

# Order

Michigan Supreme Court  
Lansing, Michigan

September 15, 2009

Marilyn Kelly,  
Chief Justice

ADM File No. 2008-43

Michael F. Cavanagh  
Elizabeth A. Weaver  
Maura D. Corrigan  
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Diane M. Hathaway,  
Justices

Proposed Amendments of Rules 3.800,  
3.802, 3.901, 3.903, 3.920, 3.921,  
3.931, 3.935, 3.961, 3.963, 3.965,  
3.974, 3.975, 3.976, 3.977, 3.980, 5.125,  
5.402, and 5.404 and Proposed New  
Rules 3.002, 3.807, 3.905, 3.967,  
and 5.109 of the Michigan Court Rules

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On order of the Court, this is to advise that the Court is considering an amendment of Rules 3.800, 3.802, 3.901, 3.903, 3.920, 3.921, 3.931, 3.935, 3.961, 3.963, 3.965, 3.974, 3.975, 3.976, 3.977, 3.980, 5.125, 5.402, and 5.404 and adoption of new Rules 3.002, 3.807, 3.905, 3.967, and 5.109 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [www.courts.michigan.gov/supremecourt](http://www.courts.michigan.gov/supremecourt).

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

## Rule 3.002 Indian Children

For purposes of applying the Indian Child Welfare Act, 25 USC 1901 et seq., to proceedings under the Juvenile Code, the Adoption Code, and the Estates and Protected Individuals Code, the following definitions taken from 25 USC 1903 and 25 USC 1911(a) shall apply.

- (1) “Child custody proceeding” shall mean and include
  - (a) “foster-care placement,” which shall mean any action removing an Indian child from his or her parent or Indian custodian for temporary placement in

a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated,

- (b) “termination of parental rights,” which shall mean any action resulting in the termination of the parent-child relationship,
- (c) “preadoptive placement,” which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but before or in lieu of adoptive placement, and
- (d) “adoptive placement,” which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act that, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

- (2) “Exclusive jurisdiction” shall mean that an Indian tribe has jurisdiction exclusive as to any state over any child custody proceeding as defined above involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the state by existing federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child. 25 USC 1911[a].
- (3) “Extended family member” shall be as defined by the law or custom of the Indian child’s tribe or, in the absence of such law or custom, shall be a person who has reached the age of 18 years and who is the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.
- (4) “Indian” means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 43 USC 1606.
- (5) “Indian child” means any unmarried person who is under age 18 and is either
  - (a) a member of an Indian tribe, or
  - (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

- (6) “Indian child’s tribe” means
- (a) the Indian tribe of which an Indian child is a member or eligible for membership, or
  - (b) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.
- (7) “Indian custodian” means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child.
- (8) “Indian organization” means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians.
- (9) “Indian tribe” means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 43 USC 1602(c).
- (10) “Parent” means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include an unwed father whose paternity has not been acknowledged or established.
- (11) “Reservation” means Indian country as defined in section 18 USC 1151 and any lands not covered under such section, for which title is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.
- (12) “Secretary” means the Secretary of the Interior.
- (13) “Tribal court” means a court with jurisdiction over child custody proceedings and that is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe that is vested with authority over child custody proceedings.

(A) [Unchanged.]

(B) Interested Parties.

- (1) The persons interested in various adoption proceedings, including proceedings involving an Indian child, are as provided by MCL 710.24a; except that theas otherwise provided in subrules (2) and (3).
- (2) If the adoptee is an Indian child, in addition to the above, the persons interested are the child's tribe and the Indian custodian, if any, and, if the Indian's child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.
- (3) The interested persons in a petition to terminate the rights of the noncustodial parent pursuant to MCL 710.51(6) are:
  - (a) the petitioner;
  - (b) the adoptee, if over 14 years of age; ~~and~~
  - (c) the noncustodial parent; and
  - (d) if the adoptee is an Indian child, the child's tribe and the Indian custodian, if any, and, if the Indian child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.

#### Rule 3.802 Manner and Method of Service

(A) Service of Papers.

(1)–(2) [Unchanged.]

