Chapter 7: Preliminary Hearings

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In this chapter. . .

In child protective proceedings, the court must hold a preliminary hearing if the child has been taken into temporary protective custody or if a party has requested that the child be taken into custody. The court must make two major decisions at a preliminary hearing: whether to authorize the filing of the petition and, if so, whether to order pretrial placement of the child. This chapter deals only with the procedures leading up to the decision to authorize the filing of the petition. The procedures governing the determination of whether the child should be placed pending trial are covered in Chapter 8. In addition to or as an alternative to placing the child outside his or her home, the court may order an alleged abuser to leave the child's home, and the court may also enter orders affecting "nonparent adults." The requirements for entering and enforcing such orders are discussed in Sections 7.13–7.15 of this chapter. This chapter also discusses the appointment of attorneys for respondents and the appointment of lawyer-guardians ad litem, attorneys, guardians ad litem, and court-appointed special advocates (CASAs) for children.

7.1 When a Preliminary Hearing Must Be Conducted

*See Sections 6.6–6.7 for a discussion of preliminary inquiries.

If a petition is accompanied by a request for placement and the child is in temporary custody, the court must hold a preliminary hearing to decide whether to authorize the filing of the petition and whether to place the child outside his or her home. If the petition does not request placement and the child is not in custody, the court may conduct a preliminary inquiry to determine an appropriate course of action. MCR 3.962(A) and MCR 3.965(A)(1).*

*See Chapter 8 for a detailed discussion of placement of the child.

If the court authorizes the filing of the petition, it must then determine whether to return the child to the parent, guardian, or legal custodian, with or without conditions, or to order placement of the child with someone other than a parent, guardian, or legal custodian pending a trial on the allegations in the petition. MCR 3.965(B)(11).*

7.2 Time Requirements for Preliminary Hearings

MCR 3.965(A) contains the time requirements for preliminary hearings. That rule states as follows:

> **"(A) Time for Preliminary Hearing.**
>
> "(1) *Child in Protective Custody.* The preliminary hearing must commence no later than 24 hours after the child has been taken into protective custody, excluding Sundays and holidays, as defined by MCR 8.110(D)(2), unless adjourned for good cause shown, or the child must be released.
>
> "(2) *Severely Physically Injured or Sexually Abused Child.* When the Family Independence Agency submits a petition in cases in which the child has been severely physically injured, as that term is defined in MCL 722.628(3)(c), or sexually abused,* and subrule (A)(1) does not apply, the preliminary hearing must commence no later than 24 hours after the agency submits a petition or on the next business day following the submission of the petition."

*See Section 2.1(A) for the applicable definitions.

7.3 Adjournments of Preliminary Hearings

The court rule governing preliminary hearings, MCR 3.965, contains two provisions that specifically allow for adjournment of a hearing. MCR 3.965(B)(1) states in part:

> "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."*

*See Section 5.4 for notice requirements.

MCR 3.965(B)(10) allows for adjournment for up to 14 days to secure the attendance of witnesses or for other good cause shown. That rule states:

> "The court may adjourn the hearing for up to 14 days to secure the attendance of witnesses or for other good cause shown. If the preliminary hearing is adjourned, the court may make temporary orders for the placement of the child when necessary to assure the immediate safety of the child, pending the completion of the preliminary hearing and subject to subrules (C) and (D)."

MCR 3.923(G) contains the general requirements for adjournments and continuances.*

*See Section 5.12.

7.4 Respondents' Right to Counsel

Definition of "respondent." The applicable statute, MCL 712A.17c, and court rule, MCR 3.915, require appointment of counsel in child protective proceedings for indigent *respondents.* Those rules are discussed below.

"Except as provided in MCR 3.977(B), 'respondent' means the parent, guardian, legal custodian, or nonparent adult who is alleged to have committed an offense against a child." MCR 3.903(C)(10). The definitions of "parent," "guardian," "legal custodian," and "nonparent adult" are contained in the court rules. Those terms are defined as follows:

- "'Parent' means the mother, the father as defined in MCR 3.903(A)(7),* or both, of the minor." MCR 3.903(A)(17).
- "'Guardian' means a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or 700.5205, by a court of another state under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202." MCR 3.903(A)(11).
- "'Legal Custodian' means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state." MCR 3.903(A)(13).

*See Sections 5.1–5.2 for the definition of "father" and a discussion of the procedures to establish paternity.

- "'Nonparent adult' means a person who is 18 years of age or older and who, regardless of the person's domicile, meets all the following criteria in relation to a child over whom the court takes jurisdiction under this chapter:

  (a) has substantial and regular contact with the child,

  (b) has a close personal relationship with the child's parent or with a person responsible for the child's health or welfare, and

  (c) is not the child's parent or a person otherwise related to the child by blood or affinity to the third degree." MCR 3.903(C)(6).

MCR 3.977(B) limits the definition of "respondent" for purposes of hearings to terminate parental rights to persons with parental rights. MCR 3.977(B) states as follows:

> "(B) *Definition.* When used in this rule, unless the context otherwise indicates, "respondent" includes:
>
> (1) the natural or adoptive mother of the child;
>
> (2) the father of the child as defined by MCR 3.903(A)(7).*
>
> "'Respondent' does not include other persons to whom legal custody has been given by court order, persons who are acting in the place of the mother or father, or other persons responsible for the control, care, and welfare of the child."

*See Sections 5.1–5.2.

Constitutional right to counsel. In *Lassiter v Dep't of Social Services of Durham Co, North Carolina,* 452 US 18, 31–32 (1981), the United States Supreme Court held that the Fourteenth Amendment of the United States Constitution does not require court-appointed counsel for a respondent in every termination of parental rights proceeding. Rather, the decision whether due process calls for the appointment of counsel is to be answered in the first instance by the trial court, subject to appellate review.

