

Juvenile Justice Benchbook (Revised Edition)

May-August 2009 Updates

Updates have been issued for the Juvenile Justice Benchbook. A summary of each update appears below. The updates have been integrated into the website version of the benchbook; consequently, some of the page numbers may have changed. Clicking on the links below will take you to the page(s) in the benchbook where the updates appear. The text added or changed in each update is underlined.

Chapter 3: Custody & Detention Pending Preliminary Hearing or Arraignment

[3.3\(A\) Obtaining Custody of a Juvenile Without a Family Division Order](#)

Effective July 1, 2009, ADM 2008-29 amended MCR 3.903 to define the term “juvenile guardian” and to include that term in the definition of a guardian.

“‘Guardian’ means 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.” 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).

Chapter 6: Notice and Time Requirements in Delinquency Proceedings

[6.2 Definitions of Parent, Guardian, Legal Custodian, and Juvenile Guardian](#)

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Chapter 7: Pretrial Proceedings in Delinquency Cases

7.6 Selected Search and Seizure Issues

Searching a student's bra and underwear for drugs without "any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that [the student] was carrying [the drugs] in her underwear," was constitutionally unreasonable and required reversal. *Safford Unified School Dist #1 v Redding*, 557 US ___, ___ (2009).

Chapter 10: Juvenile Dispositions

10.13(H) Restitution

Effective July 1, 2009, 2009 PA 28 amended MCL 780.794 to allow a crime victim to recover the replacement value of his or her damaged, lost, or destroyed property "if the fair market value of the property cannot be determined or is impractical to ascertain."

Chapter 11: Paying the Costs of Juvenile Proceedings

11.7 Orders for Reimbursement of Attorney Fees

Defendants do not have a constitutional right to an ability-to-pay assessment before the court imposes a fee for a court-appointed attorney. *People v Harvey Jackson*, 483 Mich 271, 290 (2009), overruling *People v Dunbar*, 264 Mich App 240 (2004), to the extent it held otherwise. However, before a trial court attempts to enforce the imposition of a court-appointed attorney fee, it must provide notice to the defendant and give the defendant an opportunity to challenge the enforcement on the basis of indigency. *Harvey Jackson*, *supra* at 292.

Chapter 18: Designated Case Proceedings—Pleas & Trials

18.3 Waiver of the Right to Jury Trial

A "defendant's trial counsel's statement that [the] defendant agreed to waive his [or her] jury trial right along with the written waiver signed only by counsel does not rise to the level of a valid waiver." *People v Cook*, ___ Mich App ___, ___ (2009). A valid waiver requires some record evidence that the defendant knowingly and voluntarily waived the right to a jury trial. *Cook*, *supra* at ___; MCR 6.402(B).

Chapter 25: Recordkeeping & Reporting Requirements

25.2 Access to Family Division Records and Confidential Files

Effective July 1, 2009, MCR 3.903 was amended to include “information regarding the identity or location of a . . . juvenile guardian” in the list of materials in an individual’s social file.

25.18(A) Recordkeeping Requirements of the Sex Offenders Registration Act

Despite testimony that the victim had recanted her allegations that the defendant had touched her underneath her underwear on several occasions, the charge of aggravated assault constituted a sexual offense under MCL 28.722(e)(xi) where the “[d]efendant admitted to touching the victim in a harmful way over a period of approximately a year and a half and the victim’s description of the touching, which was the only basis for establishing how the touching occurred, indicated it was of a sexual nature.” *People v Jeffry Anderson*, 284 Mich App 11, 15 (2009).

“‘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. MCR 3.903(A)(14). “‘Guardian’ means 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.” 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).

The federal regulations implementing the Juvenile Justice & Delinquency Prevention Act, 42 USC 5601 et seq., provide useful definitions when determining what constitutes “any verbal, visual, or physical contact with an adult prisoner.” 28 CFR 31.303(d)(1)(i) states in relevant part:

“The term ‘contact’ includes any physical or sustained sight or sound contact between juvenile offenders in a secure custody status and incarcerated adults, including inmate trustees. A juvenile offender in a secure custody status is one who is physically detained or confined in a locked room or other area set aside or used for the specific purpose of securely detaining persons who are in law enforcement custody. Secure detention or confinement may result either from being placed in such a room or area and/or from being physically secured to a cuffing rail or other stationary object. Sight contact is defined as clear visual contact between incarcerated adults and juveniles within close proximity to each other. Sound contact is defined as direct oral communication between incarcerated adults and juvenile offenders.”

