FINAL REPORT

of the

Quality & Depth of Hearings Committee

Michigan Court Improvement Program Statewide Taskforce

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QUALITY AND DEPTH OF HEARINGS COMMITTEE RECOMENDATIONS

I. INTRODUCTION

In 2003, the federal government required each state Court Improvement Program (CIP) to conduct a reassessment of its state laws and performance and then adopt a strategic plan to improve the state's handling of child abuse and neglect litigation and children in foster care. The Michigan State Court Administrative Office commissioned the Muskie School of Public Service and the American Bar Association to conduct the reassessment. They submitted their final reassessment report in 2005.

The CIP Quality and Depth of Hearings Committee was charged with responding to Chapter Four of the reassessment report, and to the related recommendations for changes in the Michigan system.

The committee generally agrees with the proposition that child protection proceedings should be assigned to a well-trained jurist who has a full-time, long-term assignment to handle such cases. The jurist should also have adequate time available to devote to the caseload, and a management information system designed to assure timely case processing and track meaningful outcomes.

The report says, at page 12, that "[o]verall, Michigan courts are better organized to handle child protective proceedings than those of most other states." We agree with that conclusion, but also are committed to using the material in the reassessment report to further improve the handling of these cases.

The committee recognizes that complying with some of the recommendations, like those pertaining to judicial workload and judicial assignment policies will be long-term projects. We have elected to focus our initial efforts on a careful analysis of what should be accomplished before, during, and after each type of hearing that occurs in a child protective proceeding. We chose to build on the existing procedural framework set forth in our statutes and court rules, identifying best practices, and recommending procedural changes that should result in substantial improvements. Our recommendations are not meant to be a "bench guide" or procedural checklist for conducting each type of hearing; rather, we chose to respond to specifics from the reassessment report and to highlight other areas where practice could be improved.

The reassessment report also focuses on the relationship between various parties who participate in child protective proceedings. We agree that the system will provide the best outcomes for children when all parties have a good understanding of their respective roles, an appreciation for the roles of other parties, and a commitment to working together to achieve the best outcomes possible. Toward that end, we have made occasional recommendations directed to parties who are not part of the court system.

As experienced professionals, we understand that some of the best practices we recommend will be difficult to implement because of resource limitations. In those cases, we set forth goals to strive for, even if they can be only partially attained now, or fully attained only over time.

II. CONSENSUS BUILDING/SYSTEM IMPROVEMENT

The committee recommends that in each jurisdiction, a Family Division judge should convene a workgroup to meet semiannually and discuss the processing of child protective proceedings. The workgroup should consist of representatives from the Department of Human Services (DHS), local private agencies, the prosecutor's office or attorney general's office, defense bar, lawyer guardians ad litem, Friend of the Court, adults who were previously under court jurisdiction, the Foster Care Review Board, and Community Mental Health where appropriate. If there are other interested agencies or systems in the jurisdiction, such as Court Appointed Special Advocates, they should also be invited. These multi-disciplinary meetings will allow the group to address procedural concerns and develop solutions. Equally as important, the meetings will help build a rapport and establish trust among the child welfare professionals in each community.

III. BEST PRACTICES FOR COURT HEARINGS

A. Preliminary Hearing

The court must hold a preliminary hearing if the child has been taken into temporary protective custody, or the petitioner is requesting that the child be taken into custody. MCR 3.965 governs the preliminary hearing process. The committee recommends the following as best practices tips:

1. The petitioner should make repeated attempts, if necessary, to secure the attendance of the parent, guardian, or custodian at the initial court appearance.

2. If any of the parties are incarcerated, the court should assist in securing their participation by telephone. Refer to the procedures in the "Incarcerated Parties" section of this document (p. 36).

3. At the beginning of the hearing, the court should ascertain the identity of the parties present, determine if venue is proper, and ask if the child or either parent is a member of an Indian tribe or if the child is under Tribal court jurisdiction or resides on a reservation. If the child is, or may be, eligible for tribal membership, refer to the procedures in the "Indian Children" section of this document (p. 36). The court should also verify the accuracy of the respondent's address and telephone number and inquire if anyone has information about the identity, address, or telephone number of any party for whom that information is not set forth in the petition.

4. The court should take testimony about the tentative identity of the child's father if the child has no legal father. Best practice at this stage may include utilizing the Absent Parent Protocol.

5. The court must advise the respondent of the right to have counsel at this hearing, and any subsequent hearing. Additionally, the court should inform the respondent that he or she may be ordered to reimburse the funding unit, fully or partially, for the costs of providing court-appointed counsel. Note that *putative* fathers are not entitled to court-appointed counsel.[1]

6. The court should determine, on the record, whether the case should be dismissed, referred to alternative services, or go forward on the formal judicial calendar.

7. The court should advise the respondent of his or her right to trial and determine how the respondent wishes to plead. If the respondent elects to admit the allegations, the court should make findings on the record or in writing as to what facts are considered established. These findings can be considered *res judicata* for subsequent proceedings in the case. Refer to the procedures in the "Pleas" section of this document (p. 8-11).

8. If the allegations in the petition only pertain to one parent, the parent against whom no allegations are made is only a "party" to the child protection proceeding, as defined by MCR 3.903(A)(19)(b). He or she is not a "respondent." The court cannot accept admissions from a non-respondent parent.[2] If, after the court assumes jurisdiction over the child, the petitioner files a supplemental petition against a parent who was originally a non-respondent parent, the petitioner must prove the allegations of the supplemental petition by legally admissible evidence.[3]

9. The court should inquire if there is a child support order already established for the child who is the subject of the proceeding. Refer to section VI "Child Support" in this document (p. 37).

10. If it is necessary to adjourn the preliminary hearing to secure the attendance of parties or counsel, the adjourned hearing must be conducted within 14 days. Any amendments to the petition should be filed before the adjourned hearing takes place.

11. At the conclusion of the preliminary hearing, the court should seek input from all parties about the temporary orders that will be in effect until the next hearing.

12. The order following the preliminary hearing *must* address the following issues:

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[1] MCL 712A.17c (4) states that a "respondent" has the right to court-appointed counsel. MCR 3.915 defines "respondent" to include a "parent". The definition of "parent" in MCR 3.903 (A)(7) does not include a putative father.

[2] *In re SLH*, 277 Mich App 622, 669-670; 747 NW2d 547 (2008).

[3] *In re CR*, 250 Mich App 185, 201-2002; 646 NW2d 506 (2001).

- **Administration.** Who will develop a case plan and assure that temporary orders are enforced.[4]

- **Custody.** Who will have custody of the child until the next hearing. If the court enters a temporary custody order that conflicts with an existing order for custody or parenting time, the new order should specify who will provide notice to the court that issued the prior order. [5]

- **Parenting Time.** If the child is removed from home, the order should specify parenting time terms. The court should operate from the presumption that both parents are entitled to parenting time, so long as it does not pose an undue risk of harm to the child's physical or emotional well-being. Restrictions on parenting time should not be unduly burdensome. If a parent violates a precondition or restriction regarding parenting time, subsequent visits should not be automatically terminated; rather, the court should exercise its discretion as to suspending or continuing parenting time. The committee agrees with the position advocated by the Michigan Association for Infant Mental Health that it is especially important to maintain parent-child contact for infants and young children. The frequency of parenting time can sometimes be increased by using volunteers to supervise visits on holidays or outside normal working hours. Parents should be given an opportunity to identify potential visitation supervisors, subject to the approval of the caseworker and the L-GAL. In the event that siblings are not placed together, the court should ensure that the siblings have the opportunity for contact with each other as the case progresses. If a child has a close relationship with a relative other than a parent, the court may authorize, in its discretion, visits with that relative.

- **Reasonable Efforts.** If a child is removed from home, the court must make findings that "reasonable efforts" have been made to prevent the removal (or "active efforts" to prevent the breakup of the Indian family if the ICWA applies). Appendix A describes the process of making a reasonable efforts finding. The court has 60 days from the date of removal to make this finding. If the court does not make this finding within 60 days, federal Title IV-E funding cannot be used to fund any portion of the case.

  If the court believes that the agency (usually DHS) should make additional efforts before removing the child from home, the court should not order removal of the child and should order the agency to provide additional services to the family.

- **Reasonable Efforts Not Required**. In certain egregious cases, the court is not required to find that the agency made reasonable efforts to maintain the child in the home. In certain aggravated circumstances, Michigan and federal

[4] For a case to be eligible for funding under Title IV-E, DHS must provide supervision.
[5] MCR 3.205.

statutes[6] allow the court to find that no reasonable efforts to prevent removal are required. Under those circumstances, the court must hold a permanency planning hearing within 28 days of that finding, even if the adjudication hearing has not yet occurred. This expedited permanency planning hearing should be scheduled before the end of the preliminary hearing to ensure it is scheduled for a date within the next 28 days.