In *Reist v Bay Circuit Judge*, 396 Mich 326, 346 (1976), a plurality opinion, three justices of the Michigan Supreme Court concluded that an indigent parent has a constitutional right to appointed counsel. In the lead opinion, Justice Levin held that the federal constitution required appointment of counsel for indigent respondents in involuntary termination cases. The lead opinion construed a former court rule* requiring appointment of counsel in proceedings that "may involve termination of [parental] rights." *Id.* at 331, n 2. "Because of the nature of parental rights termination proceedings and of the basic, fundamental nature of the parental relationship in our society, the Due Process Clause requires assignment of counsel at public expense for an indigent for hearings when the state seeks to terminate his [or her] parental rights." *Id.* at 346. The lead opinion also concluded that an indigent parent is entitled to appointed appellate counsel and transcripts at public expense in his or her first appeal of right. *Id.* at 349. "[W]e also conclude that indigent parents are entitled to meaningful and adequate access to the appellate process and that this right can only be achieved through the representation by counsel and providing counsel with necessary transcripts. The Equal Protection Clause requires that indigent parents be provided counsel for prosecuting the first appeal as of right . . . and such transcripts as counsel requires." *Id.* (Footnote omitted.)

*See below for the current statutory and court rule provisions. Now, a court is required to appoint counsel for indigent respondents "at any hearing . . . ."

However, in *In re Perry,* 148 Mich App 601, 609–10 (1986), the Court of Appeals concluded that *Reist* was without precedential value because a majority of the Justices had failed to agree on a rationale for the decision. The Court of Appeals in *Perry* also held that, under the court rule at issue in *Reist,* an indigent parent was not entitled to appointed counsel in proceedings that did not involve termination of parental rights. *Perry, supra* at 613–14.

See also *In re EP,* 234 Mich App 582, 597–98 (1999), overruled on other grounds 462 Mich. 341, 353, n 10 (2000) ("Although the constitutional provisions explicitly guaranteeing the right to counsel apply only in criminal proceedings, the right to due process also indirectly guarantees assistance of counsel in child protective proceedings"), *In re Osborne (On Remand, After Remand),* 237 Mich App 597, 606 (1999) (questioning whether the Michigan Constitution guarantees the right to court-appointed counsel for indigent respondents in termination proceedings), and *In re Trowbridge,* 155 Mich App 785, 786 (1986) ("The right to appointed counsel at such [termination] proceedings is . . . a fundamental constitutional right guaranteed by the equal protection clauses of the United States and Michigan Constitutions").

A parent is not entitled to court-appointed counsel for a voluntary release of parental rights. See *In re Jackson,* 115 Mich App 40, 50-52 (1982) and *In re Blankenship*, 165 Mich App 706, 713 (1988). See also *In re Koroly*, 145 Mich App 79, 88 (1985)(a putative father is not entitled to counsel where he voluntarily signs a disclaimer of paternity and a denial of interest in custody).

The court has discretionary authority to appoint counsel to assist an indigent noncustodial parent in contesting termination of parental rights under the Adoption Code. *In re Sanchez*, 422 Mich 758, 761(1985). In *Sanchez,* the Michigan Supreme Court provided that when exercising its discretion,

> "the trial court will be guided by the principle of assuring the nonconsenting parent the ability to present a case properly, measured in the particular case by factors such as the relative strength of the adversaries and the presence or absence of legal, factual, procedural, or evidentiary complexity." 422 Mich at 770-71.

Statutory and court rule provisions. MCL 712A.17c sets forth the requirements for appointing an attorney for a respondent. That statute states, in relevant part:

> "(4) In a proceeding under section 2(b) or (c) of this chapter, the court shall advise the respondent at the respondent's first court appearance of all of the following:
>
> > (a) The right to an attorney at each stage of the proceeding.
> >
> > (b) The right to a court-appointed attorney if the respondent is financially unable to employ an attorney.
> >
> > (c) If the respondent is not represented by an attorney, the right to request and receive a court-appointed attorney at a later proceeding.
>
> "(5) If it appears to the court in a proceeding under section 2(b) or (c) of this chapter that the respondent wants an attorney and is financially unable to retain an attorney, the court shall appoint an attorney to represent the respondent.
>
> "(6) Except as otherwise provided in this subsection, in a proceeding under section 2(b) or (c) of this chapter, the respondent may waive his or her right to an attorney. A respondent who is a minor may not waive his or her right to an attorney if the respondent's parent or guardian ad litem objects.
>
> ***
>
> "(9) An attorney . . . appointed by the court under this section shall serve until discharged by the court." MCL 712A.17c(4)–(6), (9).

MCR 3.915(B) also contains provisions regarding the appointment of counsel for a respondent. That rule states, in relevant part:

> **"(B) Child Protective Proceedings.**
>
> **"(1) Respondent.**
>
> "(a) At respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules and that
>
> > (*i*) the respondent has the right to a court-appointed attorney if the respondent is financially unable to retain an attorney, and,
> >
> > (*ii*) if the respondent is not represented by an attorney, the respondent may request a court-appointed attorney at any later hearing.
>
> "(b) The court shall appoint an attorney to represent the respondent at any hearing conducted pursuant to these rules if
>
> > (*i*) the respondent requests appointment of an attorney, and
> >
> > (*ii*) it appears to the court, following an examination of the record, through written financial statements, or otherwise, that the respondent is financially unable to retain an attorney.
>
> "(c) The respondent may waive the right to the assistance of an attorney, except that the court shall not accept the waiver by a respondent who is a minor when a parent, guardian, legal custodian, or guardian ad litem objects to the waiver."
>
> ***
>
> "(C) *Appearance.* The appearance of an attorney is governed by MCR 2.117(B).
>
> "(D) *Duration.* An attorney retained by a party may withdraw only on order of the court. An attorney or lawyer-guardian ad litem appointed by the court to represent a party shall serve until discharged by the court.

