physical damage or harm." Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, C.4 (2016).

### 3. Time Requirements

"An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:

> (1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;

[151] The contact information for the Midwest Region Office may be obtained at http://www.bia.gov/WhoWeAre/RegionalOffices Midwest/index.htm.

> (2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and
>
> (3) It has not been possible to initiate a 'child-custody proceeding' as defined in [25 CFR 23.2]."[152] 25 CFR 23.113(e).

#### 4. Accessibility of Reports and Records

"Each party to an emergency 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."[153] 25 CFR 23.134.

### B. Removal

#### 1. Removal From Care

"[T]he requirements of MCL 712B.15(2) that active efforts and a risk-of-harm assessment be made are triggered only when a Native American child is 'removed' from a parent, placed in foster care, or otherwise put in protective custody."[154] *In re Detmer/Beaudry*, 321 Mich App 49, 64-65 (2017). "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 at 62.

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 [the] respondent-mother's continued custody of [the child] posed a risk of emotional or physical harm to the child."[155] *In re*

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[152] For a discussion of Indian child-custody proceedings, see Section 19.4(B).

[153] See the ICWA form, *Request to Produce and Examine*, at http://www.narf.org/nill/documents/icwa/forms/index.html.

[154] For a discussion on active efforts, see Section 19.12(F).

*Detmer/Beaudry*, 321 Mich App at 64-65 (finding that "although [the child] was placed with a parent, this [did] not negate application of [MIFPA's] provisions," and additionally concluding that a second child was not removed within the meaning of MCL 712B.15(2) where the respondent-mother voluntarily placed the child with the nonrespondent-father, and that "the special protections [of MIFPA did] not apply" to that voluntary placement).[156]

"If the court orders removal of the child from a parent's care or custody, the court shall advise the parent, guardian, or legal custodian of the right to appeal that action." MCR 3.965(B)(15).[157]

## 2. Removal Hearings

If an Indian child is taken into protective custody with or without a court order under MCR 3.963(A), MCR 3.963(B), or MCR 3.974,[158] or a petition requests the removal of an Indian child,[159] the court must follow the procedures set out in MCR 3.967 [(governing removal hearings)]. MCR 3.967(A)-(B). See also MCR 3.965(B)(2) (governing preliminary hearings).

> **Note:** The court may hold a preliminary hearing in conjunction with a removal hearing if all necessary parties are notified,[160] there are no objections by the parties to do so, and at least one qualified expert witness is present to provide testimony. MCR 3.965(B)(2). However, the court may adjourn the preliminary hearing pending the conclusion of the removal hearing if necessary.[161] *Id.*

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[155] The trial court correctly found that it did not have the authority to infringe on the nonrespondent-father's parental rights ("[he] was not a respondent to the proceedings and no efforts had been made to petition his involvement"), but erred in concluding that the provisions of the MIFPA did not apply to the placement; "[n]either the holding nor the reasoning of *In re Sanders*[, 495 Mich 394 (2014) (finding due process requires that every parent receive an adjudication hearing before the state can interfere with that parent's parental rights),] negates or otherwise undermines the statutory requirements a trial court must follow before removing a Native American child from an adjudicated parent." *In re Detmer/Beaudry*, 321 Mich App at 61-62 ("the trial court should have considered whether moving [the child] from [the] respondent-mother's care and residence to his nonrespondent-father's care and residence triggered MIFPA's provisions"). For additional information on *In re Sanders*, see Section 4.3.

[156] For additional information on an Indian child's voluntary placement, see Section 19.11.

[157] For information not specific to an Indian child, see *In re Barber/Espinoza*, ___ Mich ___ (2025). See also Section 7.3(A) and Section 15.8.

[158] See Section 3.1() for a detailed discussion of protective custody of a child without court order.

[159] A petitioner must include in a petition for termination of parental rights a child's membership or eligibility for membership in an Indian tribe, if known. MCR 3.961(B)(5).

[160] See Section 19.5 for a detailed discussion of notification requirements under the ICWA.

MCR 3.967 provides the required procedures and rules of evidence for removal hearings involving an Indian child:

> "**(A) Child in Protective Custody.** If an Indian child is taken into protective custody pursuant to MCR 3.963(A) or [MCR 3.963](B) or MCR 3.974, a removal hearing must be completed within 14 days after removal from a parent or Indian custodian unless that parent or Indian custodian has requested an additional 20 days for the hearing pursuant to MCL 712B.9(2) or the court adjourns the hearing pursuant to MCR 3.923(G). Absent extraordinary circumstances that make additional delay unavoidable, temporary emergency custody shall not be continued for more than 45 days.
>
> [**Note:** "An emergency proceeding[162] regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:
>
> (1) Restoring the child to the parent[163] or Indian custodian[164] would subject the child to imminent physical damage or harm;
>
> (2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and
>
> (3) It has not been possible to initiate a 'child-custody proceeding' as defined in [25 CFR 23.2]."[165] 25 CFR 23.113(e).]

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[161] See Section 7.6(D) for information on adjournments of preliminary hearings.

[162] "*Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child." 25 CFR 23.2

[163] "*Parent* or *parents* means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established." 25 CFR 23.2. See also 25 USC 1903(9) and MCR 3.002(20), which contain substantially similar definitions of *parent*; MCL 712B.3(s), which contains a substantially similar definition of *parent*, except that where the Indian child has been adopted, it does not require the adopter to be an Indian.

[164] "*Indian custodian* means any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law." 25 CFR 23.2. See also 25 USC 1903(6), MCL 712B.3(n), and MCR 3.002(15), which contain substantially similar definitions of *Indian custodian*.

[165] For a definition of Indian child-custody proceedings, see Section 19.4(B).

> **(B) Child Not in Protective Custody.** If an Indian child has not been taken into protective custody and the petition requests removal of that child, a removal hearing must be conducted before the court may enter an order removing the Indian child from the parent or Indian custodian.
>
> **(C)** Notice of the removal hearing must be sent to the parties prescribed in MCR 3.921 in compliance with MCR 3.920(C)(1).
>
> **(D) Evidence.** An Indian child may be removed from a parent or Indian custodian, or, for an Indian child already taken into protective custody pursuant to MCR 3.963 or MCR 3.974(B), remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence that active efforts as defined in MCR 3.002 have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. The evidence must include the testimony of at least 1 qualified expert witness, who has knowledge of the child rearing practices of the Indian child's tribe, 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.
>
> **(E)** A removal hearing may be combined with any other hearing."

The use of videoconferencing technology to conduct removal hearings under MCR 3.967 is governed by MCR 3.904(B). See Section 1.7.

Federal and state law require a qualified expert witness to provide damage testimony before an Indian child may be removed from his or her home. Specifically, the ICWA and the MIFPA require clear and convincing evidence including "the testimony of at least 1 qualified expert witness, who has knowledge of the child rearing practices of the Indian child's tribe,[166] that the continued custody[167] of the Indian child by

the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child." See MCL 712B.15(2); 25 USC 1912(e); 25 CFR 23.121(a).

"Each party to an emergency 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."[168] 25 CFR 23.134.

"If the court orders removal of the child from a parent's care or custody, the court shall advise the parent, guardian, or legal custodian of the right to appeal that action." MCR 3.965(B)(15).[169]

If the Indian child is removed from the home, MCR 3.967(F) sets out a standard order of preference for the placement of the Indian child, which mirrors the order set out in the ICWA and the MIFPA. For a detailed discussion of the preferred placements of Indian children, see Section 19.13.

## C. Foster Care Placement

In general, "MCL 712B.15(2) provides that an Indian child may not be removed from the home or placed into foster care absent 'clear and convincing evidence' that active efforts were made to provide the family with services, that those efforts were unsuccessful, and that the child is likely to be harmed if not removed." *In re England*, 314 Mich App 245, 256 (2016).

Specifically, MCL 712B.15(2) provides that an Indian child may be placed into foster care only if there is clear and convincing evidence of the following:

- "active efforts[170] have been made to provide remedial services and rehabilitative programs designed to prevent the breakup[171] of the Indian family,"[172]
- "the active efforts were unsuccessful," and

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[166] For a discussion on an Indian child's tribe, see Section 19.4(A)(2).

[167] "*Continued custody* means 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." 25 CFR 23.2. For purposes of custody, "[a] party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law." *Id*.

[168] See the ICWA form, *Request to Produce and Examine*, at http://www.narf.org/nill/documents/icwa/forms/index.html.

[169] For information not specific to an Indian child, see *In re Barber/Espinoza*, ___ Mich ___ (2025). See also Section 7.3(A) and Section 15.8

- "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." See also 25 USC 1912(d)-(e), 25 CFR 23.120(a), 25 CFR 23.121(a), which contain similar language.

> **Note:** "*Continued custody* means 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."[173] 25 CFR 23.2.

"The evidence [in support of placing an Indian child in foster care] must include the testimony of at least 1 qualified expert witness, who has knowledge of the child rearing practices of the Indian child's tribe, 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." [174]MCL 712B.15(2). See also 25 CFR 23.121(a), which contains similar language.

> **Note:** "Foster care placement [means] [a]ny action removing an Indian child from his or her parent or Indian custodian, and where the parent or Indian 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 [MCL 700.5201 to MCL 700.5219].

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[170] "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 19.12(F) for a detailed discussion of active efforts.

> (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,[175] but where parental rights have not been terminated[.]"

"[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[176] 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).

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[171] "[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") (citations omitted). See Section 19.12(D) for a detailed discussion of involuntary termination of a parent's parental rights.

[172] The requirement that active efforts be taken to prevent the breakup of the Indian family does not violate the Tenth Amendment (powers not delegated to the federal government by the Constitution and not prohibited by it to the States, are reserved to the States or to the people); that is, the active-efforts requirement does not allow Congress to command a state or its political subdivisions to oversee or enforce a federal regulatory scheme. *Haaland v Brackeen*, 599 US 255, 281 (2023). The active-efforts requirement "applies to 'any party' who initiates an involuntary proceeding, thus sweeping in private individuals and agencies as well as government entities." *Id*. at 281. "A demand that either public or private actors can satisfy is unlikely to require the use of sovereign power." *Id*. at 281.

[173] 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.

[174] See Section 19.14 for a detailed discussion of expert witnesses.

"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."[177] 25 CFR 23.134. See also MCL 712B.11 and 25 USC 1912(c), which contain substantially similar language.

Once the court has ordered a foster care placement, it must follow the ICWA's and the MIFPA's placement preferences (unless the child's tribe has established a different order of preference or good cause is shown to the contrary). 25 USC 1915; MCL 712B.23. See Section 19.13 for a detailed discussion of preferred placements of Indian children.

A court order removing an Indian child from his or her home without testimony from a qualified expert witness regarding whether the continued custody of the Indian child by the parent or the Indian custodian is likely to result in serious emotional or physical damage to the Indian child, violates the ICWA, 25 USC 1912(e), and the MIFPA, MCL 712B.15(2), and is grounds for the conditional reversal of the removal order. *In re McCarrick/LaMoreaux*, 307 Mich App 436, 466-467, 468-470 (2014).

## D. 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:

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[175] A parent or Indian custodian is prohibited from regaining custody of the child *upon demand* if he or she has to do more than make a simple verbal request for the child's return. 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."

[176] "'Nonconforming social behavior' may include behaviors that do not comply with society's norms, such as dressing 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.

[177] See the ICWA form, *Request to Produce and Examine*, at http://www.narf.org/nill/documents/icwa/forms/index.html.

- "[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)[.]" *England*, 314 Mich App at 253.

- "[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)."[178] *England*, 314 Mich App at 253.

- "'[A]t least one state statutory ground for termination was proven by clear and convincing evidence[.]'" *England*, 314 Mich App at 253, quoting *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[.]'" *England*, 314 Mich App at 253-254, quoting *In re Olive/Metts*, 297 Mich App 35, 40 (2012).

"[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.

### 1. Active Efforts to Prevent the Breakup of the Indian Family

"Prior to ordering . . . termination of parental rights, the court must conclude that active efforts have been made to prevent

[178] "*Continued custody* means 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." 25 CFR 23.2. 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.

the breakup of the Indian family and that those efforts have been unsuccessful." 25 CFR 23.120(a).

> **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*, 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."

The party seeking the termination of parental rights to an Indian child under state law "must demonstrate to the court's satisfaction that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the active efforts were unsuccessful."[179] MCL 712B.15(3). See also 25 USC 1912(d), which contains substantially similar language. "[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."[180] *In re England*, 314 Mich App 245, 259-261 (2016) (finding "there was clear and convincing evidence to

[179] "The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe." MCL 712B.15(2). See Section 19.12(F) for a detailed discussion of active efforts.

[180] "[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).

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) and MCR 3.977(G)(1), which contain substantially similar language.

"[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*, 570 US 637, 652 (citation omitted).

> **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) (citations omitted). "In such a situation, the 'breakup of the Indian family' has long since occurred, and [25 USC 1912(d)] is inapplicable." *Adoptive Couple*, 570 US at 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 Indian child."[181] 25 CFR 23.121(b).[182] 25 CFR 23.2 defines *continued custody* as "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."[183]

**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[184] 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

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[181] See Section 19.4(B) for the ICWA's definition of parent and custodian, and Section 19.14 for a detailed discussion of expert witnesses.

[182] 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. Note, however, that 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).

[183] 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.

[184] 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.

[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 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, because 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)[185] 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." *Adoptive Couple*, 570 US at 649. Thus, "[25 USC 1912(f)] does not apply in cases where the Indian parent *never* had custody of the Indian child." *Adoptive Couple*, 570 US at 648. "The phrase 'continued custody' . . . refers to custody that a parent already has (or at least had at some point in the past)." *Id*.

**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,[186] 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

[185] See MCL 712B.15(4) and MCR 3.977(G)(2), which contain the same continued custody language.

[186] 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."

termination [of parental rights] hearing, did not support termination and specifically testified that returning [the Indian children] to [the mother's] care would *not* likely result in serious emotional or physical damage to either [Indian] child[, but the court n]onetheless, considering the other evidence presented, . . . determined that returning [the Indian children] to [the mother's] care *would* result in such damage beyond a reasonable doubt." *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 the ICWA and the MIFPA, the petitioner must also establish statutory grounds for termination under 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,

(2) A statutory basis for the termination of parental rights under MCL 712A.19b(3), and

(3) Termination of parental rights is in the child's best interests. See MCR 3.977(A), MCR 3.977(E)-(H).

> **Note:** See Section 17.7 for statutory grounds for termination of parental rights as well as the standard of proof required to establish each statutory ground. See Section 17.9 on determining a child's best interests.

### 4. Party's Right to Examine Reports or 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."[187] 25 CFR 23.134. See also MCL 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 custodian, it must follow the ICWA's and the MIFPA's placement preferences (unless the child's tribe has established a different order of preference or good cause is shown to the contrary). 25 USC 1915; MCL 712B.23; 25 CFR 23.129.

An Indian child's placement must be determined according to preferences established in 25 USC 1915 and 25 CFR 23.131 unless the Indian child's tribe has established a different order of preferred placement. 25 USC 1915(c); 25 CFR 23.130 (adoptive placements); 25 CFR 23.131(b)-(c) (foster care or preadoptive placements). That state courts and agencies are required to adhere to the order of preferred placements does not violate the Tenth Amendment (powers not delegated to the federal government by the Constitution and not prohibited by it to the States, are reserved to the States or to the people). *Haaland v Brackeen*, 599 US 255, 286-288 (2023). The "diligent search" mentioned in 25 CFR 23.132(c)(5) "applies to both private and public parties"; the petitioners in *Haaland* did not show that the "diligent search" requirement "demand[ed] the use of state sovereign authority." *Haaland*, 599 US at 259. "Instead, [when placement is at issue,] the burden is on the tribe or other objecting party to produce a higher-ranked placement." *Id*.

See Section 19.13 for a detailed discussion of preferred placements of Indian children.

[187] See the ICWA form, *Request to Produce and Examine*, at http://www.narf.org/nill/documents/icwa/forms/index.html.

### 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[188] may petition any court of competent jurisdiction to invalidate the action upon a showing that the action violated any provision of [MCL 712B.15]." MCL 712B.15(5). See Section 19.16 for additional information on invalidation of state court action for violation of the ICWA or the MIFPA.

## E. Involuntary Guardianship[189] Proceedings Involving an Indian Child

MCL 712B.25 provides for the following procedures related to involuntary guardianships (see also MCR 5.404(A) and MCR 5.404(C)):

> (1) If a petition for a guardianship is filed and is determined to be involuntary under [MCL 712B.15] and the court knows or has reason to know that the child is an Indian child, the court may order the [DHHS][190] or a court employee to conduct an investigation of the proposed guardianship and file a written report[191] of the investigation.[192] In addition to the information required in [MCL 700.5204], the report must include, but is not limited to, the following information:
>
> (a) Whether the child is or is not an Indian child.
>
> (b) The identity and location of the Indian child's parents, if known.
>
> (c) If the child is an Indian child, the report must also address all of the following:

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[188] For a discussion on an Indian child's Tribe, see Section 19.4(A)(2).

[189] MCL 712B.3(h) defines *guardian* as "a person who has qualified as a guardian of a minor under a parental or spousal nomination or a court order issued under [MCL 712A.19a] or [MCL 712A.19c], [MCL 700.5204] or [MCL 700.5205], or [MCL 330.1600] to [MCL 330.1644]. Guardian may also include a person appointed by a tribal court under tribal code or custom. Guardian does not include a guardian ad litem." See also MCR 3.002(9), which contains a substantially similar definition of *guardian*.

[190] Note that MCL 712B.9(5) pertains to the DHHS "or a successor department or agency." See MCL 712B.3(e).

[191] "The report shall be filed with the court and served no later than 7 days before the hearing on the petition." MCR 5.404(A)(2).

[192] The court may also appoint a guardian ad litem to represent the child's interests. MCR 5.404(A)(2).

(*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[193] and if no extended family members can be found, what efforts were made to locate them.

(2) Notice of the pending proceeding must be given as prescribed by [the Michigan Court Rule], the [ICWA], and [MCL 712B.9].[194] If the court knows or has reason to know that the proceeding involves an Indian child,[195] the court shall conduct a hearing to determine all of the following:

(a) If the tribe has exclusive jurisdiction. If so, the court shall issue an order terminating the guardianship or dismissing the petition.

(b) If the current placement with the guardian meets the placement requirements in [MCL 712B.23].[196]

(c) If it is in the Indian child's best interest to order the guardianship.

(d) If a lawyer-guardian ad litem should be appointed to represent the Indian child.[197]

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[193] For purposes of an Indian child, "[e]xtended family members' means that term as defined by the law or custom of the Indian child's tribe or, in the absence of that law or custom, means a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent and includes the term 'relative' as that term is defined in [MCL 712A.13a(1)(j)]." MCL 712B.3(f). "'[R]elative' under MCL 712A.13a(1)(j) now includes a biological parent." *In re Boshell/Shelton*, ___ Mich App ___, ___ (2025). See also 25 USC 1903(2), MCR 3.002(7), and 25 CFR 23.2, which contain substantially similar definitions of *extended family members.*

[194] See Section 19.5 for a detailed discussion of notice proceedings.

[195] "If the petition for guardianship states that it is unknown whether the minor is an Indian child, the investigation shall include an inquiry into Indian tribal membership." MCR 5.404(A)(2).

[196] See Section 19.13 for a detailed discussion of preferred placement preferences under MCL 712B.23.

[197] MCL 712B.3(q) defines *lawyer-guardian ad litem* as "an attorney appointed under [MCL 712B.21]. A lawyer-guardian ad litem represents the child, and has the powers and duties, as set forth in [MCL 712A.17d]. The provisions of [MCL 712A.17d] also apply to a lawyer-guardian ad litem appointed for the purposes of [the MIFPA] under each of the following: (*i*) [MCL 700.5213] or [MCL 700.5219][;] (*ii*) [MCL 722.24][;] and (*iii*) [MCL 722.630]." See also MCR 3.002(18), which contains substantially similar language.

> (3) If a petition for guardianship is filed and is to be accompanied by a consent to a voluntary placement of an Indian child, the consent must be executed in accordance with [MCL 712B.13]. If the Indian child's parents do not execute a consent under [MCL 712B.13], the petition is considered to be for an involuntary guardianship and the requirements of [MCL 712B.15[198]] must be met.
>
> * * *
>
> (6) If the court discovers a child may be an Indian child after a guardianship is ordered, the court shall provide notice of the guardianship and the potential applicability of [the MIFPA] and the [ICWA], in compliance with [the Michigan Court Rules], [the MIFPA], and the [ICWA], to the tribe, the parents or Indian custodian, and the current guardian on a form approved by the state court administrative office."