- **Contrary to the Welfare**. The court must also make a "Contrary to Welfare" finding, citing the specific reasons why continued placement of the child with the parent is contrary to the child's welfare.

- **Schedule the Next Hearing or Case Events.**

13. The order **may** also address the following issues if necessary or appropriate:

- Continuity of necessary medical care and preservation of the child's existing educational program, to the greatest degree possible.

- Removal of a non-parent adult from the child's home. [7]

- Other preliminary orders affecting adults, including their participation in evaluations. [8]

- Any necessary examinations of the child. [9]

- Orders assigning child support or requiring reimbursement for the costs of placement or other court services

- Orders regarding conditions for interviewing a child who is a subject of the proceeding.

- Services to be provided to the child, such as medical treatment or counseling.

- Orders regarding adults releasing information or participating in services. [10]

- Home studies of relatives who may be able to provide a placement for the child.

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[6] MCL 712A.19a(2), MCR 3.976(B)(1); 42 USC 671(a)(15)(D); 45 CFR 1356.21(b)(3).
[7] MCL 712A.13a (4).
[8] MCL 712A.6.
[9] MCL 712A.12, MCR 3.923(B).
[10] Orders directed to adults at any pretrial stage of the proceeding should be based on their consent, unless required to assure the welfare of the child, as stated in MCL 712A.6. At or after the dispositional hearing, the court has broad authority to issue orders to adults. See *In re Macomber*, 436 Mich 386; 461 NW2d 671 (1990) and MCL 712A.18 (g).

- Writs to secure the attendance of an incarcerated party who should attend the next hearing.

- An order changing venue, e.g., transferring the case to a party's county of residence.[11]

14. At the conclusion of the preliminary hearing, the court should advise the respondent(s) that DHS has an obligation to produce an initial services plan within 30 working days, and that the respondent may, but is not required to, participate in services.

15. If the preliminary hearing is conducted by a referee, the referee should advise the parties, at the conclusion of the hearing, of their right to have the referee's recommendations reviewed by a judge. [12]

16. The judicial officer, at the conclusion of the preliminary hearing, should advise the respondents of their right to a jury trial. [13]

B. Pleas

A respondent may consent to the court's jurisdiction at the preliminary hearing or at a later date. After such a plea has been accepted, the court's authority to enter orders directed to adults is governed by MCL712A.18(g), and by the court's determination of what orders are necessary to effectuate its jurisdiction. Courts should follow the procedures set forth in this section whenever a plea is taken.

1. Admission by one party

A petition in a child protective proceeding may contain allegations against one parent but not the other, or allegations against both parents. If there are allegations against both parents, one parent may admit the allegations that pertain to him or her, and the court may take jurisdiction over the child without the other parent admitting to the allegations that pertain to him or her.[14] In such cases, the admitting parent's plea must be sufficient to prove a jurisdictional ground. [15]

2. Plea of admission

MCR 3.971 governs the procedures for pleas of admission or no contest.

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[11] MCL 712A(2)(d); MCR 3.926.
[12] MCR 3.913(c).
[13] MCR 3.911(B).
[14] *In re CR* 250 Mich App 185; 646 NW2d 506 (2002).
[15] *In re SLH*, 277 Mich App 662; 747 NW2d 547 (2008).

The court must assure that the admitting party and, if the party is represented, his or her attorney, is present at the hearing. The child's L-GAL must also be present. The prosecutor or attorney for the petitioner should also be present. If the admitting party is not represented, the court should advise him or her, on the record, of the right to be represented by counsel, including court appointed counsel for an indigent party.

The court should assure that the plea is voluntary. This means that the court should inquire if any threats or promises have been made to induce or encourage the respondent to admit the allegations. If the plea agreement involves amending the petition, a resolution of criminal charges, or other agreement, the court should place the details of the agreement on the record.

The court should determine if the respondent understands the implications of admitting the allegations with the following procedural statements and questions:

- Advise the respondent of his or her trial rights.
- Ask the respondent if he or she is aware that findings resulting from the plea could later be used as evidence in a proceeding to terminate parental rights.
- Ask the respondent if he or she has had an opportunity to discuss the plea with his or her attorney, and offer a recess or an adjournment to consult with the attorney if the respondent believes the previous opportunity to consult was not sufficient.
- Make inquiries to determine the respondent's general level of competence and understanding. This may include questions about the respondent's educational attainment, if they are subject to a guardianship, or any current use of drugs or alcohol.
- Ask the respondent's attorney if he or she believes the respondent understands the implications of making the admission.
- The court, petitioner's attorney, or the parent's attorney should ask the respondent questions that demonstrate a factual basis for the plea.
- Make a finding indicating which statutory ground applies, and additional findings of fact, in writing or on the record based on the respondent's testimony.
- The court may find that an adequate factual basis for jurisdiction exists even if the respondent has not admitted each individual allegation contained in the petition. But allegations that have not been adjudicated cannot be used as evidence in a

proceeding to terminate parental rights unless they are proven at that stage by legally admissible evidence.[16]

- Note on the face of the petition that the matter has been adjudicated, the date of the plea, and the identity of the judicial officer who took the plea.

- Determine whether to adjourn the case for disposition. If the child is in placement, the dispositional hearing must be held within 28 days.[17] If the court continues directly to disposition, all parties must be provided with a copy of the case service plan.

- If the case is adjourned for disposition, the court should inquire of the parties about the necessity for changes in any temporary orders. The same considerations should apply as at the conclusion of the preliminary hearing (p. 4-8 above). Custody and parenting time should be specified in a court order, unless that has been done in a previous order. The court should order necessary examinations or evaluations, with the results furnished to the court, the caseworker, and all counsel. The committee recognizes that not all service providers have contracts with DHS. In the event that the court determines that input from a service provider not under DHS contract would be beneficial, the court may order that service provider to provide services at court expense

3. Plea of no contest

A no contest plea requires the court to give the respondent the same advice of trial rights that must be given upon a plea of admission. The court should conduct similar inquiries to assure that the plea is voluntary and understood. The factual basis may be supplied by testimony or, with the consent of the respondent, by an offer of proof. The factual basis for a plea of no contest should address all of the allegations in the petition. The court must state on the record why it is appropriate to accept a plea of no contest. Typical reasons for accepting a plea of no contest include avoidance of civil or criminal liability, intoxication, or lack of memory. The committee recommends that the court only accept pleas of no contest when absolutely necessary.

4. Withdrawal of plea

A request to withdraw an admission should be in writing and by proper motion to the court. The rejection or approval of the request is within the court's sole discretion.

[16] For a discussion of this issue, see Chapter Ten of the Child Protective Proceedings Benchbook (Revised Edition), published by the Michigan Judicial Institute.
[17] MCR 3.973(c).

In deciding whether to allow a respondent to withdraw either an admission or a plea of no contest, the court should apply considerations similar to those used in criminal cases.[18] For example, MCR 6.310 provides the instances in which a criminal plea may be withdrawn. The criminal court rule procedures for withdrawing a plea provide good guidance because they are based on the court's ultimate discretion and contemplate issues of procedural fairness for all parties. The court rule provides that a defendant must file a motion establishing grounds to withdraw the plea. The court may order the plea withdrawn only in the interest of justice. Plea withdrawals can be allowed because of an error in the plea proceeding or because the plea was not knowingly or voluntarily made. In criminal cases, a court may not allow a defendant to withdraw a plea if the prosecution demonstrates reliance on the plea and where the prosecution would suffer substantial prejudice.

C. Pretrial Conference

MCR 3.922 and 2.401 govern pretrial procedures. The committee believes that best practice requires that a pretrial conference be held before every contested adjudication or hearing on a petition to terminate parental rights.

1. The court should hold a pretrial conference within 21 days after the respondent enters a denial.

2. A pretrial conference should be conducted on the record with all parties physically present or participating via telephone.

3. Any amendments to the petition should be filed before the pretrial conference.

4. Any documents that must be served on the parties, but have not yet been served, should be served at the pretrial conference.

5. If the children are subject to ICWA requirements, the court must review the petitioner's notice to the tribe, any tribal involvement, possible transfer to tribal court, and tribal placement preferences.

6. If the child does not have a legal father, the court should review the efforts to establish paternity. The court may order the agency to conduct further attempts to locate and legitimize a father. The Absent Parent Protocol urges that courts take leadership to "identify and involve absent parents…beginning with the earliest stages of a child protection case."

[18] See *In re Zelzach*, 180 Mich App 117; 446 NW2d 588 (1989); and MCR 6.310.

7. The court should direct the manner and method of service of the summons for trial.

8. Counsel should be prepared to specify the witnesses and exhibits they intend to produce at trial, unless the court directs a different schedule for exchanging witness lists and exhibits.