B. Obligations of Officer After Notification or Attempt to Notify Parent, Guardian, or Legal Custodian

MCR 3.933(A)(1)–(3) discuss in detail the procedures that must be followed by an officer following the notification or attempt to notify the juvenile’s parent, guardian, or legal custodian. These rules state in part:

“(A) Custody Without Court Order. When an officer apprehends a juvenile for an offense without a court order and does not warn and release the juvenile, does not refer the juvenile to a diversion program,* and does not have authorization from the prosecuting attorney to file a complaint and warrant charging the juvenile with

*See Section 4.4 for a detailed explanation of the Juvenile Diversion Act.

6.1 General Rules in Delinquency Proceedings

A summons is required for trials, and it must be personally served on the juvenile and parent or parents, guardian, or legal custodian having physical custody of the juvenile. MCR 3.920(B)(2)(a). Substituted service is appropriate in limited circumstances where personal service is impracticable or cannot be achieved. MCR 3.920(B)(4)(b)–(c).

A notice of hearing may be used to notify parties of all other proceedings. MCR 3.920(A)(1). After a party's first appearance before the court, subsequent notices of proceedings and pleadings shall be served on that party or, if the party has an attorney, on the attorney for the party. MCR 3.920(F).

“Judgments and orders may be served on a person by first class mail to the person's last known address.” MCR 3.925(C).

6.2 Definitions of Parent, Guardian, Legal Custodian, and Juvenile Guardian

“Parent” means a minor's mother, father, or both. MCR 3.903(A)(18). “‘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. MCR 3.903(A)(14). “‘Guardian’ means 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.” 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).

Definition of “father.” For purposes of delinquency proceedings, a “father” 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 child was conceived or born during a marriage but is not the issue of that marriage. MCR 3.903(A)(7)(a) and *In re Montgomery*, 185 Mich App 341, 343 (1990);
- Who legally adopts the minor. MCR 3.903(A)(7)(b);

App 306, 315 (1997), citing *People v Grady*, 193 Mich App 721, 724 (1992). If a parent has common authority (joint access and control) over a child's bedroom, a parent may validly consent to a search of the bedroom. *Goforth, supra* at 316.

Warrantless searches of students by school officials. In *TLO, supra* 469 US at 333, the United States Supreme Court, in a plurality opinion, first held that the Fourth Amendment's prohibition of unreasonable searches and seizures applies to public school officials. A plurality of the Court also held that evidence seized as a result of a warrantless search by public school officials may be admitted in a delinquency proceeding if the official had a "reasonable suspicion" that the search would uncover evidence of a violation of school disciplinary rules or a violation of law. The scope of the search must be reasonably related to the objectives of the search and not overly intrusive given the age and sex of the student and the alleged violation. *Id.* at 341–42. See also *People v Mayes (After Remand)*, 202 Mich App 181, 201 (1993) (Corrigan, PJ, concurring) (under *TLO*, an assistant principal could have legally searched a car parked in a school parking lot where the assistant principal had reliable information that a gun was in the car).

Prior to *TLO*, the Michigan Court of Appeals addressed the issue of searches by school officials in *People v Ward*, 62 Mich App 46 (1975). The Court of Appeals adopted a "reasonable suspicion" standard for such searches. The Court stated the following rationale for its holding:

"School officials stand in a unique position with respect to their students. They possess many of the powers and responsibilities of parents to enable them to control conduct in their schools. . . . At times, the powers and responsibilities regarding discipline and the maintenance of an educational atmosphere may conflict with fundamental constitutional safeguards. A student cannot be subjected to unreasonable searches and seizures. On the other hand, the public interest in maintaining an effective system of education and the more immediate interest of a school official in protecting the well-being of the students entrusted to his supervision against the omnipresent dangers of drug abuse must be considered. In striking a balance, we adopt a 'reasonable suspicion' standard." *Id.* at 50–51 (citations omitted).

A "reasonable suspicion" is based upon the totality of the surrounding circumstances and requires "articulable reasons" and "a particularized and objective basis for suspecting the particular person." *United States v Cortez*, 449 US 411, 417–18 (1981).