### 1. Hearing

Before a court may appoint a guardian in a case involving an involuntary guardianship, it "must conduct a hearing on [the] petition . . . in accordance with [MCR 5.404.] . . . Notice of the hearing must be sent to persons prescribed in MCR 5.125(A)(8)[199] and [MCR 5.125(C)(20)[200]] in compliance with MCR 5.109(1). At the hearing on the petition, the court shall determine:

> (a) if the tribe has exclusive jurisdiction as defined in MCR 3.002(6). The court shall comply with MCR 5.402(E)(2).
>
> (b) if the placement with the guardian meets the placement requirements in [MCR 5.404(C)(2) and MCR 5.404(C)(3)].

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[198] MCL 712B.15 requires notice, compliance with the MIchigan Court Rules and MCL 700.5204 and MCL 700.5205, in addition to demonstration of active efforts. See also MCR 5.404(C). See Section 19.9(E) for information on the active efforts requirement.

[199] If the child is an Indian child, MCR 5.125(A)(8) requires notice to the child's tribe and Indian custodian, if any, in addition to the Secretary of the Interior if the child's parent, Indian custodian, or tribe are unknown.

[200] MCR 5.125(C)(20) requires notice to: the child, if he or she is 14 years of age or older; "if known by the petitioner or applicant, each person who had the principal care and custody of the [child] during the 63 days preceding the filing of the petition or application;" the child's parents, or, if both are deceased, any grandparents and adult presumptive heirs of the child; the nominated guardian; and "if known by the petitioner or applicant, a guardian or conservator appointed by a court in another state to make decisions regarding the person of [the child]."

(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.

(e) whether or not each parent wants to consent to the guardianship if consents were not filed with the petition. If each parent wants to consent to the guardianship, the court shall proceed in accordance with [MCR 5.404(B) (providing procedures for voluntary guardianships)]." MCR 5.404(C)(1). 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, 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 Department of Health and Human Services,
> >
> > (d) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.
>
> The standards to be applied in meeting the preference requirements above shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the

> parent or extended family members maintain social and cultural ties." MCR 5.404(C)(2).

### b. Deviating From Placement

The court may deviate from the placement requirements in MCR 5.404(C)(2) "for good cause shown in accordance with MCL 712B.23(3)-(5) and 25 USC 1915(c)." MCR 5.404(C)(3). In addition, if the child's tribe has a different order of preference than the order listed in MCR 5.404(C)(3), "placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate for the particular needs of the child, as provided in MCL 712B.23(6)." MCR 5.404(C)(3). "Where appropriate, the preference of the Indian child or parent shall be considered." MCR 5.404(C)(3). But see *In re KMN*, 309 Mich App 274, 290 (2015) (holding that "good cause [under the MIFPA] is limited to the conditions articulated in MCL 712B.23(5)").

## 2. Evidence Sufficient to Remove Indian Child from Parent or Indian Custodian

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 these rules, the court may remove the Indian child from a parent or Indian custodian and place that child with a guardian only upon clear and convincing evidence that:
>
> (a) active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family,
>
> (b) these efforts have proved unsuccessful, and
>
> (c) continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

> The evidence shall include the testimony of at least one qualified expert witness, as described in MCL 712B.17, who has knowledge about the child-rearing practices on the Indian child's tribe. The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. If the petitioner cannot show active efforts have been made, the court shall dismiss the petition and may refer the petitioner to the [DHHS] for child protective services or to the tribe for services." MCR 5.404(F)(1). 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.

## F. Active Efforts Requirement

More effort is required under MIFPA's and ICWA's *active efforts* standard than is required under Michigan's *reasonable efforts* standard.[201] See generally *In re Roe*, 281 Mich App 88 (2008), overruled in part on other grounds by *In re JL*, 483 Mich 300 (2009).[202] "'Active efforts' require affirmative, as opposed to passive, efforts." *In re Beers/Lebeau-Beers*, 325 Mich App 653, 680 (2018).

### 1. Defined For Purposes of MIFPA

For purposes of the 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

[201] *In re JL* and *In re Roe* were decided before MIFPA was enacted.

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

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.[203]

(*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

[203] See Section 19.13 for additional information on preferred placements for Indian children, including the definition of the term *extended family members.*

> 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,[204] 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

[204] For purposes of 25 CFR 23.2, "*[e]xtended family member* is defined by law or custom of the Indian child's Tribe or, in the absence of such law or custom, is a person who has reached age 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."

> 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.

### 3. Proper Standard of Proof

The proper standard of proof for determining whether the ICWA's active efforts standard was met is the clear and convincing evidence standard. *In re Roe*, 281 Mich App 88, 101 (2008), overruled in part on other grounds by *In re JL*, 483 Mich 300 (2009)[205] (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)). See also MCL 712B.15(2), which requires the clear and convincing evidence standard for determining whether the MIFPA's active efforts standard was met for an "Indian child [to] be removed from a parent or Indian custodian [and] placed into foster care placement, or[] for an Indian child already taken into protective custody, remain removed from a parent or Indian custodian pending further proceedings[;]" *In re England*, 314 Mich App 245, 259-260 (2016), finding that "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."[206]

"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).

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

[206] "[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).

### 4. Active Efforts Not Required If Indian Family Remains Intact

Active efforts are not required where termination of a parent's parental rights does not result in breaking up an Indian family. *In re SD*, 236 Mich App 240, 244-245 (1999) (active efforts were not required where "the family had already broken up by the time the termination proceedings were initiated[,][207] . . . the children's mother still live[d] with and t[ook] care of the children[,] [t]he children's mother [was] the parent that [was] of Indian heritage and it [was] through her that the children ha[d] ties to their tribe[,] . . . the children's 'Indian family' and connection to their Indian heritage remained intact when petitioner agreed not to seek termination of [the children's mother's parental] rights[, and] [t]he tribe . . . recommend[ed] that respondent[-father's] rights be terminated"). But see *In re Beers/Lebeau-Beers*, 325 Mich App 653, 676 (2018) (conditionally reversing the trial court's order terminating the non-Indian parent's parental rights due to ICWA and MIFPA noncompliance and remanding to the trial court where "[t]here was an existing intact Indian family and an existing relationship between [the non-Indian parent,] and [the Indian child] when petitioner intervened for the protection of [the child], began providing services, and then removed [the child] by court order" and "[b]oth respondent[-parents] were subject to parallel protective proceedings, their parental rights were terminated at the same time, and [the Indian parent] did not remain with [the child] as an intact Indian family").

### 5. Impact of Past Active Effort Services on New Termination Proceedings

The ICWA does not require the DHHS or the tribe to provide services each time a new termination proceeding is commenced against a parent when past efforts failed and it does not appear that providing the additional services will result in a different outcome. *In re JL*, 483 Mich at 305. See also *In re Roe*, 281 Mich App at 102, 105, where the Court held that there was nothing within 25 USC 1912(d) that prevented the DHHS from seeking termination of parental rights when past efforts to reunite the family were unsuccessful. However, the DHHS must "undertake a thorough, contemporaneous

[207] At the time of the respondent-father's termination hearing, the respondent-father and the children's mother had separated and filed for divorce, the respondent-father moved away from his children and failed to care for or financially support his children for two years before the termination proceedings, and the respondent-father was sentenced to prison for four to ten years for sexually assaulting two of his children. *In re SD*, 236 Mich App 240, 244-245 (1999).

assessment of the services provided to the parent in the past and the parent's response to those services before seeking to terminate parental rights without having offered additional services." *In re JL*, 483 Mich at 305.

> **Note:** The *In re JL* Court indicated that despite its refusal to establish an arbitrary threshold at which past services could be used to satisfy current active efforts, it did direct trial courts to "carefully assess the timing of the services provided to the parent [and that] . . . [t]he timing of the services must be judged by reference to the grounds for seeking termination and their relevance to the parent's current situation." *In re JL*, 483 Mich at 324-325. The *In re JL* Court also declined to hold that "active efforts must always have been provided in relation to the child who is the subject of the current termination proceeding." *Id.* at 325.

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.[208] 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

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[208] 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."

[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).

### 6. 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 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*.

## 19.13 Preferred Placements of Indian Children

One of the primary purposes of the ICWA and the MIFPA is to ensure that the placement of Indian children reflects the unique values of the Indian child's Tribal culture. 25 USC 1902; MCL 712B.5.

25 USC 1915, MCL 712B.23(1),[209] 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 and preadoptive placements of Indian children.[210] However, an Indian

[209] 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[.]"

[210] MCR 3.965(B)(13)(b) and MCR 3.967(F) establish the same orders of preference.

child's Tribe[211] may establish a different order of preference, and the DHHS or court making the placement must follow the tribe's order of preference if it is the least restrictive setting that most approximates a family, meets the child's special needs, and is in reasonable proximity to the child's home. 25 USC 1915(c); MCL 712B.23(6); 25 CFR 23.130(b); 25 CFR 23.131(c).[212] Tribal input on placements may also fall under a State-Tribal child welfare agreement. See 25 USC 1919(a).

> **Note:** "Nothing in [the MIFPA] or [MCL 712B.23] prevents the emergency removal, protective custody, or subsequent placement of an Indian child who is a resident of or is domiciled on a reservation[213] but is temporarily located off the reservation." MCL 712B.23(9).

The DHHS or court must consider the preference of the child or parent when appropriate, and the DHHS 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 19.4(A)(3) for a detailed discussion of confidentiality.

"[T]he prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties[,]" must be considered when meeting the preference requirements. 25 USC 1915(d); MCL 712B.23(8); MCR 3.965(B)(13)(b); MCR 3.967(F).

The Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, H.3 (2016), "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;

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[211] For a discussion on an Indian child's Tribe, see Section 19.4(A)(2).

[212] See also MCR 3.965(B)(13)(b) and MCR 3.967(F), which contain substantially similar language.

[213] "'Reservation' means Indian country as defined in 18 USC 1151 and any lands, not covered under that section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation." MCL 712B.3(t). See also 25 USC 1903(10), MCR 3.002(21), and 25 CFR 23.2 which contain substantially similar definitions of *reservation.*

- 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.

That state courts and agencies are required to adhere to the order of preferred placements does not violate the Tenth Amendment (powers not delegated to the federal government by the Constitution and not prohibited by it to the States, are reserved to the States or to the people). *Haaland v Brackeen*, 599 US 255, 285, 286, 296 (2023). The "diligent search" mentioned in 25 CFR 23.132(c)(5) "applies to both private and public parties"; the petitioners in *Haaland* did not show that the "diligent search" requirement "demand[ed] the use of state sovereign authority." *Haaland*, 599 US at 286. "Instead, [when placement is at issue,] the burden is on the tribe or other objecting party to produce a higher-ranked placement." *Id*. at 286.

## 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,[214] MCL 712B.23(6) and 25 CFR 23.131(b), or good cause

[214] "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 19.4(A)(2).

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.[215]
>
> [**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*, 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[216] or approved by the [DHHS[217]].
>
> (d) An institution for children approved by an Indian tribe or operated by an Indian organization[218] that has a program suitable to meet the Indian child's needs." MCL 712B.23(1). See also 25 USC 1915(b)(*i*)-(*iv*), MCR 3.965(B)(13)(b), MCR 3.967(F), 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).

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[215] For purposes of an Indian child, "[e]xtended family members' means that term as defined by the law or custom of the Indian child's tribe or, in the absence of that law or custom, means a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent and includes the term 'relative' as that term is defined in [MCL 712A.13a(1)(j)]." MCL 712B.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*.

[216] 25 CFR 23.2 defines *Indian foster home* as "a foster home where one or more of the licensed or approved foster parents is an 'Indian' as defined in 25 USC 1903(3)." "[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).

[217] For purposes of the MIFPA, "'[d]epartment' means the department of health and human services [(DHHS)] or a successor department or agency." MCL 712B.3(e). See also MCR 3.002(5), which contains a substantially similar definition of *department.*

[218] 25 CFR 23.102 defines *Indian organization* as "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." See also 25 USC 1903(7), MCL 712B.3(p), and MCR 3.002(16), which contain substantially similar definitions of *Indian organization*.

MCL 712B.9(5) requires "[t]he [DHHS] [to] exercise due diligence to determine, document, and contact the Indian child's extended family members in accordance with the [F]ostering [C]onnections to [S]uccess and [I]ncreasing [A]doptions [A]ct of 2008, Public Law 110-351. If applicable, determinations and documentation should be conducted in consultation with the child or parent's tribe."

"[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. Good Cause to Deviate From the Order of Preference

A court need not follow the order of preference for a foster care or preadoptive placement if it finds on the record that good cause exists to not follow the order of preference. 25 USC 1915(b); 25 CFR 23.129(c). See also MCL 712B.23(1). "[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 must be made on the record or in writing and 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;[219]

(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 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).

"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

[219] 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).

> 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.

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.

"[G]ood cause [under the MIFPA] is limited to the conditions articulated in MCL 712B.23(5) . . .[; t]herefore, a biological parent's choice of an adoptive placement does not constitute good cause[.]" *In re KMN*, 309 Mich App 274, 290 (2015). But see 25 CFR 23.130(c) and 25 CFR 23.131(d), which require the court to consider, where appropriate, "the placement preference of the Indian child or the Indian child's parent[,]" 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 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), 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."

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).

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 [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 [the] ICWA." 25 CFR 23.132(e).

See *In re KMN*, 309 Mich App at 292 (finding that "the trial court erred with regard to the application of MCL 712B.23(4)" where "the trial court did nothing to ensure . . . possible placement [with the Indian child's relatives] had been realized, investigated, and eliminated[ (even though the Indian child's relatives had not yet filed an adoption petition),] . . . [and] the trial court did nothing to ensure that any other possible listed placements were realized, investigated, and eliminated[]").

## C. Using Tribe's Order of Preference Where Tribe Sets Its Own Order

In addition, the Tribe may set a different order of preference. 25 USC 1915(c); MCL 712B.23(6); 25 CFR 23.130(b); 25 CFR 23.131(c). Both the ICWA and the MIFPA require the court or agency[220] to follow the Tribe's preference. 25 USC 1915(c); MCL 712B.23(6); 25 CFR 23.130(b); 25 CFR 23.131(c). However, the 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

[220] 25 CFR 23.102 defines *agency as* "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."

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) and MCL 712B.23(6) for the MIFPA provisions that correlate to the cited ICWA provisions; 25 CFR 23.130(a)-(b) and 25 CFR 23.131(b)-(c) for the Code of Federal Regulations provisions that correlate to the cited ICWA provisions.

## D. Maintenance of Placement Records

Michigan must maintain a record of every Indian child's voluntary and involuntary foster care and preadoptive placement, which must be made available to the Indian child's Tribe[221] or the Secretary of the Interior within 14 days of a request. 25 USC 1915(e); 25 CFR 23.141(a). Although 25 USC 1915(e) does not specify whether the records are to be retained by a state court or a state agency, "context makes clear that a 'record of each such placement' refers to the state court's placement determination." *Haaland v Brackeen*, 599 US 255, 288 n 7 (2023).

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."[222] 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

[221] For a discussion on an Indian child's Tribe, see Section 19.4(A)(2).

[222] "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). 25 CFR 23.102 defines *agency as* "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."

Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, J.1 (2016).

The MIFPA also requires:

- "A record of each placement of an Indian child [to] be maintained by the [DHHS][223] or court evidencing the efforts to comply with the order of preference specified in [MCL 712B.23]. The record shall be made available at any time upon the request of the [S]ecretary [of the Interior][224] 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).

### E. Change in Foster Care Placement

When an Indian child is removed from foster care for the purpose of further foster care, preadoptive, or adoptive placement,[225] placement must be in accordance with the placement preferences and the provisions of the 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).

## 19.14 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).

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[223] For purposes of the MIFPA, "'[d]epartment' means the department of health and human services [DHHS] or a successor department or agency."

[224] See MCL 712B.3(u), which defines *secretary* as the "Secretary of the Interior."

[225] See the Michigan Judicial Institute's *Adoption Proceedings Benchbook* for additional information on adoptive placements.

> **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 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).[226]

"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).

"[The] qualified expert witness must be qualified to testify regarding whether the child's continued custody[227] by the parent[228] or Indian custodian[229] 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 culture 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."[230] 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).

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[226] For a detailed discussion on involuntary foster care placement, see Section 19.12(C), and on termination of parental rights, see Section 19.12(D).

[227] "*Continued custody* means 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." 25 CFR 23.2. For purposes of custody, "[a] party may demonstrate the existence of custody by looking to Tribal law or Tribal custom or State law." *Id*.

[228] "*Parent* or *parents* means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established." 25 CFR 23.2.

[229] "*Indian custodian* means any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law." 25 CFR 23.2.

[230] For a discussion on an Indian child's Tribe, see Section 19.4(A)(2).

## 19.15 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.

## 19.16 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[231] who is or was the subject of any action for foster care placement or termination proceedings under state law,[232]
>
> (2) a parent[233] or Indian custodian[234] from whom the child was removed, and

[231] For additional information on determining an Indian child's status, see Section 19.4(A)(1).

[232] See Chapter 17 for information regarding the termination of parental rights pursuant to Michigan law.

[233] "*Parent* or *parents* means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established." 25 CFR 23.2. See also 25 USC 1903(9), which contains a substantially similar definition of *parent*.

[234] "*Indian custodian* means any Indian who has legal custody of an Indian child under applicable Tribal law or custom or under applicable State law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child. An Indian may demonstrate that he or she is an Indian custodian by looking to Tribal law or Tribal custom or State law." 25 CFR 23.2. See also 25 USC 1903(6), which contains a substantially similar definition of *Indian custodian*.

(3) the Indian child's Tribe.[235] 25 USC 1914; 25 CFR 23.137(a).

"To petition for invalidation there is no requirement that the petitioner's rights under [the] 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). A collateral attack based on violations of ICWA's and MIFPA's notice requirements may be raised for the first time on appeal. See *In re L A LeDee*, ___ Mich App ___, ___ (2026) (finding "the caselaw determining that Section 1914 dispenses with traditional state law preservation requirements persuasive, [and applying] the standards of review applicable to preserved ICWA and MIFPA arguments"). "One party cannot waive another party's right to seek" invalidation of a state court action for violation of the ICWA. Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, K.3 (2016).

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 the ICWA notice requirements were triggered following "the minor child's father['s] state[ment] [during the preliminary hearing] that his deceased grandmothers were both 'full-blooded' Native Americans, although he did not know to which tribe they belonged[,]" and "the [court] record contain[ed] no indication that notice was served under 25 USC 1912(a), nor [was] there any claim that such notice was ever served, apparently because there was a determination, or at least it was stated in court documents, that the minor child [was] not an Indian child."[236] *In re Johnson*, 305 Mich App at 330, 332.

[235] For a discussion on an Indian child's Tribe, see Section 19.4(A)(2).

- ***In re Morris (After Remand) (Morris IV)*, 300 Mich App 95 (2013)**

"A remand to ensure proper notice under [the] ICWA that does not lead to any evidence that [the] ICWA applies does not unravel a best-interest determination." *Morris IV*, 300 Mich App at 107-108. Specifically,

> "[The] [r]espondent[-father] asserts that [the] ICWA's remedy provisions [under 25 USC 1914] permit him to petition for invalidation of court orders entered in violation of [the] ICWA's notice requirement; thus, [the respondent-father] requests that the case be remanded to determine whether the minor child is an Indian child. However, [the] respondent[-father] has not established that [the] ICWA's notice requirement was violated on remand or that [the] ICWA actually applies to the minor child. Moreover, the issue of the minor child's best interests is not properly before this Court because it is outside the scope of the [Michigan] Supreme Court's limited remand.[237] This Court already determined that the trial court did not err by finding that termination of [the] respondent's parental rights was in the child's best interests, and the Michigan Supreme Court agreed. Thus, there was no error in the trial court's best-interest determination. A remand to ensure proper notice under [the] ICWA that does not lead to any evidence that [the] ICWA applies does not unravel a best-interest determination."*Morris IV*, 300 Mich App at 107-108.

- ***In re Morris (Morris III)*, 491 Mich 81 (2012), overruling *In re IEM*, 233 Mich App 438 (1999)[238]**

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[236] Although the Court of Appeals conditionally reversed and remanded the trial court's order terminating the respondent-mother's parental rights for purposes of ICWA compliance, the Court of Appeals went on to find that "the trial court did not clearly err when it found that termination [of the respondent-mother's parental rights] was in the minor child's best interests because of the child's need for permanence and stability[,]" which the respondent-mother could not provide. *In re Johnson*, 305 Mich App at 335-336. See Section 17.9(C) for more information on the best-interests analysis.

[237] In *In re Morris (Morris I)*, 489 Mich 877, 877 (2011), the Michigan Supreme Court "remanded th[is] case to [the Court of Appeals] for reconsideration of [the] respondent[-father's] appeal in light of [the] petitioner's confession of error regarding the failure of [the] petitioner and the trial court to comply with the notice requirements of [the] ICWA." On remand, the Court of Appeals in an unpublished opinion, "readopted, but conditionally affirmed, the order terminating [the] respondent[-father's] parental rights and remanded the case to the trial court for proper notice consistent with [the] ICWA and for further proceedings as necessary and consistent with the opinion." *Morris IV,* 300 Mich App at 99-100, citing *In re Morris (Morris II) (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket Nos. 299470, 299471).