9. The court should set deadlines for discovery and for filing motions. It also should set hearing dates for motions.

10. The court should determine whether a jury trial is requested and should set a date for trial within 63 days from the date the child was removed, unless a longer time is required for an acceptable reason. [19]

11. Unrepresented parties should be advised or re-advised of their right to counsel.

12. The court should review temporary orders and modify them, if necessary, using the same criteria set forth above (p. 5-8).

13. The court should prepare a written order that records any agreements reached during the pretrial conference and issue a scheduling order that includes the dates of all scheduled hearings and due dates. The orders must be served on all parties.

D. Adjudication Phase

A petition requesting that the court take jurisdiction may contain allegations against one or both parents. An adjudication against one parent is sufficient to bring the children under the jurisdiction of the court, and gives the court the authority to issue orders.[20]

A substantial number of abuse/neglect cases are resolved by plea, rather than contested adjudication. For cases that *are* tried, trial procedure is similar in most respects to a trial in any other court. MCR 3.972 governs trial procedures.

Perhaps the most significant difference between abuse/neglect trials and other types of trials is the participation of the child's L-GAL. The LGAL's job is to consider the evidence and make a recommendation to the court regarding the child's best interests. MCL 712A.17d(1)(b) states the L-GAL should actively participate in all aspects of the

[19] MCR 3.972(A) sets forth the following reasons:
(1) stipulation of parties for good cause
(2) process cannot be completed
(3) adjournment is necessary to secure the testimony of presently unavailable witness

[20] *In re CR*, 250 Mich App 185; 646 NW2d 506 (2002); Note: The Michigan Supreme Court recently granted leave to appeal in another case to address the viability of the "one parent doctrine" espoused in *In re CR*. See *In re Mays Minors*, lv gtd 489 Mich 857; 795 NW2d 6 (2011).

litigation. At trial, this means the L-GAL may participate in jury selection, make opening and closing statements, present evidence, examine witnesses and offer objections.

A referee licensed to practice law may preside over a non-jury adjudication hearing.[21]

Absent good cause, MCR 3.972 requires that the trial commence within 63 days of a child's removal from the parents' care. If the trial is not commenced within that time, the court must make an appropriate finding about the reason for the delay and provide justification for continued placement unless the child has been released to a parent. **Because children have a different perception of time than adults do, prompt adjudication is presumed to be in the child's best interests.**

The following procedures assume that the contested case will be tried by a jury. If a jury is not trying the case, the same general procedures should be used, omitting the references to juries, jury procedures, and jury instructions:

1. Prior to the commencement of an adjudication hearing, the court should confirm that all interested parties have been served with a summons and copy of the petition. If personal service has not been achieved, the court should determine whether appropriate procedures have been used to secure alternative service under MCR 3.920(B)(4)(b).

2. If a respondent appears for trial without an attorney, the court should re-advise him or her about the right to legal counsel. The court should also advise the respondent of the right to court-appointed counsel for indigent parties.

3. If any of the parties are incarcerated, the court should make arrangements for the incarcerated party to be present. In cases where this is impossible or impractical, the court must allow the incarcerated party to participate by telephone.[22] The court should facilitate telephonic participation for prisoners who are incarcerated outside the state of Michigan.[23]

4. After the court has determined that the parties are present or have been properly served, the court must read the petition, unless the parties waive the reading. The reading of the petition serves two purposes: (1) it advises the respondent of the charges to be tried; and (2) if a jury will hear the case, reading the petition gives the jury a sense of what the case is about. Both purposes can be served by reading material parts of the petition, including the name(s) of the child(ren), the names of the parents, the statutory section(s) asserted as grounds for taking jurisdiction, and the specific factual allegations about the respondents' behavior. Many petitions contain statements about reasonable efforts to prevent removal, placement efforts,

[21] MCR 3.913(A)(2)(b).
[22] MCR 2.004.
[23] See FN 11 above; *In re Mason,* 486 Mich 142; 782 NW2d 747 (2010).

or the petitioner's opinion about what the court should do. The court should not read these statements, as they are not appropriate for a jury to consider and may be confusing.

5. Before a trial, the judge should meet briefly with the attorneys and unrepresented interested parties to discuss initial matters such as:

    - Which parts of the petition will be read and which, if any, will not be read.
    - Procedures for voir dire.
    - Entitlement to preemptory challenges.[24]
    - What preliminary instructions the court will give, before and after voir dire.
    - Order of proof and argument.
    - Whether the children should be present in court during the trial.
    - Any limitations on evidence resulting from a pretrial conference or motions in limine. If a party invokes the "tender years" exception to the hearsay rule, or requests special accommodations for a witness under MCL 712A.17b, those matters should be resolved prior to trial. The procedures set forth in the statute should be used to avoid trauma the child might experience as a result of having to personally participate in the trial.
    - Marking of exhibits and stipulations to admit exhibits, if any.

6. Adjudication hearings are open to the public unless the court finds that a portion of the hearing should be closed to protect a victim or a juvenile witness.[25] The court should excuse the jury to hear objections to evidence that might confuse the jury or expose jurors to prejudicial material.

7. Prior to closing statements, the court should confer with the attorneys and unrepresented parties regarding final jury instructions. If the court denies a request to give a special instruction or modify a special instruction, counsel should be allowed an opportunity for argument and objection on the record out of the presence of the jury. Each party should be offered the opportunity to submit a brief "theory of the case" to be read as part of the final instructions.

8. A proposed verdict form should be prepared and presented to the parties. At the conclusion of the proofs, the L-GAL is entitled to make a recommendation as to what statutory grounds, if any, have been proven. As best practice, the committee

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[24] MCR 2.511(E) states that two or more parties on the same side are considered a single party for purposes of peremptory challenges unless they have "adverse interests." Best practice is to allow each parent three preemptory challenges. [Attorneys for parents sometimes ask that the L-GAL be aligned with the petitioner to limit the number of peremptory challenges. Unless the parties agree, the L-GAL should be considered "neutral" until the evidence is complete and, therefore, entitled to his/her own peremptory challenges.]

[25] MCL 712A.17 (7); MCR 3.925(A)(2).

recommends that the L-GAL makes his statement before the parents' closing statement. In making his or her recommendation, the L-GAL should state the child's preference, if any, even if it conflicts with the L-GAL's recommendation.

9. During a jury trial, the judge should try to prevent the presentation of evidence or argument about where the child(ren) will be placed or what orders the court might enter if the jury finds that the court has jurisdiction. These are matters appropriate to disposition, not adjudication.

10. A jury may be asked to deliver a **general verdict** (a finding that the court has, or does not have, jurisdiction over the child) or a **specific verdict** (findings on whether each alleged basis for jurisdiction has, or has not, been proven). The committee believes that best practice requires a **specific verdict** stating which factual allegations the jury found to be true. MCR 3.972(e) requires the jury to state whether one or more of the statutory grounds have been proven. Protective proceedings are considered one continuous proceeding from beginning to end. [26] Therefore, facts determined by a jury become *res judicata*, and do not need to be proven again in the course of a termination hearing.

11. At the conclusion of the trial, the court should offer the parties the opportunity to have the jury polled.[27]

12. After the adjudication is complete and (if applicable) the jury has been discharged, the court should allow the parties an opportunity to request changes in existing temporary orders pending a disposition of the case.

13. The dispositional phase hearing may be convened immediately following the conclusion of the adjudication phase. The interval between the adjudication and disposition hearings is within the court's discretion.[28] If disposition is not immediate, and the case is adjourned to allow preparation for the dispositional hearing, the dispositional hearing should be scheduled within 28 days of the adjudication if the child is in placement. The court may allow a longer time interval for good cause.[29] The committee recommends that the specific reason for an extended adjournment be placed on the record or stated in writing by the court.

14. Prompt disposition of adjudicated cases is consistent with the child's best interests and makes it easier for the court to comply with the statutory deadlines for review. It

[26] For example, see *In The Matter of LaFlure*, 48 Mich App 377; 210 NW2d 482 (1973).
[27] MCR 2.512(B)(2).
[28] MCR 3.973 (c).
[29] MCR 3.973(c).

also encourages parents to immediately begin work on issues they must resolved before reunification, or case closure, can occur.

E. Dispositional Phase

MCR 3.973 governs the dispositional hearing. At this hearing, the court reviews the proposed case plan, gets input from all parties, and enters orders that may remain in place until the case is dismissed. Disposition hearings are open to the public.[30]

1. A separate hearing is required to determine what disposition the court will order.[31] The committee recommends that the same judicial officer who presided during the adjudication phase conduct the dispositional hearing whenever possible.

2. A disposition hearing may take place immediately following adjudication, or the court may adjourn the hearing so that additional information can be gathered. If adjourned, the hearing should be held as soon as practicable, but must be held within 28 days absent good cause. “Good cause” may include, but is not limited to, the following:
   - Emergency unavailability of the assigned jurist, a party, or an attorney.
   - Failure to achieve timely service of notice of the hearing on an interested party.
   - Unavailability of an essential report from a service provider.
   - An emergency that affects the ability of the court to hold hearings.