> "(E) *Costs.* When an attorney is appointed for a party under this rule, the court may enter an order assessing costs of the representation against the party or against a person responsible for the support of that party, which order may be enforced as provided by law." MCR 3.915(B)(1), (C)–(E)

Note: Often the court will have counsel standing by for a respondent who wants counsel. The court will recess, allow counsel and respondent to talk, appoint counsel on the record, and resume the hearing.

Appointment of appellate counsel. MCR 3.977(I) assigns an indigent respondent-parent a right to appointed appellate counsel following termination of parental rights. MCR 3.977(I)(1) requires a court to advise a respondent-parent of this and related rights. MCR 3.977(I)(2)–(3) then set forth the circumstances in which the court must appoint counsel and provide copies of transcripts. MCR 3.977(I) states:

> **"(I) Respondent's Rights Following Termination.**
>
> "(1) *Advice.* Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that:
>
> (a) Respondent is entitled to appellate review of the order.
>
> (b) If respondent is financially unable to provide an attorney to perfect an appeal, the court will appoint an attorney and furnish the attorney with the portions of the transcript and record the attorney requires to appeal.
>
> (c) A request for the assistance of an attorney must be made within 21 days after notice of the order is given. The court must then give a form to the respondent with the instructions (to be repeated on the form) that if respondent desires the appointment of an attorney, the form must be returned to the court within the required period (to be stated on the form).
>
> (d) Respondent has the right to file a denial of release of identifying information, a revocation of a denial of release, and to keep current the respondent's name and address as provided in MCL 710.27.

> "(2) *Appointment of Attorney.* If a request is timely filed and the court finds that the respondent is financially unable to provide an attorney, the court shall enter an order appointing an attorney. In the interest of justice, the court may appoint an attorney where the request is filed untimely.
>
> "(3) *Transcripts.* If the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court may, on motion or its own initiative, order transcripts prepared at public expense."

See, generally, *In re Conley,* 216 Mich App 41, 45 (1996) (Court of Appeals refused to require appointment of appellate counsel where tardiness of request was the only reason for denial of the request for counsel; appointment in such circumstances is within the court's discretion).

See also *MLB v SLJ,* 519 US 102, 113–16 (1996) (state's conditioning of parent's appeal by right of an order terminating parental rights on prepayment of transcript fees is inconsistent with the requirements of due process and equal protection).

Affirmative action required for continuation of representation. In *In re Hall,* 188 Mich App 217, 220–22 (1991), respondent-mother failed to contact her court-appointed attorney for 16 months prior to a dispositional review hearing. The trial court dismissed her attorney, and at a subsequent review hearing, a caseworker testified that respondent's child had been sexually abused by respondent's boyfriend while in foster care. A supplemental petition requesting termination of respondent's parental rights was pending at the time of the subsequent review hearing. On appeal, respondent argued that the trial court should have appointed counsel on its own motion for her at the subsequent review hearing. The Court of Appeals disagreed, holding that former MCR 5.915(B) required some affirmative action by a respondent in order to have counsel appointed for purposes of a review hearing, even where a supplemental petition requesting termination of parental rights has been filed. In addition, respondent's failure to contact her court-appointed attorney and her failure to appear at any review hearings constituted a waiver of her right to appointed counsel.

> **Note:** Prior MCR 5.915(B) required a court to appoint counsel "if the respondent desires an attorney . . . ." Current MCR 3.915(B)(1)(b)(i) requires appointment if "the respondent requests appointment of an attorney . . . ."

In *In re Powers Minors,* 244 Mich App 111 (2000), respondent-father failed to appear at a termination of parental rights hearing. When his court-appointed attorney appeared late at the hearing, the hearing referee dismissed her. *Id.* at 120-21. The Court of Appeals remanded the case to the

trial court for a hearing on whether respondent-father was denied his right to counsel at the termination hearing. *Id.* at 124. The Court of Appeals distinguished *Hall, supra,* because Hall involved dismissal of counsel from a dispositional review hearing, not a termination of parental rights hearing. *Id.* at 122-23.

By analogy to criminal cases, a court must allow a respondent who has initially waived counsel to withdraw from self-representation "if the [respondent] shows a legitimate reason for the change and if substitution would 'not result in unwarranted disruption prejudicial to the orderly progress of the case'." *In re Cobb,* 130 Mich App 598, 600–01 (1983), quoting *People v Eddington,* 77 Mich App 177, 188 (1988).

Effective assistance of counsel. In *In re EP,* 234 Mich App 582, 597–98 (1999), overruled on other grounds 462 Mich 341 (2000), the Court of Appeals stated the following regarding effective assistance of counsel representing respondents in child protective proceedings:

> "The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to effective assistance of counsel. *People v Pubrat,* 451 Mich. 589, 594; 548 N.W.2d 595 (1996). The juvenile court is required to appoint an attorney for the child in child protective proceedings. MCL 712A.17c(7); MSA 27.3178(598.17c)(7). Although the constitutional provisions explicitly guaranteeing the right to counsel apply only in criminal proceedings, the right to due process also indirectly guarantees assistance of counsel in child protective proceedings. Thus, the principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings. *In re Simon,* 171 Mich. App. 443, 447; 431 N.W.2d 71 (1988); *In re Trowbridge,* 155 Mich. App. 785, 786; 401 N.W.2d 65 (1986)."