(3) Notice of Proceeding Concerning Indian Child.

If an Indian child is the subject of an adoption proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2),

- (a) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by personal service or by registered mail with return receipt requested, of the pending proceedings on a petition for adoption of the Indian

child and of their right of intervention on a form approved by the State Court Administrative Office. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested.

- (b) the court shall notify the parent or Indian custodian and the Indian child's tribe of all other hearings pertaining to the adoption proceeding as provided in this rule. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice of the hearings shall be given to the Secretary of the Interior. Such notice may be made by first-class mail.

(34) [Former (3) is renumbered, but otherwise unchanged.]

(B)–(C) [Unchanged.]

#### Rule 3.807 Indian Child

(A) Definitions. If an Indian child, as defined by the Indian Child Welfare Act, 25 USC 1903, is the subject of an adoption proceeding, the definitions in MCR 3.002 shall control.

(B) Jurisdiction, Notice, Transfer, Intervention.

(1) If an Indian child is the subject of an adoption proceeding and an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(2), the matter shall be dismissed.

(2) If an Indian child is the subject of an adoption proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2), the court shall ensure that the petitioner has given notice of the proceedings to the persons prescribed in MCR 3.800(B) in accordance with MCR 3.802(A)(3).

(a) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. In determining whether good cause not to transfer exists, the court shall consider the Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody

Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4. A perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case.

- (b) The court shall not dismiss the matter until the transfer has been accepted by the tribal court.
  - (c) If the tribal court declines transfer, the Indian Child Welfare Act applies, as do the provisions of these rules that pertain to an Indian child (see 25 USC 1902, 1911[b]).
  - (d) A petition to transfer may be made at any time in accordance with 25 USC 1911(b).
- (3) The Indian custodian of the child and the Indian child's tribe have a right to intervene at any point in the proceeding pursuant to 25 USC 1911(c).
- (C) Record of Tribal Affiliation. Upon application by an Indian individual who has reached the age of 18 and who was the subject of an adoption placement, the court that entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

#### Rule 3.901 Applicability of Rules.

- (A) [Unchanged.]
- (B) Application. Unless the context otherwise indicates:
  - (1) MCR 3.901-3.930, ~~3.980~~, and 3.991-3.993 apply to delinquency proceedings and child protective proceedings;
  - (2)-(5) [Unchanged.]

#### Rule 3.903 Definitions

- (A) General Definitions. When used in this subchapter, unless the context otherwise indicates:
  - (1)-(12)[Unchanged.]

(13) “Legal Custodian” means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. It also includes the term “Indian custodian” as defined in MCR 3.002(7).

(14)-(16)[Unchanged.]

(17) “Parent” means the mother, the father as defined in MCR 3.903(A)(7), or both, of the minor. It also includes the term “parent” as defined in MCR 3.002(10).

(18)-(26)[Unchanged.]

(B)-(E)[Unchanged.]

(F) Indian Child Welfare Act.

If an Indian child, as defined by the Indian Child Welfare Act, 25 USC 1901 *et seq.*, is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), the definitions in MCR 3.002 shall control.

#### Rule 3.905 Indian Children; Jurisdiction, Notice, Transfer, Intervention

(A) If an Indian child is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), and if an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(2), and the matter is not before the state court as a result of emergency removal pursuant to 25 USC 1922, the matter shall be dismissed.

(B) If an Indian child is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), and if an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(2), and the matter is before the state court as a result of emergency removal pursuant to 25 USC 1922, and either the tribe notifies the state court that it is exercising its jurisdiction, or the emergency no longer exists, then the state court shall dismiss the matter.

(C) If an Indian child is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d) and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2), the court shall ensure

that the petitioner has given notice of the proceedings to the persons described in MCR 3.921 in accordance with MCR 3.920(C).

