Traditional Waiver Checklist

Overview (click any of the steps below to get more information):

- ❑ Hold a hearing on the motion.
- ❑ Conduct the first-phase ("probable cause" or "adjudicative") hearing, if necessary.
- ❑ Conduct the second-phase ("best-interests" or "dispositional") hearing, if necessary.
- ❑ Grant waiver motion.

OR

- ❑ Deny waiver motion.

At Hearing on Motion[1]

- ❑ Ensure that authority exists to waive jurisdiction:
  - ❑ You are a judge assigned to hear cases in the Family Division of the Circuit Court,
  - ❑ The juvenile is 14 years of age or older at the time the offense was committed,
  - ❑ The juvenile is accused of an act that if committed by an adult would be a felony (an offense punishable by imprisonment for more than one year or an offense designated by law as a felony),
  - ❑ The offense allegedly occurred in your county, and
  - ❑ The prosecuting attorney has filed a motion seeking waiver. See MCL 712A.3; MCL 712A.4(1); MCR 3.950(A)-MCR 3.950(C).
- ❑ Ensure that the prosecutor's motion meets all of the following requirements:

[1] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C).

- ❑ Is in writing, MCR 3.950(C).
- ❑ Clearly indicates the charges and that if the motion is granted the juvenile will be prosecuted as though an adult, MCR 3.950(C); see also MCL 712A.4(2).
- ❑ Was filed within 14 days after the petition was authorized to be filed. MCR 3.950(C)(1).
  - ❑ If not, absent a timely motion and good cause shown, the juvenile is no longer subject to waiver of jurisdiction on the charges. MCR 3.950(C)(1).
- ❑ Ensure that a copy of the motion seeking waiver was personally served on the juvenile and the parent, guardian, or legal custodian of the juvenile, if their addresses or whereabouts were known or could be determined by the exercise of due diligence. MCR 3.950(C)(2); see also MCL 712A.4(2).

❑ If legal counsel has not been retained or appointed to represent the juvenile, advise the juvenile and his/her parents, guardian, custodian, or guardian ad litem of the juvenile's right to representation and appoint legal counsel. MCL 712A.4(6).

- ❑ If legal counsel is appointed, the cost of providing legal counsel may be assessed against the juvenile or those responsible for his/her support, or both, if the persons to be assessed are financially able to comply. MCL 712A.4(6).
- ❑ Ensure that legal counsel has access to records or reports provided and received by the judge as a basis for decision in proceedings for waiver of jurisdiction. MCL 712A.4(7).
  - ❑ The court must grant a continuance at legal counsel's request if any report, information, or recommendation not previously available is introduced or developed at the hearing and the interests of justice require a continuance. MCL 712A.4(7).

❑ **Note:** The right to a jury in a juvenile proceeding exists only at trial. MCR 3.911(A).

❑ Determine whether first-phase hearing (probable cause hearing) needs to be scheduled; the hearing is unnecessary if:

- ❑ the court found the requisite probable cause at a preliminary hearing under MCR 3.935(D)(1) where only legally admissible evidence was used to establish probable cause, MCR 3.950(D)(1)(c)(*i*); or

- ❑ the juvenile waives the hearing after being informed on the record that the probable cause hearing is the equivalent to and held in place of a district court preliminary examination, MCR 3.950(D)(1)(c)(*ii*). See also MCL 712A.4(3); MCL 712A.4(10).
  - ❑ Determine whether the waiver is being freely, voluntarily, and understandingly given. MCR 3.950(D)(1)(c)(*ii*).
  - ❑ Advise the juvenile on the record that if the hearing is waived, there will be no district court preliminary examination if the court waives jurisdiction. MCR 3.950(D)(1)(c)(*ii*).

Committee Tip:

Best practice is to schedule the first-phase hearing, and if it is waived, place the waiver on the record. The court has to do an automatic transcript and appeal may be filed. To cover all bases with due process issues, make it clear, on the record, that this part was not overlooked.

- ❑ If it is determined that a first-phase hearing is necessary, schedule the hearing to commence within 28 days of the authorization of the petition. MCR 3.950(D)(1)(a).
  - ❑ Provide notice of the date, time, and place of the hearing either on the record directly to the juvenile or his/her attorney, the prosecuting attorney, and all other parties, or in writing, served on each individual. MCR 3.950(D).
  - ❑ **Note:** The first-phase hearing may be adjourned for good cause. MCR 3.950(D)(1)(a).
- ❑ If no first-phase hearing will be held, determine whether the juvenile has been previously subject to the general criminal jurisdiction of the circuit court under MCL 712A.4 (traditional waiver) or MCL 600.606 (automatic waiver). If so, waive jurisdiction of the juvenile to the court of general criminal jurisdiction without holding the second-phase hearing. MCL 712A.4(5); MCR 3.950(D)(2).
- ❑ If no first-phase hearing will be held and if appropriate, schedule second-phase hearing to occur within 35 days after

the authorization of the petition, unless adjourned for good cause. MCR 3.950(D)(2)(a).

First-Phase Hearing ("Probable Cause" or "Adjudicative" Hearing)[2]

- ❑ Ensure proper notice of hearing was given either on the record directly to the juvenile or to the attorney for the juvenile, the prosecuting attorney, and all other parties, or in writing, served on each individual. MCL 712A.4(2); MCR 3.950(D).

- ❑ Ensure that, at the hearing, the prosecuting attorney meets his/her burden to present *legally admissible evidence* to establish each element of the offense and to establish probable cause that the juvenile committed the offense. MCR 3.950(D)(1)(b).