[238] The Michigan Supreme Court in *Morris III,* 491 Mich at 121, overruled *In re IEM*, *supra*, "and its progeny[.]"

In overruling *In re IEM*, 233 Mich App 438 (1999),[239] the Michigan Supreme Court held "that the proper remedy for [the] ICWA-notice violations [under 25 USC 1912(a)] is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue." *Morris III*, 491 Mich at 121-122. Specifically,

> "Because [the] ICWA and our court rules are silent regarding the proper remedy for 25 USC 1912(a) notice violations, we must choose the best of three remedies suggested by the parties and the amici curiae. The first suggestion is to automatically reverse any proceedings occurring after the tribal-notice condition of 25 USC 1912(a) was triggered. The second proffered remedy is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue. The third possibility, which is substantively very similar to the second, is to conditionally affirm the trial court and remand for resolution of the ICWA-notice issue. In *In re IEM*, 233 Mich App 438, 449-450 (1999), our Court of Appeals adopted the conditional-affirmance remedy, and it has since been applied in more than 20 cases.
>
> * * *
>
> [W]ithout a showing that [the] ICWA even applies to the foster care or termination of parental rights proceedings, i.e., that the child is an Indian child, we decline to adopt a rule of automatic reversal.[240]
>
> * * *
>
> From a practical perspective, we realize there is little difference between the conditional remedies: both require a remand to remedy the notice violation. A conditional affirmance merely states that the lower court ruling is affirmed unless [the] ICWA applies,

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[239] 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 the ICWA's notice requirements, and the proper remedy was to "conditionally affirm the [trial] court's termination order, but remand so that the court and the [DHHS] may provide proper notice to any interested tribe."

[240] In analyzing the automatic-reversal remedy, the Michigan Supreme Court in *In re Morris (Morris III)*, 491 Mich at 119-120, concluded that "the mere triggering of the notice requirement does not strip the trial court of jurisdiction over the children and does not mandate automatic reversal of all proceedings occurring after the notice requirement was triggered[,]" "[a]n automatic-reversal rule would require new termination proceedings in even the cases not involving Indian children, [which] would disrupt or delay the permanent placement of the child[,]" and the "automatic-reversal remedy would be inconsistent with our longstanding disfavor of automatic reversals." The Court noted, "[h]owever, [that] when an appellate court can conclude from the record properly before it that a child is an Indian child entitled to the benefits and protections of [the] ICWA, an outright reversal may be an appropriate remedy if the trial court failed to apply [the] ICWA's standards." *Morris III,* 491 Mich at 120 n 28.

whereas a conditional reversal states that the ruling is reversed unless [the] ICWA does not apply. Under either remedy, if the child is determined to be an Indian child, then the foster care or termination proceedings are invalidated and the proceedings begin anew under [the] ICWA's standards. If no Indian child is involved, however, or the tribe given proper notice does not respond within the times allotted by 25 USC 1912(a), any notice violation is harmless.

As far as the best interests of the children, there is again little difference between the conditional-affirmance and conditional-reversal remedies. Under either remedy, the children will likely stay in their current placements until the notice violation is resolved, and thus their permanency is not unduly affected in the interim. Additionally, there is no difference between these remedies as far as conserving judicial resources. Both require a remand to remedy the notice violation.

Nevertheless, in other ways, substantial differences exist between the two remedies. First, we think the use of a conditional reversal is more consistent with the text of 25 USC 1912(a), which mandates that '[n]o foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary . . . .' Second, between the two remedies, conditional reversal is more deferential to tribal interests, as expressed by [the] ICWA, and is more likely to ensure these interests are protected by the trial courts. The term 'conditional reversal' sends a clearer signal to the lower courts and the DHHS that they must pay closer attention when [the] ICWA is implicated. In sum, we think that the conditional-reversal remedy is more emphatic, more consistent with the text and purposes animating [the] ICWA, and more likely to encourage compliance with [the] ICWA.

Therefore, we overrule *IEM* and its progeny and hold that conditional reversal is the proper remedy for violations of 25 USC 1912(a)." *Morris III*, 491 Mich at 115, 120-121.

> **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 [the] ICWA's protections—if the Indian tribe chose not to intervene[;] [rather,] [i]f the child meets the definition of Indian child, [the] ICWA applies, regardless of whether the Indian tribe chooses to intervene in the state-court proceedings."

- ***In re Budd*, 491 Mich 934, 934-935(2012)**

In light of the Michigan Supreme Court's ruling in *Morris III*, 491 Mich at 81, the Michigan Supreme Court reversed "that part of the judgment of the Court of Appeals applying the conditional-affirmance remedy," and instead "conditionally reverse[d]" the circuit court's "termination of the respondent's parental rights, and remand[ed] th[e] case to the circuit court for resolution of the notice requirements of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*" *In re Budd*, 491 Mich at 934. On remand, the Michigan Supreme Court directed:

> "[T]he circuit court shall first ensure that notice is properly made to the appropriate entities. If the circuit court conclusively determines that [the] ICWA does not apply to the child protective proceeding—because the children are not Indian children or because the properly noticed tribe does not timely respond—the circuit court's order terminating the respondent's parental rights shall be reinstated. If, however, the circuit court concludes that [the] ICWA does apply to the child protective proceeding, the circuit court's order terminating the respondent's parental rights must be vacated and all proceedings must begin anew in accord with the procedural and substantive requirements of [the] ICWA." *In re Budd,* 491 Mich at 934-935.

- ***Empson-Laviolette v Crago*, 280 Mich App 620, 632-633 (2008)**

The Court of Appeals found that the ICWA preempted the stay imposed under MCL 722.26b(4) in a guardianship proceeding because the stay "infringed on the minimum protections [the child's mother] was afforded under § 1913(b)[;]" that is, the stay prevented the child's mother from withdrawing her consent to the guardianship at any time. See Section 19.12(E) for a detailed discussion of a parent's or custodian's right to withdraw consent.

- ***In re Morgan*, 140 Mich App 594, 602-604 (1985)[241]**

The Court of Appeals invalidated the trial court's order terminating parental rights where the trial court used the clear and convincing evidence standard rather than the beyond a reasonable doubt standard during disposition, failed to hear expert witness testimony, and failed to establish that remedial or rehabilitative efforts had failed. See Section 19.12(D) 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 MCL 712B.7, MCL 712B.9, MCL 712B.11, MCL 712B.13, MCL 712B.15,[242] 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,[243]
>
> (2) a parent[244] or Indian custodian[245] from whom the child was removed, and
>
> (3) the Indian child's tribe.[246] MCL 712B.39.

## C. Right to Appeal

"[A]ny order involving an Indian child[247] that is subject to potential invalidation under [MCL 712B.39] or [25 USC 1914 is

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[241] A different panel of the Court of Appeals later concluded that the *In re Morgan* Court erred in applying a reasonable doubt standard to the active efforts determination. *In re Roe*, 281 Mich App 88, 99-100 (2008) (stating that the standard required by the ICWA is clear and convincing). However, this decision would not likely disturb the outcome discussed in this section.

[242] MCL 712B.15(5) also provides for "[a]ny Indian child who is the subject of any action for termination of parental rights under state law, any parent or Indian custodian from whose custody the 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 19.12 for a discussion of MCL 712B.15.

[243] See Chapter 17 for information regarding the termination of parental rights pursuant to Michigan law.

[244] For purposes of MIFPA, a "'parent' means any biological parent or parents of an Indian child or any person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. *Parent does not include the putative father if paternity has not been acknowledged or established*. MCL 712B.3(s) (emphasis added). See also MCR 3.002(20), which contains a substantially similar definition of *parent*, except that, where the Indian child has been adopted, it requires the adopter to be an Indian.

[245] For purposes of MIFPA, an "'Indian custodian' means any Indian person who has custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control have been transferred by the Indian child's parent." MCL 712B.3(n). See also MCR 3.002(15), which contains a substantially similar definition of *Indian custodian*.

[246] For a discussion on an Indian child's Tribe, see Section 19.4(A)(2).

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)(7).

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

## 19.17 Annual Census

MCL 712B.37 requires "[t]he [DHHS][248] to publish annually a census with no individually identifiable information of all Indian children in the

[247] For additional information on determining an Indian child's status, see Section 19.4(A)(1).

[248] For purposes of the MIFPA, "'[d]epartment' means the department of health and human services [DHHS] or a successor department or agency." MCL 712B.3(e).

> [DHHS's] care and custody. The census shall include, by county and statewide, information regarding the Indian children on all of the following:
>
> (a) Legal status.
>
> (b) Placement information and whether it complies with [the MIFPA].
>
> (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."[249]

[249] For a discussion on Indian children, see Section 19.4(A), and child-custody proceedings, see Section 19.4(B).

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


20.1 Judicial Review of Referee's Recommended Findings and Conclusions ..... 20-2
20.2 Rehearings ..... 20-3
20.3 Appeals to the Michigan Court of Appeals ..... 20-4
20.4 Appeals to the Michigan Supreme Court ..... 20-15


## *In this chapter. . .*

This chapter discusses the procedural requirements for requesting review of a referee's recommended findings and conclusions following a hearing.

This chapter also briefly touches on rehearings and provides a brief overview of (1) how a party may appeal to the Michigan Court of Appeals or the Michigan Supreme Court, (2) the requirements of filing an appeal, and (3) the reviewing court's decisionmaking process.

# 20.1 Judicial Review of Referee's Recommended Findings and Conclusions

"Before signing an order based on a referee's recommended findings and conclusions, a judge of the court shall review the recommendations if requested by a party in the manner provided by [MCR 3.991(B)]." MCR 3.991(A)(1).

## A. Advice of Right to Seek Review

A referee must advise the parties of the right to request that a judge review a referee's recommended findings and conclusions as provided in MCR 3.991(B). MCR 3.913(C)(1).

## B. Procedural Requirements

"A party's request for review of a referee's recommendation must:

> (1) be in writing,
>
> (2) state the grounds for review,
>
> (3) be filed with the court within 7 days after the conclusion of the inquiry or hearing or within 7 days after the issuance of the referee's written recommendations, whichever is later, and
>
> (4) be served on the interested parties by the person requesting review at the time of filing the request for review with the court. A proof of service must be filed." MCR 3.991(B).

"A party may file a written response within 7 days after the filing of the request for review." MCR 3.991(C).

However, if a request for review of a referee's recommendation is not filed with seven days of the conclusion of the inquiry or issuance of the referee's written recommendation as required under MCR 3.991(B)(3), "the court may enter an order in accordance with the referee's recommendations." MCR 3.991(A)(2).

## C. Timing Requirement for Judge's Consideration of Request

Nothing in MCR 3.991 precludes a judge from reviewing a referee's recommendation and entering an appropriate order before the time for requesting a review has expired. MCR 3.991(A)(3).

However, once the judge enters an order, a request for review cannot be filed. MCR 3.991(A)(4). Rather, reconsideration of the order may be granted under MCR 3.992 (rehearings).[1] MCR 3.991(A)(4).

Unless good cause exists, the court must consider the request for review within 21 days after the request is filed if the child is in placement. MCR 3.991(D). A hearing is not required in order to rule on the request. *Id.* However, the judge has discretion to hold a hearing before ruling. MCR 3.991(F).

### D. Stay of Proceedings

"The court may stay any order . . . pending its decision on review of the referee's recommendations." MCR 3.991(G).

### E. Ruling on Review Request

MCR 3.991(E) sets out the standard of review of a request to review a referee's recommended findings and conclusions:

> "The judge must enter an order adopting the referee's recommendation unless:
>
> > (1) the judge would have reached a different result had he or she heard the case; or
> >
> > (2) the referee committed a clear error of law which
> >
> > > (a) likely would have affected the outcome, or
> > >
> > > (b) cannot otherwise be considered harmless."

"The judge may adopt, modify, or deny the recommendation of the referee, in whole or in part, on the basis of the record and the memorandums prepared, or may conduct a hearing, whichever the court in its discretion finds appropriate for the case." MCR 3.991(F).

## 20.2 Rehearings

During a child protective proceeding, an interested person may file a petition for rehearing at any time while a child is under the court's jurisdiction.[2] MCL 712A.21. However, "[a] motion will not be considered unless it presents a matter not previously presented to the court, or

[1] See Section 12.12 for a detailed discussion of rehearings.

[2] For a detailed discussion of rehearings, see Section 12.12.

presented, but not previously considered by the court, which, if true, would cause the court to reconsider the case." MCR 3.992(A).

Unless the case involves termination of parental rights, a motion for rehearing must be filed "within 21 days after the date of the order resulting from the hearing or trial." MCR 3.992(A). If the case involves termination of parental rights, a motion for rehearing must be filed "within 14 days after the date of the order terminating parental rights." *Id.* But see, MCL 712A.21, which requires a petition for rehearing to be filed within 20 days of entry of the order terminating parental rights where parental rights have been terminated and custody of a child has been removed from the parents, guardian, or other person.[3]

## 20.3 Appeals to the Michigan Court of Appeals

A brief discussion on filing an appeal with the Michigan Court of Appeals is contained in this section. "Except as modified by [MCR 3.993], chapter 7 of the Michigan Court Rules governs appeals from the family division of the circuit court." MCR 3.993(C)(1). For additional information or requirements, see MCR 7.200 *et seq.*

### A. Appeal of Right

Under MCR 3.993(A),[4] a party aggrieved by a court order may appeal as of right any of the following orders:

> "(1) any order removing a child from a parent's care and custody,
>
> (2) an initial order of disposition following adjudication in a child protective proceeding,
>
> (3) an order of disposition placing a minor under the supervision of the court in a delinquency proceeding,
>
> > [**Note:** The trial court's order removing a child from the respondent-mother's custody is appealable by right where the DHHS retained supervision over the child, but the child was physically residing in the respondent-mother's home at the time the trial court entered the supplemental dispositional order removing the child from the extended home visit. *In re EP*, 234

[3] A respondent whose parental rights have been terminated may also bring an appeal of right to the Court of Appeals under MCR 3.993(A)(5). See *In re Pawloski*, ___ Mich App ___, ___ (2025).

[4] See also MCL 600.308 and MCL 600.309, which also list orders and judgments that are appealable as a matter of right.

Mich App 582, 590-591 (1999), overruled on other grounds by *In re Trejo*, 462 Mich 341 (2000).[5]]

(4) an order granting a motion to waive jurisdiction as provided in MCR 3.950(E)(1)(c),

(5) an order terminating parental rights,[6]

(6) any order required by law to be appealed to the Court of Appeals,

(7) any order involving an Indian child that is subject to potential invalidation under [MCL 712B.39] or [25 USC 1914], 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

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

[6] The Court of Appeals Clerk must give priority to appeals of orders terminating parental rights when scheduling them for submission to the courts. See Administrative Order No. 1981-6.

> 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;[7] and

(8) any final order."

MCR 7.203(A)(2) establishes the Court's jurisdiction over appeals of right filed by "an aggrieved party" from a judgment or order of a court or tribunal when the right to appeal is created by law or court rule. *In re Pawloski*, ___ Mich App ___, ___ (2025). "An aggrieved party" is a litigant who has "suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power." *Id*. at ___ (quotation marks and citation omitted). However, "a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case." *Id*. at ___ (holding that "when a parent challenges the validity of a release of parental rights on the ground that it was not made knowingly or voluntarily, the parent alleges a concrete injury arising from the trial court's order and qualifies as an aggrieved party for purposes of appellate jurisdiction").

The requirements for filing an appeal of right appear in MCR 7.204(A)-(H).

Filing an appeal does not stay enforcement of a court order, "unless the court to which the appeal is taken specifically orders the suspension." MCL 600.1041. See also MCR 7.209(A)(1).

"[T]he collateral bar rule generally prohibits a litigant from indirectly attacking a prior judgment in a later, *separate* action, unless the court that issued the prior judgment lacked jurisdiction over the person or subject matter in the first instance. Instead, the litigant must seek relief by reconsideration of the judgment from the issuing court or by direct appeal. . . . [However,] a child protective proceeding is a single continuous proceeding that begins with a petition, proceeds to an adjudication, and—unless the family has been reunified—ends with a determination of whether a respondent's parental rights will be terminated" and "an appeal of an adjudication error in an appeal from an order terminating parental rights is not a collateral attack. The collateral-bar rule does not apply within one child protective case, barring some issues from review." *In re Ferranti*, 504 Mich 1, 22-23, 35 (2019) (quotation marks and citations omitted). According to the *Ferranti* Court, *In re Hatcher*,

[7] For additional discussion on appealing an invalidation of State court action, see Section 19.16.

443 Mich 426 (1993), made a foundational mistake; it erroneously applied the rule from *Jackson City Bank & Trust Co v Frederick*, 271 Mich 538 (1935)—that a court's exercise of jurisdiction cannot be collaterally attacked in a second proceeding—to what is a single, continual proceeding." *Ferranti*, 504 Mich at 22. "*Hatcher* was *not* a collateral attack. It was a direct appeal of an (unpreserved) adjudicative error."[8] *Ferranti*, 504 Mich at 20 n 8. "[I]ssue preservation dictates the appellate standard of review; it does not transform direct review into collateral attack." *Id*. at 25.

"If termination [of a parent's parental rights] occurs at the initial disposition as a result of a request for termination contained in the original, or amended, petition for jurisdiction, then an attack on the adjudication is direct and not collateral, as long as the appeal is from an initial order of disposition containing both a finding that an adjudication was held and a finding that the children came within the jurisdiction of the court.' *In re SLH*, 277 Mich App 662, 668-669 (2008).

**Time requirements.** "The time limit for an appeal of right is jurisdictional. See MCR 7.203(A)." MCR 7.204(A).

The Court of Appeals has jurisdiction over an aggrieved party's appeal of right of certain orders entered under the Juvenile Code or of any final order. See MCR 3.993(A); MCR 7.203(A)(2).

"Except where another time is provided by law or court rule, an appeal of right in any civil case must be taken within 21 days."[9] MCR 7.204(A)(1). The 21-day period begins with the entry of:[10]

> "(a) the judgment or order appealed from;
>
> (b) an order appointing counsel[;]
>
> (c) an order denying a request for appointment of counsel in a civil case in which an indigent party is entitled to appointed counsel, if the trial court received the request within the initial 21-day period; or

---

[8] "This Court's decision in *In re Hatcher*, 443 Mich 426 (1993), generally bar[ring] a parent from raising errors from the adjudicative phase of a child protective proceeding in the parent's appeal from an order terminating his or her parental rights," and prohibiting "a posttermination appeal of a defect in the adjudicative phase . . . because it is a collateral attack . . . was wrongly decided, and we overrule it." *Ferranti*, 504 Mich at 7-8.

[9] The computation of time is governed by MCR 1.108. MCR 7.204(A).

[10] "For purposes of [MCR 7.204(A)(1)] and [MCR 7.204(A)(2)], 'entry' means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions." MCR 7.204(A).

> (d) an order deciding a postjudgment motion for new trial, rehearing, reconsideration, or other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period or within any further time that the trial court has allowed for good cause during that 21-day period." MCR 7.204(A)(1).

## B. Appeal by Leave/Delayed Leave

The Court of Appeals may grant leave to appeal all orders not listed in MCR 3.993(A). MCR 3.993(B).

Appeal by leave is available to a party who wishes to appeal a judgment or order that is not considered a final judgment appealable of right, or to a party who failed to timely file an appeal of right (also known as a delayed appeal). MCR 3.993(B); MCR 7.203(B)(1); MCR 7.203(B)(5).

**Time requirements for leave to appeal.** "The time limit for an application for leave to appeal is jurisdictional. See MCR 7.203(B)."[11] MCR 7.205(A).

"Except as otherwise provided in this rule, an application for leave to appeal must be filed within:

> (a) 21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule; or
>
> (b) 21 days after entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period." MCR 7.205(A)(1).

The Court of Appeals may not grant an application for leave to appeal an order terminating parental rights filed more than 63 days after entry of a judgment on the merits, or more than 63 days after entry of an order denying rehearing or reconsideration. MCR 3.993(C)(3); MCR 7.205(A)(3).

**Time requirements for delayed leave to appeal.** When an application for leave to appeal is not filed within the time prescribed in MCR 7.205(A)(1), "a delayed application for leave to appeal may

[11] The computation of time is governed by MCR 1.108. MCR 7.204(A).

be filed within 6 months of the entry of a judgment or order described in [MCR 7.205(A)(1)]."[12] MCR 7.205(A)(4)(a).