- (1) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. In determining whether good cause not to transfer exists, the court shall consider the Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4. (November 26, 1979). A perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case.
  - (2) The court shall not dismiss the matter until the transfer has been accepted by the tribal court.
  - (3) If the tribal court declines transfer, the Indian Child Welfare Act applies to the continued proceeding in state court, as do the provisions of these rules that pertain to an Indian child. See 25 USC 1902, 1911(b).
  - (4) A petition to transfer may be made at any time in accordance with 25 USC 1911(b).
- (D) The Indian custodian of the child and the Indian child's tribe have a right to intervene at any point in the proceeding pursuant to 25 USC 1911(c).

#### Rule 3.920 Service of Process

(A)-(B) [Unchanged.]

(C) Notice of Proceeding Concerning Indian Child. If an Indian child is the subject of a protective proceeding or is charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or (d) and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2):

- (1) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by personal service or by registered mail with return receipt requested, of the pending proceedings on a petition filed under MCR 3.931 or MCR 3.961 and of their right of intervention on a form approved by the State Court Administrative Office. If the identity or location of the parent or Indian

custodian, or of the tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested. Subsequent notices shall be served in accordance with this subrule for proceedings under MCR 3.967 and MCR 3.977.

- (2) the court shall notify the parent or Indian custodian and the Indian child's tribe of all hearings other than those specified in subrule (1) as provided in subrule (D). If the identity or location of the parent or Indian custodian or the tribe cannot be determined, notice of the hearings shall be given to the Secretary of the Interior. Such notice may be by first-class mail.

(~~E~~)-(H) [Renumbered, but otherwise unchanged.]

### Rule 3.921 Persons Entitled to Notice

#### (A) Delinquency Proceedings.

- (1) General. In a delinquency proceeding, the court shall direct that the following persons be notified of each hearing except as provided in subrule (A)(3):

(a)–(f) [Unchanged.]

(g) in accordance with the notice provisions of MCR 3.905, if the juvenile is charged with a status offense in violation of MCL 712A.2(a)(2)–(4) or (d) and if the juvenile is an Indian child:

(i) the juvenile's tribe and, if the tribe is unknown, the Secretary of the Interior, and

(ii) the juvenile's parents or Indian custodian, and if unknown, the Secretary of the Interior.

(2)–(3) [Unchanged.]

#### (B) Protective Proceedings.

- (1) General. In a child protective proceeding, except as provided in subrules (B)(2) and (3), the court shall ensure that the following persons are notified of each hearing:

(a)–(g) [Unchanged.]

- (h) in accordance with the notice provisions of MCR 3.905, if the child is an Indian child:
  - (i) the child's tribe and, if the tribe is unknown, the Secretary of the Interior, and
  - (ii) the child's parents or Indian custodian, and if unknown, the Secretary of the Interior, and
- (i) [former (h) relettered, but otherwise unchanged.]
- (2) Dispositional Review Hearings and Permanency Planning Hearings. Before a dispositional review hearing or a permanency planning hearing, the court shall ensure that the following persons are notified in writing of each hearing:
  - (a)–(i) [Unchanged.]
  - (j) any tribal leader, if there is an Indian tribe affiliation if the child is an Indian child, the child's tribe,
  - (k) [Unchanged.]
  - (l) if the child is an Indian child and the parents, guardian, legal custodian, or tribe are unknown, to the Secretary of Interior, and
  - (m) [former (l) relettered, but otherwise unchanged.]
- (3) Termination of Parental Rights. Written notice of a hearing to determine if the parental rights to a child shall be terminated must be given to those appropriate persons or entities listed in subrule (B)(2), except that if the child is an Indian child, notice shall be given in accordance with MCR 3.920(C)(1).

(C)–(D)[Unchanged.]

### MCR 3.931 Initiating Delinquency Proceedings

(A) [Unchanged.]

(B) Content of Petition. A petition must contain the following information:

- (1) the juvenile's name, address, and date of birth, if known;
- (2) the names and addresses, if known, of
  - (a) the juvenile's mother and father,
  - (b) the guardian, legal custodian, or person having custody of the juvenile, if other than a mother or father,
  - (c) the nearest known relative of the juvenile, if no parent, guardian, or legal custodian can be found, ~~and~~
  - (d) the juvenile's membership or eligibility for membership in an Indian tribe, if any, and the identity of the tribe, and
  - (~~e~~) any court with prior continuing jurisdiction;

(3)–(8)[Unchanged.]