3. Courts should be conservative in adjourning any hearing in a protective proceeding because federal law[32] has strict time limits for children to achieve permanency. Dispositional hearings are especially important because, after the dispositional hearing, the court has authority to order implementation of the case service plan. Until disposition, courts may only issue temporary orders to assure the child’s safety and a parent’s participation in services is deemed voluntary.

4. The DHS or agency caseworker assigned to the case must gather all relevant information, prepare a report and proposed case service plan, and provide those documents to the court. The report should recommend disposition, and identify the caseworker responsible for carrying out the case service plan. The case service plan should list the services the parent needs, and outline the responsibilities and obligations of the agency and the parent. In preparing the report, the caseworker should consider concurrent planning and, if specific steps are necessary to accomplish the secondary plan, the caseworker should request whatever orders are necessary to

[30] MCR 3.925 (A).
[31] *In re AMAC*, 269 Mich App 533; 711 NW2d 426 (2006).
[32] Adoption and Safe Families Act, PL 105-89 (1997).

support the concurrent planning process, such as initiating home studies or licensing relatives to provide foster care.

5. The caseworker should file the report and proposed case service plan with the court and distribute copies of both to all parties at least five working days before the disposition hearing.[33] The court should designate a central location where workers can deliver reports.

6. The court may order the production of evidence, examinations, or evaluations on its own motion.[34] The court should begin the dispositional hearing by determining whether the parties, including the child, and the foster parents, if any, received timely notice of the hearing. The court should then ascertain who is present to participate in the hearing. The child who is the subject of the proceeding is entitled to be present. A party who is incarcerated must be afforded the opportunity to participate by telephone if the party cannot attend in person.[35] Other parties may be allowed to participate by telephone or videoconference in the court's discretion. If timely notice has been given, the court may proceed in the absence of one or more of the parties.[36] The court should state on the record the attempts that were made to identify, locate, and secure the attendance of an absent parent.

7. The Michigan Rules of Evidence (MRE), other than those regarding privilege, do not apply at a dispositional hearing.[37] In addition, the Michigan Child Protection Law governs privileges in child protective cases.[38] It states in pertinent part: "Any legally recognized privileged communication except that between attorney and client…is abrogated [sic]…." Privileges authorized by federal law, such as privileges relating to health care, education, or substance abuse treatment, may be set aside in child protective cases by court orders for disclosure of the privileged information, or by the parent signing a release to allow the disclosure. Even though the MREs do not apply during dispositional hearings, legally admissible evidence may be required in special circumstances, such as to prove allegations that did not appear in the original petition.[39]

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[33] MCR 3.973 (D)(3) does not state when the report must be filed, but does state the parties must be given an opportunity to examine the reports. The Michigan Court Improvement Program Reassessment, dated August 2005, recommends that court reports should be delivered no later than five days before court hearings (at p 192).
[34] MCR 3.923.
[35] MCR 2.004; *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).
[36] MCR 3.973(D)(3).
[37] MCR 3.973(E); MCL 722.631. Also see *In re Brock*, 442 Mich 101; 499 NW2d 752, (1993).
[38] MCL 722.631.
[39] MCR 3.977(F). See the discussion at pp 33 and 42 regarding termination hearings.

8. Unrepresented parties should be advised of their right to counsel, including court-appointed counsel for indigent parties. The child's L-GAL should state on the record whether he or she has met with the child prior to the hearing.[40]

9. The case service plan should be offered into evidence. The court should then inquire if any of the other parties present intend to offer evidence or reports. The court should ask the DHS or agency caseworker if there are additions or corrections to the case services plan. DHS's attorney or legal consultant [41] should be offered an opportunity to state their position and address specific requests for orders.

10. In cases for which DHS has purchased casework services (referred to as "Purchase of Service" or "POS"), both the POS caseworker and the DHS POS monitor should sign the case service plan. If DHS's POS monitor and the agency caseworker do not agree, and the court becomes aware of the disagreement before the dispositional hearing, the presiding judicial officer should encourage the parties to reach agreement before the hearing. If that is not possible, the workers should attempt to reduce the areas of disagreement to a minimum and explicitly state the reasoning behind each position. A representative of the county prosecutor's office sometimes will attend a dispositional hearing to act as DHS's "legal consultant." However, the court may also treat the prosecutor's office as an independent party representing the People of the State of Michigan. A prosecutor allowed to appear as an independent party may agree or disagree with the positions stated in the case services plan.

11. The court should ask the parents' attorneys to state their positions about what disposition the court should order. The parents or their attorneys have the right to present or cross-examine witnesses or offer evidence in addition to the case service plan. The committee recommends, as a matter of best practice, that each parent be allowed an opportunity to address the court personally, as well as through counsel.

12. If the court has appointed a CASA for a child, the court should give the CASA an opportunity to provide input. In cases that have been selected for review by a Foster Care Review Board panel, the court shall ensure that all parties have an opportunity to review the FCRB panel's recommendations, and to file objections to those recommendations before a dispositional order is entered. The court must file the FCRB report in the confidential portion of the case file, and may adopt some or all of the FCRB recommendations in entering a dispositional order.[42]

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[40] MCL 712a.17d(1)(d)(iii).
[41] In Wayne County, the Attorney General, rather than the prosecutor, acts as the DHS legal consultant.
[42] MCR 3.973 (E)(5).

The L-GAL should be asked for a recommendation about what disposition is in the best interests of the child(ren). If the L-GAL has not visited the children prior to the hearing as required by MCL 712A.17d(1)(d), the court should determine on the record whether there is good cause to excuse the non-compliance. The L-GAL should advise the court about the child's wishes for disposition. This is particularly important if the child does not agree with the position advocated by the L-GAL. In appropriate circumstances, the court may consider appointing another attorney (in addition to the L-GAL) to advocate for the child's *position* while the LGAL advocates for the child's *best interests*. If the child is present at the dispositional hearing, the court should allow the child an opportunity to participate in an age-appropriate manner, which may include asking questions. If the child chooses to state a disposition preference, the child should do so in open court, not *in camera*.[43] The child's preference may also be presented in other ways, such as written statements or as part of the L-GAL's report.

After hearing from all of the parties and giving bona fide consideration to the positions presented, the judicial officer will order a disposition. The court may order full or partial compliance with the case services plan, and may enter orders directed to non-respondent adults pursuant to MCL 712A.18 (g), including orders removing an individual from the home where the child resides.

If the court elects to order a *specific* placement or *level* of placement that is inconsistent with the DHS position, the court should state on the record what testimony has been considered, and what efforts have been made to work with all of the parties. [44]

In making a disposition, the court should address all the findings of fact that supported the earlier adjudication decision. The court's disposition order should include:

- Identification of the permanency plan.
- What efforts are appropriate for concurrent planning.
- A statement about whether "reasonable efforts" (and "active efforts" in the cases of Indian children) have been made to prevent the child's removal, unless such findings have been made in a previous order.

[43] *In re Compton Minors*, 286 Mich App 444; 781 NW2d 105 (2009).
[44] Such findings are necessary to preserve eligibility for federal participation in payment for foster care under Title IV-E of the Social Security Act. HHS/ACF Questions and Answers on Child Welfare Final Rule, Question 13.

- If the child is to be removed from a custodial parent, the conditions and frequency of parenting time. If the child will reside apart from siblings, the court should order a schedule of contact between siblings. The court may also consider restrictions on contact with the child, or order contact or visitation with other individuals, such as grandparents, with whom the child may have an established relationship.

- If the court orders removal of an Indian child, as defined by the Indian Child Welfare Act, [45] the court must assure that the child's placement is consistent with the ICWA's placement preferences set forth in 25 USC § 1915, or the tribe's placement preferences, if different from those set forth in the statute.

- The court may order a respondent to reimburse the court for the costs of placement, legal representation, or other services, and may order a party to pay child support, provided that the child support order complies with MCL 552.605 and MCR 3.211(D).

- If the whereabouts of any party are unknown, the court should order continued attempts to locate that party and determine the party's interest in participating in the case.[46]

- The court should schedule a timely review of the disposition in accordance with Michigan statutes and court rules. The committee recommends, as best practice, that the court consult with all parties about their future availability, and that the date and time of the next review hearing be incorporated into the dispositional order. If that is not possible, the committee recommends that the next review hearing be scheduled in an order issued within seven days of the dispositional hearing.

When ordering a disposition in a protective proceeding, the court should give serious consideration to allowing the child(ren) to remain in their own home with appropriate safeguards and services. The committee recognizes that, although foster care is intended to assure the safety of the child, it causes disruption and emotional upset and may interfere with the child's education and established personal relationships. Foster care should be utilized only when absolutely necessary. If the court does order an out-of-home placement, the court, the caseworker, the parents, and the foster parents should cooperate to accomplish reunification of the family as expeditiously as possible if reunification can safely be accomplished.