If the Court of Appeals dismisses for lack of jurisdiction a claim of appeal governed by MCR 7.205(A)(1), "a delayed application for leave to appeal may also be filed within 21 days of the entry of the dismissal order or an order denying reconsideration of that order, provided that:

> (*i*) the delayed application is taken from the same lower court judgment or order as the claim of appeal, and
>
> (*ii*) the claim of appeal was filed within the applicable time period in [MCR 7.205(A)(1)]." MCR 7.205(A)(4)(b).

"A delayed application under [MCR 7.205] must contain a statement of facts explaining the reasons for delay. The appellee may challenge the claimed reasons in the answer. The court may consider the length of and the reasons for delay in deciding whether to grant the delayed application." MCR 7.205(4).

C. Termination of Parental Rights: Appointment of Appellate Counsel

A respondent's right to request and be appointed appellate counsel after termination of his or her parental rights is governed by MCR 3.993. MCR 3.977(J)(2). "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).

The respondent must request the appointment of appellate counsel "within 21 days after notice of the order is given or an order is entered denying a timely filed postjudgment motion." MCR 3.993(D)(1).

If the respondent makes a timely request for the appointment of appellate counsel and the court determines that the respondent is not financially able to provide an attorney, the court must, within 14 days after the respondent's request is filed, appoint an attorney for the respondent.[13] MCR 3.993(D)(2). The order appointing counsel "must be entered on a form approved by the State Court Administrator's Office, entitled 'Claim of Appeal and Order Appointing Counsel[.]'" MCR 3.993(D)(3).

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[12] See also MCL 600.1041, which states: "An application for a delayed appeal from an order of the family division of circuit court in a matter involving the disposition of a juvenile shall be filed within 6 months after entry of the order."

[13] "The chief judge of the court shall bear primary responsibility for ensuring that the appointment is made within the deadline stated in [MCR 3.993]." MCR 3.993(D)(2).

**Note:** See generally, *In re Conley*, 216 Mich App 41, 45 (1996), where the Court of Appeals refused to require the appointment of appellate counsel when the only reason to deny the request for counsel was the lateness of the request; appointment in such circumstances is within the court's discretion.

If the court appoints counsel for the respondent, the court must immediately send to the Court of Appeals:

(1) a copy of the Claim of Appeal and Order Appointing Counsel;

(2) a copy of the judgment or order being appealed; and

(3) a copy of the complete register of actions in the case. MCR 3.993(D)(3).

**Note:** The trial court's entry of the order appointing counsel constitutes a timely filed claim of appeal for purposes of MCR 7.204. MCR 3.993(D)(3).

The court must also file in the Court of Appeals proof that the Claim of Appeal and Order Appointing Counsel was served on:

(1) The respondent(s);

(2) The respondent(s)' appointed counsel;

(3) The court reporter(s)/recorder(s);

(4) The petitioner;

(5) The prosecuting attorney;

(6) The child(ren)'s lawyer-guardian ad litem under MCL 712A.13a(1)(f);[14] and

(7) The child(ren)'s guardian ad litem or attorney (if any).[15] MCR 3.993(D)(3).

"If the court appoints appellate counsel for respondent, the court must order the complete transcripts of all proceedings prepared at public expense." MCR 3.993(E).

**Note:** See *MLB v SLJ*, 519 US 102, 107 (1996) (it is inconsistent with the Due Process and Equal Protection

[14] See Section 7.10 for a detailed discussion of lawyer-guardians ad litem (L-GAL).

[15] See Section 7.11 and Section .

Clauses of the Fourteenth Amendment for a state to "condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees").

## D. Restoring Respondent's Appellate Rights

If errors by the respondent's prior attorney or the court, or "other factors outside the respondent's control" caused a denial of a respondent's right to appeal or respondent's right to have appellate counsel appointed, the respondent may file a motion to restore appellate rights under MCR 3.993(F). However, "[a] motion under [MCR 3.993(F)] will not be considered if it alleges grounds for relief that were resolved against that respondent in a prior proceeding or appeal." MCR 3.993(F)(3). Except if excused for good cause shown, a respondent must provide the Court of Appeals with a copy of the order issued under MCR 3.993(F) "when filing the appeal with the claim of appeal or application for leave to appeal." MCR 3.993(F)(4).

### 1. Denial of Appellate Review

A motion based on the denial of a respondent's right to appellate review "must be filed within a reasonable time after an order identified in [MCR 3.993(A)] was entered, or, if applicable, within a reasonable time after the respondent's claim of appeal was dismissed." MCR 3.993(F)(1). A motion under MCR 3.993(F)(1) is presumed to be filed within a reasonable time if it is filed within two years after entry of an order identified in MCR 3.993(A), or within one year of the date that a respondent's claim of appeal was dismissed. MCR 3.993(F)(1).

### 2. Denial of Appointed Appellate Counsel

A motion based on the denial of a respondent's right to appointed appellate counsel "must be filed within a reasonable time after being denied the appointment of appellate counsel." MCR 3.993(F)(2). A motion under MCR 3.993(F)(2) is presumed to be filed within a reasonable time if it is filed within two years of the date of the order denying the appointment of appellate counsel. *Id*.

### 3. "Reasonable Time" Determination

While MCR 3.993(F)(1) and (2) state time frames that are presumed reasonable for bringing motions under those subsections, MCR 3.993(F)(5) allows for further examination of

reasonableness. When determining if a motion is filed within a reasonable time, "the court must consider whether factors existed outside the respondent's control that contributed to the delay in filing a motion under [MCR 3.993(F)]." MCR 3.993(F)(5).

#### 4. Order Restarting Time in Which to File an Appeal or Request Counsel—May Not Extend Time to Appeal Termination Order Beyond 63 Days

If a respondent establishes grounds for relief under MCR 3.993(F), "the trial court must issue an order restarting the time in which to file an appeal or request counsel, except that the court must not issue any order that would extend the time for appealing an order terminating parental rights beyond 63 days from entry of the order terminating rights." MCR 3.993(F).

### E. Court Determination

#### 1. Decision on Application for Leave to Appeal

Oral argument is not heard on an application for leave to appeal. MCR 7.205(E)(1). Rather, the application is decided solely on the documentation filed, and, in an administrative tribunal or agency appeal, the certified record. *Id.*

On an application for leave to appeal, the Court of Appeals may do any of the following:

(1) Grant the application.

(2) Deny the application.

(3) Enter a final decision.

(4) Grant other relief.

(5) Request additional information from the record.

(6) Require a certified statement of proceedings and facts from the trial court or administrative tribunal or agency. MCR 7.205(E)(2).

If an application is granted, the application for leave to appeal proceeds as an appeal of right except that a party need not file a claim of appeal and some time limits run from the date the order granting leave is certified. See MCR 7.205(E)(3).

## 2. Standards of Review

### a. Clear Legal Error Standard

- "[W]e conclude that . . . it was not necessary for respondent to move for a directed verdict at the adjudication trial in order to preserve for appeal the argument that there was insufficient evidence presented at trial for the trial court to assume jurisdiction." *In re Sluiter*, ___ Mich App ___, ___ (2024). "In determining whether sufficient evidence exists to sustain a jury's verdict finding jurisdiction in a child-neglect proceeding," the clear legal error standard requires the Court of Appeals to "review[] the evidence in the light most favorable to the petitioner, and consider[] whether there was sufficient evidence to justify a rational trier of fact in finding jurisdiction by a preponderance of the evidence." *Id*. at ___ (quotation marks and citation omitted). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id*. at ___ (quotation marks and citation omitted). "[And i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded to those inferences." *Id*. at ___ (quotation marks and citation omitted).

- "[A] trial court's factual findings as well as its ultimate determination that a statutory ground for termination of parental rights has been proved by clear and convincing evidence" is reviewed for clear error. *In re Mason*, 486 Mich 142, 152 (2010), citing MCR 3.977(K) ("[t]he clearly erroneous standard shall be used in reviewing the court's findings on appeal from an order terminating parental rights.").

- A trial court's decision regarding a child's best interests is reviewed for clear error. *In re Trejo*, 462 Mich 341, 356-357 (2000).

"'A finding is 'clearly erroneous' if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made.'" *In re Long*, 326 Mich App 455, 460 (2018), quoting *In re HRC*, 286 Mich App 444, 459 (2009).

However, the Court of Appeals cannot substitute its judgment for that of the trial court. *In re Hall (Dylan)*, 483 Mich 1031 (2009) (Michigan Supreme Court reversed the Court of Appeals and reinstated the trial court's ruling where "[t]he Court of Appeals misapplied the clear error standard by substituting its judgment for that of the trial court . . . and rendered a decision that was contrary to the clear and convincing evidence supporting termination of the respondent-mother's parental rights . . . ."); *In re Krupa*, 490 Mich 1004, 1004 (2012) (Michigan Supreme Court reversed the Court of Appeals and remanded the case to the Court of Appeals to address the respondent's remaining issues where "[t]he Court of Appeals misapplied the clear error standard by engaging in improper fact-finding and substituting its judgment for that of the trial court[,] . . . [and] [a]s a result, the Court of Appeals rendered a decision that was contrary to the clear and convincing evidence supporting the statutory grounds for termination under MCL 712A.19b(3)(g) and MCL 712A.19b(3)(j)[]"); *In re Engle*, 480 Mich 931 (2007) (Michigan Supreme Court reversed the Court of Appeals and reinstated the trial court's ruling where "[t]he Court of Appeals misapplied the clear error standard by substituting its judgment for that of the trial court. . . , failed to acknowledge that the applicable statutes and court rules do not require efforts for reunification or provision of services under the circumstances of this case. . . , and rendered a decision that was contrary to the clear and convincing evidence supporting the statutory grounds for termination and the best interests of the minor children . . . .").

## b. Abuse of Discretion Standard

- A refusal to grant a request for rehearing is reviewed for an abuse of discretion. *In re Toler*, 193 Mich App 474, 478 (1992).

"At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269 (2003). See also *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006), which adopted the *Babcock* Court's articulation of the abuse of discretion standard as the default standard.[16] "An abuse of discretion occurs . . . when the trial court

chooses an outcome falling outside this principled range of outcomes." *Babcock*, *supra* at 269.

### c. De Novo

- Questions of law such as the interpretation and application of statutes and court rules, *In re Mason*, 486 Mich at 152, and constitutional challenges, *In re Rood*, 483 Mich 73, 91 (2009), are reviewed de novo.

- Claims of instructional error are reviewed de novo. *In re Vandalen*, 293 Mich App 120, 133 (2011).

Where a claim of instructional error is made, reversal is not warranted if the error did not effect the outcome of the trial. *In re Vandalen*, 293 Mich App at 133. "'If, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury, no error requiring reversal occurs.'" *In re Vandalen, supra*, quoting *Lewis v LeGrow*, 258 Mich App 175, 211 (2003).

### d. Plain Error

- "[A]djudication errors raised after the trial court terminated parental rights are reviewed for plain error." *In re Ferranti*, 504 Mich 1, 29 (2019).

"The respondents must establish that (1) error occurred; (2) the error was 'plain,' i.e., clear or obvious; and (3) the plain error affected their substantial rights. And the error must have 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings[] . . .'" *In re Ferranti*, 504 Mich at 29 (quoting *People v Carines*, 460 Mich 750, 763 (1999), and applying the criminal procedure plain-error test in appeals to juvenile proceedings) (citation omitted; alteration in original); see also *In re Barber/Espinoza*, ___ Mich ___, ___ (2025) (quoting *Ferranti*, 504 Mich at 29).

DHHS is obligated to make reasonable efforts toward family reunification before seeking termination of a respondent's parental rights unless one of the exceptions in MCL 712A.19a(2) applies to excuse DHHS from its obligation. *In re C Walters*, ___ Mich App ___, ___ (2025). A court plainly errs when it terminates a respondent's

[16] But see *Shulick v Richards*, 273 MIch App 320, 324 (2006), where the Michigan Court of Appeals construed the *Maldonado* holding to mean that "a default abuse of discretion standard of review is an assumed or assigned standard of review unless the law instructs otherwise." For example, cases involving MCL 722.28 (child custody under the Child Custody Act) require a different standard for abuse of discretion reviews under *Fletcher v Fletcher*, 447 Mich 871 (1994). *Shulick, supra* at 324.

parental rights under those circumstances. *Id.* at ___ ("Because DHHS did not establish the requisite aggravating factors [under MCL 712A.19a(2)], the trial court erred by terminating respondent's parental rights at the initial disposition."). Additionally, terminating respondent's parental rights "based largely on her failure to completely comply with a malleable oral safety plan, the details of which remain[ed] unclear, despite the fact that [the child] was kept safe and well cared for," constituted plain error. *Walters*, ___ Mich App at ___ ("[I]t cannot be reasonably disputed that it is an error to terminate someone's parental rights on the basis of her failure to comply with an oral safety plan that was implemented before a court took jurisdiction.").

The Court of Appeals has discretion to review an unpreserved legal issue or an issue not raised on appeal by the parties. *In re D M A N*, ___ Mich App ___, ___ (2025). On appeal, unpreserved issues and issues not raised on appeal are reviewed for plain error affecting substantial rights. *Id.* at ___. The Court exercised its discretion in *D M A N* when the trial court terminated respondents' parental rights after the "DHHS completely disregarded its obligation under MCL 722.954a(2) to investigate relative placements . . . ." *Id.* at ___. The Court held that the error was plain and that "the failure to even attempt to keep [the child] from being separated from her biological family seriously affect[ed] the fairness, integrity, and public reputation of judicial proceedings." *Id.* at ___. If a suitable relative placement was available, it would have weighed against a finding that termination was in the child's best interests, and it would have protected the child's interest in maintaining a familial relationship with her other relatives. *Id.* at ___. Resultantly, the Court conditionally reversed the trial court's finding that termination was in the child's best interests and remanded for a determination as to whether a suitable relative placement was available, and if so, to conduct the appropriate procedural steps indicated in MCL 722.954a. *Id.* at ___.

## 20.4 Appeals to the Michigan Supreme Court

A brief discussion on filing an appeal with the Michigan Supreme Court is contained in this section. For additional information or requirements, see MCR 7.300 *et seq*. With the exception of certain Judicial Tenure Commission orders, the Michigan Supreme Court retains discretion whether to grant leave to appeal.

A party may apply for leave to appeal to the Michigan Supreme Court while a case is pending review by the Court of Appeals or after a decision has been made by the Court of Appeals. MCR 7.303(B)(1). A party filing for leave to appeal to the Supreme Court must comply with the

applicable procedural requirements in MCR 7.305(A), MCR 7.305(C), MCR 7.305(D), and MCR 7.305(E).

Except for "an appeal from an order of discipline or dismissal entered by the Attorney Discipline Board,"[17] an application for leave to appeal after a Court of Appeals decision "must be filed within 42 days in civil cases, or within 56 days in criminal cases, after:

> (a) the Court of Appeals order or opinion resolving an appeal or original action, including an order denying an application for appeal,
>
> (b) the Court of Appeals order or opinion remanding the case to the lower court or Tribunal for further proceedings while retaining jurisdiction,
>
> (c) the Court of Appeals order denying a timely filed motion for reconsideration, or
>
> (d) the Court of Appeals grants a request to publish an opinion that was originally released as unpublished." MCR 7.305(C)(2).[18]

"If the decision of the Court of Appeals remands the case to a lower court for further proceedings, an application for leave to appeal may be filed within 42 days in civil cases and 56 days in criminal cases, after the date of

> (a) the Court of Appeals order or opinion remanding the case,
>
> (b) the Court of Appeals order denying a timely filed motion for reconsideration of a decision remanding the case, or
>
> (c) the Court of Appeals order or opinion disposing of the case following the remand procedure, in which case an application may be made on all issues raised initially in the Court of Appeals, as well as those related to the remand proceedings."MCR 7.305(C)(5).

On receipt of an application for leave to appeal, the Supreme Court may:

> (1) Grant the application.
>
> (2) Deny the application.

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[17] MCR 7.305(C)(4).

[18] The Supreme Court Clerk must give priority to appeals of orders terminating parental rights when scheduling them for submission to the courts. See Administrative Order No. 1981-6.

(3) Enter a final decision.

(4) Direct argument on the application.

(5) Issue a peremptory order. MCR 7.305(I)(1).

If the Supreme Court *grants* a party's application for leave to appeal and the Court of Appeals *has not yet made a decision* on the case, the appeal is deemed pending in the Supreme Court only. MCR 7.305(I)(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(I)(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(I)(3).

# Chapter 21: Family Division Records


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## *In this chapter. . .*

This chapter discusses the recordkeeping requirements for the Family Division in child protective proceedings. Specifically, this chapter discusses the court's recordkeeping obligations, confidentiality of and access to records, and retention and destruction of records and files.[1] For information concerning records used in suspected abuse or neglect investigations, see Chapter 2.

[1] The "[d]estruction of a case record does not negate, rescind, or set aside an adjudication." MCR 3.925(E)(1).

# 21.1 Family Division Records and Recordkeeping Obligations

"The court, under the direction of the chief judge, has responsibility for the management of all records necessary to adequately support the business of the court. It requires the systematic control of those records from the point they are created, received, or filed to the point they are transferred to the Archives of Michigan or destroyed in accordance with approved record retention and disposal schedules. This is accomplished through the assistance of staff support, including, but not limited to, court administrators, registers of probate, clerks of the court, probation officers, and friends of the court, all of whom are required to comply with various laws, court rules, and standards pertaining to management of the judiciary's court records." Michigan Trial Court Records Management Standards, *Introduction*.

## A. Records and Register of Actions

The clerk of the court[2] is required to maintain case records; a register of actions (case history), searchable by case number or party name; and a case file[3] for each case. See MCR 1.109; MCR 8.119.[4]

**Records**. "For purposes of [MCR 8.119], records are as defined in MCR 1.109, MCR 3.218, MCR 3.903, and MCR 8.119(D)-(G)." MCR 8.119(A). See also MCR 3.925(A)(25) ("'[r]ecords' are as defined in MCR 1.109 and MCR 8.119). In general, "[c]ourt records are recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules." MCR 1.109(A)(1). MCR 8.119(I)(5), in turn, provides that "'court records' includes all documents and records of any nature that are filed with or maintained by the clerk in connection with the action." MCR 3.903(A)(25) provides that "'[r]ecords' . . . include, but are not limited to, pleadings, complaints, citations, motions, authorized and unauthorized petitions, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, registers of action, consent calendar case plans, and court orders."[5] In addition, MCR 1.109(A)(1)(a) provides that "[c]ourt records include, but are not limited to:

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[2] The county clerk is the clerk of the court for the circuit court, including the Family Division. MCL 600.1007.

[3] A case file is not required for civil infractions. MCR 8.119(D)(1).

[4] Cases filed under the Juvenile Code in the Family Division are governed by the rules of practice and procedure contained in Michigan Court Rules subchapters 3.900, 1.100, and 8.100. MCR 3.901(A)(1).

[5] Records may be filed using facsimile communication equipment. MCR 2.406(B); MCR 3.929. "Filing of records by the use of facsimile communication equipment in juvenile proceedings is governed by MCR 2.406." MCR 3.929.

> "(*i*) documents, attachments to documents, discovery materials, and other materials filed with the clerk of the court,
>
> (*ii*) documents, recordings, data, and other recorded information created or handled by the court, including all data produced in conjunction with the use of any system for the purpose of transmitting, accessing, reproducing, or maintaining court records."[6]
>
> **Note:** A *document* is "a record produced on paper or a digital image of a record originally produced on paper or originally created by an approved electronic means, the output of which is readable by sight and can be printed to 8 1/2 x 11 inch paper without manipulation." MCR 1.109(B). See also MCR 1.109(D)(1), providing that "documents prepared for filing in the courts" must be "transmitted through an approved electronic means and maintained as a digital image." For more information on e-filing, see the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 1.

"Discovery materials that are not filed with the clerk of the court are not court records. Exhibits that are maintained by the court reporter or other authorized staff pursuant to MCR 2.518 or MCR 3.930 during the pendency of a proceeding are not court records." MCR 1.109(A)(2).

**Case File.** A *file* is "a repository for collection of the pleadings and other documents and materials related to a case." MCR 3.903(A)(8). The clerk of the court is required to maintain a case file of each action, except for civil infractions, "for all pleadings, process, written opinions and findings, orders, and judgments filed in the action, and any other materials prescribed by court rule, statute, or court order to be filed with the clerk of the court." MCR 8.119(D)(1)(b); see also MCR 8.119(D)(1).