(C)–(D)[Unchanged.]

Rule 3.935 Preliminary Hearing.

(A) [Unchanged.]

(B) Procedure.

(1)–(4)[Unchanged.]

- (5) If the charge is a status offense in violation of MCL 712A.2(a)(2)-(4) or (d), the court must inquire if the juvenile or a parent is a member of any ~~American~~ Indian tribe ~~or band~~. If the juvenile is a member, or if a parent is a ~~tribal~~ member and the juvenile is eligible for membership in the tribe, the court must determine the identity of the tribe ~~or band~~ and ~~follow the procedures set forth in~~ comply with MCR ~~3.9803.905~~ before proceeding with the hearing.

(6)–(8)[Unchanged.]

(C)–(F)[Unchanged.]

### Rule 3.961 Initiating Child Protective Proceedings

- (A) [Unchanged.]
- (B) Content of Petition. A petition must contain the following information, if known:
  - (1)–(4) [Unchanged.]
  - (5) The child’s membership or eligibility for membership in an ~~American~~ Indian tribe ~~or band~~, if any, and the identity of the tribe.
  - (6) The type of relief requested. A request for removal of the child or a parent or for termination of parental rights at the initial disposition must be specifically stated. If the petition requests removal of an Indian child or if an Indian child was taken into protective custody pursuant to MCR 3.963 as a result of an emergency, the petition must specifically describe:
    - (a) the active efforts that have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family; and
    - (b) documentation, including attempts, to identify the child’s tribe.
  - (7) [Unchanged.]

### Rule 3.963 Protective Custody of Child

- (A) Taking Custody Without Court Order. An officer may without court order remove a child from the child’s surroundings and take the child into protective custody if, after investigation, the officer has reasonable grounds to conclude that the health, safety, or welfare of the child is endangered. If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the officer may take the child into protective custody only when necessary to prevent imminent physical harm to the child.
- (B) Court-Ordered Custody.
  - (1) The court may issue a written order authorizing a child protective services worker, an officer, or other person deemed suitable by the court to immediately take a child into protective custody when, upon presentment of

proofs as required by the court, the judge or referee has reasonable grounds to believe that the conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child. If the child is an Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, the child is subject to the exclusive jurisdiction of the tribal court. However, the state court may enter an order for protective custody of that child when it is necessary to prevent imminent physical harm to the child. At the time it issues the order or as provided in MCR 3.965(D), the court shall make a judicial determination that reasonable efforts to prevent removal of the child have been made or are not required. The court may also include in such an order authorization to enter specified premises to remove the child.

(2)–(3)[Unchanged.]

(C) [Unchanged.]

#### Rule 3.965 Preliminary Hearing

(A) [Unchanged.]

(B) Procedure.

(1) The court must determine if the parent, guardian, or legal custodian has been notified, and if the lawyer-guardian ad litem for the child is present. The preliminary hearing may be adjourned for the purpose of securing the appearance of an attorney, parent, guardian, or legal custodian or may be conducted in the absence of the parent, guardian, or legal custodian if notice has been given or if the court finds that a reasonable attempt to give notice was made.

(2) The court must inquire if the child or either parent is a member of an Indian tribe. If the child is a member, or if a parent is a member and the child is eligible for membership in the tribe, the court must determine the identity of the child's tribe, notify the tribe, and, if the child was taken into protective custody pursuant to MCR 3.963(A) or the petition requests removal of the child, follow the procedures set forth in MCR 3.967. If necessary, the court may adjourn the preliminary hearing pending the conclusion of the removal hearing. A removal hearing may be held in conjunction with the preliminary hearing if all necessary parties have been

notified as required by MCR 3.905, there are no objections by the parties to do so, and at least one expert witness is present to provide testimony.

(23)-(89)[Renumbered, but otherwise unchanged.]

~~(9) The court must inquire if the child or either parent is a member of any American Indian tribe or band. If the child is a member, or if a parent is a tribal member and the child is eligible for membership in the tribe, the court must determine the identity of the child's tribe, notify the tribe or band, and follow the procedures set forth in MCR 3.980.~~

(10)-(11)[Unchanged.]