In *EP,* the Court of Appeals held that a respondent could not assert a claim of ineffective assistance of counsel on behalf of her child, as the right to effective assistance of counsel is personal and cannot be asserted vicariously. *EP, supra* at 598.

In *In re CR,* 250 Mich App 185, 198 (2002), the Court of Appeals briefly recited the applicable standard:

> "To prevail on this claim of ineffective assistance of counsel, [a respondent] must show that her [or his] trial counsel's performance was deficient, i.e., she [or he] must 'show that counsel's performance fell below an objective standard of reasonableness, and that the

> representation so prejudiced' her [or him] that it denied her [or him] a fair trial. This necessarily entails proving prejudice to [the respondent], which means that there is 'a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." (Citations omitted.)

Conflict of interest. In *In re Osborne (On Remand, After Remand),* 237 Mich App 597, 603 (1999), lv app den 461 Mich 931 (1999), the Court of Appeals held that "plain error regarding a conflict of interest of counsel falls within the category of error for which prejudice must be proved before reversal may be ordered." One of the respondent's five court-appointed attorneys represented the respondent at a review hearing and, one year later, as an assistant prosecuting attorney, represented the FIA as petitioner at a termination of parental rights hearing. The Court of Appeals initially held that reversal was warranted regardless of prejudice. *In re Osborne,* 230 Mich App 712, 716–17 (1998). The Michigan Supreme Court vacated the Court of Appeals' opinion and remanded the case to the trial court for an evidentiary hearing to determine whether the respondent suffered actual prejudice. *In re Osborne,* 459 Mich 360 (1999). At the evidentiary hearing, the attorney testified that he did not recall representing the respondent or obtaining information from her. On appeal after the evidentiary hearing, the Court of Appeals affirmed the trial court's finding that the respondent did not suffer actual prejudice. *In re Osborne (On Remand, After Remand), supra* at 602–03.

Appointment of counsel in proceedings involving an Indian child. The appointment of counsel in a "child custody proceeding" pursuant to the Indian Child Welfare Act (ICWA) is governed by 25 USC 1912(b), which provides:

> "Appointment of counsel. In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary* upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to [25 USC 13]."

*The "Secretary" refers to the Secretary of the Interior. 25 USC 1903(11). See Chapter 20 for a detailed discussion of the Indian Child Welfare Act.

When the court notifies the Secretary of the appointment of counsel, the court must also notify the Bureau of Indian Affairs Area Director at Minneapolis Area Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401-2241. 25 CFR 23.13(a) and 25 CFR

23.11(c)(2). Pursuant to 25 CFR 23.13(a)(1)–(7), the notice of appointment of counsel must include the following:

> "(1) Name, address, and telephone number of attorney who has been appointed.
>
> "(2) Name and address of client for whom counsel is appointed.
>
> "(3) Relationship of client to child.
>
> "(4) Name of Indian child's tribe.
>
> "(5) Copy of the petition or complaint.
>
> "(6) Certification by the court that state law makes no provision for appointment of counsel in such proceedings.
>
> "(7) Certification by the court that the Indian client is indigent."

7.5 Appointment of Lawyer-Guardians Ad Litem for Children

Appointment under the Child Protection Law. MCL 722.630 states as follows:

> "In each case filed under this act in which judicial proceedings are necessary, the court shall appoint a lawyer-guardian ad litem to represent the child. A lawyer-guardian ad litem represents the child and has powers and duties in relation to that representation as set forth in . . . MCL 712A.17d. All provisions of . . . 712A.17d[] apply to a lawyer-guardian ad litem appointed under this act."

MCL 722.622(r) defines "lawyer-guardian ad litem" as "an attorney appointed under [MCL 722.630] who has the powers and duties referenced by [MCL 722.630].

Appointment under the Juvenile Code. The court must appoint a lawyer-guardian ad litem to represent the child, and the child may not waive the assistance of a lawyer-guardian ad litem. MCL 712A.17c(7)–(9) state as follows:

"(7) In a proceeding under section 2(b) or (c) of this chapter, the court shall appoint a lawyer-guardian ad litem to represent the child. The child shall not waive the assistance of the lawyer-guardian ad litem. In addition to any other powers and duties, a lawyer-guardian ad litem's powers and duties include those prescribed in section 17d.

"(8) If [a] . . . lawyer-guardian ad litem is appointed for a party under this act, after a determination of ability to pay the court may enter an order assessing attorney costs against the party or the person responsible for that party's support, or against the money allocated from marriage license fees for family counseling services under section 3 of 1887 PA 128, MCL 551.103. An order assessing attorney costs may be enforced through contempt proceedings.

"(9) A[] . . . lawyer-guardian ad litem appointed by the court under this section shall serve until discharged by the court. If the child's case was petitioned under section 2(b) of this chapter, the court shall not discharge the lawyer-guardian ad litem for the child as long as the child is subject to the jurisdiction, control, or supervision of the court, or of the Michigan children's institute or other agency, unless the court discharges the lawyer-guardian ad litem for good cause shown on the record. If the child remains subject to the jurisdiction, control, or supervision of the court, or the Michigan children's institute or other agency, the court shall immediately appoint another lawyer-guardian ad litem to represent the child."

MCL 712A.13a(1)(f) defines "lawyer-guardian ad litem" as follows:

"'Lawyer-guardian ad litem' means an attorney appointed under section 17c of this chapter. A lawyer-guardian ad litem represents the child, and has the powers and duties, as set forth in section 17d of this chapter. The provisions of section 17d of this chapter also apply to a lawyer-guardian ad litem appointed under each of the following:

(*i*) Section 5213 or 5219 of the estates and protected individuals code, 1998 PA 386, MCL 700.5213 and 700.5219.*

(*ii*) Section 4 of the child custody act of 1970, 1970 PA 91, MCL 722.24.