**Register of Actions (Case History).** A *register of actions* is "the case history of all cases, as defined in [MCR 3.903(A)(1)], maintained in accordance with the Michigan Supreme Court Records

[6] "For purposes of this subrule: (*i*) Documents include, but are not limited to, pleadings, orders, and judgments. (*ii*) Recordings refer to audio and video recordings (whether analog or digital), stenotapes, log notes, and other related records. (*iii*) Data refers to any information entered in the case management system that is not ordinarily reduced to a document but that is still recorded information, and any data entered into or created by the statewide electronic-filing system. (*iv*) Other recorded information includes, but is not limited to, notices bench warrants, arrest warrants, and other process issued by the court that do not have to be maintained on paper or digital image." MCR 1.109(A)(1)(b).

Management Standards." MCR 3.903(A)(26). The clerk of the court must create and maintain a register of actions (case history) for each case in the court's automated case management system, and the system must be searchable by case number or party name ("previously known as numerical and alphabetical indices"). MCR 8.119(D)(1)(a).

The requirements of properly recording a case history continue:

> "The case history shall contain both pre- and post-judgment information and shall, at a minimum, consist of the data elements prescribed in the Michigan Trial Court Records Management Standards. Each entry shall be brief, but shall show the nature of each item filed, each item issued by the court, and the returns showing execution. The case history entry of each item filed shall be dated with the date of filing (if relevant) and the date and initials of the person recording the action, except where the entry is recorded by the electronic filing system. In that instance, the entry shall indicate that the electronic filing system recorded the action. The case history entry of each order, judgment, opinion, notice, or other item issued by the court shall be dated with the date of issuance and the initials of the person recording the action." MCR 8.119(D)(1)(a).

**Personal identifying information.** Information identified as "personal identifying information (PII)"[7] that has been entered into a court's case management system pursuant to MCR 1.109(D)(9)(e) must not be included or displayed in a case's case history. MCR 8.119(D)(1)(a). "[PII] shall be maintained for the purposes for which it was collected and for which its use is authorized by federal or state law or court rule; however, it shall not be included or displayed as case history, including when transferred to the Archives of Michigan pursuant to law." MCR 8.119(D)(1)(a).

"The court shall destroy its case files and other court records only as prescribed by the records retention and disposal schedule established under MCR 8.119(K). Destruction of a case record does not negate, rescind, or set aside an adjudication." MCR 3.925(E). For a detailed discussion of the retention and destruction of court records specific to child protective proceedings, see Section 21.6.

[7] See Section 21.2. Information characterized as "personal identifying information" is discussed in MCR 1.109(D)(9)-(10).

## B. County Clerk's Obligations

### 1. Custodial Function

"[T]he clerk has a constitutional obligation to have the care and custody of the circuit court's records and . . . the circuit court may not abrogate this authority." *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 158 (2003), citing *In the Matter of Head Notes to the Opinions of the Supreme Court*, 43 Mich 640, 643 (1880). In *Lapeer Co Clerk*, *supra* at 160, the Michigan Supreme Court further explained the clerk's custodial function:

> "The circuit court clerk's role of having the care and custody of the records must not be confused with *ownership* of the records. As custodian, the circuit court clerk takes care of the records for the circuit court, which owns the records. Nothing in the constitutional custodial function gives the circuit court clerk independent ownership authority over court records. Accordingly, the clerk must make those records available to their owner, the circuit court. The clerk is also obligated to make the records available to members of the public, when appropriate."

### 2. Ministerial Function

"The clerk's noncustodial ministerial duties are directed by the [Michigan Supreme] Court, as the determination of the precise noncustodial ministerial duties to be performed is a matter of court administration entrusted exclusively to the judiciary under Const 1963, art 3, § 2, Const 1963, art 6, § 1, and Const 1963, art 6, § 5." *Lapeer Co Clerk*, 469 Mich at 170-171. "This authority includes the discretion to create duties, abolish duties, or divide duties between the clerk and other court personnel, as well as the right to dictate the scope and form of the performance of such noncustodial ministerial duties." *Lapeer Co Clerk*, *supra* at 164.

# 21.2 Personal Identifying Information (PII)[8]

"[P]ersonal identifying information is protected and shall not be included in any public document or attachment filed with the court on or after April 1, 2022," unless otherwise provided by the Michigan Court Rules. MCR 1.109(D)(9)(a).

## A. Protected PII Defined

An individual's protected PII includes the following:

- date of birth,
- Social Security number or national identification number,
- driver's license number or number of state-issued personal identification card,
- passport number, and
- financial account numbers. MCR 1.109(D)(9)(a)(*i*)-(*v*).

## B. Filing and Accessing Protected PII

### 1. Filing a Document Containing Protected PII

When law or court rule requires protected PII, as it is defined in MCR 1.109(D)(9)(a), to be filed with the court, or when the court finds the information necessary to identify a specific individual in a case, the PII must be provided using the form and manner required by the State Court Administrative Office (SCAO).[9] MCR 1.109(D)(9)(b)(*i*).

Protected PII provided to the court in compliance with the requirements of MCR 1.109(D)(9)(b) must be entered into the case management system according to standards established by the SCAO. MCR 1.109(D)(9)(e). "The information shall be maintained for the purposes for which it was collected and for which its use is authorized by federal or state law or court rule;

[8] For FAQs related to the scope of information that qualifies as protected personal identifying information (PII) when it appears in, or is required by, certain court documents filed in a case, see the SCAO document summarizing the duties assigned to courts and court staff that are tasked with safeguarding an individual's PII and limiting access to it.

[9] SCAO Form MC 97, *Protected Personal Identifying Information* (for an individual who is a defendant, respondent, or decedent), and SCAO Form MC 97a, *Addendum to Protected Personal Identifying Information* (for an individual who is a plaintiff, petitioner, or other individual).

however, it shall not be included or displayed as case history under MCR 8.119(D)(1).

Except as the court rules otherwise provide, when a party is required to provide protected PII in a public document to be filed with the court, the party must redact the protected PII from the document and file the PII form approved by SCAO.[10] MCR 1.109(D)(9)(b)(*iii*).

The SCAO form must contain the information redacted from the document and must assign an appropriate reference to the information contained in the SCAO form that uniquely associates each item redacted from the document with the corresponding personal identifying information provided on the SCAO form.[11] MCR 1.109(D)(9)(b)(*iii*). When a reference is made in a case to the identifier representing the personal identifying information on the SCAO form, the reference to the identifier is understood to refer to the complete information related to the identifier appearing on the form. *Id*. The SCAO form may include fields for the PII, and the information inserted into the fields will be protected.[12] *Id*. "Unredacted protected personal identifying information may be included on Uniform Law Citations filed with the court and on proposed orders submitted to the court." *Id*. "If a party submits to the court a proposed order that is required to contain unredacted protected personal identifying information once issued by the court, the party shall not attach the proposed order to another document." *Id*.

**Providing a Social Security number.** When a Social Security number is required to be filed with the court, the number must be limited to the last four digits, except when the documents being filed are required by the Friend of the Court and will not be placed in the court's legal file under MCR 8.119(D). MCR 1.109(D)(9)(b)(*ii*).[13]

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[10]SCAO Form MC 97, *Protected Personal Identifying Information* (for an individual who is a defendant, respondent, or decedent), and SCAO Form MC 97a, *Addendum to Protected Personal Identifying Information* (for an individual who is a plaintiff, petitioner, or other individual).

[11]A specific form for protecting personal identifying information must be filed when a petition is filed in child protective proceedings. See SCAO Form MC 97b, *Protected Personal Identifying Information*. SCAO Form MC 97b is the form listing the birthdates, which are protected PII under MCR 1.109(D)(9)(a), of the children and other parties named on a petition to initiate child protective proceedings. Birthdates appear on SCAO Form MC 97b in fields designated by number and letter. Those number and letter combinations are noted on SCAO Form JC 04b so that actual birthdates do not appear on the petition; instead, the petition contains only the letter and number designation that corresponds to a party's particular birthdate as it is listed on SCAO Form 97b.

[12]Local court forms are prohibited from containing fields in which protected PII may be entered. MCR 1.109(D)(9)(c). A court must not reject a document to be filed, dismiss a case, or otherwise take negative action against a party if the party has failed to provide protected PII on a local court form. *Id*.

### 2. Amending Protected PII

An individual may amend as of right the protected PII provided in the SCAO form. MCR 1.109(D)(9)(b)(*iii*).

### 3. Access to a Document Containing Protected PII

**Limited access to protected PII.** Protected PII under MCR 1.109(D) is nonpublic. MCR 1.109(D)(9)(b)(*iv*). Protected PII is available for purposes of case activity or as otherwise required by law or court rule. *Id*. The protected PII provided is available only to the parties in a case, to interested persons described in the court rules, and to other persons, entities, or agencies authorized by law or court rules to access nonpublic records that have been filed with the court. *Id*.

## C. Consenting to the Access of Protected PII

A party may stipulate in writing to permit any person, entity, or agency to access to his or her protected PII. MCR 1.109(D)(9)(b)(*v*)(A). Unless otherwise provided in MCR 3.903, any person, entity, or agency attempting to access the protected PII must provide the court with the stipulation permitting access. *Id*.

### 1. Access to a Party's Date of Birth

**Obtaining authority to access a party's date of birth.** For the purpose of confirming a particular person's identity and with the person's consent, an individual may be authorized to access a party's date of birth without having to present a stipulation as is required under MCR 1.109(D)(9)(b)(*v*)(A) in order to access protected PII. MCR 1.109(D)(9)(b)(*v*)(B)(1).

**Possession of the party's consent.** The individual authorized to access a birthdate must retain possession of the consent, or the consent may be retained by the entity for which the individual works, or the person or organization (or someone acting on their behalf) seeking a party's date of birth. MCR 1.109(D)(9)(b)(*v*)(B)(1).

[13]See also MCR 1.109(D)(10)(b), which provides that a court's dissemination of social security numbers is limited to the purposes permitted under federal or state law. If a request is filed on or after March 1, 2006, for a copy of a public document, "the court must review the document and redact all social security numbers on the copy." *Id*. "This requirement does not apply to certified copies or true copies when they are required by law, or copies made for those uses for which the social security number was provided." *Id*.

### 2. List of Individuals Authorized to Access a Party's Date of Birth

**SCAO list of authorized individuals.** The SCAO will maintain a list of the individuals having the authority to access a party's date of birth. MCR 1.109(D)(9)(b)(*v*)(B)(1). To appear on the SCAO list, an individual must provide in writing the name of the entity for which the individual works and an assurance that on each occasion the individual seeks to confirm a party's birthdate, it is in the course of the individual's work and with the consent of the person whose date of birth is sought. *Id*. The assurance must be updated every six months from the date of the original submission. *Id*.

**Additional information required for placement on the SCAO list.** In addition, an individual seeking to be placed on the SCAO list of individuals authorized to access birthdates must provide proof of his or her employer's or hiring entity's professional liability insurance in effect during the time the individual is seeking the person's date of birth. MCR 1.109(D)(9)(b)(*v*)(B)(2). The proof of insurance is nonpublic and must be updated whenever the insurance policy expires or is terminated. *Id*.

**Court's duty to verify identity.** A court must verify the identity of an individual claiming to be authorized to obtain a person's birthdate by matching the name appearing on the individual's state-issued identification card with the individual's name on the SCAO list. MCR 1.109(D)(9)(b)(*v*)(B)(3). "Courts and the State Court Administrative Office may create secure, individualized accounts that allow authorized individuals to access a party's date of birth electronically." *Id*. After confirming the identity of the individual seeking information about a person's birthdate, a court must supply the authorized individual with a public register of actions or other public document that includes the person's date of birth. *Id*.

## D. No Exemptions for Service of Protected PII

Except by a court order issued under MCR 1.109(D)(9)(b)(*vii*) making the PII confidential, there is no exemption from the requirement that a court or a party serve a nonpublic document that was filed with the court and includes the protected PII that must be provided to the court as stated in MCR 1.109(D)(9)(b)(*i*). MCR 1.109(D)(9)(b)(*vi*).

## E. Protected PII May Be Made Confidential

For just cause found, a court may, on its own motion or by motion of a party, order that PII be made confidential. MCR 1.109(D)(9)(b)(*vii*). The order must identify the person, party, or entity whose access to the PII is restricted. *Id*. When a party's home address or telephone number is made confidential, the court order must provide an alternative address for service on the party or an alternative phone number by which the party may be contacted about case activity. *Id*.

## F. Failing to Comply With Requirements to Protect PII

If a party files his or her protected PII in a public document and does not provide the information in the form and manner established by the SCAO under MCR 1.109(D)(9), the party waives the protection available for his or her PII. MCR 1.109(D)(9)(d)(*i*). When a party fails to comply with the requirements of MCR 1.109(D) the court, on its own initiative or by a party's motion, may have the improperly filed documents sealed and order that new documents with redactions be prepared and filed. MCR 1.109(D)(9)(d)(*ii*).

## G. Redacting Protected and Unprotected PII

### 1. Protected PII in Documents Filed With a Court

A person whose protected PII appears in a document filed with the court may request in writing that the protected PII be redacted;[14] if a person makes such a request, the clerk of the court must promptly process the request. MCR 1.109(D)(10)(c)(*i*). No motion fee is required for the request, the request must specify the protected PII to be redacted, and the document must be maintained as a nonpublic document in the case file. *Id*.

### 2. Unprotected PII in Public Documents Filed With a Court

PII not protected under MCR 1.109 may be redacted or made confidential or nonpublic. MCR 1.109(D)(10)(c)(*ii*). A party or a person having unprotected PII in a public document filed with the court may, in an ex parte motion using the appropriate SCAO-approved form,[15] request that the court direct the court

[14] SCAO Form MC 97r, *Request for Redaction of Protected Personal Identifying Information*.

[15] SCAO Form MC 97m, *Ex Parte Motion to Protect Personal Identifying Information*.

clerk to redact the information specified by the party or person or to make the information confidential or nonpublic. *Id*. The court has discretion to hold a hearing on the motion. *Id*. The court must enter an order to redact the information or to make the information confidential or nonpublic "if the party or person's privacy interest outweighs the public's interest in the information."[16] *Id*.

### 3. Protected PII in an Exhibit Offered for Hearing or Trial

Protected PII may be redacted from an exhibit offered at a hearing or a trial when a person or party having protected PII in the exhibit requests in writing to have the PII redacted. MCR 1.109(D)(10)(c)(*iii*). No motion fee is required. *Id*. The person or party seeking redaction must identify in the request the specific protected PII to be redacted, and the request must be maintained as a nonpublic document in the case file. *Id*. The court must order the information redacted "if the party or person's privacy interest outweighs the public's interest in the information." *Id*.

### 4. Protected PII in Transcripts Filed With the Court

Unredacted protected PII may be included on transcripts that are filed with the court. MCR 1.109(D)(10)(c)(*iv*). The protected PII must be redacted by the court clerk if redaction is requested in writing pursuant to MCR 1.109(D)(10)(c)(*i*). MCR 1.109(D)(10)(c)(*iv*). The written request for redaction of protected PII from a transcript "must identify the page and line number for each place in the transcript where the protected information is located." *Id*.

## H. Responsibility for Redaction

The parties and their attorneys are *solely* responsible for excluding or redacting the PII listed in MCR 1.109(D)(9) from all documents filed with or offered to the court. MCR 1.109(D)(10)(a). There is no requirement that at the time of filing, a court clerk review, redact, or screen documents for PII, whether protected or unprotected, without regard to whether the documents are filed electronically or on paper. *Id*.

Except as otherwise provided in the court rules, a court clerk is not required to redact protected PII from documents filed with or

[16] SCAO Form MC 97o, *Order Regarding Ex Parte Motion to Protect Personal Identifying Information.*

offered to the court[17] before providing a copy of the document requested, whether in-person or via the internet, or before making available at the courthouse via a publicly accessible computer that gives a person direct access to the document. MCR 1.109(D)(10)(a).

### I. Certifying a Record

"The clerk of the court may certify a redacted record as a true copy of an original record on file with the court by stating that information has been redacted in accordance with law or court rule, or sealed as ordered by the court." MCR 1.109(D)(10)(d).

### J. Maintaining a Document After Redacting PII

Documents from which PII has been redacted, or to which access has been restricted, must be maintained according to the standards established by the SCAO. MCR 1.109(D)(10)(e).

## 21.3 Recording Proceedings in the Family Division

"A record of all hearings must be made. All proceedings on the formal calendar[18] must be recorded by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108. A plea of admission or no contest, including any agreement with or objection to the plea, must be recorded." MCR 3.925(B).

If a record of a hearing is made by a recording device, transcription of the hearing is unnecessary unless there is a request by an interested party. MCL 712A.17a. Such a recording "shall be maintained as prescribed by rules of the supreme court." *Id.*[19]

## 21.4 Sealing Records

"Unless access to a case record or information contained in a record as defined in [MCR 8.119(D)] is restricted by statute, court rule, or an order entered pursuant to [MCR 8.119(I)], any person may inspect that record

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[17] This provision applies equally to documents filed with or offered to the court before or after April 1, 2022. MCR 1.109(D)(10)(a).

[18] MCR 3.903(A)(10) defines *formal calendar* as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

[19] See also MCL 600.1428(1), requiring the State Court Administrative Office (SCAO) to "establish and maintain records management policies and procedures for the courts, including a records retention and disposal schedule, in accordance with [S]upreme [C]ourt rules." For more information, see SCAO's records management policies.

and may obtain copies as provided in [MCR 8.119(J)]."[20] MCR 8.119(H)(7). Note that "[a]ll court records not included in [MCR 8.119(D)], [MCR 8.119(E)], and [MCR 8.119(F)] are considered administrative and fiscal records or nonrecord materials and are not subject to public access under [MCR 8.119(H)]."[21] MCR 8.119(G).

> **Note:** "Documents and other materials made nonpublic[22] or confidential[23] by court rule, statute, or order of the court pursuant to [MCR 8.119(I)] must be designated accordingly and maintained to allow only authorized access."[24] MCR 8.119(D).

Upon motion of a party, the court may seal[25] court records, other than a court order or opinion, as provided in MCR 8.119(I). MCR 1.109(D)(8) permits a party filing a motion to seal a document to "request that a public document be made nonpublic temporarily when filing a motion to seal a document under MCR 8.119(I)" if certain requirements set out in MCR 1.109(D)(8) are met.

Under MCR 8.119(I)(1) and "[e]xcept as otherwise provided by statute or court rule, a court may not enter an order that seals court records, in whole or in part, in any action or proceeding, unless:

> (a) a party has filed a written motion that identifies the specific interest to be protected,
>
> (b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and

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[20] "Except as otherwise provided in [MCR 8.119(F)], only case records as defined in [MCR 8.119(D)] are public records, subject to access in accordance with these rules." MCR 8.119(H). See MCR 8.119(H) for information on accessing public records, and MCR 8.119(J) for information on access and reproduction fees. Note that MCR 8.119(F) refers to court recordings, log notes, jury seating charts, and media, which "are court records and are subject to access in accordance with [MCR 8.119(H)(8)(b)]."

[21] "[Administrative and fiscal records or nonrecord materials not subject to public access under MCR 8.119(H)] are defined in the approved records retention and disposal schedule for trial courts." MCR 8.119(G). See Section 21.6 for additional information on the records retention and disposal schedule.

[22] For purposes of *case records*, as that term is defined in MCR 8.119(D)-(E), *nonpublic* "means that a case record is not accessible to the public. A nonpublic case record is accessible to parties and only those other individuals or entities specified in statute or court rule. A record may be made nonpublic only pursuant to statute or court rule. A court may not make a record nonpublic by court order." MCR 1.109(H)(2).

[23] For purposes of *case records*, as that term is defined MCR 8.119(D)-(E), *confidential* "means that a case record is nonpublic and accessible only to those individuals or entities specified in statute or court rule. A confidential record is accessible to parties only in the manner specified in statute or court rule." MCR 1.109(H)(1).

[24] "In the event of transfer or appeal of a case, every rule, statute, or order of the court under [MCR 8.119(I)] that makes a document or other materials in that case nonpublic or confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed." MCR 8.119(D).

> (c) there is no less restrictive means to adequately and effectively protect the specific interest asserted."

MCR 8.119(I)(2) provides that, "[i]n determining whether good cause has been shown, the court must consider[:]

> (a) the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence, and
>
> (b) the interest of the public."

Additionally, "[t]he court must provide any interested person the opportunity to be heard concerning the sealing of the records." MCR 8.119(I)(3). "Materials that are subject to a motion to seal a record in whole or in part must be made nonpublic temporarily pending the court's disposition of the motion." MCR 8.119(I)(4).

MCR 8.119(I)(9) provides that "[a]ny person may file a motion to set aside an order that disposes of a motion to seal the record, to unseal a document filed under seal pursuant to MCR 2.302(C), or an objection to entry of a proposed order." If the motion is denied, "the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action." *Id*.[26]

## 21.5 Access to Family Division Records and Confidential Files

### A. Access to Case Records

MCL 712A.28(2) provides, in part:

> "Beginning June 1, 1988, the [Family Division] shall maintain records of all cases brought before it . . . . Except as otherwise provided in [MCL 712A.28(2)], until December 31, 2020,[27] records of a case brought before the [Family Division] are open to the general public."[28]

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[25] For purposes of *case records*, as that term is defined in MCR 8.119(D)-(E), *sealed* "means that a document or portion of a document is sealed by court order pursuant to MCR 8.119(I). Except as required by statute, an entire case may not be sealed." MCR 1.109(H)(5).