Searching a student's bra and underwear for drugs without "any indication of danger to the students from the power of the drugs or their quantity, and

any reason to suppose that [the student] was carrying [the drugs] in her underwear,” was constitutionally unreasonable and required reversal. *Safford Unified School Dist #1 v Redding*, 557 US _____, _____ (2009). In *Safford*, after searching the student’s outer clothing and backpack, the assistant principal then had the student’s bra and underwear searched based on information that she was carrying and distributing a forbidden prescription medicine and over-the-counter medications. *Safford, supra* at _____. Because the specific drugs that the assistant principal was searching for had a limited threat to students (they were common pain relievers), and because there was no reason to suspect that the student hid the drugs in her underwear, the United States Supreme Court concluded that “the content of the suspicion failed to match the degree of intrusion.” *Id.* at _____. The Court went on to state:

**New Jersey v TLO*, 469 US 325 (1985).

“We do mean [] to make it clear that the *T.L.O.** concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.” *Safford*, 557 US at _____.

In *Beard v Whitmore Lake School District*, 402 F3d 598 (CA 6, 2005), school officials conducted a strip search of all of the students in a gym class in an attempt to find money that was reported missing. The Sixth Circuit held that the searches violated the Fourth Amendment because “[t]he highly intrusive nature of the searches, the fact that the searches were undertaken to find missing money, the fact that the searches were performed on a substantial number of students, the fact that the searches were performed in the absence of individualized suspicion, and the lack of consent, taken together, demonstrate that the searches were not reasonable.”

Warrantless searches of lockers and lockers’ contents by school officials and law enforcement officers. The United States Supreme Court in *TLO* did not address the issue of whether a public school student has a reasonable expectation of privacy in school lockers. *TLO, supra* 469 US at 337, n 5. In Michigan, this issue is addressed in MCL 380.1306. MCL 380.1306(1) states that “[a] pupil who uses a locker that is the property of a school district, local act school district, intermediate school district, or public school academy is presumed to have no expectation of privacy in that locker or that locker’s contents.”

MCL 380.1306(2)–(5) require school boards and boards of directors of public school academies to adopt policies on searches of pupil lockers and lockers’ contents. MCL 380.1306(2) requires that pupils and their parents receive copies of the policies. Pursuant to a search policy, a public school principal or designee may search a pupil’s locker or a locker’s contents at

In an appropriate case, the amount of the victim’s loss may include prejudgment interest. In *People v Law*, 459 Mich 419, 424 (1999), the Michigan Supreme Court held that where the defendant pled guilty to criminal desertion and abandonment, the trial court properly ordered interest on unpaid child support and medical bills under the CVRA. The Court also stated that the appropriate interest rate may be determined by reference to a “closely related statute” (the Support and Visitation Enforcement Act in this case); however, where there is no “closely related statute,” the court has discretion to set a reasonable rate of interest. *Id.* at 429 n 12.

Pending civil litigation between the victim and offender is an insufficient reason for ordering less than full restitution. The amount of restitution paid to the victim must be set off against any amount the victim recovers as compensatory damages in a civil suit against the defendant or juvenile. *People v Avignone*, 198 Mich App 419, 423 (1993).*

*See Section 10.12(T), below (required set off of amounts later recovered by victim).

H. Calculating Restitution Where the Offense Results in Property Damage, Destruction, Loss, or Seizure

If an offense results in damage to or loss or destruction of a victim’s property, or if it results in the seizure or impoundment of a victim’s property, the court shall order the juvenile to pay restitution to the victim. The relevant statutory provisions, MCL 780.794(3)(a)–(c), determine the amount of restitution to be ordered in such cases. These provisions state that the court may order the juvenile to do one or more of the following:

“(a) Return the property to the owner of the property or to a person designated by the owner.

“(b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (i) or (ii), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:

“(i) The fair market value of the property on the date of the damage,

loss, or destruction. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.

“(ii) The fair market value of the property on the date of disposition. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.

“(c) Pay the costs of the seizure or impoundment, or both.”

Thus, the court may order the juvenile to return the property to the victim or the victim’s designee. If return of the property is impossible, impractical, or inadequate, the court may order the juvenile to pay the value of the property on the day it was damaged, lost, or destroyed (if the value of the property has depreciated or remained the same) or the value of the property at disposition (if the property has appreciated in value), less the value of any property returned to the victim. In addition, the court may order the juvenile to pay the costs of seizure, impoundment, or both.