*These provisions deal with the appointment of guardians for minors. See Section 4.12.

(*iii*) Section 10 of the child protection law, 1975 PA 238, MCL 722.630."

The court rule governing appointment of lawyer-guardians ad litem, MCR 3.915(B)(2), references the statute and requires that the court appoint a lawyer-guardian ad litem for the preliminary hearing:

"(2) Child.

(a) The court must appoint a lawyer-guardian ad litem to represent the child at every hearing, including the preliminary hearing. The child may not waive the assistance of a lawyer-guardian ad litem. The duties of the lawyer-guardian ad litem are as provided by MCL 712A.17d.

*See Section 7.7, below.

(b) If a conflict arises between the lawyer-guardian ad litem and the child regarding the child's best interests, the court may appoint an attorney to represent the child's stated interests.*

"(C) *Appearance.* The appearance of an attorney is governed by MCR 2.117(B).

"(D) *Duration.* An attorney retained by a party may withdraw only on order of the court. An attorney or lawyer-guardian ad litem appointed by the court to represent a party shall serve until discharged by the court.

"(E) *Costs.* When an attorney is appointed for a party under this rule, the court may enter an order assessing costs of the representation against the party or against a person responsible for the support of that party, which order may be enforced as provided by law."

7.6 Powers and Duties of Lawyer-Guardians Ad Litem

A lawyer-guardian ad litem's powers and duties include those prescribed in MCL 712A.17d. That statute states as follows:

"(1) A lawyer-guardian ad litem's duty is to the child, and not the court. The lawyer-guardian ad litem's powers and duties include at least all of the following:

(a) The obligations of the attorney-client privilege.

(b) To serve as the independent representative for the child's best interests, and be entitled to full and active participation in all aspects of the litigation and access to all relevant information regarding the child.

(c) To determine the facts of the case by conducting an independent investigation including, but not limited to, interviewing the child, social workers, family members, and others as necessary, and reviewing relevant reports and other information.

(d) Before each proceeding or hearing, to meet with and observe the child, assess the child's needs and wishes with regard to the representation and the issues in the case, review the agency case file and, consistent with the rules of professional responsibility, consult with the child's parents, foster care providers, guardians, and caseworkers.

(e) To explain to the child, taking into account the child's ability to understand the proceedings, the lawyer-guardian ad litem's role.

(f) To file all necessary pleadings and papers and independently call witnesses on the child's behalf.

(g) To attend all hearings and substitute representation for the child only with court approval.

(h) To make a determination regarding the child's best interests and advocate for those best interests according to the lawyer-guardian ad litem's understanding of those best interests, regardless of whether the lawyer-guardian ad litem's determination reflects the child's wishes. The child's wishes are relevant to the lawyer-guardian ad litem's determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity. Consistent with the law governing attorney-client privilege, the lawyer-guardian ad litem shall inform the court as to the child's wishes and preferences.

(i) To monitor the implementation of case plans and court orders, and determine whether services the court ordered for the child or the child's

family are being provided in a timely manner and are accomplishing their purpose. The lawyer-guardian ad litem shall inform the court if the services are not being provided in a timely manner, if the family fails to take advantage of the services, or if the services are not accomplishing their intended purpose.

(j) Consistent with the rules of professional responsibility, to identify common interests among the parties and, to the extent possible, promote a cooperative resolution of the matter.

(k) To request authorization by the court to pursue issues on the child's behalf that do not arise specifically from the court appointment.

"(2) If, after discussion between the child and his or her lawyer-guardian ad litem, the lawyer-guardian ad litem determines that the child's interests as identified by the child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian ad litem shall communicate the child's position to the court. If the court considers the appointment appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and the lawyer-guardian ad litem's identification of the child's interests, the court may appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child's lawyer-guardian ad litem.

"(3) The court or another party to the case shall not call a lawyer-guardian ad litem as a witness to testify regarding matters related to the case. The lawyer-guardian ad litem's file of the case is not discoverable."

Effective assistance of counsel. A child is entitled to the effective assistance of counsel. To constitute effective assistance of counsel, a child's attorney's conduct must comply with "applicable statutes, court rules, rules of professional conduct, and any logically relevant case law." *In re AMB,* 248 Mich App 144, 226 (2001).

Appointment of lawyer-guardian ad litem under the Safe Delivery of Newborns Law. The court may appoint a lawyer-guardian ad litem to represent a newborn under the Safe Delivery of Newborns Law, MCL 712.1 et seq. MCL 712.2(1). "'Lawyer-guardian ad litem' means an attorney appointed under [MCL 712.2]. A lawyer-guardian ad litem represents the newborn, and has the powers and duties, as set forth in [MCL 712A.17d]."

For a more complete discussion of the lawyer-guardian ad litem's role, see Miller, "Lawyer-Guardian ad Litem Protocol" (MJI, 2003), an excerpt of which is attached as an appendix to this chapter.

7.7 Appointment of Attorney for the Child

MCL 712A.17d(2) allows for the court to appoint an attorney to represent a child where the lawyer-guardian ad litem's determination of the child's best interests conflicts with the child's interests as identified by the child. That statute states:

> "(2) If, after discussion between the child and his or her lawyer-guardian ad litem, the lawyer-guardian ad litem determines that the child's interests as identified by the child are inconsistent with the lawyer-guardian ad litem's determination of the child's best interests, the lawyer-guardian ad litem shall communicate the child's position to the court. If the court considers the appointment appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and the lawyer-guardian ad litem's identification of the child's interests, the court may appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child's lawyer-guardian ad litem."

See also MCR 3.915(B)(2)(b), which states that "[i]f a conflict arises between the lawyer-guardian ad litem and the child regarding the child's best interests, the court may appoint an attorney to represent the child's stated interests."