[26] MCR 8.116(D)(2) similarly allows "[a]ny person" to "file a motion to set aside an order that limits access to a court proceeding . . . or an objection to entry of such an order[,]" and to file an application for leave to appeal in the same manner as a party if the court denies the motion or objection.

[27] Note that the public act that added the "until December 31, 2020" language was not effective until March 24, 2021. See 2021 PA 362.

"Beginning January 1, 2021,[29] except as otherwise provided, records of a case brought before the [Family Division] are not open to the general public and are open only to persons having a legitimate interest."[30] MCL 712A.28(3). See also MCR 3.925(D)(1) ("[r]ecords[31] of a case brought before the [Family Division] under [the Juvenile Code,] MCL 712A.1 *et seq*., are only open to persons having a legitimate interest"). The status of diversion records is governed by the juvenile diversion act. MCL 712A.28(1)-(3).

Records created before June 1, 1988, are open only by court order to persons with a legitimate interest, "except that diversion records shall be open only as provided in the juvenile diversion act[, MCL 722.821 *et seq*]." MCL 712A.28(1).

"Requests for access to public court records shall be granted in accordance with MCR 8.119(H)." MCR 1.109(F). Under MCR 8.119(H)(7), access to case records are open to the public, unless made nonpublic or confidential by statute, court rule, or court order. Note that "[e]xcept as otherwise provided in [MCR 8.119(F)[32]], only case records as defined in [MCR 8.119(D)] are public records, subject to access in accordance with [the court rules]." MCR 8.119(H).[33]

If an individual requests a public record and the court maintains the record electronically, the court must provide a method of accessing the record. MCR 8.119(H)(4). If a document contains protected personal identifying information that has not been redacted,[34] the document cannot be provided through a website that is publicly accessible.[35] *Id*. If the court prepares or issues a public document on

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[28] For discussion of exceptions to the general rule that records are open to the general public, see Section 21.4 (discussing access to records of proceedings that are closed under MCL 712A.17).

[29] Note that the public act that added the "[b]eginning January 1, 2021" language was not effective until March 24, 2021. See 2021 PA 362.

[30] "'Persons having a legitimate interest' includes, but is not limited to, the juvenile, the juvenile's parent, the juvenile's guardian or legal custodian, the juvenile's guardian ad litem, counsel for the juvenile, the department or a licensed child caring institution or child placing agency under contract with the department to provide for the juvenile's care and supervision if related to an investigation of child neglect or child abuse, law enforcement personnel, a prosecutor, a member of a local foster care review board established under . . . MCL 722.131 to [MCL] 722.139a, the Indian child's tribe if the juvenile is an Indian child, and a court of this state." MCL 712A.28(5)(d); MCR 3.925(D)(1).

[31] "'Records' are as defined in MCR 1.109 and MCR 8.119 and include, but are not limited to, pleadings, complaints, citations, motions, authorized and unauthorized petitions, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, registers of action, consent calendar case plans, and court orders." MCR 3.903(A)(25).

[32] MCR 8.119(F) refers to court recordings, log notes, jury seating charts, and media, which "are court records and are subject to access in accordance with [MCR 8.119(H)(8)(b)]."

[33] If a court can reasonably accommodate a request for a document that is not available on paper or by digital image, the court may provide the record. MCR 8.119(H)(6). "The court is not required to provide the means to access or reproduce the contents of . . . materials if the means is not already available." *Id*.

or after April 1, 2022, or if a Uniform Law Citation is filed with the court on or after April 1, 2022, and the document contains protected personal identifying information, that information must be redacted before the public may access the document without regard to whether the copy of the document is provided on paper, electronically, or through direct access from a publicly accessible computer at the courthouse. MCR 8.119(H)(5).

When, on or after April 1, 2022, the court receives a proposed order that includes protected personal identifying information, the court must protect the information as prescribed by MCR 8.119(H) "as if the document was prepared or issued by the court." MCR 8.119(H)(5).

## B. Confidential Files

### 1. Definition of "Confidential Files"

"Confidential files are defined in MCR 3.903(A)(3) and include the social case file and those records in the legal case file made confidential by statute, court rule, or court order." MCR 3.925(D)(2).[36] Specifically, MCR 3.903(A)(3) defines *confidential files* in relevant part as:

> "(a) that part of a file made confidential by statute or court rule, including, but not limited to,
>
> * * *
>
> (*iii*) the testimony taken during a closed proceeding pursuant to MCR 3.925(A)(2) and MCL 712A.17(7);[37]
>
> (*iv*) the dispositional reports pursuant to . . . MCR 3.973(E)(4);[38]
>
> * * *

[34]For purposes of *case records* as that term is defined in MCR 8.119(D)-(E), *redact* "means to obscure individual items of information within an otherwise publicly accessible document." MCR 1.109(H)(3). *Redacted document* "means a copy of an original document in which items of information have been redacted." MCR 1.109(H)(4).

[35]A *document* is "a record produced on paper or a digital image of a record originally produced on paper or originally created by an approved electronic means, the output of which is readable by sight and can be printed to 8 1/2 x 11 inch paper without manipulation." MCR 1.109(B).

[36]The text appearing in MCR 3.925(D) and MCR 3.925(D)(2) was changed from *confidential* file(s) to *social* file(s). See ADM File No. 2021-09, effective March 24, 2021.

[37] See Section 9.5 for a detailed discussion of closing child protective proceedings to the public.

[38] See Section 13.4 for additional information on MCR 3.973(E).

(b) the contents of a social file maintained by the court, including materials such as:

(*i*) youth and family record sheet;

(*ii*) social study;

(*iii*) reports (such as dispositional, investigative, laboratory, medical, observation, psychological, psychiatric, progress, treatment, school, and police reports);

(*iv*) Department of Health and Human Services records;

(*v*) correspondence;

(*vi*) victim statements;

(*vii*) information regarding the identity or location of a foster parent, preadoptive parent, or relative caregiver."

## 2. Access to Confidential Files

Confidential files are accessible only by persons found by the court to have a legitimate interest. MCR 3.925(D)(2). To determine whether a person has a legitimate interest, the court must consider:

- the nature of the proceedings;
- the welfare and safety of the public;
- the interests of the child; and
- any restriction imposed by state or federal law. MCR 3.925(D)(2).

Types of records subject to restrictions under state and federal law include:

- educational records and communications, 20 USC 1232g(b)(1); MCL 600.2165;
- records of recipients of mental health services, MCL 330.1748;
- records of patients participating in substance abuse programs, 42 USC 290dd-2; and

- prescription records, MCL 333.17752.[39]

### 3. Disclosure Under the Freedom of Information Act (FOIA)

Under FOIA, a public body is subject to disclosure requirements. See MCL 15.232(h). The term *public body* includes "[a]ny other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body." MCL 15.232(h)(*iv*). Accordingly, court records and confidential files are not subject to requests under the FOIA.

### 4. Immunity for Persons or Agencies Furnishing Information to the Court

MCR 3.924 provides:

> "Persons or agencies providing testimony, reports, or other information at the request of the court, including otherwise confidential information, records, or reports that are relevant and material to the proceedings following authorization of a petition, are immune from any subsequent legal action with respect to furnishing the information to the court."[40]

## C. Access to Closed Protective Proceedings

MCL 712A.17 permits a court to close proceedings to the general public during the testimony of a child witness or a victim to protect the welfare of either individual. MCL 712A.17(7); MCR 3.925(A)(2).[41]

[39] For additional information on state and federal restrictions, see Section 2.4.

[40] See Section 2.8 for a discussion of civil and criminal immunity with respect to reporting suspected child abuse or neglect.

[41] See Section 9.5 for a detailed discussion of closing child protective proceedings to the public.

### D. Access to Records and Reports under the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA)

The Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA)[42] provide each party involved in an emergency proceeding, a foster-care-placement, or termination-of-parental-rights proceeding with "the 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."[43] 25 USC 1912(c); MCL 712B.11; 25 CFR 23.134.

## 21.6 Retention and Destruction of Family Division Records

### A. Records Retention

"For purposes of retention, the records of the trial courts include: (1) administrative and fiscal records, (2) case file and other case records, (3) court recordings, log notes, jury seating charts, and recording media, and (4) nonrecord material.[44] The records of the trial courts shall be retained in the medium prescribed by MCR 1.109." MCR 8.119(K). MCR 1.109(A)(1) provides that "[c]ourt records may be created using any means and may be maintained in any medium authorized by these court rules provided those records comply with other provisions of law and these court rules."[45]

For additional information on records management, and for links to records retention and disposal schedules, see the State Court Administrative Office's Records Management.

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[42] See Chapter 19 for a detailed discussion of the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA).

[43] See the ICWA form *Request to Produce and Examine*.

[44] MCR 8.119(D)-(G) address these various types of records. MCR 8.119(G) provides that "[a]ll court records not included in [MCR 8.119(D)-(F)] are considered administrative and fiscal records or nonrecord materials and are not subject to public access under [MCR 8.119](H). These records are defined in the approved records retention and disposal schedule for trial courts." See Section (A) for additional discussion of records.

[45] "Court records are defined by MCR 8.119 and [MCR 1.109(A)][, which MCR 1.109(A) defines] [c]ourt records [as] recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules." MCR 1.109(A)(1). "Court records include, but are not limited to: (i) documents, attachments, data, and other materials filed with the clerk of the court, (ii) documents, recordings, data, and other recorded information created or handled by the court, including all data produced in conjunction with the use of any system for the purpose of transmitting, accessing, reproducing, or maintaining court records." MCR 1.109(A)(1)(a). For additional information on court records, see Section (A).

## B. Disposal of Files and Records

MCR 8.119(K) requires, in part, that "[t]he records of a trial court may not be disposed of except as authorized by the records retention and disposal schedule and upon order by the chief judge of that court." Additionally, "[b]efore disposing of records subject to the order, the court shall first transfer to the Archives of Michigan any records specified as such in the Michigan trial courts approved records retention and disposal schedule." *Id.*

> **Note:** "An order disposing of court records shall comply with the retention periods established by the State Court Administrative Office and approved by the state court administrator, Attorney General, State Administrative Board, Archives of Michigan and Records Management Services of the Department of Management and Budget, in accordance with MCL 399.811."[46] MCR 8.119(K).

"The court shall destroy its case files and other court records only as prescribed by the records retention and disposal schedule established under MCR 8.119(K).[47] Destruction of a case record does not negate, rescind, or set aside an adjudication." MCR 3.925(E).

[46] See Section 21.6(A) for discussion of records retention.

[47] See SCAO's record retention and disposal schedules for more information.

# Appendix A: Table Summarizing Michigan Statutes and Court Rules Related to Child Protective Proceedings

The following table provides general guidance in locating statutes and court rules governing various proceedings involving child protective proceedings. Other statutes and court rules may be incorporated by reference in these provisions. Court rules take precedence over statutes only in matters involving judicial rules of practice and procedure, not substantive law. See *McDougall v Schanz*, 461 Mich 15 (1999).

| Type of Proceeding | Statutes and Court Rules |
|---|---|
| **Reporting and Investigating of Suspected Child Abuse or Neglect** | Statutes:<br>—MCL 330.1748a (release of mental health records)<br>—MCL 333.2640 (release of medical records)<br>—MCL 333.16281 (release of medical records)<br>—MCL 333.16648 (release of dental records)<br>—MCL 333.18117 (release of counseling records)<br>—MCL 333.18237 (release of psychological records)<br>—MCL 600.2165 (release of school records)<br>—MCL 722.621 *et seq*. (Child Protection Law)<br><br>Court Rule:<br>MCR 3.218(C)(2) (DHHS access to Friend of the Court records) |
| **Child Protective Proceedings in Family Division** | Statutes:<br>—MCL 712A.1 *et seq*. (Juvenile Code)<br>—MCL 722.1101 *et seq*. (Uniform Child-Custody Jurisdiction and Enforcement Act)<br><br>Court Rules:<br>—MCR 3.901–MCR 3.929 (general rules for child protective cases)<br>—MCR 3.961–MCR 3.979 (rules for child protective cases)<br>—MCR 3.991–MCR 3.993 (reviews, rehearings, and appeals) |
| **Safe Delivery of Newborns** | Statute:<br>MCL 712.1 *et seq*. (Safe Delivery of Newborns Law) |

| Type of Proceeding | Statutes and Court Rules |
|---|---|
| **Establishing Parentage** | Statutes:<br>—MCL 722.711 *et seq*. (Paternity Act)<br>—MCL 722.1001 *et seq*. (Acknowledgment of Parentage Act) |
| **Care and Custody of a Child Subject to Child Protective Proceedings** | Statutes:<br>—MCL 400.1 *et seq*. (Social Welfare Act)<br>—MCL 400.201 *et seq*. (Michigan Children's Institute)<br>—MCL 400.641 *et seq.* (Young Adult Voluntary Foster Care Act)<br>—MCL 700.5201 *et seq*. (guardian appointments under Estates and Protected Individuals Code)<br>—MCL 722.111 *et seq*. (Child Care Organizations)<br>—MCL 722.124a(1) (authority to consent to medical treatment)<br>—MCL 722.131 *et seq*. (Foster Care Review Boards)<br>—MCL 722.951 *et seq*. (Foster Care and Adoption Services Act) |

# Appendix B: Table of Time and Notice Requirements in Child Protective Proceedings

The following table contains time and notice requirements only.[1] For contents of notices, see the appropriate sections. For waiver of notice requirements, see Section 5.3. To compute time periods, see MCR 1.108. For court holidays, see MCR 8.110(D)(2).

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Reporting Suspected Child Abuse or Child Neglect** | Oral or electronic report must be made to centralized intake immediately. Written report must be filed with centralized intake within 72 hours of the report unless electronic report was "made using the online reporting system and that report includes the information required in a written report[.]" | MCL 722.623(1)(a); MCL 722.623(2). See Section 2.2(A). |
| **Investigating Suspected Abuse, Neglect, or Exposure to or Contact with Methamphetamine Production** | Report must be referred to the appropriate agency and/or an investigation must be commenced within 24 hours. | MCL 722.628(1); MCL 722.628(6); MCL 722.628(7). See Section 2.3. |

[1] Delays resulting from "the unprecedented COVID-19 pandemic" are not attributable to the trial courts. See *In re Sanborn*, 337 Mich App 252, 270 (2021).