In *People v Guajardo*, 213 Mich App 198, 199–200 (1995), the defendant was ordered to pay \$28,105.00 in restitution for jewelry that he stole from a retail jewelry store. This amount, which was uncontroverted by any credible evidence, represented the retail value of the stolen jewelry. The Court of Appeals upheld the restitution order, finding that the victim lost the replacement value of the jewelry plus expected profit from its sale, and the victim’s profit would have been used to pay operating expenses and employee wages.

I. Calculating Restitution Where the Offense Results in Physical or Psychological Injury, Serious Bodily Impairment, or Death

Expenses related to physical or psychological injury. If an offense results in physical or psychological injury to a victim, the court shall order the juvenile to pay restitution for professional services and devices, physical and occupational therapy, lost income, medical and psychological treatment for the victim’s family, and homemaking and child care expenses. MCL 780.794(4)(a)–(e) state that the court may order the juvenile to do one or more of the following, as applicable:

“(a) Pay an amount equal to the reasonably determined cost of medical and related professional services and devices actually incurred and reasonably expected to be incurred relating to physical and psychological care.

“(b) Pay an amount equal to the reasonably determined cost of physical and occupational therapy and rehabilitation actually incurred and reasonably expected to be incurred.

“(c) Reimburse the victim or the victim’s estate for after-tax income loss suffered by the victim as a result of the offense.

“(d) Pay an amount equal to the reasonably determined cost of psychological and medical treatment for members

impose upon a criminal defendant “[t]he expenses of providing legal assistance to the defendant.” See also *People v Nowicki*, 213 Mich App 383, 385–88 (1995), where the Court of Appeals held that an order for reimbursement of fees for a court-appointed attorney was not a part of the judgment of sentence and thus did not represent “costs,” which may only be imposed pursuant to statutory authority. The Court of Appeals found that a trial court has the independent authority to order a defendant to defray the public cost of representation.

Defendants do not have a constitutional right to an ability-to-pay assessment before the court imposes a fee for a court-appointed attorney. *People v Harvey Jackson*, 483 Mich 271, 290 (2009), overruling *People v Dunbar*, 264 Mich App 240 (2004), to the extent it held otherwise. However, before a trial court attempts to enforce the imposition of a court-appointed attorney fee, it must provide notice to the defendant and give the defendant an opportunity to challenge the enforcement on the basis of indigency. *Harvey Jackson, supra* at 292. In conducting the ability-to-pay assessment, “[t]he operative question . . . will be whether a defendant is indigent and unable to pay at that time or whether forced payment would work a manifest hardship on the defendant at that time.” *Id.* at 293.



18.3 Waiver of the Right to Jury Trial

A criminal defendant has the right to be tried by a jury, or may, with the consent of the prosecutor and approval by the court, elect to waive that right and be tried before the court without a jury. MCR 6.401 and MCL 763.3.

A defendant's constitutional rights to trial by jury are contained in Const 1963, art 1, § 20, and US Const, Am VI. However, a criminal defendant has no constitutional or substantive right to insist upon a nonjury trial. *People v Kirby*, 440 Mich 485, 494 (1992) (requiring consent of prosecutor to waiver of jury trial does not violate due process).

Under the Michigan Constitution, the right to a jury trial applies in both felony and misdemeanor cases. *People v Harris*, 45 Mich App 217, 218–19 (1973).

In designated cases, the court may not accept a waiver of trial by jury until after the juvenile has been offered an opportunity to consult with a lawyer. MCR 3.954. In delinquency cases, a jury trial is automatically waived unless the juvenile makes a demand for a jury trial.

Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding. MCR 6.402(B).

A “defendant’s trial counsel’s statement that [the] defendant agreed to waive his [or her] jury trial right along with the written waiver signed only by counsel does not rise to the level of a valid waiver.” *People v Cook*, ___ Mich App ___, ___ (2009). A valid waiver requires some record evidence that the defendant knowingly and voluntarily waived the right to a jury trial. *Cook, supra* at ___; MCR 6.402(B). In *Cook*, the defendant did not sign a written waiver statement, the trial court did not inform the defendant of his right to a jury trial, and the defendant objected to the trial court’s statement that he had waived his right to a jury trial. *Cook, supra* at ___. The Court of Appeals concluded that these circumstances amounted to a violation of the defendant’s Sixth Amendment right to a jury trial and stated that “a constitutionally invalid jury waiver is a structural error requiring reversal.” *Id.* at ___.