MCL 712A.13a(1)(b) defines "attorney" as follows:

> "'Attorney' means, if appointed to represent a child in a proceeding under section 2(b) or (c) of this chapter, an attorney serving as the child's legal advocate in a traditional attorney-client relationship with the child, as governed by the Michigan rules of professional conduct. An attorney defined under this subdivision owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client. For the purpose of a notice required under these sections, attorney includes a child's lawyer-guardian ad litem."

7.8 Appointment of Guardians Ad Litem

A guardian ad litem (GAL) may be appointed by the court to assist the court in determining a child's best interests. MCL 712A.17c(10) states that "[t]o assist the court in determining a child's best interests, the court may appoint a guardian ad litem for a child involved in a proceeding under this chapter." A guardian ad litem does not need to be an attorney. MCL 712A.13a(1)(e).

The court rule governing appointment of a guardian ad litem in a child protective proceeding, MCR 3.916, states as follows:

> "(A) *General.* The court may appoint a guardian ad litem for a party if the court finds that the welfare of the party requires it.
>
> "(B) *Appearance.* The appearance of a guardian ad litem must be in writing and in a manner and form designated by the court. The appearance shall contain a statement regarding the existence of any interest that the guardian ad litem holds in relation to the minor, the minor's family, or any other person in the proceeding before the court or in other matters.
>
> "(C) *Access to Information.* The appearance entitles the guardian ad litem to be furnished copies of all petitions, motions, and orders filed or entered, and to consult with the attorney of the party for whom the guardian ad litem has been appointed.
>
> "(D) *Costs.* The court may assess the cost of providing a guardian ad litem against the party or a person responsible for the support of the party, and may enforce the order of reimbursement as provided by law."

Like a Court-Appointed Special Advocate (CASA), a GAL may be appointed to investigate the child's circumstances and make recommendations to the court regarding the child's best interests. A guardian ad litem's duty is to the court, not the child.

7.9 Appointment of Court-Appointed Special Advocates (CASAs)

If available in the jurisdiction and appropriate in a given case, the court may appoint a Court Appointed Special Advocate or CASA. A CASA is a volunteer who investigates the child's circumstances and makes recommendations to the court concerning the best interests of that child. A CASA does not need to be an attorney. A CASA must maintain regular contact with the child, investigate the background of a case, collect

information regarding the child, provide written reports to the court and parties before a hearing, and testify when requested by the court.

MCR 3.917 sets forth the requirements regarding CASAs:

> "(A) *General.* The court may, upon entry of an appropriate order, appoint a volunteer* special advocate to assess and make recommendations to the court concerning the best interests of the child in any matter pending in the family division.
>
> "(B) *Qualifications.* All court appointed special advocates shall receive appropriate screening.
>
> "(C) *Duties.* Each court appointed special advocate shall maintain regular contact with the child, investigate the background of the case, gather information regarding the child's status, provide written reports to the court and all parties before each hearing, and appear at all hearings when required by the court.
>
> "(D) *Term of Appointment.* A court appointed special advocate shall serve until discharged by the court.
>
> "(E) *Access to Information.* Upon appointment by the court, the special advocate may be given access to all information, confidential or otherwise, contained in the court file if the court so orders. The special advocate shall consult with the child's lawyer-guardian ad litem."

*Because a CASA is a volunteer, the court will not enter an order assessing costs.

7.10 Required Procedures at Preliminary Hearings

A. Attempt to Notify Parent

"The court must determine if the parent, guardian, or legal custodian has been notified . . . . 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." MCR 3.965(B)(1).*

*See Section 5.4 for notice requirements.

B. Required Presence of Lawyer-Guardian Ad Litem for Child

MCR 3.965(B)(1) requires the court to determine if a lawyer-guardian ad litem is present at the preliminary hearing. "The child's lawyer-guardian ad litem must be present to represent the child at the preliminary hearing. The

court may make temporary orders for the protection of the child pending the appearance of an attorney or pending the completion of the preliminary hearing. The court must direct that the lawyer-guardian ad litem for the child receive a copy of the petition." MCR 3.965(B)(2).

C. Reading the Allegations in Petition

"If the respondent is present, the court must assure that the respondent has a copy of the petition. The court must read the allegations in the petition in open court, unless waived." MCR 3.965(B)(3).

D. Decision to Continue With the Hearing

"The court shall determine if the petition should be dismissed or the matter referred to alternate services. If the court so determines the court must release the child. Otherwise, the court must continue [with] the hearing." MCR 3.965(B)(4).

E. Required Advice of Rights

MCR 3.965(B)(5)–(6) require the court to advise a respondent of certain rights:

*See Section 7.4, above.

> "(5) The court must advise the respondent of the right to the assistance of an attorney at the preliminary hearing and any subsequent hearing pursuant to MCR 3.915(B)(1)(a).*

*See Section 9.5.

> "(6) The court must advise the respondent of the right to trial on the allegations in the petition and that the trial may be before a referee unless a demand for a jury or judge is filed pursuant to MCR 3.911 or 3.912."*

F. Opportunity for Respondent to Admit or Deny the Allegations

"The court shall allow the respondent an opportunity to deny or admit the allegations and make a statement of explanation." MCR 3.965(B)(7).

G. Determining Whether Child is Subject to Jurisdiction of Another Court

*See Section 4.14.

"The court must inquire whether the child is subject to the continuing jurisdiction of another court and, if so, which court." MCR 3.965(B)(8).*

H. Required Procedures for Cases Involving Indian Children

"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." MCR 3.965(B)(9).*

*See Chapter 20.