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[45] 25 USC § 1901ff.
[46] Michigan Absent Parent Protocol, available at: http://courts.michigan.gov/scao/resources/standards/APP.pdf

F. Dispositional Review Hearings

The purpose of the dispositional review hearing is to review the parties' compliance with the existing case plan and to review the continued appropriateness of the permanency plan to determine if modifications are needed. If a child has not been removed from home, statutes and court rules allow a 182 day interval between review hearings.[47] If a child has been removed from home, a review hearing must occur every 91 days for the first year, and every 182 days thereafter. Timeliness of review hearings may affect the availability of federal funding to support the child's placement.

The committee recommends, as a best practice, that each case be reviewed every 91 days. Whenever possible, the same judicial officer who conducted the original dispositional hearing should conduct all subsequent dispositional review hearings. At least five days prior to the dispositional review hearing, the caseworker responsible for carrying out the case plan should file a report with the court documenting the progress toward executing the case plan and a recommendation for orders that the court should enter at the review hearing. The caseworker should serve the court report on all interested parties, including non-respondent parties, at the same time the report is filed with the court. It is particularly important that copies of the report be served on incarcerated parties prior to the hearing.

If a Foster Care Review Board panel has reviewed the case, the court shall ensure that the parties have an opportunity to review the FCRB report and file objections before the court enters a dispositional review order. The court must file the FCRB report in the confidential portion of the case file.[48]

At the beginning of a review hearing, the court should determine whether all parties received appropriate notice. Any child who is at least 11 years old is entitled to notice.[49] If the children are excused from attending the hearing pursuant to MCR 3.973(D)(1), the court should state the reasons on the record. The court should identify the attending parties, including the children. The court may, in its discretion, allow parties to participate in the review hearing by telephone or videoconference. Incarcerated parties should be allowed to participate by telephone. The court should assure that a child's L-GAL has visited the child before the hearing unless excused from that requirement by the court for good cause.

At the hearing, the court report should be offered into evidence. Each party should be offered an opportunity to address the court and present evidence. The L-GAL should make a recommendation to the court about the best interests of the child. If any children

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[47] For example, if the child was never removed from home, MCR 3.974 allows a six-month interval before the first review and six month intervals after the first year of jurisdiction.
[48] MCR 3.975(E).
[49] MCR 3.921(B)(2)(i).

are present, the court should ask them for input, giving consideration to their age and ability to express themselves. The court should also attempt to answer their questions.

In determining whether to continue or modify the case plan or permanency plan at a review hearing, the court should consider the following issues:

1. The parent(s) and worker's compliance with each element of the case plan.
2. The need for continued placement, if the child has been removed. The court should consider what services might allow the child to return safely to the parent's custody, or if any relatives might be able to provide care for the child.
3. Frequency and duration of parenting time, if the child will continue in out-of-home care. The court should consider what efforts have been made or could be made to facilitate and increase the availability of parenting time, if appropriate, including such issues as funding for transportation to and from parenting time visits. If parenting time is being supervised, the court should consider whether supervision needs to continue, and who should be authorized to provide supervision.[50]
4. Sibling visitation, if siblings are not placed in the same home.
5. Ongoing contact between the children and other individuals, such as grandparents or other relatives who may have established relationships with the children.
6. The children's educational progress and any need for supportive services.
7. Whether or not the children have any unmet needs for medical treatment or counseling.
8. The need for additional evaluations.
9. Orders that require the parties to participate in services such as substance abuse treatment, parenting education, or counseling, and whether the respondent has benefited from such services.
10. Concurrent planning efforts that have been or should be made.
11. Input from a CASA and, if applicable, findings and recommendations by an FCRB panel that has reviewed the case.
12. Input from the foster parents.
13. Information about team decision-making meetings, permanency planning conferences, wraparound meetings, or mediation.
14. Compliance with any court orders that have required a party to reimburse the funding unit for all or part of the costs of the child's care or court-ordered services.
15. If the case plan has been completed, whether to dismiss the case from court jurisdiction. The court may dismiss the case on its own motion. While some period of supervision is desirable after a child has returned to a parent's or guardian's care, three months should generally be sufficient. The committee recommends, as best

[50] The committee recommends that the court consider allowing supervision of visits by appropriate adults who are identified by the parent(s) and approved by the caseworker. Relatives, neighbors, teachers, church members, or other adults who can help supervise visits may add to the frequency of contact between the family and the child.

practice, that the court apply a presumption in favor of dismissal for any case review beyond three months after the child has been returned to a parent's care.

At the conclusion of the dispositional review hearing, the court should state the permanency planning goal on the record, and make findings about the reasonableness of the efforts to achieve that goal. The court may return the child to the parents, continue out-of-home placement, change the child's placement, modify the existing dispositional order, enter a new dispositional order, or modify the case plan.[51]

The committee recommends, as best practice, that the date for the next review hearing be incorporated into the order that results from each review hearing. The SCAO-approved form for an order following a review hearing contains a line for entering that information.

The committee recommends as a best practice that the DHS or private agency caseworker responsible for the case receive a copy of the court's order within seven days after the hearing.

G. Permanency Planning Hearing

Michigan statutes [52] and court rules [53] require that the court conduct periodic "permanency planning hearings." The purpose of the permanency planning hearing is to assure that the court holds all parties accountable for finding a permanent placement for the child in a reasonable amount of time.

In "aggravated circumstances," such as a caregiver's conviction of a serious crime, severe injury to a child or a sibling, or a prior termination of parental rights, the court must hold a permanency planning hearing within 28 days after determining that the aggravated circumstances render it unnecessary to make reasonable efforts to prevent the child's removal or reunite the family. [54] It necessarily follows that, if aggravated circumstances exist, the court is not required to make reasonable efforts findings.

In the more typical cases where no "aggravated circumstances" exist, a permanency planning hearing is required no later than 12 months after the child is removed from home, and at least every 12 months thereafter.[55] Permanency planning hearings may be conducted at shorter intervals in the court's discretion. **As with other required hearings, failure to conduct a timely permanency planning hearing may jeopardize federal funding for the child's placement.**

[51] MCR 3.975(6).
[52] MCL 712A.19a (1).
[53] MCR 3.976.
[54] MCR 3.976(B)(1).
[55] MCR 3.976(B)(2) and (3).

The notice to the parties before a permanency planning hearing must specifically state that the hearing will be a permanency planning hearing. The notice must also state that the hearing may result in subsequent proceedings to terminate parental rights.

If the Foster Care Review Board has reviewed the case and issued recommendations, the court shall ensure that the parties have an opportunity to review those recommendations and file objections before the court enters a new dispositional order. The court must file the FCRB panel's recommendations in the confidential part of the case file, and may incorporate any or all of the FCRB recommendations into the order entered following the hearing.[56]

At a permanency planning hearing, the court must consider the evidence and then address specific questions in a particular order. The first issue the court must consider is whether the child should be returned to the custody of the parent(s). If the court determines that the child should not be returned to a parent's custody, the next issue to consider is whether to order the agency to file a petition to terminate parental rights.

The court **must** order the agency to initiate termination proceedings if the child has been in foster care for 15 out of the most recent 22 months, unless one of the statutory exceptions apply. The exceptions include:

1. The child is being cared for by relatives.[57]
2. The state has not provided the family with the necessary services for the child's safe return home.
3. A compelling reason exists not to proceed, including:[58]
    - Adoption is not the appropriate goal for the child.
    - No grounds to file a termination petition exist.
    - The child is an unaccompanied refugee minor.
    - There are international legal obligations or compelling foreign policy reasons not to file a termination petition.

If one of the exceptions applies or the court decides not to order the agency to seek a termination of parental rights, the court must order an alternative placement plan. Alternative placement plans include a limited-time continuation in foster care, long term placement in foster care, or a juvenile guardianship. The federal government also recognizes "Another Planned Permanent Living Arrangement" (APPLA) as an acceptable permanency goal.

An APPLA is an arrangement that provides a child who is at least 14 years old with a long-term relationship with a caring adult. The adult might be a relative, friend, or

[56] MCR3.376(D)(3).
[57] MCL 712A.19a(6)(a).
[58] MCL 712A.19a (6)(b)(i)-(iv).

mentor. Similarly, an APPLA for children who appear likely to eventually emancipate from foster care "APPLA(E)" may be appropriate for a child over age 16 whose permanency plan does not include a goal of leaving foster care and transitioning into the home of a permanent family. The goal for APPLA(E) children is to leave foster care and become self-supporting, with guidance from a supportive adult. Any APPLA(E) plan should include the following components: (1) information about the adult who will assist and support the child; (2) for each existing relationship the child has with an adult, a description of the adult's and siblings' active participation in the life of the child; (3) a description of how the relationships will be maintained; (4) the services and supports developed for the child; and (5) the child's detailed independent living plan.