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Mandatory Petitions in Cases of Severe Physical Abuse, Sexual Abuse, or Exposure to or Contact with Methamphetamine Production** | The DHHS must file petition within 24 hours after determining that child was severely physically injured, sexually abused, or allowed to be exposed to or have contact with methamphetamine production. The DHHS is not required to file a petition if it determines that the parent or legal guardian is not a suspected perpetrator of the abuse and all of the following: (1) the parent or legal guardian did not neglect or fail to protect the child; (2) the parent or legal guardian does not have a historical record that shows a documented pattern of neglect or failing to protect the child; and (3) the child is safe in the parent's or legal guardian's care. | MCL 722.637.<br>See Section 7.3(A). |
| **Contrary to Child's Welfare Determination** | **Title IV-E Requirement.** Court must make a contrary to the child's welfare determination in the first court ruling that sanctions (even temporarily) a child's removal from his or her home. *If the determination is not made in the first court ruling, the child is not eligible for Title IV-E foster care maintenance payments for the duration of that stay in foster care.*<br>See DHHS Children's Foster Care Manual (FOM), *Funding Determinations and Title IV-E Eligibility*, FOM 902-1, pp 22-28, which details the judicial determinations that must be made in order to satisfy Title IV-E requirements. | 42 USC 672(a);<br>45 CFR 1356.21(c);<br>MCR 3.963(B)(1)(e).<br>See Section 3.1(A). |
| **Preliminary Inquiries** | May be conducted at any time. There is no notice requirement. | MCR 3.962.<br>See Section 7.5. |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Preliminary Hearings/ Preadjudication Hearing on Petition for Out-of-Home Placement (child *not* under court jurisdiction and amended petition to remove child from home is filed, see MCR 3.974(B)(1))** | Hearing must commence within 24 hours after child is taken into protective custody, excluding Sundays and holidays, unless adjourned for good cause shown, or child must be released.<br><br>If a mandatory petition was filed alleging serious physical harm or sexual abuse, a hearing must be held within 24 hours of the filing, or on the next business day after the filing.<br><br>Notice of hearing must be given to the parent in person, in writing, on the record, or by telephone as soon as the hearing is scheduled, if the child is placed outside the home.<br><br>Videoconferencing technology may be used to conduct the hearing. For court's permissible use of videoconferencing technology, see MCR 3.904(B), discussed in detail at Section 1.7. | MCR 3.965(A)(1). See Section 7.6.<br><br>MCL 712A.13a(2); MCR 3.965(A)(2). See Section 7.6.<br><br>MCR 3.920(D)(2)(b). See Section 5.2.<br><br>MCR 3.904(B)(1). |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Removal Hearing for Indian Child** | Following emergency removal, court must complete a removal hearing within 14 days of removal unless that parent or Indian custodian has requested an additional 20 days for the hearing or the court adjourns the hearing. Absent extraordinary circumstances, a temporary emergency custody must not exceed 45 days. Note that an emergency removal or emergency placement of an Indian child should not continue beyond 30 days unless the court determines that returning the Indian child to the parent or Indian custodian would "subject the child to imminent physical damage or harm[,] [t]he court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe[,] and [i]t has not been possible to initiate a 'child-custody proceeding' as defined in [25 CFR 23.2]." | MCR 3.967(A); 25 CFR 23.113(e). See Section 19.12(B). |
| | In other cases, a removal hearing must be conducted before removal. | MCR 3.967(B). See Section 19.12(B). |
| | A removal hearing may be combined with any other hearing. | MCR 3.967(E). See Section 19.12(B). |
| | Videoconferencing technology may be used to conduct the hearing. For court's permissible use of videoconferencing technology, see MCR 3.904(B), discussed in detail at Section 1.7. | MCR 3.904(B)(2). |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Identification of Appropriate Relative Placement** | The supervising agency must identify, locate, notify, and consult with the child's relatives within 30 days of the child's removal to determine appropriate placement.<br><br>Within 90 days of removal, the supervising agency must make and document in writing its placement decision and provide written notice of the decision and the reasons for the placement decision to the child's attorney, guardian, guardian ad litem, mother, father, the attorneys for the mother and father, each relative who expresses an interest in caring for the child, the child if he or she is old enough to be able to express an opinion regarding placement, and the prosecuting attorney. | MCL 722.954a(2). See Section 8.2(A).<br><br>MCL 722.954a(4). See Section 8.10. |
| **Reasonable Efforts to Prevent Child's Removal Determination** | **Title IV-E Requirement.** Court must determine whether reasonable efforts to prevent removal were made or that reasonable efforts are not required. A court must make determination at the earliest possible time, but no later than 60 days after the date of removal. Court must state factual basis for its determination.<br>See DHHS Children's Foster Care Manual (FOM), *Funding Determinations and Title IV-E Eligibility*, FOM 902-1, pp 22-28, which details the judicial determinations that must be made in order to satisfy Title IV-E requirements. | 45 CFR 1356.21(b); MCR 3.965(C)(4). See Section 8.4. |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Initial Service Plan, Criminal Record Check, Central Registry Clearance, and Home Study** | The DHHS must complete an initial service plan within 30 days of placement. | MCL 712A.13a(10)(a); MCR 3.965(D)(1). See Section 8.7. |
| | If the child is placed in a relative's home, the DHHS must conduct a criminal record check and central registry clearance before or within seven days of placement, and must submit a home study to the court within 30 days of placement. | MCL 712A.13a(11). See Section 8.2(A). |
| | The court may order the DHHS to report the results of a criminal record check and central registry clearance to the court before or within seven days after placement. | MCR 3.965(C)(5)(a). See Section 8.2(A). |
| | The court must order the DHHS to perform a home study and submit a copy of it to the court within 30 days after placement. | MCR 3.965(C)(5)(b). See Section 8.2(A). |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Review of Placement Order and Initial Service Plan** | Court must review placement order or initial service plan when a motion is made by a party. | MCL 712A.13a(17); MCR 3.966(A)(1). See Section 8.12. |
| | "If [a] child is removed from the home and disposition is not completed, the court shall conduct a dispositional hearing in accordance with MCR 3.973." | MCR 3.966(A)(2). See Section 8.12. |
| | Personal or electronic service of a written motion must be made at least seven days before hearing, and the response at least three days before hearing. If service is by first-class mail, service must be made at least nine days before hearing, and the response at least five days before hearing. For good cause, court may set different periods for filing and serving motions. | MCR 2.119(C); MCR 3.922(D). See Section 9.4. |
| | Videoconferencing technology may be used to conduct the hearing. For court's permissible use of videoconferencing technology, see MCR 3.904(B), discussed in detail at Section 1.7. | MCR 3.904(B)(1). |
| | If a hearing is held, at least seven days' notice in writing or on record must be given to the respondent; respondent's attorney; child's lawyer-guardian ad litem; child's parents, guardian, or legal custodian, if any, other than respondent; the petitioner; a party's appointed guardian ad litem; the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Indian child's tribe (if unknown to the Secretary of the Interior); Indian child's parents or Indian custodian (if unknown to the Secretary of the Interior); and any other person the court may direct to be notified. | MCR 3.920(D)(1); MCR 3.921(B)(1). See Section 5.2. |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Review of Supervising Agency's Initial Placement Determination** | Persons notified of the initial placement decision may request written documentation of the reasons for the decision within five days of the notice. | MCL 722.954a(9); MCR 3.966(B)(1)(d). See Section 8.12(A). |
| | A child's lawyer-guardian ad litem must petition the court for review within 14 days after the date of the written placement decision, and a review hearing on the record must commence within seven days after the petition is filed. | MCL 722.954a(9); MCR 3.966(B)(2); MCR 3.966(B)(3). See Section 8.12(A). |
| | Videoconferencing technology may be used to conduct the hearing. For court's permissible use of videoconferencing technology, see MCR 3.904(B), discussed in detail at Section 1.7. | MCR 3.904(B)(1). |
| | At least seven days' notice in writing or on record must be given to the respondent; respondent's attorney; child's lawyer-guardian ad litem; child's parents, guardian, or legal custodian, if any, other than respondent; the petitioner; a party's appointed guardian ad litem; the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Indian child's tribe (if unknown to the Secretary of the Interior); Indian child's parents or Indian custodian (if unknown to the Secretary of the Interior); and any other person the court may direct to be notified. | MCR 3.920(D)(1); MCR 3.921(B)(1). See Section 5.2. |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Review of Change of Child's Foster Care Placement** | Unless the foster parent requests or agrees to the change in placement or the court orders the child returned home, removal must occur less than 30 days after the child's initial removal from home. Supervising agency must maintain placement for at least three days or until the FCRB makes its determination if foster parent appeals. Removal may occur at any time the supervising agency has reasonable cause to suspect sexual abuse, nonaccidental physical injury, or substantial risk of harm to the child's physical or emotional well-being. | MCL 712A.13b(1)(c)(*ii*); MCL 712A.13b(2)(c); MCL 712A.13b(7). See Section 8.10. |
| | Supervising agency must notify the FCRB, foster parents, the court with jurisdiction over the child, the child's lawyer guardian ad litem, and an Indian child's tribe before removal. Notice may be given by ordinary mail or by electronic means subject to agreement of the DHHS and the SCAO. Supervising agency must notify the foster parents, FCRB, the court with jurisdiction over the child, and an Indian child's tribe of emergency removal. Notice must indicate the reason for the placement change, how many times the placement has been changed, whether a change in the child's school will be required, whether the change will separate or reunite siblings or impact sibling visitation, and, if the child is an Indian child, a statement to that effect and a list of active efforts taken to place the child according to MCL 712B.23, including how the standards in MCL 712B.23(8) are met. Notice to the court may be given by ordinary mail or by electronic means subject to agreement of the DHHS and court with jurisdiction. | MCL 712A.13b(2); MCL 712A.13b(7). See Section 8.10. |
| | Foster parents may appeal to the FCRB within three days of notice of the intended move. Within seven days of receiving an appeal, the FCRB must investigate and, within three days after completing its investigation, report to the court or MCI superintendent, foster parents, parents, an Indian child's tribe, and supervising agency. | MCL 712A.13b(2)(b); MCL 712A.13b(3). See Section 8.11. |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Review of Change of Child's Foster Care Placement, continued** | If necessary, the court must set a hearing no sooner than seven or later than 14 days after notice from the FCRB. Notice of hearing must be given to the foster parents, interested parties, and prosecuting attorney (if he or she has appeared). | MCL 712A.13b(5); MCR 3.966(C)(2)(a); MCR 3.966(C)(2)(b). See Section 8.11. |
| | MCI superintendent must make a decision regarding the child's placement and inform each interested party of the decision within 14 days after notice from the FCRB. | MCL 712A.13b(5). See Section 8.11. |
| | Videoconferencing technology may be used to conduct the hearing. For court's permissible use of videoconferencing technology, see MCR 3.904(B), discussed in detail at Section 1.7. | MCR 3.904(B)(1). |
| **Demand for Jury Trial** | Written demand for jury trial must be filed within 14 days after court gives notice of the right to jury trial or 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later, but no later than 21 days before trial. The court may excuse a late filing in the interest of justice. | MCR 3.911(B). See Section 9.6(B). |
| **Demand for Trial by Judge (Rather Than Referee)** | Written demand for trial by judge rather than referee must be filed within 14 days after court gives notice of the right to trial by judge or 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later, but no later than 21 days before trial. The court may excuse a late filing in the interest of justice. | MCR 3.912(B). See Section 9.6(C). |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Motions to Suppress Evidence** | Personal or electronic service of motion must be made at least seven days before hearing, and the response at least three days before hearing. If service is by first-class mail, service must be made at least nine days before hearing, and the response at least five days before hearing. For good cause, court may set different periods for filing and serving motions. | MCR 2.119(C); MCR 3.922(D). See Section 9.4. |
| | If a hearing is held, at least seven days' notice in writing or on record must be given to the respondent; respondent's attorney; child's lawyer-guardian ad litem; child's parents, guardian, or legal custodian, if any, other than respondent; the petitioner; a party's appointed guardian ad litem; the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Indian child's tribe (if unknown to the Secretary of the Interior); Indian child's parents or Indian custodian (if unknown to the Secretary of the Interior); and any other person the court may direct to be notified. | MCR 3.920(D)(1); MCR 3.921(B)(1). See Section 5.2 |
| **Notice of Intent to Use Alternative Procedures to Obtain Testimony or to Admit Hearsay Statements under MCR 3.972(C)(2)** | Within 21 days after notice of trial date, but no later than seven days before trial, proponent must file with the court and serve all parties written notice of intent to use alternative procedures or admit hearsay statements. | MCR 3.922(F)(1). See Section 11.4. |
| | Within seven days after receipt of notice, but no later than two days before trial, nonproponent parties must provide written notice to court of intent to offer rebuttal testimony or evidence in opposition to the proponent's request and identify any witnesses to be called. | MCR 3.922(F)(2). See Section 11.4. |
| | The court may shorten these time periods for good cause shown. | MCR 3.922(F)(3). See Section 11.4. |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Trials** | If the child is not in placement, trial must be held within six months after the authorization of the petition unless adjourned for good cause. If the child is in placement, trial must commence as soon as possible but no later than 63 days after the child is removed from the home unless the trial is postponed on stipulation of the parties for good cause, because process cannot be completed, or because the court finds that the testimony of a witness presently unavailable is needed. | MCR 3.972(A). See Section 12.2. |
| | At least seven days' notice in writing or on record must be given to the respondent; respondent's attorney; child's lawyer-guardian ad litem; child's parents, guardian, or legal custodian, if any, other than respondent; the petitioner; a party's appointed guardian ad litem; the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Indian child's tribe (if unknown to the Secretary of the Interior); Indian child's parents or Indian custodian (if unknown to the Secretary of the Interior); and any other person the court may direct to be notified. | MCR 3.920(D)(1); MCR 3.921(B)(1). See Section 5.2. |
| | A summons must be served on any respondent and any nonrespondent parent. A summons may be served on a person with physical custody of the child directing such person to appear with the child. A guardian or legal custodian who is not a respondent must be served with notice of hearing as provided in the paragraph above. | MCR 3.920(B)(2)(b). See Section 5.1. |
| | Personal service is required at least seven days before trial. If personal service is impracticable or cannot be achieved, the court may direct service in any manner reasonably calculated to give notice and an opportunity to be heard, including publication. If summons is served by registered mail, it must be sent at least 14 days before trial, or 21 days if the person is not a Michigan resident. | MCR 3.920(B)(4); MCR 3.920(B)(5)(a); MCR 3.920(B)(5)(b). See Section 5.1. |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Trials, continued** | If service is by publication, notice must appear in a newspaper in the county where the party resides, if known, or in the county where the action is pending, at least once 14 days before trial.<br><br>If the child has been removed from the home, a review hearing must be held within 182 days of the date of removal, even if the trial has not been completed before the expiration of that 182-day period.<br><br>Videoconferencing technology may be used to conduct the hearing. For court's permissible use of videoconferencing technology, see MCR 3.904(B), discussed in detail at Section 1.7. | MCR 3.920(B)(4)(b); MCR 3.920(B)(5)(c). See Section 5.1.<br><br>MCR 3.972(A)(3). See Section 12.2.<br><br>MCR 3.904(B)(2). |
| **Rehearings or Motions for New Trial** | If case does not involve termination of parental rights, written motion must be filed within 21 days after the date of the order resulting from the hearing or trial. If case involves "termination of parental rights, a motion for new trial, rehearing, reconsideration, or other postjudgment relief [must] be filed within 14 days after the date of the order terminating parental rights." Court may entertain untimely motion for good cause shown. Written response must be filed with the court and served on opposing parties within seven days of motion.<br><br>At least seven days' notice of the motion or hearing, if held, in writing or on record must be given to the respondent; respondent's attorney; child's lawyer-guardian ad litem; child's parents, guardian, or legal custodian, if any, other than respondent; the petitioner; a party's appointed guardian ad litem; the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Indian child's tribe (if unknown to the Secretary of the Interior); Indian child's parents or Indian custodian (if unknown to the Secretary of the Interior); and any other person the court may direct to be notified. | MCR 3.992(A); MCR 3.992(C). See Section 12.12.<br><br>MCR 3.920(D)(1); MCR 3.921(B)(1). See Section 5.2. |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Case Service Plans** | The DHHS must prepare a Case Service Plan before the court enters an order of disposition. The plan must be made available to the parties and court.<br><br>Foster parent must be given copies of all Initial Service Plans, updated service plans, revised service plans, court orders, and medical, mental health, and education reports, including reports made before child's placement, within 10 days of a written request from the provider.<br><br>The Case Service Plan must be updated every 90 days as long as the child remains in placement. | MCL 712A.18f(2). See Section 13.6.<br><br>MCL 712A.13a(18). See Section 8.5; Section 13.11.<br><br>MCL 712A.18f(5). See Section 13.6(D). |
| **Initial Dispositional Hearings***<br><br>***If termination is requested at the initial dispositional hearing, see notice requirements in "Hearings to Terminate Parental Rights," below.** | The interval between trial and disposition is discretionary with the court, but if the child is in placement, the interval may not be more than 28 days, except for good cause.<br><br>Unless the dispositional hearing is held immediately after trial, notice of hearing may be given by scheduling it on the record in the presence of the parties or in accordance with MCR 3.920.<br><br>If the child was diagnosed with failure to thrive, Munchausen syndrome by proxy, Shaken baby syndrome, a bone fracture diagnosed as the result of abuse or neglect, or drug exposure, each of the child's physicians must be notified of the time and place of the hearing. | MCR 3.973(C). See Section 13.2.<br><br>MCR 3.973(B). See Section 13.2.<br><br>MCL 712A.18f(7). See Section 5.2(B). |
| **Review of Referee's Recommended Findings and Conclusions** | Request for review must be filed within seven days after the inquiry or hearing or seven days after issuance of referees' recommendations, whichever is later, and served on interested parties, and a response may be filed within seven days at the time of filing the request for review.<br><br>Absent good cause for delay, the judge must consider the request within 21 days after it is filed if child is in placement. | MCR 3.991(B)(3); MCR 3.991(B)(4); MCR 3.991(C). See Section 20.1(B).<br><br>MCR 3.991(D). See Section 20.1(D). |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Dispositional Review Hearings***<br><br>***See also provisions for reviews of children in permanent foster family or relative placements, below.** | The court must conduct review hearings no later than 182 days after the child's removal from the home and no later than every 91 days after that for the first year the child is subject to the court's jurisdiction. After the first year the child has been removed from the home and is subject to the court's jurisdiction, the court must conduct review hearings no later than 182 days from the immediately preceding review hearing conducted during that first year and every 182 days after that until the case is dismissed. A review hearing must not be canceled or delayed beyond the number of days set out above, regardless of whether a petition to terminate parental rights or another matter is pending.<br><br>Videoconferencing technology may be used to conduct the hearing. For court's permissible use of videoconferencing technology, see MCR 3.904(B), discussed in detail at Section 1.7.<br><br>**Title IV-E Requirement.** Reviews of child's status must occur at least every six months.<br><br>At the initial disposition hearing and every review hearing, the court must decide whether it will accelerate the date for the next scheduled review hearing. | MCL 712A.19(3); MCR 3.975(C). See Section 15.3(A).<br><br>MCR 3.904(B)(1).<br><br>45 CFR 1355.34(c)(2)(*ii*). See Section 15.3(A).<br><br>MCL 712A.19(3); MCR 3.975(D). See Section 15.3(C). |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Dispositional Review Hearings, continued** | Seven days' written notice to the agency responsible for child's care and supervision; person or institution having court-ordered custody of child; parents and attorney for respondent-parent (if parental rights have not been terminated); child's guardian or legal custodian; child's guardian ad litem; child's lawyer-guardian ad litem; a nonparent adult (if ordered to comply with Case Service Plan); elected leader of the Indian tribe (if tribal affiliation has been determined); attorneys for each party; prosecuting attorney (if he or she has appeared); the child (if 11 years of age or older); Indian child's tribe (if the court knows or has reason to know the child is an Indian child); the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Secretary of the Interior (if the Indian child's parents, guardian, legal custodian, or tribe are unknown); and any other person the court may direct to be notified. | MCL 712A.19(5); MCR 3.921(B)(2); MCR 3.975(B). See Section 5.2(A). |
| | If the child was diagnosed with failure to thrive, Munchausen syndrome by proxy, Shaken baby syndrome, a bone fracture diagnosed as the result of abuse or neglect, or drug exposure, each of the child's physicians must be notified of the time and place of the hearing. | MCL 712A.18f(7). See Section 5.2(B) . |
| | If at least seven days' written notice is given to all parties (unless waived), and if no party requests a hearing within the seven days, the child may be returned home without a hearing. | MCL 712A.19(11); MCR 3.975(H). See Section 15.3(D). |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Review Hearings for Children Remaining in Home** | The court must conduct a review hearing no later than 182 days from the date a petition is filed to give the court jurisdiction and no later than every 91 days after that for the first year the child is subject to the court's jurisdiction. After the first year the child is subject to the court's jurisdiction, the court must conduct a review hearing no later than 182 days from the immediately preceding review hearing conducted during that first year and every 182 days after that until the case is dismissed. A review hearing must not be canceled or delayed beyond the number of days set out above, regardless of whether a petition to terminate parental rights or another matter is pending.<br><br>Videoconferencing technology may be used to conduct the hearing. For court's permissible use of videoconferencing technology, see MCR 3.904(B), discussed in detail at Section 1.7. | MCL 712A.19(2). See Section 15.3(B).<br><br>MCR 3.904(B)(1). |
| **Postadjudication Hearing on Petition for Out-of-Home Placement (child under court jurisdiction and supplemental petition to remove child from home is filed)** | Court must ensure proper notice has been provided.<br><br>"If the court has not held a dispositional hearing under MCR 3.973, the court shall conduct the dispositional hearing within 28 days after the child is placed by the court, except for good cause shown."<br><br>"If the court has already held a dispositional hearing under MCR 3.973, a dispositional review hearing must commence no later than 14 days after the child is placed by the court, except for good cause shown. The dispositional review hearing may be combined with the removal hearing for an Indian child prescribed by MCR 3.967. . . ." | MCR 3.920; MCR 3.921; MCR 3.974(B)(2). See Section 5.2.<br><br>MCR 3.974(D)(1). See Section 15.7(B).<br><br>MCR 3.974(D)(2). See Section 15.7(B). |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Emergency Removal Hearings** | Court must conduct hearing no later than 24 hours after child is taken into custody, excluding Sundays and holidays. If the child is an Indian child, the court must also conduct removal hearing under MCR 3.967 for the child to remain removed. | MCR 3.974(C)(3). See Section 15.8. |
| | Notice of the emergency removal hearing must be given to the parent in person, in writing, on the record, or by telephone as soon as the hearing is scheduled. | MCR 3.920(D)(2)(b); MCR 3.974(C)(2). See Section 5.2. |
| | "If the court has not held a dispositional hearing under MCR 3.973, the court shall conduct the dispositional hearing within 28 days after the child is placed by the court, except for good cause shown." | MCR 3.974(D)(1). See Section 15.8(B). |
| | "If the court has already held a dispositional hearing under MCR 3.973, a dispositional review hearing must commence no later than 14 days after the child is placed by the court, except for good cause shown. The dispositional review hearing may be combined with the removal hearing for an Indian child prescribed by MCR 3.967." | MCR 3.974(D)(2). See Section 15.8(B). |
| | Seven days' written notice to the agency responsible for child's care and supervision; person or institution having court-ordered custody of child; parents and attorney for respondent-parent (if parental rights have not been terminated); child's guardian or legal custodian; child's guardian ad litem; child's lawyer-guardian ad litem; a nonparent adult (if ordered to comply with Case Service Plan); elected leader of the Indian tribe (if tribal affiliation has been determined); attorneys for each party; prosecuting attorney (if he or she has appeared); the child (if 11 years of age or older); Indian child's tribe (if the court knows or has reason to know the child is an Indian child); the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Secretary of the Interior (if the Indian child's parents, guardian, legal custodian, or tribe are unknown); and any other person the court may direct to be notified. | MCL 712A.19(5); MCR 3.921(B)(2). See Section 5.2; Section 15.2. |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Permanency Planning Hearings** | If a court determines that reasonable efforts to reunify the family are not required, the court must conduct a permanency planning hearing within 30 days after that determination. **Note:** MCR 3.976(B)(1) requires that this hearing be held within 28 days after a determination that reasonable efforts to reunite the family or to prevent removal are not required. | MCL 712A.19a(2); MCR 3.976(B)(1). See Section 16.3(A). |
| | In other cases, court must conduct permanency planning hearings within 12 months after the child was removed from home and every 12 months thereafter during the continuation of foster care. | MCL 712A.19a(1); MCL 712A.19c(1); MCR 3.976(B)(3). See Section 16.3. |
| | A permanency planning hearing must not be canceled or delayed beyond the time limits set out above, regardless of whether a petition for termination of parental rights or another matter is pending. | MCL 712A.19a(1); MCL 712A.19c(1). See Section 16.3. |
| | **Title IV-E Requirement.** A permanency hearing must be conducted within 12 months after the child enters foster care and every 12 months thereafter during the continuation of foster care. In cases involving "aggravated circumstances," a permanency hearing must be conducted within 30 days of a determination that reasonable efforts to reunify a family are not required. Agency must obtain a judicial determination that it has made reasonable efforts to finalize permanency plan within 12 months of a child's entry into foster care and every 12 months thereafter during the continuation of foster care.<br>See DHHS Children's Foster Care Manual (FOM), *Funding Determinations and Title IV-E Eligibility*, FOM 902-1, pp 24-28, which details the judicial determinations that must be made in order to satisfy Title IV-E requirements. | MCL 712A.19a(4); MCR 3.976(A); 45 CFR 1355.34 (c)(2)(*iii*); 45 CFR 1356.21(b); 45 CFR 1356.21(h)(2). See Section 16.2; Section 16.3. |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Permanency Planning Hearings, continued** | 14 days' written notice to the agency responsible for child's care and supervision; person or institution having court-ordered custody of child; parents and attorney for respondent-parent (if parental rights have not been terminated); a guardian or legal custodian of child; guardian ad litem; child's lawyer-guardian ad litem; a "nonparent adult" (if ordered to comply with Case Service Plan); elected leader of the Indian tribe (if tribal affiliation has been determined); attorneys for each party; prosecuting attorney (if he or she has appeared); the child (if 11 years of age or older); Indian child's tribe (if the court knows or has reason to know the child is an Indian child); the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Secretary of the Interior (if the Indian child's parents, guardian, legal custodian, or tribe are unknown); and any other person the court may direct to be notified. | MCL 712A.19a(6); MCR 3.920(D)(3)(a); MCR 3.921(B)(2); MCR 3.976(C). See Section 5.2(A). |
| | If the child was diagnosed with failure to thrive, Munchausen syndrome by proxy, Shaken baby syndrome, a bone fracture diagnosed as the result of abuse or neglect, or drug exposure, each of the child's physicians must be notified of the time and place of the hearing. | MCL 712A.18f(7). See Section 5.2(B). |
| | If a child is not returned home following hearing, the agency must initiate termination proceedings if the child has been in foster care for 15 of the last 22 months. However, the agency does not have to initiate termination proceedings if relatives are taking care of the child, if there is a compelling reason that filing a petition is not in the child's best interests, or if reasonable efforts for reunification, when required, have not been made. "If the court does not require the agency to initiate proceedings to terminate parental rights under [MCR 3.976(E)(3)], the court shall state on the record the reason or reasons for its decision." | MCL 712A.19a(8); MCR 3.976(E)(3). See Section 16.7(B). |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Dispositional Review Hearings When Child Is in Permanent Foster Family Agreement or Placement With Relative Is Intended to Be Permanent** | The court must hold review hearings not more than 182 days after the child is removed from home and every 182 days thereafter as long as the child is subject to the jurisdiction of the court, MCI, or other agency. A review hearing must not be canceled or delayed beyond the number of days set out above, regardless of whether a petition to terminate parental rights or another matter is pending.<br><br>Upon motion of a party or the court, the court may accelerate the date for the next scheduled review hearing.<br><br>Videoconferencing technology may be used to conduct the hearing. For court's permissible use of videoconferencing technology, see MCR 3.904(B), discussed in detail at Section 1.7. | MCL 712A.19(4); MCR 3.975(C)(2). See Section 15.3(A).<br><br>MCL 712A.19(4); MCR 3.975(D). See Section 15.3(C).<br><br>MCR 3.904(B)(1). |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Hearings to Terminate Parental Rights** | Petition must be filed by the end of a child's fifteenth month in foster care if he or she has been in foster care 15 of the last 22 months, or within 60 days of a determination that a child is an abandoned infant or that reasonable efforts to reunify a child with a parent convicted of a specified felony are not required, unless the child is being cared for by a relative, a compelling reason exists that petitioning is not in the child's best interest, or the state has not provided the family services necessary for the child's safe return home. | MCL 712A.19a(8); MCR 3.976(E)(3); 42 USC 675(5)(E); 45 CFR 1356.21(i). See Section 16.7(B). |
| | Parties must make disclosures as detailed in MCR 3.922(A) at least 21 days before termination hearing and have rights to discovery consistent with that rule. | MCR 3.977(F)(2). |
| | Court must conduct termination hearing within 42 days of filing of supplemental petition, but court may extend time for 21 days for good cause shown. | MCR 3.977(F)(2); MCR 3.977(H)(1)(b). See Section 17.4; Section 17.5(A). |
| | 14 days' written notice to the agency responsible for child's care and supervision; person or institution having court-ordered custody of child; parents and attorney for respondent-parent (if parental rights have not been terminated); child's guardian or legal custodian; child's guardian ad litem; child's lawyer-guardian ad litem; elected leader of the Indian tribe (if tribal affiliation has been determined); attorneys for each party; prosecuting attorney (if he or she has appeared); the child (if 11 years of age or older); Indian child's parent or Indian custodian and Indian child's tribe (these parties must also be given notice of their right of intervention); the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state; Secretary of the Interior (if the identity or location of an Indian child's parents, Indian custodian, or tribe are unknown); and any other person the court may direct to be notified. | MCL 712A.19b(2); MCR 3.920(C)(1); MCR 3.920(D)(3); MCR 3.921(B)(2); MCR 3.921(B)(3); MCR 3.977(C). See Section 5.2(A); Section 19.5. |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Hearings to Terminate Parental Rights (continued)** | Any respondent and nonrespondent parent must be served with a summons. A summons may be served on a person with physical custody of the child directing such person to appear with the child. A guardian or legal custodian who is not a respondent must be served with notice of hearing as provided in the paragraph above. | MCL 712A.12; MCR 3.920(B)(2)(b). See Section 5.1. |
| | Personal service is required at least 14 days before hearing. If personal service is impracticable or cannot be achieved, the court may direct service in any manner reasonably calculated to give notice and an opportunity to be heard, including publication. If summons is served by registered mail, it must be sent at least 14 days before trial, or 21 days if the person is not a Michigan resident. | MCR 3.920(B)(4); MCR 3.920(B)(5). See Section 5.1. |
| | If service is by publication, notice must appear in a newspaper in the county where the party resides, if known, or in the county where the action is pending, at least once 14 days before trial. | MCR 3.920(B)(5)(c). See Section 5.1. |
| | If it does not issue a decision on the record, the court must issue opinion and order within 70 days of the commencement of the initial hearing on termination of parental rights petition. Failure to issue opinion within 70 days does not dismiss petition, however. | MCL 712A.19b(1); MCR 3.977(I)(1). See Section 17.10. |
| | Videoconferencing technology may be used to conduct the hearing. For court's permissible use of videoconferencing technology, see MCR 3.904(B), discussed in detail at Section 1.7. | MCR 3.904(B)(2). |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Post-Termination of Parental Rights Review Hearing** | Unless the child is placed in a permanent foster family or a placement with a relative intended to be permanent, the court must conduct review hearings at least every 91 days following termination of parental rights for the first year following termination of parental rights. If a child remains in placement for more than one year following termination of parental rights, the court must conduct a review hearing not later than 182 days from the immediately preceding review hearing during the first year and every 182 days thereafter until the case is dismissed. A review hearing must not be canceled or delayed, regardless of whether a petition to terminate parental rights or another matter is pending.<br><br>Foster parents and preadoptive parents or relatives providing care must be given notice of and an opportunity to be heard at each hearing.<br><br>Supervising agency must submit information to place the child in the adoption directory if an adoptive family is not identified within 90 days of the entry of the order terminating parental rights. | MCL 712A.19c(1).<br>See Section 18.1.<br><br>MCR 3.978(B).<br>See Section 5.2(A).<br><br>MCL 722.954b(2).<br>See Section 18.5(B). |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Appeals Following Termination of Parental Rights** | Request for appellate counsel must be made within 21 days after notice of the order terminating parental rights is given or after a timely postjudgment motion is denied. | MCR 3.977(J)(1)(c). See Section 17.11. |
| | In the Court of Appeals, an appeal of right must be filed within 21 days of entry of an order terminating parental rights under the Juvenile Code; 21 days of an order appointing counsel; 21 days after entry of an order denying a timely postjudgment motion for new trial, rehearing, reconsideration, or other relief from the judgment or order appealed; or 21 days after entry of an order denying appointment of appellate counsel in a case in which an indigent party is entitled to appointed counsel, if the trial court received the request for counsel within the initial 21-day appeal period. | MCR 3.993(A)(4); MCR 7.204(A)(1)(a)-(d). See Section 20.3(B)(2). |
| | Application for leave to appeal may not be granted if filed more than 63 days after entry of the order terminating parental rights or 63 days after entry of an order denying motion for reconsideration or rehearing. | MCR 3.993(C)(3); MCR 7.205(A)(3). See Section 20.3(B). |
| | In the Michigan Supreme Court, after a decision by the Court of Appeals, and except for an appeal from an order of discipline or dismissal entered by the Attorney Discipline Board, an application for leave to appeal must be filed within 42 days in civil cases, or within 56 days in criminal cases, after "the Court of Appeals order or opinion resolving an appeal or original action, including an order denying an application for leave to appeal, the Court of Appeals order or opinion remanding the case to the lower court or Tribunal for further proceedings while retaining jurisdiction, the Court of Appeals order denying a timely filed motion for reconsideration, or the Court of Appeals grants a request to publish an opinion that was originally released as unpublished." | MCR 7.305(C)(2). See Section 20.4. |