7.11 Petition Authorization

MCR 3.965(B)(11) states as follows:

> "Unless the preliminary hearing is adjourned, the court must decide whether to authorize the filing of the petition and, if authorized, the placement of the child pending trial. *The court may authorize the filing of the petition upon a showing of probable cause, unless waived, that one or more of the allegations in the petition are true and fall within MCL 712A.2(b). The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent that such privileges are abrogated by MCL 722.631."* (Emphasis added.)*

*See Chapter 8 regarding placement of a child and Section 11.3 regarding abrogation of privileges.

MCL 712A.13a(2) contains substantially similar language.

The factual allegations in a petition need not be *proven* at a preliminary hearing. See *In re Hatcher,* 443 Mich 426, 434–35 (1993) (at a preliminary hearing, court must make "a finding of probable cause to substantiate that the facts alleged in the petition are true and that if proven at trial would fall under [MCL 712A.2(b)]"). In the analogous context of a preliminary examination in a criminal case, probable cause has been defined as "[a] reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a person accused is guilty of the offense with which he is charged." *People v Dellabonda,* 265 Mich 486, 490 (1933).

The "probable-cause" phase of a preliminary hearing may proceed in the following ways:

- **Respondent waives probable-cause determination:** if the respondent waives the probable-cause determination, the verified petition allows the court to authorize the filing of the petition. This is similar to the probable-cause "showing" at a preliminary inquiry. See MCR 3.962(B)(3) and MCL 712A.13a(2). Alternatively, the court may swear in the petitioner and have the petitioner make a record, on information and belief, that the allegations in the petition are true.

- **Respondent does not waive probable-cause determination and witnesses are present:** if the respondent does not waive the probable-cause determination, the petitioner presents witnesses, the respondent cross-examines those witnesses, and the court makes its findings or adjourns the hearing to allow presentation of additional witnesses or evidence. If the court finds probable cause that one or more of the allegations in the petition are true, the court may authorize the filing of the petition.

- **Respondent does not waive probable-cause determination and no witnesses are present:** if the respondent does not waive the probable-cause determination and no witnesses are present, the court may adjourn the hearing to allow presentation of witnesses. When the hearing resumes, if witnesses are presented, the procedures outlined immediately above apply. If no witnesses are presented, the court must dismiss the petition.

The court may allow amendment of the petition. A petition may be amended at any stage of the proceedings as the ends of justice require. MCL 712A.11(6).

7.12 Procedures Following Petition Authorization

MCR 3.965(B)(12) sets forth the procedures to be followed following authorization of petition:

> "(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."*

*See Chapter 8.

7.13 Requirements to Order Alleged Abuser From the Child's Home

Under MCL 712A.13a(4), the court may order a parent, guardian, custodian, "nonparent adult," or other person residing in a child's home to leave the home.* MCL 712A.13a(5) requires a court to make certain findings before returning a child home or placing a child in unlicensed foster care (i.e., with

*See Section 7.15, below, for discussion of the enforcement of such an order.

a relative) where abuse has been alleged, regardless of whether the alleged abuser has been ordered from the home.

MCL 712A.13a(4) states as follows:

> "(4) The court may order a parent, guardian, custodian, nonparent adult, or other person residing in a child's home to leave the home and, except as the court orders, not to subsequently return to the home if all of the following take place:
>
> > (a) A petition alleging abuse of the child by the parent, guardian, custodian, nonparent adult, or other person is authorized under subsection (2).*
> >
> > (b) The court after a hearing finds probable cause to believe the parent, guardian, custodian, nonparent adult, or other person committed the abuse.
> >
> > (c) The court finds on the record that the presence in the home of the person alleged to have committed the abuse presents a substantial risk of harm to the child's life, physical health, or mental well-being."

*See Section 7.11, above.

"Abuse" by a parent, guardian, custodian, or "nonparent adult," for purposes of this provision, is defined as one or more of the following:

> "(a) Harm or threatened harm by a person to a juvenile's health or welfare that occurs through nonaccidental physical or mental injury.
>
> "(b) Engaging in sexual contact or sexual penetration as defined in . . . MCL 750.520a, with a juvenile.
>
> "(c) Sexual exploitation of a juvenile, which includes, but is not limited to, allowing, permitting, or encouraging a juvenile to engage in prostitution or allowing, permitting, encouraging, or engaging in photographing, filming, or depicting a juvenile engaged in a listed sexual act as defined in . . . MCL 750.145c.*
>
> "(d) Maltreatment of a juvenile." MCL 712A.13a(15)(a)–(d).

*See Section 2.1(A)–(B) for discussion of the terms used to define "abuse."

In determining whether to order a parent, guardian, custodian, "nonparent adult," or other person from the home, the court may consider whether the parent who is to remain in the home:

- is married to the person to be removed from the home, or
- has a legal right to retain possession of the home.

MCL 712A.13a(6).

The order removing a parent or person from the home may contain one or more of the following conditions:

> "(a) The court may require the alleged abusive parent to pay appropriate support to maintain a suitable home environment for the juvenile during the duration of the order.
>
> "(b) The court may order the alleged abusive person, according to terms the court may set, to surrender to a local law enforcement agency any firearms or other potentially dangerous weapons the alleged abusive person owns, possesses, or uses.
>
> "(c) The court may include any reasonable term or condition necessary for the juvenile's physical or mental well-being or necessary to protect the juvenile." MCL 712A.13a(7)(a)–(c).

Required findings when abuse is alleged. MCL 712A.13a(5) states:

> "(5) If a petition alleges abuse by a person described in subsection (4), regardless of whether the court orders the alleged abuser to leave the child's home under subsection (4), the court shall not leave the child in or return the child to the child's home or place the child with a person not licensed under 1973 PA 116, MCL 722.111 to 722.128, unless the court finds that the conditions of custody at the placement and with the individual with whom the child is placed are adequate to safeguard the child from the risk of harm to the child's life, physical health, or mental well-being."