Any APPLA plan should contain components to give the youth information about available support services and address the child's ongoing needs for housing, medical care, and educational services. "Independent living" or "emancipation" are *not* considered appropriate permanency plans; rather, an appropriate plan must identify an adult who will maintain a long-term relationship with the child.

If there are no compelling reasons negating the mandatory nature of a termination petition and the court directs the agency to file such a petition, the agency may be given up to 28 days to file the petition.[59]

At the conclusion of the permanency planning hearing, the court should assure that the existing permanency plan for the case is up-to-date and workable, and that a realistic back-up, or concurrent plan has been identified.

H. Termination of Parental Rights Hearing

A request to terminate parental rights may be contained in an initial petition or a supplemental petition filed at any time during the course of a protective proceeding.

If the original permanency plan is reunification, but a supplemental petition to terminate parental rights is filed, the committee recommends that the court continue to designate reunification as the permanency plan until after the court issues a ruling on the termination petition. At that point, the court should reconsider what permanency plan is most appropriate for the child. Persons who have standing to request the termination of parental rights include the prosecutor (whether or not acting as legal counsel to DHS); the child's guardian, custodian, or foster parent; the Children's Ombudsman; and the child.[60]

Effective September 4, 2010, if DHS files a new petition involving a child whose parent(s) have previously lost their parental rights to a sibling of the child (even if the previous termination was voluntary), DHS and the court must give special treatment to

[59] MCR 3.976(E)(3).
[60] MCL 712A.19b (1); MCL 712A.19b (6).

the new petition. The law requires that DHS include a request for termination of parental rights in the new petition if the sibling's earlier termination proceeding proved any of the following: abandonment of a young child; criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate; battering, torture, or other severe physical abuse; 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. MCL 722.638(1)(b)(i-ii).

A parent may not request termination of his or her own parental rights.[61] A petition may request the termination of one parent's rights, leaving the other parent's rights intact.[62] Some Michigan courts have allowed a parent to petition for termination of the parental rights of a *non*-custodial parent [63] even though the primary intent of MCL 712A.2(b) is to protect a child from abuse or neglect by a primary caregiver.

The court may not consider a petition for termination of parental rights until after the adjudication phase has been completed.[64] This means that a statutory ground for jurisdiction under MCL 712A.2(b) must be proved before the court can consider the statutory grounds for termination set forth in MCL 719A.19b(3). There is some overlap between the grounds for jurisdiction and the grounds for termination, but they are not identical. A petition requesting that the court take jurisdiction is not proper if it recites only a statutory ground for termination.

DHS and private agencies sometimes take the position that reunification services should be suspended when a petition to terminate parental rights is filed. If the agency elects not to continue services, it must state a sufficient reason for discontinuing services.[65] The court has discretion to order continuation of services pending a termination hearing. The committee recommends, as a matter of best practice, that the court order services to continue pending the termination hearing, so that parents receive every opportunity to preserve their parental rights.

The court also has discretion to suspend parenting time upon the filing of a petition to terminate parental rights. [66] In exercising this discretion, the court should consider how recently and frequently visitation has occurred, and whether the child will experience distress as a result of contact, or no contact, with the parent.

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[61] *In re Swope*, 190 Mich App 478; 476 NW2d 459 (1991).
[62] *In re Marin*, 198 Mich App 560; 499 NW2d 400 (1993).
[63] See, for example, *In re Huisman*, 230 Mich App 372; 584 NW2d 349 (1998)
[64] *In re Riffe*, supra.
[65] *In re Terry*, 240 Mich App14; 610 NW2d 563 (2000).
[66] MCL 712A.19b (4); MCR 3.977 (D).

While it is always desirable to have all hearings in a case conducted by the same judge, it is critically important to have the termination hearing conducted by someone who is familiar with the case because the evidence from all hearings is considered as though they were "a single continuous proceeding" for purposes of deciding a petition to terminate parental rights.[67]

Unless termination is sought at the initial dispositional hearing, the committee recommends, as best practice, that the court convene a separate pretrial conference before conducting a hearing on a petition for termination of parental rights. Before a termination hearing starts, the judge or judicial officer should make sure that appropriate notice has been provided to the parties as required by MCR 3.921(B)(3).

The Michigan Supreme Court has held that notice to non-custodial parents of a termination proceeding is a matter of procedural due process.[68] Both the agency and the court have a responsibility to give notice if the parent can be located. If personal service of a notice of a termination proceeding is impractical or cannot be achieved, the court may authorize service by publication. The request to serve a party by publication must be supported by testimony or a motion and affidavit detailing the attempts to achieve personal service.[69]

At the beginning of the termination hearing, the presiding officer should identify the parties present. The hearing may proceed in the absence of properly served parties who fail to appear. A party who is in the custody of the Michigan Department of Corrections should be allowed to participate in the entire hearing by telephone, as required by MCR 2.004. The court rule does not apply to prisoners in county jails or in the custody of other states, although best practice and recent appellate case law suggest that due process requires allowing such prisoners to participate by telephone, if possible. Children may be excused from termination hearings at the court's discretion.

Because a termination hearing is considered a dispositional phase hearing, the Michigan Rules of Evidence do not apply, except those regarding privileges.[70] One notable exception to that general rule requires that the ground(s) for termination must be established by legally admissible evidence if termination is sought as an initial disposition or requested in a supplemental petition on the basis of different circumstances.[71]

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[67] *In re Sharpe*, 68 Mich App 619;243 NW2d 696 (1976).
[68] *In re Rood*, 483 Mich 73, 763 NW2d 587 (2009).
[69] MCR 3.920(B)(4)(b).
[70] MCR 3.977(G)(2).
[71] MCR 3.977(E)(3); MCR 3.977(F).

If the case involves an Indian child, as defined by the ICWA in 25 USC 1903(4), the petitioner must present testimony from at least one expert witness who is familiar with the customs and childrearing practices of the child's tribe.

The court may take notice of its own records in deciding a termination case. If newly generated reports are offered into evidence, they may be considered, provided the parties have had an opportunity to examine them and an opportunity to cross-examine the individuals who wrote the reports, if the report preparer is reasonably available.[72]

Some of the statutory grounds for termination of parental rights refer to a "…reasonable time considering the age of the child." The committee recognizes that children of different ages have different needs, and those needs typically become more complex as the child matures. If expert testimony is presented, the expert should be asked specifically about the child's needs, and the court should make specific findings relating to those needs. Evidence regarding the best interests of the child may be presented at any stage of the hearing, but a statutory ground must be proven before the court considers the child's best interests.[73]

As with the adjudication phase hearing, the committee recommends that the parent(s)' attorney be given the last opportunity to cross-examine witnesses, and allowed to present a closing argument after the court hears the L-GAL's recommendation about the best interests of the child.

At the completion of a termination hearing, the court must make specific findings on the record or in writing.[74] The court's findings of fact must include a citation to the statutory ground(s) for termination.[75] Petitions for termination of parental rights often cite more than one ground. Some of the grounds are similar enough so that the same evidence may prove multiple grounds. In this situation, the court should specify which ground the evidence supports, or indicate that the same evidence has proven more than one ground. Each statutory ground alleged in the petition should be addressed individually.

If there are conflicts in the testimony, the court should address the credibility of the competing witnesses when making its findings. MCR 3.977(H)(1) requires that if findings are not made on the record, they should be made within 28 days, and no later than 70 days after the termination hearing commenced.

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[72] MCR 3.977(G)(2).
[73] *Fritts v.Krugh*, 354 Mich 97; 92 NW2d 604 (1958).
[74] MCR 3.977(H)(1).
[75] MCR 3.977(H)(3).

There is no burden of proof specified for the evidence that termination is in the child's best interests. The usual burden of proof in civil cases is "a preponderance of evidence." The court's best interest findings should be based on evidence in the whole record.[76]

The burden of proof for termination of parental rights for Indian children is "evidence beyond a reasonable doubt, supported by the testimony of at least one expert witness, that continued custody of the child by the parent is likely to result in serious emotional or physical harm to the child." [77] The Indian Child Welfare Act also provides that if a state standard provides a higher standard of protection to an Indian parent than does the ICWA, the state standard shall apply. [78] Michigan appellate courts have interpreted this provision to mean that, in cases involving Indian children, at least one statutory ground must be proved by clear and convincing evidence *and* the court must find, by evidence beyond a reasonable doubt that continued custody by the parent will result in serious physical or emotional harm to the child. [79]

In termination proceedings involving Indian children, the court must also find that "active efforts" have been made to provide rehabilitative and remedial services to prevent the breakup of the Indian family. [80] Those active efforts must be proved by clear and convincing evidence. [81] The Michigan Supreme Court has held that there is no requirement that "active efforts" be contemporaneous with the petition to terminate parental rights. [82] If parental rights to an Indian child are terminated, the child's placement must be consistent with the placement preferences set forth in the Indian Child Welfare Act, or the tribe's placement preference plan if different from the hierarchy set forth in ICWA. [83]

The committee recommends, as best practice, that courts schedule sufficient time for hearing a termination petition so that the hearing can be completed without an adjournment. The committee also recommends that if the court denies a petition for termination of parental rights, the court also should schedule the next dispositional review hearing within 28 days to identify a new permanency planning goal and determine what efforts should be made to accomplish the new goal.