(12) If the court authorizes the filing of the petition, the court:

- (a) may release the child to a parent, guardian, or legal custodian and may order such reasonable terms and conditions believed necessary to protect the physical health or mental well-being of the child; or
- (b) may order placement of the child after making the determinations specified in subrules (C) and (D), if those determinations have not previously been made. If the child is an Indian child, the child must be placed in descending order of preference with:
  - (i) a member of the child's extended family,
  - (ii) a foster home licensed, approved, or specified by the child's tribe,
  - (iii) an Indian foster family licensed or approved by a non-Indian licensing authority,
  - (iv) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

The court may order another placement for good cause shown. If the Indian child's tribe has established by resolution a different order of preference than the order prescribed above, placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in 25 USC 1915(b). The standards to be applied in meeting the preference requirements above shall be the prevailing social and

cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(13) [Unchanged.]

(C)-(E)[Unchanged.]

#### Rule 3.967 Removal Hearing for Indian Child

- (A) Child in Protective Custody. If an Indian child is taken into protective custody pursuant to MCR 3.963(A) or (B) or MCR 3.974, a removal hearing must be held within 14 days after removal from a parent or Indian custodian unless that parent or Indian custodian has requested an additional 20 days for the hearing pursuant to 25 USC 1912(a). Absent extraordinary circumstances that make additional delay unavoidable, temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- (B) Child Not in Protective Custody. If an Indian child has not been taken into protective custody and the petition requests removal of that child, a removal hearing must be conducted before the court may enter an order removing the Indian child from the parent or Indian custodian.
- (C) Notice of the removal hearing must be sent to the parties prescribed in MCR 3.921 in compliance with MCR 3.920(C)(1).
- (D) Evidence. An Indian child may be removed from a parent or Indian custodian, or, for an Indian child already taken into protective custody pursuant to MCR 3.963 or MCR 3.974(B), remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence, including the testimony of at least one expert witness who has knowledge about the child-rearing practices of the Indian child's tribe, that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- (E) A removal hearing may be combined with any other hearing.

(F) The Indian child, if removed from home, must be placed in descending order of preference with:

- (1) a member of the child's extended family,
- (2) a foster home licensed, approved, or specified by the child's tribe,
- (3) an Indian foster family licensed or approved by a non-Indian licensing authority,
- (4) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.

The court may order another placement for good cause shown. If the Indian child's tribe has established by resolution a different order of preference than the order prescribed in subrule (F), placement shall follow that tribe's order of preference as long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in 25 USC 1915(b).

The standards to be applied in meeting the preference requirements above shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

#### Rule 3.974 Post-Dispositional Procedures; Child At Home

(A) Review of Child's Progress.

(1)–(2)[Unchanged.]

- (3) Change of Placement. Except as provided in subrule (B), the court may not order a change in the placement of a child solely on the basis of a progress review. If the child over whom the court has retained jurisdiction remains at home following the initial dispositional hearing or has otherwise returned home from foster care, the court must conduct a hearing before it may order the placement of the child. Such a hearing must be conducted in the manner provided in MCR 3.975(E), except as otherwise provided in this subrule for Indian children. If the child is an Indian child, in addition to the hearing prescribed by this subrule, the court must also conduct a removal hearing in accordance with MCR 3.967 before it may order the placement of the Indian child.

(B) Emergency Removal; Protective Custody.