*See Section 2.21 for a discussion of petition requirements in such cases.

Required considerations when severe physical injury or sexual abuse is alleged. If severe physically injury or sexually abuse is alleged,* the court must consider at least the following at a preliminary hearing:

- ordering the alleged abuser to leave the child's home as described in MCL 712A.13a(4), and
- the limitations on placement described in MCL 712A.13a(5).

MCL 712A.13a(2).

7.14 Orders Affecting "Nonparent Adults"

At a preliminary hearing, the court may issue an order that affects a "nonparent adult" and that does one or both of the following:

- permanently removes the "nonparent adult" from the child's home,* and/or
- permanently restrains the "nonparent adult" from coming into contact with or within close proximity of the child.

*See Section 7.13, above.

MCL 712A.6b(1)(c) and (d).

A "nonparent adult" is a person 18 years old or older who, regardless of the person's domicile, meets all of the following criteria in relation to a child over whom the court takes jurisdiction under MCL 712A.2(b):

- the person has substantial and regular contact with the child;
- the person has a close personal relationship with the child's parent or with a "person responsible for the child's health or welfare"; and
- the person is not the child's parent or a person otherwise related to the child by blood or affinity to the third degree.

MCL 712A.13a(1)(g)(*i*)–(*iii*).

A "nonparent adult" who violates an order issued by the court pursuant to §6b of the Juvenile Code is guilty of a misdemeanor punishable by imprisonment for not more than one year, a fine of not more than $1000.00, or both. Subsequent violations are punishable as felonies by imprisonment for not more than two years, a fine of not more than $2000.00, or both. Moreover, §6b of the Juvenile Code does not prohibit a "nonparent adult" from being charged with, convicted of, or punished for any other violation of law he or she commits while violating an order issued under this section of the Juvenile Code. MCL 712A.6b(2)–(4).

In addition, the court may exercise its criminal or civil contempt powers for a violation of §6b of the Juvenile Code. MCL 712A.6b(5).*

*See Section 4.18.

MCL 712A.6b does not affect the authority or jurisdiction of the court to issue orders affecting adults under MCL 712A.6. MCL 712A.6b(6).*

*See Section 4.17.

7.15 Warrantless Arrest of Persons Violating Orders Removing Them From Child's Home

MCL 764.15f(1) gives a law enforcement officer authority to arrest without a warrant a person for violation of an order removing that person from a child's home. That statute states:

> "(1) A peace officer, without a warrant, may arrest and take into custody a person if the peace officer has reasonable cause to believe all of the following exist:
>
> (a) The probate court before January 1, 1998 or the family division of circuit court on or after January 1, 1998 has issued an order under section 13a(4)* of chapter XIIA of Act No. 288 of the Public Acts of 1939, being section 712A.13a of the Michigan Compiled Laws, stating on its face the period of time for which the order is valid.
>
> (b) A true copy of the order and proof of service has been filed with the law enforcement agency having jurisdiction of the area in which the person having custody of the child pursuant to section 13a(4) of chapter XIIA of Act No. 288 of the Public Acts of 1939 resides.
>
> (c) The person named in the order has received notice of the order.
>
> (d) The person named in the order is acting in violation of the order.
>
> (e) The order states on its face that a violation of its terms subjects the person to criminal contempt of court and, if found guilty, the person shall be imprisoned for not more than 90 days and may be fined not more than $500.00." MCL 764.15f(1)(a)–(e).

*See Section 7.13, above.

Orders and proofs of service must be entered into the Law Enforcement Information Network (LEIN). MCL 764.15f(6). If an order is rescinded, the court must immediately order the removal of the protective order from LEIN. MCL 764.15f(7). In *People v Freeman,* 240 Mich App 235, 236 (2000), the Court of Appeals held that a police officer's reliance on LEIN information provided reasonable cause to believe that a respondent named in a personal protection order (PPO) had notice of the PPO and had violated it, thereby supporting an immediate arrest. The Court noted that "reasonable cause" means "having enough information to lead an ordinarily careful person to believe that the defendant committed a crime. CJI2d 13.5(4)."

A person arrested must be brought before the Family Division having jurisdiction of the cause within 24 hours after the arrest to answer to a charge of contempt for violation of the order. MCL 764.15f(3).* A Family Division judge must then:

*See Section 7.14, above, for discussion of criminal penalties for violation of orders affecting "nonparent adults."

- set a time certain for a hearing on the alleged violation of the order. The hearing must be conducted within 72 hours after arrest, unless extended by the court on motion of the person arrested;
- set a reasonable bond pending a hearing of the alleged violation of the order; and
- notify the person having custody of the child and direct that person to appear at the hearing and give evidence on the charge of contempt.

MCL 764.15f(3)(a)–(c).

MCL 764.15f(4) states:

> "(4) For purposes of this section, a judge of the family division of circuit court may arraign, take a plea, or sentence the person for criminal contempt in the same manner that the circuit court may arraign, take a plea, or sentence a person in other criminal cases."

If a Family Division judge is unavailable within 24 hours after arrest, the person must be taken before a district court judge, who must set a hearing before the Family Division that entered the order violated or that has jurisdiction over the order, and must set bond. MCL 764.15f(5).

Note: The requirements for enforcing orders issued under MCL 712A.13a(4) are similar to the requirements for enforcing a PPO. For further discussion, see *Domestic Violence Benchbook: A Guide to Civil & Criminal Proceedings (3d Edition)* (MJI, forthcoming). For a detailed discussion of contempt proceedings, see *Contempt of Court Benchbook (Revised Edition)* (MJI, 2000).