A child whose parental rights have been terminated can be made a permanent court ward or a permanent state ward. Permanent state wards are committed to the Department of Human Services. That commitment vests the superintendent of the Michigan Children's

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[76] *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000).
[77] 25 USC 1912(f).
[78] 25 USC 1921.
[79] *In re Elliott*, 218 Mich App 196; 554 NW2d 32 (1996).
[80] *In re Morgan*, 140 Mich App 594; 364 NW2d 754 (1985).
[81] *In re Lee*, 483 Mich 300, 16, 770 NW^2 853 (2009).
[82] *In re Lee*, supra.
[83] 25 USC 1915.

Institute with decision making authority regarding the child's care and custody. Until such children are adopted or dismissed, the court should conduct periodic post-termination review hearings to assure that they achieve a permanent placement in a timely fashion.

I. Miscellaneous Hearings

The circumstances of an individual case may necessitate further non-standard hearings. Each time the matter comes before the court, the presiding officer should take the opportunity to evaluate all aspects of the case, consider compliance with the case plan, decide if additional evaluations or modifications of the existing court orders are needed, discuss the existing permanency plan, and determine if additional steps are required for concurrent planning.

All hearings should be conducted in a manner consistent with due process. The presiding officer should ensure that the parties received timely notice and a meaningful opportunity to be heard. In certain circumstances, the court should allow the parties to participate via telephone. To assure due process protection to the parties, the court should determine that all parties have received notice and an appropriate opportunity to participate in the hearing. Incarcerated parties must be afforded an opportunity to participate by telephone.[84]In emergency circumstances, the court has discretion to allow other parties to participate by electronic means. If possible, the same judicial officer should preside over every hearing in a case. The court should balance the need to get the matter resolved as promptly as possible against the possibility that a brief adjournment may allow a more meaningful opportunity for the parties to participate and yield better information that the court can use to make its decisions.

Some miscellaneous hearing types, and the areas of special emphasis for each type, are as follows:

1. Putative Father Hearing

Putative fathers are not included in the definition of "father" under MCR 3.903 (A) (7). However, at the inception of a child protective proceeding there are several good reasons to identify the child's father and establish him as the legal father as expeditiously as possible. These include establishment of child support, determination of whether the ICWA will apply if the putative father becomes the legal father, and the legal father's right to participate in case planning as required by In re Mason, *supra*. Efforts to identify and locate the child's father are also encouraged by the Absent Parent Protocol published by SCAO.

[84] MCR 2.004 and fn 11, supra at p7.

MCR 3.921 (D) provides a procedure a court can use to encourage a putative father to become a legal father eligible to participate in the proceedings. The putative father's hearing is a two-step process.

The first step involves the court taking "initial testimony" about the tentative identity and address of the child's father. The rule does not specify who should testify, but presumably the best source of information would be the child's mother. If the court finds probable cause to believe that a particular individual is the child's father, the court must serve that individual with a notice of a hearing.

The notice of hearing may be served in "any manner reasonably calculated to provide notice to the putative father, including publication of the notice if his whereabouts remain unknown after diligent inquiry."[85]

The notice of hearing must identify the child and the mother, and contain a statement that the putative father's failure to attend the hearing will constitute a denial of interest in the child and may result in the termination of parental rights.[86]

The court rule does not specify other parties who should attend a putative father hearing. The committee suggests that the prosecutor or DHS's legal representative assist with presenting the necessary testimony, and that the child's L-GAL be present to address the child's best interests.

At the conclusion of the hearing, the court has several options:

- If the preponderance of evidence identifies a particular individual as the child's father, that individual may be given 14 days (or longer in the court's discretion) to formally establish himself as the child's legal father.
- If there is probable cause to believe that some other individual is the child's father, the court may give notice to that individual and schedule another putative-father hearing.
- If a putative father fails to appear after receiving notice, the court may proceed with the case without giving him further notices, not even notice of a proceeding to terminate parental rights.
- If the court determines that the father's identity cannot be established, the court may proceed to hear the case without further attempts to identify or give notice to the child's father.

[85]MCR 3.921(D)(1).
[86] MCR 3.921 (D)(1)(d).

If the identified person appears at the putative father hearing and the court allows him a specified period to establish himself as the legal father, but he fails to do so within the specified time, the court may find that he has waived any right to receive further notice or to participate in the proceedings. This court-ordered waiver specifically includes a waiver of notice of a hearing to terminate parental rights.[87]

2. Section 21 Hearing

MCL 712A.21 provides that any interested person may file a written petition to have a case reviewed at any time. The committee recommends as best practice, that the court require the prosecutor to appear at any Section 21 hearing.[88] After a Section 21 hearing, the court may affirm, modify, or set aside any existing court order. Section 21 hearings may be convened for such purposes as adjusting parenting time or changing custody. The parties should be afforded the usual due process rights for Section 21 hearings. If necessary, a Section 21 hearing may be adjourned to secure attendance of necessary parties. If the hearing is adjourned, the court should state the reason for the adjournment and enter necessary temporary orders.

3. Removal Hearing

An emergency removal of a child from a parent's custody is a specialized type of Section 21 hearing. Emergency removals are governed by MCR 3.974(A)(3). Such hearings are required within 24 hours after the removal, excluding Sundays and holidays. The respondent parent is entitled to receive a written statement of the reasons for the removal, and the court must make findings that continued placement of the child with the parent is "contrary to the child's welfare." [89] The parent from whom the child is being removed has the right to state why the child should not be removed, the right to counsel, and the right to an adjournment of up to 14 days to prepare to present evidence on the issue of removal. [90]

The Indian Child Welfare Act requires specialized removal hearings for Indian children. They are governed by ICWA Sections 1912 (c) and 1922, and must include the testimony of at least one expert witness who is familiar with the tribe's customs and child-rearing practices. The placement of Indian children must be consistent with the placement preferences set out in 25 USC 1915, or the preference of the child's tribe.

[87] MCR 3.921(D)(3)(b).
[88] MCR 3.914(A).
[89] MCR 3.974(B)(3)(a); MCR 3.965(2).
[90] MCR 3.974(3).

4. **Supplemental Petition regarding non-respondent parent**

At any stage of the proceedings, a new petition or supplemental petition may be filed to name the other parent (or parents) as an additional respondent. If such a petition is filed, a person who was previously considered a non-respondent parent must have the opportunity to have a hearing at which a trier of fact will determine whether the allegations have been proved by a preponderance of evidence.[91] There is no right to a jury trial in this situation. Often the new allegations are heard at the same time as the contested termination hearing; however, any new allegations must be proved by legally admissible evidence.[92]

The purpose of the contested hearing on a supplemental petition is not to establish jurisdiction over the child; it is to determine whether a parent who was not previously a respondent should become a respondent, and to establish facts that may later be considered *res judicata*. Once the court has assumed jurisdiction over the child, whether the jurisdiction is based on the actions of one or both parents, the court has the authority to issue dispositional orders. Section 18 of the Juvenile Code gives the court the authority to issue orders affecting adults, even non-parent adults; [93] however, this authority does not allow the court to enter an order terminating parental rights of a newly added respondent. But any new allegations proven at the contested hearing may later be treated as established for purposes of termination. If the supplemental petition seeks termination as the initial disposition, the statutory grounds for termination must be proved by legally admissible evidence.[94] That means that if a petition to terminate the parental rights of a newly added respondent requests termination on a statutory ground not previously proved, the statutory termination ground must be proved by legally admissible evidence.[95]

5. **AWOLP Hearing**

Children under the court's abuse/neglect jurisdiction sometimes leave their court-ordered placements without authority or are reported as missing from care. If the court is notified that a child is absent from placement, the committee recommends as best practice that the court conduct a hearing to determine what efforts are being made to locate the child. When a child who is absent without leave from a placement (AWOLP) is located, the court should conduct a hearing as soon as possible to determine whether the child can safely be returned to the original placement, or

[91] For cases involving an Indian child, as defined by ICWA, the higher burden of proof set forth in that statute will apply.
[92] MCR 3.977(E)(3),
[93] MCL 712A.18 (g).
[94] MCR 3.977(E)(3).
[95] MCR 3.977(F).

whether the original placement should be changed.[96] All interested parties should be notified and given an opportunity to participate in an AWOLP hearing. The court should consider ordering a physical examination of the child and evaluate the child's need for further services. Each local court must have a SCAO-approved AWOLP plan, and follow the procedures set forth in that plan. When AWOLP children are found, those who are under court jurisdiction as a result of a protective proceeding may not be placed in secure detention facilities unless they are also charged with a delinquent offense. [97]

6. FCRB Appeal Hearing (Change of Placement)

If there is a dispute (about where a child should be placed) between a current foster parent and an agency supervising the child, the dispute can be reviewed by a local Foster Care Review Board panel. Either party may appeal the panel's determination to the circuit court. The court then must conduct a hearing to determine whether the proposed change in placement is in the child's best interests. Such hearings are governed by MCR 3.966(C). Notice of the hearing must be given to the foster parents, all interested parties, and the prosecutor, if the prosecutor has previously appeared in the case.