The waiver procedure in MCR 6.402(B) differs from that contained in MCL 763.3(2), which requires a writing signed in open court by the defendant. The statute has been superseded by the court rule. *People v James*, 184 Mich App 457, 464 (1990).

(iii) the testimony taken during a closed proceeding pursuant to MCR 3.925(A)(2) and MCL 712A.17(7);*

*See Section 7.12.

(iv) the dispositional reports pursuant to MCR 3.943(C)(3)* and MCR 3.973(A)(4)(c);

*See Section 10.6.

(v) fingerprinting material required to be maintained pursuant to MCL 28.243;*

*See Section 25.12, below.

(vi) reports of sexually motivated crimes, MCL 28.247;

(vii) test results of those charged with certain sexual offenses or substance abuse offenses, MCL 333.5129;*

*See Section 25.20, below.

“(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 Human Services records;

(v) correspondence;

(vi) victim statements;

(vii) information regarding the identity or location of a foster parent, preadoptive parent, relative caregiver, or juvenile guardian.”

Petitions that the court has not authorized for filing do not fall within the definition of “records” in MCR 3.903(A)(25)* and are therefore “confidential files.”

*See Section 25.1, above, for the definition of “records.”

If a document from a juvenile’s confidential or “social” file is admitted into evidence, that document becomes a “record,” as the definition of “record” includes “exhibits.” MCR 3.903(A)(25).

Access to confidential files. MCR 3.925(D)(2) provides that confidential files shall only be made accessible to persons found by the court to have a legitimate interest. In determining whether a person has a legitimate interest, the court must consider:

required to register under SORA because MCL 752.795 is not a “listed offense.” The Court of Appeals cited *People v Meyers*, 250 Mich App 637 (2002), and held that the underlying factual basis for the defendant’s conviction under MCL 752.795 constituted a sexual offense for purposes of SORA registration. According to the *Golba* Court:

“the evidence introduced at trial supported the trial court’s findings that defendant violated the school’s computer acceptable use policy by downloading pornography on his school computer and that he viewed the pornography on the computer in the presence of a 16-year-old female student. The evidence also supported the trial court’s finding that defendant used the computer to solicit sex from the student. The student received sexually explicit e-mails from an e-mail address that defendant admitted was his. The e-mails, which were sent to the student’s e-mail address, graphically described sexual acts and contained explicit references to oral sex and sexual intercourse.” *Golba, supra* at 611-612.

Because the defendant’s computer use conviction was based on conduct involving sex and a 16-year-old student, the *Golba* Court concluded that the defendant’s offense “by its nature constitute[d] a sexual offense against an individual who is less than 18 years of age,” and therefore, that MCL 28.722(e)’s catch-all provision, MCL 28.722(e)(xi), required the defendant to register under SORA.

See also *People v Jeffrey Anderson*, 284 Mich App 11, 15 (2009) (despite testimony that the victim had recanted her allegations that the defendant had touched her underneath her underwear on several occasions, the charge of aggravated assault constituted a sexual offense under MCL 28.722(e)(xi) where the “[d]efendant admitted to touching the victim in a harmful way over a period of approximately a year and a half and the victim’s description of the touching, which was the only basis for establishing how the touching occurred, indicated it was of a sexual nature”).

“[I]n determining whether the violation ‘by its nature constitutes a sexual offense against an individual who is less than 18 years of age[,]’ the court must consider the particular facts of a violation. MCL 28.722(e)(xi); *People v Althoff*, ___ Mich App ___, ___ (2008), citing *People v Golba*, 273 Mich App 603, 610-611 (2007).

Note: The addition of a new (iii)* to MCL 28.722(e) changed the numeric designation of subsequent paragraphs in the statute—existing (iii) is now (iv), (iv) is now (v), etc. The substantive content of the remaining paragraphs did not change. The paragraph numbering in MCL 28.722(e) will be updated when the benchbook is reprinted in its entirety.

*2005 PA 301, effective February 1, 2006. See the February 2006 update to page 522.