- (1) General. If the child, over whom the court has retained jurisdiction, remains at home following the initial dispositional hearing or has otherwise returned home from foster care, the court may order ~~temporary removal~~ of the child to be taken into protective custody to protect the health, safety, or welfare of the child, pending an emergency removal hearing, except, that if the child is an Indian child and the child resides or is domiciled within a reservation, but is temporarily located off the reservation, the court may order the child to be taken into protective custody only when necessary to prevent imminent physical harm to the child.
- (2) Notice. The court shall ensure that the parties are given notice of the hearing as provided in MCR 3.920 and MCR 3.921.
- (3) Emergency Removal Hearing. If the court orders ~~removal of the child~~ to be taken into protective custody ~~from the parent, guardian, or legal custodian~~ to protect the child's health, safety, or welfare, the court must conduct an emergency removal hearing no later than 24 hours after the child has been taken into custody, excluding Sundays and holidays as defined in MCR 8.110(D)(2). If the child is an Indian child, the court must also conduct a removal hearing in accordance with MCR 3.967 in order for the child to remain removed from a parent or Indian custodian. Unless the child is returned to the parent pending the dispositional review, the court must make a written determination that the criteria for placement listed in MCR 3.965(C)(2) are satisfied.

(a)–(b)[Unchanged.]

- (C) Dispositional Review Hearing; Procedure. If the child is in placement pursuant to subrule (B), the dispositional review hearing must commence no later than 14 days after the child is placed by the court, except for good cause shown. The dispositional review hearing may be combined with the removal hearing for an Indian child prescribed by MCR 3.967. The dispositional review hearing must be conducted in accordance with the procedures and rules of evidence applicable to a dispositional hearing.

## Rule 3.975 Post-Dispositional Procedures; Child in Foster Care

(A)–(E)[Unchanged.]

- (F) Criteria.

- (1) Review of Case Service Plan. The court, in reviewing the progress toward compliance with the case service plan, must consider:
- (a)–(d)[Unchanged.]
  - (e) any likely harm to the child if the child continues to be separated from his or her parent, guardian, or custodian; ~~and~~
  - (f) any likely harm to the child if the child is returned to the parent, guardian, or legal custodian; and
  - (g) if the child is an Indian child, whether the child’s placement remains appropriate and complies with MCR 3.967(F).
- (2) Progress Toward Returning Child Home. The court must decide the extent of the progress made toward alleviating or mitigating conditions that caused the child to be, and to remain, in foster care.

(G)-(H)[Unchanged.]

#### Rule 3.976 Permanency Planning Hearing

(A)-(B)[Unchanged.]

- (C) Notice. The parties entitled to participate in a permanency planning hearing include the:
- (1) parents of the child, if the parent’s parental rights have not been terminated,
  - (2) ~~the~~ child, if the child is of an appropriate age to participate,
  - (3) guardian,
  - (4) legal custodian,
  - (5) foster parents,
  - (6) preadoptive parents, ~~and~~
  - (7) relative caregivers, and

- (8) if the child is an Indian child, the Indian child's tribe.

Written notice of a permanency planning hearing must be given as provided in MCR 3.920 and MCR 3.921(B)(2). The notice must include a brief statement of the purpose of the hearing, and must include a notice that the hearing may result in further proceedings to terminate parental rights. The notice must inform the parties of their opportunity to participate in the hearing and that any information they wish to provide should be submitted in advance to the court, the agency, the lawyer-guardian ad litem for the child, or an attorney for one of the parties.

(D)-(E) [Unchanged.]

### Rule 3.977 Termination of Parental Rights

(A) General.

- (1) This rule applies to all proceedings in which termination of parental rights is sought. Proceedings for termination of parental rights involving an Indian child, ~~as defined by 25 USC 1901 et seq.,~~ are governed by MCR 3.98025 USC 1912 in addition to this rule.

(2)-(3)[Unchanged.]

(B)-(F)[Unchanged.]

(G) Termination of Parental Rights; Indian Child

In addition to the required findings in this rule, the parental rights of a parent of an Indian child must not be terminated unless:

- (1) the court is satisfied that active efforts have been made to provide remedial service and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful, and
- (2) the court finds evidence beyond a reasonable doubt, including testimony of at least one qualified expert witness, that parental rights should be terminated because continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child.

(GH)-(JK)[Renumbered, but otherwise unchanged.]