7. Guardianship Hearing

Historically, the Probate Code provided authorization to create guardianships for minors. That authority still exists at MCL 700.5204 (for full guardianships) and MCL 700.5205 (for limited guardianships). Recent legislation[98] has added specific authority to appoint a guardian for a minor during a child protective proceeding.

A juvenile guardianship may be established in a family court proceeding either before or after a termination of parental rights. MCL 712A.19a(7)-(15) govern guardianships in cases where parental rights have *not* been terminated. MCL 712A.19c (2)-(14) apply when parental rights *have* been terminated. For both types of guardianships, the legal standard is whether appointing a guardian is in the child's best interests. Upon appointment of a guardian, the court must terminate the underlying protective proceeding after conducting a review hearing.[99] The timing of the review hearing is within the court's discretion.

For post-termination guardianships, the court must either obtain the consent of the superintendent of the Michigan Children's Institute (MCI), or determine that the

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[96] Best practices are described at: http://courts.michigan.gov/scao/services/CWS/Materials/10-21-10AWOLP.pdf.
[97] MCL 712A.15 (4).
[98] P.A. 199-204, 2008.
[99] MCL 712A.19a (10)

superintendent's decision to withhold consent was arbitrary and capricious.[100] The post-termination guardianship also requires termination of the protective proceeding, provided the court has completed a review hearing.[101]

MCL 712A.19a(15) provides that if a Juvenile Code guardianship is terminated, custody of the child shall be "restored" to the Department of Human Services. The Legislature apparently intended that the protective proceeding that preceded the guardianship should resume from the point it had reached at the time the guardian was appointed. However, a case review at the time the abuse and neglect case reopens would be necessary to determine the current status of parties and a new case service plan. This provision needs clarification by court rule or case law because circumstances can change dramatically during the course of the guardianship. If parental rights have previously been terminated and the guardianship is ended pursuant to MCL 712A.19c (13), the same problems do not arise, because the child simply reverts to the pre-guardianship status of being an MCI ward.

But, when a *pre*-termination guardianship is revoked, the court should re-evaluate the need for further proceedings.

8. Custody Hearing

During the course of a child protective proceeding, the court may modify a pre-existing order regarding custody. Section 2(a) of the Juvenile Code provides that the court has authority to issue orders "…superior to and regardless of the jurisdiction of another court…" This may happen when, for example, the same court or another court already has continuing jurisdiction over a child for other reasons, such as a divorce, paternity, or child custody proceeding. Orders entered in the course of a protective proceeding terminate upon dismissal of the protective proceeding.

If another court has prior continuing jurisdiction over the child, that court's orders, if any, will control the child's placement when the protective proceeding ends. If someone files a request for a change of custody during the course of the protective proceeding, the court may address it only by applying the rules and evidentiary standards that govern similar types of proceedings. [102] All family courts are required to have a Family Division plan approved by the State Court Administrator. The jurisdiction's Family Division plan may provide guidance as to who should hear a motion to change a pre-existing custody order. Any change to a pre-existing order should address all issues, including custody, support, and parenting time. The judge who originally heard the case should also hear the motion, if possible.

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[100] MCL 712A.19a (6)
[101] MCL 712A.19c (9)
[102] *In re AP*, 283 Mich App 574, 770 NW2d 403 (2009).

IV. INDIAN CHILDREN

At the earliest possible stage of an investigation, the petitioner should determine whether the Indian Child Welfare Act (ICWA) applies to the child(ren) for whom court intervention is being sought. If the child is a tribal member, or is a biological child of a tribal member and eligible for tribal membership in a federally recognized tribe, the child is considered an "Indian child" and the ICWA applies. The caseworker must collect information about which tribe is involved, give notice to the tribe(s) at the earliest possible date, obtain information about the tribe's placement preferences, and identify a possible expert witness who has knowledge of the tribe's child rearing practices. The ICWA requires hearing that expert's testimony if removal of the child(ren) is requested. If an Indian child resides on a reservation or is subject to the jurisdiction of a tribal court, the tribal court has exclusive jurisdiction and the state court should not proceed to hear the case.

Some children have affiliations with more than one tribe because tribes are entitled to establish their own eligibility criteria for tribal membership. If it appears that the child is a member or might be eligible for membership in more than one federally recognized tribe, the court should give notice to all such tribes and request that each send a representative to a hearing. At that hearing, the court should encourage the tribal representatives to reach an agreement about notices and participation required by the ICWA. If the tribes cannot agree, the court should make a finding, based on the factors listed in the Bureau of Indian Affairs' Guidelines for State Courts,[103] identifying the tribe that has the most significant contacts.

If the child is an "Indian child", the court should ensure that the placement is consistent with the ICWA or the tribe's placement preferences.[104]

V. INCARCERATED PARTIES

The caseworker should notify the court of the party's prisoner number and the location and telephone number of the prison so that the court can make necessary arrangements for telephone testimony. [105] The committee recommends that DHS casework staff receive initial training and refresher training at regular intervals regarding the requirements of MCR 2.004. Prisoners incarcerated in other states should be allowed to participate in hearings by telephone, if possible.[106]

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[103] Guidelines for State Courts, Indian Child Custody Proceedings; Federal Register Vol. 44, No 228, Nov 22, 1979, p. 67584ff.

[104] 25 USC 1915.

[105] MCR 2.004 requires such participation for domestic relations cases and all proceedings that involve custody, guardianship, neglect, foster care, and termination. The rule states that notification shall be made by the "party seeking the order."

[106] See, for example, *In re Mason,* 486 Mich 142; 782 NW2d 747 (2010).

VI. CHILD SUPPORT

The court may consider the diversion of child support or a reimbursement order to offset the cost of an out-of-home placement. The diversion of child support or an order for reimbursement for court services should be based on the court's determination of what is in the child's best interests.[107] A parent's obligation to pay child support is not extinguished by an order terminating parental rights.[108] If no child support order exists, the court has the authority to enter an order consistent with the Michigan Child Support Guidelines.[109]

If the parents are receiving an adoption support subsidy, the subsidy will continue even if the adopted child is removed from their care. However, the court may consider the amount of the support subsidy in determining the amount of reimbursement to be paid by the parents for placement or court services.

VII. SUMMARY OF RECOMMENDATIONS

The committee's work revealed that the following changes are likely to facilitate more effective child welfare practices and procedures:

1. The committee recommends that MCR 3.921(D)(1) be amended to require the court to take initial testimony about the tentative identity of the child's father if the child has no legal father.

2. The committee recommends that the Michigan Court Rules be amended to require that a pretrial conference be held within 21 days after the entry of a denial by a respondent.

3. The committee recommends that the court advise a parent who requests court-appointed counsel that he or she may be required to reimburse the funding unit for all or part of the costs of appointed counsel.

4. The committee recommends that SCAO develop, as part of its ongoing analysis of money collection by Michigan courts, a simple form courts can use to determine a party's financial status, for purpose of appointment of counsel.

VIII. FUTURE CONSIDERATIONS FOR THE COURTS

In general, the committee believes that family division judges have broader authority to issue orders than older appellate decisions would suggest. Until 1998, protective proceedings were heard in Probate Court, where a specific statutory authorization is required before an order can be issued. But after the 1998 transfer of jurisdiction over these cases to circuit court, which is a

[107] Diverting child support, rather than ordering reimbursement under MCL 712A.18 (3), may eliminate the court's ability to retain a 25% administrative share of collections.
[108] *In re Beck*, 488 Mich 6; 793 NW2d 562 (2010).
[109] MCR 3.973(F).

court of general jurisdiction, the court now has the authority to issue "…any order proper to fully effectuate the circuit court's jurisdiction and judgments,**"** [110] even absent a specific statutory authorization.

The reassessment report states, "Courts should stop assigning referees to handle preliminary hearings." (p.40) Following this recommendation would bring Michigan courts more closely in line with the "one family, one judge" concept. However, it may not be possible to attain this goal. A shift to a system in which judges conducted all hearings in all cases would require a substantial increase in the number of judges. The economic resources needed to obtain additional judgeships to absorb the work now done by referees are simply not available, at either the state or county level, and will not be available in the foreseeable future.

[110] MCL 600.611.