| Type of Proceeding | Time and Notice Requirements | Authorities and Cross-References |
|---|---|---|
| **Motion to Restore Appellate Rights** | **If a respondent was denied the right to appellate review or to the appointment of appellate counsel due to errors by the respondent's prior attorney or other factor's outside the respondent's control, the respondent may file a motion to restore their appellate rights "within a reasonable time."** | **MCR 3.993(F)** |
| | **Two years from the entry date of an order identified in MCR 3.993(A) is presumed to be a reasonable time to bring a motion to restore appellate rights for appellate review of that order. One year from the date on which the respondent's claim of appeal was dismissed is presumed reasonable.** | **MCR 3.993(F)(1)** |
| | **Two years from the date of an entry denying the appointment of appellate counsel is presumed reasonable for a motion to restore appellate rights based on that denial.** | **MCR 3.993(F)(2)** |
| | **When determining what is a reasonable time, courts must consider whether factors outside the respondent's control delayed the respondent's filing of their motion.** | **MCR 3.993(F)(5)** |
| | **In granting a motion to restore a respondent's appellate rights, a trial court "must not issue any order that would extend the time for appealing an order terminating parental rights beyond 63 days from entry of the order terminating rights."** | **MCR 3.993(F)** |

# Appendix C: Table Summarizing Application of the Rules of Evidence and Standards of Proof in Child Protective Proceedings

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

For most hearings, the applicability of the Michigan Rules of Evidence and the required standard of proof is explained in the following table.[1]

1 Privileges are discussed in Section 11.2.

| Stage of Proceeding | Application of Rules of Evidence | Standard of Proof | Authorities and Cross-References |
|---|---|---|---|
| Order to Take Child Into Protective Custody | The rules of evidence do not apply. | Following "presentment of a petition or affidavit of facts to the court, the court has reasonable cause to believe that all of the following conditions exist, together with specific findings of fact:<br>(a) The child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child's immediate removal from those surroundings is necessary to protect the child's health and safety. If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the child is subject to the exclusive jurisdiction of the tribal court. However, the state court may enter an order for protective custody of that child when it is necessary to prevent imminent physical damage or harm to the child.<br>(b) The circumstances warrant issuing an order pending a hearing in accordance with: (*i*) MCR 3.965 [(preliminary hearing)] for a child who is not yet under the jurisdiction of the court, or (*ii*) MCR 3.974(C) [(emergency removal hearing)] for a child who is already under the jurisdiction of the court under MCR 3.971 or [MCR] 3.972.<br>(c) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.<br>(d) No remedy other than protective custody is reasonably available to protect the child.<br>(e) Continuing to reside in the home is contrary to the child's welfare." | MCR 3.963(B)(1). See also MCL 712A.14b(1)(a)-(e).<br>See Section 3.1(A). |

| Stage of Proceeding | Application of Rules of Evidence | Standard of Proof | Authorities and Cross-References |
|---|---|---|---|
| Emergency Removal | The rules of evidence do not apply. | Officer has "reasonable grounds to believe that a child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child's immediate removal from those surroundings is necessary to protect the child's health and safety." | MCL 712A.14a(1); MCR 3.963(A)(1). See Section 3.1(B). |
| Emergency Removal of Indian Child | The rules of evidence do not apply. | If the Indian child resides or is domiciled on a reservation but is temporarily off the reservation, reasonable grounds to believe that the Indian child must be removed to prevent imminent physical damage or harm to the Indian child.<br><br>See the Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act*, 81 Federal Register 96476, C.1 (2016), which extends emergency proceedings to non-reservation-resident Indian children. See Section 19.12(A). | 25 USC 1922; MCL 712B.7(2); MCR 3.963(A)(1); MCR 3.974(C)(1); 25 CFR 23.113. See Section 15.8. |
| Preliminary Inquiries | The rules of evidence do not apply. | Probable cause that one or more allegations in the petition are true. Probable cause may be established with such information and in such manner as the court deems sufficient. | MCL 712A.13a(2); MCR 3.962(B)(3). See Section 7.5(B). |
| Hearings to Determine Whether to Order Alleged Abuser Out of Child's Home | The rules of evidence do not apply. | Probable cause to believe that the person ordered to leave the home committed the alleged abuse, and that person's presence in the home presents a substantial risk of harm to the child's life, physical health, or mental well-being. | MCL 712A.13a(4). See Section 7.6(C). |

| Stage of Proceeding | Application of Rules of Evidence | Standard of Proof | Authorities and Cross-References |
|---|---|---|---|
| Preliminary Hearings | The rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631.<br><br>Findings regarding placement of a child may be on the basis of hearsay evidence that possesses adequate indicia of trustworthiness. | Probable cause that one or more allegations in the petition are true and fall within MCL 712A.2(b). | MCL 712A.13a(2); MCR 3.965(B)(12).<br>See Section 7.6(B). |
| | | "The court may order placement of the child into foster care if the court finds all of the following:<br>(a) Custody of the child with the parent presents a substantial risk of harm to the child's life, physical health, or mental well-being.<br>(b) No provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from risk as described in subrule (a).<br>(c) Continuing the child's residence in the home is contrary to the child's welfare.<br>(d) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.<br>(e) Conditions of child custody away from the parent are adequate to safeguard the child's health and welfare." | MCL 712A.13a(9); MCR 3.965(C)(2).<br>See Section 8.1(B). |
| | | Probable cause that leaving the child in his or her home is contrary to the child's welfare. | MCR 3.965(C)(3).<br>See Section 8.3. |
| | | Reasonable efforts to prevent the removal of the child have been made or are not required. | MCR 3.965(C)(4).<br>See Section 8.4. |
| Review of Child's Placement | The rules of evidence do not apply. | Best interests of the child. | MCR 3.966.<br>See Section 8.12. |

| Stage of Proceeding | Application of Rules of Evidence | Standard of Proof | Authorities and Cross-References |
|---|---|---|---|
| Removal Hearing—Indian Child | The rules of evidence do not apply. | Clear and convincing evidence that active efforts designed to prevent breakup[1] of Indian family have been made and were unsuccessful, and continued custody by Indian parent or custodian is likely to result in serious emotional or physical damage to child. Evidence must include testimony by at least one qualified expert witness with knowledge of the child rearing practices of the Indian child's tribe stating that the continued custody of the Indian child with the parent or Indian custodian is likely to result in serious physical or emotional damage to the Indian child | 25 USC 1912(d)-(e); MCL 712B.15(2); MCR 3.967(D); 25 CFR 23.120(a); 25 CFR 23.121(a). See Section 19.12(B). |
| Hearing to Identify Father | The rules of evidence do not apply. | Probable cause that an identified person is the child's legal father. Paternity must be established by a preponderance of the evidence. | MCR 3.921(D). See Section 6.11. |
| Trials | Except as specifically provided in the court rules, the rules of evidence for civil proceedings apply. | Preponderance of the evidence, even where the initial petition contains a request for termination of parental rights. | MCR 3.972(C)(1). See Section 12.5. |
| Initial Disposition Hearings (not terminating parental rights) | The rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value. | Appropriate for welfare of child and society. | MCL 712A.18(1); MCR 3.973(E). See Section 13.4. |

| Stage of Proceeding | Application of Rules of Evidence | Standard of Proof | Authorities and Cross-References |
|---|---|---|---|
| Review of Out-of-Home Placement Following Initial Disposition | The rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value. | Appropriate for welfare of child and society. | MCL 712A.18(1); MCR 3.973(E); MCR 3.974(D)(2). See Section 15.7. |
| Review of Emergency Removal of Child Following Initial Disposition | The rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value. | Appropriate for welfare of child and society. | MCL 712A.18(1); MCR 3.973(E); MCR 3.974(D)(2). See Section 15.8. |
| Dispositional Review Hearings for Child in Foster Care | The rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value. | Appropriate for welfare of child and society. | MCL 712A.18(1); MCL 712A.19(12); MCR 3.973(E); MCR 3.975(E). See Section 15.4. |

| Stage of Proceeding | Application of Rules of Evidence | Standard of Proof | Authorities and Cross-References |
|---|---|---|---|
| Hearings on Supplemental Petitions Alleging Additional Abuse or Neglect | If termination of parental rights is requested, see Hearings to Terminate Parental Rights below.<br><br>If termination of parental rights is not requested, the rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value. | See Hearings to Terminate Parental Rights below.<br><br>Appropriate for welfare of child and society. | MCR 3.973(J)(1); MCR 3.977.<br>See Section 13.13.<br><br>MCL 712A.18(1); MCR 3.973(E); MCR 3.973(J)(2); MCR 3.974; MCR 3.975.<br>See Section 13.13. |
| Permanency Planning Hearings | The rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value. | Returning child to home would cause substantial risk of harm to life, physical health, or mental well-being of child.<br><br>Keeping child in out-of-state care must be appropriate and in child's best interests.<br><br>Initiating proceedings to terminate parental rights is not in best interest of child. | MCL 712A.19a(14); MCR 3.976(D)(2); MCR 3.976(E)(1); MCR 3.976(E)(2); MCR 3.976(E)(3).<br>See Section 16.1; Section 16.6. |

| Stage of Proceeding | Application of Rules of Evidence | Standard of Proof | Authorities and Cross-References |
|---|---|---|---|
| Hearings to Terminate Parental Rights at Initial Disposition | 1. *Trial:* except as specifically provided in the court rules, the rules of evidence for civil proceedings apply.<br><br>2. *Factfinding phase of termination hearing:* the rules of evidence apply, other than those with respect to privileges, unless abrogated by MCL 722.631.<br><br>3. *Best interests phase of termination hearing:* the rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value. | 1. Preponderance of the evidence.<br><br>2. Clear and convincing evidence from trial or plea proceedings or that is introduced at initial disposition that one or more allegations in the petition are true and establish grounds for termination under MCL 712A.19b(3)(a)-(b), MCL 712A.19b(3)(d)-(m).<br><br>3. Termination of parental rights is in the child's best interests. | MCL 712A.19b(4)-(5); MCR 3.977(E).<br>See Section 17.3. |

| Stage of Proceeding | Application of Rules of Evidence | Standard of Proof | Authorities and Cross-References |
|---|---|---|---|
| Hearings to Terminate Parental Rights Based on Different Circumstances | 1. *Factfinding phase of termination hearing:* the rules of evidence apply, other than those with respect to privileges, unless abrogated by MCL 722.631.<br><br>2. *Best interests phase of termination hearing:* the rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value. | 1. Clear and convincing evidence that one or more allegations in the supplemental petition are true and establish grounds for termination under MCL 712A.19b(3)(a)-(b), MCL 712A.19b(3)(c)(*ii*), MCL 712A.19b(3)(d)-(g), or MCL 712A.19b(3)(i)-(m).<br><br>2. Termination of parental rights is in the child's best interests. | MCR 3.977(F)(1).<br>See Section 17.4. |
| Hearings to Terminate Parental Rights: Other Cases | The rules of evidence do not apply, other than those with respect to privileges, unless abrogated by MCL 722.631. All relevant and material evidence may be received and relied on to the extent of its probative value. | Clear and convincing evidence admitted under MCR 3.977(G)(2) that one or more allegations in the petition are true and come within MCL 712A.19b(3), and that termination of parental rights is in the child's best interests. | MCL 712A.19b(1); MCR 3.977(H).<br>See Section 17.5. |

| Stage of Proceeding | Application of Rules of Evidence | Standard of Proof | Authorities and Cross-References |
|---|---|---|---|
| Hearings to Terminate Parental Rights to Indian Child*<br><br>*To terminate parental rights of an Indian child, the ICWA and the MIFPA requirements, and the statutory grounds for termination under state law must be met. | *State law requirements:* See Hearings to Terminate Parental Rights above.<br><br>*ICWA and MIFPA requirements:* See above. | See Hearings to Terminate Parental Rights above.<br><br>Beyond a reasonable doubt, including testimony of at least one qualified expert witness, that continued custody with the parent or Indian custodian will likely result in serious emotional or physical damage to the Indian child. | MCR 3.977(G); *In re Elliott,* 218 Mich App 196, 209-210 (1996).<br>See Section 17.10; Section 19.12(D).<br><br>25 USC 1912(f); MCL 712B.15(4); MCR 3.977(G); 25 CFR 23.121(b).<br>See Section 17.10; Section 19.12(D). |
| Post-termination Review Hearings | The rules of evidence do not apply. | Reasonable efforts to establish permanent placement. Court may enter orders it considers necessary in the child's best interests, including appointment of a juvenile guardian pursuant to MCL 712A.19c and MCR 3.979. | MCR 3.978(C).<br>See Section 18.2. |

1."[25 USC 1912(d)] applies only in cases where an Indian family's 'breakup' would be precipitated by the termination of the parent's rights. The term 'breakup' refers in this context to '[t]he discontinuance of a relationship,' or 'an ending as an effective entity[.]'" *Adoptive Couple v Baby Girl*, 570 US 637, __ (2013) (where a biological Indian-parent abandons his or her child before the child's birth and never exercises legal or physical custody over the child, 25 USC 1912(d) is inapplicable because "there is no 'relationship' that would be 'discontinu[ed]'–and no 'effective entity' that would be 'end[ed]'–by the termination of the Indian parent's rights[, and i]n such a situation, the 'breakup of the Indian family' has long since occurred") (citations omitted). See Section 19.12(D) for a detailed discussion of involuntary termination of a parent's parental rights.

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