### Rule 3.980 American Indian Children

(A) ~~Notice; Transfer. If any Indian child as defined by the Indian Child Welfare Act, 25 USC 1901 et seq., is the subject of a protective proceeding or is charged with an offense in violation of MCL 712A.2(a)(2) (4) or (d), the following procedures shall be used:~~

- ~~(1) If the Indian child resides on a reservation or is under tribal court jurisdiction at the time of referral, the matter shall be transferred to the tribal court having jurisdiction.~~
- ~~(2) If the child does not reside on a reservation, the court shall ensure that the petitioner has given notice of the proceedings to the child's tribe and the child's parents or Indian custodian and, if the tribe is unknown, to the Secretary of the Interior.~~
- ~~(3) If the tribe exercises its right to appear in the proceeding and requests that the proceeding be transferred to tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. A perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case.~~

(B) ~~Emergency Removal.~~

- ~~(1) An Indian child who resides or is domiciled on a reservation, but is temporarily located off the reservation, must not be removed from a parent or Indian custodian unless the removal is to prevent imminent physical harm to the child.~~
- ~~(2) An Indian child not residing or domiciled on a reservation may be temporarily removed if reasonable efforts have been made to prevent removal of the child, and continued placement with the parent or Indian custodian would be contrary to the welfare of the child.~~

(C) ~~Removal Hearing.~~

- ~~(1) After Emergency Removal. If an Indian child is removed under subrule (B)(1) or (2), a removal hearing must be completed within 28 days of removal from the parent or Indian custodian.~~

- ~~(2) Non-Emergency Removal. Except in cases of emergency removal under subrules (B)(1) or (2), a removal hearing must be completed before an Indian child may be removed from the parent or Indian custodian.~~
- ~~(3) Evidence. An Indian child must not be removed from a parent or Indian custodian, or, for an Indian child removed under subrules (B)(1) or (2), remain removed from a parent or Indian custodian pending further proceedings, without clear and convincing evidence, including the testimony of at least one expert witness who has knowledge about the child-rearing practices of the Indian child's tribe, that services designed to prevent the break up of the Indian family have been furnished to the family and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical injury to the child.~~
- ~~(4) A removal hearing may be combined with any other hearing.~~
- ~~(5) The Indian child, if removed from home, must be placed, in descending order of preference, with:
 
  - ~~(a) a member of the child's extended family,~~
  - ~~(b) a foster home licensed, approved, or specified by the child's tribe,~~
  - ~~(c) an Indian foster family licensed or approved by a non Indian licensing authority,~~
  - ~~(d) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.~~~~

~~The court may order another placement for good cause shown.~~

- ~~(D) Termination of Parental Rights. In addition to the required findings under MCR 3.977, the parental rights of a parent of an Indian child must not be terminated unless there is also evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that parental rights should be terminated because continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child.~~

#### Rule 5.109 Notice of Guardianship Proceedings Concerning Indian Child

If an Indian child is the subject of a guardianship proceeding and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2):

- (1) in addition to any other service requirements, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by personal service or by registered mail with return receipt requested, of the pending proceedings on a petition to establish guardianship over the Indian child and of their right of intervention on a form approved by the State Court Administrative Office. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice shall be given to the Secretary of the Interior by registered mail with return receipt requested.
- (2) the court shall notify the parent or Indian custodian and the Indian child's tribe of all other hearings pertaining to the guardianship proceeding as provided in MCR 5.105. If the identity or location of the parent or Indian custodian, or of the tribe, cannot be determined, notice of the hearings shall be given to the Secretary of the Interior. Such notice may be made by first-class mail.

#### Rule 5.125 Interested Persons Defined

- (A) Special Persons. In addition to persons named in subrule (C) with respect to specific proceedings, the following persons must be served:

(1)–(7) [Unchanged.]

- (8) In a guardianship proceeding for a minor, if the minor is an Indian child as defined by the Indian Child Welfare Act, 25 USC 1901 *et seq.*, the minor's tribe and the Indian custodian, if any, and, if the Indian child's parent or Indian custodian, or tribe, is unknown, the Secretary of the Interior.

(B)–(E) [Unchanged.]

#### Rule 5.402 Common Provisions

(A)–(D) [Unchanged.]

(E) Indian Child; Definitions, Jurisdiction, Notice, Transfer, Intervention.