- ❑ Determine whether there is probable cause to believe that an offense has been committed that if committed by an adult would be a felony, and that there is probable cause to believe that the juvenile who is 14 years of age or older committed the offense. MCL 712A.4(3); MCR 3.950(D)(1).

  - ❑ **Note:** A finding of probable cause at the first-phase hearing satisfies the requirements of, and is the equivalent of, a preliminary examination in a court of general criminal jurisdiction. MCL 712A.4(10).

- ❑ If probable cause exists, determine whether the juvenile has been previously subject to the general criminal jurisdiction of the circuit court under MCL 712A.4 (traditional waiver) or MCL 600.606 (automatic waiver). If so, waive jurisdiction of the juvenile to the court of general criminal jurisdiction without holding the second-phase hearing. MCL 712A.4(5); MCR 3.950(D)(2).

- ❑ If probable cause exists and the juvenile has not been previously subject to the general criminal jurisdiction of the circuit court under MCL 712A.4 or MCL 600.606, schedule second-phase hearing to occur within 28 days after the conclusion of the first phase, unless adjourned for good cause. MCR 3.950(D)(2)(a).

Second-Phase Hearing ("Best Interests" or "Dispositional" Hearing)[3]

[2] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C).

- ❑ Ensure proper notice of hearing was given either on the record directly to the juvenile or to the attorney for the juvenile, the prosecuting attorney, and all other parties, or in writing, served on each individual. MCL 712A.4(2); MCR 3.950(D).

  Note: The rules of evidence other than those with respect to privileges, do not apply to the second-phase hearing. MCR 3.950(D)(2)(b).

- ❑ Ensure that the prosecuting attorney meets his/her burden of establishing by a preponderance of the evidence that the best interests of the juvenile and the public would be served by waiver. MCR 3.950(D)(2)(c).

- ❑ Determine whether the interests of the juvenile and the public would best be served by granting the motion. MCL 712A.4(4); MCR 3.950(D)(2). Consider and make findings on the following criteria, giving greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency than to the other criteria:

  - ❑ the seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the effect on any victim. MCL 712A.4(4)(a); MCR 3.950(D)(2)(d)(*i*).

  - ❑ the culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines. MCL 712A.4(4)(b); MCR 3.950(D)(2)(d)(*ii*).

  - ❑ the juvenile's prior record of delinquency, including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior. MCL 712A.4(4)(c); MCR 3.950(D)(2)(d)(*iii*).

  - ❑ the juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming. MCL 712A.4(4)(d); MCR 3.950(D)(2)(d)(*iv*).

[3] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C).

- ❑ the adequacy of the punishment or programming available in the juvenile justice system. MCL 712A.4(4)(e); MCR 3.950(D)(2)(d)(*v*).

- ❑ the dispositional options available for the juvenile. MCL 712A.4(4)(f); MCR 3.950(D)(2)(d)(*vi*).

❑ The court may also consider any stipulation by the defense to a finding that the best interests of the juvenile and the public support a waiver. MCR 3.950(D)(2)(e).

❑ Enter a written order either granting or denying the motion to waive jurisdiction and state on the record or in a written opinion findings of fact and conclusions of law forming the basis for entering the order. MCL 712A.4(8); MCR 3.950(E)-(F).

Grant of Waiver Motion

❑ Enter a written order granting the motion to waive jurisdiction and transferring the matter to the appropriate court having general criminal jurisdiction for arraignment of the juvenile on the information. MCL 712A.4(8); MCL 712A.4(10); MCR 3.950(E)(1)(a).

- ❑ **Note:** A finding of probable cause at the first-phase hearing satisfies the requirements of, and is the equivalent of, a preliminary examination in a court of general criminal jurisdiction. MCL 712A.4(10).

❑ Make findings of fact and conclusions of law forming the basis for entry of the waiver order either on the record or in a written opinion. MCR 3.950(E)(1)(b).

❑ Advise the juvenile, orally or in writing, that:

- ❑ he/she is entitled to appellate review of the decision to waive jurisdiction. MCR 3.950(E)(1)(c)(*i*).

- ❑ he/she must seek review of the decision in the Court of Appeals within 21 days of the order to preserve the right to appeal. MCR 3.950(E)(1)(c)(*ii*).

- ❑ if he/she is financially unable to retain an attorney, one will be appointed to represent the juvenile on appeal. MCR 3.950(E)(1)(c)(*iii*).

❑ Send, without cost, a copy of the order and a copy of the written opinion or transcript of the court's findings and conclusions, to the court having general criminal jurisdiction. MCR 3.950(E)(1)(d).

- ❑ Transfer the juvenile to the adult criminal justice system, where he/she is subject to the same procedures used for adult criminal defendants. MCR 3.950(E)(2).

  - ❑ **Note:** It is required that the juvenile be kept separate and apart from adult prisoners following waiver. MCR 3.950(E)(2); MCL 764.27a.

Denial of Waiver Motion

- ❑ If the waiver motion is denied, make written findings or place them on the record. MCR 3.950(F).

- ❑ Send a transcript of the findings, or, if a written opinion is prepared, a copy of the written opinion, to the prosecuting attorney and the juvenile, or the juvenile's attorney, upon request. MCL 712A.4(9); MCR 3.950(F).

- ❑ If the juvenile is detained and the trial of the matter in the family division has not started within 28 days after entry of the order denying the waiver motion, and the delay is not attributable to the defense, the court must forthwith order the juvenile released pending trial without requiring that bail be posted, unless the juvenile is being detained on another matter. MCR 3.950(F).

For court forms related to juvenile actions, see the One Court of Justice website.