- (1) If an Indian child, as defined by the Indian Child Welfare Act, 25 USC 1903, is the subject of a guardianship proceeding under the Estates and Protected Individuals Code, the definitions in MCR 3.002 shall control. This does not include guardianships established under the Juvenile Code and MCR 3.979.

- (2) If an Indian child is the subject of a petition to establish guardianship of a minor and an Indian tribe has exclusive jurisdiction as defined in MCR 3.002(2), the matter shall be dismissed.
- (3) If an Indian child is the subject of a petition to establish guardianship of a minor and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(2), the court shall ensure that the petitioner has given notice of the proceedings to the persons prescribed in MCR 5.125(A)(8) and (C) in accordance with MCR 5.109.
- (a) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. In determining whether good cause not to transfer exists, the court shall consider the Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4. A perceived inadequacy of the tribal court or tribal services does not constitute good cause to refuse to transfer the case.
- (b) The court shall not dismiss the matter until the transfer has been accepted by the tribal court.
- (c) If the tribal court declines transfer, the Indian Child Welfare Act applies, as do the provisions of these rules that pertain to an Indian child (see 25 USC 1902, 1911[b]).
- (d) A petition to transfer may be made at any time in accordance with 25 USC 1911(b).
- (4) The Indian custodian of the child and the Indian child's tribe have a right to intervene at any point in the proceeding pursuant to 25 USC 1911(c).

#### Rule 5.404 Guardianship of Minor

- (A) Petition for Guardianship of Minor. The petitioner shall state in the petition whether or not the minor is an Indian child or whether that fact is unknown. If the court requires the petitioner to file a social history before hearing a petition for guardianship of a minor, it shall do so on a form approved by the State Court Administrative Office. The social history for minor guardianship is confidential,

and it is not to be released, except on order of the court, to the parties or the attorneys for the parties.

(B)–(F) [Unchanged.]

Staff Comment: These proposed amendments were recommended by the Indian Child Welfare Act subcommittee in an effort to incorporate the specific provisions of the Indian Child Welfare Act into the relevant rules that relate to adoption and guardianships. The proposal incorporates provisions of the Indian Child Welfare Act into specific provisions within various rules relating to child protective proceedings and juvenile status offenses. The proposal is designed to make the rules reflect a more integrated approach to addressing issues specific to Indian children.

MCR 3.002(1)(c) defines “preadoptive placement” to mean the “temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but before or in lieu of adoptive placement, and . . . .” The phrase “in lieu of adoptive placement” is not intended to mean that it is permissible to leave a child in foster care indefinitely, in violation of MCL 712A.19b(6) or (7) or 45 CFR 1355.20, 45 CFR 1356.21, or 45 CFR 1356.50. Rather, it addresses situations where the parental rights to a child have been terminated and there is no permanency plan for adoption of the child. One example is when the child has been placed with a juvenile guardian and the guardianship is subsequently revoked. In this situation, jurisdiction over the child pursuant to MCL 712A.2(b) will be reinstated and the child is placed in foster care.

The proposed amendment of MCR 3.905(C)(1) states that a court shall consider guidelines established by the Bureau of Indian Affairs (BIA) in determining whether good cause not to transfer exists (Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4. [November 26, 1979]). Some examples of good cause are that the Indian tribe does not have a tribal court or that the Indian child is over 12 years old and objects to the transfer. For additional examples of good cause and relevant case law, see the BIA guidelines cited above and A Practical Guide to the Indian Child Welfare Act. (Native American Rights Fund, A Practical Guide to the Indian Child Welfare Act [Boulder, CO: Native American Rights Fund, 2007], 7.15 and 7.16, p 60.)

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or [MSC\\_clerk@courts.mi.gov](mailto:MSC_clerk@courts.mi.gov). When filing a comment, please refer to ADM File No. 2008-43. Your comments and the comments of others will be posted at [www.courts.mi.gov/supremecourt/resources/administrative/index.htm](http://www.courts.mi.gov/supremecourt/resources/administrative/index.htm).



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 15, 2009

*Corbin R. Davis*

Clerk